

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Gary S. Arnold
Dr. Alice C. Mignerey

In the Matter of LUMINANT GENERATION COMPANY, LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4)	Docket Nos. 52-034-COL and 52-035-COL ASLBP No. 09-886-09-COL-BD01 October 28, 2009
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I. Background and Introduction

This proceeding concerns the Application of Luminant Generation Company, LLC, (Luminant or Applicant) to construct and operate two U.S.-Advanced Pressurized Water Reactors (US-APWRs) at the Comanche Peak Nuclear Power Plant (Comanche Peak) site in Somervell County, Texas. On August 6, 2009, this Licensing Board granted the hearing request of Intervenors Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and State Representative Lon Burnam, admitting two of Intervenors' 19 contentions submitted with that request – Contentions 13 and 18 – and ruling that those contentions would be litigated under the hearing procedures of 10 C.F.R. Part 2, Subpart L.¹ The Board rejected all of the remaining contentions except for Contention 7, on which the Board reserved judgment, and which involves the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2). Applicant and the NRC Staff argue that Contention 7 is now moot, based on Luminant's filing of a supplement to its Application that is asserted to address the requirements in question, and which is designated as sensitive unclassified non-safeguards information (SUNSI). Also currently pending are five new contentions filed by Intervenors, which relate to the Applicant's SUNSI filing, which are themselves designated as SUNSI, and on which oral argument is scheduled for November 12, 2009.² That oral argument will also address the mootness of Contention 7 and Intervenors' request for a 10 C.F.R. Part 2, Subpart G, hearing on the five new contentions.

¹ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 NRC __, __ (slip op. at 84-85) (Aug. 6, 2009).

² Because much of what will be discussed in the oral argument will concern SUNSI, significant portions of the session may be closed to any persons other than the parties and designated associated persons. See Licensing Board Notice (Regarding Oral Argument) (Oct. 9, 2009) (unpublished).

Meanwhile, on August 20, 2009, at the direction of the Board, the parties³ filed a Joint Proposal for Hearing Schedule,⁴ setting forth proposed deadlines and time frames to govern the course of this proceeding with regard to Contentions 13 and 18, both of which concern matters that should allegedly have been included in the Applicant's Environmental Report and are therefore designated as "environmental contentions." On September 16, 2009, the Board held a telephone conference with the parties to discuss these and other scheduling matters.⁵ Based on the input we have received from the parties, the regulatory requirements, and the nature and circumstances of this case, the Board now issues this scheduling order, which addresses timelines for litigating the two environmental contentions admitted into this proceeding thus far, either on their own, or in conjunction with any additional environmental contentions that may be admitted in the future. In addition, if in the future any safety-related contentions are admitted, an additional schedule will be issued with regard to any such contentions, or, alternatively, if it would be more efficient and meaningful in the end, a combined schedule for the hearing of both environmental and safety contentions will be issued. Finally, as the dates for the NRC Staff's issuance of its final environmental and safety documents approach (now scheduled for January 10, 2011, and December 2011, respectively), (a) more detailed schedule(s) containing actual dates will be issued, as appropriate.

³ Pursuant to 10 C.F.R. § 2.1202(b)(2), the NRC Staff notified the Board that it will participate as a party on the admitted contentions. Letter from James Biggins, Counsel for NRC Staff, to the Atomic Safety and Licensing Board (Aug. 19, 2009).

⁴ See Letter from Steven P. Frantz, Counsel for Luminant, to the Atomic Safety and Licensing Board (Aug. 20, 2009).

⁵ See Tr. at 414-57.

II. Schedule

In addition to applicable general and other relevant provisions of 10 C.F.R. Part 2,⁶ the following schedule and related provisions will govern this proceeding, except as modified for good cause in future Board issuances.

- A. Mandatory Disclosures and Hearing File. Except as otherwise stated herein or in subsequent orders, the Board accepts and adopts the Agreement of the Parties Regarding Mandatory Discovery Disclosures, submitted on August 13, 2009.⁷
- B. Time Requirements on Updates to Disclosures and Hearing File. The parties submitted their initial disclosures and the NRC Staff provided its first submission of a hearing file on September 15, 2009;⁸ the parties filed their first updated disclosures on October 15. The parties shall continue to provide updates on the 15th day of each month, keeping to the same schedule until issuance of the final environmental impact statement (EIS). *Thereafter, updates shall be provided on the 1st and 15th day of each month, until two weeks prior to the deadline for filing of initial statements of position, at which point updates shall be filed on a weekly basis until the week before the commencement of the hearing, and thereafter on a daily basis until the close of the hearing. The responsibility to update disclosures and the hearing file shall not terminate until the close of the hearing and the closing of the record.*⁹
- C. Disclosure Disputes and Motions to Compel. The parties shall file any motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file entry,

⁶ The parties should familiarize themselves with these rules and all requirements contained therein, and be aware that in some instances deadlines specified in Part 2 are modified herein. See, e.g., 10 C.F.R. §§ 2.307(a), 2.319(k).

