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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO INTERVENORS' CONTENTIONS  
AND REQUEST FOR SUBPART G HEARING

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's (Board) Order dated July 1, 2009,<sup>1</sup> the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) hereby answers the "Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. §§ 50.54(hh)(2) and Request for Subpart G Hearing" (New Contentions), filed on August 10, 2009. As discussed below, the Intervenors do not offer any admissible contentions and have not demonstrated that Subpart G hearing procedures are appropriate. Therefore, Intervenors' proposed contentions should be dismissed and the request for Subpart G hearing procedures denied.

BACKGROUND

On April 6, 2009, SEED Coalition, Public Citizen, True Cost of Nukes, and Mr. Lon Burnam (collectively, "Intervenors") submitted a Petition to Intervene in the Comanche Peak

<sup>1</sup> Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 & 4) ML091820781 (July 1, 2009) (unpublished order) (slip op.) ("Protective Order").

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Units 3 and 4 ("Comanche Peak") combined license ("COL") proceeding.<sup>2</sup> The Intervenor's Contention 7 alleged, in part, that the COL application omitted information required by 10 C.F.R. § 52.80(d), pursuant to Power Reactor Security Requirements; Final Rule, 74 Fed. Reg. 13,926 (Mar. 27, 2009). On May 26, 2009, the Applicant filed a "Mitigative Strategies Report" addressing the requirements of 10 C.F.R. § 52.80(d) and stated that the filing "renders Contention 7 moot."<sup>3</sup> At the prehearing conference on standing and contention admissibility held on June 9-10, 2009, the Staff agreed that the Applicant's filing of the missing information rendered the admissible portion of Contention 7 moot.

On July 1, 2009, the Board issued an order directing the Intervenor to "notify the Board and all parties whether [the Intervenor] challenge the assertions of Applicant and NRC Staff that the material [provided] renders Contention 7 moot," and setting a briefing schedule if the Intervenor sought to challenge the mootness of Contention 7 "separate and apart from" the filing of any new or amended contentions based on the information provided. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4) ML091820778 (July 1, 2009) (unpublished order) (slip op. at 1) ("July 1 Order"). On July 14, 2009, in response to the Board's July 1 Order, the Intervenor submitted a letter to the Board stating their position that Contention 7 is not moot. On July 20, 2009, pursuant to the same order, the Intervenor

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<sup>2</sup> The Staff and Applicant submitted timely answers to the petition on May 1, 2009. The Intervenor timely replied on May 8, 2009.

<sup>3</sup> Letter from Steven P. Frantz, Morgan, Lewis & Bockius, Notification of Filing Related to Proposed Contention 7 (May 26, 2009) (ML091460830). Because the Mitigative Strategies Report contains sensitive unclassified non-safeguards information (SUNSI), the Board issued a Protective Order governing disclosure of the information. See Protective Order. The Protective Order also granted the Intervenor leave to file new contentions based on the contents of the Mitigative Strategies Report within 25 days of receipt of the information. *Id.* at 4. The time for filing SUNSI contentions was extended to August 10, 2009 by a July 16, 2009 Order.

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submitted a brief supporting their position.<sup>4</sup> The Staff and Applicant filed their Answers in Response to Petitioners' Mootness Brief on July 27, 2009. Both the Staff and Applicant argued that the Applicant's May 26, 2009 submittal rendered Contention 7 moot. The Board has not yet ruled on the admissibility of Contention 7.

On August 10, 2009, the Intervenors filed five new contentions based on the Applicant's Mitigative Strategies Report in accordance with the Board's July 1, 2009 Order. In addition, Intervenors request the use of Subpart G procedures for these contentions. New Contentions at 22.

DISCUSSION

I. Legal Requirements for Contentions

The legal requirements governing the admissibility of contentions are well established and are currently set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice (formerly 10 C.F.R. § 2.714(b)).<sup>5</sup>

The standards in 10 C.F.R. § 2.309(f)(1) may be summarized as follows, an admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is

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<sup>4</sup> Petitioners' Brief Regarding Contention Seven's Mootness, July 20, 2009 ("Petitioners' Brief").

<sup>5</sup> In 2004, the requirements of former § 2.714 together with rulings regarding contentions set forth in Commission cases were re-codified by the Commission in 10 C.F.R. § 2.309. See Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182 (Jan. 14, 2004), *as corrected*, 69 Fed. Reg. 25,997 (May 11, 2004). In the Statements of Consideration for the final rule, the Commission cited several Commission and Atomic Safety and Licensing Appeal Board decisions applying former § 2.714 in support of the codified provisions of § 2.309. See 69 Fed. Reg. at 2202. Accordingly, Commission and Atomic Licensing Appeal Board decisions on former § 2.714 retain their vitality, except to the extent the Commission changed the provisions of § 2.309 as compared to former § 2.714.

