UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
Luminant Generation Company, LLC **Docket Nos. 52-034 and 52-035**
Comanche Peak Nuclear Power Plant
Units 3 and 4
Combined License Adjudication

INTERVENORS' CONSOLIDATED RESPONSE TO NRC STAFF'S AND APPLICANT'S ANSWERS TO ALTERNATIVES CONTENTIONS

Introduction

Intervenors offer the following Consolidated Response to the Staff's and Applicant's Answers to the modified and new alternatives contentions,[1] derived from the Applicant's revisions to its Environmental Report section 9.2.2.11 et seq.[2]

The modified and new contentions are consistent with 10 CFR 2.309(f)(1)(iii)(iv)(v) because they raise issues related to alternatives to the proposed action[3], bear on issues to be decided in this proceeding,[4] and are supported by facts and/or expert opinions.[5,6]

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[1] Intervenors' Contentions Regarding Applicant's Revisions to Environmental Report Concerning Alternatives to Nuclear Power, January 15, 2010 (Alternatives Contentions)
[2] December 8, 2009 Luminant Letter to Board, with ER Revisions Attachment. (ER Revisions)
[3] Consideration of alternatives is required under the National Environmental Policy Act, 42 USC 4332, *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)
[4] The decision to issue a license must be consistent with the public interest, 42 USC 2133(d), and be the product of a "hard look" at alternatives to the proposed action. 42 USC 4332, *Robertson,* 432 U.S. at 350.
[5] Intervenors reference herein expert reports from Drs. Dean and Makhijani and Mr. Paul Robbins. Moreover, Intervenors cite to the U.S. Department of Energy National Renewable Energy Laboratory in support of Contention Alt-4 that wind combined with storage is a feasible and nonspeculative alternative.
[6] Intervenors recognize that the proposed revised contention 18 and the contentions Alt-1-Alt-6 were not filed with a motion specified in the October 26, 2009, Scheduling Order, at Sec. D.1.2. This was due to the oversight of undersigned counsel. In this response Intervenors address the timeliness provisions of section D.1,2 of the Scheduling Order and request that such be considered in lieu of the motion required under section D.1. Undersigned counsel will endeavor to follow the provisions of the Scheduling Order in future proceedings.

The revisions were prepared by the Applicant to address Intervenors' Contention 18 admitted by the Board August 6, 2009.

> The Comanche Peak Environmental Report is inadequate because it fails to include consideration of alternatives to the proposed Comanche Peak Units 3 and 4, consisting of combinations of renewable energy sources such as wind and solar power, with technological advances in storage methods and supplemental use of natural gas, to create baseload power.[7]

NEPA's rule of reason does not require discussion of every conceivable alternative.[8] Intervenors' modified and new contentions address alternatives the Board articulated in Contention 18 and logical extensions thereof. Neither Staff nor Applicant argues that the Board's admitted Contention is an unreasonable set of alternatives.[9]

Alt-1[10]

Intervenors argue in Contention Alt-1 that "[t]he Applicant overstates and mischaracterizes, without substantiation, the impacts of wind power generation and CAES."[11] Part A of the contention states that the "Applicant substantially overstates wind power and CAES land use impacts."[12]

The part of Contention Alt-1 related to wind power land use is not untimely.[13] Intervenors are challenging the Applicant's characterization of the land use impacts for the combination of wind power and CAES, which was not available until Applicant filed its ER Revisions. Additionally, contentions that raise issues based on this omission should be considered timely even if some of the relevant information had been previously available. This Panel has the discretion to accept nontimely contentions under section 2.309(c)(1) upon a showing of "good cause" for failure to file such in a timely manner and a weighing of

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[7] ASLB "MEMORANDUM and ORDER (Ruling on Standing and Contentions of Petitioners, and Other Pending Matters)," August 6, 2009. Docket Nos. 52-034-COL and 52-035-COL, ASLBP No. 09-886-09-COL-BD01. p. 82
[8] Staff Answer, pp. 11, 14, 24, 28
[9] Nor did Staff or Applicant appeal Contention 18, as admitted.
[10] The Intervenors refer to these contentions as Alt-1 – Alt-6 in order to distinguish these contentions from previously filed contentions.
[11] Alternatives Contentions, p. 3
[12] Id.
[13] Applicant Answer, pp. 8-9; Staff considers Alt-1 – Alt-4 to be timely, Staff Answer, p. 3

a number of factors.[14] When new contentions are based on "breaking developments of information, they are to be treated as 'new or amended,' not as 'nontimely.'"[15] Here, the submittal of Applicant's ER Revisions is new information upon which the contention is based. The contention should, therefore be considered timely.