⁷ Letter from Steven Frantz, Counsel for Luminant, to the Atomic Safety and Licensing Board (Aug. 13, 2009).

⁸ See 10 C.F.R. §§ 2.336, 2.1203(a).

⁹ If the record is not closed at the close of the oral hearing, the Board will upon request or on its own motion set a new schedule for updates that is appropriate for whatever circumstance(s) may be cause for holding the record open.

the appropriateness of any redactions in documents, or the validity of any claim that a document is privileged or protected, as soon as is reasonably practicable, and in any event no later than: (1) during the period up to issuance of the Final EIS, ten (10) days after the occurrence or circumstance from which the motion arises, in accordance with 10 C.F.R. § 2.323(a); (2) during the period thereafter until two weeks prior to the deadline for filing initial statements, three (3) days after the relevant occurrence; and (3) during the remainder of the proceeding, one (1) day after the relevant occurrence. Any motion must clearly reference the occurrence or circumstance from which the motion arises and demonstrate that the applicable time limit has been met.

D. Additional Contentions

1. Motion for Leave to File; Statement of Contention(s); Support for Contention(s).

If a party seeks to file any new or amended contention(s) (timely or non-timely), then it shall file a motion or request for leave to file any such contention(s), along with the substance of the proposed contention(s), simultaneously. The pleading shall include a motion for leave to file any timely new or amended contention(s) under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file any non-timely new or amended contention(s) under 10 C.F.R. § 2.309(c) (or both), as well as the statement of the contention(s) and the support therefor, demonstrating how the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi) are met.

2. Timeliness. A motion and proposed new or amended contention as specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed non-timely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c), as well as the six criteria of 10 C.F.R. § 2.309(f)(1).

3. Answers and Replies. Within twenty (20) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention.¹⁰ Within seven (7) days of service of the answer, the movant may file a reply.

4. Selection of Hearing Procedures. A motion and proposed new contention may address the selection of the appropriate hearing procedures for the proposed new contention(s).¹¹

E. Motions for Summary Disposition. Any motions for summary disposition regarding Contentions 13 and 18 shall be filed no later than 30 days after issuance of the Draft EIS (now scheduled for March 10, 2010).¹² Responses thereto shall be filed within 20 days after service of the motion. Deadlines for motions for summary disposition regarding any additional contentions that may be filed in this proceeding will be set after the filing of any such contentions.

F. Initial Statements of Position, Prefiled Testimony, Affidavits, Exhibits. If no additional contentions are filed or admitted, all parties shall file their initial written statements of position, prefiled written testimony with supporting affidavits, and exhibits, on a contention-by-contention

¹⁰ Given the relative shortness of the 30-day period set herein for new contentions in comparison to the 60-day period set in the original notice of opportunity for hearing in this proceeding, see Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 6177 (Feb. 5, 2009); see *also* 10 C.F.R. § 2.309(b)(3), we deem it appropriate to shorten somewhat the period for answers to new contentions that is set at 10 C.F.R. § 2.309(h)(1). Because the 7-day period for replies set at 10 C.F.R. § 2.309(h)(2) is, however, already relatively brief, we leave that regulatory time period in place.

¹¹ See 10 C.F.R. §§ 2.309(g), 2.310(d).

¹² The Board considers that, in view of the nature of the subject matter of Contentions 13 and 18, it is not necessary to wait until issuance of the Final EIS for the filing of summary disposition motions, and that tying this deadline to issuance of the Draft EIS will promote a more efficient proceeding. If new information is provided in the NRC Staff's Response to public comments on the Draft EIS or in the Final EIS that would warrant reconsideration of this conclusion, the parties may request the opportunity to file additional dispositive motions on all or part of any remaining issues, for good cause shown, and this will be addressed as necessary and appropriate at the time, in a manner that will best avoid delay in the hearing schedule.

basis, no later than 60 days after issuance of the Final EIS.¹³ If any new environmental contentions are admitted, all parties shall file their initial written statements of position, prefiled written testimony with supporting affidavits, and exhibits, no later than 155 days after issuance of the Final EIS, unless intervening circumstances warrant setting an earlier or later date, which will be determined at a time closer to the actual issuance of the Final EIS, now scheduled to be issued January 10, 2011.

