UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
	)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034 & 52-035
	)	
	)	
(Comanche Peak Nuclear Power Plant, Units 3 & 4)	)	

NRC STAFF'S ANSWER TO PETITIONERS' BRIEF REGARDING CONTENTION SEVEN'S MOOTNESS

INTRODUCTION

Pursuant to the Board's Order of July 1, 2009, the staff of the U.S. Nuclear Regulatory Commission (NRC) hereby responds to "Petitioners' Brief Regarding Contention Seven's Mootness," submitted on July 20, 2009 ("Petitioners' Brief"). For the reasons discussed below, Contention 7 became moot when Luminant Generation Company (the "Applicant") submitted the required information, and should be dismissed in its entirety.[1]

BACKGROUND

On April 6, 2009, SEED Coalition, Public Citizen, True Cost of Nukes, and Mr. Lon Burnam (collectively, "Petitioners") submitted a petition to intervene in the Comanche Peak

[1] In this brief, "Contention 7" refers to the portion of Contention 7 that alleged that the Applicant omitted information required by 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2) from the COL application, which the NRC Staff initially agreed was admissible only to the extent it claimed that the COL application did not contain the required information. NRC Staff's Answer to Petition for Intervention and Request for Hearing at 27 (May 1, 2009) ("Staff's Answer"). The remainder of Contention 7 is an inadmissible challenge to the Design Control Document (DCD) and the design certification rulemaking. Staff's Answer at 25-28.

Units 3 and 4 ("Comanche Peak") combined license ("COL") proceeding.[2] The Petitioners' Contention 7 alleged, in part, that the COL application omitted information required by 10 C.F.R. § 52.80(d), pursuant to Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (March 27, 2009). On May 26, 2009, the Applicant filed a "Mitigative Strategies Report" addressing the requirements of 10 C.F.R. § 52.80(d) and stated that the filing "renders Contention 7 moot."[3] At the prehearing conference on standing and contention admissibility held on June 9-10, 2009, the Staff agreed that the Applicant's filing of the missing information rendered the admissible portion of Contention 7 moot.

On July 1, 2009, the Board issued an order directing the Petitioners to "notify the Board and all parties whether [the Petitioners] challenge the assertions of Applicant and NRC Staff that the material [provided] renders Contention 7 moot," and setting a briefing schedule if the Petitioners sought to challenge the mootness of Contention 7 "separate and apart from" the filing of any new or amended contentions based on the information provided. Order (unpublished) at 1 (July 1, 2009) ("July 1 Order"). On July 14, 2009, in response to the Board's July 1 Order, the Petitioners submitted a letter to the Board stating their position that

---

[2] The Staff and Applicant submitted timely answers to the petition on May 1, 2009. The Petitioners timely replied on May 8, 2009.

[3] Luminant Generation Company LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), Docket Nos. 52-034 and 52-035, Notification of Filing Related to Proposed Contention 7, Letter from Steven P. Frantz, Morgan, Lewis & Bockius, May 26, 2009. Because the Mitigative Strategies Report contains sensitive unclassified non-safeguards information (SUNSI), the Board issued a Protective Order governing disclosure of the information. Memorandum and Order (Protective Order Governing the Disclosure of Protected Information), July 1, 2009 ("Protective Order"). The Protective Order also granted the Petitioners leave to file new contentions based on the contents of the Mitigative Strategies Report within 25 days of receipt of the information. Protective Order at 4.

Contention 7 is not moot. On July 20, 2009, pursuant to the same order, the Petitioners submitted a brief supporting their position.[4]

DISCUSSION

I. Commission case law establishes that Contention 7 is moot

The Petitioners' Contention 7, citing the new requirement of 10 C.F.R. § 52.80(d), asserts omission of information, not "specific deficiencies in the way the [information] was used[,]" and is a contention of omission. *Duke Energy Corp*. (McGuire Nuclear Station, Unit 1, Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002) ("*McGuire/Catawba*"). A contention of omission is a contention that "merely allege[s] an 'omission' of information," as opposed to a contention that "challenge[s] substantively and specifically how particular information has been discussed in a license application." McGuire/Catawba, CLI-02-28, 56 NRC at 382-83; *see also* 10 C.F.R. § 2.309(f)(1)(vi) (distinguishing between contentions that assert that the application "fails to contain information on a relevant matter" and those that raise a dispute with a specific portion of the application).

