

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
NUCLEAR INNOVATION NORTH AMERICA LLC)	Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))	52-013-COL
	June 17, 2011

**NUCLEAR INNOVATION NORTH AMERICA’S MOTION IN LIMINE TO STRIKE
PORTIONS OF INTERVENORS’ INITIAL AND REBUTTAL SUBMISSIONS**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.337 and the Licensing Board’s (“Board”) Scheduling Order of March 11, 2011, Applicant Nuclear Innovation North America LLC (“NINA”)¹ hereby moves to strike *limited* portions of (1) Intervenors’ initial position statement on Contentions CL-2 and DEIS-1-G²; (2) the direct testimony of Mr. Clarence L. Johnson³; (3) the direct testimony of Mr. Philip H. Mosenthal;⁴ (4) Intervenors’ rebuttal position statement on Contentions CL-2 and DEIS-1-G⁵; (5) the rebuttal testimony of Mr. Clarence L. Johnson⁶; (6) the

¹ The original lead applicant for South Texas Project (“STP”) Units 3 and 4 was the STP Nuclear Operating Company (“STPNOC”). NINA became the lead applicant in early 2011. This motion refers to both NINA and STPNOC as the “Applicant.”

² Intervenors’ Initial Statements of Position in Support of Contentions CL-2 and DEIS-1 (May 9, 2011) (“Intervenors’ Initial Statement of Position”).

³ Direct Testimony of Clarence L. Johnson (dated April 22, 2010 and April 9, 2011, but submitted on May 9, 2011) (“Johnson Direct Testimony”).

⁴ Direct Testimony of Philip H. Mosenthal (May 9, 2011) (“Mosenthal Direct Testimony”). The Intervenors’ Initial Statement of Position, Johnson and Mosenthal Direct Testimony, and exhibits will be referred to collectively throughout this motion as the “Initial Submission.”

⁵ Intervenors’ Consolidated Response to Applicant’s and Staff’s Statements of Initial Positions (May 31, 2011) (“Intervenors’ Rebuttal Statement of Position”).

rebuttal testimony of Mr. Philip H. Mosenthal⁷; and (7) Intervenors' Exhibits INT000003 and INT000004. The Applicant also moves to strike the entirety of Intervenors' Exhibits INT000005, INT000006, INT000008, INT000010, INT000014, INT000017, INT000018, INT000019, INT000034, INT000042, INT000043, INT000044, and INT000053. The Board should strike this information because it is outside the scope of Contentions CL-2 and DEIS-1-G and their supporting bases. Such information is inadmissible in this proceeding and should be stricken pursuant to 10 C.F.R. § 2.337(a) or, in the alternative, should not be considered by the Board in its findings of fact.⁸ Additionally, NINA requests that the Board exclude this information based on the Intervenors' failure to comply with their discovery obligations.

We have contacted the Intervenors, who have agreed that some of the information listed above may be excluded. The Attachment to this Motion identifies the information that Intervenors have agreed may be excluded. We appreciate the cooperation of the Intervenors.

II. LEGAL STANDARDS

NRC regulations governing the admission of evidence provide that “[o]nly relevant, material, and reliable evidence . . . will be admitted Immaterial and irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.”⁹ Based on this

⁶ Rebuttal Testimony of Clarence L. Johnson (May 31, 2011) (“Johnson Rebuttal Testimony”).

⁷ Rebuttal Testimony of Philip H. Mosenthal (May 31, 2011) (“Mosenthal Rebuttal Testimony”). The Intervenors' Rebuttal Statement of Position and Johnson and Mosenthal Rebuttal Testimony will be collectively referred to throughout this motion as the “Rebuttal Submission.”

⁸ In an abundance of caution, NINA submitted rebuttal testimony to address some of the Intervenors' issues that NINA believes should be stricken. For example, as discussed below, NINA believes that Intervenors' discussion related to Fukushima should be stricken, but nevertheless responded to such discussion in NINA's Rebuttal Testimony of Applicant Witnesses Jeffrey L. Zimmerly and Adrian Pieniasek Regarding Contention CL-2 (May 31, 2011), at Q16 and Q17. If the Board were to strike discussion of Fukushima or other issues from the Intervenors' submissions, NINA believes that it would be appropriate to strike the corresponding portions of NINA's rebuttal submissions.

⁹ 10 C.F.R. § 2.337(a).

standard, licensing boards may exclude or accord no weight to testimony, exhibits, and statements of position on issues that are outside the scope of the admitted contention, that are unrelated to the issues in the proceeding, or that seek to raise issues that were not properly raised in earlier pleadings.¹⁰

The Intervenors are not allowed to change the scope of the contention as admitted by the Board. As the Commission has stated: “Our own longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions.”¹¹ Additionally, the Commission has stated that “[w]here an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.”¹²

Further, the Board has limited the scope of rebuttal submission, and the Intervenors may not use rebuttal to raise issues for the first time. As the Board has stated, the “rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party’s previously filed initial written statement.”¹³

¹⁰ See, e.g., *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Ruling on In Limine Motions) at 3-6 (Jan. 26, 2009) (unpublished) (granting in part motion to exclude testimony and exhibits outside the scope of the admitted contentions); *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) (granting in part motion to exclude evidence on topics outside scope of contention) (Aug. 9, 2007) (unpublished); *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) at 4-10 (Jan. 21, 2005) (unpublished) (granting in part motions to exclude testimony on topics outside the scope of the admitted contention, including topics raised and rejected at the pleadings stage) (“*L.E.S.*”).