Applicant argues that Intervenors attempt to "flyspeck" Luminant's use of the word cover.[16] Intervenors are raising a genuine dispute on a material fact in questioning the Applicant's substantial overstatement of the amount of land required for CAES. This overstatement distorts the environmental impacts of CAES and in turn, unfairly favors nuclear generation. It is not "flyspecking" to point out this distortion because it frustrates a fair comparison of alternatives.[17]

Staff argues that Intervenors make "no attempt to identify or describe the current types of land use at the site" and "have not addressed potential disturbance to other land uses beyond the proposed site"[18] This argument overlooks the fact that this is an omission contention. Applicant has omitted a discussion of impacts based on an accurate land use projection. Moreover, it is the Applicant's duty to evaluate environmental impacts of alternatives in its ER and for the NRC to do so in the EIS.[19]

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[14] 10 C.F.R. §2.309(c)(1)(ii)-(viii)
[15] *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility). LBP-07-14. 66 NRC 169, 210 n.95 (2007)
[16] Applicant Answer, p. 11
[17] An accurate assessment of the impacts is necessary to achieve NEPA's purpose of consideration of whether environmentally preferable alternatives to the Applicant's proposed nuclear plants exist. A faulty assessment does not allow a proper comparison. *In the Matter of Consumers Power Company* (Midland Plant, Units 1 and 2), 7 N.R.C. 155, 162 (1978).
[18] Staff Answer, pp. 13-14
[19] "NRC and CEQ regulations and federal case law agree that the alternatives analysis is "the heart of the environmental impact statement." 10 C.F.R. Part 51, App. A, § 5; 40 C.F.R. § 1502.14. NRC regulations specify that the EIS must include an analysis of "alternatives available for reducing or avoiding adverse environmental effects." 10 C.F.R. § 51.71(d) (Draft EIS). *See also* 10 C.F.R. § 51.91 (Final EIS). "All reasonable alternatives will be identified and the range of alternatives discussed will encompass those proposed to be considered by the ultimate decisionmaker." 10 C.F.R. Part 51, Subpart A, App. A, § 5. With regard to ESP applications, the EIS "must include an evaluation of alternative sites to determine whether there is any obviously superior alternative to the site proposed." 10 C.F.R. § 52.18. *In the Matter of Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site) 65 N.R.C. 539, 607.

Staff argues that under NEPA's rule of reason not every conceivable alternative requires discussion.[20] However, in this contention Intervenors address alternatives the Board articulated in Contention 18, and no party argues that the Board's admitted Contention 18 is an unreasonable set of alternatives.

Staff also states, "Intervenors have failed to establish that NEPA requires the Applicants to provide an analysis beyond a brief discussion of why certain alternatives – such as wind power generation and CAES – were eliminated from consideration."[21] NEPA requires "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned."[22] The brief discussion is not the "hard look" required by NEPA and omits key information about the alternatives.[23]

Part B of the contention states that the "Applicant does not consider the benefits of using CAES in Texas."[24] The advantages for CAES offered by the geology and abundant wind capacity in Texas are not disputed by Applicant or Staff.

Staff argues that the Dean Report does not support Intervenors argument that the Applicant "mischaracterizes" the impacts of wind/CAES, and does not controvert information in ER Revisions.[25] The Dean Report questions the Applicant's assumptions and reliance on Iowa's CAES experience.[26] The Applicant's failure to consider the benefits of using CAES in Texas over Iowa's experiences constitutes an omission of material information and a mischaracterization of how CAES would work in Texas. Applicant argues it did not reject the wind/CAES combination based on geological factors, but rather because the "economics and feasibilities of such a system in Texas are speculative."[27] But the expert

[20] Staff Answer, p. 14
[21] Staff Answer, p. 14
[22] *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).
[23] NEPA imposes procedural requirements that mandate a "hard look" at the environmental impacts of a proposed action and reasonable alternatives thereto. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998).
[24] Alternatives Contentions, p. 4
[25] Staff Answer, pp. 15-16
[26] Dean Report, pp. 2-4
[27] Applicant Answer, p. 12

reports[28] in support of the Intervenors' contentions show that the alternatives are feasible and not speculative.[29]

Alt-2

Intervenors argue in Contention Alt-2 that "[t]he Applicant inadequately characterizes, without substantiation, the impacts of solar with storage."[30]

Staff states that the "Intervenors correctly point out that the Applicant's analysis in the ER is an economic – not socioeconomic – analysis. However, the Applicant dismissed solar power generation with storage after determining that it was not a viable solution."[31] Because of this flawed analysis Applicant's assertion that solar with storage has large impacts inappropriately weighted the economic parameter at the expense of the more complete socioeconomic analysis. Intervenors and their experts contend that solar with storage is feasible and nonspeculative and as such requires that the socioeconomic analysis be completed by Applicant.

