

**PUBLIC REDACTED VERSION**

LBP-10-05

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

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

<p>In the Matter of</p> <p>LUMINANT GENERATION COMPANY, LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4)</p>	<p>Docket Nos. 52-034-COL and 52-035-COL</p> <p>ASLBP No. 09-886-09-COL-BD01</p> <p>March 11, 2010</p>
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**MEMORANDUM and ORDER**  
**(Ruling on New SUNSI Contentions, Mootness of Original Contention 7,  
and Intervenors' Access to ISG-016)<sup>1</sup>**

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<sup>1</sup> Because this Memorandum and Order contains information relating to the physical protection of the proposed nuclear power plants for which licenses are sought in the Application at issue, those parts of the document that contain and discuss such security-related information are protected from public disclosure under 10 C.F.R. § 2.390(d)(1), and are not part of the public version of this document. See *infra* note 277 for the language of § 2.390(d)(1).

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**I. Introduction**

This Licensing Board rules herein on issues relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which concern “guidance and strategies” for addressing certain circumstances that might arise from potential beyond-design-basis explosions and fires,<sup>2</sup>

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<sup>2</sup> See 10 C.F.R. §§ 52.80(d), 50.54(hh)(2). 10 C.F.R. § 52.80(d) requires a combined license application to contain:

(d) A description and plans for implementation of the guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with the loss of large areas of the plant due to explosions or fire as required by § 50.54(hh)(2) of this chapter.

10 C.F.R. § 50.54(hh)(2) provides that:

(2) Each licensee shall develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire, to include strategies in the following areas:

- (i) Fire fighting;
- (ii) Operations to mitigate fuel damage; and
- (iii) Actions to minimize radiological release.

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relative to the two proposed new nuclear reactors at the Comanche Peak site that are the subject of the Combined Operating License (COL) Application at issue.<sup>3</sup> Intervenors Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam argue in contentions now pending before us that Applicant Luminant Generation Company has not satisfied these requirements. Specifically before us at this time are (1) the matter of the mootness of Intervenors' original Contention 7 (alleging that Applicant had failed altogether to address the relevant requirements), in light of Applicant's subsequent submission of a "Mitigative Strategies Report" (Report) claimed to comply with the requirements; (2) five new contentions alleging various failures to address adequately the requirements in question in the new Report; and (3) Intervenors' appeal of the NRC Staff's denial of access to a document designated by the NRC Staff as containing "sensitive unclassified non-safeguards information" ("SUNSI").<sup>4</sup> For the reasons discussed herein, we conclude that Contention 7 is moot under relevant Commission case law; that Intervenors have not demonstrated that their new contentions are admissible; and that Intervenors should be provided with access to the document withheld by the NRC Staff.

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<sup>3</sup> See Letter Transmitting Combined License Application for Comanche Peak Nuclear Power Plant, Units 3 and 4 (Sept. 19, 2008) (ADAMS Accession No. ML082680250); <http://www.nrc.gov/reactors/new-reactors/col/comanche-peak/documents.html> [hereinafter Application or COLA]; see also Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008).

<sup>4</sup> See *infra* note 276, regarding the definition of SUNSI and related matters. Intervenors request access to a draft NRC Staff guidance document regarding means that COL applicants may use to satisfy the requirements of §§ 52.80(d) and 50.54(hh)(2). As indicated in the Background section of this Memorandum, the issue of the extent to which various information should be protected or be open to Intervenors, and in some cases the public, is one that runs throughout the matters before us herein. See also note 277.

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**II. Background**

In LBP-09-17,<sup>5</sup> this Licensing Board granted the hearing request of Intervenors in this proceeding, finding that they had shown standing and submitted two admissible contentions, and ruling that the hearing on those contentions would be conducted according to the provisions of 10 C.F.R. Part 2, Subpart L.<sup>6</sup> We did not therein rule on Intervenors' original Contention 7, Applicant having on May 26, 2009, provided notification that it had filed its Mitigative Strategies Report, which, Applicant asserted, rendered Contention 7 moot.<sup>7</sup> Because this Report was designated by the Applicant as containing security-related information that was to be withheld from public disclosure under 10 C.F.R. § 2.390, Intervenors were not initially provided with a copy of the document.<sup>8</sup> They did, however, request,<sup>9</sup> and the NRC Staff subsequently granted them, access to the document.<sup>10</sup> All parties then filed a joint proposed Protective Order,<sup>11</sup> which the Board approved and issued on July 1, 2009.<sup>12</sup> Thereafter, certain of the Intervenors,

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<sup>5</sup> See *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 NRC \_\_ (Aug. 6, 2009).

<sup>6</sup> See *id.*, 70 NRC \_\_, \_\_ (slip op. at 84-85).

<sup>7</sup> Letter from Steven P. Frantz, Counsel for Luminant, to Ann Marshall Young *et al.* (May 26, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (May 22, 2009) [hereinafter Flores May 22, 2009, Letter]; see *also* Letter from Steven P. Frantz, Counsel for Luminant, to Office of the Secretary (April 30, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (April 24, 2009); Letter from Steven P. Frantz, Counsel for Luminant, to Office of the Secretary (Apr. 29, 2009), with attached Letter from Rafael Flores to NRC Document Control Desk (Apr. 28, 2009).