The Commission has established a process for allowing petitioners or intervenors to challenge information that was originally omitted from an application but is later supplied by an applicant. Once the applicant provides the missing information, the original contention asserting omission is moot,[5] and the petitioner or intervenor "must timely file a new or amended

[4] Petitioners' Brief Regarding Contention Seven's Mootness, July 20, 2009 ("Petitioners' Brief").

[5] *McGuire/Catawba*, CLI-02-28, 56 NRC 383. The Staff notes that the Commission, in *McGuire/Catawba*, did not establish any prerequisite, such as assessment of the information submitted, that must be met before a finding of mootness can be made. *Id*. Rather, submittal of the information is the basis for the finding of mootness, while the *adequacy* of the information submitted is the subject of a new or amended contention.

contention . . . in order to raise specific challenges regarding the new information."[6] *McGuire/Catawba*, CLI-02-28, 56 NRC at 383. The Commission articulated the rationale for this process in *McGuire/Catawba*:

> If we did not require an amended or new contention in "omission" situations, an original contention alleging simply a failure to address a subject could readily be transformed – without basis or support – into a broad series of disparate new claims. This approach effectively would circumvent NRC contention-pleading standards and defeat the contention rule's purposes."[7]

Id. at 383. Furthermore, the Commission has held that when a contention is rendered moot by the subsequent submission of the missing information, a finding of mootness "requires no more than a finding by the presiding officer that the matter has become moot[,]" and "may be accomplished as part of the contention admission phase of the proceeding."[8] *USEC, Inc*. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444-45 (2006).

---

[6] In *McGuire/Catawba*, the Commission indicated that a new or amended contention would have to address the requirements of former 10 C.F.R. § 2.714(b) regarding late-filed contentions. CLI-02-28, 56 NRC at 383. In the current regulations, 10 C.F.R. § 2.309(f)(2) provides a basis for filing a new or amended contention based on previously unavailable information. In this case, however, the Board has already granted the Petitioners leave to file a new or amended contention addressing the mitigative strategies information. Protective Order at 4.

[7] *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 30 (2002) ("A significant change in the nature of the purported . . . imperfection, from one focusing on . . . information omission to one centered on a deficient analysis of subsequently supplied information, warrants issue modification by the complaining party.") (emphasis in original) (quotations and citations omitted).

[8] The Commission explained that

> admitting such a contention likely would lead to the submittal of a curing license application amendment which would be appropriate for summary disposition. The net result of such a process would add no additional information, but would simply create unnecessary additional work for the parties and unnecessary delay – both of which the Commission has continuously encouraged licensing boards to avoid.

USEC, CLI-06-9, 63 NRC at 445.

The Petitioners' Contention 7, citing the new requirement of 10 C.F.R. § 52.80(d), asserts that the COL Application omitted 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. Petition at 23. Thus, Contention 7 merely asserts the omission of information, not "specific deficiencies in the way the [information] was used." *McGuire/Catawba*, CLI-02-28, 56 NRC at 383. Indeed, because the information at issue— the description of mitigative strategies required by 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2)— was not originally provided in the COL Application, the Petitioners could not have asserted specific deficiencies in that information at the time they submitted their petition.[9] The Applicant has now supplied the information, and the Board has issued an order allowing the Petitioners to provide new or amended contentions based on the information that was supplied.[10] Therefore, according to the Commission's established precedent, Contention 7 is moot.