The Staff argues that the NEPA rule of reason excuses Applicant's omission of a complete analysis of the solar with storage alternative because it is "uncommon" and "unknown".[32] Based on the Intervenors' expert reports this alternative is neither "uncommon" nor "unknown."[33] Staff's conclusion

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[28] Dr. Makhijani stated "there is considerable experience" with CAES systems and "there is no material difference between using coal-fired electricity to drive the air compressor and using wind-generated electricity to do so….To say that wind plus CAES is not a feasible technology for meeting baseload is like saying that operating a refrigerator on wind-generated electricity is not feasible." Makhijani Report, pp. 1-2
In addition to Dr. Dean's description of how CAES in Texas would be easier to develop than in Iowa, Dr. Dean stated, "there are several decades of experience using CAES to absorb power from the grid when customer demand is weak and supply power to the grid when customer demand is strong. This is not significantly different from using CAES to absorb power from the grid when wind power is strong and supply power to the grid when wind power is weak." Dean Report, pp. 2-4
Mr. Robbins similarly states, "CAES using conventional power has been built…successfully operated for many years, and there is "nothing preventing CAES from being used with wind power." Robbins Report, p. 1

[29] NEPA requires consideration of reasonable alternatives, i.e., those that are feasible and nonspeculative. *City of Carmel-by-the-Sea v. Department of Transportation,* 123 F.3d 1142, 1155 (9th Cir. 1997); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 65 (1991).

[30] Alternatives Contentions, p. 5

[31] Staff Answer, p. 17

[32] Id.

[33] Makhijani Report, pp. 2-3; Robbins Report, p. 7

that Applicant was not required to provide a discussion of socioeconomic impacts under NEPA ignores the findings of the Intervenors' experts that establish the solar with storage is feasible and nonspeculative. As such, a comprehensive analysis under NEPA is required. Additionally, the Board's admitted Contention 18 expressly calls for this alternative to be considered.

Alt-3

Intervenors argue in Contention Alt-3 that the "Applicant's determination that nuclear is environmentally preferable to renewable energy with storage, supplemented by natural gas, is based on fundamentally flawed assumptions about the nature and extent of environmental impacts related thereto."[34]

This contention relates to Section 9.2.2.11.4.1 of the Applicant's ER Revisions,[35] and part A of the contention argues that the Applicant overstates the environmental impacts of the combination put forth in this section, "[b]y asserting that each technology needs to be capable of generating 3200 MW 'individually'" and considering the impacts of the technologies cumulatively.[36] Staff sidesteps Intervenors argument related to this specific combination, by stating that "the Applicant did not limit its analysis" and that Section 9.2.2.11.4.2 includes amount "*up to* 3200 MW renewable power" and "*up to* 3200 MW of storage."[37] However, Intervenors' contention relates to the Applicant's exaggeration of environmental impacts of the combination of renewable energy with storage, supplemented by natural gas, not the combination of natural gas supplemented by renewable energy with storage.[38]

[34] Alternatives Contentions, p. 8
[35] "Renewable Energy Sources Combined with Storage and Supplemented by Natural Gas Power Generation." ER Revisions, p. 9.2-45
[36] Alternatives Contentions, pp. 8-9
[37] Staff Answer, p. 20 referring to Section 9.2.2.11.4.2 in ER Revision entitled "Natural Gas Power Generation Supplemented by Renewable Energy Sources Combined with Storage." P. 9.2-47
[38] Staff's argument does raise the question, why is the supplemental energy source "3200 MW or lesser capacity" in one combination but not for the other?

Part C of the Contention argues that "[t]he Applicant did not consider wind ***and*** solar energy combined."[39] Applicant claims "the Intervenors' argument that wind and solar should have been considered in combination with each other is untimely and beyond the scope of the original Contention 18 as restated and admitted by the Board."[40] Contention 18, as admitted by the Board, states that the Comanche Peak ER is "inadequate because it fails to include consideration of alternatives… consisting of ***combinations*** of renewable energy sources such as wind ***and*** solar power."[41] For the Applicant to assert that the Board was saying the ER failed to consider either wind or solar but not both combined is contradicted by the contention itself.[42] Applicant's refusal to consider wind and solar in tandem is a material omission.

