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NUCLEAR REGULATORY COMMISSION

Title: Luminant Generation Company
Comanche Peak Nuclear Plant
Open Session

Docket Number: 52-034-COL and 52-035-COL
ASLBP Number: 09-886-09-COL-BD01

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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HEARING

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

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Thursday, November 12, 2009

Nuclear Regulatory Commission
Hearing Room T-3B45
11545 Rockville Pike
Rockville, Maryland

BEFORE:

ANN MARSHALL YOUNG, Chair
GARY S. ARNOLD, Administrative Judge
ALICE C. MIGNEREY, Administrative Judge

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P-R-O-C-E-E-D-I-N-G-S

(9:03 a.m.)

1
2
3 JUDGE YOUNG: Good morning. My name is
4 Ann Marshall Young. I am the chair of the Licensing
5 Board. I am going to ask my colleagues to introduce
6 themselves. And we also have with us Ann Hope and
7 Matthew Rotman, who are our law clerks.

8 After we introduce ourselves, I would like
9 to start with the staff and have you introduce
10 yourselves, and whoever you have with you, and then
11 the applicant and the intervenors.

12 Just for those who are not NRC people,
13 there is a requirement that you be escorted at any
14 time while you are here. So when you are in the room,
15 that's fine. But if you need to go to the restroom,
16 or I guess people can also escort you to the cafeteria
17 for lunch, we have Sara Culler in the back. Sara,
18 would you stand up?

19 MS. CULLER: I'm right here.

20 JUDGE YOUNG: Oh, I'm sorry.

21 (Laughter.)

22 That's why I didn't see you. You can ask
23 Ms. Culler if you need to be escorted anywhere. And
24 at lunchtime we will see if we can get other people in
25 case we need to have more than one.

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1 Any questions before we get started?

2 (No response.)

3 All right. Again, my name is Ann Marshall
4 Young. I am the lawyer member of the Board and the
5 chair.

6 Judge Mignerey, would you introduce
7 yourself?

8 JUDGE MIGNEREY: Yes. I am Alice
9 Mignerey. I am a part-time technical judge. I am a
10 professor of nuclear chemistry at the University of
11 Maryland.

12 JUDGE ARNOLD: And I am Gary Arnold, a
13 technical judge, Ph.D. in nuclear engineering, and I
14 am full-time here at the NRC.

15 JUDGE YOUNG: The staff, please?

16 MS. VRAHORETIS: Good morning, Your Honor.
17 I am Susan Vrahoretis on behalf of the staff. With me
18 is Anthony Wilson, also an attorney with the staff,
19 and James Biggins. And I -- given my vantage point,
20 I can't see everybody that is here from the staff.
21 Mark Caruso, Earl Libby, Hossein Hamzehee, Bern
22 Stapleton, Steve Monarque.

23 THE COURT REPORTER: Can you come closer
24 to the microphone, please?

25 MS. VRAHORETIS: Hossein Hamzehee, Steve

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1 Monarque, Lynn Mrowca, John Fringer. Is there anyone
2 else from NRC staff in the ASLBP room? Marian Zobler,
3 Michael Spencer, and Jessica Bielecki. They are also
4 attorneys with staff, and they are here observing.

5 JUDGE YOUNG: Thank you.

6 Yes, I think --

7 MR. FRANTZ: My name is Steve Frantz. I
8 am from the law firm of Morgan, Lewis & Bockius. With
9 me here today at the table is Jon Rund. Also in the
10 audience from my firm are Al Gutterman and Stephen
11 Burdick. From Luminant Generation we have a number of
12 individuals including Don Woodlan, Bob Reible, Bill
13 Moore, who is the General Counsel for Luminant, Jeff
14 Simmons, also Bobby Bird, and one of our contractors,
15 Joe Tapia from Mitsubishi.

16 JUDGE YOUNG: Thank you.

17 Mr. Eye?

18 MR. EYE: Good morning. Thank you. My
19 name is Robert Eye. I am an attorney with the firm of
20 Kauffman & Eye in Topeka, Kansas, and I represent the
21 intervenors. To my immediate left is Elizabeth Brown,
22 and to her left is Karen Hadden. They are both
23 affiliated with the SEED Coalition, which is one of
24 the intervenors.

25 Also in the audience today is Mr. Tyson

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1 Slocomb, who is affiliated with Public Citizen here in
2 Washington, D.C. Public Citizen is also an intervenor
3 in this matter.

4 And I should also add Ed Lyman is here
5 from Union of Concerned Scientists, and he, as you
6 probably know, is one of our witnesses.
7 Representative Lon Burnam from Texas is also in the
8 audience today with us. Thank you.

9 JUDGE YOUNG: Thank you all. I will just
10 mention that we also have some of the judges and law
11 clerks from our office who will be attending parts or
12 all of this session. All of those will be working on
13 other COL proceedings, so they will be observing in
14 light of what they might learn for their own COL
15 proceedings.

16 Also, I have just been informed that there
17 is a video camera set up. I don't think that there is
18 any problem with that during any open portion of the
19 proceeding, but we would have to make sure that we
20 turn it off if we go into any closed session.

21 All right. The agenda for today, I think
22 we will proceed in this order. First, we will talk
23 about the motion that has been filed by the
24 intervenors to have this proceeding be an open
25 proceeding. Then, in conjunction with that, I see

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1 Bern Stapleton in the office -- in the audience, and
2 I presume that he is the staff's person who will be
3 available to answer any questions and make an
4 explanations about SUNSI information and about the
5 difference between that and safeguards and any
6 requirements regarding that. Is that correct?

7 MS. VRAHORETIS: Yes, Your Honor. We also
8 have Early Libby from the staff.

9 JUDGE YOUNG: Okay.

10 MS. VRAHORETIS: And he can also help with
11 those determinations.

12 JUDGE YOUNG: Okay. We will probably want
13 to go straight into that in conjunction with or right
14 after we talk about the motion. And then, after that,
15 we will start with the briefs on the mootness of
16 contention 7 and then proceed through the contentions
17 1 through 5 and end with the request for Subpart G
18 hearing on these five new contentions.

19 I will say about the motion, I am not sure
20 what ruling is being requested or could be made. We
21 have issued an order in which we indicated that based
22 on 10 CFR Section 2.390(d), I believe it is, which
23 makes security-related information of the sort that we
24 are talking about here, puts that into the category of
25 trade secrets and financial information or essentially

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1 proprietary information. And there are provisions for
2 doing in camera sessions with regard to that sort of
3 information. That is the procedure that we would be
4 following.

5 I am not sure that in the motion the
6 intervenors are asking that we disregard that. We
7 will hear short argument on that, but I will say,
8 further, that we did request briefing on this I
9 believe in June or July, giving a long period of time
10 for the filing of those briefs.

11 What we received was a joint brief that
12 was -- as I understand it, I believe we were told it
13 was written by staff counsel, and so I guess the first
14 question for the intervenors is, in light of the fact
15 that timeliness arguments have been made, and in light
16 of the fact that we did request those briefs back
17 early in the summer, why was this not provided in that
18 context?

19 MR. EYE: Thank you, Your Honor. First of
20 all, we didn't know there were going to be hearings
21 until we got a notice of oral argument some time well
22 after that first order came out.

23 JUDGE YOUNG: Well, the order directing
24 parties to advise what authority the Board would have
25 to close or keep confidential, close any hearings or

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1 keep confidential any information, specifically
2 addressed the possibility of having sessions that
3 might need to be closed. And we asked, "What legal
4 authority is there for that?" In fact, that was not
5 provided. I don't think anyone mentioned 2.390(d).

6 But we subsequently found that ourselves
7 and made that ruling, so I'm not sure that your
8 argument that no hearings were mentioned holds a lot
9 of water.

10 MR. EYE: Well, if I may continue, please,
11 in that regard, we were not exactly sure what would be
12 litigated in relation to these contentions. And we
13 did not know precisely what the process would be.

14 In all candor, I didn't think of it until
15 the motion was developed and filed. And, frankly,
16 that was a function of spending a lot of time with the
17 information and trying to make an objective
18 determination on my own as to what in NEI 06-112, for
19 example, might in fact be sensitive enough to be
20 considered security-related information and to
21 differentiate between that and non-security-related
22 information. It simply took a while to parse that
23 out.

24 And as far as the timeliness is concerned,
25 the order that came out I believe October -- well, it

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1 was earlier this month, or last month, I forget the
2 exact date -- said that significant portions of the
3 hearing would be closed. But it didn't make any
4 attempt to differentiate between those that would be
5 open and those that would be closed.

6 So it was part of the underlying intent of
7 the motion that we filed to bring these issues to the
8 surface, so that we could deal with them in -- at the
9 front end of these hearings, rather than me probably
10 making objections as we go along in the hearing and
11 having to take these up in the course of the hearing.

12 JUDGE YOUNG: What issues exactly did you
13 think needed to be brought to the surface that had not
14 already been brought to the surface?

15 MR. EYE: Which information in the
16 particular documents should be protected from the
17 public and which -- withheld from the public and which
18 should not be.