<sup>8</sup> In the original Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene in this proceeding, 74 Fed. Reg. 6177 (Feb. 5, 2009), the means potential parties could utilize to obtain access to such SUNSI were described. *Id.* at 6179. Petitioners had to demonstrate, among other things, a "need for the information in order to meaningfully participate in this adjudicatory proceeding." *Id.*

<sup>9</sup> Letter from Robert Eye, Counsel for Petitioners, to NRC Office of the Secretary (June 5, 2009).

<sup>10</sup> Letter from James Biggins, Counsel for NRC Staff, to Robert Eye, Counsel for Petitioners (June 15, 2009).

<sup>11</sup> Joint Motion for Entry of a Protective Order (June 30, 2009).

<sup>12</sup> Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished) [hereinafter Protective Order].

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their counsel and their expert signed nondisclosure agreements regarding the Report and related information also designated as SUNSI.<sup>13</sup> The Board permitted Intervenors to respond to Applicant's claim that its Report rendered Contention 7 moot,<sup>14</sup> and after receiving the Report,<sup>15</sup> Intervenors challenged the asserted mootness;<sup>16</sup> all parties thereafter briefed the mootness issue.<sup>17</sup>

On August 10, 2009, pursuant to deadlines arising out of the Protective Order,<sup>18</sup> Intervenors also submitted five new "SUNSI Contentions" regarding Applicant's Report, requesting a 10 C.F.R. Part 2, Subpart G hearing on the contentions.<sup>19</sup> On September 4, 2009, Applicant and NRC Staff submitted Answers opposing admission of the new contentions,<sup>20</sup> and on September 11, 2009, Intervenors filed a Consolidated Response to these Answers.<sup>21</sup>

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<sup>13</sup> See Nondisclosure Affidavits of Eliza Brown, Karen Hadden, and Robert V. Eye (July 2, 2009); Nondisclosure Affidavit of Dr. Edwin S. Lyman (July 21, 2009).

<sup>14</sup> Licensing Board Order (July 1, 2009) (unpublished).

<sup>15</sup> Letter from Jonathan M. Rund, Counsel for Luminant, to Robert V. Eye, Counsel for Petitioners (July 7, 2009).

<sup>16</sup> Letter from Robert V. Eye, Counsel for Petitioners, to Ann Marshall Young (July 14, 2009).

<sup>17</sup> Petitioners' Brief Regarding Contention Seven's Mootness (July 20, 2009) (document filed as a non-public submission pursuant to the July 1, 2009, Protective Order) [hereinafter Petitioners' Brief on Contention 7 Mootness]; Luminant's Response to Petitioners' Brief Regarding Mootness of Contention 7 (July 27, 2009) (document filed as a non-public submission pursuant to the July 1, 2009, Protective Order); NRC Staff's Answer to Petitioners' Brief Regarding Contention Seven's Mootness (July 27, 2009); Petitioners' Consolidated Response to NRC Staff's Answer and Applicant's Answer to Petitioners' Brief Regarding Contention Seven's Mootness (Aug. 3, 2009) [hereinafter Petitioners' Mootness Response] (document filed as a non-public submission pursuant to the July 1, 2009, Protective Order).

<sup>18</sup> Protective Order at 4 (stating that "Petitioners must file any proposed SUNSI contentions within twenty-five (25) days after receipt of or access to that information"). The Board later amended the Protective Order, on Petitioners' motion, extending the deadline for SUNSI contentions by seven days. Licensing Board Order (Amending Protective Order and Extending Time for Filing New Contentions Based on SUNSI Information) (July 16, 2009) (unpublished).

<sup>19</sup> See Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing (August 10, 2009) [hereinafter SUNSI Contentions].

<sup>20</sup> Luminant's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report (Sept. 4, 2009) [hereinafter Luminant Answer]; NRC Staff's Answer to Intervenors'

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The Board meanwhile, recognizing the possibility of needing to refer to the above-referenced information designated as SUNSI in oral argument and in orders relating to Applicant's Report, had, by Order dated August 7, 2009, required the parties to file briefs regarding legal authority on the treatment of such material in adjudication-related contexts.<sup>22</sup> In response the parties on August 27 filed a joint brief in which they cited 10 C.F.R. § 2.390(b) along with the Federal Register notice in this proceeding, and restated certain NRC policy on identifying and withholding SUNSI.<sup>23</sup> In this brief, which was prepared by NRC Staff counsel,<sup>24</sup> no actual legal authority for the Board to close otherwise-public sessions or to issue anything other than public orders with regard to information labeled as "SUNSI" was cited. Thereafter, in a telephone scheduling conference held September 16, 2009,<sup>25</sup> questions regarding the legal authority for protection of SUNSI were further addressed. The Board raised with the parties the requirement of 10 C.F.R. § 2.328 that all NRC hearings are to be public except as requested under section 181 of the Atomic Energy Act (AEA) or otherwise ordered by the Commission,<sup>26</sup> and Staff counsel pointed out the Board's authority to hold *in camera* hearings under 10 C.F.R. § 2.390(b)(6).<sup>27</sup>

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Contentions and Request for Subpart G Hearing (Sept. 4, 2009) [hereinafter NRC Staff Answer].

