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~~WITHHOLD PER 10 C.F.R. § 2.390 AND JULY 1, 2009 PROTECTIVE ORDER~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 52-012-COL 52-013-COL
STP NUCLEAR OPERATING COMPANY	)	
(South Texas Project Units 3 and 4)	)	September 4, 2009

STP NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING LATE-FILED CONTENTIONS REGARDING THE MITIGATIVE STRATEGIES REPORT

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h) and the Order of the Atomic Safety and Licensing Board ("Board") dated July 1, 2009, STP Nuclear Operating Company ("STPNOC"), applicant in the above-captioned proceeding, hereby submits this Answer opposing "Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing" ("Request").

In the Request, the Intervenors seek admission of seven contentions[1] related to the adequacy of a report filed by STPNOC on May 26, 2009 with the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), entitled "South Texas Project Units 3 & 4 Mitigative Strategies Report 10 CFR 52.80(d)" ("Mitigative Strategies Report"). The contentions claim that the Mitigative Strategies Report is insufficient to satisfy the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which specify requirements for dealing with loss of large areas of the

[1] To prevent confusion with other contentions filed by the Intervenors in this proceeding, the numbering system used in this Answer for the late-filed contentions includes an "MS" designation for "Mitigative Strategies."

plant due to fires or explosions. Additionally, the Intervenors request that a hearing related to these contentions use the hearing procedures in Subpart G to 10 C.F.R. Part 2.

As demonstrated below, the seven contentions proffered by the Intervenors do not satisfy the contention admissibility requirements specified in 10 C.F.R. § 2.309(f)(1), and therefore should be rejected.[2] Additionally, the Intervenors have not justified their request to use Subpart G hearing procedures for any admitted contentions, and therefore this request should be denied.

II. PROCEDURAL BACKGROUND

On September 20, 2007, STPNOC submitted an application to the NRC for combined licenses ("COLs") for STP Units 3 and 4 ("COLA").[3] The Sustainable Energy and Economic Development Coalition, Susan Dancer, the South Texas Association for Responsible Energy, Daniel A. Hickl, Public Citizen, and Bill Wagner ("Intervenors") filed a "Petition for Intervention and Request for Hearing" ("Petition") on April 21, 2009, alleging 28 separate contentions. The Petition included Contention 2, which claimed that the COLA is incomplete because it fails to address 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).[4] STPNOC opposed the admission of Contention 2 for several reasons, including that Contention 2 would be moot once STPNOC updated its COLA to address Sections 52.80(d) and 50.54(hh)(2).[5]

STPNOC filed a supplement to its COLA on May 26, 2009 that provided the NRC with the Mitigative Strategies Report, which addresses the requirements of Sections 52.80(d)

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2 In addition to proposing contentions that are not admissible, the Intervenors do not discuss, and therefore fail to demonstrate, how the contentions meet the late-filed contention requirements in 10 C.F.R. §§ 2.309(c) and (f)(2).

3 South Texas Project Nuclear Operating Company; Notice of Receipt and Availability of Application for a Combined License, 72 Fed. Reg. 60,394 (Oct. 24, 2007).

4 Petition at 13.

5 STP Nuclear Operating Company's Answer Opposing Petition for Intervention and Request for Hearing at 18-20 (May 18, 2009).

and 50.54(hh)(2). The Mitigative Strategies Report was written using the guidance in NEI 06-12, "B.5.b Phase 2&3 Submittal Guideline," Rev. 2 (Dec. 2006),[6] which has been endorsed by the Commission as an acceptable means for complying with these regulations.[7] On July 1, 2009, the Board issued a Protective Order allowing the Intervenors to obtain access to the Mitigative Strategies Report,[8] which they received on July 7, 2009.[9]

On July 14, 2009, the Intervenors notified the Board that they do not believe that Contention 2 is moot.[10] Subsequently, on July 21, 2009, the Intervenors filed a brief to attempt to support this claim.[11] Thereafter, STPNOC, on July 27, 2009, and the NRC Staff, on July 30, 2009, both filed responsive briefs demonstrating that Contention 2 is moot.[12] The Intervenors filed their Request, including the seven contentions related to the adequacy of the Mitigative Strategies Report, on August 14, 2009. On August 27, 2009, the Board issued its ruling on the admissibility of many of the contentions in the Petition, and concluded that Contention 2 is moot based on submission of the Mitigative Strategies Report.[13]

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6 Mitigative Strategies Report at 3.

7 Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926, 13,958 (Mar. 27, 2009) ("Final Security Rule").

8 Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished).

9 Letter from S. Burdick, Counsel for STPNOC, to R. Eye, Counsel for Petitioners, Transmittal of § 52.80(d) Mitigative Strategies Report (July 7, 2009).

10 Letter from R. Eye, Counsel for Petitioners, to Licensing Board (July 14, 2009).

11 Petitioners' Brief Regarding Contention Two's Mootness (July 21, 2009).

12 STP Nuclear Operating Company's Response to Petitioners' Brief Regarding Mootness of Contention 2 (July 27, 2009); NRC Staff's Reply to Petitioners' Brief Regarding Contention Two's Mootness (July 30, 2009).

13 *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-09-21, 70 NRC __, slip op. at 11 (Aug. 27, 2009).

III. LEGAL STANDARDS

A petitioner must show that a late-filed contention meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).[14] These requirements are discussed in detail in STPNOC's May 18, 2009 Answer opposing the Petition, and a briefer discussion of the important contention admissibility requirements is set forth below.

Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." In addition, that section specifies that each contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[15]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[16] The Commission has stated that it "should not

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[14] *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993); *see also Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC __, slip op. at 42 (May 18, 2009) (stating that the timeliness of the late-filed contention need not be evaluated because the contention did not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)).

[15] *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[16] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[17]

The Commission's rules on contention admissibility are "strict by design."[18] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[19] As the Commission has stated:

> Nor does our practice permit "notice pleading," with details to be filled in later. Instead, we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them.[20]

The failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[21]

A contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding . . . ."[22] This includes contentions that advocate stricter requirements than agency rules impose.[23]

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17 *Id.*

18 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

19 *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Oconee*, CLI-99-11, 49 NRC at 334).

20 *N. Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

21 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

22 10 C.F.R. § 2.335(a).

23 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001).

IV. BACKGROUND ON 10 C.F.R. §§ 52.80(d) AND 50.54(hh)(2)

The requirements of Sections 52.80(d) and 50.54(hh)(2) stem from security orders issued to operating reactors by the NRC following the terrorist attacks on September 11, 2001.[24] Specifically, on February 25, 2002, the Commission imposed Order EA-02-026, which required operating reactor licensees to take interim compensatory measures "to address the generalized high-level threat environment in a consistent manner throughout the nuclear reactor community."[25] Section "B.5.b" of this order imposed requirements regarding mitigating measures for large fires and explosions.[26] The regulatory guidance to comply with these requirements is found in NEI 06-12, which has been endorsed by the Commission.[27]

On October 26, 2006, the Commission issued a proposed rule to impose new security regulations.[28] While the rulemaking addressed many parts of the NRC's security regulations, it also proposed including provisions in Appendix C of 10 C.F.R. Part 73 that would require applicants and licensees to establish mitigative strategies for fires and explosions.[29] The Commission explained that this change would include the elements of the post-September 11 security orders that required licensees to preplan strategies to cope with beyond design basis events, "including those that may result in the loss of large areas of the plant due to explosions or fire."[30] Thus, the rulemaking was initiated to codify the B.5.b requirements.

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24 Final Security Rule, 74 Fed. Reg. at 13,926.