19 JUDGE YOUNG: Well, you did sign a non-
20 disclosure agreement back in the spring I believe.

21 MR. EYE: I did. Well, it was actually in
22 July. But that doesn't necessarily mean that
23 everything that is designated as SUNSI is in fact
24 SUNSI. And I think that your determinations in this
25 particular proceeding are going to make -- are going

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1 to be determinative, at least at this stage of the
2 game, as to what should be held back from the public
3 and what should be disclosed to the public:

4 JUDGE YOUNG: So you are not arguing that
5 everything should be open.

6 MR. EYE: No.

7 JUDGE YOUNG: You are just arguing that
8 there may be disagreements about particular
9 information, whether that information would be SUNSI
10 or not.

11 MR. EYE: That is correct, Your Honor.
12 And in fact in footnote 1, for example, of the motion
13 we specifically call out the submittal presented by
14 the applicant as something that we would consider to
15 be protected from public disclosure.

16 So we are -- and we also call out in the
17 motion certain parts of the particular guidance
18 document that we think would be likely presumptively
19 withheld from the public as well. But the way the
20 order read -- that is, that significant portions of
21 the hearing would be closed to the public -- to us
22 didn't give enough guidance at the front end as to
23 know exactly which -- you know, which territory we
24 would be free to venture into and which territory we
25 should restrict ourselves from.

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1 So this was really an attempt to get those
2 issues raised, and so that we could deal with them in
3 a -- as much as we can at any rate at the beginning of
4 the hearing rather than having to deal with those
5 intermittently throughout the hearing as particular
6 issues and facts would be raised.

7 JUDGE YOUNG: Okay. I guess we assume too
8 much in terms of what would be understood by our
9 order. Basically, under 10 CFR 2.390(c)(6), there is
10 a reference to in camera sessions of hearings may be
11 held -- being held when the information sought to be
12 withheld is produced or offered into evidence.

13 I think we have construed that to mean
14 that if we are going to move into an area where
15 information that is SUNSI is going to be discussed, or
16 where it would be very difficult to avoid discussing
17 it, that would be when we would stop the open part of
18 the hearing, direct the Court Reporter to start a new
19 booklet in the transcript marked -- and actually,
20 since the SUNSI is classified under 2.390(d) as
21 commercial or financial information or proprietary
22 information, and what the Court Reporter will be doing
23 is marking this as proprietary information at the top
24 of the transcript. I think that's what the agreement
25 calls for with the Court Reporter.

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1 Then, we will go into closed session. If
2 there is anyone in the audience who should not
3 properly be in the room, then those persons would be
4 asked to leave the room during that part of the
5 session. And when we reopen it, then those people
6 could come back in the room.

7 Since the Mitigative Strategies Report has
8 been marked SUNSI, the contentions and most, if not
9 all, of the pleadings, most of the pleadings anyway,
10 have been marked SUNSI, I think it seemed to us that
11 it would be difficult to discuss those without somehow
12 discussing SUNSI information.

13 As we indicated before, we have asked that
14 a security expert who is qualified in classification
15 matters be present to ask questions -- to answer
16 questions and provide some elucidation on that. We
17 are not classification experts.

18 We also indicated that we would expect
19 that security expert to alert us if we seem to be
20 moving into SUNSI information, or, for that matter, if
21 we look like we are moving into safeguards
22 information, at which point we would have to stop and
23 not discuss that at all, because this is not -- the
24 parties have not gone through the proper process, and
25 this hearing is -- oral argument is not set up to

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1 consider safeguards information.

2 Given all of that, I am not sure that any
3 ruling is called for on your motion. Would you say
4 that there is at this point a need for a ruling?

5 MR. EYE: Yes, Your Honor, and I will --
6 there is a couple of reasons why. The first is
7 that --

8 JUDGE YOUNG: Tell us what it would be.

9 MR. EYE: Your ruling would be that, for
10 example, there would have to be a differentiation
11 between information that is indeed security-related as
12 opposed to -- or that has been designated security-
13 related but is not necessarily security-related, and
14 differentiate between those.

15 And we have argued in our motion what we
16 think is properly in the SUNSI or security-related
17 category and that which we believe is not. And I
18 think significantly in the staff's response to our
19 motion the staff actually agrees that a number of the
20 documents that we have designated as being outside the
21 security-related designation, they agree with that,
22 that some of these pleadings that have been -- that
23 have been handled or been presumptively marked as
24 SUNSI ought not to be, or at least they concur with
25 our idea that they ought to be made available to the

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1 public and be part of this public hearing.

2 JUDGE YOUNG: Okay. Let me interject
3 here. I am still not understanding you to say that we
4 need to make a ruling now that would be general and
5 pertain to everything. What I understand you to be
6 asking us to do is what we had planned to do in any
7 event, which was at any point at which we decide we
8 need to go into a closed hearing, to be sure that we
9 are going to be discussing SUNSI and not to go into a
10 closed hearing if we are not going to be discussing
11 SUNSI. Is that correct?

12 MR. EYE: It is partially. But I think
13 that also, as a part of that, is a determination as to
14 precisely what is SUNSI and what is not, instead of
15 just making a -- instead of just deferring to the
16 designations that have been made thus far, because
17 even the designations that have been made thus far are
18 somewhat in doubt, given the staff's recognition of
19 some of the documents that we urged that should be
20 outside that category should be.

21 JUDGE YOUNG: Well, one of the things that
22 we want to ask the expert is to discuss that very
23 issue. And certainly, if at any point any party wants
24 to raise a question about whether something is or is
25 not SUNSI, then that could be done. Is there anything

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1 more that you would want?

2 MR. EYE: Yes, Your Honor, there is. A
3 ruling at the beginning of the hearing that the
4 documents that we have designated as outside of SUNSI
5 be permitted to be discussed in an open public
6 hearing. We have listed them in our motion.

7 JUDGE YOUNG: Has the staff or the
8 applicant responded on those particular items?

9 MR. FRANTZ: On some of these, yes. For
10 example, the very first document that he mentions here
11 is NEI 06-12 Rev 2. That document has been marked as
12 SUNSI previously. That is not the applicant's
13 document. It is a document prepared by an industry
14 trade group. As I understand it, that designation has
15 been accepted by the NRC staff.

16 The applicant has no ability to agree to
17 declassify that document, because it is not our
18 document. And before that could be declassified, I
19 would expect that the Board would want to hear, for
20 example, from NEI itself on whether or not that
21 document should be declassified.

22 JUDGE YOUNG: What about the various
23 pleadings of the parties?

24 MR. FRANTZ: Many of these pleadings
25 either discuss or quote from NEI 06-12. And since

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1 NEI 06-12 itself is SUNSI, I would think that those
2 quotes and discussions of provisions in NEI 06-12 are
3 also SUNSI.

4 JUDGE YOUNG: But what about the extent to
5 which -- I don't think the intervenors question that
6 the Mitigative Strategies Report itself is SUNSI,
7 correct?

8 MR. EYE: That is correct, Your Honor.

9 JUDGE YOUNG: All of the pleadings discuss
10 the report to one extent or another. I assume the
11 intervenors are arguing that these pleadings that they
12 have listed don't discuss it in enough or any details
13 such that they should be marked SUNSI. Is that
14 correct?

15 MR. EYE: Yes, Your Honor.

16 JUDGE YOUNG: Okay. Today we don't need
17 to make rulings on these documents. Today we need to
18 decide how to handle this oral argument. So with that
19 said, I am not sure that it would be a worthwhile
20 expenditure of time to make individual determinations
21 on these pleadings, all of which refer to the report
22 in one way or another, and make fine-tuned
23 designations on that.

24 Now, I know with safeguards, there is a
25 requirement with safeguards and classified that you

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1 indicate which lines contain safeguards and which are
2 unclassified, for example. I am not sure if there is
3 that same practice with SUNSI, but that is something
4 we can take up with the security experts when we talk
5 with them.

6 And, as the staff pointed out I think in
7 their response, there is a provision that if we do a
8 closed hearing and later it turns out that some things
9 that were discussed that we assumed were SUNSI are
10 not, then that can be remarked. Is that correct?
11 That is the staff's argument?

12 MR. WILSON: Yes, that is correct. The
13 first step would be to prevent disclosure and have an
14 opportunity to review the transcript. And then, if
15 the transcripts needs to be redacted, they can be.
16 And if they don't need to be redacted, that can also
17 happen and then they can be released.

18 JUDGE YOUNG: What more would you ask for
19 at this point? I'm still not --

20 MR. EYE: The only thing we would ask for,
21 Your Honor, is to -- and evidently you, in your good
22 judgment, have decided not to do this, but the only
23 thing we would ask for are rulings at the beginning of
24 the proceeding rather than have them done
25 intermittently throughout the proceeding. This was

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1 simply our attempt to raise these issues now and get
2 them dealt with, rather than doing it throughout the
3 hearing, but that was -- or at least that's one of the
4 reasons that we filed the motion.

5 And, Your Honor, I might point out, I
6 don't know of any safeguards information that has been
7 designated in this docket at all.