<sup>21</sup> Intervenor's Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenor's Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) (Sept. 11, 2009) [hereinafter Intervenor's Consolidated Reply].

<sup>22</sup> Licensing Board Order (Regarding Briefing on Handling SUNSI in Board Orders and Oral Argument) (Aug. 7, 2009) (unpublished) at 1.

<sup>23</sup> Parties' Joint Brief on Handling SUNSI in Board Orders and Oral Argument (Aug. 27, 2009).

<sup>24</sup> See *id.* at 1.

<sup>25</sup> See Transcript of Proceeding (Tr.) at 414-57.

<sup>26</sup> See Tr. at 442; see also *id.* at 440-443. 10 C.F.R. § 2.328 provides:

Except as may be requested under section 181 of the Act, all hearings will be public unless otherwise ordered by the Commission.

<sup>27</sup> Tr. at 443. 10 C.F.R. § 2.390(b)(6) provides as follows:

Withholding from public inspection does not affect the right, if any, of persons properly

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The Board subsequently determined that 10 C.F.R. § 2.390(d)(1) does provide legitimate legal authority for nondisclosure and protection of security-related information concerning the physical protection of nuclear power plants, and in September indicated, in setting oral argument on the five “SUNSI Contentions,” that significant portions of the argument might be closed based on this authority.<sup>28</sup> Only the Board, NRC Staff, Applicant, and necessary associated persons, along with individuals who had signed a non-disclosure affidavit pursuant to the July 1, 2009, Protective Order, would be permitted to remain in the hearing room during the closed portions of the oral argument, which was scheduled for November 12, 2009.<sup>29</sup>

Notwithstanding the preceding developments, on November 2, 2009, Intervenors filed a Motion for Public Argument/Hearing, requesting that the November 12 oral argument and all future hearings regarding Applicant’s COLA (COL Application) be held in public pursuant to 10 C.F.R. § 2.328.<sup>30</sup> On November 6, 2009, Applicant submitted its Answer opposing Intervenors’ November 2 Motion.<sup>31</sup> Also on November 6, 2009, the Board issued an order regarding the

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and directly concerned to inspect the document. Either before a decision of the Commission on the matter of whether the information should be made publicly available or after a decision has been made that the information should be withheld from public disclosure, the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection under a protective agreement by contractor personnel or government officials other than NRC officials, by the presiding officer in a proceeding, and under protective order by the parties to a proceeding. *In camera* sessions of hearings may be held when the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such in camera session will be made publicly available.

<sup>28</sup> See Licensing Board Order (Regarding Oral Argument and Future Course of Proceeding) (Sept. 24, 2009) (unpublished); Licensing Board Notice (Regarding Oral Argument) (Oct. 9, 2009) (unpublished).

<sup>29</sup> See *id.* at 1-2.

<sup>30</sup> Motion for Order that Arguments/Hearings Related to the Fires and Explosions Contentions that Address Factual and Legal Arguments Related Thereto and NEI 06-12 Be Conducted in Public Pursuant to 10 C.F.R. § 2.328 (Nov. 2, 2009) [hereinafter Motion for Public Hearing].

<sup>31</sup> Luminant’s Answer Opposing Motion to Make Public the Oral Arguments and Documents

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scheduled November 12 oral argument, directing all parties to be prepared to address certain issues related to Intervenor's Motion and directing the Staff to bring an expert in security classification matters to answer related questions.<sup>32</sup> Finally, on November 10, the Board advised the parties that Intervenor's Motion would be addressed at the beginning of the November 12 session, and provided questions for the parties to focus on, related to the five SUNSI contentions.<sup>33</sup>

During the November 12 oral argument,<sup>34</sup> after hearing the parties' arguments on Intervenor's Motion for Public Argument, the Board denied the Motion to the extent that argument on the contentions relating to Applicant's SUNSI Report was held in closed session.<sup>35</sup> The parties were, however, advised that, consistent with the provisions of 10 C.F.R. § 2.390(b)(6), they might propose creation of a public copy of the transcript, with appropriate redactions for protected information, and further advised to attempt to cooperate in this effort.<sup>36</sup> At the conclusion of the oral argument Intervenor's were given the opportunity to file any citations to relevant authority on statutory construction that might support their contentions.<sup>37</sup> They thereafter filed a letter providing certain additional arguments,<sup>38</sup> to which Applicant and Staff filed responses.<sup>39</sup>

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Related to the Large Fires and Explosions Contentions (Nov. 6, 2009) [hereinafter Luminant Answer to Motion for Public Hearing].

<sup>32</sup> Licensing Board Order (Regarding November 12, 2009, Oral Argument) (Nov. 6, 2009) at 1 (unpublished).

<sup>33</sup> See Licensing Board Order (Regarding November 12, 2009, Oral Argument) (Nov. 10, 2009) (unpublished).

<sup>34</sup> See Tr. at 462-720.

<sup>35</sup> See *id.* at 523-24.

<sup>36</sup> See *supra* note 27.

<sup>37</sup> See Tr. at 621, 717.

<sup>38</sup> Letter to Licensing Board from Robert V. Eye (Nov. 20, 2009) [hereinafter Eye Nov. 20, 2009, Letter].