25 All Operating Power Reactor Licensees; Order Modifying Licenses, EA-02-026, 67 Fed. Reg. 9792, 9792 (Mar. 4, 2002).

26 Final Security Rule, 74 Fed. Reg. at 13,928.

27 *Id.* at 13,958.

28 Proposed Rule, Power Reactor Security Requirements, 71 Fed. Reg. 62,664 (Oct. 26, 2006) ("Proposed Security Rule").

29 *Id.* at 62,674.

30 *Id.*

Following comments on the proposed rule, the Commission issued a supplemental proposed rule on April 10, 2008 that provided more details regarding the mitigative strategies requirements and concluded that these requirements more appropriately should be located at 10 C.F.R. § 50.54(hh).[31] Thereafter, on March 27, 2009, the Commission published the final rule, which included Section 50.54(hh)(2) regarding mitigative strategies for loss of large areas of the plant due to fires and explosions and Section 52.80(d) that requires a COL applicant to provide a description and plans in a COLA for addressing the Section 50.54(hh)(2) requirements.[32]

Specifically, Section 52.80(d) states that a COLA must include:

> A description and plans for implementation of the guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with the loss of large areas of the plant due to explosions or fire as required by § 50.54(hh)(2) of this chapter.

In turn, Section 50.54(hh)(2) states that:

> Each licensee shall develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire, to include strategies in the following areas:
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> (i) Fire fighting;
>
> (ii) Operations to mitigate fuel damage; and
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> (iii) Actions to minimize radiological release.

Section 50.54(hh)(2) applies to licensees (and to applicants for licenses through the provisions in Section 52.80(d) and Section 50.34(i)). Section 50.54(hh)(2) does not apply to applicants for design certification and design approvals. In that regard, the rule does not require

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[31] Supplemental Proposed Rule, Power Reactor Security Requirements, 73 Fed. Reg. 19,443, 19,443-445 (Apr. 10, 2008) ("Supplemental Proposed Security Rule").

[32] Final Security Rule, 74 Fed. Reg. at 13,926-928.

an applicant to perform design evaluations of fires and explosions, but instead to "develop and implement guidance and strategies." This reflects the genesis of the rule, which is based upon Section B.5.b of the security orders that were issued to existing operating plants (*i.e.*, plants with a completed design). This should be contrasted with the recently-issued aircraft impact assessment rule in 10 C.F.R. § 50.150, which does require design evaluations and is applicable to design certification applicants, but has not been backfit onto existing operating plants.

V. THE LATE-FILED CONTENTIONS SHOULD BE REJECTED

A. Contention MS-1 – "Damage States"

Contention MS-1 states:

> The submittal is deficient because it omits any reference to the numbers and magnitudes of the fires and explosions that would be expected, for example, from the impact of a large commercial airliner(s). Without such reference there is an inadequate basis to determine whether the proposed mitigative strategies are adequate to comply with 10 C.F.R. § 50.54(hh)(2). Compliance with 10 C.F.R. § 50.54(hh)(2) cannot be determined without a determination of the full spectrum of damage states. At a minimum, the Applicant should be required to describe damage footprints both quantitatively and qualitatively, including composite damage footprints, that are reasonably expected with an airstrike(s) and include descriptions of anticipated physical damage, shock damage, fire damage, fire spread, radiation exposures to emergency responders and the public and other effects such as failure of structural steel. See draft regulatory guidance for the aircraft impact design regulation, 10 C.F.R. § 50.150, NEI 07-13, pp. 32-36.[33]

In short, Contention MS-1 claims that the Mitigative Strategies Report incorrectly omits a discussion and evaluation of a full spectrum of "damage states" (*i.e.*, the resulting effects to the plant of an event that causes large fires and explosions) that would be caused by a large

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[33] Request at 5-6.

commercial aircraft impact or other such event.[34] Contention MS-1 essentially consists of an attack upon the acceptability of NEI 06-12 for addressing Section 50.54(hh)(2).[35]

As explained below, Contention MS-1 does not demonstrate a genuine dispute on a material issue of law or fact with STPNOC's COLA. Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states, the Intervenors confuse the requirements of 10 C.F.R. § 50.150 for aircraft impacts with those of Sections 52.80(d) and 50.54(hh)(2), and the Commission has already approved NEI 06-12 that was followed by STPNOC in developing the Mitigative Strategies Report.[36] For these reasons, Contention MS-1 should be rejected.[37]

1. Sections 52.80(d) and 50.54(hh)(2) Do Not Require Specification of Damage States

Contention MS-1 does not demonstrate an omission of any required information from the Mitigative Strategies Report. Contrary to the Intervenors' allegations, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant or licensee to identify or evaluate damage states, such as calculation of the impact of a large commercial aircraft or assessment of the impacts of fires or

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[34] *Id.* at 5-14. The Intervenors interchangeably use the terms "damage states" and "numbers and magnitudes of fires and explosions."

[35] *Id.* at 8-10.

[36] *See* Final Security Rule, 74 Fed. Reg. at 13,958. Additionally, because Sections 52.80(d) and 50.54(hh)(2) do not require the Mitigative Strategies Report to include a discussion of damage states, the Intervenors' claim that the Report must include such a discussion essentially constitutes an impermissible challenge to these regulations, contrary to 10 C.F.R. § 2.335. Section 2.335 states that, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."

[37] The Intervenors submitted a Declaration from Dr. Lyman, which states: "I have also reviewed contentions 1, 2, 4 and 7 and agree with them." Declaration of Dr. Edwin S. Lyman in Support of Petitioners' Contentions at 2 (Aug. 14, 2009) ("Lyman Declaration"). This vague statement is insufficient to act as expert opinion in support of these contentions. He merely states that he agrees with the contentions; he does not state that he is adopting any statements in those contentions as his own. This should be contrasted with his position on Contentions MS-3, 5, and 6, where he states that he is "responsible for the factual content and expert opinions" expressed in those contentions. *Id.* Therefore, the Lyman Declaration should not be considered as expert opinion for Contentions MS-1, 2, 4, and 7.

explosions on plant equipment.[38] Instead, these regulations set forth performance-based standards for mitigative strategies assuming the loss of large areas of the plant due to fires or explosions.[39] By arguing that the Mitigative Strategies Report should evaluate the effects of fires and explosions and identify damage states, the Intervenors misinterpret the purpose and requirements of Sections 52.80(d) and 50.54(hh)(2). In essence, the Intervenors are contending that STPNOC should perform design evaluations of fires and explosions, which is inconsistent with the nature of the rule.

a. The Plain Language of Sections 52.80(d) and 50.54(hh)(2) Does Not Require Specification of Damage States

The plain language of Sections 52.80(d) and 50.54(hh)(2) does not require that a COL applicant identify damage states. Section 52.80(d) only requires a COL applicant to provide a "description and plans for implementation of the guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with the loss of large areas of the plant due to explosions or fire as required by § 50.54(hh)(2) of this chapter." This requirement does not state that an applicant must evaluate the effects of fires or explosions or identify specific damage states. The Intervenors appear to concede this point by stating that "[t]he regulation [Section 50.54(hh)(2)]

Exhibit 4 NEI Mitigating Strategies

38 (b)(4)

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does not specify the numbers and magnitudes of the fires and explosions that the Applicant is to consider."[40]

As required by the plain language of Sections 52.80(d) and 50.54(hh)(2), STPNOC's Mitigative Strategies Report includes descriptions and plans for implementing guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities. These descriptions and plans satisfy the regulations by addressing (i) fire fighting, (ii) operations to mitigate fuel damage, and (iii) actions to minimize radiological release.[41] Thus, STPNOC has complied with the requirements of Sections 52.80(d) and 50.54(hh)(2).

b. The Rulemaking Record for Sections 52.80(d) and 50.54(hh)(2) Demonstrates that Specification of Damage States Is Not Required

The rulemaking record for Sections 52.80(d) and 50.54(hh)(2) does not support the Intervenors' argument that the Mitigative Strategies Report must evaluate specific accidents and their resulting damage states. In this regard, the Commission stated in the Statement of Considerations ("SOC") for the final rule that it "decided to maintain the language from the supplemental proposed rule that recognizes that the mitigative strategies can address losses of large areas of a plant and the related losses of plant equipment *from a variety of causes including aircraft impacts and beyond-design basis security events*."[42] Similarly, the Commission provided the following explanation in the SOC for the final rule:

> The requirements described in § 50.54(hh) relate to the development of procedures for addressing certain events that are the cause of large fires and explosions that affect a substantial portion of the nuclear power plant and *are not limited or directly*

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40 Request at 7.

