

November 30, 2009

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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
Luminant Generation Co. LLC
(Comanche Peak Nuclear Power Plant, Units 3 and 4)
Docket Nos. 52-034 & 52-035

Dear Administrative Judges:

During the November 12, 2009, oral argument on contention admissibility in this proceeding, the Licensing Board directed counsel for the Intervenors to submit, by November 20, "any case law in which specific regulations or statutes have been construed to include additional specific requirements that are not in the statute or rules itself." Transcript of November 12, 2009 Oral Argument, at 717. The Licensing Board directed Luminant Generation Co. LLC (Applicant) and the United States Nuclear Regulatory Commission staff (NRC Staff) to respond to the Intervenors' submission by November 30, 2009.¹ Accordingly, the NRC Staff hereby responds to the Intervenors' November 20, 2009 letter to the Licensing Board.

Intervenors argue that the Applicant has not complied with 10 C.F.R. § 50.54(hh)(2) and 10 C.F.R. § 52.80(d) because the Applicant did not describe and address its Mitigative Strategies Report the full spectrum of damage states to which the proposed mitigative strategies are to apply, or demonstrate that those strategies would be effective in the full spectrum of damage states. Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. §

¹ The Applicant submitted its response to the Intervenors' Letter on November 27, 2009. See Letter dated November 27, 2009, from Jonathan M. Rund, Counsel for the Applicant, to the Members of the Licensing Board,

52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing, filed August 10, 2009 (Intervenors' Mitigative Strategies Contentions), p. 1. Intervenors also argue that, at a minimum, the Applicant should be required to describe the damage footprints that are reasonably expected to result from impact by a commercial airliner. Intervenors' Mitigative Strategies Contentions, p. 3. Notwithstanding the fact that the regulation does not include language that explicitly requires a combined license (COL) applicant to demonstrate the effectiveness of its proposed mitigative strategies, the Intervenors argue that "10 C.F.R. § 50.54(hh)(2) may be construed to infer that there is a requirement for the mitigative strategies in question to be demonstrably effective." Letter from Robert V. Eye, Counsel for the Intervenors, to the Licensing Board, dated November 20, 2009 (Intervenors' Letter), p. 1. Intervenors base this argument on the Statement of Considerations for the Power Reactor Security Rule, and in support of this assertion, cite a portion of the Statement of Considerations for that rule: "Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigative measures for large fires and explosions...." Intervenors' Letter, p. 1, ¶ 1, *citing* Power Reactor Security Requirements; Final Rule, 74 Fed. Reg. 13,926, 13,958 (March 27, 2009).²

Neither the NRC Staff nor the Applicant argues, however, that there is no requirement that the mitigative strategies employed by the Applicant be effective. The issue here is that the Intervenors seek to substitute their definition of effectiveness, which focuses on damage states, for the Commission's determination of effectiveness.

The NRC's regulations should be construed to effectuate the Commission's intent, which may be found in the language used, the overall purpose of the regulation, and the practical effect of possible interpretations of the regulation. *Hydro Resources* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-11, 63 NRC 483, 491 (2006). The Statement of Considerations, which explains the Commission's basis for and interpretation of regulatory language and is issued contemporaneously with the regulation, provides useful guidance, which is entitled to "special weight," on the proper application of the requirements. *Connecticut Yankee Atomic Power Company* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47 (2001) (*citing Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91, *review declined*, CLI-88-11, 28 NRC 603 (1988)).

Rather than focus on what is potentially lost in a beyond-design basis event, the Commission has required COL applicants to submit a description and plan for the implementation of the guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling. 74 Fed. Reg. at 13,958. After careful consideration,

² In quoting the Statement of Considerations for the Power Reactor Security Rule, the Intervenors omitted a portion of the quoted sentence. The complete sentence reads: "Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigative measures for large fires and explosions including (but not limited to) those caused by the impacts of large commercial aircraft."

the Commission decided to focus on the restoration capabilities needed to mitigate the effects of beyond-design basis events from a variety of causes. 74 Fed. Reg. at 13,933.

The citations the Intervenors provide do not support the assertion that specific words or phrases should be inserted into the regulations or that the regulations should be interpreted inconsistently with the Commission's expressed intent. The Intervenors argue that the regulations should focus on a full spectrum of damage states, but the Commission rejected a similar suggestion prior to implementing the final Power Reactor Security Requirements rule.