Applicant also argues that Dr. Dean's report is inadequate support for the contention.[43] However, neither Applicant nor Staff suggest that the combination of wind and solar is speculative and/or infeasible. And Dr. Dean's analysis supports that such a combination for baseload is feasible and not speculative. Accordingly, it should be considered as a viable alternative.

Applicant asserts that the Intervenors argument is not material since wind and solar have been considered individually, and because the "Intervenors present no reason to believe that a combined wind and solar generation facility would not have LARGE impacts on land use…"[44] This overlooks Intervenors' arguments that wind and solar impacts have been exaggerated by the Applicant.[45]

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[39] Alternatives Contentions, p. 10. Part C is similar to amended Contention 1 in "Intervenors' Response Opposing Applicant's Motion to Dismiss Contention 18 as Moot." January 4, 2010, pp. 3, 8.
[40] Applicant Answer, p. 22
[41] ASLB Order August 6, 2009. p. 82, emphasis added.
[42] Notwithstanding the clearly stated intent of the Panel in adopting Contention 18 that wind and solar be considered in combination, the Applicant has resisted this directive. Applicant states it should not have to do so because Intervenors did not specify this contention in their Petition for Intervention. The original Contention 18 pointed out the Applicant's lack of discussion about alternatives. This Panel considered the matter and admitted Contention 18 in a version that it determined appropriate. No party appealed the Contention 18, as admitted. Hence, whether the original Contention 18 called out the wind and solar combination is not relevant because Contention 18, as admitted, does. And neither Staff nor Applicant can say otherwise.
[43] Applicant Answer, p.23.
[44] Applicant Answer, pp. 23-24
[45] See Intervenors Alt-1 and Alt-2 Contentions, pp. 3-8

Alt-4

Intervenors' Contention Alt-4 is based on the United States Department of Energy National Renewable Energy Laboratory (NREL) findings that "Wind energy systems that combine wind turbine generation with energy storage and long-distance transmission may overcome these obstacles and provide a source of power that is functionally equivalent to a conventional baseload electric power plant.[46]

Neither the Staff nor Applicant offer any proof that the NREL finding is inaccurate. Staff's observation that the reference to the NREL study "simply contradict[s]" assertions in ER section 9.2.211.3 implies that the NREL analysis determined that this alternative is speculative and not feasible. While the NREL study acknowledges that this alternative requires additional development there is no indication that it is a speculative and infeasible alternative. Accordingly, its analysis by the Applicant as an alternative is required.[47]

Alt-5

Intervenors argue in Contention Alt-5 that "[i]n evaluating alternatives, the Applicant has not taken into account new ERCOT demand data and the positive impacts of modular additions of renewable/storage combinations in meeting a declining and uncertain demand."[48]

Staff and Applicant argue this is not a timely contention.[49] However, because the contention is based on the Applicant's ER Revisions it constitutes new information.[50] The Applicant's failure to discuss the ERCOT demand data and a modular approach to generation capacity additions in its ER Revisions are material omissions in the context of alternatives to the proposed action.

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[46] Alternatives Contentions, p. 11
[47] *City of Carmel-by-the-Sea v. Department of Transportation,* 123 F.3d 1142, 1155 (9th Cir. 1997); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 65 (1991).
[48] Alternatives Contentions, p. 13
[49] Staff Answer, p. 29; Applicant Answer, pp. 26-27
[50] *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility). LBP-07-14. 66 NRC 169, 210 n.95 (2007)

This contention is not an attack on the Applicant's need for power conclusion. The contention argues that the rate of growth in demand is declining and that a one-time addition of 3200 MW is likely to greatly exceed demand.[51] It may be the case that Applicant needs 3200 MW of additional capacity.[52] But the Applicant's assumption that 3200 MW will be needed when Units 3 & 4 are expected to be placed into service is unsubstantiated. In the context of this contention, this is a crucial distinction because a modular approach is a feasible and nonspeculative alternative to the addition of 3200 MW of nuclear capacity. And neither Staff nor Applicant say otherwise. The alternative of a modular approach is not speculative and infeasible and should be included in the Applicant's ER.[53]

The Staff cites *In the Matter of South Carolina Electric and Gas Co. and South Carolina Public Service Authority* (Also Referred to as Santee Cooper) for the idea that the modular approach advocated in this contention was rejected by the Commission.[54] But the Commission did not rule that a discussion of modular additions was unreasonable or beyond the scope of the proceeding. The basis of the ruling was that the Applicant in Santee Cooper had actually discussed a modular approach to capacity additions and the petitioners had not taken issue with that discussion.[55] The Commission did not rule that consideration of the modular approach was beyond the NEPA rule of reason.[56] Moreover, while not binding on the Panel, the fact that the applicant in Santee Cooper considered modular additions a sufficiently reasonable alternative to include such in its COL application, lends support to Intervenors' similar argument in the *instant* matter.