41 *See* Mitigative Strategies Report at 15-37.

42 Final Security Rule, 74 Fed. Reg. at 13,933 (emphasis added); *see also* Supplemental Proposed Security Rule, 73 Fed. Reg. at 19,447 ("The rule contemplates that the initiating event for such large fires and explosions could be any number of design basis threat or beyond design basis threat events.").

> *linked to an aircraft impact.* The rule contemplates that the initiating event for such large[] fires and explosions could be any number of beyond-design basis events.[43]

As this language indicates, Section 50.54(hh)(2) does not require an applicant or licensee to postulate or assess any particular fire or explosion. Instead, the rule requires an applicant to describe "operational actions," which in turn encompass fourteen elements listed in the SOC for the final rule.[44] Those elements are not tied to any particular fire or explosion.

During the rulemaking for Sections 52.80(d) and 50.54(hh)(2), the Commission considered and rejected arguments similar to those made by the Intervenors. In the SOC for the supplemental proposed rule, the Commission evaluated the following comment:

> *Comment:* Another commenter stated that proposed Part 73, Appendix C [which was later moved to Section 50.54(hh)] does not specify what types of fires or explosions the licensee must prepare for, nor does it specify what areas of the plant are considered particularly susceptible to damage or destruction by fire or explosion.[45]

Thus, similar to the Intervenors, the commenter wanted the rule to require evaluation of specific types of fires and explosions and specific damage states. The Commission provided the following response in the rulemaking:

> *Response:* . . . The Commission did not intend to limit beyond-design basis scenarios to aircraft attacks but, instead called for the development of mitigation measures to generally deal with the situation in which large areas of the plant were lost due to fires and explosions, *whatever the beyond-design basis initiator*. . . . Accordingly, as with the original section B.5.b requirements, this proposed rule would apply only performance-based criteria so that individual licensees would have to determine the most appropriate site-specific measures that would meet the general performance criteria. . . . [T]he NRC does not believe it is necessary, or even

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43 Final Security Rule, 74 Fed. Reg. at 13,957 (emphasis added).

44 *Id.*

45 Supplemental Proposed Security Rule, 73 Fed. Reg. at 19,445.

> practical, that the prescription suggested by the stakeholder be incorporated into supplemental proposed § 50.54(hh).[46]

Given the Commission's rejection of this comment, the Board should reject the Intervenors' arguments in Contention MS-1.

c. The Statements in the SOC Cited by the Intervenors Do Not Demonstrate a Requirement to Specify Damage States

In the bases for Contention MS-1, the Intervenors identify various statements in the SOC for the final rule for Sections 52.80(d) and 50.54(hh)(2) and claim the statements indicate a requirement to consider aircraft attacks as a "baseline" for determining the scale of fires and explosions to be evaluated pursuant to Section 50.54(hh)(2).[47] The Intervenors, however, have misconstrued those statements.

First, some of the statements referenced by the Intervenors directly refer to the requirements of the aircraft impact rule in 10 C.F.R. § 50.150. For example, the Intervenors quote the following statement from the SOC: "the Commission has proposed in a separate rulemaking to require . . . an assessment of the effects of the impact of a large commercial aircraft on a nuclear power plant."[48] However, that statement directly refers to the aircraft impact rule and does not provide support for the Intervenors' argument that Section 50.54(hh)(2) requires an evaluation of aircraft attacks.

Additionally, other statements in the SOC referenced by the Intervenors apply to Section 50.54(hh)(1), not Section 50.54(hh)(2). For example, the Intervenors quote the following statement: "Licensees are required to develop procedures to facilitate the rapid entry of appropriate onsite personnel as well as offsite responders into their protected areas to deal with

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46 *Id.* (emphasis added).

47 Request at 6-8 & nn.3-4.

48 *Id.* at 6 n.3 (quoting Final Security Rule, 74 Fed. Reg. at 13,957).

the consequences of an aircraft impact."[49] However, this statement refers to a requirement in Section 50.54(hh)(1), not a requirement in Section 50.54(hh)(2). COL applicants are not required to address the requirements in Section 50.54(hh)(1).[50]

Furthermore, other statements from the SOC referenced by the Intervenors simply acknowledge that the requirements of Sections 52.80(d) and 50.54(hh)(2) are intended to mitigate a variety of events, including aircraft impacts. For example, the Intervenors refer to the following statement: "Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigative measures for large fires and explosions including (but not explicitly limited to) those caused by the impacts of large commercial aircraft."[51] None of the statements in the SOC suggests that an applicant must evaluate aircraft impacts and identify damage states.

2. The Intervenors Confuse the Requirements of Sections 52.80(d) and 50.54(hh)(2) with the Requirements of Section 50.150 for Aircraft Impacts

The Intervenors confuse the provisions in Sections 52.80(d) and 50.54(hh)(2) with the provisions in 10 C.F.R. § 50.150. Section 50.150 requires an assessment of the impacts of specific commercial aircraft and an evaluation of the plant's "design features and functional capabilities." Unlike Section 50.150, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify or assess the impacts of any particular fires and explosions or to evaluate the design of the plant.

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49 *Id.*

50 *See* 10 C.F.R. § 52.80(d).

51 Request at 6 n.3 (quoting Final Security Rule, 74 Fed. Reg. at 13,958).

In the SOC for the final rule for Sections 52.80(d) and 50.54(hh)(2), the Commission explained the difference between the mitigative strategies regulations and the aircraft impact assessment regulations as follows:

> The Commission regards the two rulemakings to be complementary in scope and objectives. The aircraft impact rule will focus on enhancing the design of future nuclear power plants to withstand large commercial aircraft impacts, with reduced reliance on human activities (including operator actions). Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigative measures for large fires and explosions including (but not explicitly limited to) those caused by the impacts of large commercial aircraft.[52]

The differences between the requirements in Sections 52.80(d) and 50.54(hh)(2) and the requirements in Section 50.150 are significant. For example, Section 50.150(a)(2) requires specific aircraft impact characteristics (*e.g.*, aircraft size, fuel loading, speed, and angle) to be evaluated as part of the aircraft impact rule. No such requirements are provided in connection with Sections 52.80(d) and 50.54(hh)(2).

The Intervenors' confusion of the aircraft impact assessment rule in Section 50.150 with Section 50.54(hh)(2) is further indicated by the Intervenors' references to NEI 07-13, "Methodology for Performing Aircraft Impact Assessments for New Plant Designs," Rev. 07 (May 2009), Public Version.[53] NEI 07-13 is explicitly intended for use in implementing Section 50.150,[54] not Section 50.54(hh)(2).

Furthermore, if the Intervenors' interpretation of Section 50.54(hh)(2) were to be accepted, it would essentially render Section 50.150 redundant and unnecessary. If applicants and licensees were required to assess the effects of aircraft impacts and other beyond design

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52 Final Security Rule, 74 Fed. Reg. at 13,958.