8 JUDGE YOUNG: No, there hasn't been.

9 MR. EYE: It may be -- okay.

10 JUDGE YOUNG: There hasn't been. However,
11 the nature of some of the subjects that we are going
12 to be discussing raised in our minds the possibility
13 at least that we might stray into that, and we want to
14 avoid doing that. That is our main concern with
15 regard to safeguards, not that anything has been
16 introduced or would necessarily be presented that
17 would be safeguards, just to avoid going into that in
18 discussing plans or procedures for the physical
19 protection of nuclear power plants, detailed plans for
20 which I understand would be safeguards.

21 Go ahead.

22 MR. EYE: Your Honor, thank you. There is
23 one other issue I would like to raise, and it concerns
24 the staff person that has been designated as being
25 sort of the guidance person on what is SUNSI and

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1 safeguards, and so forth, and what is not.

2 I think that that kind of guidance can be
3 useful. Procedurally, it is a little bit unclear to
4 me as to exactly what status this person has. Is this
5 person a witness? If so, should this person be sworn
6 in and dealt with as a witness in terms of dealing
7 with direct and cross, for example?

8 Moreover, I think that it is this Panel's
9 legal obligation to make the rulings that it sees
10 independence -- and that it sees are required,
11 independent of what staff may suggest. And so I am a
12 little bit unclear as to precisely -- I mean, I
13 understand the role that you anticipate for this
14 person, but procedurally, again, I think there are
15 some predicates that perhaps need to be dealt with.

16 JUDGE YOUNG: You are anticipating me
17 again. We actually have considered swearing in this
18 person, and allowing questions from all parties. And,
19 obviously, the Board does have the responsibility to
20 make all rulings.

21 However -- and, actually, there is a
22 formal process for asking for an expert to be
23 appointed that would be assigned to the Board. We did
24 not think that that would be necessary or at least we
25 didn't think that the probability was high enough that

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1 we would need that kind of a person, since we don't
2 think that we will be going into safeguards, we mainly
3 want to avoid straying into it.

4 However, since these issues have come up,
5 and since we are holding this oral argument, where we
6 may need to discuss SUNSI, we thought it would be good
7 to have a security expert from the staff who would be
8 available to answer questions and provide information
9 based on that person's expertise that would be helpful
10 to us and to the parties, and that the parties would
11 be able to, obviously, challenge anything if you
12 disagree.

13 Okay. And if we weren't more clear about
14 that, hopefully that is clear now.

15 I don't think that there is really any
16 need for any ruling now based on what -- on our
17 discussion, and I don't think we are prepared to rule
18 on these individual documents. Certainly, what the
19 applicant has said about the NEI document, they are
20 correct that it is the originator of the document that
21 sets the classification. So on that one, I don't
22 think we would be doing anything to change that
23 designation here.

24 On the pleadings, each party initiated
25 their own pleadings. And as we discuss them, if any

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1 issues come up, we can deal with those. But I think
2 probably the most efficient thing would be to move
3 forward and have -- I have worked with Mr. Stapleton
4 before and know of his expertise. I don't know Mr.
5 Libby. Maybe we could have both of them come up and
6 sit in the witness box here, be sworn in, and then
7 answer any questions.

8 MR. WILSON: Your Honor, a point of
9 clarification. How would you like for the witnesses
10 to proceed? Do you want them to interrupt, or how do
11 you want them to alert you when there is a potential
12 issue?

13 JUDGE YOUNG: I think they would need to
14 interrupt.

15 MR. WILSON: Should they simply stand, or
16 should they immediately speak?

17 JUDGE YOUNG: They could speak. Any way
18 that they need to get our attention. I don't want to
19 get into safeguards, definitely. And if it looks like
20 we are going to be moving into SUNSI and we need to
21 take a break and stop and change, then feel free to
22 interrupt us.

23 Okay. Let me ask both of you to raise
24 your right hands, please.

25 (Whereupon, an oath was administered to

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1 Mr. Earl Libby and Mr. Bern Stapleton.)

2 Thank you, both.

3 By the way, for the Court Reporter, if you
4 need to interrupt us to -- speaking of interruptions,
5 to ask for spellings or ask the witness to repeat a
6 word, feel free to do that. Okay?

7 Mr. Stapleton is on the right, and Mr.
8 Libby is on the left.

9 Okay.- I think maybe we will start with a
10 few basic questions that we might have, and then allow
11 each of you to ask questions. For my part, I guess it
12 would be helpful if you did explain for us what the
13 definition of "SUNSI" is, what the difference between
14 SUNSI and safeguards is, what safeguards information
15 is, and any basic information on those subjects.

16 MR. STAPLETON: Good morning, Your Honor.
17 I'm Bern Stapleton. I'm the Senior Program Manager in
18 the Information Security Branch within the Office of
19 Nuclear Security Incident Response.

20 JUDGE YOUNG: You might need to speak up
21 a little bit, or move closer to the --

22 MR. STAPLETON: Oh, okay. I will address
23 the definition of "SUNSI" as well as the definition of
24 "safeguards information." SUNSI, which stands for
25 sensitive unclassified non-safeguards information,

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1 means any information of which the loss, misuse,
2 modification, or unauthorized access can reasonably be
3 foreseen to harm the public interest, the commercial
4 or financial interests of the entity or individual to
5 whom the information pertains, conduct of NRC and
6 federal programs, or the personal privacy of
7 individuals.

8 JUDGE YOUNG: When you give definitions
9 like that, it might be helpful if you gave us the
10 source for that also.

11 MR. STAPLETON: This is off of the NRC's
12 SUNSI website. The specific document is NRC Policy
13 for Handling, Marking, and Protecting Sensitive
14 Unclassified Non-Safeguards Information.

15 Safeguards information -- and I am quoting
16 this from the NRC's designation guide on safeguards
17 information -- is defined as information the
18 disclosure of which could reasonably be expected to
19 have a significant adverse effect on the health and
20 safety of the public and/or the common defense and
21 security, by significantly increasing the likelihood
22 of theft, diversion, or sabotage of materials or
23 facilities subject to NRC jurisdiction.

24 The unauthorized release of this
25 information, for example, could result in harm to the

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1 public health and safety and the nation's common
2 defense and security, or damage to the nation's
3 critical infrastructure, which includes nuclear power
4 plants and certain other facilities and radioactive
5 materials licensed and regulated by the NRC.

6 Some other information that I think I
7 could add here from an information security
8 standpoint, this general area of mitigative strategies
9 that nuclear power plants have responded to the NRC
10 on, the information ranges as a result of the 9/11
11 terrorist attacks anywhere from uncontrolled public
12 released information all the way up to secret national
13 security information that exists in a special access
14 program, which actually had to be approved by the
15 President of the United States.

16 Most of the information -- well, all of
17 the information that I read in the Luminant document
18 concerning the mitigative strategies report I would
19 concur appears to fit the definition of SUNSI. SUNSI
20 information, in accordance with 10 CFR 2.390(d), is
21 determined by the entity providing the information to
22 the NRC, and then is generally concurred in by the
23 staff, the NRC staff.

24 The staff has an obligation, if they see
25 information designated as SUNSI and do not concur, to

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1 go back to the entity and ask for the -- either for a
2 justification or ask that the designation be removed.

3 JUDGE YOUNG: Could you give maybe a brief
4 summary of the most significant differences between
5 SUNSI and safeguards?

6 MR. STAPLETON: I think the most
7 significance differences -- the information that has
8 been designated as SUNSI in the Mitigative Strategies
9 Report is primarily engineering or emergency planning
10 information that the applicant or the licensee at some
11 point in the future would use to address safety issues
12 following this event that is postulated.

13 Information that is used by the
14 operational, engineering, or emergency planning staffs
15 is generally not considered to be safeguards
16 information. It is information being used to protect
17 the facility or to respond to an event. That contrast
18 with safeguards information, which would be
19 information that the physical security force would use
20 in terms of armaments, response, timelines, so most of
21 the engineering information I do not expect would get
22 into the safeguards information area.

23 JUDGE YOUNG: Okay. Go ahead. If you
24 have any questions, go ahead, if you had anything else
25 you were going to say.

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1 MR. STAPLETON: I guess that some of the
2 information, when the NRC post-9/11 started to put
3 together designations or classifications on how this
4 information would be protected, it depends on the
5 level of detail. Also, it depends on who in fact
6 originated the information, and it also depends on
7 whether or not that information is in the hands of
8 commercially licensed or public entities or companies,
9 or whether or not it relates to information that the
10 United States Government came up with.

11 JUDGE YOUNG: You just mentioned the level
12 of detail, and I guess one of the -- one of our
13 concerns is that there was one definition in the rules
14 for "safeguards" that talks about detailed security
15 measures for the physical protection of source
16 byproduct or special nuclear material, etcetera.

17 And some of the contentions before us have
18 -- in effect have to do with the level of detail that
19 should be included in the licensee's or the
20 applicant's discussion of how they will satisfy the
21 requirements of 10 CFR 50.54(hh)(2).

22 What I just heard you say was that the
23 main distinction would be that information about the
24 physical security response, armaments, and so forth,
25 is more the safeguards, and operational engineering

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1 and emergency planning would be SUNSI.