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[51] Alternatives Contentions, pp. 13-14

[52] The case for this magnitude of a one-time addition of base-load capacity is called into doubt by, *inter alia*, the observations of FERC Chair. (See http://www.nytimes.com/gwire/2009/04/22/22greenwire-no-need-to-build-new-us-coal-or-nuclear-plants-10630.html) However, for the limited purposes of this contention, Intervenors contest only that the rate of growth of demand is overstated rather than the ultimate amount of capacity Applicant projects will be required to meet demand.

[53] *City of Carmel-by-the-Sea v. Department of Transportation,* 123 F.3d 1142, 1155 (9th Cir. 1997); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 65 (1991).

[54] Staff Response, p35. (Virgil C. Summer Nuclear Station, Units 2 and 3), 2010 WL 87736 (N.R.C. Jan 07, 2010) (NO. 52-027-COL, 52-028-COL, CLI-10-01)

[55] *Santee*, Slip op. p. 13.

[56] Id.

Applicant in the instant matter has omitted altogether any discussion that a modular approach to capacity additions is a reasonable alternative to a one-time addition of 3200 MW. The Commission decision in *Santee* did not suggest such a discussion was not germane in the context of alternatives. And the applicant in *Santee* evidently found it sufficiently feasible and nonspeculative to justify its inclusion in a discussion of alternatives.

Alt-6

Intervenors argue in Contention Alt-6 that the "Applicant does not meet Criterion 1: Developed, proven, and available in the relevant region ERCOT.[57]

The Applicant and Staff both argue that this contention is untimely and does not raise a genuine dispute of material fact.[58] Staff argues that the Intervenors have raised this issue previously, which was dismissed by the Commission and the Board.[59] Staff further argues that the Intervenors do not "demonstrate that the general objections raised to the US-APWR are within the scope of the COL proceeding."[60] Intervenors argument is timely and different from previous issues raised by the Intervenors, because the Applicant is judging and dismissing energy alternatives with storage, not previously considered, based on a criterion which the planned CPNPP Units do not meet.[61]

The Applicant argues that "[t]he Intervenors provide no technical analysis that suggests that any of the parameters or systems described in the US-APWR DCD present any safety or environmental problems that might somehow limit the deployment of this technology."[62] Showing factors that would limit the deployment of a technology is a much lower threshold than the Criterion 1 Applicant has rigorously applied to renewable/storage. In the Applicant's ER Revisions, renewable energy with storage

[57] Alternatives Contentions, p. 14
[58] Applicant Answer, pp. 28-29, Staff Answer, pp. 36, 38
[59] Staff Answer, pp. 37-38
[60] Staff Answer, p. 38
[61] If this evaluation of alternatives to nuclear power is within the scope of the proceeding, how is a comparable evaluation for the Units 3 & 4 not within the scope?
[62] Applicant Answer, p. 29

is held to a much higher standard than the US-APWR design. The APWR is a variant of PWR technology but that does not alter the fact that it has yet to be developed or deployed. This is not a contention over the Applicant's selection of its untested design. The contention attacks Applicant's technique of analysis for excluding alternatives that are at least as feasible and nonspeculative as the US-APWR design.

Both Applicant and Staff also argue that the APWR design is proven and based on prior PWR technology.[63] The differences between the PWR and APWR are sufficient that a new reactor design rulemaking is required. Accepting Staff's and Applicant's arguments would render the rulemaking for the US-APWR superfluous.

Staff argues that this contention is an impermissible challenge on a NRC regulation.[64] However, this argument misses the point of the contention. The Applicant selectively applies its criteria to alternative generation technologies and conveniently allows its preferred alternative to be judged under different standards.

Conclusion

For the above reasons and based on the arguments and authorities in the new contentions, Intervenors urge that Contention 18, in its admitted form and as modified, and Contentions Alt-1 – Alt-6 advance for adjudication and that a hearing pursuant to 10 C.F.R. Part 2, Subpart L be ordered for these contentions.

[63] Staff Answer, p. 40; Applicant Answer, pp. 29-30.
[64] Staff Answer, p. 37

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010 a copy of "Intervenors' Consolidated Response to NRC Staff's and Applicant's Answers to Alternatives Contentions" was served by the Electronic Information Exchange on the following recipients:

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