53 *See, e.g.*, Request at 3, 6, 11-13.

54 NEI 07-13 at v-vi.

basis events and identify damage states in order to satisfy Section 50.54(hh)(2), Section 50.150 would be meaningless; *i.e.*, Section 50.54(hh)(2) would encompass Section 50.150.[55] As the U.S. Supreme Court has held, a regulation should not be interpreted in a manner that renders it superfluous with other regulations.[56] Because the Intervenors are urging an interpretation of Section 50.54(hh)(2) that would render Section 50.150 superfluous, their interpretation should be rejected.

In summary, the Intervenors conflate the requirements in Section 50.150 with those in Section 50.54(hh)(2). Contrary to the Intervenors' arguments, Section 50.54(hh)(2) does not require an evaluation of damage caused by aircraft impacts. Instead, such a requirement is contained in Section 50.150.

3. The Commission Has Approved NEI 06-12 as a Method for Satisfying Section 50.54(hh)(2)

As acknowledged by the Intervenors, the Mitigative Strategies Report follows the guidance in NEI 06-12.[57]

(b)(4)

The Intervenors attack

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55 The Intervenors refer to a passage in NEI 07-13 which states that uncertainties such as hot shorts and spurious actuations are best addressed through Section 50.54(hh) instead of by Section 50.150. Request at 11. Contrary to the Intervenors' arguments, this statement from NEI 07-13 does not mean that Section 50.54(hh) requires evaluation of the potential for generation of hot shorts and spurious actuations from an aircraft impact. Instead, this passage from NEI 07-13 simply indicates that Section 50.54(hh) encompasses the effects of such uncertainties, such as hot shorts and spurious actuations, because it assumes that large areas of the plant are lost, and therefore the components therein are not functional. Furthermore, the Intervenors' interpretation of NEI 07-13 is belied by NEI 06-12, which does not require an explicit evaluation of hot shorts, spurious actuations, or other uncertainties.

56 *See Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668-69 (2007) (rejecting an interpretation of a regulation because it would render the regulation entirely superfluous with other regulations and stating "we have cautioned against reading a text in a way that makes part of it redundant" (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001))).

57 Request at 8; *see also* Mitigative Strategies Report at 3.

58 NEI 06-12 at 1.

STPNOC's reliance on NEI 06-12. The Intervenors imply that NEI 06-12 is insufficient for satisfying Section 50.54(hh)(2) because NEI 06-12 does not provide for evaluation of damage states.[59]

The Intervenors' argument must fail because the Commission itself has already approved the use of NEI 06-12 for satisfying the requirements of Section 50.54(hh)(2). Specifically, the Commission stated in the SOC for the final rule:

> *The Commission* issued guidance (Safeguards Information) to current reactor licensees on February 25, 2005, and additionally *endorsed NEI 06-12, Revision 2*, by letter dated December 22, 2006, *as an acceptable method for current reactor licensees to comply with the mitigative strategies requirement.* These two sources of guidance provide an acceptable means for developing and implementing the mitigative strategies.[60]

Furthermore, the Commission stated in the SOC for the final rule that "[n]ew applicants for . . . combined licenses under part 52 are required to develop and implement procedures that employ mitigative strategies similar to those now employed by current licensees."[61] NEI 06-12 provides those procedures employed by current licensees. Thus, STPNOC has appropriately followed the guidance in NEI 06-12. The Intervenors' criticisms of and challenges to NEI 06-12 do not provide an appropriate basis for a contention in light of the Commission's explicit approval of NEI 06-12.

STPNOC's adherence to approved guidance is entitled to significant weight in demonstrating regulatory compliance. The Commission has ruled in the past that compliance with guidance documents "constitutes reasonable assurance" of compliance with applicable

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59 Request at 8-10, 13.

60 Final Security Rule, 74 Fed. Reg. at 13,958 (emphasis added); *see also* Supplemental Proposed Security Rule, 73 Fed. Reg. at 19,447.

61 Final Security Rule, 74 Fed. Reg. at 13,957.

regulatory requirements.[62] Here, where STPNOC has followed the guidance of NEI 06-12 that has been specifically approved by the Commission itself and not just the NRC Staff, use of this guidance is entitled to even more deference. Thus, the Intervenors' challenges to NEI 06-12 in Contention MS-1 should be rejected because they are inconsistent with the Commission's intent in enacting Section 50.54(hh)(2).

4. Summary

There is no requirement in Sections 52.80(d) and 50.54(hh)(2) for an applicant to evaluate any particular fires or explosions or to identify damage states. Intervenors' arguments to the contrary are inconsistent with the SOC and NEI 06-12, which has been explicitly approved by the Commission for use in implementing the rule. Accordingly, Contention MS-1 should be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(iv) and (vi) and § 2.335.

B. Contention MS-2 – Deferred Actions

Contention MS-2 states:

> According to the submittal, Phase 1 mitigative strategies are dependent on yet to be completed assessments, evaluations, action plans, and procedures that will not be completed until near the end of construction. Submittal, p.3 The submittal does not specify that the subject assessments, evaluations, etc. will be done based on the full spectrum of damage states. The assessments, evaluations, etc. will evidently determine the scope of the Phase 1 fire fighting strategy and therefore must be done with the full spectrum of damage states in order to determine whether the proposed fire suppression strategies are adequate.[63]

Similar to Contention MS-1, Contention MS-2 incorrectly claims that the Mitigative Strategies Report is deficient because mitigative strategies will not address the "full spectrum of

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[62] *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC __, slip op. at 6 (Oct. 6, 2008); *see also Petition for Emergency & Remedial Action*, CLI-78-6, 7 NRC 400, 407 (1978) ("If there is conformance with regulatory guides, there is likely to be compliance with" the regulations.).

[63] Request at 14.

damage states." Additionally, as discussed below, procedures and similar documents do not need to be provided now and the Intervenors have not provided adequate support to justify otherwise. For these reasons, Contention MS-2 should be rejected.

1. Contention MS-2 Makes the Same Arguments as Contention MS-1 and Should Be Rejected for the Same Reasons

The arguments in Contention MS-2 simply repeat arguments from Contention MS-1. The Intervenors concede as much by stating that "[t]he arguments and authorities related to Contention One are incorporated by reference."[64] The Intervenors argue that "[t]he submittal does not specify that the subject assessments, evaluations, etc. will be done based on the full spectrum of damage states."[65] This argument is encompassed within the more general arguments in Contention MS-1.

Since Contention MS-2 is encompassed by Contention MS-1, Contention MS-2 should be rejected for the same reasons discussed above with respect to Contention MS-1. Simply stated, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to evaluate damage states.

2. Contention MS-2 Incorrectly Concludes that Certain Information Must Be Developed Prior to Issuance of the COL

Contention MS-2 also states that "Intervenors contend that the Applicant's assumption that these assessments, evaluations, etc. can be delayed until near the completion of construction is unreasonable."[66] To the extent that the Intervenors intend that Contention MS-2 argue that this

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64 *Id.*

65 *Id.*

66 *Id.*

information must be developed prior to issuance of a COL, the argument is without any legal basis.[67]

The plain language of Section 52.80(d) does not require implementation of regulatory strategies (such as development of action plans and procedures for mitigative strategies) at the COLA stage. Section 52.80(d) requires only that a COLA include a "description *and plans for implementation*" of these mitigative strategies.[68] This understanding also is supported by the SOC for Section 52.80(d), which explains that "[t]he Commission reviews the program description provided in the application as part of the licensing process and performs subsequent inspections of procedures and plant hardware to verify implementation."[69] STPNOC included a description and plans for implementation of these mitigative strategies in Section 4.0 of the Mitigative Strategies Report and the corresponding Mitigative Strategies Table ("MST"), which remain unchallenged by the Intervenors.[70]

In addition, the Intervenors have not provided adequate support for their conclusion that it is "unreasonable" that the assessments, evaluations, action plans, and procedures for certain mitigative strategies be delayed. The Intervenors' basis for this argument is that it needs to be determined now whether these "assessments will yield acceptable results under the full spectrum

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67 The Intervenors also argue that these assessments are needed now to allow STPNOC to comply with the aircraft impact rule at 10 C.F.R. § 50.150. *Id.* at 14 n.9. Suffice it to state, the Intervenors are inappropriately conflating the provisions of Section 50.150 and Section 50.54(hh)(2). Furthermore, contrary to the Intervenors' arguments, the Mitigative Strategies Report (*e.g.*, at 6, 9) does identify operator actions, and the Intervenors have not identified any deficiency in the operator actions identified in the Report.