<sup>39</sup> Letter to Licensing Board from Jonathan M. Rund (Nov. 27, 2009) [hereinafter Rund Nov. 27,

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Finally, on November 20 Intervenor's appealed to this Licensing Board<sup>40</sup> the NRC Staff's denial<sup>41</sup> of their November 5, 2009, request<sup>42</sup> that the Staff grant them access to a newly-issued draft Staff Guidance Document relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which the Staff has designated as containing SUNSI.<sup>43</sup> NRC Staff replied to Intervenor's appeal on November 25.<sup>44</sup> We rule on this matter in Section IV *infra*.

**III. Discussion and Rulings on New Contentions and Mootness of Original Contention 7**

**A. General Observations**

Because Intervenor's new contentions as well as their arguments on the mootness of their original Contention 7 largely concern one central theme that is repeated throughout, we preliminarily direct our attention to this theme and related legal issues arising from it. We then address the individual matters before us.

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..... REDACTED PURSUANT TO 10 C.F.R. § 2.390(d)(1) .....

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2009, Letter]; Letter to Licensing Board from Susan H. Vrahoretis (Nov. 30, 2009) [hereinafter Vrahoretis Nov. 30, 2009, Letter].

<sup>40</sup> Letter from Robert V. Eye to Administrative Judge Ann Marshall Young (Nov. 20, 2009) [hereinafter Intervenor's SUNSI Appeal].

<sup>41</sup> Letter from Susan H. Vrahoretis to Robert Eye (Nov. 16, 2009) [hereinafter Staff's Denial].

<sup>42</sup> Email from Robert V. Eye to Susan Vrahoretis et al., Re: SUNSI request/ ISG 06-12 [sic] (Nov. 5, 2009) [hereinafter Intervenor's SUNSI Request to Staff]. Intervenor's counsel subsequently amended the request to correct the reference, indicating that the "request is for ISG 0-16 not ISG 06-12." Email from Robert V. Eye to Susan Vrahoretis et al., Re: Amended request for ISG 06-12 [sic] (Nov. 9, 2009).

<sup>43</sup> See Staff Denial at 1.

<sup>44</sup> NRC Staff's Reply to Intervenor's Challenge of the NRC Staff's Denial of Access to SUNSI (Nov. 25, 2009) [hereinafter NRC Staff's Reply to SUNSI Appeal].

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**B. Mootness of Contention 7**

Petitioners in their original Contention 7 alleged:

The Applicant's COLA is incomplete because it fails to include the requirements of 10 CFR 52.80(d) that require the applicant to submit a description and plans for implementation of the guidance strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities with the loss of large areas of the plant due to explosions and/or fires as required by 10 CFR 50.54(hh)(2).<sup>52</sup>

On May 26, 2009, Applicant through counsel notified the Board that it had filed its "Mitigative Strategies Report" with the NRC, stating that the filing of the report rendered Contention 7 moot.<sup>53</sup> Intervenor contest the mootness of Contention 7, challenging the adequacy of Applicant's Report and indicating among other things that they "modify" the original contention in various particulars.<sup>54</sup> At the November 12 oral argument, their counsel agreed, however, that the arguments they make in challenging the adequacy of the Report are all essentially contained in their new contentions.<sup>55</sup> We therefore address those issues in conjunction with the new contentions.

Regarding the mootness of original Contention 7, it is clear that, after the filing of that contention, Applicant filed its Mitigative Strategies Report for the express purpose of addressing the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).<sup>56</sup> Under Commission precedent on "contentions of omission," once information asserted to have been omitted is supplied, "the [original] contention is moot," and "Intervenor must timely file a new or amended contention . . .

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<sup>52</sup> Petition at 22.

<sup>53</sup> See *supra* note 7. We refrained from ruling on the mootness of the original Contention 7 until all submissions related to it, along with the new contentions now before us, were filed and oral argument was held on all these related matters. See *Comanche Peak*, LBP-09-17, 70 NRC at \_\_\_ (slip op. at 43-44).

<sup>54</sup> See Petitioners' Brief on Mootness; Petitioners' Mootness Response at 2, 4, 6, 7, 9, 10.

<sup>55</sup> See Tr. at 507-11; see also *id.* at 501-07.

<sup>56</sup> See Flores May 22, 2009, Letter at 1; Report at 1.

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in order to raise specific challenges regarding the new information.”<sup>57</sup> Thus, Intervenors’ original Contention 7, asserting omission of information addressing §§ 52.80(d) and 50.54(hh)(2), is now moot. This ruling should not, however, be taken to suggest any ruling on whether Applicant’s Report *adequately* addresses the requirements of the sections at issue. Intervenors were provided with opportunity to contest such adequacy in the filing of new contentions, and we rule herein on the admissibility of Intervenors’ five new contentions that were timely filed to this end.

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<sup>57</sup> See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002).

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*RULINGS ON CONTENTIONS REDACTED PURSUANT TO 10 C.F.R. § 2.390(d)(1)*

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**IV. Ruling on Intervenors' Request for Access to SUNSI Guidance Document**

Intervenors have appealed to this Licensing Board<sup>271</sup> the NRC Staff's denial<sup>272</sup> of their November 5, 2009, request that the Staff grant them access to a newly-issued draft Staff Guidance Document relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).<sup>273</sup> The document in question — Interim Staff Guidance DC/COL-ISG-016 – Compliance With 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d), or “ISG-016”<sup>274</sup> — was withheld as security-related SUNSI, and the Staff in denying access to it cited the provisions of the Commission's Order Imposing Procedures for Access to [SUNSI] and Safeguards Information for Contention Preparation, found in the original Federal Register Notice in this proceeding.<sup>275</sup> We note that

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<sup>271</sup> See Intervenors' SUNSI Appeal.