2 But if you are talking about plans to deal
3 with fires and explosions, could that -- does that
4 automatically all go under operational engineering,
5 and so forth? Or could it also sort of bleed into
6 physical security? Or is physical security mainly to
7 prevent mitigative -- to deal with after something
8 happens? Would that be a distinction that --

9 MR. STAPLETON: That is a pretty good
10 distinction, and the definition that I read for
11 safeguards talks about to prevent acts from occurring.
12 Depending on how the applicant postulates the event
13 that is occurring, there is a possibility that you
14 could get into safeguards information if they
15 developed a scenario that could be useful to an
16 adversary by explaining, you know, what systems would
17 they need to shut down, timelines, scenarios for how
18 to gain access to the plant, or to debilitate the
19 security forces protecting those vital areas. That
20 could get into safeguards information.

21 Also, if the applicant identified through
22 their review vulnerabilities, to where they say there
23 is no way we can protect a particular scenario, that
24 could get into safeguards information even though
25 there is no involvement by the physical security

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1 force.

2 JUDGE YOUNG: Before you end, I would like
3 you to just repeat for us the definition of "SUNSI"
4 that you gave us earlier.

5 MR. STAPLETON: SUNSI means any
6 information of which the loss, misuse, modification,
7 or unauthorized access can reasonably be foreseen to
8 harm the public interest, the commercial or financial
9 interests of the entity or individual to whom the
10 information pertains, the conduct of NRC in federal
11 programs, or the personal privacy of individuals.

12 JUDGE YOUNG: Thank you.

13 Did you have anything to add? And also,
14 did Mr. Libby have anything to add?

15 MR. LIBBY: Good morning, Your Honor. No,
16 I do not. It is an excellent definition and a good
17 breakdown between the differences between SUNSI and
18 SGI information.

19 JUDGE YOUNG: Do you have any questions?

20 JUDGE ARNOLD: Yes. Just to ask by
21 example, I have been looking through NEI 06-12, and I
22 have seen a lot of things in here that I would expect
23 to be totally innocuous.

24 MS. VRAHORETIS: Your Honor, I would just
25 interrupt. This document has been categorized as

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1 SUNSI. There is recording equipment in the room, and
2 there are members of the public that are not subject
3 to the protective order.

4 JUDGE ARNOLD: I am not going to speak of
5 anything specific that is in it. I am just asking --
6 the designation of SUNSI does not mean --

7 MS. VRAHORETIS: Thank you, Your Honor.

8 JUDGE ARNOLD: -- that every piece of
9 information within the document is sensitive. It just
10 means that within the document there are pieces of
11 information that are sensitive. Is that correct?

12 MR. STAPLETON: You are correct, Your
13 Honor. Judge Young had mentioned earlier -- I guess
14 I should follow up on this -- what you are referring
15 to I believe is what we refer to as portion marking.
16 If the document, the NEI document is, you know, 30,
17 40, 50 pages, and there is one sentence that is SUNSI,
18 then the entire document would be designated as SUNSI
19 for its protection.

20 But then, the staff, you know, could take
21 a look, and generally you are correct that just
22 because it is marked as SUNSI, security-related
23 information, does not mean that every sentence or
24 paragraph is in fact -- meets that level of SUNSI.
25 There is no requirement in SUNSI to portion mark.

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1 There is a requirement for safeguards information to
2 portion mark, and there is a requirement for certain
3 types of classified information to portion mark.

4 JUDGE ARNOLD: And, let's see, this
5 document was developed by NEI, and they did the
6 initial classification on it. And, as you mentioned
7 earlier, the staff then looks and they have the
8 responsibility that if they think it is incorrectly
9 marked to go back to NEI.

10 In this case, the staff has looked through
11 it, and their determination that it is properly marked
12 is basically saying within the document there are
13 parts that are sensitive, and basically their review
14 is not saying every piece of information in it is
15 sensitive, but basically that there is sensitive
16 information somewhere in it.

17 MR. STAPLETON: That's correct. It is my
18 understanding, as counsel pointed out, that the
19 document was designated by NEI as sensitive
20 information, the staff reviewed it, concurred in that
21 overall designation, and accepted the document as a
22 sensitive document.

23 JUDGE ARNOLD: And as Judge Young was
24 talking about earlier, and Mr. Eye was talking about,
25 he would like us to treat some of the documents -- and

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1 he listed them -- as being not sensitive. But in
2 order to do that, we would have to essentially go
3 through the documents paragraph by paragraph to see --
4 to try to parse out what is sensitive and what is not.
5 Is that correct?

6 MR. STAPLETON: Unless the counsel told us
7 which paragraphs they disagreed with, or were in
8 contention, and then those could be reviewed on an
9 individual basis. I am more or less the general
10 expert in terms of, you know, what is SUNSI, how is it
11 handled, the same for safeguards or classified. If
12 there was in fact disagreement between parties, the
13 applicant would be allowed or should be asked to
14 explain why they felt it met the definition.

15 And then, generally, the NRC staff that is
16 involved would in fact be the program office. So in
17 this case I believe it would be the Office of New
18 Reactors.

19 JUDGE ARNOLD: Thank you.

20 JUDGE YOUNG: Does the staff have any
21 questions that you would like to ask to bring out
22 anything we may have omitted?

23 MS. VRAHORETIS: One moment, Your Honor.

24 (Pause.)

25 Your Honor, I would just like to ask Mr.

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1 Libby to clarify that we did ask him to review the
2 pleadings listed by the intervenors and to review our
3 response before we filed it, and that he concurred
4 with the information that we provided the Board.

5 MR. LIBBY: I was given a series of
6 documents to review from the Office of General
7 Counsel. I am in the New Reactor Office in the Branch
8 of Rulemaking and Guidance. It took a period of time.
9 Those documents were reviewed, and the results of the
10 SUNSI review that I completed were given back to OGC.

11 MS. VRAHORETIS: Thank you.

12 JUDGE YOUNG: Does the applicant have any
13 questions?

14 MR. FRANTZ: Just one quick question. Mr.
15 Stapleton, do you agree that discussions of the safety
16 features and mitigation measures within vulnerability
17 assessments should be treated as SUNSI?

18 MR. STAPLETON: At a minimum as SUNSI,
19 yes, sir.

20 MR. FRANTZ: Thank you. And by the way,
21 I would just refer the Board to SECY 2004-191,
22 Attachment 1, page 6, where essentially it states,
23 "Discussions of safety features or mitigation
24 strategies within vulnerability assessments will also
25 be withheld from public disclosure." And that SECY

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1 document was approved by the Commission in the staff
2 requirements memorandum dated November 9, 2004.

3 MS. VRAHORETIS: Thank you.

4 Mr. Eye, do you have any questions?

5 MR. EYE: Just a couple, Your Honor.

6 Thank you.

7 This is for both you, and the order you
8 answer is up to you. When were you notified that you
9 would be designated to undertake this document review?
10 I guess this would be for Mr. Libby.

11 MR. LIBBY: I do not recall the exact
12 date, but it was some time last week.

13 MR. EYE: Okay. Mr. Stapleton, did you
14 review any of the documents that are at issue in this
15 case?

16 MR. STAPLETON: The only document I have
17 reviewed in any detail for a SUNSI determination was
18 the Luminant May 22, 2009, document on the Mitigative
19 Strategies Report.

20 MR. EYE: Did you review any of the
21 documents that were designated in that as guidance
22 documents?

23 MR. STAPLETON: No, sir, I did not.

24 MR. EYE: Mr. Libby, to whom did you speak
25 regarding -- or did you consult with anybody regarding

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1 your evaluation of the documents that you were
2 provided to review? Were there other staff involved?
3 I guess that's --

4 MR. LIBBY: Was there other staff involved
5 with my review, or the SUNSI review, of the documents
6 that I was given? No, there was not. And, no, I did
7 not ask for or receive any other outside help.

8 MR. EYE: Same question for you, Mr.
9 Stapleton.

10 MR. STAPLETON: No, sir.

11 MR. EYE: All right. Prior to this
12 particular proceeding that we are here today for, have
13 either of you been involved with the Comanche Peak
14 proceeding, or the docket that we are here for today?
15 Mr. Stapleton?

16 MR. STAPLETON: No, sir.

17 MR. EYE: Mr. Libby?

18 MR. LIBBY: Yes, I have been involved with
19 Comanche Peak. I am in the New Reactor Office, and I
20 work with the project manager on different aspects of
21 all of the COLs as well as the -- all of the design
22 certification rulings.

23 MR. EYE: Have you done any SUNSI
24 classification work related to Comanche Peak prior to
25 the assignments you got for this proceeding?

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1 MR. LIBBY: I normally review all in-bound
2 documents that are received in the New Reactor Office
3 to some extent I receive, as well as the program
4 managers, project managers, for the different combined
5 operating licenses. I have done SUNSI reviews for the
6 majority of the COLs, as well as a majority of the --
7 if not all of the design certification centers.

8 MR. EYE: Mr. Stapleton, do you agree that
9 there is a balance that needs to be struck between
10 transparency or openness of NRC proceedings and
11 protecting sensitive information?

12 MR. STAPLETON: Yes, sir, I do. And in
13 our designation guide, it actually speaks exactly to
14 that about the intent to strike a balance between
15 openness as well as protecting information.

