UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 52-034-COL
LUMINANT GENERATION COMPANY LLC	)	52-035-COL
	)	
(Comanche Peak Nuclear Power Plant Units 3 and 4)	)	April 16, 2009

LUMINANT'S ANSWER OPPOSING PETITION TO STAY OR HOLD IN ABEYANCE THE COMANCHE PEAK UNITS 3 AND 4 PROCEEDING

I. INTRODUCTION

On April 6, 2009, the Sustainable Energy and Economic Development ("SEED") Coalition, Public Citizen, True Cost of Nukes, and Lon Burnam (collectively, "Petitioners") submitted a Petition to the U.S. Nuclear Regulatory Commission ("Commission" or "NRC") requesting that the Commission either stay or hold in abeyance all proceedings related to the combined license application ("COLA") submitted by Luminant Generation Company LLC ("Luminant") for Comanche Peak Units 3 and 4.[1] Pursuant to 10 C.F.R. § 2.323(c), Luminant submits this answer opposing the Petition.

The Petitioners argue that the COLA is incomplete because it references the Mitsubishi U.S. Advanced Pressurized Water Reactor ("US-APWR"), which has not been certified by the

[1] Petition for Order to Stay Comanche Peak Nuclear Power Units 3 and 4 Combined Construction and Operating Licensing Application Proceedings and Hold the Combined Operating License Application in Abeyance Pending Completion of the US-APWR Application Rulemaking (Apr. 6, 2009) ("Petition"). Because the Petition uses the phrases "stay" and "hold in abeyance" interchangeably, they also are treated interchangeably in this answer.

NRC.[2] The Petition further claims that proceeding to hearing on the COLA under these circumstances would be inconsistent with the governing statutes and regulations, and would deprive the Petitioners of a fair and meaningful opportunity for hearing.[3] As discussed below, the Petition should be denied because those claims have no basis in law or fact and are inconsistent with applicable regulatory requirements and precedent.[4]

II. BACKGROUND

By letter dated September 19, 2008, Luminant submitted a COLA to the NRC under Subpart C of 10 C.F.R. Part 52 requesting COLs for two US-APWR units for its Comanche Peak Nuclear Power Plant site located near Glen Rose, Texas.[5] As authorized by 10 C.F.R. § 52.55(c), the COLA incorporates by reference the US-APWR design certification application and the associated Design Control Document ("DCD").

Luminant's COLA was made available through NRC's website and publicly noticed on November 7, 2008.[6] Based upon its review pursuant to 10 C.F.R. § 2.101, the NRC found that the application was sufficiently complete and acceptable for docketing, and docketed the application on December 2, 2008.[7] Thereafter, on February 5, 2009, the NRC issued a hearing

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2 *Id.* at 1. Mitsubishi Heavy Industries, Ltd. submitted the design certification application for the US-APWR in December 2007. The NRC's review of that application is pending. *See* US-APWR Application Review Schedule, *available at* http://www.nrc.gov/reactors/new-reactors/design-cert/apwr/review-schedule.html.

3 Petition at 1-2, 24.

4 The Petitioners also submitted a separate petition to intervene. *See* Petition for Intervention and Request for Hearing (Apr. 6, 2009). Luminant will address the Petitioners' standing and contentions in its answer to that petition. Thus, these issues are not addressed further here.

5 Letter from M. Lucas, Luminant, to NRC, Combined License Application for Comanche Peak Nuclear Power Plant, Units 3 and 4 (Sept. 19, 2008), *available at* ADAMS Accession No. ML082680250.

6 Luminant Generation Company LLC; Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008).

7 Luminant Generation Company LLC; Acceptance for Docketing of an Application for Combined License for Comanche Peak Nuclear Power Plant, Units 3 and 4, 73 Fed. Reg. 75,141 (Dec. 10, 2008).

notice for the COLA.[8] On April 6, 2009, in response to this hearing notice, the Petitioners petitioned to intervene and requested a hearing, while simultaneously filing this Petition.

III. DISCUSSION

A. The Petition Is Untimely

Without needing to reach the merits, the Commission should dismiss the Petition because Petitioners have failed to comply with applicable procedural requirements.

Commission precedent has treated similar petitions as motions in accordance with 10 C.F.R. § 2.323.[9] The NRC regulations at 10 C.F.R. § 2.323(a) specify that motions "must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." As discussed above, Luminant submitted its COLA to the NRC on September 19, 2008, and a receipt of the application was publicly noticed in the *Federal Register* on November 7, 2008. Accordingly, the issue raised by the Petitioners (*i.e.*, the COLA references the US-APWR design certification application) pertains to an event that was publicly noticed and occurred well before the 10-day period prior to the Petition being filed. Thus, the Petition was filed after the required filing deadline. Even if the time period is calculated from the publication of the hearing notice on February 5, 2009, the Petition was submitted well after the 10-day period. Therefore, the Petition is untimely and should be rejected.

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[8] Luminant Generation Company LLC; Application for the Comanche Peak Nuclear Power Plant Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 6177 (Feb. 5, 2009).

