~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER 10 C.F.R. § 2.390 AND JULY 1, 2009 PROTECTIVE ORDER~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
Luminant Generation Company, LLC
Comanche Peak Nuclear Power Plant
Units 3 and 4
Combined License Adjudication

Docket Nos. 52-034 and 52-035

Petitioners' Consolidated Response to NRC Staff's Answer and Applicant's Answer To Petitioners' Brief Regarding Contention Seven's Mootness

Introduction

Consistent with the Board's Order dated July 1, 2009, the Petitioners hereby reply to the NRC Staff's Answer and the Applicant's Answer to Petitioner's Brief Regarding Contention Seven's Mootness.

The Petitioners do not dispute the NRC Staff's or Applicant's characterizations of the procedural background related to the mootness issue concerning Contention Seven. Staff Answer, pp.1-3; Applicant's Answer, pp. 2-3.

The absence of any discussion in the Applicant's submittal regarding the full spectrum of damages expected from the large loss of a nuclear plant gives the Petitioner's contention of omission continued viability. This absence of discussion is significant because there is no way to

determine, for example, whether the mitigative strategies will assure success under the full spectrum of potential damage states.

Based on the review of Applicant's submittal, Contention Seven is now modified to the extent that it focuses primarily on the absence of discussion of the full spectrum of damage states to which the mitigative strategies are to apply.[1]

Discussion

1. Contention Seven is not moot because the Applicant's submittal fails to discuss the magnitude of fires and explosions and full spectrum of damage the mitigative strategies are intended to address.

Contention Seven is one of omission and its primary legal basis is 10 C.F.R. 52.80(d) that requires 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 <u>large areas</u> of the plant due to explosions or fire as required by § 50.54(hh)(2) of this chapter." (Emphasis added) Additionally, the Petitioners rely on the provisions of the Administrative Procedure Act at 5 U.S.C. 551 et seq. and the provisions of the Atomic Energy Act at 42 U.S.C. 2133(d).

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[1] Modification of a contention based on the content, or absence of content , is anticipated in NRC case law. "[W]here a contention is "superseded by the subsequent issuance of licensing-related documents" — whether a draft EIS or an applicant's response to a request for additional information — the contention must be disposed of or modified. 56 N.R.C. at 382 (added).

The Staff's and Applicant's positions appear to be that the ministerial act of providing the submittal is adequate to satisfy the provisions of 10 C.F.R.52.80 (d) notwithstanding the absence of discussion in the submittal regarding the magnitude of expected fires and explosions or the full spectrum of damage footprints the mitigative strategies are intended to address. Staff brief, p.3. The Staff contends that the proper procedural mechanism for the Petitioners is to submit a new substantive contention that would be required to address the way particular information has been discussed in the submittal. Staff brief, p. 4, Applicant brief, p. 7. But that assumes the information about damage footprints has been discussed in the submittal; but it was not and Staff and Applicant do not argue otherwise.

While there are substantive contentions that the Petitioners intend to file pursuant to this Board's scheduling order, those contentions are anticipated to address, *inter alia*, the substantive issues that are discussed in the submittal.[2] The Staff and Applicant have failed to differentiate between the attributes of a contention of omission and a substantive contention. The difference has been discussed in NRC case law.

The Staff and Applicant cite to *McGuire/Catawba*, CLI-02-28, 56 NRC 373, 383 (2002) and note that there was no threshold assessment of the information before a finding of mootness was entered. Staff brief, p.3, Applicant brief, p.6. However, in that case the issue was not whether the subsequently supplied information still supported the contention of omission. The original contention related to whether the subject study conducted by Sandia laboratory was

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2 Petitioners may also raise contentions of omission in the anticipated August 10, 2009 filing that are germane to the submittal.

omitted from discussion in the application. 56 NRC at 379. Later, after the study was discussed in the application, the intervenors shifted from a contention of omission to advancing a substantive contention about how the Sandia study was used. *Id.*at 382. The Commission determined that when the subsequent information is discussed by an applicant and intervenors challenge how the information is used/discussed in the application, the contention is substantive in nature as distinct from one of omission. The absence of any discussion however, meets the requirements of an omission contention. *Id.* at 382-383. Hence, the Staff's and Applicant's assertion that a finding of mootness automatically accrues by the mere act of providing the submittal to the Commission is not supported by *McGuire/Catawba.*

> There is, in short, a difference between contentions that merely allege an "omission" of information and those that challenge substantively and specifically how particular information or considered by the Staff in a draft EIS, the contention is moot. Intervenors must timely file a new or amended contention that addresses the factors in section 2.714(b) in order to raise specific challenges regarding the new information. As the Licensing Board explained in a recent decision in the *Private Fuel Storage* proceeding: " [A] significant change in the nature of the purported NEPA imperfection, from one focusing on comprehensive information omission to one centered on a deficient analysis of subsequently supplied information, *warrants issue modification by the complaining party.* Otherwise, absent any new pleading, the other parties would be left to speculate whether the concerns first expressed had been satisfied by the new information." 56 NRC at 383 (emphasis added).