<sup>272</sup> See Staff's Denial.

<sup>273</sup> See Intervenors' SUNSI Request to Staff.

<sup>274</sup> Interim Staff Guidance – Compliance With 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d) – Loss of Large Areas of the Plant due to Explosions or Fires from a Beyond-Design Basis Event – DC/COL-ISG-016 (Oct. 2009) (ADAMS Accession No. NL092100361) [hereinafter ISG-016]. See <http://www.nrc.gov/reading-rm/doc-collections/isg/col-dc-isg-16.pdf> (last visited Feb. 23, 2010). On the website is found the following description:

The Interim Staff Guidance (ISG) outlines technical positions defining specific acceptance criteria or an acceptable approach and includes information to be included in a combined license (COL) application to fully address compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d), loss of large areas (LOLAs) of the plant due to explosions or fires from a beyond-design basis event (BDBE). This ISG is provided to assist new applicants for, and new holders of, a COL issued under 10 CFR Part 52 to comply with requirements to address LOLAs of the plant due to explosions or fires from a BDBE. This ISG provides one acceptable approach for satisfying the requirements in Section 50.54(hh)(2) of 10 CFR Part 50 and Section 52.80(d) of 10 CFR Part 52. New applicants for, and new holders of, an operating license may use other methods for satisfying these requirements. The NRC staff will review such methods and determine their acceptability on a case by case basis.

*Since this guidance was issued as need to know, Official Use only (OUO) and security related, the details are characterized as SUNSI-A(3) in accordance with MD 3.4 Category A.3 and is not available for public [sic].*

*Id.*

<sup>275</sup> See Staff's Denial at 2 (citing 74 Fed. Reg. at 6179).

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the document, in addition to assertedly fitting within NRC policy defining SUNSI,<sup>276</sup> appears to fall within the ambit of “information . . . concerning a licensee’s or applicant’s physical protection” under 10 C.F.R. § 2.390(d)(1).<sup>277</sup> It is also the same document to which Intervenors refer in their Consolidated Reply on Contention 1.<sup>278</sup> On November 16, NRC Staff denied the Intervenors access to the document, finding that they had not “demonstrated a legitimate need

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<sup>276</sup> See NRC Policy For Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (Oct. 26, 2006) (ADAMS Accession No. ML052990146), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2005/2005-0054comscy-attachment2.pdf> (last visited Feb. 24, 2010), wherein “SUNSI” is defined as “any information of which the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals.” *Id.* at 1. The policy lists seven category groupings of SUNSI: (1) Allegation information; (2) Investigation information; (3) Security-related information; (4) Proprietary information; (5) Privacy Act information; (6) Federal-, State-, foreign government-, and international agency-controlled Information; and (7) Sensitive internal information. *Id.*

<sup>277</sup> 10 C.F.R. § 2.390(d)(1) provides as follows:

(d) The following information is considered commercial or financial information within the meaning of § 9.17(a)(4) of this chapter and is subject to disclosure only in accordance with the provisions of § 9.19 of this chapter.

(1) Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data.

10 C.F.R. § 9.17(a)(4) defines certain exemptions from public disclosure; § 9.19 concerns the segregation of exempt information. See *supra* note 27 for the language of 10 C.F.R. § 2.390(b)(6), which concerns the right of “persons properly and directly concerned” to inspect material, and means for managing the protection and inspection of information addressed in § 2.390(d)(1) such as *in camera* hearings and subsequent consideration of whether transcripts should be made public.

We note that the provisions now found at § 2.390(d)(1), previously found at § 2.790(d)(1), have been in effect since 1981, see Protection of Unclassified Safeguards Information, 46 Fed. Reg. 51,718, 51,723 (Oct. 22, 1981), the same year the definition for “Safeguards,” see *supra* note 89 (providing definition for “Safeguards Information” from 10 C.F.R. § 73.2), was added to 10 C.F.R. § 73.2, see 46 Fed. Reg. at 51,724.

<sup>278</sup> See *supra* note 127 (referring to an NRC listing of Interim Staff Guidance documents as of August 2009, including ISG-016 (ADAMS Accession No. ML092450022)) and accompanying text; see also *supra* text accompanying note 139 (regarding reference to ISG-016 in Transcript of closed hearing).

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for access to DC/COL-ISG-016 in order to meaningfully participate in this adjudicatory proceeding at this time.”<sup>279</sup> We will not repeat here the arguments of Intervenors in support of their initial request to the Staff, or the statements of the Staff explaining its denial of access in greater detail, as these are largely repeated in Intervenors’ SUNSI Appeal and in the NRC Staff’s Reply to the Intervenors’ Appeal.