II. The Petitioners do not address the issue of whether Contention 7 is moot, but instead raise new contentions regarding the substance of the newly-provided information

The Petitioners now contend that the Applicant's Mitigative Strategies Report has not cured the omission in the COL application and is deficient because it "omits a reference to the magnitude of the fires and explosions that would be on a scale caused by the impact of a large commercial airliner[,]" it contains "incomplete regulatory commitments," and it improperly incorporates by reference the US-APWR Mitigative Measures Evaluation (MME). Petitioners'

---

[9] At oral argument, the Petitioners' counsel stated that "the day that we were required to file our contentions . . . we were operating on the assumption . . . that the information had not been submitted, so at that point it was on the idea that it was an omission. But we also . . . took the approach that we *would likely argue with the sufficiency of what was submitted* . . . ." Transcript at 121-122 (R. Eye) (emphasis added).

[10] Protective Order at 4.

Brief at 2, 7. In so contending, the Petitioners attempt to raise new substantive contentions based on the adequacy of the information provided in the Mitigative Strategies Report. The Petitioners appear to acknowledge that they are raising new contentions through this brief when they draw the distinction, on page 4 of their brief, between these three new arguments that they raise in their brief and "[t]he original contention seven[,]" which focused on the omission of information. The Commission has held that when a contention of omission is superseded by subsequent information, "the contention must be disposed of or modified[,]" and "*new* claims must be raised in a new or amended contention." *McGuire/Catawba*, CLI-02-28, 56 NRC at 382 (internal citations omitted). The Petitioners' Brief, which is supposed to address the mootness of Contention 7 "separate and apart from new contentions," July 1 Order at 1, is not the appropriate vehicle for the Petitioners to raise new contentions and attempt to amend their original contention.

Furthermore, the Staff observes that even if the Petitioners' Brief were to be accepted as a petition for admission of a new or amended contention, the Petitioners have not adequately established the new deficiencies they characterize as omissions. A contention of omission "must describe the information that should have been included . . . and provide the legal basis that requires the omitted information to be included." *Calvert Cliffs Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-4, 69 NRC ___, slip op. at 22 (March 29, 2009); *see also* 10 C.F.R. § 2.309(f)(1)(vi).

The Petitioners have not provided the requisite legal basis for any of the claimed omissions. With regard to their claim that the Mitigative Strategies Report "omits a reference to the magnitude of the fires and explosions," the Petitioners concede that the regulation at issue, 10 C.F.R. § 50.54(hh)(2), "does not specify the magnitude of fires/explosions that the applicant is to consider." Rather, the Petitioners assert that the Statement of Considerations (SOC) for the power reactor security rule "require[s] that the mitigative strategies response procedures

consider aircraft attacks as a baseline for determining the scale of fires/explosions that would be assumed to occur and therefore addressed by the requirements of 10 C.F.R. 50.54(hh)(2)."[11] An SOC, while it provides useful guidance on the proper application of the regulations which is "entitled to special weight,"[12] is not itself a regulation. Moreover, the SOC states that "50.54(hh)(2) requires licensees to develop guidance and strategies for addressing the loss of large areas of the plant due to explosions or fires *from a beyond-design basis event*," and that "[t]he rule contemplates that the initiating event for such large fires and explosions could be any number of beyond-design basis events," of which a large aircraft impact is only one example. Power Reactor Security Requirements, Final Rule, 74 Fed. Reg. 13,926, 13,957 (March 27, 2009) (emphasis added). Rather than suggesting any intent that an applicant "describe the scale or magnitude of fires and explosions," Petitioners' Brief at 4, these statements demonstrate that the Commission did not intend to limit beyond-design-basis security events to one or another cause, much less establish aircraft impacts as a baseline.[13]

Similarly, there is no legal basis for the Petitioners' new assertion that the Application is deficient because it contains incomplete regulatory commitments. Petitioners' Brief at 7. Section 52.80(d) of Title 10 of the C.F.R. states that the application must contain "a description

---

[11] Petitioners' Brief at 2-3 and nn. 2,3.