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material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute with the Applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. § 2.309(f).

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202; see also *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Phila. Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3)*, ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3)*, CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. 69 Fed. Reg. at 2221; see also *Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC 318, 325 (1999); *Ariz. Pub. Serv. Co. et al. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3)*, CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-06-24, 64 NRC 111, 119 (2006).

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Finally, it is well established that the purpose for requiring a would-be intervener to establish the basis of each proposed contention is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom*, ALAB-216, 8 AEC at 20-21; *Ariz. Pub. Serv. Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

These rules focus the hearing process on real disputes susceptible to resolution in an adjudication. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). Further, "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies." *Id.* Specifically, NRC regulations do not allow a contention to attack a regulation unless the proponent requests a waiver from the Commission. See 10 C.F.R. § 2.335; *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 and n.15 (2007) (citing *Millstone*, CLI-01-24, 54 NRC at 364).

II. NRC Staff Response to Proposed Contentions

A. Proposed Contention 1

The submittal is deficient because it omits any reference to the numbers and magnitudes of the fires and explosions that would be expected, for example, from the impact of a large commercial airliner(s). Without such reference there is an inadequate basis to determine whether the proposed mitigative strategies are adequate to comply with 10 CFR §50.54(hh)(2). Compliance with 10 C.F.R. 50.54(hh)(2) cannot be determined without a

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determination of the full spectrum of damage states. At a minimum, the Applicant should be required to describe damage footprints both quantitatively and qualitatively, including composite damage footprints, that are reasonably expected with an airstrike(s) and include descriptions of anticipated physical damage, shock damage, fire damage, fire spread, radiation exposures to emergency responders and the public and other effects such as failure of structural steel. See draft regulatory guidance for the aircraft impact design regulation, 10 C.F.R. § 50.150, NEI 07-13, pp. 32-36.

New Contentions at 5. The Intervenor's acknowledge that 10 C.F.R. § 50.54(hh)(2) does not specify "the numbers and magnitudes of the fires and explosions that the applicant is to consider." New Contentions at 6. The Intervenor's claim that the Commission's Statements of Consideration adopted with the rule "require that the mitigative strategies response procedures consider aircraft attacks as a baseline for determining the scale of fires/explosions." *Id.* at 6-7. The Intervenor's argue that the "failure of the Applicant to discuss the scale (i.e. numbers and magnitudes) of the fires and explosions ... renders [the Applicant's] submittal inadequate to meet the requirements of 10 C.F.R. § 52.80(d) and 10 C.F.R. § 50.54(hh)." *Id.* at 8. The Intervenor's argue that without a "quantitative and/or qualitative" description of the magnitude of the fires and explosions, "the Commission cannot be expected to make a reasonable case-by-case determination" of whether the Applicant's mitigative strategies provide reasonable assurance of adequate protection. *Id.* at 12.

Staff Response: For the reasons set forth below, the Staff opposes admission of Proposed Contention 1 because it fails to meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(vi) and constitutes an impermissible attack on the regulations without requesting a waiver under 10 C.F.R. § 2.335.

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Proposed Contention 1 is inadmissible because the Intervenor's have not demonstrated that the Application fails to contain information on a relevant matter as required by law, and the contention impermissibly attacks the Commission's rules. 10 C.F.R. § 2.309(f)(1)(vi); 10 C.F.R. § 2.335. The Intervenor's acknowledge that the rule language in 10 C.F.R. § 50.54(hh) does not contain a requirement that the Applicant identify the number and magnitude of fires and explosions resulting in loss of large areas of the plant, and the Intervenor's do not identify an alternative legal requirement that requires the Applicant to describe the number and magnitude of fires and explosions. The Intervenor's misconstrue the Statements of Consideration as establishing a baseline event from an aircraft impact. Further, in arguing that a baseline event is necessary, the Intervenor's do not acknowledge the Commission's experience and insights used to develop the Power Reactor Security Requirements rule and that no baseline is necessary. Therefore, it appears that the Intervenor's challenge the rule itself for what it does not require.

The Power Reactor Security Requirements rule does not contain a requirement that the Applicant identify the number and magnitude of fires and explosions caused by a beyond-design-basis event.<sup>6</sup> 10 C.F.R. §§ 52.80(d) and 50.54(hh). The Intervenor's acknowledge that

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<sup>6</sup> The Power Reactor Security Requirements; Final Rule, 74 Fed. Reg. 13,926 (Mar. 27, 2009) states in pertinent part that a combined license application must 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. § 52.80(d).