16 MR. EYE: Mr. Libby, have you ever been
17 involved in a situation where you have disagreed with
18 the designation of something that came in to your
19 office as -- marked SUNSI?

20 MR. LIBBY: There is numerous occasions
21 where we have discussions as to what is actually SUNSI
22 and what is not SUNSI.

23 MR. EYE: Have you ever contested a
24 particular designation of SUNSI that has been assigned
25 to a particular document by the person who was

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1 presenting it?

2 MR. LIBBY: Yes. As I stated, there is
3 constant discussion within and among the staff as to
4 what is SUNSI and what is not SUNSI. So, yes, we do
5 have contentions. It is not a formal process, but,
6 yes, we do have discussions as to what would fall
7 within SUNSI and what should be released to the
8 public.

9 MR. EYE: Have you ever notified the
10 person or the entity that has presented a document
11 that has been designated as SUNSI that you disagree
12 with that designation?

13 MR. LIBBY: I can recall instances in the
14 reverse order, where something was submitted that
15 should have been SUNSI that was not. But I have not
16 -- I don't know -- I have not made any notifications
17 to an outside external organization that something
18 that they submitted as SUNSI was not.

19 MR. EYE: And, again, this is for you, Mr.
20 Libby, prior to receiving the documents in the last
21 week or so, whenever it was that you got these for
22 review, had you reviewed any of the guidance documents
23 related to the May 22, 2009 submittal by the
24 applicant?

25 MR. LIBBY: Which was the May 22nd?

1 The --

2 MR. EYE: That was their mitigative
3 strategies submittal.

4 MR. LIBBY: I have not seen the mitigating
5 strategies tables, mitigating strategies -- they have
6 a name for it -- for Luminant, Comanche Peak.

7 MR. EYE: And the underlying guidance
8 documents, have you reviewed -- have you reviewed
9 those prior to this assignment?

10 MR. LIBBY: I have reviewed NEI 06-12,
11 Revision 2, as well as Revision 3, and the documents
12 that were used in conjunction with developing that,
13 yes.

14 MR. EYE: Okay. And, Mr. Libby, have you
15 reviewed anything related to the interim staff
16 guidance that bears on this same question about how to
17 deal with the 50.54(hh)(2) requirements?

18 MR. LIBBY: Yes, sir, I have.

19 MR. EYE: That is all I have. Thank you,
20 Your Honor.

21 JUDGE YOUNG: Any other questions?

22 MS. VRAHORETIS: Yes, Your Honor.

23 I would like to ask Mr. Stapleton if there
24 is a distinction between SUNSI and security-related
25 SUNSI regarding the balancing test. Is there a

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1 balancing test for openness regarding security-related
2 SUNSI?

3 MR. STAPLETON: I'm sorry. Is there a
4 distinction between SUNSI and security-related SUNSI?

5 MS. VRAHORETIS: Mr. Eye asked you about
6 a balancing test between openness and transparency and
7 withholding SUNSI information. And I am just asking,
8 is there -- do we draw a distinction when the SUNSI
9 information is security-related?

10 MR. STAPLETON: There are seven different
11 categories of SUNSI information, security-related
12 being one of those. Whenever staff is looking at, you
13 know, is it SUNSI, should it be uncontrolled,
14 publicly-released, we do try to balance test, we also
15 try to take a very broad look at what information is
16 already in the public domain. If it's in the public
17 domain legitimately, then we should not be placing
18 SUNSI labels on information.

19 Not all SUNSI is subject to Freedom of
20 Information Act restrictions. Some information the
21 NRC may mark as SUNSI, or the licensee may mark as
22 SUNSI, but it may or may not hold up to a Freedom of
23 Information Act request, depending upon, you know, if
24 something like that comes in.

25 But we do -- there is constantly a

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1 balancing as to, you know, what is the public's right
2 to the information, what is the NRC's obligation, and
3 what potential harm could occur if adversaries got
4 hold of the information.

5 MS. VRAHORETIS: Thank you.

6 JUDGE YOUNG: Anything further from
7 counsel?

8 (No response.)

9 I will say, I guess I will repeat, as we
10 discussed the last time we talked, this Board is
11 acutely aware of the public interest in open
12 proceedings, and the need for transparency, and that
13 is something that I think we emphasized in our
14 discussion the last time we were together, I think by
15 telephone at that point.

16 And that has been in our minds and in the
17 mix all the way through. And at the same time, the
18 need to protect information that could harm the public
19 interest, in the case of SUNSI, or could help
20 potential adversaries with safeguards, are also very
21 serious considerations.

22 So taking all of those things into
23 account, it seems to me that the best way to proceed
24 is to -- if it looks as though we are moving into
25 SUNSI, we will close the hearing, we will stop and

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1 have those people who are not appropriately in the
2 room leave the room for that period of time, have the
3 Court Reporter start a new booklet in the transcript,
4 and then, once the transcript has been produced and
5 the parties have it, if there are any objections or
6 questions that you want to raise, that you would like
7 to have all or portions of it made public, or if
8 anyone would like to have a redacted version produced,
9 that that would be an appropriate way to err on the
10 side of caution with regard to security-related
11 information, but provide a method for making open
12 anything that should be open.

13 If you feel strongly enough at the point
14 at which we are moving into -- about to move into
15 SUNSI, we are not going to foreclose you from raising
16 an objection at that point, but I think that the
17 safest way to proceed would be to err on the side of
18 caution rather than risk disclosing something we
19 should not disclose, and then not be able to put a lid
20 on it at that point nearly as effectively.

21 So with that said, is there anything else
22 regarding this issue of the motion and the SUNSI that
23 we need to talk about at this point? Any party see
24 anything? Or do the witnesses see anything that we
25 may have omitted?

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1 MR. LIBBY: No, Your Honor.

2 MR. STAPLETON: No, Your Honor.

3 JUDGE YOUNG: Okay. So we will just count
4 on you to alert us if at any time it looks as though
5 we are going to move into SUNSI.

6 MR. STAPLETON: Your Honor, I think that
7 from my standpoint you will probably hear either the
8 applicant or the program office, represented by Mr.
9 Libby, probably raise the issue of SUNSI before I
10 would, since I am not familiar with the majority of
11 the documents.

12 JUDGE YOUNG: Okay. And of course if we
13 move into safeguards, stop us immediately, too.

14 MR. STAPLETON: Then you will hear from
15 me.

16 JUDGE YOUNG: On the mootness briefs, I
17 just wanted to say a few preliminary remarks about
18 that as well. Basically, this brief, in terms of the
19 substance of it, appears to raise pretty much the same
20 issues that are raised in the new contention 1.

21 It strikes me that there is some sort of
22 failure to communicate on at least one level. I can
23 understand that the intervenor's argument is that your
24 original contention alleged that the applicant had not
25 filed anything to meet the requirements of -- I

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1 believe you used the word "requirements" in a couple
2 places -- of 52.80 and -- 52.80(d) and 50.54(hh)(2).

3 And so you are arguing that what they
4 subsequently provided in the mitigative strategies
5 report doesn't meet those requirements, and so the
6 contention stays alive by virtue of that.

7 In the discussion of the case law on
8 contentions of omission, however, you picked up on one
9 word that is used, and that is "the contention as
10 modified." And in a couple of places, maybe more, in
11 your brief, and maybe your reply response, you say
12 that we, hereby modify our contention, that the
13 contention is now modified.

14 My understanding of the case law is that
15 the Commission has viewed contentions of omission as
16 saying there is nothing on subject X. And then, the
17 applicant submits something on subject X that the case
18 law pretty much says that that renders a contention
19 moot, and that at that point in order to modify a
20 contention an intervenor has to file an amended
21 contention or a new contention.

22 In a situation where time goes by and, for
23 whatever reason, an intervenor does not file an
24 amended or new contention on a timely basis, then
25 there might be some need to get into an argument on

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1 whether the original contention encompassed questions
2 of whether something met some requirements or met them
3 adequately.

4 But in a situation where an intervenor has
5 been given the opportunity to file new contentions or
6 amended contentions by a certain deadline, and they do
7 file those new contentions, and, as in this case,
8 where one of those contentions raises essentially the
9 same substantive issues as were raised in the brief on
10 mootness, I am sort of left wondering whether there is
11 any need to argue the mootness issue at this point.

12 In other words, the mootness issue may be
13 moot at this point. And it would strike me that any
14 argument on it would be almost a semantic argument on
15 whether -- what "modified" means, what circumstances
16 it deals with, and whether your use of the word
17 "requirements" in your original contention somehow
18 under that kept your original contention alive in the
19 face of the case law on contentions of omission and
20 mootness.

21 Are you following what I'm saying? And do
22 you still want to make an argument on the mootness
23 issue? Do you think maybe your contention 1 raises
24 everything that you really wanted to raise in the
25 mootness brief?

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1 MR. EYE: First of all, Your Honor, I do
2 believe I understand what you are saying. Part of
3 this is driven by the need to protect the record. And
4 that -- I mean, I don't do that in a -- I'm not trying
5 to do it so that we create a bunch of superfluous
6 things in the record. But on the other hand, we were
7 confronted with a situation where we did see a
8 conceptual gap in that which was submitted that
9 supposedly was going to satisfy the requirements under
10 52.80.