G. Motions in Limine; Rebuttal Statements of Position, Testimony, Affidavits, Exhibits.

No later than ten (10) days after service of the materials submitted under paragraph F, the parties shall file (1) any motion(s) in limine; and (2) rebuttal statements, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis.¹⁴ Responses to any motion(s) in limine shall be filed no later than five (5) days after filing of the motion(s).

H. Proposed Questions for Board to Ask. No later than ten (10) days after service of the materials submitted under paragraph G, all parties shall file proposed questions for the Board to consider propounding to the direct or rebuttal witnesses.¹⁵

I. Motions for Cross-Examination. No later than ten (10) days after service of the materials submitted under paragraph G, all parties shall also file any motions or requests to permit that

¹³ See 10 C.F.R. § 2.1207(a)(1). If no new environmental contentions are filed, nor any other new contentions that warrant holding one hearing on all contentions at a later date, the Board considers that the timing of filings and a hearing on Contentions 13 and 18 can be handled on a more expedited basis than according to the schedule set in the Model Milestones of 10 C.F.R. Part 2, Appendix B, absent intervening circumstances that would lead to a different conclusion. The Board therefore sets herein what are essentially two alternative schedules for the hearing of environmental contentions, depending on whether any new environmental contentions are filed and admitted. Additionally, if any new contentions are filed based on the Final EIS, this would also trigger the secondary schedule, requiring the filing of Initial Statements of Position within 155 days of issuance of the Final EIS, absent other circumstances that would warrant going ahead with an earlier schedule for a hearing on Contentions 13 and 18.

¹⁴ See *id.* § 2.1207(a)(2).

¹⁵ See *id.* § 2.1207(a)(3)(i) and (ii).

party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s).¹⁶

J. Evidentiary Hearing. The evidentiary hearing will commence approximately thirty (30) days after the service of the materials specified in paragraphs H and I.

K. Proposed Findings of Fact and Conclusions of Law; Responses. The parties shall simultaneously file proposed findings of fact and conclusions of law, containing specific references to transcript pages, exhibit numbers, and any relevant additional identification information, no later than thirty (30) days after the conclusion of the hearing or the closing of the record.¹⁷ Responses to other parties' proposed findings and conclusions shall be filed no later than 15 days after filing of the proposed findings and conclusions, with specific references to be made to pages and paragraphs of other filings, in addition to specific references to transcript pages, exhibit numbers, and any relevant additional identification information.

L. Initial Decision. The Board will issue its Initial Decision on Environmental Contentions within 90 days after conclusion of the hearing or the closing of the record.

M. Modifications to Schedule. The Board understands that modifications of the schedule may be appropriate based on future developments, and will consult with the parties regarding any such modifications. Any motions for extension or modification of any timelines or deadlines set herein or required under relevant provisions of 10 C.F.R. Part 2 shall be filed as soon as reasonably possible after a party learns of the facts and circumstances establishing the need for modification of the schedule. Any motion to extend a deadline for filing any item shall be filed no later than three (3) business days before the due date for the submission at issue. Any motion shall indicate whether the request is opposed or supported by the other parties, and

¹⁶ See *id.* § 2.1204(b).

¹⁷ See *id.* § 2.1209.

shall demonstrate appropriate cause for extending the deadline or otherwise modifying the schedule.

III. Additional Requirements and Considerations

A. Initial Statements of Position, Prefiled Testimony, Affidavits, Exhibits. An initial statement of position is not evidence, and should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (e.g., stating which issues each witness and exhibit addresses). The prefiled written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, rely upon, or otherwise use in any statements.

B. Rebuttal Statements of Position, Testimony, Affidavits, Exhibits. The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, rely upon, or otherwise use in their statements. Being in the nature of rebuttal, the rebuttal statements, testimony, and exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement.

C. Proposed Questions for Board to Ask.¹⁸ The proposed questions should be accompanied by a brief description of the issue or issues which the party contends need further

¹⁸ A party should cover all essential points in the direct and rebuttal testimony that it prefiles for

examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. The proposed questions and accompanying material should be filed *in camera* and not served on the NRC Staff or any other party.¹⁹

D. Motions for Cross-Examination. A motion for cross-examination shall be filed with all parties, but the cross-examination plan and questions themselves should be filed *in camera* and not be served on the NRC Staff or any other party.²⁰

E. Witnesses with Written Testimony To be Available in Person. Unless the Board expressly provides otherwise, each party (including the NRC Staff) must, at its own expense and effort, assure that each person for whom it submitted written direct or rebuttal testimony attends the evidentiary hearing in person and is available to testify and to respond orally to questions.²¹

each of its own witnesses. The prefiled proposed questions should not focus on a party's own witnesses, but should instead be directed to the witnesses of the *other* parties.

