## UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

# BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of South Texas Project Nuclear Operating Co. Application for the South Texas Project Units 3 and 4 Combined Operating License

Docket Nos. 52-012, 52-013

November 30, 2011

## INTERVENOR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING CONTENTION DEIS-1

The following Proposed Findings of Fact and Conclusions of Law regarding

Contention DEIS 1<sup>1</sup> are submitted on behalf of the Intervenors pursuant to the

order of the Atomic Safety and Licensing Board (the "Board") on October 31,

2011.

# I. PROPOSED FINDINGS OF FACT

 The Final Environmental Impact Statement does not quantify electricity consumption savings anticipated to result from adoption of the ACEEE building code.

<sup>&</sup>lt;sup>1</sup> DEIS 1-G as admitted states: 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.

- Tables 8-2, 8-3 and 8-5 of the FEIS do not account for savings from adoption of the ACEEE building code.
- DEIS-1 is not limited by either the time frame it encompasses nor a threshold on the amount of savings that will be realized by adoption of the ACEEE building code.
- Projected savings of 1191 MW in 2023 represents approximately one-half of the capacity attributable to STP Units 3 & 4.
- 5. In 2008-2009 the ERCOT load growth was essentially flat.
- 6. In 2008 and 2009 new construction activity slowed load growth significantly.
- 7. Because building code changes typically affect new construction more than existing buildings and new construction in 2008-2009 was slack, the energy reductions realized in 2008-2009 were relatively small compared to years when new construction is more robust.
- 8. Prior to 2010, the only major city in Texas that had adopted a building code that required energy efficiency greater than the statewide code was Houston.
- 9. Houston's prior building code was significantly less energy efficient than the statewide 2009 IECC and IRC codes.
- 10.Houston's energy efficient building code was not effective until August 2008 for non-residential and January 2009 for residential.

- 11.Because the FEIS relies on 2010 ERCOT forecast data, any energy efficient building code adoptions that were not effective in 2009 (the most recent year of historic load data for the FEIS) would not affect the 2010 ERCOT forecast.
- 12. Dallas' energy efficient building code was not effective until April 1, 2011.
- 13. San Antonio's energy efficient building code was not effective until January1, 2010.
- 14. Austin's energy efficient building code was not effective until April 19, 2010.
- 15. Fort Worth's energy efficient building code was not effective until April 1, 2011.
- 16. Energy efficient building codes affect only new construction and major renovations.
- Energy efficient building codes typically have a grace period of six to twelve months for compliance.
- Energy savings from adoption of the 2009 ACEEE code are expected to have occurred in 2011.
- Initial compliance with ACEEE building code requirements in 2011 is 80% for commercial buildings.

- 20. Initial compliance with ACEEE building code requirements in 2011 is 60% for single-family housing.
- 21. In 2017 compliance with ACEEE building codes is expected to be at approximately 90% and will remain constant subsequently.
- 22. Building codes, like other efficiency resources, generally follow loads well.The greatest savings are realized when there is increased demand.
- 23. New construction represents less than 2% load growth on average.
- 24. Building code changes typically affect new construction more than existing buildings.
- 25. ACEEE applies to major renovations as well as new construction.
- 26. A reasonable renovation cycle is approximately once every 25 years. Approximately 4% of existing buildings energy consumption would turnover and become subject to the ACEEE code annually.
- 27. Including renovations in the ACEEE code energy use reductions would result in total savings of 2800-4200 MW in 2020 and 4800-7200 MW in 2025.
- 28. In order to measure energy use reductions from building codes, baselines are adopted to estimate savings for market-driven construction.

29. The baseline for determining savings in Texas energy efficiency building codes only quantify savings that are realized beyond when the code was adopted.

## **Proposed Conclusions of Law**

- The Administrative Procedure Act, 5 U.S.C. § 556(d) and 10 C.F.R. §2.325 require that the burden of proof is on the proponent of a rule or order. 2. As forDEIS-1, the Applicant has the burden of proof and persuasion because it seeks a license on the premise that adoption of the 2009 ACEEE building code will not materially reduce demand.
- 2. The Staff also has the burden of proof to the extent it seeks approval of its environmental impact statement. Under the National Environmental Policy Act (NEPA), 42 U.S.C.A. §§ 4321-4347, the environmental impact statement must contain sufficient discussion of relevant issues and opposing perspectives to allow decision makers and the public to take hard look at environmental impacts and to make reasoned decisions.

- 3. An EIS must be sufficiently adequate to enable those who did not participate in its preparation to understand the environmental factors involved with the proposed action.<sup>2</sup>
- 4. The standard of proof in this adjudication is preponderance of the evidence.<sup>3</sup>
- Contention DEIS-1 raises issues related to whether the savings from adoption of the 2009 ACEEE building code have been addressed in the EIS for STP Units 3 & 4.
- The underlying purpose of the need for power analysis is to consider whether the capacity from STP Units 3 & 4 is actually required to meet demand.
- DEIS-1 is germane to the licensing adjudication because accounting for savings from the 2009 ACEEE building code is sufficient to make capacity from one or both of the proposed STP Units 3 & 4 unnecessary.<sup>4</sup>

<sup>&</sup>lt;sup>2</sup> Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Com'n, 869 F.2d 719, 737 (1989), rehearing denied,(internal cites omitted), Duke Power

*Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

 <sup>&</sup>lt;sup>3</sup> "[T]o prevail on ... factual issues, the ... position must be supported by a preponderance of the evidence"; *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341, 360 (1978)
<sup>4</sup> 10 C.F.R 51.107(a)(3)

- 8. Contention DEIS-1 is material because if the energy efficient building code can effect reductions in demand, as quantified by Mr. Mosenthal, then it is an alternative that could change the licensing decision.
- 9. Neither the DEIS nor the FEIS include any adjustments for energy conservation in the calculated ERCOT reserve margin. See DEIS Table 8-2, p. 8-16 and FEIS Table 8-2, p. 8-18.
- 10.Mr. Mosenthal's analysis that concludes that there is not a need for STP 3 &4 capacity does not depend on either novel or untested methodologies.
- 11. The savings from the ACEEE building code is a practicable alternative as demonstrated by its adoption in Texas and results in quantifiable reductions in demand.
- 12. The failure to fully consider the effects of the 2009 ACEEE energy efficient building code violates NEPA and renders the need for power analysis in the EIS fundamentally flawed.<sup>5</sup>

<sup>&</sup>lt;sup>5</sup> *Ohio River Valley Environmental Coalition V. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006)(agency decision that does not consider relevant factors is a clear error of judgment.)

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2011 a copy of "INTERVENORS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAWCONCERNING DEIS-1" was served by the Electronic Information Exchange on the following recipients:

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