11 In a former life before I was a lawyer, I
12 was a college teacher. When I gave assignments for
13 papers, I tried to be fairly detailed. If there was
14 a parameter that I assigned to be covered that wasn't,
15 I usually handed it back with an incomplete and asked
16 for that parameter to be covered.

17 That is the analogy that I would draw
18 here. There is a parameter that I can't discuss,
19 because it does get into what we have been talking
20 about earlier in the SUNSI, but in our judgment that
21 conceptual gap rendered the submittal of May 22, 2009,
22 so defective that it should not be accepted as an
23 adequate means by which to respond to the regulatory
24 requirements of 50.54(hh)(2).

25 JUDGE YOUNG: What about the Commission's

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1 case law where they use the word "modified"? It does
2 seem to me that you are using it in a different way
3 than the Commission used it, don't you think? I mean,
4 are you still -- and I guess part of that view would
5 be supported by the idea that the contention
6 admissibility rules are fairly strict, and there is no
7 procedural mechanism for modifying a contention other
8 than through the filing of an amended contention.

9 And I think your brief and your response
10 more or less conceded that you need to modify it to
11 specify the things that you say are not dealt with
12 sufficiently to meet the requirements of the two rules
13 in question, right?

14 MR. EYE: Yes, Your Honor. And we will --
15 we are not here to argue form. We would like to focus
16 on function as much as possible. And to the extent
17 that there is an overlap between those issues that we
18 raise in our mootness brief, and contention 1, and,
19 really, other contentions as well, I think that there
20 is a fair amount of interrelationship, I don't think
21 that we have a huge problem with moving on to
22 contention 1 and leaving the mootness -- I'm a little
23 reluctant to say this, but leaving it behind.

24 But on the other hand, there is one issue
25 that I do want to raise here, and that is that under

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1 the staff and the applicant's view, any information
2 that is presented is adequate, that there is no
3 threshold that has to be met in order to be a
4 "submittal."

5 And that sets the bar to me at a
6 troublingly low level, because there needs to be at
7 least a determination as to whether the submittal is
8 adequate to move forward. And if it's not, then it
9 needs to be handed back to whomever provided it, and
10 they can rework it if there are, again, the conceptual
11 gaps that we believe exist.

12 The precedent that comes out of this to us
13 indicates that anything will do as far as a submittal.
14 And I don't think that that is a precedent that serves
15 the public's interest, and I don't think it is a
16 submittal that sends a message to the regulated
17 community that they need to strive to meet the
18 regulatory requirements in the most complete way that
19 is possible.

20 JUDGE YOUNG: Let me interject and ask you
21 a question. You mention in more than one place in
22 your discussion of your contentions that with a
23 contention of omission you don't need the same level
24 of facts and expert support. You just need to say why
25 the information that you are alleging should be there,

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1 but that you are alleging is missing, why that -- why
2 it should be there.

3 And let's look at it from the standpoint
4 of -- well, let me back up. Just as a matter of
5 history, my understanding is that a lot of these
6 contentions of omission arise because the original
7 contention says something to the effect of, "There is
8 no discussion of XYZ in the application."

9 The applicant then submits something that
10 discusses XYZ. A petitioner or intervenor may
11 challenge how adequately the applicant has discussed
12 XYZ in their submittal. And they can make that
13 challenge in a new or amended contention.

14 The problem arises when the intervenor,
15 for whatever reason, doesn't realize that they need to
16 file a new contention, and so then there is really
17 more of a necessity to argue whether the original one
18 stays alive because they pass some deadline or some
19 reasonable period of time and not filed a new
20 contention.

21 Let's assume that the staff is doing their
22 job and put that aside, that the staff will be
23 reviewing what has been submitted. From the
24 standpoint of the intervenor, if you realize you need
25 to file a new or amended contention, and you do file

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1 those contentions, is there anything -- doesn't that
2 adequately protect your interest and, by extension, to
3 the extent that you represent it, the public interest
4 by allowing you to be -- file something that
5 specifically challenges the sufficiency of the
6 submittal? Doesn't that satisfy that?

7 MR. EYE: It does. Functionally, it does,
8 Your Honor, and I don't dispute what you said
9 whatsoever. Again, I would just simply -- the
10 assumption that was made as a predicate to your
11 remarks was that there had been a review of that
12 submittal to determine its regulatory sufficiency
13 before it was accepted.

14 And if in fact that was done, in our
15 judgment there was -- it was inadequate to -- it was
16 an inadequate review and --

17 JUDGE YOUNG: Well, when you say
18 "accepted," what do you mean? I mean, in the normal
19 course, an application is filed, and various
20 additional documents and amendments and new submittals
21 are filed all during the whole process. And I think
22 we -- the staff is, on an ongoing basis, reviewing
23 everything. I don't know that they stop every time
24 something new is filed and decide whether to accept it
25 or not. That may be an initial decision, deciding

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1 whether to accept the application for docketing.

2 But thereafter things that are filed to my
3 knowledge -- we can ask the staff to confirm or deny
4 this, but to my knowledge there aren't additional
5 decisions made whether to accept or not accept various
6 submittals. The staff will review them in one way or
7 another and may make requests for additional
8 information.

9 But you seem to be presuming that there is
10 some process for accepting each additional document or
11 submittal that an applicant makes, separate and apart
12 from the process of reviewing it for sufficiency and
13 adequacy on its own.

14 MR. EYE: That's correct, Your Honor. I
15 did make the assumption that there would be at least
16 an effective triage, if you will, of the document to
17 determine whether or not it hits the basic regulatory
18 points that it intends to hit, and that, if it does,
19 then it moves forward for whatever further process is
20 pertinent, or it is sent back.

21 It is my understanding that there --

22 JUDGE YOUNG: Can we ask the staff to
23 confirm? What is the situation?

24 MR. BIGGINS: Certainly, Your Honor. I
25 believe your understanding is correct in that when we

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1 initially receive an application we go through a
2 docketing process and review for technical sufficiency
3 the application to ensure that it contains all of the
4 substantive information required for review.

5 However, once the application is docketed,
6 as you are aware, and as you noted, an applicant
7 submits many other things, and including revisions,
8 annual revisions even, to their application. And
9 those subsequent submittals to the NRC staff for its
10 review do not undergo any kind of docketing review.

11 Rather, as you noted, the staff's review
12 is in an ongoing phase at that point. And so as the
13 staff receives new information, it reviews
14 substantively that information and asks for additional
15 information through an RAI if the staff believes that
16 additional information is necessary.

17 JUDGE YOUNG: Does that affect your
18 position on this at all? I mean, what I'm trying to
19 determine is -- really, is there anything left here in
20 the mootness issue that you would like to argue? Or
21 can we move into the contentions which appear to deal
22 with all of the substantive issues that you raise?

23 MR. EYE: There is nothing left, other
24 than what we have already argued. So I don't see any
25 reason that we can't move on. I mean, I think we have

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1 made a record on the legal issues that we think are --
2 that pertain to the submittal.

3 JUDGE YOUNG: Okay.

4 MR. EYE: At least as -- on the mootness
5 question.

6 JUDGE YOUNG: Okay. All right. Why don't
7 we take a short break and then come back and be ready
8 to address contention 1.

9 Now, the contentions, when filed, I
10 believe were filed as containing SUNSI. It seems that
11 this might be a point at which to go into closed
12 session to discuss the contention you are going to be
13 talking about, I guess things that could conceivably
14 be -- and this is where some of the worry comes in --
15 could conceivably be argued as vulnerabilities or you
16 are arguing that certain things have not been included
17 that should be included.

18 Let me hear from -- we can take this up
19 after the break if you want, or we can -- if we can
20 resolve it quickly, we can just know that after the
21 break we are going to go into closed session.

22 Are you withdrawing your designation of
23 your contentions as SUNSI, or --

24 MR. EYE: Yes, Your Honor. As noted in
25 our motion that we took up at the beginning of today,

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1 yes, we are.

2 JUDGE YOUNG: Okay.

3 MR. EYE: We are. And I would simply note
4 that much of the information that I think is thought
5 to be SUNSI was also covered in subsequent briefs that
6 the staff has concurred, and I think with staff's
7 technical consultation as well has agreed that falls
8 outside of that which would be properly designated as
9 SUNSI and should be made public.

10 JUDGE YOUNG: Do you agree we can discuss
11 contention 1 without going into closed session?

12 MS. VRAHORETIS: No, we do not, Your
13 Honor. We have asked Mr. Libby to conduct a review of
14 the contentions that the intervenors have filed, and
15 we concur with Mr. Libby's finding that the
16 contentions contain SUNSI information, and also
17 discuss official use only information.

18 And, Your Honor, I would just point out
19 that in a public oral argument such as this, the
20 public really has no right other than to observe.
21 This isn't a public meeting where they would be
22 permitted to participate in any way. Such that if you
23 were to close the proceeding, and then later release
24 the transcript, the only thing is the minor delay that
25 would be inherent in that.

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1 And I believe that in balancing the
2 public's right to hear everything in real time, it
3 needs to take a second chair to our need to protect
4 this information from inadvertent disclosure.