¹¹ *La. Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 105 (1998).

¹² *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002) (citation omitted); see also *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n. 11 (1988) (stating that the “intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses”), *aff’d in part and remanded in part on other matters sub nom., Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991).

¹³ Initial Scheduling Order at 15 (Oct. 20, 2009) (unpublished).

III. INTERVENORS RAISE ISSUES THAT ARE OUTSIDE THE SCOPE OF THE ADMITTED CONTENTIONS

A. Intervenor Raise Issues that Are Outside the Scope of Contention DEIS-1-G

As admitted by the Board, Contention DEIS-1-G is narrow in scope; it is limited *only* to demand reductions based upon the adoption of the 2010 energy efficient building code in Texas.¹⁴ Contention DEIS-1-G states that the “NRC Staff’s DEIS analysis of the need for power is incomplete because it fails to account for reduced demand caused by the adoption of an energy efficient building code in Texas, the implementation of which could significantly reduce peak demand in the ERCOT region.”¹⁵ As a basis for Contention DEIS-1-G, the Intervenor stated that the proposed Texas energy efficient building code “has the potential to reduce peak demand by 2,362 MW annually by 2023 in the ERCOT region.”¹⁶ The Board admitted this Contention, based upon the fact that Texas enacted a new building code in June 2010.¹⁷

Despite the narrow scope of Contention DEIS-1-G, the Intervenor has submitted numerous arguments, statements, and exhibits that are wholly unrelated to the energy efficient building code enacted in Texas in 2010, which is the sole basis for Contention DEIS-1-G. These arguments, statements, and exhibits are outside the scope of Contention DEIS-1-G and should be stricken from the record.¹⁸ The table in the Attachment to this Motion identifies the specific

¹⁴ See *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-11-07, 73 NRC ___, slip op. at 21-26, 48, 74 (Feb. 28, 2011).

¹⁵ *Id.* at 48.

¹⁶ Intervenor’s Motion for Leave to File New Contentions Based on the Draft Environmental Impact Statement at 4 (May 19, 2010).

¹⁷ *South Texas Project*, LBP-11-07, slip op. at 42.

¹⁸ See, e.g., *Vogtle ESP Site* at 3-6 (granting in part motion to exclude testimony and exhibits outside the scope of the admitted contentions); *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 12 (granting in part motion to exclude evidence on topics outside scope of contention).

information from the Initial Submission and the Rebuttal Submission that should be stricken, including a description of the information and support for exclusion.

For example, Intervenors speculate that the Texas legislature will approve future energy efficient building code updates that Intervenors allege will lead to substantial decreases in energy demand.¹⁹ However, the scope of Contention DEIS-1-G pertains to the energy efficient building code adopted by Texas in 2010, not future building codes that might be enacted by the state. Furthermore, the Board previously rejected a contention which alleged that future changes in legislation might lead to reductions in demand.²⁰ As other licensing boards have ruled, once a contention has been rejected, it may not be resurrected by an intervenor in the form of testimony and exhibits.²¹ Therefore, the Intervenors' testimony, exhibits, and arguments related to potential energy savings from future building code changes is outside the scope of Contention DEIS-1-G and should be stricken.

The Intervenors proffer testimony, exhibits, and arguments regarding potential energy savings from the Federal Energy Independence and Security Act ("EISA") of 2007.²² However, Contention DEIS-1-G is limited to savings from the 2010 Texas energy efficient building code. Potential savings from other codes are outside the scope of the contention and should be stricken.

The Intervenors also attempt to take credit for various other forms of demand side management ("DSM"), use of non-nuclear generation, and energy savings achieved in other

¹⁹ See Att., Issue 1.

²⁰ *South Texas Project*, LBP-11-07, slip op. at 37 & n.206. The Board also stated that "a proposed rule or proposed law may not support an admissible contention, *i.e.*, its ultimate effect [on need for power] is at best speculative." *Id.* at 42 n.233.

²¹ See *L.E.S.*, at 4 ("Having been rejected at the pleadings stage, [a] matter cannot now be resurrected by virtue of the prefiled direct testimony of a witness who, for whatever reason, did not provide support . . . [for an] issue when it was previously proffered. . .").

²² See Att., Issue 2.

states.²³ However, Contention DEIS-1-G pertains to the 2010 building code in Texas, not to DSM or energy conservation in general or to non-nuclear forms of generation of electricity. Furthermore, the Intervenor previously raised similar arguments in proposed contentions that the Board rejected. For example, the Board rejected proposed contentions related to: DSM as an alternative source of power,²⁴ the feasibility of renewable energy including wind and solar,²⁵ and the effect of renewable energy on need for power.²⁶ Therefore, Intervenor's statements on those issues should be stricken.²⁷

Intervenor's witness raises issues regarding the cost and duration of construction of STP Units 3 and 4 and alleged benefits to delaying their construction.²⁸ However, these issues are not relevant to the demand savings from the 2010 energy efficient building code in Texas and are not within the scope of Contention DEIS-1-G. Therefore, those arguments should be stricken.