(continued. . .)

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the "regulation does not specify the numbers and magnitudes of the fires and explosions that the applicant is to consider." New Contentions at 6. The Intervenor's contention states that "at a minimum, the Applicant should be required to describe damage footprints, that are reasonably expected with an airstrike(s) and include descriptions of anticipated physical damage, shock damage, fire damage, fire spread, radiation exposures to emergency responders and the public and other effects such as failure of structural steel." New Contentions at 5. However, the Intervenor does not cite any legal requirement for the Application to contain the description of damage footprints or the numbers and magnitudes of fires and explosions, so the Intervenor has not met the requirements of 10 C.F.R. § 2.309(f)(1)(vi). While the Intervenor has described the information they believe is missing from the Application, they have not provided the legal basis that requires the omitted information to be included. 10 C.F.R. § 2.309(f)(1)(vi). See *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC \_\_ (March 24, 2009) (slip op. at 22).

The Intervenor argues that the Statements of Consideration "require that the mitigative strategies response procedures consider aircraft attacks as a baseline for determining the scale

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(. . .continued)

(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.

10 C.F.R. § 50.54(hh)(2).

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of fires/explosions." New Contentions at 6-7 (emphasis added). However, in the absence of a regulatory requirement that an applicant consider aircraft attacks as a baseline in a mitigative strategies report, the Statements of Consideration do not establish a legal requirement by themselves.<sup>7</sup> Moreover, the Intervenors misconstrue the Statements of Consideration when they assert that the Statements of Consideration set a baseline for the beyond-design-basis events. The Statements of Consideration provide that these beyond design basis events may be caused by an aircraft impact, but "[a]fter careful consideration, the Commission . . . recognizes that the mitigative strategies can address losses of large areas of a plant and the related losses of plant equipment from a variety of causes including aircraft impacts and beyond-design-basis security events." 74 Fed. Reg. at 13,933. The Commission specifically did not intend the mitigative strategies to be limited to addressing plant losses due to aircraft impacts where it provides:

The requirements described in § 50.54(hh) relate to the development of procedures for addressing certain events that are the cause of large fires and explosions that affect a substantial portion of the nuclear power plant and are not limited or directly linked to an aircraft impact. The rule contemplates that the initiation event for such large fires and explosions could be any number of beyond-design basis events.

74 Fed. Reg. at 13,957. To the extent that the Intervenors attempt to directly link the mitigative strategies to an aircraft impact, or disagree with the rule's lack of a requirement for the Applicant

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<sup>7</sup> "The Statement of Considerations which explains the Commission's basis for, and interpretation of, the regulations' language provides useful guidance on the proper application of the regulations – guidance that is entitled to "special weight." *Connecticut Yankee Atomic Power Company* (Haddam Neck Plant) LBP-01-21, 54 NRC 33, 47 (2001) (citing *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988)).

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to identify the magnitude and number of the fires and explosions, the Intervenor's raise a challenge to the rule itself without meeting the requirements of 10 C.F.R. § 2.335.

The Intervenor's assertion that "the Commission cannot be expected to make a reasonable case-by-case determination without an adequate starting point" assumes that the Commission does not already have "an adequate starting point." New Contentions at 12. The ability of the Commission to determine the effectiveness of a mitigative strategies plan is not dependant on an Applicant describing the magnitude and number of fires and explosions possible from a beyond-design-basis event as discussed below.

As acknowledged by the Intervenor's,<sup>8</sup> the Commission has already studied the extent and magnitude of fires and explosions caused by beyond-design-basis events. "In early 2002, NRC launched a classified vulnerability assessment program for nuclear facilities for a wide range of hypothetical attacks, using internal and Department of Energy (DOE) national laboratory resources."<sup>9</sup> The NRC performed additional analysis of spent fuel cooling and

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<sup>8</sup> See New Contentions at 10, footnote 6.

<sup>9</sup> Enclosure of Letter from Chairman, Nils J. Diaz to The Honorable Pete V. Domenici, United States Senate (Mar. 14, 2005), U.S. Nuclear Regulatory Commission Report to Congress on the National Academy of Sciences Study on the Safety and Security of Commercial Spent Nuclear Fuel Storage at 10 (Mar. 2005) (ML050280428) ("Report").

The NRC agrees with the value of some additional analyses and as noted above has initiated plant-specific assessments on the loss of large areas of the plant to fire and explosions, including the identification of mitigation strategies and the collection of detailed design information on SFPs [spent fuel pools] for further evaluation. However, the NRC considers the breadth and range of additional analyses and sensitivities recommended by the NAS [National Academy of Sciences] report to be more than is needed for informed decision making, when considering what is currently well understood and the most effective and efficient use of NRC and licensee resources.