68 10 C.F.R. § 52.80(d) (emphasis added).

69 Final Security Rule, 74 Fed. Reg. at 13,958.

70 (b)(4)

of damage states."[71] This argument should be rejected because, as discussed above with respect to Contention MS-1, Sections 52.80(d) and 50.54(hh)(2) do not require evaluation of damage states.

In summary, Section 52.80(d) does not require that the types of information identified in Contention MS-2 be developed to support issuance of the COL. Instead, the rule only requires a description of the strategies and procedures, and identification of plans for their implementation. The actual strategies and procedures may be developed after issuance of the COL, and will be subject to NRC inspection at that time. Thus, to the extent that the Intervenors are arguing that any strategies and procedures must be developed now, that argument is inconsistent with Section 52.80(d) and should be rejected in accordance with 10 C.F.R. § 2.335. Additionally, the Intervenors have not provided adequate support for their arguments, contrary to 10 C.F.R. § 2.309(f)(1)(v).

C. Contention MS-3 – Dose Assessment

Contention MS-3 states:

> [redacted] (b)(4)
> However, there is no quantitative or qualitative description of the "event" nor is there a stated commitment to evaluate the dose projection models considering the full spectrum of damage states.[72]

EXEMPTION 4 SOUTH TEXAS

As explained below, NRC regulations do not require disclosure of the information identified by the Intervenors. Additionally, Contention MS-3 is not adequately supported by expert opinion or factual information. For these reasons, Contention MS-3 should be rejected.

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71 Request at 14.

72 *Id.* at 15.

1. Contention MS-3 Makes the Same Arguments as Contention MS-1 and Should Be Rejected for the Same Reasons

The arguments in Contention MS-3 repeat arguments from Contention MS-1. The Intervenors base Contention MS-3 on their understanding that there should be a commitment to evaluate dose projection models considering "the full spectrum of damage states."[73] As discussed above in the response to Contention MS-1, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states. Since Contention MS-3 repeats the same arguments as Contention MS-1, Contention MS-3 should be rejected for the same reasons discussed above with respect to Contention MS-1.

2. Sections 52.80(d) and 50.54(hh)(2) Do Not Require the Information Identified by the Intervenors

Contention MS-3 argues that the Mitigative Strategies Report is deficient because "there is no quantitative or qualitative description of the 'event' nor is there a stated commitment to evaluate the dose projection models considering the full spectrum of damage states."[74] Sections 52.80(d) and 50.54(hh)(2), the corresponding rulemaking documents, and NEI 06-12 do not require this information to be included in the Mitigative Strategies Report. Furthermore, the Intervenors have not identified any such requirements.

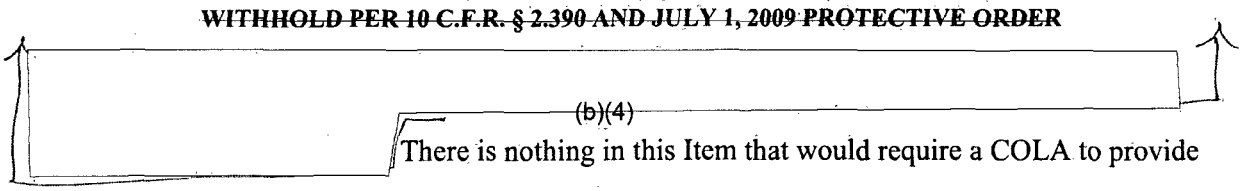
(b)(4)

[redacted]

[73] *Id.*

[74] *Id.*

[75] Mitigative Strategies Report at 37.



There is nothing in this Item that would require a COLA to provide a quantitative or qualitative description of the event, to describe the dose assessment model, or to provide an assessment of the dose from the event.

The NRC contention admissibility regulations, 10 C.F.R. § 2.309(f)(1)(vi), require that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner's belief." The Intervenors have not identified any failure to provide information required by Section 50.54(hh)(2). Therefore, Contention MS-3 should be rejected for failure to satisfy Sections 2.309(f)(1)(vi) and 2.335. Additionally, because Section 50.54(hh)(2) does not require the information specified in this contention, the contention does not identify an issue that is material to this proceeding and the contention should be rejected for failure to satisfy Section 2.309(f)(1)(iv).

3. Contention MS-3 Is Not Adequately Supported

This contention is professed to be supported by the Declaration of Dr. Edwin S. Lyman.[77] However, his Declaration does not provide a sufficient analysis to dispute the Mitigative Strategies Report. In fact, his Declaration contains no analysis or factual statements whatsoever, but instead simply states that Dr. Lyman is responsible for the factual statements and opinions in Contention MS-3.[78]

The Commission has stated that "an expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or

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[76] *Id.*

[77] Lyman Declaration at 2.

[78] *Id.*

explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion."[79] Additionally, conclusory statements cannot provide "sufficient" support for a contention, simply because they are made by an expert.[80] For these reasons, Contention MS-3 is inadequately supported, contrary to 10 C.F.R. § 2.309(f)(1)(v).

Furthermore, at least one licensing board has criticized the approach of wholesale adoption of legal pleadings in an affidavit, because a petitioner should distinguish its legal pleadings from the substantive facts and opinions expressed by its purported expert.[81] The Commission has also rejected this practice in the context of a motion to reopen the record, stating that blurring this distinction "undermines [a board's] ability to differentiate between the legal pleadings and the facts and opinions expressed by the expert."[82] The Lyman Declaration should be rejected for these reasons as well.[83]

D. Contention MS-4 – Mitigative Strategies Are Not Based on Damage States

Contention MS-4 states:

> (b)(4) However, the MST does not specify whether the LOLA "event" commitments/strategies are or will be developed based on a damage footprint of sufficient extent and severity to accommodate the likely impact(s) of large commercial airliner(s) and/or the full spectrum of

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79 *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

80 *Id.*

81 *See Entergy Nuclear Vt. Yankee LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 560 n.16 (2004).

82 *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC __, slip op. at 79 n.318 (Apr. 1, 2009) (quoting *Vermont Yankee*, LBP-04-28, 60 NRC at 560 n.16).

83 *Cf. U.S. Dept. of Energy* (High Level Waste Repository), LBP-09-06, 69 NRC __, slip op. at 41-45 (May 11, 2009), in which a licensing board accepted use of affidavits that adopted specific paragraphs of the bases for a contention (rather than the contention as a whole).

damage states. Accordingly, there is no way to determine whether the proposed mitigative strategies are adequate.[84]

Similar to Contention MS-1, Contention MS-4 claims that the Mitigative Strategies Report is deficient because the strategies identified in the MST contained in the Mitigative Strategies Report do not address damage states. As explained below, NRC regulations do not require evaluation of damage states. Additionally, Contention MS-4 incorrectly argues that all guidelines and strategies must be developed now. For these reasons, Contention MS-4 should be rejected.