In their Appeal Intervenors argue that they “require [ISG-016] for meaningful participation” in this proceeding, asserting that the document “may clarify or address issues not discussed in the Standard Review Plan by providing guidance on compliance with 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) for new reactor applications.”<sup>280</sup> Stating that NEI 06-12 has been approved by the Commission only for current operating reactors, not new reactors,<sup>281</sup> Intervenors contend that they “cannot meaningfully analyze Applicant’s claims that they comply with 10 C.F.R. § 50.54(hh)(2) for new reactor submittals without having access to the subject guidance itself.”<sup>282</sup> They argue that the standard for access to ISG-016 “should be identical to the standard by which Intervenors were granted access to other SUNSI documents,” and that the document “is relevant and material to the pending fires and explosions contentions because it has a direct bearing on whether the Applicants’ [sic] submittals are consistent with the Staff’s interpretation of the requirements under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2).”<sup>283</sup> Indeed, they urge, ISG-016 is “every bit as relevant and material as NEI 06-12 and arguably, even more so given the express limitation that NEI 06-12 is primarily intended to apply to currently operating nuclear plants.”<sup>284</sup> Finally, they note that they refer to the document in their

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<sup>279</sup> Staff’s Denial at 3.

<sup>280</sup> Intervenors’ SUNSI Appeal at 1.

<sup>281</sup> *Id.* (citing 74 Fed. Reg. at 13,958).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

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Consolidated Reply on the current contentions, and state that it is their understanding that there is no publicly available version of the document.<sup>285</sup>

NRC Staff confirms that there is no publicly available version of the document,<sup>286</sup> also noting that ISG-016 is a draft document and has not been approved by the Commission as “an approved means to comply with a regulatory requirement.”<sup>287</sup> Staff does acknowledge that the “purpose in developing” the document, according to the website notice for it, is “to assist COL applicants and licensees with meeting the requirements of §§ 50.54(hh)(2) and 52.80(d).”<sup>288</sup> However, Staff argues that Intervenors have not shown a need for the document under the requirements the Commission set out in its “SUNSI/SGI Order.”<sup>289</sup> Staff asserts that under these requirements a “requester,” in addition to showing standing, must “explain why it needs the information ‘in order to meaningfully participate in this adjudicatory proceeding.’”<sup>290</sup>

Staff puts forth a number of arguments to “flesh out” this basic need standard. First, Staff avers, the fact that Intervenors with the assistance of an expert were, based on the information available to them, able to prepare the contentions addressed herein shows that they do not need ISG-016 with regard to these contentions.<sup>291</sup> With regard to any additional, new contentions, Staff cites a licensing board decision in the *South Texas* COL proceeding for the proposition that, in order to demonstrate a need for SUNSI, the Intervenors must “(1) discuss the basis for a proffered contention and (2) describe why the information available to the

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<sup>285</sup> *Id.*

<sup>286</sup> NRC Staff’s Reply to SUNSI Appeal at 2.

<sup>287</sup> *Id.* at 6.

<sup>288</sup> *Id.* at 2; *see also supra* note 274.

<sup>289</sup> NRC Staff’s Reply to SUNSI Appeal at 3; *see* 74 Fed. Reg. at 6179.

<sup>290</sup> NRC Staff’s Reply to SUNSI Appeal at 3.

<sup>291</sup> *Id.* at 4.

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Intervenors is not sufficient to provide the basis and specificity for a proffered contention.”<sup>292</sup>

Next, Staff cites a licensing board decision in the *Vermont Yankee* proceeding for the proposition that, “in the absence of documentary or expert support, reliance on a guidance document to form the basis of a proposed contention does not, by itself, demonstrate a dispute with the Applicant.”<sup>293</sup> Staff cites additional licensing board decisions in the *Indian Point* and *Crow Butte* proceedings for the proposition that “[t]he admissibility of contentions does not hinge on access to a draft guidance document, which is not a legal requirement.”<sup>294</sup> Staff urges that, although Intervenors have established standing, “they have not demonstrated that they need the draft [ISG-016] to provide the basis and specificity for a proffered contention.”<sup>295</sup>

Finally, Staff points out, regarding NEI 06-12 and the Commission’s approval of it for COL applicants, that although the Commission did endorse Rev. 2 of the document as providing an “acceptable method for *current reactors* to comply with the mitigative strategies requirement,” it also made other statements indicating its appropriateness for COL applicants. The statements noted by the Staff are that “[n]ew reactor licensees are required to employ the same strategies as current reactor licensees to address core cooling, spent fuel pool cooling, and containment integrity”; but that, “[u]nlike current operating reactors, new reactors ‘also need to account for, as appropriate, the specific features of the plant design.’”<sup>296</sup>

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<sup>292</sup> *Id.* at 4 (citing *South Tex. Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), LBP-09-05, 69 NRC 303, 308, 312-13 (2009)).

<sup>293</sup> *Id.* at 5 (citing *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 200-201 (2006), *rev’d on other grounds*, CLI-07-16, 65 NRC 371 (2007)).

<sup>294</sup> *Id.* at 5-6 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 89 (2008); *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC 241, 323 (2008), *rev’d in part on other grounds*, CLI-09-12, 69 NRC 535 (2009)).

<sup>295</sup> *Id.* at 6.

<sup>296</sup> *Id.* at 6 n.7 (quoting 74 Fed. Reg. at 13,957-58).