Report at 16.

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contracted with Sandia National Laboratories to perform such studies for completion in 2005. Report at 16-17. The NRC also contracted with Sandia to perform experimental work to confirm analytical modeling, and finally the NRC was participating in a long-term international cooperative testing program to examine fuel heat-up behavior in an air environment. *Id.* "The NRC has conducted detailed, site-specific engineering studies of a limited number of typical plants to assess potential vulnerabilities of nuclear power plants to deliberate attacks involving large commercial aircraft. The results of these studies have confirmed the effectiveness of the required mitigative measures and have identified further enhancements to mitigative strategies."<sup>10</sup> "The NRC has utilized the insights from its classified research on security assessments to direct that appropriate imminent threat procedures be developed at each power reactor."<sup>11</sup> Implementation of these procedures significantly enhances mitigation capabilities." *Id.* The Commission used its knowledge gained from the study of beyond-design-basis events to inform its rulemaking. *Id.* at 3. Thus, the Intervenor's premise that "the Commission cannot be expected to make a reasonable case-by-case determination without an adequate starting point" fails to acknowledge that the Commission has already studied the full spectrum of damage states that could result from a beyond-design-basis event.

A rule could be challenged either for what it requires or what it does not require.<sup>12</sup> Here, the Intervenor's challenge the rule to the extent that it does not require Applicants to describe

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<sup>10</sup> Letter from Chairman, Nils J. Diaz to The Honorable Tom Ridge, U.S. Department of Homeland Security at 2 (Sept. 8, 2004) (ML042400525).

<sup>11</sup> Letter from Chairman, Dale E. Kline to the Honorable Michael Chertoff, U.S. Department of Homeland Security at 2 (Aug. 28, 2006) (ML062340047).

<sup>12</sup> A petitioner for rulemaking "should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened." 10 C.F.R. 2.802(c)(3).

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the number or magnitude of fires and explosions, and only requires the Applicants to describe their mitigative strategies. The Intervenor's position that the Statements of Consideration sets a baseline to be described in a mitigative strategies plan is not required by the rule. Thus, based on the Commission's knowledge of the expected extent of loss due to fires and explosions, there is no need for an applicant to describe the expected loss or establish a baseline, and any argument by the Intervenor to the contrary is a challenge claiming the rule is either deficient or needs to be strengthened.

Therefore, this proposed contention as well as the subsequent proposed contentions which incorporate the arguments from Proposed Contention 1 by reference, do not cite a legal requirement that the Applicant describe the magnitude and number of fires and explosions caused by a beyond-design-basis event. 10 C.F.R. § 2.309(f)(1)(vi). The proposed contention also raises a challenge to the Commission's rule, 10 C.F.R. 50.54(hh), to the extent that the Intervenor argues that the rule should require the Applicant to describe the magnitude and number of fires and explosions. 10 C.F.R. § 2.335. Therefore, Proposed Contention 1 is inadmissible.

B. Proposed Contention 2

There are at least seventeen items in the Mitigative Strategies Table which reference to LOLA "event guidelines" for the "Commitment/Strategy". However, the MST does not specify whether the LOLA "guidelines" or "event guidelines" are or will be developed based on a damage footprint of sufficient extent and severity to accommodate the likely impact(s) of large commercial airliner(s) and/ or the full spectrum of damage states irrespective of the initiating event(s). Accordingly, there is no way to determine whether the proposed mitigative strategies are adequate.

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New Contentions at 12-13. The Intervenor explain that "[t]his omission contention addresses similar deficiencies as discussed in Contention One" and incorporate their argument from Proposed Contention 1. New Contentions at 13-14. The Intervenor argue that "[t]here are numerous instances in the MST that anticipate specific actions that are dependent on specifications of the damage states that can be expected in a LOLA." *Id.* at 14. The Intervenor state, "[t]hese deficiencies in the submittal can be cured only by a comprehensive analysis that fully accounts for and discusses how each is dependent on the magnitude of the initiating event(s) to which the particular mitigative measure applies." *Id.*

Staff Response: As explained more fully below, the Staff opposes admission of Proposed Contention 2 because it fails to meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(vi) and constitutes an impermissible attack on the regulations without requesting a waiver under 10 C.F.R. § 2.335.