1. Contention MS-4 Makes the Same Arguments as Contention MS-1 and Should Be Rejected for the Same Reasons

The arguments in Contention MS-4 simply repeat arguments from Contention MS-1. The Intervenors concede as much by stating that "[t]his omission contention addresses similar deficiencies as discussed in Contention One" and stating that they are incorporating the arguments from Contention MS-1 by reference.[85]

Since Contention MS-4 is encompassed by Contention MS-1, Contention MS-4 should be rejected for the same reasons discussed above with respect to Contention MS-1. Simply stated, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states.

Furthermore, the basic premise of Contention MS-4 is faulty. Contention MS-4 argues that adequate mitigative strategies cannot be developed without identification of the full spectrum of damage states.

(b)(4)

Exempt 4 NRC

[84] Request at 16-17.

[85] *Id.* at 17. The Intervenors argue that "[t]here are numerous instances in the MST that anticipate specific actions that are dependent on specifications of the damage states" and they cite to specific portions in the MST (pages 16, 18, 21-22, 27, 31-33, 44) that they claim are deficient because it is unknown whether the items account for "the full spectrum of damage states." *Id.* at 17-18. These arguments are encompassed within the more general arguments in Contention MS-1.

(b)(4)

As discussed above, this approach in NEI 06-12 has been accepted by the Commission as an acceptable method for satisfying Section 50.54(hh)(2).[87]

2. Contention MS-4 Incorrectly Implies that Certain Information Should Be Developed Prior to Issuance of the COL

Contention MS-4 also mentions that some of STPNOC's "event commitments/strategies" have not yet been developed. Footnote 11 and the text of the Request discuss various items in the MST that identify commitments to develop information in the future. It is unclear whether the Intervenors are contending that this information must be developed prior to issuance of the COL. To the extent that the Intervenors intend that Contention MS-4 include such an argument, the argument is without any legal basis.

The plain language of Section 52.80(d) does not require implementation of regulatory commitments (such as development of procedures or guidelines) at the COLA stage. Section 52.80(d) requires only that a COLA include a "description *and plans for implementation*" of these mitigative strategies.[88] This understanding also is supported by the SOC for Section 52.80(d), which explains that "[t]he Commission reviews the program description provided in the application as part of the licensing process and performs subsequent inspections of procedures and plant hardware to verify implementation."[89]

In summary, Section 52.80(d) does not require that the type of information specified in Contention MS-4 be developed to support issuance of the COL. Instead, the rule only requires a description of the guidelines and strategies and identification of plans for their implementation. The actual guidelines may be developed after issuance of the COL, and will be subject to NRC

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86 NEI 06-12 at 1.

87 *See* Final Security Rule, 74 Fed. Reg. at 13,958.

88 10 C.F.R. § 52.80(d) (emphasis added).

89 Final Security Rule, 74 Fed. Reg. at 13,958.

inspection at that time. Thus, to the extent that the Intervenors are arguing that guidelines must be fully developed now, that argument is inconsistent with Section 52.80(d) and should be rejected in accordance with 10 C.F.R. § 2.335.

E. Contention MS-5 – Assumption in NEI 06-12 Regarding "Heroic Action"

Contention MS-5 states:

> [redacted] (b)(4) However, the guidance also concedes that the "[i]dentified response capabilities will not ensure success under the full spectrum of potential damage states." Accordingly, the submittal should reconcile the premise that no heroic actions will be required with the recognition that the mitigative measures may be unsuccessful, considering the full spectrum of damage states, and that heroic actions would in fact be required to actually mitigate the effects of fires and explosions that are not controlled by use of the Applicant's mitigative measures.[90]

As explained below, Contention MS-5 improperly challenges NEI 06-12. Furthermore, Contention MS-5 is not material because NRC regulations do not require the Mitigative Strategies Report to include the information identified by the Intervenors. For these and other reasons discussed below, Contention MS-5 should be rejected.

1. Contention MS-5 Improperly Challenges NEI 06-12

Contention MS-5 challenges the assumptions in NEI 06-12 and the reliance by the Mitigative Strategies Report on NEI 06-12.[91] These challenges should be rejected because the Commission has already approved use of NEI 06-12 as an appropriate means to satisfy the requirements of Sections 52.80(d) and 50.54(hh)(2).[92] As explained in Section V.A.3 above with

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90 Request at 18.

91 *Id.*

92 *See* Final Security Rule, 74 Fed. Reg. at 13,958.

respect to Contention MS-1, the Intervenors' challenges to NEI 06-12 are inconsistent with the Commission's intent in enacting Section 50.54(hh)(2).

2. Contention MS-5 Seeks Information that Is Not Required by Sections 52.80(d) and 50.54(hh)(2)

Contention MS-5 states that the Mitigative Strategies Report must include (1) "procedures . . . to determine which individual(s) would receive higher doses of radiation" than the doses received by individuals carrying out the Emergency Plan, and (2) "information individuals would receive for training" about the magnitude of exposures that might be incurred during implementation of the mitigative actions.[93]

Sections 52.80(d) and 50.54(hh)(2), the corresponding rulemaking documents, and NEI 06-12 do not require this information to be included in the Mitigative Strategies Report. The Intervenors have not cited to anything in the regulations or regulatory guidance that would require such procedures or training.

The NRC contention admissibility regulations, 10 C.F.R. § 2.309(f)(1)(vi), require that "if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner's belief." The Intervenors have not identified any reasons to believe that the allegedly missing information is required by law. Therefore, Contention MS-5 does not satisfy Sections 2.309(f)(1)(vi) and 2.335 and should be rejected. Additionally, because Section 50.54(hh)(2) does not require the information specified in this contention and the contention does not identify an issue that is material to this proceeding, the contention should be rejected for failure to satisfy Section 2.309(f)(1)(iv).

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[93] Request at 18-19.

3. Contention MS-5 Is Not Adequately Supported

Contention MS-5 argues that the Mitigative Strategies Report must assume that "extraordinary actions" will be required for nuclear plant fires that do not respond to the mitigative actions identified in the applicant's submittal.[94]

Contention MS-5 does not provide any support for its claim that STPNOC's mitigative strategies will not be adequate for fires, or that STPNOC will need to take "extraordinary actions."[95] Rather than provide justification or even identify which of the mitigative strategies are inadequate or what extraordinary actions may be needed, Contention MS-5 simply provides conclusory statements.

This contention professes to be supported by the expert opinion of Dr. Lyman, but he has not provided any analysis to dispute the Mitigative Strategies Report. Dr. Lyman does not provide a reasoned basis or explanation, but instead simply adopts the conclusory statements in Contention MS-5 to the effect that STPNOC's mitigative actions will not be adequate for suppressing fires and that "extraordinary actions" will be required. The Commission has stated that "an expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion."[96] Additionally, conclusory statements cannot provide "sufficient"

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94 *Id.* at 18.

95 (b)(4)

This statement only means that the drill used to simulate a large release of radioactive material includes a fire component. The Intervenors mischaracterize this statement.

96 *USEC*, CLI-06-10, 63 NRC at 472.

support for a contention, simply because they are made by an expert.[97] Furthermore, as discussed above with respect to Contention MS-3, an affidavit that simply adopts a contention does not constitute adequate support for the contention.

For these reasons, Contention MS-5 is inadequately supported, and should be rejected for failure to satisfy 10 C.F.R. § 2.309(f)(1)(v).