[9] *See, e.g.*, Order, Docket Nos. 52-031 and 52-032 (Nov. 12, 2008) (unpublished), *available at* ADAMS Accession No. ML083170853. Any filing that does not fit within one of the specific forms of pleading specified in the NRC Rules of Practice and that requests the NRC take some action is effectively a "motion," and should be governed by 10 C.F.R. § 2.323. *See Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC __, slip op. at 17 (Oct. 6, 2008) (treating petitions to suspend several license renewal proceedings "as general motions brought under the procedural requirements of 10 C.F.R. § 2.323" because the "requests do not fit cleanly within any of the procedures described within [NRC] rules of practice"). The Petitioners concede this point in their Petition by providing a "Certification Pursuant to 10 CFR 2.323(b)." Petition at 29. Petitioners fail to provide any justification for its untimeliness.

B. The Petition Fails to Justify a Stay of this Proceeding

Even if the Commission were to overlook the procedural defects of the Petition, it should still deny the Petition because the Petitioners have not provided a sufficient basis for holding the proceeding in abeyance. The Petitioners argue that this proceeding violates: (1) the Atomic Energy Act ("AEA") and 10 C.F.R. Part 52 regulations addressing the scope of COL adjudications; and (2) the Administrative Procedure Act ("APA") and NRC hearing notice requirements.[10]

As explained below, the Petition is legally and factually baseless, because: (1) NRC regulations, as well as the Commission's 2008 Policy Statement and its recent decisions in *Fermi* and *Shearon Harris*,[11] provide that the NRC may hold hearings on a COLA that references a design certification application; (2) the AEA and the APA do not prohibit proceeding with an adjudication for a COLA that references a design certification application; (3) the claim that it would be unfair to proceed to hearing on the COLA is groundless and does not warrant holding the proceeding in abeyance; and (4) granting the Petition and holding the proceeding in abeyance would unnecessarily delay the licensing proceeding and would impose undue burden on all parties.[12]

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[10] Petition at 2-3, 7-18, 23-27.

[11] *Detroit Edison Co.* (Fermi Unit 3), CLI-09-04, 69 NRC __, slip op. at 6-7 (Feb. 17, 2009); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC __, slip op. at 3-4 (July 23, 2008).

[12] Additionally, while the Petitioners characterize their Petition as a request for a stay, they have cited no legal standard and have provided no justification for a stay. The NRC regulations address suspensions or stays in 10 C.F.R. §§ 2.342 and 2.1213, but those regulations are not applicable in this situation. Even if these regulations did apply, the Petitioners have not addressed the factors for a stay. For example, the Petitioners have not demonstrated that they will prevail in this proceeding or that they will be irreparably injured. Additionally, the Commission has characterized suspension of proceedings as a "drastic course of action" that is only warranted for "immediate threats to public health and safety." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000). The present circumstances do not satisfy this high standard.

1. Commission Rules, Policy, and Precedent Specifically Contemplate a Hearing on a COLA that References a Design Certification Application

a. The Petition Impermissibly Challenges 10 C.F.R. § 52.55(c) and the Commission's Policy Statement on the Conduct of New Reactor Licensing Proceedings

As noted above, Luminant's COLA incorporates by reference the US-APWR design certification application, as specifically authorized by 10 C.F.R. § 52.55(c). That provision provides that "[a]n applicant for a . . . combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted."[13] This provision does not restrict a licensing board from proceeding with adjudication of a COLA if the Commission has yet to decide on issuance of a final Design Certification Rule ("DCR"). By suggesting that the proceeding be held in abeyance, the Petition constitutes an impermissible attack on Section 52.55(c).[14] Because the Petitioners may not use the adjudicatory process to challenge NRC regulations, this attack on 10 C.F.R. § 52.55(c) cannot serve as a basis to hold the proceeding in abeyance.[15]

The Petitioners appear to be claiming that 10 C.F.R. § 52.55(c) should not be interpreted to allow hearings on a COLA that references a design certification application.[16] Such an interpretation of Section 52.55(c) would render the regulation meaningless. There is no reason

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[13] The Petitioners have conceded that Luminant's COLA complies with this regulation by discussing 10 C.F.R. § 52.55(c) and stating that "[i]n the *instant* matter, this is precisely what the applicant and NRC have done by advancing a COLA adjudication in the absence of a completed reactor design certification rulemaking." Petition at 12.

[14] *See* 10 C.F.R. § 2.335(a). As the D.C. Circuit has noted, "it is hornbook administrative law that an agency need not—indeed should not—entertain a challenge to a regulation, adopted pursuant to notice and comment, in an adjudication or licensing proceeding." *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

[15] Despite the Petitioners' assertion to the contrary (Petition at 11-12), 10 C.F.R. § 52.55(c) is not a new section that was added in 2007, but instead has been in effect for almost 20 years. *See* Final Rule, Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15,372, 15,392 (Apr. 18, 1989).

[16] *See, e.g.*, Petition at 18.

for a regulation to authorize submission of an application that cannot be processed by the NRC. Section 52.55(c) has meaning only if it is interpreted as Commission direction that consideration of a COLA that references a design certification application, including a hearing, should proceed in parallel with consideration of the design certification application. As recognized in Section 52.55(c), such an approach is at the risk of the applicant—meaning that the COLA may need to change based upon the results of the design certification rulemaking proceeding and the issuance of the COL may be delayed pending issuance of the DCR.[17] But that does not mean that the COLA proceeding should be stayed simply because the design certification proceeding is simultaneously in process.