Proposed Contention 2 is inadmissible to the same extent as Proposed Contention 1, because the Intervenor do not provide a legal basis for the claim that the Applicant must identify the "full spectrum of damage states" as explained in response to Proposed Contention 1. 10 C.F.R. § 2.309(f)(1)(vi). Likewise, Proposed Contention 2 is inadmissible to the extent it incorporates Proposed Contention 1 because it is an impermissible attack on Commission rules as explained in response to Proposed Contention 1. Additionally, the Intervenor do not provide a regulatory basis for their argument that there must be an analysis of how each particular mitigative measure is dependent on the magnitude of the initiating event, showing that the suggested omission is a relevant matter as required by law. 10 C.F.R. § 2.309(f)(1)(vi).

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The Commission does not view the mitigative strategies as pertaining to only one possible beyond design basis event. "The NRC recognizes that these mitigative strategies are beneficial for the mitigation of all beyond-design basis events that result in the loss of large areas of the plant due to explosions or fires." 74 Fed. Reg. at 13,957. The Intervenor do not challenge the adequacy of the mitigative strategies where Proposed Contention 2 states, "there is no way to determine whether the proposed mitigative strategies are adequate." New Contentions at 13. This leaves only the same issue raised in Proposed Contention 1, namely whether or not the Applicant must identify the number and magnitude of fires and explosions from the beyond design basis events. Even if the Commission intended each COL applicant to describe the number and magnitude of fires and explosions, the Commission "views the mitigative strategies as similar to those operational programs for which a description of the program is provided and reviewed by the Commission as part of the combined license application and subsequently the more detailed procedures are implemented by the applicant and inspected by the NRC before plant operation." 74 Fed. Reg. at 13,933. Thus, the mitigative strategies need only be described in an application. Therefore, Proposed Contention 2 is inadmissible because the Intervenor do not provide the legal basis supporting a contention of omission, and they have not shown that the Application fails to contain information on a relevant matter as required by law. 10 C.F.R. § 2.309(f)(1)(vi). Additionally, the Intervenor's arguments that the Applicant must submit this information is an impermissible attack on the Power Reactor Security Requirements rule. 10 C.F.R. § 2.335. Proposed Contention 2 is therefore, inadmissible.

C. Proposed Contention 3

(b)(4)

Without an appropriately detailed and accurate model, the Applicant cannot demonstrate that its plan for mitigating LOLAs can be effectively executed without subjecting on-site responders to excessive radiation exposure. The Applicant has not conducted a dose assessment necessary to establish that the mitigative strategies could be implemented without reliance on extraordinary or heroic actions. Further, the Applicant has not established that the dose assessment models are adequate to do the assessment in any event, taking into account the full spectrum of damage states.

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New Contentions at 15. The Intervenor argue that the "responders that will be relied on to execute the mitigative actions as detailed in the MST will likely encounter extreme and complex conditions that may well exceed those that emergency responders would be expected to encounter under the existing CPNPP emergency plan." New Contentions at 15. The Intervenor argue that the burden is on the Applicant to show that the dose projection models referenced in the emergency plan are adequate for compliance with 10 C.F.R. § 50.54(hh)(2). The Intervenor also state that the doses for responders under 10 C.F.R. § 50.54(hh)(2) "by definition exceed those that licensees are required to address under existing emergency plan requirements." New Contentions at 15. The Intervenor further argue that "[a]ccurate on-site dose modeling is also needed to determine whether, in fact, the LOLA mitigation scenarios could credibly be executed without a reliance on extraordinary or heroic actions." New Contentions at 16.

Staff Response: As explained more fully below, the Staff opposes admission of Proposed Contention 3 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v).

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Proposed Contention 3 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) because the Intervenor has not provided a concise statement of the alleged facts or expert opinions which support their position. The Intervenor correctly argues that the burden is on the Applicant to show that the dose projection models referenced in the emergency plan are adequate for compliance with 10 C.F.R. § 50.54(hh)(2). However, the contention admissibility rule (formerly 10 C.F.R. § 2.714) "places an initial burden on Petitioners to come forward with reasonably precise claims rooted in fact, documents, or expert opinion in order to proceed past the initial stage and toward a hearing." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996). Here, the Intervenor provides only bare assertions that doses for responders for mitigative actions "by definition exceed those that licensees are required to address" in an emergency plan, and "[a]ccurate on-site dose modeling is also needed to determine whether, in fact the LOLA mitigation scenarios could credibly be executed without a reliance on extraordinary or heroic actions." New Contentions at 15-16. Such bare assertions are insufficient to form an admissible contention. A "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;" rather, "a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998) (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995), *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention.")). The Intervenor has not provided any facts or expert opinions that

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would show that the Emergency Plan is inadequate for the purposes of the Mitigative Strategies Plan.<sup>13</sup> Although the Intervenor provide a declaration from Dr. Lyman in which Dr. Lyman states that he is responsible for the factual content and expert opinions expressed in Proposed Contention 3, neither Dr. Lyman's declaration nor the New Contentions explain why or how the dose projection models referenced in the Emergency Plan along with the Radiological Exposure Controls are inadequate for the purposes of the Mitigative Strategies Plan. Instead, the Intervenor only claim that the Applicant has the burden to show that the Emergency Plan is sufficient. Dr. Lyman's Declaration provides no explanation or support for the assertions made in Proposed Contention 3. "[A]n expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion . . ." *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (discussing expert support in the context of contention admissibility) (quoting *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 181 (1998)).