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We approach the question of whether Intervenors should be granted access to ISG-016 by considering, as the Staff did, whether Intervenors have shown that they need the document in order to participate meaningfully in the proceeding, but we ultimately reach a different result. We begin by noting that this standard for obtaining access to information designated as SUNSI, cited by Staff and as set forth in the Commission's Federal Register Notice and Order in this proceeding, is actually directed to "potential parties," defined by the Commission as including "any person who intends or may intend to participate as a party by demonstrating standing and the filing of an admissible contention under 10 CFR 2.309."<sup>297</sup> We note also that Intervenors have signed nondisclosure affidavits pursuant to the July 2009 Protective Order, which by its own terms applies to "access to and use of protected information in the correspondence from Applicant to the NRC Staff dated May 22, 2009 [*i.e.*, Applicant's Mitigative Strategies Report], regarding the requirements under 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)(2) *and any related documents* (Protected Information)."<sup>298</sup> This suggests that access to ISG-016, which addresses the requirements of the very same regulations cited at page 1 of the Protective Order, might reasonably fall under the Protective Order.

At this point, however, we are faced with a dispute between Intervenors and Staff on access to ISG-016, and with the situation that Intervenors have not been provided with access to the document, as they were with NEI 06-12. Under these circumstances, notwithstanding that Intervenors are already parties in the proceeding and are no longer "potential parties," we

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<sup>297</sup> 74 Fed. Reg. at 6179. We further note that "potential party" is defined at 10 C.F.R. § 2.4 (also cited by the Commission, *id.*) as "any person who has requested, or who may intend to request, a hearing or petition to intervene in a hearing under 10 CFR part 2, other than hearings conducted under Subparts J and M of 10 CFR part 2." See *also* Proposed Rule, Interlocutory Review of Rulings on Requests by Potential Parties for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information; Reopening of Public Comment Period and Notice of Availability of Proposed Procedures for Comment, 72 Fed. Reg. 43,569, 43,570 (Aug. 6, 2007).

<sup>298</sup> Protective Order at 1 (emphasis added).

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find it appropriate to apply the standard of showing a need for a document in order to participate meaningfully in a proceeding. The standard is a fairly generic one, and it is not an inappropriate one to apply when parties have a dispute over information that is security-related, as ISG-016 is. It is not an onerous standard on its face and, particularly with actual parties, should not be applied to lead to an onerous result.

Applying this standard, we find that Intervenors have shown a need for the document in order to participate meaningfully in this proceeding. First, we note, they refer to the document in their Consolidated Reply on new Contentions 1 through 5, and have obviously followed its progress prior to and following its issuance.<sup>299</sup> Second, they have shown an interest in Applicant's satisfaction of the requirements of §§ 52.80(d) and 50.54(hh)(2) from the outset of this proceeding. And although the document is currently only a draft, according to Staff the undisputed "purpose" of its development is "to assist COL applicants and licensees with meeting the requirements of §§ 50.54(hh)(2) and 52.80(d)." To be sure, the draft status of the document lessens its relevance to these requirements, but it does not negate it, given that the NRC Staff prepared it, and it thus may be accorded a level of consideration, or even persuasiveness, appropriate to its contents.<sup>300</sup> In this light, to require the Intervenors to wait until the Commission determines whether to approve it would not seem to be an efficient approach.

In addition, the Intervenors have an expert who can guide them in submitting any additional contentions relating to §§ 52.80(d) and 50.54(hh)(2) after they have read the Staff's draft guidance document. While it is true that a guidance document alone does not provide sufficient support for a contention, where there is in fact expert support, a guidance document may well be part of the support for a contention.

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<sup>299</sup> See *supra* notes 127, 139, and accompanying text.

<sup>300</sup> See *supra* text accompanying note 288.

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Regarding Staff's arguments that Intervenors must "discuss the basis for a proffered contention" in order to show need for the document, citing the *South Texas* April 2009 Order on SUNSI access,<sup>301</sup> what that Board actually said, in considering a like argument by Staff, was that such argument "is not to be equated with the discussion that would be necessary to support an admissible contention." Rather, the Board said, "the discussion need only show why the publicly available information in the application is not sufficient to support the basis and specificity of a proffered contention."<sup>302</sup> The Board pointed out that the Petitioners — *potential parties at that point* — had "simply asserted that they needed information . . . because ratepayers had a 'right to know the expected costs of the project.'"<sup>303</sup>

In the instant case, the Intervenors — who are actual parties at this point — have made no such argument, and have instead asserted that the document they seek, which they argue is "every bit as relevant as NEI 06-12," may clarify issues relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which will allow them more meaningful participation in this proceeding. In light of the somewhat minimal information that is included in the rules themselves, Intervenors' argument on needing such clarification carries some weight. In addition, they have, as we point out above, followed the progress of the document, sought out information on it, but could not use it in the preparation of the contentions now at issue because it was not then available to them. They point out that no publicly available version of the document exists.<sup>304</sup> Basic fairness dictates that they should have access to the document, for which they have shown a need in order to meaningfully participate in the proceeding.

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<sup>301</sup> See *supra* text accompanying note 292.

<sup>302</sup> *South Texas*, LBP-09-5, 69 NRC at 313.