Commission policy fully supports this commonsensical, plain language interpretation of 10 C.F.R. § 52.55(c). In 2008, the Commission issued a Policy Statement on the Conduct of New Reactor Licensing Proceedings ("Policy Statement") that explicitly recognized that consideration of a COLA that references a design certification application should proceed in parallel with the design certification rulemaking.[18] The Policy Statement provides guidance on how licensing boards should disposition design-related contentions in light of the longstanding principle that a contention that raises a matter that is, or is about to become, the subject of a rulemaking is outside the scope of a COL proceeding. The Commission stated:

> With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent that "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." *Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI–99–11, 49 NRC 328, 345 (1999), quoting *Potomac Elec.*

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17 *See, e.g.*, Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,973 (Apr. 17, 2008) (noting that the "license may not issue until the design certification rule is final").

18 *Id.*

> *Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB–218, 8 AEC 79, 85 (1974). In accordance with these decisions, a licensing board should treat the NRC's docketing of a design certification application as the Commission's determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final design certification rule, such a contention should be denied.[19]

As this section of the Policy Statement demonstrates, the Commission fully anticipated that COL proceedings such as this would continue *prior* to the promulgation of the final DCR. Furthermore, the Commission indicated that concerns relating to the proposed design should be addressed in the rulemaking. Consistent with the NRC Policy Statement, if a petitioner raises design-related issues in the COL proceeding, and if the contention is otherwise admissible, then the licensing board should refer the issue to the NRC staff to address in the design certification rulemaking and should hold the contention in abeyance pending the conclusion of the rulemaking. Once the design certification rulemaking is complete, there would no longer be grounds to litigate the issue in the COL proceeding because challenges to NRC regulations are impermissible in licensing proceedings, and thus the licensing board could deny the contention.[20]

Not only does the Policy Statement contemplate the issuance of a hearing notice on a COLA that references a design certification application, it also contemplates that a licensing

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[19] *Id.* at 20,972.

[20] *See* 10 C.F.R. § 2.335(a).

board *will conduct hearings* on the COLA prior to issuance of the DCR. In particular, the Policy Statement states:

> A licensing board considering a COL application referencing a design certification application might conclude the proceeding and determine that the COL application is otherwise acceptable before the design certification rule becomes final.[21]

Therefore, the Petition directly contradicts the clear meaning of the rule as further evidenced by the Commission's subsequent Policy Statement.

b. The Petition Is Inconsistent with Recent and Controlling Commission Adjudicatory Decisions

Three recent Commission decisions support rejecting the Petition. First, the Petition is inconsistent with the Commission's recent decision in *Shearon Harris*. In that decision, the Commission rejected a motion to suspend an already-issued hearing notice until the NRC staff completed its review of the pending AP1000 design certification amendment application. The Commission stated:

> A specific provision of Part 52, however, allows applicants to reference a certified design that has been docketed but not approved, and Petitioners may not challenge Commission regulations in licensing proceedings. Thus, although the Commission anticipated that applicants would first seek to have designs certified before submitting COLs which reference those designs, the NRC's regulations, nonetheless, allow an applicant - at its own risk - to submit a COL application that does not reference a certified design.
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> The Commission discussed this very situation in its Final Policy Statement on the Conduct of New Reactor Licensing Proceedings. In that policy statement the Commission stated that issues concerning a design certification application should be resolved in the design certification rulemaking and not in a COL proceeding. When a contention is raised in a COL proceeding that challenges information in the design certification rulemaking, licensing boards

[21] Policy Statement, 73 Fed. Reg. at 20,973.

> "should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible." If an applicant later decides not to reference a certified design, and instead proceeds with a site-specific design, any admissible issues would have to be addressed in the licensing adjudication.[22]

Second, the Petition contradicts the resolution of a similar request related to the Victoria County Station COLA, in which a petitioner requested that the hearing notice be held in abeyance because the referenced design had not been certified.[23] Although the request became moot because the applicant stated that it was changing reactor designs, the Office of the Secretary stated, on behalf of the Commission, that "the Commission has explained, in an adjudicatory context, that there is *no basis* to hold in abeyance a notice of hearing pending completion of the design certification rulemaking for the referenced design."[24] Thus, the denial of the very similar request in *Victoria* supports rejecting the Petition in this proceeding.

Third, even more recently, in February 2009, the Commission re-affirmed its already clear position regarding this very question. In *Fermi*, a group of petitioners requested that the adjudication of the Fermi COLA be suspended until completion of the referenced ESBWR

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22 *Shearon Harris*, CLI-08-15, slip op. at 3-4 (citations omitted).

23 In fact, the Petition appears to have been based on the request in the Victoria County Station and repeats most of the same arguments. *See* Texans for a Sound Energy Policy's Petition to Hold Docketing Decision and/or Hearing Notice for Victoria Combined License Application in Abeyance Pending Completion of Rulemaking on Design Certification Application for Economically Simplified Boiling Water Reactor (Nov. 3, 2008), *available at* ADAMS Accession No. ML083090800.