Therefore, Proposed Contention 3 is inadmissible because the Intervenor fail to provide support for their proposed contention. 10 C.F.R. § 2.309(f)(1)(v).

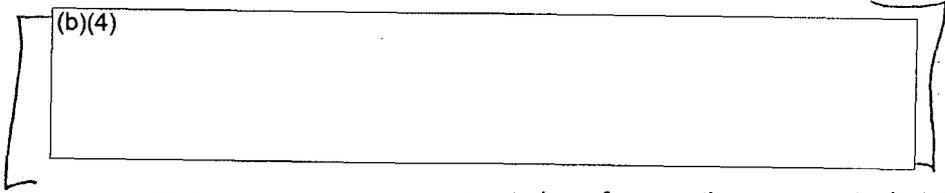
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<sup>13</sup> Comanche Peak Nuclear Power Plant, Units 3 and 4 COL Application, Part 5 - II. Emergency Plan, Section K. Radiological Exposure Control provides on-site exposure guidelines and authorizations, p. II-66. (ML082680315).

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Exemption 4 NRE

D. Proposed Contention 4



New Contentions at 17. The Intervenor incorporate by reference the arguments that they make in their preceding contentions. The Intervenor argue that "to effectively suppress nuclear plant fires that do not respond to the mitigative measures in the applicant's submittal, extraordinary actions, either individual or collective, would be required." New Contentions at 17. The Intervenor also reiterate their challenge to the Emergency Plan stating, "[t]here are no procedures . . . to determine which individual(s) would receive higher doses of radiation above those that might be incurred by individuals carrying out the CPNPP Emergency Plan." *Id.*

Staff Response: As explained more fully below, the Staff opposes admission of Proposed Contention 4 because it fails to meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(i), (ii), and (iv) - (vi) and 2.335.

Proposed Contention 4 is inadmissible to the same extent as Proposed Contention 1, because the Intervenor do not provide a legal basis for the claim that the Applicant must identify the "full spectrum of damage states" as explained in response to Proposed Contention 1. 10 C.F.R. § 2.309(f)(1)(vi). Likewise Proposed Contention 4 is inadmissible to the extent it incorporates Proposed Contention 1 because it is an impermissible attack on Commission rules as explained in response to Proposed Contention 1. Proposed Contention 4 is inadmissible to the extent that it incorporates by reference Proposed Contention 3 because it is not supported by facts or expert opinions as explained in response to Proposed Contention 3. 10 C.F.R. § 2.309(f)(1)(v). The Intervenor do not demonstrate that the issue raised in the

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contention is material to the findings that the NRC must make to support the action that is involved in the proceeding; and do not provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(iv) and (vi). The Intervenor do not provide a specific statement of the issue of law or fact to be raised or controverted and do not provide a basis for this proposed contention. 10 C.F.R. § 2.309(f)(1)(i) and (ii).

(b)(4)

New Contentions at 17, quoting *Id.* at 1.<sup>14</sup> The

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(continued...)

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Intervenors do not explain how this proposed contention raises an issue of law or fact to be controverted, or provide a brief basis for such an issue. 10 C.F.R. § 2.309(f)(1)(i) and (ii). The Intervenors do not describe how these statements show that a genuine dispute exists with the Applicant on a material issue of law or fact, where the Applicant's Mitigative Strategy Report is based on the approved guidance document, and it is not shown to be inconsistent with the guidance document. The Intervenors do not cite a rule or other legal requirement with which the Applicant is allegedly not complying. 10 C.F.R. § 2.309(f)(1)(vi).

This contention contains only a bare assertion that individuals would receive higher doses than "those that might reasonably be incurred by individuals carrying out the CPNPP

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Emergency Plan." New Contentions at 17. Such bare assertions are insufficient to form an admissible contention. A "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;" rather, "a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention." *PFS*, LBP-98-7, 47 NRC at 180 (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention.")). The Intervenor has not provided any facts or expert opinions that would show that the Emergency Plan is inadequate. 10 C.F.R. § 2.309(f)(1)(v).