In order for a contention of omission to be viable it must specify information that has been omitted from discussion in the applicant's submittal. *Id.* In the *instant* case, the Petitioners have met their burden by specifying that the failure to discuss the magnitude of fires and explosions or a full spectrum of damage footprints in the submittal is a material omission that supports the Petitioner's Contention Seven, as modified.

First, there can be little dispute about the materiality of the information related to the magnitude of fires and explosions that the mitigative strategies purport to address. As the Petitioners noted in their opening brief related to the mootness question, the Federal Register notice related to the adoption of 10 C.F.R. 50.54 (hh) made numerous references to explosions and fires reasonably expected to be caused by the impact of a large commercial airliner. Petitioner's brief, pp. 2-3. Additionally, 10 C.F.R. 50.150, related to aircraft impact design assessments, utilizes a methodology that includes descriptions of anticipated damage footprints, fire spread, shock damage etc. NEI 07-13, Revision 7, pp.29-36. Although the Federal Register notice related adoption of 10 C.F.R. 50.54 (hh) did not specify that applicants were to use realistic assumptions in developing mitigative strategies to address large fires and explosions, any reasonable inquiry about whether the mitigative strategies will be effective must begin with an understanding of the full spectrum of damage that could be expected from, for example, the impact of a large commercial airliner. See NEI 07-13, Rev. 7, pp. 29-36. The authors of NEI 07-13 state that the use of the damage footprints out of context of the analysis related to aircraft impact design considerations is "inappropriate"[3]; however, the Petitioners contend that there is no inherent reason why the methodology utilized in the aircraft impact design assessment guidance document is not equally as applicable to the submittal at issue in this matter.

Whether the submittal meets the minimum threshold for consideration and compliance with 10 C.F.R. 52.80(d) should require more than the simple ministerial act of submitting information. That reasoning, carried to its logical conclusion, would permit an applicant to submit virtually any quality of information and still satisfy the requirements of 10 C.F.R.

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[3] NEI 07-13, p.36

52.80(d). The Petitioners contend that the bar is set higher than simply satisfying the ministerial act that the Staff's argument implies. A finding that the submittal is adequate under 10 C.F.R. 52.80(d) must be supported by substantial evidence. See, *e. g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456, (1951); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 163, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962) (citations omitted), 5 U.S.C. 706(2).

2. Contention Seven is not moot under NRC pleading requirements.

The pleading rules related to questions of mootness consider whether:

> "an original contention alleging simply a failure to address a subject could readily be transformed — without basis or support — into a broad series of disparate new claims. This approach effectively would circumvent NRC contention-pleading standards and defeat the contention rule's purposes: (1) providing notice to the opposing party of the issues that will be litigated; (2) ensuring that at least a minimal factual or legal foundation exists for the different claims that have been alleged; and (3) ensuring there exists an actual "genuine dispute" with the applicant on a material issue of law or fact. 56 NRC at 383.

The Contention Seven, as modified, is not an attempt to transform it into a new broad-based set of contentions. In contrast, the contention is now more focused on the absence of discussion in the submittal of the full spectrum of damage. Further, (1) the Applicant was provided notice of the omission in the Petitioners' opening brief; (2) the factual basis for contention is based on the failure to discuss information related to the magnitude of fires and explosions and the full spectrum of damage states assumed in the Applicant's mitigative measures; (3) there is a legal basis for the petitioner's contention of omission based on the provisions of 10 C.F.R. 52.80(d) and the regulatory expectation articulated in the Federal Register notice that fires and explosions of a magnitude expected from the impact of a large commercial airliner should be expressly considered in satisfying the requirements of 10 C.F.R. 50.54(hh); and, (4) there is a genuine material dispute between the Petitioners and the Applicant

about whether there is a requirement for discussion in the submittal of information related to the magnitude of fires and explosions assumed in the mitigative strategies.

When a contention of omission is challenged and the Applicant comes forward with information in an attempt to render the contention moot the contention must be either disposed of or modified. See footnote 1, herein. In this case, the Petitioners have modified their original contention to more sharply focus on the omission of specific information in the submittal. Accordingly, the contention is not moot and will not be rendered such unless and until the Applicant comes forth with information that describes in both quantitative and qualitative ways the magnitude of fires and explosions and the full spectrum of damage its mitigative strategies are intended to address.