24 Letter from A. Bates, Acting Secretary of the Commission, to counsel for the petitioner, Exelon Nuclear Texas Holdings, LLC (Victoria County Station, Units 1 and 2), Docket Nos. 52-031-COL and 52-032-COL (Dec. 30, 2008) (citing *Shearon Harris*, CLI-08-15) (emphasis added), *available at* ADAMS Accession No. ML083650299. Additionally, one of the Petitioners, Public Citizen, was involved in this earlier request. Specifically, Public Citizen submitted a pleading in the Victoria County Station COL proceeding in support of the request to hold the hearing notice in abeyance. *See* Nuclear Information and Resource Service, Beyond Nuclear and Public Citizen's Energy Program's Response to Texans for a Sound Energy Policy's Petition to Hold Docketing Decision and/or Hearing Notice for Victoria Combined License Application in Abeyance Pending Completion of Rulemaking on Design Certification Application for Economically Simplified Boiling Water Reactor (Nov. 18, 2008), *available at* ADAMS Accession No. ML083240589. Thus, Petitioners are well aware of the denial of this earlier request.

design certification.[25] The petitioners in *Fermi* made arguments essentially identical to the Petitioners' arguments in this proceeding, including arguments that proceeding with the adjudication would violate the AEA, APA, NRC regulations, and case law.[26] The Commission rejected all of these arguments, stating that "the Commission, consistent with its decision in *Shearon Harris*, declines to suspend these proceedings pending the outcome of the ESBWR design certification process."[27]

In rejecting that request, the Commission affirmed that the request was contrary to the Policy Statement discussed above, 10 C.F.R. § 52.55(c), and NRC precedent.[28] Additionally, the Commission concluded that proceeding with adjudication of a COLA that references a design that has not been certified does not violate the AEA or APA and provides adequate notice and public participation.[29] The Petitioners' identical arguments in this proceeding should be rejected for these same sound reasons.[30]

Although the Petitioners fail to reference or discuss the Commission's recent *Fermi* decision, they admit that the Commission's holding in *Shearon Harris* contravenes their arguments.[31] Specifically, the Petitioners acknowledge that the Commission rejected similar arguments in *Shearon Harris* based on the NRC regulations and the Policy Statement, but "urge

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25 *Fermi*, CLI-09-04, slip op. at 1, 6.

26 *Id.* at 6-7.

27 *Id.* at 7.

28 *Id.* at 6-7.

29 *Id.*

30 The Petition is also inconsistent with recent licensing board decisions. *See, e.g.*, *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC __, slip op. at 10-11 (Sept. 22, 2008) ("[Petitioner] has not identified a dispute with the Application, but rather asserts that requiring petitioners to file contentions at this time is unfair. The Commission has disagreed. The procedure that Duke has followed here—referencing a reactor design for which a design certification application has been docketed but not yet granted—is expressly authorized by the Commission's regulations.").

31 Petition at 18.

the NRC to reconsider this decision."[32] This request for reconsideration of *Shearon Harris* repeats a similar request in *Fermi*, which the Commission also rejected.[33] Thus, the Commission already has rejected requests identical to those made in the Petition multiple times within the past few months. There is no basis to support a different outcome here.

c. The Petitioners' References to Various Part 52 Regulations Are Misplaced and Fail to Support the Relief Sought in the Petition

The Petitioners also argue that proceeding with this adjudication would be inconsistent with the requirements of 10 C.F.R. § 52.79 and the structure of Part 52.[34] This argument is unavailing. Section 52.79 pertains to the contents of a COLA; it provides no insight on the temporal relationship between COL adjudication and the design certification process.

In any event, while the Petitioners argue that Luminant's COLA must comply with 10 C.F.R. § 52.79(a), they fail to identify any noncompliance with that section. Rather, they simply claim that the COLA is "incomplete."[35] As is permitted by both 10 C.F.R. § 52.8(b) and Section 161(h) of the AEA, 42 U.S.C. § 2201(h), an application may incorporate by reference information contained in other applications or reports filed with the NRC. The COLA for Comanche Peak Units 3 and 4 incorporates by reference the US-APWR DCD. The Petitioners have not alleged in the Petition, much less shown, that the combination of the COLA and US-APWR DCD fails to meet any of the requirements in 10 C.F.R. § 52.79(a).[36] Furthermore, the Petitioners' argument is irrelevant, because neither 10 C.F.R. § 52.79 nor any other provision in NRC's regulations requires that the NRC hold in abeyance the hearing on a COLA that

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32 *Id.*

33 *Fermi*, CLI-09-04, slip op. at 6.

34 Petition at 12-17, 24-25.

35 *Id.* at 13-18.

36 Since the COLA references a design certification application, the appropriate subsection is 10 C.F.R. § 52.79(d). Nevertheless, the COLA also would satisfy 10 C.F.R. § 52.79(a) if that subsection were applicable.

references a design certification application. The Petitioners' assertions related to 10 C.F.R. § 52.79 provide no support for holding the proceeding in abeyance until the design certification rulemaking is complete.

The Petitioners also argue that NRC regulations in 10 C.F.R. § 52.145(b) require a hearing on a COLA that references a standard design approval.[37] However, that regulation pertains to a final design approval ("FDA") in Subpart E of 10 C.F.R. Part 52.[38] The US-APWR is not the subject of an application for an FDA under Subpart E. Instead, it is the subject of a design certification application under 10 C.F.R. Part 52, Subpart B. Unlike a design certification, there is no rulemaking proceeding associated with an FDA in which design-related issues may be resolved in a legally binding manner.[39] Therefore, the hearing provisions related to a COLA that references an FDA are inapplicable to a COLA that references a design certification or application for a design certification.