The Intervenor also criticizes the assumptions in the Final Environmental Impact Statement ("FEIS") regarding retirements of existing plants within ERCOT.²⁹ However, Contention DEIS-1-G is limited to savings from the 2010 building code in Texas, not the amount of retirements estimated in the FEIS. Therefore, this attack on the FEIS should be stricken.

²³ See Att., Issues 3 and 4.

²⁴ See *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-21, 71 NRC ___, slip op. at 44-45 (Aug. 27, 2009) (rejecting proposed Contention 23).

²⁵ See *id.* at 42-47; *South Texas Project*, LBP-11-07, slip op. at 50, 54.

²⁶ *South Texas Project*, LBP-09-21, at 53.

²⁷ See *L.E.S.* at 4 ("Having been rejected at the pleadings stage, [a] matter cannot now be resurrected by virtue of the prefiled direct testimony of a witness who, for whatever reason, did not provide support [for an] issue when it was previously proffered").

²⁸ See Att., Issue 5.

²⁹ See Att., Issue 6.

Finally, the Intervenor raise an issue related to the savings from renovations (as distinct from new buildings).³⁰ However, this issue was never raised by NINA or the NRC staff in its direct testimony or exhibits. As the Board has stated, the “rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party’s previously filed initial written statement.”³¹ Therefore, the discussion of this issue by the Intervenor should also be stricken, because the other parties have not been afforded an opportunity to provide responsive evidence.

B. Intervenor Raise Issues that Are Outside the Scope of Contention CL-2

Intervenor seek to litigate various issues that are outside the scope of Contention CL-2, including some issues addressed for the first time in rebuttal. The central issue in Contention CL-2 concerns the calculation of replacement power costs in the event of an accident at STP Unit 3 or 4, leading to temporary shutdowns of the other STP units.³² In this regard, the Johnson Report that was submitted as the basis for Contention CL-2, states:

This review accepts the Applicants’ assumption [in Environmental Report Section 7.5S.5] that a major accident at one unit will cause a six year shutdown of the companion reactor, and a two year shut down of the remaining two reactors at the site. For purposes of this review, a scenario involving an accident at STP 3 or 4 is assumed, in which case STP 1 and 2 are shutdown for two years and the remaining ABWR [Advanced Boiling Water Reactor] unit is shutdown for six years.³³

³⁰ See Att., Issue 1.

³¹ Initial Scheduling Order at 15.

³² See *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-10-14, 72 NRC ___, slip op. at 30 (July 2, 2010).

³³ Report of Clarence L. Johnson at 3 (Dec. 21, 2009) (in Intervenor’s Contentions Regarding Applicant’s Proposed Revision to Environmental Report Section 7.5S and Request for Hearing (Dec. 22, 2009)).

Furthermore, in response to Applicant’s motion for summary disposition of Contention CL-2,³⁴ the Intervenor did not contest Statement of Material Fact No. III.D, which stated that the six year and two year periods are reasonable estimates of outage durations based upon the experience at Three Mile Island.³⁵ In ruling on the motion for summary disposition, the Board identified several issues in dispute to be resolved at hearing; however, issues related to the duration of the outages were not among those issues.³⁶

In contrast, the Johnson Direct Testimony states that based on the experience from the Fukushima Daiichi nuclear incident, the Board should assume that all STP units would be shut down permanently in the event of a severe accident.³⁷ The Johnson Rebuttal Testimony goes even further, and argues that consideration should be given to natural phenomena that could create “the potential for a common mode event which could affect the ABWR and other generating units in ERCOT at the same time.”³⁸

It is well established that eleventh hour attempts by an intervenor to change the scope of a contention are impermissible.³⁹ Therefore, the Board should strike the Intervenor’s arguments

³⁴ STP Nuclear Operating Company’s Motion for Summary Disposition of Contention CL-2 (Sept. 14, 2010).

³⁵ See Intervenor’s Response to Applicant’s Statement of Material Facts Pursuant to 10 C.F.R. § 2.710 (Oct. 8, 2010) (which did not controvert Statement of Material Fact III.D).

³⁶ See *South Texas Project*, LBP-11-07 at 20-21.

³⁷ Johnson Direct Testimony, at 6, 14-15; see also Att., Issues 7 and 9.

³⁸ Johnson Rebuttal Testimony, at 12.

³⁹ See, e.g., *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC ___, slip op. at 28-31 (Mar. 26, 2010) (stating that the “NRC adjudicatory proceedings would prove endless if parties were free . . . to introduce entirely new claims” and the Commission does “not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds”) (citation omitted); see also *Seabrook*, ALAB-899, 28 NRC at 97 & n. 11 (stating that the “intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses”); *S. Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site)*, LBP-08-2, 67 NRC 54, 77-78 (2008) (refusing to consider new bases that were included in an answer to summary disposition motion and were outside the scope of the original contention).

and testimony which address common mode accidents involving all four STP units, or an accident at one STP unit that results in the permanent shutdown of all four STP units.