5 JUDGE YOUNG: Does the applicant have
6 anything to -- I know in your response you indicated
7 that you would be discussing various examples that
8 would in your mind definitely be SUNSI.

9 MR. FRANTZ: That's correct, Judge Young.
10 I intend to go into some detail to give the Board
11 examples of how we approach our mitigative strategies
12 and how we deal with NEI 06-12. Additionally, I might
13 point out that the contentions themselves do quote
14 from NEI 06-12, which is SUNSI. They do address our
15 mitigative strategies, which is SUNSI. They admit
16 these are SUNSI.

17 And, therefore, I believe the discussion
18 of contention 1 should be closed to the public.

19 JUDGE YOUNG: Mr. Libby, is that correct,
20 that you have gone through the contentions and you
21 find all of them to contain SUNSI?

22 MR. LIBBY: I have gone through the
23 contentions, yes. The exact ones that contain SUNSI,
24 I gave the list back to OGC. I don't have it with me
25 currently.

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1 JUDGE YOUNG: And was that all of them or
2 some of them?

3 MS. VRAHORETIS: Going page by page, Your
4 Honor, it appears that it is most of them. Most of
5 the contentions contain SUNSI or official use only
6 information.

7 JUDGE YOUNG: Are there any that don't?

8 MS. VRAHORETIS: It doesn't appear to me
9 that there are, Your Honor. And also, it -- our
10 answer contains SUNSI, and Luminant's answer contains
11 SUNSI. So I don't know how the arguments can be
12 freely made, so that we can answer your questions,
13 without this part of the hearing being closed.

14 JUDGE YOUNG: Mr. Eye, do you want to
15 respond?

16 MR. EYE: Thank you, Your Honor.

17 JUDGE YOUNG: It sounds like there is a
18 pretty good argument for closing the proceeding at
19 this point.

20 MR. EYE: We will object. For the record,
21 we are going to object to that. And the second thing
22 is, I would like to have the document that they are
23 referring to. I mean, if this is a document that has
24 been prepared in anticipation of responding to your
25 questions, and so forth, I --

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1 JUDGE YOUNG: You are talking about Mr.
2 Libby's document that he gave to counsel.

3 MR. EYE: Yes.

4 JUDGE YOUNG: Let's back up for a minute.
5 You are objecting -- give us the basis for your
6 objection.

7 MR. EYE: The basis for our objection is
8 that, Your Honor, the particular information in
9 contention 1 -- well, really, in -- let's cover
10 contention 1, because that's what we are about to
11 launch into -- focuses primarily on omissions, and
12 also focuses primarily on the information in the
13 guidance document that we believe has already been
14 vetted by the staff and determined to be not SUNSI.
15 And I am speaking specifically about the introduction
16 to the particular guidance document.

17 To the extent that there are other
18 references to the -- to NEI 06-12, I think those could
19 be taken up in perhaps a closed session, if that is
20 justified. But in terms of the introductory part of
21 that document, that has been vetted, and it has been
22 agreed, at least by staff, that that part does not
23 implicate security-sensitive information.

24 JUDGE YOUNG: How, though, can we really
25 have an effective discussion of the contentions and

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1 the responses to them and your replies to the
2 responses without -- how can we have an effective
3 discussion of that if we need to stop for small
4 portions of it and go back and forth all the way
5 through? That's the thing that is a little difficult
6 to contemplate. How do you contend that we could do
7 that?

8 MR. EYE: Well, I think that it -- while
9 cumbersome, I think that may just be a function of
10 trying to make this as public as possible without
11 jeopardizing truly security sensitive information.
12 And though while cumbersome, I think that to the
13 extent that counsel are obligated to recognize that
14 which has been properly designated as SUNSI, and that
15 which we believe is based upon the review by staff,
16 and so forth, that it falls outside of it, we could
17 take it up that way.

18 Again, what we primarily focus on is the
19 information that is in that introductory part of the
20 guidance document. And, again, that is not SUNSI
21 according to the staff's review.

22 JUDGE YOUNG: Put the -- oh.

23 JUDGE MIGNERAY: However, I understand
24 that the applicant's response will be very SUNSI-
25 related.

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1 MR. FRANTZ: That's correct. We do intend
2 to go into some details.

3 MR. EYE: Well, then, that part would be
4 properly closed. Again, I think there has to be a
5 differentiation between that which is properly open
6 and that which is not.

7 JUDGE MIGNEREY: I do not see how one
8 could have a meaningful exchange of information back
9 and forth between the different parties if one puts a
10 constraint that every time someone opens their mouth
11 we close or open the session. While I do understand
12 that full disclosure to the public is desirable, I
13 think we have a practical conundrum here if we do
14 that.

15 JUDGE YOUNG: Let me add to that. As the
16 staff argued, the harm to the public interest and
17 openness, if we go into closed session and allow for
18 a procedure for reexamining the transcript and either
19 issuing a redacted version or determining that some
20 portions of it are not SUNSI, the harm in that
21 instance would be the delay that it would take to get
22 the transcript and to look at it and to make any
23 changes that would put out as much as possible that
24 would be public, either in a redacted version or
25 otherwise.

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1 I mean, how significant of a harm is
2 there? And who -- do you have people here who have
3 not signed the non-disclosure agreement? I know in
4 the list of people that were coming that I saw Mr. --
5 representative or -- is he representative or --

6 MR. EYE: Representative Burnam.

7 JUDGE YOUNG: Is he a representative or
8 senator, state senator?

9 MR. EYE: He is a state representative,
10 Your Honor.

11 JUDGE YOUNG: Representative Burnam had
12 not previously filed a non-disclosure affidavit. He
13 did yesterday, and so he is able to stay in the room.
14 And I didn't see any other names on the list. Were
15 there other names added?

16 MR. EYE: Yes. Mr. Slocomb from Public
17 Citizen is here. He has not signed the non-disclosure
18 agreement. So he would be -- he would fall into that
19 category of somebody who is here for the public
20 hearing, but is not a signatory to the non-disclosure.

21 JUDGE YOUNG: Have you discussed the
22 possibility of his signing the non-disclosure
23 agreement?

24 MR. EYE: Yes.

25 JUDGE YOUNG: Okay. My second question

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1 is, and I may need to make reference here to Mr. Libby
2 and Mr. Bern Stapleton, having done a case involving
3 safeguards information, I think Mr. Lyman was involved
4 in that one, and I think Mr. Stapleton was involved in
5 that one. This idea of discussion of vulnerabilities
6 is something that was engraved in my brain back then
7 with regard to safeguards information.

8 And maybe I'm assuming too much, but I
9 have been looking at these contentions as assertions
10 of, if not vulnerabilities, insufficiencies in how the
11 applicant -- alleged insufficiencies in how the
12 applicant meets the requirements of 52.80(d) and
13 50.54(hh)(2).

14 And so I guess, let me just ask, under
15 SUNSI is there -- it would make sense that there would
16 be a similar concept. Is there a similar concept of
17 vulnerabilities or --

18 MR. LIBBY: There is a similar concept of
19 vulnerabilities and the use -- the ability to use that
20 information by terrorists at some point in the future.

21 JUDGE YOUNG: I think the rationale, as I
22 understand it, or at least as I understood it from a
23 previous experience, is that just as a potential
24 adversary could use specific information about what
25 the plans are and what the structure and layout and

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1 numbers of people, and so forth, just as that type of
2 information could be helpful, information about what
3 you don't have, what a plant does not have, would be
4 helpful, because then that potential adversary could
5 use that information about what is not there, say,
6 "Ah ha, they don't -- they haven't done this, so that
7 is a weakness that we can take advantage of."

8 And all your contentions are contentions
9 of that nature, alleging insufficiencies, which you
10 have every right to do. But do you see the point I'm
11 trying to make here?

12 MR. EYE: I do.

13 JUDGE YOUNG: How do you respond to it?
14 I guess is the question.

15 MR. EYE: Yes, sorry. I didn't mean to
16 interrupt you.

17 JUDGE YOUNG: That's all right.

18 MR. EYE: I do see your point. My
19 response would be that, as a general rule, I agree
20 with you. But on the specifics that we have raised,
21 I went back and tried to be as detached and objective
22 as I could about whether there is anything that we
23 argued that could be a material help to somebody who
24 wanted to do harm to a nuclear power plant that is
25 already well-known out in the public domain, if

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1 somebody really wanted to go out and find it, or have
2 a reference to other kinds of calamities that have had
3 to be dealt with in an emergency response context.

4 And as to the introductory information in
5 the guidance document in question, there is nothing in
6 that information that I believe, on an objective
7 basis, is going to be any assistance to somebody who
8 wants to commit a malicious act. Does it -- does that
9 particular information point out shortcomings and
10 vulnerabilities? It does.

11 Does that information point out things
12 that aren't already pretty well-known and understood,
13 either inside the rather insular nuclear community, if
14 you will, or outside of it? I think those are all
15 pretty well understood.

16 And so keeping them under wraps now is
17 really equivalent to trying to put the toothpaste back
18 in the tube, which is always hard to do and kind of
19 messy. So in reference to the particular section of
20 information that we are focused on primarily, I don't
21 believe that there is anything there that would -- at
22 least in my judgment -- and, again, I am the lawyer
23 here.