The Petitioners claim that Part 52 does not contain any provisions that permit the NRC to restrict the scope of COL adjudication required by 10 C.F.R. § 52.85.[40] However, there is nothing in Part 52 that prohibits the NRC from holding contentions related to a standard design in abeyance pending completion of a design certification rulemaking. Furthermore, 10 C.F.R. § 52.85 references the Commission's Rules of Practice in 10 C.F.R. Part 2. As discussed above, the Commission's longstanding precedents under Part 2 state that a licensing board should not

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37 Petition at 12, 25.

38 While the NRC regulations originally required an FDA as a prerequisite to design certification, *see* 10 C.F.R. § 52.43(c) (2004), the requirement for an FDA as a prerequisite to a design certification was removed and an applicant now has the option to apply for an FDA, a design certification, or both. *See* Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,379 (Aug. 28, 2007).

39 *Compare id.* at 49,453 ("there is no issue preclusion in the mandatory hearing for a combined license that references an FDA") *with* 10 C.F.R. § 52.63(a)(5) ("the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule").

40 Petition at 10, 12, 24.

accept in individual licensing proceedings issues that are or are about to become the subject of rulemaking by the Commission.[41] Thus, the Policy Statement and the Commission's decisions in *Fermi* and *Shearon Harris* are fully consistent with the Commission's regulations in Part 2 and Part 52.

The Petitioners also claim that the COL hearings must include issues related to the standard design because the design certification application does not qualify for any of the exclusions in 10 C.F.R. Part 52 that provide finality to matters that are resolved in an early site permit, design certification, or manufacturing license.[42] Contrary to the Petitioners' arguments, neither the Policy Statement nor *Shearon Harris* provide finality under 10 C.F.R. § 52.63 or § 52.79(d) to a design certification application. Instead, they simply hold in abeyance otherwise admissible COLA contentions related to the design certification application, pending completion of the design certification rulemaking.[43] Therefore, the Petitioners' references to the finality provisions in Part 52 are not relevant to the relief requested by the Petition.

d. The Petitioners' Reference to 10 C.F.R. § 2.317(a) and Related "Bifurcation" Arguments Are Misplaced

The Petitioners also appear to claim that proceeding with adjudication of the COLA before the US-APWR design certification rulemaking is complete would impermissibly bifurcate

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41 The Petition argues that these longstanding precedents are inconsistent with the regulatory scheme in Part 52, claiming that Part 52 allows litigation of material issues when a COLA does not reference a certified design. *See id.* at 25-26. Petitioners misconstrue the Policy Statement and *Shearon Harris*. Neither prohibits litigation of contentions related to a design certification application. Instead, they hold litigation in abeyance pending completion of the design certification proceeding. If a COL applicant that references a pending design certification application were to request that the COL proceeding be completed prior to issuance of the DCR, such contentions would be litigable in the COL proceeding. But that is not the factual posture of this COL proceeding for Comanche Peak Units 3 and 4.

42 *Id.* at 25.

43 *Shearon Harris*, CLI-08-15, slip op. at 3-4 (citing Policy Statement at 20,972).

this proceeding.[44] This argument lacks merit. The regulation cited in the Petition, 10 C.F.R. § 2.317(a), addresses when the NRC will hold separate hearings in the *same* adjudicatory proceeding. The Comanche Peak COL proceeding and the US-APWR design certification proceeding, however, are two *separate* proceedings. Moreover, 10 C.F.R. § 2.317(a) is contained in Subpart C to 10 C.F.R. Part 2, which provides generally applicable hearing procedures for NRC *adjudications*, while the US-APWR design certification proceeding must be conducted in accordance with the provisions of Subpart H of 10 C.F.R. Part 2, which addresses the procedures for NRC *rulemakings*.[45] Therefore, Section 2.317(a) is simply inapplicable to the NRC's decision regarding what issues should be resolved through adjudication and what issues should be resolved through rulemaking.[46]

As a purported basis for their Petition, the Petitioners claim that there are differences between the US-APWR and currently operating four loop plants.[47] Petitioners fail to provide any integrating rationale that would justify use of these design differences as a basis for staying this proceeding.[48] The Commission's regulations in 10 C.F.R. § 52.55(c), its Policy Statement, and its decisions in *Fermi* and *Shearon Harris* are not predicated upon an absence of differences between the design certification application and previously licensed plants.

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44 *See* Petition at 27.

45 *See* 10 C.F.R. § 52.51(a).

46 As discussed further below, the NRC's authority to resolve issues generically by rule rather than through individual licensing adjudication cannot be seriously questioned. As the Commission has noted, "the Supreme Court has repeatedly emphasized that the choice between rulemaking and adjudication 'lies primarily in the informed discretion of the administrative agency.'" *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 467 (*quoting Gen. Am. Transp. Corp. v. ICC*, 883 F.2d 1029, 1031 (D.C. Cir. 1989); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Petitioners ignore this settled legal principle.

47 Petition at 18-23.

48 The Petitioners repeat this exact same information in their petition to intervene. *See* Petition for Intervention and Request for Hearing, at 10-14. Luminant will address this proposed contention in its answer to the petition to intervene.