Therefore, the Intervenor's Proposed Contention 4 is inadmissible because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(i), (ii), and (iv) - (vi), and constitutes an impermissible attack on the regulations without requesting a waiver under 10 C.F.R. § 2.335.

E. Proposed Contention 5

(b)(4) However, there is no discussion of the number or magnitude of fires that would require water nor the full spectrum of damage states that would require fire suppression. There is no evidentiary support for an assumption by the Applicant that adequate supplies or pumping capacity is available simultaneously for emergency reactor cooling, SFP cooling and suppressing multiple fires.

New Contentions at 18. The Intervenor incorporates by reference their arguments from Proposed Contention 1. *Id.* The Intervenor characterizes this contention as one of omission, however, they specifically challenge the adequacy of the "total pumping capacity" and the

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adequacy of the "fire suppression capacity." *Id.* at 18-19. The Intervenor also argue that the Applicant does not "discuss compromised water supplies nor pumping capacity under all damage states." *Id.* at 19.

Staff Response: As explained more fully below, the Staff opposes admission of Proposed Contention 5 because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Proposed Contention 5 is inadmissible to the same extent as Proposed Contention 1, because the Intervenor do not provide a legal basis for the claim that the Applicant must identify the "full spectrum of damage states" as explained in response to Proposed Contention 1. 10 C.F.R. § 2.309(f)(1)(vi). Likewise Proposed Contention 5 is inadmissible to the extent it incorporates Proposed Contention 1 because it is an impermissible attack on Commission rules or policies as explained in response to Proposed Contention 1. 10 C.F.R. § 2.335.

The Intervenor's challenge the adequacy of the total pumping capacity and the adequacy of the fire suppression capacity, but they do not describe how the capacities are inadequate nor do the Intervenor provide any factual or expert support for the position that the total pumping capacity or the fire suppression capacity are inadequate. 10 C.F.R. § 2.309(f)(1)(v) and (vi). The Intervenor attempt to construe this Proposed Contention as a contention of omission, but where their contention relies on an assertion of inadequate mitigative measures rather than omitted information, the burden rests with the Intervenor to provide support for their contention to show why their proposed contention is admissible.

Yankee, CLI-96-7, 43 NRC at 262, [redacted] (b)(4)

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(b)(4)

EXEMPTION 4  
LUMENANT

The intervenors also assert that "the Applicant does not discuss compromised water supplies nor pumping capacity under all damage states." New Contentions at 19. However, the intervenors do not provide a legal requirement that the Applicant include such a discussion. While the intervenors have described the information they believe is missing from the Application, they have not provided the legal basis that requires the omitted information to be included, and thus have failed to satisfy 10 C.F.R. § 2.309(f)(1)(vi). See *Calvert Cliffs*, LBP-09-04, 69 NRC at \_\_\_ (slip op. at 22).

Therefore, the intervenors have not met the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) for Proposed Contention 5. Proposed Contention 5 is, therefore, inadmissible.

III. Intervenors Fail to Show That Subpart G Procedures Are Appropriate

A. Regulatory Requirements Regarding the Selection of Hearing Procedures

In 2004 the Commission revised its Rules of Practice for adjudicatory proceedings to "improve the effectiveness and efficiency of the NRC's hearing process, and better focus and use limited resources of all involved." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2190 (Jan. 14, 2004).<sup>15</sup> The Commission decided that "the greater use of more informal hearing procedures is desirable" and thus revised its rules to expand the use of informal Subpart L procedures. *Id.* at 2206. Accordingly, the Commission stated that Subpart L

<sup>15</sup> As stated by the First Circuit Court of Appeals, the NRC had determined that its "existing rules of practice lead to hearings that are cumbersome, unnecessarily protracted, and wasteful of the resources of the parties and the Commission." *Citizen's Awareness Network, Inc. v. United States*, 391 F.3d 338, 352 (1st Cir. 2004) ("CAN v. NRC") (upholding the NRC's procedures for discovery and cross-examination in licensing proceedings).

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procedures "would be used . . . in licensing proceedings for the resolution of contentions which do not meet the criteria set forth in section 2.310(d) for use of Subpart G hearing procedures." *Id.* at 2205-06.<sup>16</sup>

Section 2.310(d) provides two situations in which a licensing proceeding must be resolved using formal Subpart G procedures: "resolution of (1) issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or (2) issues of motive or intent of the party or eyewitness material to the resolution of the contested matter." 69 Fed. Reg. at 2222 (discussing 10 C.F.R. § 2.310(d)). In explaining these criteria, the Commission stated that this first criterion contains two elements. 69 Fed. Reg. at 2222. The first element is that there is a dispute of material fact concerning a past activity, which includes for example, a disagreement regarding the details of a past conversation. *Id.* The second element is that the credibility of a witness is reasonably expected to be an issue, for example, where there is a question of whether an eye witness accurately describes a past activity. *Id.* But, the Commission stated that "[t]his does not include disputes between parties over the qualifications and professional 'credibility' of expert witnesses