<sup>303</sup> *Id.*

<sup>304</sup> Although we note the *South Texas* Board's reference to "publicly available information in the application," see *supra* text accompanying note 302, the request in that case by the potential parties was for information not included in the Environmental Report of the publicly available

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Nor does Staff's argument that the "admissibility of contentions does not hinge on access to a draft guidance document"<sup>305</sup> change this conclusion. Staff's wording misstates the actual principle of the *Indian Point* and *Crow Butte* Orders, which is simply that guidance documents are merely guidance and not binding legal authority.<sup>306</sup> Nor do we find persuasive Staff's argument that, because Intervenors crafted the contentions we rule on herein without access to ISG-016, they do not need access to the document.

In conclusion, we find, based on all of the arguments and information before us, that the appropriate standard to apply in this proceeding is as follows: A party requesting access to a document withheld as SUNSI (or as protected under 10 C.F.R. § 2.390(d)(1)<sup>307</sup>) must, in the event no protective order addresses the matter and/or in the event of a dispute concerning such access, show that it needs the document in order to participate meaningfully in the proceeding. We further find that Intervenors have met this standard and shown that they need the document in order to participate meaningfully in this proceeding, based in this case on the following factors: (1) Intervenors noted the expected issuance of the document and informed the Board and other parties about it in their September 2009 Reply on the current contentions; (2) they followed its progress thereafter, and requested access to it within a reasonable time after it was

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version of the Application, whereas the Intervenors who have been admitted as parties in this proceeding seek not information that has been omitted from the Application, but another document altogether. It would not make sense to require the Intervenors to show that they could not formulate a contention with the publicly available information in the Application. They obviously can, and have. As parties, they are in a different position than "potential parties," however. They have shown that they deserve status as parties, and they have signed nondisclosure affidavits pursuant to a Protective Order. They have shown that no publicly available version of the document they seek exists. To this extent, the requisite showing of need in these circumstances does not require the same showing with regard to the "publicly available version of the application."

<sup>305</sup> See *supra* text accompanying note 294.

<sup>306</sup> See *Indian Point*, LBP-08-13, 68 NRC at 89; *Crow Butte*, LBP-08-06, 67 NRC at 323.

<sup>307</sup> See *supra* note 277. We note that it is 10 C.F.R. § 2.390(d)(1) that provides the actual legal authority for withholding information relating to the physical protection of nuclear power plants.

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issued; (3) they have shown its relevance to matters at issue in the proceeding relating to the requirements of §§ 52.80(d) and 50.54(hh)(2), which have been a concern of Intervenors from the outset of this proceeding; and (4) they have an expert who can provide support for any new contentions relating to these requirements and to any provisions of ISG-016.<sup>308</sup>

**V. Conclusion and Order**

Having found Intervenors' original Contention 7 to be moot, that Intervenors have not demonstrated that their five new contentions are admissible, and that Intervenors have shown a need for access to ISG-016, we hereby ORDER the following:

A. Intervenors' original Contention 7 and their five new contentions relating to the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2) are DISMISSED.

B. Intervenors' request for access to ISG-016 is GRANTED, and Staff shall provide ISG-016 to Intervenors in the same manner that Applicant's Report and NEI 06-12 have been provided to them, with the same conditions to be applied.

C. Having denied admission of all of Intervenors' new contentions, it is not necessary that we rule on their request for a 10 C.F.R. Part 2, Subpart G hearing on the contentions.

D. If the parties wish to jointly propose line-by-line redactions in place of any of the redactions made in the Public Version of this Memorandum and Order, they may do so, and should file a notice of intent regarding this within 45 days of issuance of this Memorandum and Order.

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<sup>308</sup> We do not mean to imply by this ruling that we will necessarily consider any such contentions to be timely based simply on when Intervenors ultimately obtain access to ISG-016. For example, they would need to show that the information on which they base any contention was not available from any other reasonably available source prior to obtaining the document, and, as we indicate in the text, to provide more than merely what is in the guidance document — specifically, expert and/or other documentary support. See *supra* text accompanying note 293. In short, they would need to meet all relevant requirements of 10 C.F.R. § 2.309.

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E. Section IV of this Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311(a)(3). In addition, interlocutory review of the Order may also be requested as provided at 10 C.F.R. § 2.341(f)(2).

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

***/RA/***

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Ann Marshall Young, Chair<sup>309</sup>  
ADMINISTRATIVE JUDGE

***/RA/***

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Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

***/RA, by Edward R. Hawkens for/***

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Dr. Alice C. Mignerey  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 11, 2010<sup>310</sup>

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<sup>309</sup> Judge Young signs subject to the Additional Statement that follows this Memorandum and Order.

<sup>310</sup> Copies of this Order were filed this date with the agency's E-filing system for service to all parties.

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**Additional Statement of Administrative Judge Ann Marshall Young**

My colleagues and I are joined on all rulings made in the preceding Memorandum and Order, save one. I would admit the Intervenors' new Contention 3, in part.

.....

..... *REDACTED PURSUANT TO 10 C.F.R. § 2.390(d)(1)* .....

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON NEW SUNSI CONTENTIONS, MOOTNESS OF ORIGINAL CONTENTION 7, AND INTERVENORS' ACCESS TO ISG-016) (LBP-10-5) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-034-COL and 52-035-COL  
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[Original signed by Nancy Greathead]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 11<sup>th</sup> day of March 2010.