In summary, the Petition is inconsistent with NRC regulations, policy, and precedent. Although the Petition argues that proceeding with this adjudication would violate various regulations, the regulations cited by the Petitioners either are inapplicable or do not address whether the NRC may proceed with an adjudication on a COLA that references a design certification application.

2. No Statute Prohibits Proceeding with Adjudication of a COLA that References a Design Certification Application

The Petitioners argue that proceeding with this adjudication before the promulgation of the US-APWR DCR would deprive them of their hearing rights under the AEA and APA, and the corresponding NRC regulations.[49] For example, "[t]he Petitioners contend excluding the uncertified reactor issues from the adjudication would violate the NRC's duty under the AEA to assure that the Applicant's proposed nuclear plants will protect public health and minimize danger to life and property, 42 USC 2133(b)(2) and the APA's requirements related to fair hearings, 5 USC 554(b)(c)."[50] In essence, the Petitioners are claiming that the NRC may not legally refer issues pertaining to the US-APWR to the design certification rulemaking, and must consider such issues in the COL proceeding or hold the *entire* COL proceeding in abeyance pending issuance of the DCR.

The Petitioners have not identified any provision in either the APA or AEA that prohibits the NRC from resolving issues related to a design certification application in the design certification proceeding rather than COL proceedings.[51] To the contrary, there are numerous NRC and federal court cases that allow the NRC to resolve generic issues through rulemaking

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49 *See* Petition at 2-3, 7-18, 23-27.

50 *Id.* at 2-3.

51 Furthermore, the Commission rejected a similar claim in *Fermi*. *See* CLI-09-04, slip op. at 7.

while allowing related licensing hearings to proceed.[52] As the Appeal Board explained in *Douglas Point*:

> The law does not preclude administrative agencies from passing on issues of general applicability in individual adjudications. On the contrary, regulatory agencies may—and many do—decide so-called 'generic' issues on a case-by-case basis; the right to do so is well established. So too, when in their informed judgment it seems wiser for the resolution of broad issues of general applicability to proceed via a rulemaking proceeding where all concerned may participate, agencies may elect that course in lieu of adjudication. . . . '[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily within the informed discretion of the administrative agency.' Absent some statutory inhibition - and we find none applicable to the Commission and none has been suggested to us - the Commission and other administrative agencies have the flexibility to defer broad across-the-board issues presented in a multitude of individual adjudicatory proceedings and to consolidate them for consideration in a single rulemaking proceeding, while continuing in the interim to rely on individual adjudications to resolve remaining questions.[53]

As these cases make clear, the NRC has a choice of resolving issues either through rulemaking or adjudication, and the NRC is not required to hold licensing hearings in abeyance pending completion of a rulemaking.

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[52] *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345-46 (1999) (upholding a decision to reject a contention related to the transportation of spent fuel because it would be governed by a pending rule) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1979)); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1308-09 (D.C. Cir. 1984), *reh'g denied*, No. 84-1410, 1985 U.S. App. LEXIS 31609 (D.C. Cir. May 1, 1985) (upholding NRC decision to treat generic seismic issues through rulemaking rather than in individual adjudications); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974) (upholding decision to exclude issues relating to the emergency core cooling system ("ECCS") criteria because efforts to improve the criteria were being addressed in a pending rulemaking); *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974) ("*USC I*") (rejecting due process claim based on AEC's refusal to allow challenges to ECCS criteria while a simultaneous rulemaking was underway).

[53] *Douglas Point*, ALAB-218, 8 AEC at 84 (citations omitted).

This principle has not only been accepted by the NRC, it has also been accepted by the U.S. Court of Appeals. For example, in *Massachusetts v. NRC*,[54] the First Circuit affirmed the NRC's denial of a petition to intervene in a license renewal proceeding that raised generic environmental issues that were the subject of a rulemaking petition to amend Table B-1 to 10 C.F.R. Part 51 governing environmental reviews in license renewal proceedings. In doing so, the Court of Appeals stated:

> In sum, the NRC acted reasonably when it invoked a well-established agency rule to reject the Commonwealth's requests to participate as a party in individual re-licensing proceedings to raise generic safety concerns and required that the Commonwealth present its concerns in a rulemaking petition.[55]

Additionally, in *UCS I*, the petitioner claimed that issuance of an operating license for the Pilgrim plant prior to resolving the petitioner's ECCS concerns, which were then the subject of rulemaking, violated due process and the Commission's regulations and was an abuse of discretion.[56] The petitioner claimed that it was deprived of an opportunity to be heard by "being shunted over to the simultaneous rule making."[57] The Court rejected that claim, ruling:

> If the agency could not consolidate the challenges to its rules into rule making, and meanwhile proceed with adjudications, UCS and other intervenors in other cases would effectively be able to impose a moratorium on licensing, despite the Commission's judgment that it is prompt action that is called for.[58]

In summary, there is no legal prohibition to processing a license application while referring generic issues related to the license to a pending rulemaking proceeding.

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54 522 F.3d 115, 127-30 (1st Cir. 2008).

55 *Id.* at 129-30.

56 499 F.2d at 1080-82.

57 *Id.* at 1081.

58 *Id.* at 1081-82.