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<sup>16</sup> Among the primary differences between Subparts G and L are the types of discovery allowed, and the means of presenting evidence at hearing. Both Subpart G and Subpart L require the parties to provide discovery through the use of mandatory disclosures. See 10 C.F.R. §§ 2.336 and 2.704. In a formal Subpart G proceeding, the parties are also permitted to conduct oral depositions and other discovery. See 10 C.F.R. §§ 2.705-2.709; in contrast, in an informal proceeding under Subpart L, the Staff prepares a hearing file under § 2.1203, but no discovery is permitted apart from the parties' mandatory disclosures. 10 C.F.R. § 2.1203(d). Under Subpart G, oral or written testimony may be presented, and cross-examination is permitted, 10 C.F.R. § 2.711; in contrast, in an informal proceeding, all direct and rebuttal testimony is filed in writing, the Board interrogates the witnesses, and cross-examination is only "permitted, on motion, if the Board deems it necessary for the development of an adequate record." See 10 C.F.R. §§ 2.1207-1208; *Entergy Nuclear Vermont Yankee L.L.C. & Entergy Nuclear Operations, Inc.*, (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 693 (2004).

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who have no first-hand knowledge of the disputed event/facts." *Id.* Finally, the Commission explained that the second criterion is appropriate where a contention requires consideration and resolution of the motive or intent of a witness or party. *Id.*

The Commission further indicated that unless an enforcement proceeding is involved, there is seldom a basis to require Subpart G procedures, because a governmental deprivation of life, liberty or property is not involved. See *id.* at 2205 n.14 (emphasis added). Thus, the Commission provided for the use of formal Subpart G procedures in only a limited number of circumstances, "where the application of such procedures are necessary to reach a correct, fair and expeditious resolution of such matters." 69 Fed. Reg. at 2205.<sup>17</sup> A determination as to which procedures should be used is made on a contention-by-contention basis. 69 Fed. Reg. at 2222.

**B. Response to Intervenors' Request to Use Subpart G Hearing Procedures**

Intervenors anticipate that the Applicant will argue that its Mitigative Strategies Report is adequate and meets the requirements to 10 C.F.R. § 50.54(hh)(2). New Contentions at 19. Intervenors argue that this anticipated position "sets up a material fact issue related to the assumptions about the full spectrum of damage states" and that live testimony "regarding these contentions is necessary because the credibility of the witnesses sponsoring such testimony would be in issue." *Id.* at 20. Therefore, Intervenors request the use of Subpart G hearing procedures. *Id.*

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<sup>17</sup> As stated in the Statement of Consideration, "the Commission has decided to provide for formal, on-the-record hearings using the full panoply of Subpart G procedures and cross-examination in certain narrowly-prescribed areas." 69 Fed. Reg. at 2192 (emphasis added).

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Intervenors have not, however, demonstrated that Subpart G procedures are appropriate with regard to its five new proposed contentions. Here, Intervenors' statement that their new contentions raise a material issue for which witness credibility will be an issue fails to meet either requirement for the use of Subpart G procedures in this proceeding. See New Contentions at 19. First, Intervenors' contentions do not raise a material issue regarding a past event nor do they raise an issue of motive or intent. In addition, the fact that an applicant is anticipated to support its own application fails to raise an issue of credibility. If an applicant's credibility were questioned every time it supported its application, then Subpart G procedures would be appropriate in virtually every licensing case, which is contrary to the Commission's intent for the use of Subpart G hearings. The Commission stated that "there is seldom a basis to require Subpart G procedures . . . ." and in most licensing cases, Subpart L procedures are appropriate. 69 Fed. Reg. at 2205 n.14. Therefore, because Intervenors have not shown that their Proposed Contentions satisfy the special circumstances enumerated in 10 C.F.R. § 2.310(d)(4), the Intervenors' request for the use of Subpart G procedures should be denied.

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CONCLUSION

As discussed above, the Intervenor's do not offer any admissible contentions and have not demonstrated that Subpart G hearing procedures are appropriate. Therefore, Intervenor's proposed contentions should be dismissed and the request for Subpart G hearing procedures should be denied.

/Signed (electronically) by/

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO INTERVENORS' CONTENTIONS AND REQUEST FOR SUBPART G HEARING" has been served on the following persons by Electronic Information Exchange on this 4th day of September, 2009:

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