In response to the proposed rulemaking, a commenter objected that the proposed rule, specifically in Part 73, Appendix C, did not specify what types of fires or explosions the licensee must prepare for, or the areas of the plant considered particularly susceptible to damage or destruction by fire or explosion. Power Reactor Security Requirements; Supplemental Proposed Rule, 73 Fed. Reg. 19,443, 19,445 (April 10, 2008). The commenter recommended that the final rule contain provisions addressing the effects of jet fuel fires on vital areas of the plant, such as the containment dome, spent fuel pool building, and control room building, and that the licensee be required to harden these buildings to withstand aircraft impacts and significant airliner debris. *Id.* The Commission did not agree, and stated that it did not intend to limit beyond-design basis scenarios to aircraft attacks. *Id.* Instead, the Commission called for the development of mitigation measures that would generally deal with any situation in which large areas of the plant were lost due to fires or explosions, whatever the beyond-design basis initiator. *Id.* The Commission stated that it did not believe it was necessary or even practical to specify the types of fires or explosions a licensee must prepare for, or to identify the specific areas of a plant that are considered particularly susceptible to damage or destruction by fire or explosion. *Id.*

In promulgating the final Power Reactor Security Requirements rule, the Commission focused on performance-based criteria, not definitions of beyond-design basis events. 73 Fed. Reg. at 19,445. The final rule contemplates a changing threat environment, 74 Fed. Reg. at 13,926, and therefore places great value on the flexibility, diversity, redundancy, and multiplicity of mitigative strategies. The Commission agreed with one commenter, that putting specific details regarding mitigative strategies into security contingency response plans actually limits the effectiveness of licensee strategies for dealing with unpredictable plant events. 73 Fed. Reg. at 19,445. The Commission considered including enumerated strategies in 10 C.F.R. § 50.54(hh)(2), but then decided that the more general performance-based language would better account for future reactor designs that might contain features that preclude the need for some of the strategies. 73 Fed. Reg. at 19,447.

For the same reasons, the Commission declined to define the particular types of accidents to which the NRC's emergency planning regulations apply under 10 C.F.R. § 50.47. The Commission has held that while "[p]lanning for emergencies is required as a prudent risk reduction measure... [s]ince a range of accidents with widely differing offsite consequences can be postulated, the regulation does not depend on the assumption that a particular type of accident may or will occur." *Southern California Edison Company, et al.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983) (*citing* NUREG-0654/FEMA-REP-1, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980)).

Regarding the interpretation of emergency planning regulations, the Commission stated that “no specific accident sequences should be specified because each accident could have different consequences both in nature and degree.” *Id.* Although the Commission considered specific accident sequences as well as a number of accident descriptions in order to develop its regulations for emergency planning, the emergency planning basis was determined to be independent from the specific accidents, themselves. *Id.*

There is no legal support for the Intervenor’s assertion that the regulations contain a requirement that the full spectrum of damage states must be identified or addressed in order for mitigative strategies to be effective or a COL applicant to be found to be compliant with 10 C.F.R. § 50.54(hh)(2). In addressing similar arguments regarding emergency planning regulations, the Commission held that the emphasis should be on prudent risk reduction measures, and that “[t]he regulation does not require dedication of resources to handle every possible accident that can be imagined.” *San Onofre*, CLI-83-10, 17 NRC at 533. The Commission’s focus in implementing its regulations is that there should be core planning with sufficient planning flexibility to develop a reasonable response to those very serious low probability accidents which could affect the public. *Id.*

The Intervenor’s interpretation of the regulations is not supported by Commission case law or the Statement of Considerations for the rule. The Commission has endorsed NEI-06-12, Rev. 2, by letter dated December 22, 2006, as an acceptable method for current reactor licensees to comply with the mitigative strategies requirement. 74 Fed. Reg. at 13,958. While NEI-06-12 is guidance and is not a regulatory requirement, it is guidance that has been endorsed by the Commission and is therefore entitled to special weight. *Shoreham*, ALAB-900, 28 NRC at 290 (*citing Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 711 & n. 40 (1985)). New reactor licensees are required to employ the same strategies as current reactor licensees to address core cooling, spent fuel pool cooling, and containment integrity. 74 Fed. Reg. at 13,957. The Commission determined that the best way to accomplish this was to require mitigative strategies as an operational program, for which a description of the program is provided as part of the COL application, and the details are inspected later. 74 Fed. Reg. at 13,955.

None of the cases the Intervenor’s cite support their argument that in order for mitigative strategies to be effective, they must identify and address the full spectrum of damage states. The Commission did not find it necessary or practical to specify the types of fires or explosions a licensee must prepare for, or to identify the specific areas of the plant that are considered particularly susceptible to damage or destruction by fire or explosion, and expressly declined to include these items as requirements in the final rule. 73 Fed. Reg. at 19,445. The Intervenor’s contentions, which focus on damage states and specifics the Commission expressly declined to

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Judge Arnold
Judge Mignerey

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include in the final Power Reactor Security Requirements rule, are not supported by the regulations, the Statement of Considerations, or Commission case law, and should be denied.

Sincerely,

/Signed Electronically By/

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of a letter from Susan Vrahoretis, counsel for the NRC Staff, dated November 30, 2009, to the Members of the Licensing Board was served on the following persons by Electronic Information Exchange on this 30th day of November, 2009:

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Dated at Rockville, Maryland
this 30th day of November, 2009