In addition, there is no basis for the Petitioners' claim that there will not be a hearing on all issues material to the granting of a COL.[59] The hearing notice in this proceeding did not narrow the issues that are included within the scope of the hearing.[60] To the contrary, the hearing notice included a reference to the US-APWR design certification application, which provided ample notice for petitioners to formulate contentions on the US-APWR.[61] In fact, the Petitioners submitted a contention that challenges aspects of the US-APWR design.[62] Furthermore, as discussed above, the Commission's Policy Statement acknowledges that a petitioner may proffer contentions on a standard design that is subject to a design certification application. However, such contentions will be held in abeyance, *if otherwise admissible*, until either issuance of the DCR or the COL applicant decides to proceed without the DCR.

The Petitioners cite *Union of Concerned Scientists v. NRC* ("*UCS II*")[63] for the proposition that the NRC must offer a meaningful hearing on all issues that it considers material to a license.[64] However, *UCS II* is inapposite. That case involved exclusion of plant-specific issues relating to emergency planning from adjudicatory proceedings.[65] That case does not address whether the NRC may resolve generic issues in a rulemaking proceeding rather than a licensing proceeding. In this COL proceeding, the findings relating to the US-APWR design will

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59 *See* Petition at 23-27. The Petitioners appear to argue that proceeding with this adjudication is unacceptable because the final design of the US-APWR will not be known until the completion of the design certification rulemaking. However, that claim is nothing more than a variation of their argument that they should not be required to file contentions now because the COLA might change due to changes in the design certification application. That argument is inconsistent with 10 C.F.R. § 2.309(f)(2), as discussed in the following section.

60 *See* Luminant Generation Company LLC; Application for the Comanche Peak Nuclear Power Plant Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 6177.

61 *Id.* at 6177, 6179.

62 *See* Petition for Intervention and Request for Hearing, at 10-14. Luminant will address this proposed contention in its answer to the Petitioners' petition to intervene.

63 735 F.2d 1437, 1443 (D.C. Cir. 1984).

64 Petition at 7, 24.

65 *See UCS II*, 735 F.2d at 1442-44.

be made in the design certification rulemaking proceeding, and those generic findings will then be applied to the COL proceeding. Thus, there is no need to adjudicate US-APWR standard design issues on a case-by-case basis, and it would be contrary to Commission regulations, policy, and precedent to do so.

3. The Petitioners' Claims of Unfairness Are Speculative and Do Not Provide Grounds to Hold the Proceeding in Abeyance

The Petitioners assert that proceeding with this adjudication before the US-APWR design certification rulemaking is completed would be unfair.[66] This claim is based on nothing but speculation and is essentially nothing more than an objection to the longstanding requirement that petitioners propose contentions based on the license application at the commencement of the NRC staff review rather than after completion of the staff review.

First, the Petitioners allege various concerns related to the design of the US-APWR.[67] NRC regulations, however, make clear that the Petitioners will have an opportunity to submit those concerns to the NRC for resolution during the design certification rulemaking.[68] Proceeding with this adjudication will not deprive the Petitioners of any rights to contest the US-APWR during the design certification rulemaking.

Furthermore, as discussed above, the Commission's Policy Statement explicitly allows petitioners to submit contentions on a design certification application that is referenced in a COL proceeding.[69] Similarly, in *Fermi* and *Shearon Harris*, the Commission restated its position and indicated that petitioners may submit contentions challenging information in the design

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66 *See* Petition at 23-24.

67 *Id.* at 18-23.

68 10 C.F.R. § 52.51(a).

69 Policy Statement, 73 Fed. Reg. at 20,972.

certification application.[70] Despite the Petitioners' assertion to the contrary, the Policy Statement and the Commission decisions do not restrict the scope of contentions that may be submitted in a COL proceeding, but only address the timing of the litigation of any such contentions if they are otherwise admissible.[71] To avoid potentially duplicative hearings on design-related issues, the Policy Statement provides for holding any such admissible *contentions* in abeyance, not for holding the entire COL *proceeding* in abeyance, as requested by the Petitioners.

Next, the Petitioners state that the design certification rulemaking is integrally related to the COLA, and that the outcome of the rulemaking could have a significant impact on contentions challenging the COLA. This assertion is nothing but a thinly-veiled attack on the requirement in 10 C.F.R. § 2.309(f)(2) that contentions "be based on documents or other information available at the time the petition is to be filed." The Petitioners' assertion that they would rather not have to submit contentions until there is a final version of the COLA or until the NRC staff has completed its review of the US-APWR design directly contravenes this provision and NRC precedent.[72] As the Commission explained in rejecting an argument that a hearing notice must be suspended due to the purported incompleteness of the COLA:

> If the Petitioners believe the Application is incomplete in some way, they may file a contention to that effect. Indeed, the very purpose of NRC adjudicatory hearings is to consider claims of

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70 *See Fermi*, CLI-09-04, slip op. at 6-7; *Shearon Harris*, CLI-08-15, slip op. at 3-4.

71 *See* Policy Statement, 73 Fed. Reg. at 20,972; *Fermi*, CLI-09-04, slip op. at 6-7; *Shearon Harris*, CLI-08-15, slip op. at 3-4.