4. Sections 52.80(d) and 50.54(hh)(2) Do Not Require Specification of Damage States

Contention MS-5 incorporates by reference the arguments in Contention MS-1 regarding the alleged need for the Mitigative Strategies Report to specify damage states.[98] For the same reasons discussed in Contention MS-1, these arguments in Contention MS-5 should be rejected. Contrary to the Intervenors' arguments, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states. Because the regulations do not require the information specified in this contention, the contention does not identify an issue that is material to this proceeding and the contention should be rejected for failure to satisfy Sections 2.309(f)(1)(iv) and 2.309(f)(1)(vi).

F. Contention MS-6 – Reactor Outages

Contention MS-6 states:

> The South Texas Project 3&4 Mitigative Strategies Report is deficient because it does not address strategies suitable for the particular circumstances associated with LOLAs occurring during reactor outages. Therefore, it does not comply with the requirements of 10 C.F.R. §50.54(hh)(2), which applies both during full-power operation and during outages.[99]

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97 *Id.*

98 Request at 19.

99 *Id.*

As explained below, Contention MS-6 makes arguments similar to those in Contention MS-1 and should be rejected for similar reasons. Additionally, Contention MS-6 is an improper challenge to NEI 06-12, is not adequately supported, and does not demonstrate a genuine dispute with the COLA. For these reasons, Contention MS-6 should be rejected.

1. Contention MS-6 Makes Arguments Similar to Those in Contention MS-1 and Should Be Rejected for the Same Reasons

Contention MS-6 argues that the Mitigative Strategies Report should address strategies suitable for accidents during reactor outages.[100] This argument is simply a modified version of the Intervenors' arguments in Contention MS-1 regarding evaluation of the full spectrum of damage states, because the Intervenors are arguing that the Mitigative Strategies Report must evaluate additional initial plant conditions (*i.e.*, reactor outage) that would affect the resulting damage states and the effectiveness of the mitigative strategies.[101]

Since the arguments in Contention MS-6 are encompassed by the arguments in Contention MS-1, Contention MS-6 should be rejected for the same reasons discussed above for Contention MS-1. Specifically, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states, and thus do not require evaluation of various initial plant conditions, such as a reactor outage. Instead, these regulations require the identification of mitigative strategies regardless of the initial plant conditions and the resulting damage states. Because the regulations do not require the information specified in this contention, the contention does not identify an issue that is material to this proceeding and the contention should be rejected for failure to satisfy Sections 2.309(f)(1)(iv) and (vi) and 2.335.

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[100] *Id.* at 19-20.

[101] *Id.*

2. Contention MS-6 Improperly Challenges NEI 06-12

(b)(4)

The Intervenors' challenge to these assumptions in NEI 06-12 should be rejected because the Commission has already approved use of NEI 06-12 as an appropriate means to satisfy the requirements of Sections 52.80(d) and 50.54(hh)(2).[103] As explained in Section V.A.3 above with respect to Contention MS-1, the Intervenors' challenges to NEI 06-12 are inconsistent with the Commission's intent in enacting Section 50.54(hh)(2).

3. Contention MS-6 Is Not Adequately Supported

Contention MS-6 argues that the Mitigative Strategies Report is deficient because it does not address mitigative strategies during a reactor outage.[104] However, the contention does not provide adequate support for this argument.

Contention MS-6 states that the conditions during outages may have a significant impact on the effectiveness of mitigative strategies, because (1) the risk of core damage is typically significantly higher than when the reactor is at full power; (2) important safety systems may be out of service for maintenance; (3) the containment hatch may be open; (4) the entire core may be off-loaded to the spent fuel pool, increasing pool heat load; and (5) there may be a large number of temporary contractor personnel on-site.[105] Rather than provide justification or even

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102 *Id.* at 20.

103 *See* Final Security Rule, 74 Fed. Reg. at 13,958.

104 Request at 20.

105 *Id.*

identify which of the mitigative strategies are inadequate based on these claims, Contention MS-6 simply provides conclusory statements.

This contention professes to be supported by the expert opinion of Dr. Lyman, but he has not provided any analysis to dispute the Mitigative Strategies Report. Dr. Lyman does not provide a reasoned basis or explanation, but instead simply adopts the conclusory statements in Contention MS-6 to the effect that outages need to be evaluated separately in the Mitigative Strategies Report.[106] The Commission has stated that "an expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion."[107] Additionally, conclusory statements cannot provide "sufficient" support for a contention, simply because they are made by an expert.[108] Furthermore, as discussed above with respect to Contention MS-3, an affidavit that simply adopts a contention does not constitute adequate support for the contention.

For these reasons, Contention MS-6 is inadequately supported, and should be rejected for failure to satisfy 10 C.F.R. § 2.309(f)(1)(v).

4. Contention MS-6 Does Not Demonstrate a Genuine Dispute

To the extent that Contention MS-6 is relying upon two quotations from NEI 06-12, Contention MS-6 fails to demonstrate a genuine dispute with the Mitigative Strategies Report because the Intervenors misconstrued the quoted statements in NEI 06-12, and the Intervenors' use of those statements does not establish a genuine dispute on a material issue.

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106 *Id.*; Lyman Declaration at 2.

107 *USEC*, CLI-06-10, 63 NRC at 472.

108 *Id.*

The first quoted statement is that "there is no need to consider the potential for equipment to be out of service for routine maintenance activities."[109]

(b)(4)

The Intervenors have not explained how this assumption is incorrect for this mitigative strategy.

(b)(4)

The Intervenors have not explained how this assumption is incorrect for this mitigative strategy. Specifically, the Intervenors have not explained why it would be more conservative to assume the reactor is shutdown when evaluating means to provide makeup to the spent fuel pool.

(b)(4)

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109 Request at 20 (quoting NEI 06-12 at 10).

110 NEI 06-12 at 9-10.

111 Request at 20 (quoting NEI 06-12 at 11).

112 NEI 06-12 at 9-11.

(b)(4)

Exhibit 4 South Texas

The Intervenors do not contest or even acknowledge these alternatives. Therefore, the Intervenors' use of the two quotations from NEI 06-12 does not result in a genuine dispute with the COLA and does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). Accordingly, this contention should be rejected.

G. Contention MS-7 – Assumption Regarding Abundant Water Supply

Exhibit 4 South Texas

Contention MS-7 states:

> (b)(4) However, there is no discussion of the number or magnitude of fires that would require water nor the full spectrum of damage states that would require fire suppression and cooling functions. There is no evidentiary support for an assumption by the Applicant that adequate supplies or pumping capacity is available simultaneously for emergency reactor cooling, SFP cooling and suppressing multiple fires.[113]

Similar to Contention MS-1, Contention MS-7 also claims that the Mitigative Strategies Report is deficient because it omits damage states. As explained below, Contention MS-7 is not material and does not demonstrate a genuine dispute on a material issue of law or fact, because the contention simply repeats the arguments from Contention MS-1, which do not support an admissible contention. Additionally, Contention MS-7 misconstrues the Mitigative Strategies Report and does not provide any support to challenge the assumption on water availability. For these reasons, Contention MS-7 should be rejected.

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[113] Request at 21.

1. Contention MS-7 Makes the Same Arguments as Contention MS-1 and Should Be Rejected for the Same Reasons

Contention MS-7 incorporates by reference the arguments in Contention MS-1.[114] The Intervenors state that "[t]his is an omission contention and like others related to the submittal, is based on the failure to discuss the full spectrum of damage states assumed."[115] The Intervenors' arguments are all based on the premise that STPNOC omitted evaluation of the "full spectrum of damage states" from the Mitigative Strategies Report and discussion of the impact of those damage states on water availability, including for fire suppression and cooling.[116] These arguments are encompassed within the more general arguments in Contention MS-1.

Since Contention MS-7 is encompassed by Contention MS-1, Contention MS-7 should be rejected for the same reasons discussed above for Contention MS-1. Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states. Because the regulations do not require the information specified in this contention, the contention does not identify an issue that is material to this proceeding and the contention should be rejected for failure to satisfy Section 2.309(f)(1)(iv) and (vi).