In this regard, the Board previously rejected a contention that alleged that an accident at one STP unit could cause accidents at the other STP units.⁴⁰ Furthermore, to the extent that the Intervenor are contending, based upon Fukushima Daiichi, that natural phenomena could cause simultaneous accidents at all four STP units, the Board has rejected a proposed contention that alleged that external events (such as natural phenomena) could result in common mode failures at multiple co-located STP units.⁴¹ The Board stated that, even considering common mode events involving natural phenomena, external events at the STP site have a small contribution to risk.⁴² For these reasons, issues related to the possibility of simultaneous accidents at all four STP units have been rejected previously by the Board and are outside the scope of Contention CL-2. Therefore, Intervenor's arguments, testimony, and exhibits related to Fukushima Daiichi and permanent shutdown of all four STP units are outside the scope of Contention CL-2.

The Intervenor also allege that lessons learned from the Fukushima Daiichi nuclear incident should cause NINA to change its "reliance upon the CDRs [sic] used in this application."⁴³ However, issues related to the frequency of accidents are outside the scope of

⁴⁰ See *South Texas Project*, LBP-10-14, slip op. at 12 (rejecting Contention 21A).

⁴¹ See *id.* at 21-22 (rejecting Contention CL-1, Part C).

⁴² See *id.*

⁴³ Johnson Rebuttal Testimony at 18. We assume that the Intervenor are referring to core damage frequency ("CDF"). See also Att., Issue 8. Additionally, Mr. Johnson has no demonstrated expertise to address issues related to nuclear safety, including CDF, and therefore should not be allowed to testify on such matters. See *Duke Power Co. (William McGuire Nuclear Station, Units 1 and 2)*, ALAB-669, 15 NRC 453, 475 (1982). Furthermore, the last and final version of the Johnson Rebuttal Testimony (designated as "INT000R. 45") submitted on June 8, 2011 does not include page 18.

Contention CL-2 (which pertains to replacement power costs, not core damage frequency).⁴⁴ Additionally, those arguments are impermissibly presented by Intervenors for the first time in rebuttal. As the Board has previously directed in its Initial Scheduling Order in this proceeding, rebuttal submissions are “not to advance any new affirmative claims or arguments that should have been, but were not, included in the party’s previously filed initial written statement.”⁴⁵

The Intervenors also argue that NINA should prepare a new cost estimate for Severe Accident Mitigation Design Alternatives (“SAMDA”), because the SAMDA cost estimate for the ABWR design certification is 20 years old and some SAMDAs did not pass through NINA’s screening test.⁴⁶ However, issues related to the costs of SAMDAs (except for escalation of costs from 1991 dollars to current dollars) are outside the scope of Contention CL-2, which pertains to replacement power costs. Additionally, Intervenors’ claim regarding the costs of SAMDAs is raised for the first time in rebuttal, and therefore should be stricken based upon the Board’s Initial Scheduling Order discussed above. Furthermore, Intervenors’ claim represents a challenge to the finality of the ABWR design certification. The ABWR Technical Support Document (“TSD”) identifies the SAMDAs and their costs in 1991 dollars.⁴⁷ Those costs are generic costs, and are not dependent upon site-specific factors. As such, those costs have finality in accordance with the ABWR design certification rule in 10 C.F.R. Part 52, Appendix A.VI.B.7 and cannot be challenged per 10 C.F.R. § 52.63(a)(5) (which provides that in making its combined license (“COL”) findings, the Commission will treat as resolved those matters

⁴⁴ See *Duke Energy Corp.*, CLI-02-28, 56 NRC at 378-81 (with respect to an admitted contention on severe accident mitigation alternatives (“SAMAs”), intervenors were not allowed to litigate the frequency of an accident because accident frequency was not part of the SAMA original contention or its bases).

⁴⁵ Initial Scheduling Order at 15.

⁴⁶ See Att., Issue 10.

⁴⁷ See Exh. NRC00009A at 25-26.

resolved in the issuance of a design certification rule).⁴⁸ Therefore, according to 10 C.F.R. § 2.335 Intervenor's argument regarding SAMDA costs is an impermissible attack on the design certification rule. Under 10 C.F.R. § 2.335, NRC rules and regulations are not subject to attack in an adjudicatory proceeding unless a party submits a petition for waiver or exception, which the Intervenor has not submitted.

C. Designation of Information that Should Be Stricken

The Attachment to this Motion designates the specific arguments, positions and exhibits from Intervenor's Initial and Rebuttal Submissions that should be stricken from the record because they are outside the scope of the admitted contentions. The Board should strike the portions of the Intervenor's Initial and Rebuttal Submissions and supporting exhibits, including some exhibits in their entirety, because they raise issues outside the scope of Contentions CL-2 and DEIS-1-G, including attempts to resurrect issues previously rejected by the Board, to present new arguments that were not identified in the Initial Submission, and to raise issues that challenge the ABWR design certification rule. The Intervenor is prohibited from attempting to shoehorn such issues into the admitted contentions. Accordingly, the material identified in the Attachment should be stricken.

IV. ADDITIONAL GROUNDS FOR STRIKING THE DESIGNATED MATERIAL

In addition to the fact that the Intervenor's positions discussed above and in the Attachment are outside the scope of the admitted contentions, those positions (including the associated exhibits) should be stricken because they were never disclosed by the Intervenor during discovery, as required by 10 C.F.R. § 2.336.