72 *See, e.g.*, *Oconee*, CLI-99-11, 49 NRC at 338 ("The petitioners' demand that initiation of the NRC hearing process await completion of NRC Staff reviews would turn our adjudicatory process on its head."); *see also Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55-56 (D.C. Cir. 1990) ("*USC III*") ("We see nothing in the statute that guarantees all private parties the right to have the staff studies as a sort of pre-complaint discovery tool."); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), at 2 (Apr. 7, 2008) (unpublished order) (stating that if during the course of a licensing proceeding the applicant provides new and materially different information, petitioners will not be harmed because they will have an opportunity to proffer contentions based upon that new information under 10 C.F.R. § 2.309(f)), *available at* ADAMS Accession No. ML080980595.

> deficiencies in a license application; such contentions are commonplace at the outset of NRC adjudications. Accordingly, this claim does not provide a basis for suspending the hearing notice.[73]

As the Commission also ruled in *Catawba*, the possibility that the staff's review might lead to a change in the Final Safety Analysis Report "does not provide a reasonable basis for deferring the filing of safety-related contentions."[74]

Moreover, if information in the COLA changes as a result of modifications to the US-APWR DCD, Commission regulations provide the Petitioners with an adequate opportunity to submit late-filed contentions on new material.[75] As the U.S. Court of Appeals for the D.C. Circuit explained in upholding the NRC's late-filing contention standard, "[w]hatever the statutory restraints on the NRC's authority to exclude material *issues* from its hearings, the Commission can certainly adopt a pleading schedule designed to expedite its proceedings."[76]

4. Granting the Petition Would Unduly Delay the COL Proceeding and Would Be Burdensome

Granting the Petition would result in a lengthy delay to the COL proceeding, would place a large burden on Luminant and the NRC staff, and could increase the burden on public participants—including the Petitioners themselves.

The Petition requests, in part, that the Petitioners be allowed to litigate the merits of the US-APWR DCD in the COL proceeding.[77] For example, the Petition states that if the Commission does not complete the US-APWR rulemaking prior to adjudicating the COLA, then the "COLA is . . . subject to an adjudicatory hearing on all issues, including the US APWR

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73 *Shearon Harris*, CLI-08-15, slip op. at 2-3.

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

75 *See* 10 C.F.R. § 2.309(c) and (f)(2).

76 *UCS III*, 920 F.2d at 55.

77 *See* Petition at 2, 23-24.

design certification application."[78] The Petitioners' position would significantly increase the burden on the participants while providing no corresponding benefit. Under the Petitioners' proposed approach, it would be necessary to litigate any admitted contentions that are within the scope of the US-APWR design certification rulemaking, which could require mandatory disclosures, various pleadings, and hearing preparations. All of this significant effort would become moot upon completion of the rulemaking for the US-APWR design certification. In short, litigating US-APWR standard design issues in the COL proceeding would be a meaningless and duplicative exercise, because issuance of the DCR would supersede the litigation.

The Petitioners' alternative, holding the entire COL proceeding in abeyance until issuance of the US-APWR DCR, would impose years of delay in the COL proceeding, to the detriment of both the NRC and Luminant, because it would postpone litigation of all issues. The Commission has expressed its reluctance to suspend proceedings given the "substantial public interest in efficient and expeditious administrative proceedings."[79]

In summary, aside from the numerous legal and factual deficiencies in the Petition discussed above, the actions requested by the Petitioners would impose substantial delays and other burdens on the parties to this proceeding. The Commission has stated that it has a "long-

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[78] *Id.* at 23.

[79] *Oconee*, CLI-99-11, 49 NRC at 339. In fact, the Commission did not even suspend adjudicatory proceedings during review of its regulations following the Three Mile Island accident. *See, e.g.*, *Duke Energy Corp.* (McGuire Nuclear Station Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 305, 390 (2001) (referring to Interim Statement of Policy and Procedure, 44 Fed. Reg. 58,559 (Oct. 10, 1979)). Similarly, the Commission did not suspend adjudicatory proceedings during review of security requirements after the September 11, 2001 terrorist attacks. *See, e.g.*, *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 240 (2002); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001); *McGuire*, CLI-01-27, 54 NRC at 389-90; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 (2001), *recons. denied*, CLI-02-2, 55 NRC 5 (2002).

standing commitment to the expeditious completion of adjudicatory proceedings"[80] and that it "aims . . . to avoid unnecessary delays in its review and hearing processes."[81] Granting the Petition would be inconsistent with those commitments.

IV. CONCLUSION

As set forth above, the Petition is inconsistent with a number of procedural and legal requirements and precedents. Additionally, the arguments made by the Petitioners do not provide a sufficient basis for holding the proceeding in abeyance. In essence, the Petitioners are requesting that the Commission violate its own rules, policy, and precedent, and ignore its long-standing practices regarding licensing proceedings. Accordingly, the Petition should be denied.

Respectfully submitted,

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[80] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (1998); *see also Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 38 (2001).

[81] Policy Statement, 73 Fed. Reg. at 20,969.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 52-034-COL
LUMINANT GENERATION COMPANY LLC	)	52-035-COL
	)	
(Comanche Peak Nuclear Power Plant Units 3 and 4)	)	April 16, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2009 a copy of "Luminant's Answer Opposing Petition to Stay or Hold in Abeyance the Comanche Peak Units 3 and 4 Proceeding" was filed electronically with the Electronic Information Exchange.

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