

II. BACKGROUND

On January 13, 2011, the NRC published a Notice of Opportunity for Hearing related to STPNOC's application to renew the licenses for South Texas Project ("STP") Units 1 and 2.² The Hearing Notice required any person who wishes to participate as a party in this proceeding to file a written request for a hearing and petition to intervene within 60 days of its publication (*i.e.*, by March 14, 2011) in accordance with 10 C.F.R. § 2.309.³ Petitioners filed their Petition on March 14, 2011.

The Petition proffered four proposed contentions. Three of the proposed contentions relate to the requirements of 10 C.F.R. § 50.54(hh)(2) for mitigative strategies for loss of large areas ("LOLA") of the plant due to fires or explosions. The remaining proposed contention relates to reduced demand for electricity due to adoption of an energy efficient building code in Texas.

The NRC Staff and STPNOC filed their respective Answers on April 7, 2011. The NRC Staff and STPNOC each objected to the four proposed contentions on various grounds.⁴

Petitioners did not file a reply to the STPNOC Answer or the Staff Answer.

On May 8, 2011, Petitioners filed the Amended Petition.⁵ The Amended Petition is essentially identical to the Petition, except that the Amended Petition includes three footnotes not included in the Petition. Each of the three footnotes appears to relate to Petitioners' attempt to satisfy 10 C.F.R. § 2.309(f)(1)(v).

² See Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Numbers NPF-76 and NPF-80 for an Additional 20-Year Period, STP Nuclear Operating Company, South Texas Project, Units 1 and 2, 76 Fed. Reg. 2426, 2426-428 (Jan. 13, 2011) ("Hearing Notice").

³ *Id.* at 2427.

⁴ STPNOC Answer at 4-18; Staff Answer at 14-30.

⁵ Petitioners filed a Certificate of Service for the Amended Petition on May 11, 2011.

III. THE AMENDED PETITION IS UNTIMELY AND SHOULD NOT BE CONSIDERED

A. The Amended Petition Is Untimely

The Hearing Notice required any person who wishes to participate as a party in this proceeding to file a petition to intervene by March 14, 2011.⁶ Therefore, the Amended Petition is almost two months late.

Additionally, even if the Amended Petition were treated as a reply, it would be untimely. As provided in 10 C.F.R. § 2.309(h)(2), a reply must be filed within 7 days of an answer to a petition to intervene—in this case, by April 14, 2011. Therefore, even if treated as a reply, the Amended Petition is almost one month late.

Furthermore, even if the proposed contentions in the Amended Petition were treated as contentions, they would be untimely. As stated in 10 C.F.R. § 2.309(f)(2), a petitioner may file amended or new contentions “only with leave of the presiding officer” upon a showing that all three of the following criteria are met:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

As discussed below, the new information in the Amended Petition existed at the time of the Petition, and it has not been submitted in a timely fashion. Therefore, even if treated as late-filed contentions, the proposed contentions in the Amended Petition are untimely.⁷

⁶ Hearing Notice at 2427.

⁷ As the Commission has stated, a new or amended contention “is not an occasion to raise additional arguments that could have been raised previously.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385-86 (2002).

B. Petitioners Have Not Justified Their Untimely Filing

As specified in the Hearing Notice⁸ and in accordance with 10 C.F.R. § 2.309(c), nontimely petitions will not be entertained, unless the Licensing Board determines that the petition should be granted based upon a balancing of eight factors, including good cause for failure to file on time. The Amended Petition does not address the criteria in 10 C.F.R. § 2.309(c). Petitioners have the burden of showing that these criteria have been satisfied.⁹ The Commission has affirmed summary rejection of proposed contentions that did not address these late-filing criteria.¹⁰ Because Petitioners have not attempted to meet their burden for late-filed contentions, their Amended Petition and the associated contentions should be summarily rejected.

In this regard, the factors in 10 C.F.R. § 2.309(c) are not of equal importance: absence of good cause (factor one) is a particularly important factor.¹¹ In this case, Petitioners do not have good cause for the late filing.

The new footnotes in the Amended Petition refer to information dated August 10, 2009, March 11, 2010, February 28, 2011, and March 11, 2011 in the Comanche Peak and STP combined license (“COL”) dockets.¹² Thus, the underlying information was available at the time the Petition was filed, and could have been included in the Petition. Furthermore, Petitioners

⁸ *Id.* at 2428.

⁹ *See Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

¹⁰ *See, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) (“The Board correctly found that failure to address the requirements [of 10 C.F.R. §§ 2.309(c) and (f)(2)] was reason enough to reject the proposed new contentions.”).

¹¹ *See, e.g., Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 395 (1976).

¹² Amended Petition at 4-6 nn.1-3. In addition to the dated documents identified in the Petitioners’ footnotes, footnote 1 refers to Intervenors’ Petition for Review Pursuant to 10 C.F.R. § 2.341 in the Comanche Peak COL proceeding (which is dated March 11, 2011), and footnote 3 refers to LBP-11-07 (which is dated February 28, 2011).

cannot claim that they only recently became aware of that information, since SEED Coalition is one of the intervenors in the STP COL proceeding and the Comanche Peak COL proceeding.¹³ For these reasons, the new footnotes in the Amended Petition could have been included in the original Petition.

Moreover, on March 17, 2011, Petitioners sent an email to counsel for STPNOC and the NRC Staff (with a copy to the members of the Board), asking whether they would object to Petitioners' plans to submit an amended petition with new footnotes. On March 21, 2011, Petitioners provided counsel for STPNOC and the NRC Staff (with a copy to the members of the Board) with a draft of the amended petition with the same footnotes that were eventually included in the Amended Petition.¹⁴ Nevertheless, Petitioners waited approximately one and a half months to file the Amended Petition. Petitioners have provided no explanation for the delay, and there would not appear to be any good cause for such delay.