⁴⁸ In that regard, the costs of SAMDAs are different than the costs of severe accidents, which are dependent upon site-specific factors and do not have finality unless the site characteristics are bounded by the site parameters in the Technical Support Document for the ABWR. *See, e.g., South Texas Project*, LBP-11-07, slip op. at 24-25.

The Intervenors did not comply with their mandatory disclosure obligations to disclose the name of their expert witnesses, a copy of the analyses and authorities upon which the expert relies, and an identification of relevant documents. Up to and including their monthly disclosures on May 2, 2011⁴⁹ (*i.e.*, one week before they filed their direct testimony and exhibits), Intervenors' disclosures consistently stated that Intervenors: "have not yet identified the persons that they may rely upon as their witnesses"; "will update this disclosure when they have identified such persons"; and "have not acquired any documents that require disclosure."

On June 1, 2011, after filing their Initial and Rebuttal Submissions in support of the upcoming evidentiary hearing, the Intervenors disclosed for the first time the names of their expert witnesses and pointed to their supporting exhibits as the only documents within their possession, custody, or control.⁵⁰ Such belated disclosures do not satisfy Intervenors' obligations under NRC's established discovery rules. As further evidence of Intervenors' discovery violations, Mr. Johnson's direct testimony for Contention CL-2 is dated April 22, 2010 and April 9, 2011.⁵¹ He is not, however, mentioned as an expert witness in Intervenors' May 2011 disclosures. Furthermore, not one of the documents referenced in his testimony was identified in the Intervenors' discovery disclosures until June 2011.⁵²

Discovery rules are designed to act as safeguards to prevent unfair prejudice and surprise at hearing. As the licensing board stated in *Kerr-McGee Chemical Corp.* when it dismissed a contention for failure of the intervenor to comply with its discovery obligations:

⁴⁹ Intervenors' Nineteenth Update to Disclosures (May 2, 2011).

⁵⁰ *See* Intervenors' Twentieth Update to Disclosures (June 1, 2011).

⁵¹ Johnson Direct Testimony, at 1-2.

⁵² *See id.*; Intervenors' Twentieth Update to Disclosures.

All parties have a responsibility to respond to discovery so that their opponents may gain an understanding of the bases of their contentions in order to properly prepare their own case. This process minimizes the possibility for surprise at hearing, focuses the testimony and cross-examination, and leads to a fully developed record.⁵³

By including new positions, arguments, and exhibits in the Initial Submission and Rebuttal Submission and not disclosing them beforehand, the Intervenors have prejudiced the other parties by depriving them of the opportunity to address those new issues in their direct testimony (and, in some cases, even their rebuttal testimony).

For discovery violations, the Board may impose sanctions per 10 C.F.R. § 2.336(e):

(1) The presiding officer may impose sanctions, including dismissal of specific contentions, dismissal of the adjudication, denial or dismissal of the application or proposed action, or the use of the discovery provisions in subpart G of this part against the offending party, for the offending party's continuing unexcused failure to make the disclosures required by this section.

(2) The presiding officer may impose sanctions on a party that fails to provide any document or witness name required to be disclosed under this section, unless the party demonstrates good cause for its failure to make the disclosure required by this section. A sanction that may be imposed by the presiding officer is prohibiting the admission into evidence of documents or testimony of the witness proffered by the offending party in support of its case.⁵⁴

See also 10 C.F.R. § 2.320; *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

⁵³ *Kerr-McGee Chem. Corp.* (W. Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986). The NRC's discovery rules in 10 C.F.R. § 2.336 follow the form of the Federal Rules of Civil Procedure (Rule 26) in adjudicatory proceedings. The legal authorities and court decisions pertaining to Rule 26 of the Federal Rules of Civil Procedure provide appropriate guidelines for interpreting NRC discovery rules. *Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 494-95 (1983).

There have been numerous cases in which sanctions have been imposed upon parties for failure to meet discovery obligations. For example:

- In *Duke Power Co.*, the licensing board dismissed certain of the intervenor’s contentions, noting that the intervenor had engaged in a pattern of failure to meet its discovery obligations that made it virtually impossible for the other parties to prepare for hearings. The Board noted: “The ‘unmet obligation’ is extremely important; indeed, it is a prerequisite to a fair hearing.”⁵⁵
- In *Metropolitan Edison Co.*, the licensing board dismissed several contentions when the intervenor failed to provide “any information whatsoever” during discovery. In that case, the licensing board noted that an applicant is unable to defend itself if it is not informed of the specifics of the intervenor’s case.⁵⁶
- In *Public Service Co. of New Hampshire*, the licensing board dismissed an intervenor’s contentions when it repeatedly failed to disclose any information regarding its contentions during discovery.⁵⁷

Similarly, federal courts have imposed sanctions for failure to satisfy discovery obligations.⁵⁸

In accordance with Section 2.336(e), the Applicant requests that the Board impose sanctions on the Intervenors for failure to comply with their discovery obligations. In particular,

⁵⁵ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121, 1122-23 (1983).

⁵⁶ *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), LBP-80-17, 11 NRC 893, 897, 904 (1980).

⁵⁷ *Pub. Serv. Co. of N. H.* (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 590-91 (1983).