[12] *Connecticut Yankee Atomic Power Company* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47 (2001) (citing *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988)).

[13] The Petitioners also argue that the Applicant's reliance on NEI-06-12 renders the submission inadequate. However, the only support the Petitioners provide for this assertion is a vague statement claiming that NEI-06-12 "concedes that it does not consider the scale of any potential fire or explosion," without reference to a specific page in the document. Moreover, the Petitioners fail to acknowledge that the Commission has endorsed NEI-06-12 as an acceptable means for current licensees to address the requirements of 10 C.F.R. § 50.54(hh)(2), and that "[n]ew reactor licensees are required to employ the same strategies as current reactor licensees to address core cooling, spent fuel pool cooling, and containment integrity." 74 Fed. Reg. at 13,957.

and plans for implementation of the guidance and strategies . . . ." 74 Fed. Reg. at 13,970. Nothing in 10 C.F.R. § 52.80(d) or 10 C.F.R. § 50.54(hh)(2) precludes the use of regulatory commitments, and the Petitioners have not cited any other legal basis for their claim. Furthermore, "[t]he Commission views the mitigative strategies as similar to those operational programs for which a description of the program is provided and reviewed by the Commission as part of the combined license application and subsequently the more detailed procedures are implemented by the applicant and inspected by the NRC before plant operation." 74 Fed. Reg. at 13,933.

Finally, the Petitioners have not provided a legal basis for their claim of improper incorporation by reference of the US-APWR MME. Petitioners' Brief at 7. The regulations permit a COL applicant to reference a pending design certification, 10 C.F.R. § 52.55(c). In raising this argument, the Petitioners appear to be reiterating the portion of their original Contention 7, which is inadmissible because it impermissibly attacked the DCD.

In summary, the Petitioners have not demonstrated that the Petitioners' proposed Contention 7, a contention of omission of the information required by 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), is not now moot after the Applicant's May 26, 2009 submittal. Furthermore, even if the Petitioners' Brief is considered as a petition for admission of a new or amended contention, Petitioners have not adequately supported the admissibility of such a contention.

CONCLUSION

For the reasons discussed above, Contention 7 is moot and, as a result, should be dismissed in its entirety.

Respectfully submitted,

/Signed (electronically) by/
James P. Biggins
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, D.C. 20555-0001
(301) 415-6305
(301) 415-3725 fax
James.Biggins@nrc.gov

Executed in Accord with 10 C.F.R. § 2.304(d)
Susan H. Vrahoretis
Marcia J. Simon
Counsel for NRC Staff
(301) 415-4075/(301) 415-1261
(301) 415-3725 fax
Susan.Vrahoretis@nrc.gov
Marcia.Simon@nrc.gov

Dated at Rockville, Maryland
this 27th day of July, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
	)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034 & 52-035
	)	
	)	
(Comanche Peak Nuclear Power Plant, Units 3 & 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO PETITIONERS' BRIEF REGARDING CONTENTION SEVEN'S MOOTNESS" has been served on the following persons by Electronic Information Exchange on this 27th day of July, 2009:

Ann Marshall Young, Chair
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Ann.Young@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail:OCAAmail@nrc.gov

Gary S. Arnold
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Gary.Arnold@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Alice C. Mignerey
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Alice.Mignerey@nrc.gov

Robert V. Eye
Kauffman & Eye
Suite 202
112 SW 6th Ave.
Topeka KS 66603
bob@kauffmaneye.com

Jonathan M. Rund
Martin J. O'Neill
Stephen J. Burdick
Timothy P. Matthews
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
jrund@morganlewis.com
martin.o'neill@morganlewis.com
sburdick@morganlewis.com
tmatthews@morganlewis.com

/Signed (electronically) by/

James P. Biggins
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, D.C. 20555-0001
(301) 415-6305
(301) 415-3725 fax
James.Biggins@nrc.gov

Dated at Rockville, Maryland
this 27th day of July, 2009