Given the absence of good cause for the nontimely filing and Petitioners' failure to satisfy their burden on the other factors in 10 C.F.R. § 2.309(c), the Amended Petition should not be considered by the Board.

IV. THE AMENDED PETITION DOES NOT CURE THE DEFECTS IN THE PROPOSED CONTENTIONS

Even if the Board were to ignore the procedural defects with the untimely filing of the Amended Petition, the proposed contentions should be denied for failure to satisfy 10 C.F.R. § 2.309(f)(1).

¹³ *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-21, 70 NRC 581, 638 (2009); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 382 (2009).

¹⁴ STPNOC and the NRC Staff objected to the filing of an amended petition.

In their respective answers to the Petition, STPNOC and the NRC Staff objected to each of the four proposed contentions on several grounds, including:

- The proposed contentions are outside the scope of the proceeding and therefore do not satisfy 10 C.F.R. § 2.309(f)(1)(iii);¹⁵
- The proposed contentions lack factual or expert support and therefore do not satisfy 10 C.F.R. § 2.309(f)(1)(v);¹⁶ and
- The proposed contentions do not raise a genuine dispute with the application and therefore do not satisfy 10 C.F.R. § 2.309(f)(1)(vi).¹⁷

The new footnotes in the Amended Petition do not address the objections of STPNOC and the NRC Staff with respect to the criteria in 10 C.F.R. § 2.309(f)(1)(iii) and (vi). Therefore, the Amended Petition does not cure the defects in the proposed contentions with respect to those criteria.

Furthermore, the new footnotes in the Amended Petition do not cure the objections with respect to the fifth criterion in 10 C.F.R. § 2.309(f)(1), which states that a proposed contention shall:

Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.

¹⁵ STPNOC Answer at 5-9 (Contentions 1, 2 and 3), 12-14 (Contention 4); Staff Answer at 15-16 (Contention 1), 20-22 (Contentions 2 and 3), 26-28 (Contention 4).

¹⁶ STPNOC Answer at 10-11 (Contentions 1, 2 and 3), 17-18 (Contention 4); Staff Answer at 18-19 (Contention 1), 22-23 (Contentions 2 and 3), 29-30 (Contention 4).

¹⁷ STPNOC Answer at 11 (Contentions 1, 2 and 3), 14-17 (Contention 4); Staff Answer at 17-18 (Contention 1), 23-25 (Contentions 2 and 3), 28-29 (Contention 4).

As discussed above, both STPNOC and the NRC Staff objected to each of the four proposed contentions on the grounds that they were not supported by any facts or expert opinions. The footnotes in the Amended Petition do not cure that defect.¹⁸ In particular:

- Footnote 1 relates to the fifth criterion for Contention 1 (mitigative strategies for LOLA).¹⁹ The footnote states that Petitioners rely upon the information submitted in Docket Nos. 52-034 and 52-035, which is the Comanche Peak COL docket. That information does not address the STP license renewal application or the LOLA mitigative strategies for STP Units 1 and 2. Accordingly, the footnote is not relevant, either to this proceeding or to the mitigative strategies for STP Units 1 and 2.
- Footnote 2 relates to the fifth criterion for Contention 2 (radiation exposures of LOLA responders).²⁰ In addition to citing to the same information in Footnote 1, Footnote 2 states that Petitioners rely upon the dissent in LBP-10-5, which is a decision in the Comanche Peak COL proceeding. That decision does not address the STP license renewal application or the LOLA mitigative strategies for STP Units 1 and 2. Accordingly, the footnote is not relevant, either to this proceeding or to radiation exposures of LOLA responders for STP Units 1 and 2.
- Footnote 3 relates to the fifth criterion for Contention 4 (decline in electricity demand due to the enactment of an energy efficient building code in Texas).²¹ The footnote states that

¹⁸ Additionally, Petitioners provide no discussion of how the information referenced in the new footnotes supports their proposed contentions. Instead, Petitioners claim that the proposed contentions are supported by “information and belief,” and cite to multiple pleadings (Footnotes 1 and 2), the entire dissent (Footnote 2), and the entire portion of a decision admitting a contention (Footnote 3). The Commission has held that vague references to documents are insufficient to support admissible contentions, and the “Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely.” *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC 234 (1989).

¹⁹ Amended Petition at 4.

²⁰ *Id.* at 5.

²¹ *Id.* at 6.

Petitioners rely upon the decision in LBP-11-07, pp. 41-48, which admitted a contention on need for power in the STP Units 3 and 4 COL docket. That decision does not address the need for power from STP Units 1 and 2 and therefore is not relevant to this proceeding. Furthermore, STPNOC and the NRC Staff objected to Contention 4 on the ground that the contention relates to need for power, which is outside the scope of a license renewal proceeding.²² Footnote 3 confirms the position of STPNOC and the NRC Staff that Contention 4 is a need for power contention, and therefore reinforces their objections to this contention.

In summary, the footnotes do not cure the defects in the proposed contentions.

Accordingly, the Amended Petition should be rejected for failure to satisfy 10 C.F.R. § 2.309(f)(1).

²² STPNOC Answer at 12-14; Staff Answer at 26-28.

V. CONCLUSION

For the reasons discussed above, the Amended Petition is untimely and should not be considered by the Board. Furthermore, the Amended Petition does not cure the defects in the Petition, and therefore all of the proposed contentions should be dismissed and the request to intervene should be denied.

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Dated in Washington, D.C.
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