⁵⁸ Federal courts have routinely excluded evidence submitted after the close of discovery deadlines and just prior to trial to prevent unfair and prejudicial surprise to the other party. *See, e.g., Primos, Inc. v. Hunter’s Specialties, Inc.*, 451 F.3d 841, 851 (Fed. Cir. 2006) (excluding evidence when party had ample opportunity to disclose during discovery, but did not do so); *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 551 (Fed. Cir. 1998) (absent adequate reason to justify late production, evidence should be excluded); *Robinson v. Ford Motor Co.*, 967 F. Supp. 482, 486-87 (M.D. Ala. 1997) (failure to comply with scheduling order that required disclosure of expert witnesses and their reports warranted exclusion of expert testimony).

Intervenors' new positions, detailed in the Attachment to this Motion, should be stricken, because Intervenors have not complied with their discovery obligations.

V. CONCLUSION

For the foregoing reasons, the Board should strike the designated portions of Intervenors' Initial and Rebuttal Statements of Position, Mosenthal Direct and Rebuttal Testimony, Johnson Direct and Rebuttal Testimony, and Exhibits INT000003 and INT000004 identified in the Attachment, and should strike Intervenors' Exhibits INT000005, INT000006, INT000008, INT000010, INT000014, INT000017, INT000018, INT000019, INT000034, INT000042, INT000043, INT000044, and INT000053 in their entirety. In the alternative, the Board could retain such information in the record but rule that it shall be given no consideration in the Board's findings of fact.

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

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Counsel for Nuclear Innovation North America LLC

Dated in Washington, D.C.
this 17th day of June 2011

CERTIFICATION

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues. I certify that my efforts with the Intervenors have been partially successful and partially unsuccessful, as explained in this Motion. The NRC staff has stated that it does not oppose this Motion.

Signed (electronically) by Steven P. Frantz

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Counsel for Nuclear Innovation North America LLC

NINA Attachment

The following table designates the information in the Intervenor’s Initial Submission and Rebuttal Submission that is the subject of NINA’s motion to strike. The Intervenor has agreed that the information identified in this table by bold and italicized font may be excluded.

Issue #	Location of Information to Be Stricken from Intervenor’s Initial and Rebuttal Statements of Position, Mosenthal Direct and Rebuttal Testimony, Johnson Direct and Rebuttal Testimony, and Supporting Exhibits	Description of Information and Support for Exclusion
1	<p style="text-align: center;"><i>Contention DEIS-1-G</i></p> <p><u>Mosenthal Direct Testimony</u></p> <ul style="list-style-type: none"> • On page 5, strike lines 1 through 2, including the associated footnote. • On page 6, strike lines 7 through 14, beginning “While the ACEEE analysis.” • On page 9, strike lines 1 through 14. • On page 9 strike lines 18 through 19 and continuing on page 10, strike lines 1 through 11. • On page 10, Table 1, and on page 13, Table 2, strike the two sets of rows entitled “Building Energy Code Savings (MW)” and “Net Need After Building Energy Codes (MW).” <p><u>Intervenor’s Initial Statement of Position</u></p> <ul style="list-style-type: none"> • Strike the sentence on page 8 beginning “Intervenor rely on testimony.” • Strike the carry-over sentence from page 8 to 9 beginning “The drastic difference in Staff’s.” <p><u>Mosenthal Rebuttal Testimony</u></p> <ul style="list-style-type: none"> • On page 10, strike lines 11 through 19. • On page 11, strike the sentence on lines 1-3 that begins “Perhaps the largest flaw.” • On page 11, strike the sentence that begins on line 16 and ends on line 19. <p><u>Intervenor’s Rebuttal Statement of Position</u></p> <ul style="list-style-type: none"> • Strike the carry-over paragraph on pages 6 and 7 beginning “Further, Mr. Mosenthal’s estimates” to the end of the paragraph. 	<p>These portions of the Mosenthal Direct and Rebuttal Testimony, Intervenor’s Initial and Rebuttal Statements of Position, and referenced Exhibits take credit for future updates to the Texas energy efficient building code in order to arrive at an assumed annual energy savings (for residential, 39% to 55% and 22% to 32% for commercial, which corresponds to a savings of 1,404 MW in 2020 and 2,419 MW in 2025). These future updates are not part of the energy efficient building code enacted in Texas in 2010, as specified in Contention DEIS-1-G as admitted by the Board and the Intervenor’s basis for Contention DEIS-1-G. For the above reasons, these statements are outside the scope of Contention DEIS-1-G and its basis.</p> <p>In addition, the designated portions of the Mosenthal Rebuttal Testimony on</p>