¹⁹ See 10 C.F.R. § 2.1207(a)(3)(iii).

²⁰ See *id.* § 2.1204(b)(2). With regard to cross-examination generally, we note the following observation of another Licensing Board:

The standard for allowing the parties to conduct cross-examination is the same under Subparts G and L, to wit – the Administrative Procedure Act (APA) standard for cross-examination in formal administrative proceedings as set forth in 5 U.S.C. § 556(d) (“A party is entitled . . . to conduct such cross examination as may be required for a full and true disclosure of the facts.”). See *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (1st Cir. 2004); see also 69 Fed. Reg. at 2,195-96.

Progress Energy Fla., Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-10, 70 NRC __, __ (slip op. at 104) (July 8, 2009).

²¹ If, after reading the prefiled testimony, the Board concludes that it has no questions for a particular witness and does not grant any cross-examination request regarding that witness, it will so advise the parties and that individual will not need to attend the evidentiary hearing.

F. Attachments to Filings

1. Documents Must Be Attached. If a motion or pleading of any kind refers to a report, website, NUREG, guidance document, or document of any kind (other than to a law, regulation, case, or other legal authority), (1) that document must be clearly and completely identified, and (2) a copy of that document, or the relevant portion thereof, shall be submitted with and attached to the pleading. The pleading must cite to the specific page or section of the document that is relevant.

2. Exception. If the following documents are publicly available on the NRC ADAMS system and are not submitted as exhibits for an evidentiary hearing, then they do not need to be attached to a motion or pleading: Luminant's Application and Environmental Report, the Draft EIS, the Final EIS, the Advanced SER and the Final SER, and associated documents. With regard to such documents, it is sufficient if the pleading clearly identifies the document (including its date and revision number, if any), provides its ADAMS ML number, and cites to the specific page or section that is relevant.²²

3. Attached Documents to be Labeled as "Attachments." All documents referred to in the pleadings (pursuant to the two preceding paragraphs), and which are not exhibits for an evidentiary hearing, shall be labeled and referred to as "Attachments," not exhibits.²³

4. Designation and Marking of Attachments. A separate numeric designation shall be assigned to each Attachment (e.g., Attachment 3). With regard to Attachments covered by paragraph F.1, the numeric designation shall be prominently marked on the first page of the appended document.

²² The NRC's E-Filing guidance document has guidance concerning the filing of copyrighted material. See <http://www.nrc.gov/site-help/electronic-sub-ref-mat.html> (access link for Guidance for Electronic Submissions to the NRC, Revision 5).

²³ The term "exhibit" is reserved for use as a designation for those items that are submitted pursuant to paragraphs III.A and III.B as proffered *evidence* for the evidentiary hearing.

5. Method of Electronic Submission. All Attachments associated with a pleading shall be submitted *together* via the E-Filing system as a *single* electronic file that consists of the pleading or other submission, the certificate of service, and all the Attachments, *unless* the submission exceeds fifteen megabytes in size. If a pleading exceeds fifteen megabytes, it should be separated into two or more submissions, clearly identified as relating to each other, with each less than fifteen megabytes.²⁴

G. Questions About Schedule and Any Needed Modifications Thereto. In addition to motions for modification as set forth at II.M above, issues relating to the schedule for this proceeding may be brought up at any conference, whether in person or by telephone, depending upon time available, in the interest of seeing that this proceeding moves forward in the most efficient, effective and meaningful way possible.

²⁴ This accords with NRC's E-Filing guidance (at page 14). See <http://www.nrc.gov/site-help/electronic-sub-ref-mat.html> (access link for Guidance for Electronic Submissions to the NRC, Revision 5).

H. Site Visit, Limited Appearance Statements. The Board has not herein set any time for a site visit or for limited appearance statements as provided under 10 C.F.R. § 2.315, but will as the proceeding moves forward consult with the parties regarding the setting of both, and welcomes suggestions from the parties regarding the scheduling of these events.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA, by Edward R. Hawkens for/

Dr. Alice C. Mignerey
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 28, 2009²⁵

²⁵ Copies of this memorandum and order were filed this date with the agency's E-Filing system for service to all parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB INITIAL SCHEDULING ORDER have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-034-COL and 52-035-COL
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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 28th day of October 2009