This is not a theoretical exercise. For example, omitting a discussion about the full spectrum of damage means, *inter alia*, that accurate dose projections for emergency responders is not possible. Additionally, the submittal omits any discussion of what contingencies would be necessary and available when the identified response measures do not succeed "under the full spectrum of damage states". See NEI 06-12, p.1, cited in Petitioner's Brief On Mootness, p 3.

Staff contends the finding of mootness can be accomplished with a "finding" by the presiding officer and cites for support *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433.(2006). Staff brief, p.4. *USEC, Inc.* is distinguishable on its facts because there the petitioner could not establish a causal nexus between anticipated radiological emissions from the proposed facility and the petitioner's property; thus, the contention was determined moot

subsequent to information that showed the lack of a causal nexus. 63 NRC at 443. In the *instant* case there is a clear relationship between the interests of Petitioners and the capacity of the mitigative measures to deal with the full spectrum of damages from fires and explosions. Moreover, a finding requires a reasonable factual basis. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. at 163. The finding that the Staff would have this Board make is that there is information discussed in the submittal about the magnitude of fires and explosions expected to be addressed by the applicant's mitigative strategies. Such a finding would not be supported by any information that is discussed in the submittal.

This circumstance is analogous to admissibility of an expert witness report. Expert witness reports are screened by trial courts to determine reliability of the methodology that underpins the report. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 592-93 (1993). In McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir.2002). The court said "*Daubert* requires that trial courts act as "gatekeepers" to ensure that speculative, unreliable expert testimony does not reach the jury. Federal Rule of Evidence 702, governing the admissibility of expert evidence, provides that if "specialized knowledge will assist the trier of fact, ... a witness qualified as an expert ..., may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed.R.Evid. 702. (emphasis added)

The methodology in the submittal is inherently flawed because it omits any predicate discussion about the damage footprints that would be confronted under the full spectrum of expected damages from explosions and fires caused by, for example, a large commercial airliner. And while an expert in an agency proceeding may not have to meet the rigors of *Daubert* and its progeny, there is still a level of expertise that must be present to justify reliance on the information. *In re Strong Steel Products, LLC*, 2003 WL 22534560 (E.P.A. Oct 27, 2003). The absence of the discussion of the full spectrum of damage assumed in the mitigative strategies calls into question the reliability of the submittal and therefore, its admissibility under 10 C.F.R. 52.80(d).

The Staff cites to the transcript of the oral arguments in this matter apparently to argue that the Petitioners have somehow waived their right to contest whether the submittal meets minimum admissibility requirements by pointing out that even before the Petitioners obtained the submittal they expected to challenge it on "sufficiency" grounds. Staff brief, p.5, fn. 9. Petitioners have challenged the sufficiency of the submittal on omission grounds in their notice letter, the opening brief on mootness and in this brief, as well. To be certain, contentions based both on substantive grounds and material omissions are anticipated in the contentions to be filed on August 10, 2009. But that circumstance does not moot Contention Seven, as modified.

The Staff also appears to argue, at page 7, footnote 10, of their brief, that there should be a presumption that a Commission endorsement of NEI 06-12 is conclusive on the question of whether it is an acceptable means to address the requirements of 10 C.F.R. 50.54(hh)(2).

However, NRC case law is more nuanced on the matter than the Staff's argument suggests. In *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit One) 28 NRC 275 (1988) the Commission discussed the limitations of such regulatory documents as follows:

> As we have often stressed, NUREG–0654 and similar documents are akin to "regulatory guides." That is, they provide guidance for the Staff's review, but set neither minimum nor maximum regulatory requirements. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB–819, 22 NRC 681, 709–10 (1985), aff'd in part and review otherwise declined, CLI–86–5, 23 NRC 125 (1986); Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB–725, 17 NRC 562, 568 n. 10 (1983). Where such guidance documents conflict or are inconsistent with a regulation, the latter of course must prevail. On the other hand, guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight. See, e.g., Limerick, 22 NRC at 711 & n. 40.
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> 28 NRC at 290.

The Petitioners contend that the failure to discuss the full spectrum of damages expected from large fires and explosions in NEI 06-12 is inconsistent with the requirement of 10 C.F.R 50.54(hh)(2) that specifies the mitigative strategies must be consistent with the loss of large areas of a nuclear plant. Accordingly, NEI 06-12 should not be given any special weight. 28 NRC at 290.

Conclusion

Based on the arguments and authorities cited herein the Petitioners urge this Board to find that Contention Seven, as modified, is not moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2009 a copy of "Petitioners' Consolidated Response to NRC Staff's Answer and Applicant's Answer To Petitioners' Brief Regarding Contention Seven's Mootness" was served by the Electronic Information Exchange consistent with the Board's July 1, 2009 protective order on the following recipients:

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