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	<p><u>Exhibit INT000003</u></p> <ul style="list-style-type: none"> Strike the entirety of columns labeled 2014 through 2025. <p><u>Exhibit INT000004</u></p> <ul style="list-style-type: none"> Strike the entirety of columns labeled 2014 through 2025. <p><u>Exhibit INT000017</u></p> <ul style="list-style-type: none"> Strike entire exhibit. 	<p>page 10 (lines 14 through 19) and page 11 (lines 16 through 19) and the Intervenor’s Rebuttal Statement of Position on pages 6-7 raise new issues related to energy savings from renovations of buildings that are not responsive to NINA’s or the NRC staff’s direct testimony or exhibits.</p>
2	<p style="text-align: center;"><i>Contention DEIS-1-G</i></p> <p><u>Mosenthal Direct Testimony</u></p> <ul style="list-style-type: none"> <i>On page 5, strike lines 3 through 8.</i> <i>Strike page 12.</i> <i>On page 13, strike lines 5 through 12.</i> <i>On page 13, Table 2, strike the two sets of rows entitled “Federal Equipment and Appliance Standards Savings (MW)” and “Net Need After Federal Equipment and Appliance Standards (MW).”</i> <i>On page 14 strike lines 1 through 2.</i> <i>On page 14, strike lines 19 through 21, and continuing onto page 15 strike lines 1 through 6.</i> <i>On page 16, strike lines 20 through 21.</i> <p><u>Mosenthal Rebuttal Testimony</u></p> <ul style="list-style-type: none"> <i>On page 11, strike line 11 beginning “As my analysis” through line 14 ending “standard savings.”</i> <p><u>Exhibit INT000005</u></p> <ul style="list-style-type: none"> <i>Strike entire exhibit.</i> <p><u>Exhibit INT000006</u></p> <ul style="list-style-type: none"> <i>Strike entire exhibit.</i> <p><u>Exhibit INT000008</u></p>	<p>These portions of the Mosenthal Direct and Rebuttal Testimony and referenced exhibits take credit for savings from the EISA and other Federal standards. Federal standards are not part of the energy efficient building code enacted in Texas in 2010, and are therefore outside the scope of Contention DEIS-1-G.</p>

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	<ul style="list-style-type: none"> • <i>Strike entire exhibit.</i> <p><u><i>Exhibit INT000010</i></u></p> <ul style="list-style-type: none"> • <i>Strike entire exhibit.</i> 	
3	<p style="text-align: center;"><i>Contention DEIS-1-G</i></p> <p><u><i>Mosenthal Direct Testimony</i></u></p> <ul style="list-style-type: none"> • <i>On page 15, strike lines 7 through 25, and continuing on page 16, strike lines 1 through 10.</i> • <i>On page 17, strike lines 6 through 11, beginning “Given the high risk.”</i> <p><u><i>Mosenthal Rebuttal Testimony</i></u></p> <ul style="list-style-type: none"> • <i>On page 11, strike the sentence that begins on line 14 and ends on line 16.</i> 	<p>These portions of the Mosenthal Direct and Rebuttal Testimony discuss the use of smaller generation (e.g., natural gas, demand side management) as baseload generation, the economic value of delaying new nuclear units, technological advancements, costs of alternative generation, mothballed plants, and costs of demand response programs. These topics are not tied to the energy efficient building code enacted in Texas in 2010. Therefore, these portions of the Direct and Rebuttal Testimony are outside the scope of Contention DEIS-1-G.</p>
4	<p style="text-align: center;"><i>Contention DEIS-1-G</i></p> <p><u><i>Mosenthal Rebuttal Testimony</i></u></p> <ul style="list-style-type: none"> • <i>On page 6, strike lines 19-20, and on page 7, strike lines 1 through 4.</i> • <i>On page 8, strike the following on line 8 “and no impacts from future Federal Standards.”</i> • <i>On page 8, strike lines 12 (beginning “First, the passage of recent legislation”) through 20, including footnotes 7 and 8, and continuing on page 9, strike lines 1 through 2.</i> 	<p>These portions of the Mosenthal Rebuttal Testimony and Exhibit INT000043 reference Federal efficiency standards, future code updates and the practices for planned energy savings in other states and countries. Each of these sections and the entirety of Exhibit INT000043 are</p>

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	<ul style="list-style-type: none"> On page 11, strike lines 20 through 21 beginning “In addition,” and continuing on page 12, strike lines 1 through 2. <p><u>Exhibit INT000043</u></p> <ul style="list-style-type: none"> <i>Strike entire exhibit.</i> 	outside the scope of Contention DEIS-1-G, which only pertains to the 2010 Texas energy efficient building code.
5	<p style="text-align: center;"><i>Contention DEIS-1-G</i></p> <p><u>Mosenthal Rebuttal Testimony</u></p> <ul style="list-style-type: none"> On page 13, strike lines 4 through 8. <i>On page 13, strike lines 9 through 19.</i> On page 13, strike lines 20 through 22. <i>On page 13, strike lines 23 and 24, and continuing on page 14, strike lines 1 through 6.</i> On page 14, strike lines 8 through 11. <p><u>Exhibit INT000042</u></p> <ul style="list-style-type: none"> <i>Strike entire exhibit.</i> <p><u>Exhibit INT000044</u></p> <ul style="list-style-type: none"> <i>Strike entire exhibit.</i> 	These portions of the Mosenthal Rebuttal Testimony and Exhibits INT000042 and INT000044 raise issues regarding the cost and construction duration of STP, as well as various benefits to delaying the building of STP Units 3 and 4. These topics are not tied to the energy efficient building code enacted in Texas in 2010, and are therefore outside the scope of Contention DEIS-1-G.
6	<p style="text-align: center;"><i>Contention DEIS-1-G</i></p> <p><u>Mosenthal Direct Testimony</u></p> <ul style="list-style-type: none"> <i>On page 5, strike lines 9 through 14.</i> <i>On page 14, strike lines 3 through 17.</i> <i>On page 16, strike lines 22 through 25.</i> <p><u>Mosenthal Rebuttal Testimony</u></p> <ul style="list-style-type: none"> <i>On page 12, strike lines 3 through 20.</i> <i>On page 13, strike lines 1 through 3 beginning “while at the same time”.</i> <p><u>Intervenor’s Rebuttal Statement of Position</u></p> <ul style="list-style-type: none"> On page 7, strike the first full paragraph. 	These portions of the Mosenthal Direct and Rebuttal Testimony and the Intervenor’s Rebuttal Statement of Position take issue with the assumption in the FEIS regarding retirements of existing plants within the ERCOT region. However, Contention DEIS-1-G is limited to savings from the 2010 building codes in Texas, not the amount of retirements estimated in the FEIS.