2. Contention MS-7 Mischaracterizes the MST and Provides No Support for Challenging STPNOC's Assumptions Related to Water Supply

The Intervenors refer to a statement in an MST Item that there are "abundant" water supplies for cooling and fire suppression. The Intervenors question that statement, arguing that the MST does not demonstrate that there will be adequate supplies or pumping capacity.[117] As

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114 *Id.*

115 *Id.*

116 *Id.* at 21-22.

117 *Id.* at 21.

discussed below, the Intervenors have mischaracterized the MST Item, and their claims are baseless.

(b)(4)

Contention MS-7 does not contest or even mention these other Items.

The first column for the MST Item at issue identifies the "Expectation" for nuclear plants in general, and the second column identifies STPNOC's "Commitment/Strategy."

(b)(4)

[118] *Id.*

[119] Mitigative Strategies Report at 34.

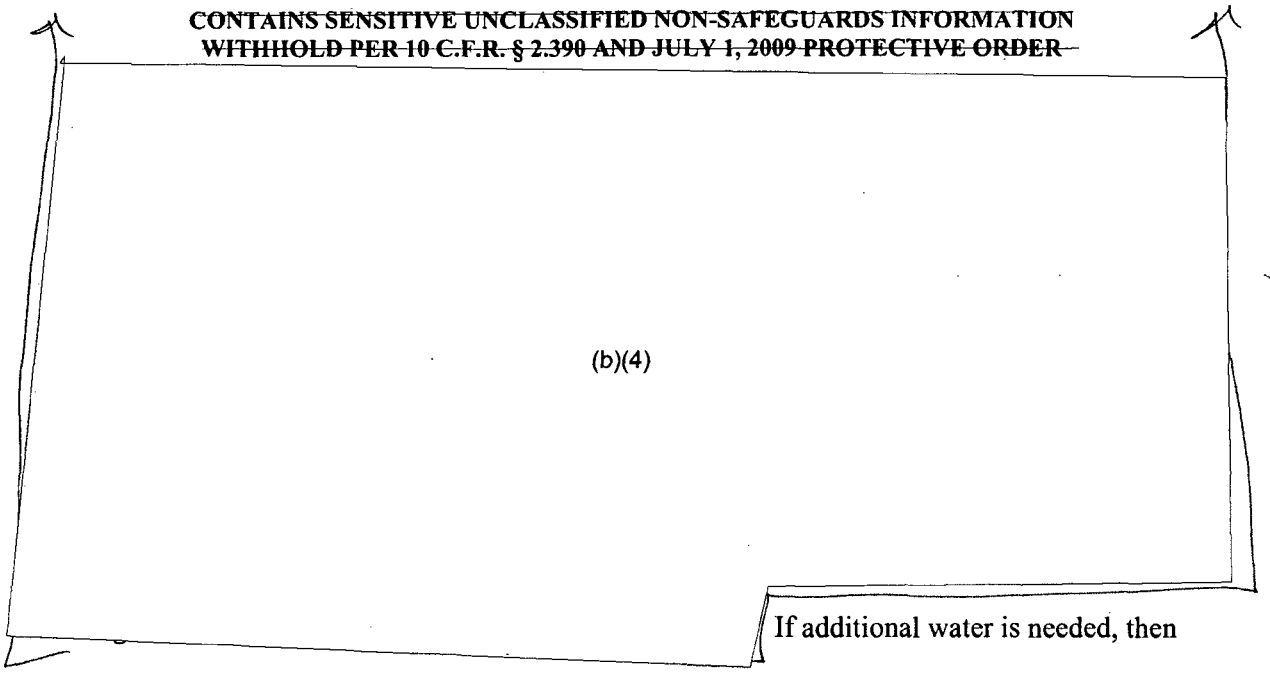

Exhibit 4 South Texas

If additional water is needed, then offsite sources can be obtained. The Intervenors have provided no factual information or expert opinion that would call into question the adequacy of this amount of water for the purposes of component cooling water. Because the Intervenors have not provided any support for questioning the adequacy of this water supply, Contention MS-7 should be dismissed for failure to satisfy 10 C.F.R. § 2.309(f)(1)(v).[121]

VI. THE INTERVENORS' REQUEST FOR SUBPART G HEARING PROCEDURES SHOULD BE REJECTED

The Intervenors have requested the use of Subpart G hearing procedures for litigation of their contentions related to the Mitigative Strategies Report.[122] As discussed below, the Intervenors' request is inconsistent with 10 C.F.R. § 2.310(d) and should be rejected.

The regulations in 10 C.F.R. Part 2 establish several hearing tracks. Of particular relevance to COL proceedings, Subpart L establishes informal hearing procedures and Subpart G establishes formal hearing procedures. The selection of the appropriate hearing track depends

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120 *Id.* (emphasis added).

121 *See also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996).

122 Request at 22.

upon the nature of the contentions. Specifically, 10 C.F.R. § 2.310(d) presumes use of Subpart L unless the proceeding involves "resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter."[123]

The only support the Intervenors provide for their request to use Subpart G hearing procedures is that they anticipate that STPNOC will argue that the Mitigative Strategies Report meets the requirements of Section 50.54(hh)(2), which "sets up a material fact issue related to the assumptions about the full spectrum of damage states. Live testimony on the contentions herein is necessary because the credibility of the witnesses sponsoring such testimony would be in issue."[124]

This argument does not provide adequate justification for use of Subpart G hearing procedures. None of the proposed contentions, if admitted, would require eyewitness or other fact-specific testimony pertaining to a past activity, motive, or intent. Therefore, under Section 2.310(d), there is no basis for applying the formal hearing procedures in Subpart G.

For several reasons, the Intervenors' claim that the credibility of witnesses is in issue is not sufficient to warrant use of Subpart G procedures. First, the Intervenors incorrectly focus on the credibility of all witnesses, rather than *eye*witnesses as required by Section 2.310(d). Additionally, the Intervenors' argument could apply to any contention that involves witnesses (*i.e.*, all contentions except for contentions that involve solely legal issues). If such an argument

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[123] When it issued these regulations, the Commission stated that given the provision in Section 2.310(d), "Subpart L procedures would be used, as a general matter, for hearings on power reactor construction permit and operating license applications under Parts 50 and 52." Changes to Adjudicatory Process, 69 Fed. Reg. at 2206.

[124] Request at 22.

were to be accepted, Subpart G proceedings would be the norm. However, that would be inconsistent with the Commission's intent in establishing the Subpart L hearing process as the preferred alternative for COL proceedings. Subpart G hearing procedures are not appropriate when, as here, witnesses will be addressing technical issues (as distinct from past events involving eyewitnesses). In this regard, the Commission recently rejected an argument that Subpart G hearing procedures "would be helpful in resolving complex technical issues," and characterized imposition of Subpart G hearing procedures as an "extraordinary" action.[125]

Accordingly, the Board should reject the Intervenors' request to use Subpart G hearing procedures for failure to satisfy the standards in Section 2.310(d).

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[125] *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC __, slip op. at 49-51 (June 25, 2009).

VII. CONCLUSION

For the foregoing reasons, the late-filed contentions submitted by the Intervenors should be rejected and the Intervenors' request for Subpart G hearing procedures should be denied.

Respectfully submitted,

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Dated in Washington, D.C.
this 4th day of September 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 52-012-COL 52-013-COL
STP NUCLEAR OPERATING COMPANY	)	
(South Texas Project Units 3 and 4)	)	September 4, 2009

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2009 a copy of "STP Nuclear Operating Company's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report" was served by the Electronic Information Exchange on the following recipients:

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