24 I don't profess to have the kind of
25 expertise that the staff witnesses do. But stepping

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1 back and asking myself, "Is there anything here that
2 could jeopardize the security of a nuclear plant?" the
3 answer I came up with was, uniformly, no.

4 You know, but, again, I am probably erring
5 on the side of openness here, but not entirely. We
6 want to see nuclear plants operated safely. We want
7 to make sure that nuclear plants are not going to be
8 easily attacked, and, if they are, that they are well
9 defended and that they deal with the virus explosions
10 in an effective way.

11 The last thing we want is to be the source
12 of anything that would assist in a contrary kind of
13 view than that. So I -- we have tried to be careful.
14 We have tried not to be cavalier about these -- about
15 the designations. And as was noted earlier, we don't
16 just say everything that is submitted ought to be
17 public. We do differentiate between some that ought
18 to be and some that ought not to be.

19 So I guess my response is, it needs to be
20 dealt with in a very specific, particular way,
21 depending upon the information that is at issue.

22 JUDGE YOUNG: All right. Unless there is
23 anything else right now, we will take all of your
24 arguments under advisement. And let's be prepared to
25 go either way when we come back, and we will let you

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1 know when we reconvene in about 15 minutes.

2 MR. EYE: Thank you.

3 JUDGE YOUNG: Let's take 10 minutes.

4 (Whereupon, the proceedings in the
5 foregoing matter went off the record at
6 10:35 a.m. and went back on the record at
7 10:49 a.m.)

8 JUDGE YOUNG: All right. While we
9 appreciate that the intervenors viewed their
10 contentions as not being SUNSI, and they are the
11 originator of that, they do make reference in there to
12 certain SUNSI documents, and you say that the only
13 references are to the non-SUNSI part of the NEI
14 guidance document.

15 The answers and arguments on the answers
16 will definitely get into SUNSI. We may have questions
17 for counsel all the way through, referring back and
18 forth to other documents. And we think it would just
19 be too unwieldy to separate out short parts of the
20 argument into SUNSI or not SUNSI.

21 So what we are going to do is go into
22 closed session in a couple of minutes. And after the
23 proceeding, once the transcript is available, we will
24 provide an opportunity for the parties to suggest that
25 portions of the transcript should be public, and we

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1 may ask for proposed redactions.

2 We will discuss that once the transcript
3 becomes available, so that anything that can be made
4 public will be made public. I think as I emphasized
5 before, we certainly feel very strongly that anything
6 that can be made public should be made public, and
7 that is a -- should not be taken -- anything that we
8 do here today should not be taken as any indication
9 that we do not view things that way, because we
10 certainly do, and I have long been an advocate of
11 that.

12 So, but we -- for the reasons we stated,
13 we are going to go into closed session at this point.
14 So would each party designate which people should
15 stay, and which people should not? And, let's see,
16 maybe a good way to do that would be to have -- why
17 don't we have everybody in the audience stand? And
18 then, if the staff could go around and tell all of the
19 people in your group that should stay to sit down.

20 MS. VRAHORETIS: John Fringer, you can
21 stay. Lynn Mrowca, Steve Monarque, Hossein Hamzehee,
22 Marian Zobler, Michael Spencer, Jessica Bielecki. Is
23 there anyone else that I can't see around the -- Mark
24 Caruso.

25 JUDGE YOUNG: Okay. Applicant, could you

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1 do the same?

2 MR. FRANTZ: Yes. Bobby Bird, Don
3 Woodlan, Bob Reible, Bill Moore, Jeff Simmons, Joe
4 Tapia, Steve Burdick, and Al Gutterman, but I don't
5 see Al right here. Okay. He's in the other room.

6 JUDGE YOUNG: Okay. And intervenor?

7 MR. EYE: Thank you. Dr. Lyman and
8 Representative Burnam should stay. Mr. Slocomb should
9 go.

10 JUDGE YOUNG: Mr. Slocomb, we are sorry to
11 send you out. We really are. But you are free to
12 sign a non-disclosure agreement, but under -- for the
13 reasons we have stated, we are going to have to ask
14 you to sit outside. I think there are chairs out
15 there if you want to stay. I don't know how much
16 more --

17 MR. SLOCOMB: That's fine. I appreciate
18 very much your consideration.

19 JUDGE YOUNG: Okay. If you need --

20 MR. SLOCOMB: Thank you.

21 JUDGE YOUNG: If you need to leave, you
22 will need to get an escort to go anywhere other than
23 just outside.

24 MR. SLOCOMB: Thank you so much.

25 JUDGE YOUNG: Thank you.

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1 MR. EYE: Your Honor, just to make sure
2 that I protect the record with a contemporaneous
3 objection, we do object to the Panel's ruling on
4 closing the hearing at this point.

5 (Whereupon, at 10:54 a.m., the proceedings
6 went into Proprietary Session to resume in Open
7 Session at 4:55 p.m.)

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(4:55 p.m.)

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3 JUDGE YOUNG: I don't think there is much
4 remaining to discuss. Thank you for coming here.

5 MS. VRAHORETIS: Your Honor, we have two
6 things.

7 JUDGE YOUNG: Okay, before we get to
8 those, I was going to say, except for your deadline,
9 Mr. Eye, for submitting any case law in which specific
10 regulations or statutes have been construed to include
11 additional specific requirements that are not in the
12 statute or rules itself. And then - you are going to
13 do that by next Friday, which would be --

14 MR. EYE: The 20th, I think.

15 JUDGE YOUNG: The 20th, right. And does
16 the staff or applicant want to respond on that?

17 MS. VRAHORETIS: We were going to ask if
18 we could have an opportunity to respond.

19 JUDGE YOUNG: Yes, definitely if you want
20 to. So the week after that? Actually a week after
21 that is the day after Thanksgiving, right?

22 MS. VRAHORETIS: Yes.

23 JUDGE YOUNG: So do you want to do it the
24 day before Thanksgiving?

25 MR. FRANTZ: Or perhaps if we could do it

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1 the Monday following Thanksgiving?

2 JUDGE YOUNG: If there is no objection
3 that will be fine.

4 MS. VRAHORETIS: And the other thing,
5 Your Honor, is that we on behalf of the staff would
6 like to ask clarification of one provision of the
7 scheduling order of October 28th, 2009. Particularly
8 on page four, section Roman numeral two, capital V -
9 I can just state that it's the provision regarding -
10 in the scheduling order requiring daily updates to the
11 hearing file during the ongoing hearing. And we just
12 wanted to ask, would we be permitted to physically
13 hand any new information to the parties and then file
14 something later, or are you going to require a daily
15 filing during the hearing to note that there is no new
16 information?

17 JUDGE YOUNG: No, no, I think you can
18 just notify the parties. The main reason for that is
19 actually to address disclosure. If you learn of
20 anything during the hearing that you realize is
21 something that you should have disclosed earlier you
22 would have a continuing obligation to provide that
23 while we're in the hearing. It wouldn't be very
24 meaningful if you waited a week, so we are going to
25 require that on a daily basis.

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1 But no, you don't need to be filing things
2 everyday. If you have anything to disclose then you
3 can provide it to the parties and to us, and then file
4 it as soon as reasonably possible given the hearing
5 schedule.

6 And if it's just simply a matter of saying
7 we don't have anything additional, you can just do
8 that verbally, and if you want to supplement that with
9 a written filing at the close of the hearing that's
10 fine. It's just mainly so that all parties can keep
11 each other aware of anything that you may become aware
12 of or realize that you should have disclosed and that
13 everything is out on the table during the hearing.

14 MS. VRAHORETIS: Thank you.

15 JUDGE YOUNG: Is there anything else that
16 any party would like to provide to us after this
17 session that we have not addressed? Is there anything
18 else that we need to address before we close today?

19 MR. FRANTZ: The applicant has nothing.

20 MR. EYE: Nothing on behalf of the
21 intervenor, thank you.

22 MS. VRAHORETIS: Nothing else, Your
23 Honor, thank you.

24 JUDGE YOUNG: Well, thank you all. I
25 think we have closed almost on the dot of 5:00, which

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1 I promised our technical person. We didn't do it for
2 that reason, but I'm sure he'll appreciate it.

3 And again we appreciate your - especially
4 those of you who came from a long distance coming here
5 to the D.C. area to be with us.

6 And once we receive your filings we will
7 be issuing rulings on these as soon as possible, and
8 if anything else arises that would require a telephone
9 conference, any party of course is free to request
10 that.

11 Okay, thank you, that will close this
12 proceeding.

13 (Whereupon at 5:00 p.m. the proceeding in
14 the above-entitled matter was adjourned)

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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Luminant Generation Company
 Comanche Peak Nuclear Plant.

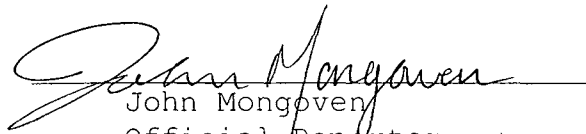
Name of Proceeding: Hearing-Open Session

Docket Number: 52-034-COL and 52-035-COL

 ASLBP No. 09-886-09-COL-BD01

Location: Rockville, Maryland

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.


John Mongoven
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