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7	<p style="text-align: center;"><i>Contention CL-2</i></p> <p><u>Johnson Direct Testimony</u></p> <ul style="list-style-type: none"> • On page 6, strike lines 1 through 7. • On page 14, strike line 22 beginning “However, the accident at Fukushima,” and continued on page 15, strike lines 1 through 8. <p><u>Intervenor’s Rebuttal Statement of Position</u></p> <ul style="list-style-type: none"> • On page 4, top, partial paragraph, strike the three sentences beginning “Additionally, this argument” through the sentence ending “at Fukushima Daiichi.” Also, strike all of footnote 19 on page 4 beginning “Intervenor request that the ASLB.” 	<p>These portions of the Johnson Direct Testimony and Intervenor’s Rebuttal Statement of Position refer to the accident at Fukushima Daiichi and argue that the Board should assume that all four STP units would be permanently shut down. The Board previously rejected a proposed contention that the ER should evaluate accidents at all four STP units. The basis for Contention CL-2 is an accident at STP Unit 3 or 4, and a temporary shutdown of the other STP units. These portions of the Intervenor’s submissions are outside the scope of Contention CL-2.</p>
8	<p style="text-align: center;"><i>Contention CL-2</i></p> <p><u>Johnson Rebuttal Testimony</u></p> <ul style="list-style-type: none"> • On page 18, strike lines 1 through 12 beginning “Second, the Staff.” <p><u>Exhibit INT000053</u></p> <ul style="list-style-type: none"> • Strike entire exhibit. 	<p>This portion of the Johnson Rebuttal Testimony and Exhibit INT000053 discuss prevention and mitigation of core damage and provide new information and arguments that lessons learned from Fukushima Daiichi nuclear incident may cause NINA to modify the Core Damage Frequency used in its application. This argument is outside the scope of Contention CL-2. Furthermore, these positions provide new arguments that</p>

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		<p>were not included in the Initial Submission. Additionally, Mr. Johnson has no demonstrated expertise to address issues related to nuclear safety, including core damage frequency.</p>
9	<p style="text-align: center;"><i>Contention CL-2</i></p> <p><u>Johnson Rebuttal Testimony</u></p> <ul style="list-style-type: none"> • On page 12, strike lines 13 through 18. 	<p>This portion of the Johnson Rebuttal Testimony argues that NINA did not consider a common mode event involving STP and other generating units in ERCOT. This argument is outside the scope of Contention CL-2 and its bases. These positions also provide new arguments that were not included in the Initial Submission.</p>
10	<p style="text-align: center;"><i>Contention CL-2</i></p> <p><u>Johnson Rebuttal Testimony</u></p> <ul style="list-style-type: none"> • On page 8, strike lines 12 through 20. • On page 17, strike lines 7 through 23 (except for the full sentence on lines 10 through 12), and on page 18 also strike the portion on line 1 ending at “effectiveness of alternative.” 	<p>These portions of the Johnson Rebuttal Testimony argue that NINA should prepare a new cost estimate for SAMDAs, because the SAMDA cost estimate for the ABWR design certification is 20 years old and some SAMDAs did not pass through NINA’s screening test. These claims represent a challenge to the finality of the cost estimates in the TSD for the ABWR design certification. Therefore, according to 10 C.F.R. §</p>

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		2.335 this argument constitutes an impermissible attack on the Commission's rules. Furthermore, these positions provide new arguments that were not included in the Initial Submission.
11	<p style="text-align: center;"><i>Neither Contention</i></p> <p><u>Exhibit INT000014</u></p> <ul style="list-style-type: none"> • Strike entire exhibit. <p><u>Exhibits INT000018, INT000019, and INT000034</u></p> <ul style="list-style-type: none"> • Strike entire exhibits. 	<p>Exhibit INT000014 is cited as part of Mr. Mosenthal's experience. <i>See</i> Mosenthal Direct Testimony at 3 n.1. The exhibit does not appear to relate to either of the admitted contentions.</p> <p>Exhibits INT000018, INT000019, and INT000034 do not appear to be referenced in any of the testimony.</p>

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
NUCLEAR INNOVATION NORTH AMERICA LLC)	Docket Nos. 52-012-COL
(South Texas Project Units 3 and 4))	52-013-COL
	June 17, 2011

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2011, copies of “Nuclear Innovation North America’s Motion in Limine to Strike Portions of Intervenor’s Initial and Rebuttal Submissions” were served by the Electronic Information Exchange on the following recipients:

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