

~~CONTAINS SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION
WITHHOLD PER 10 C.F.R. § 2.396 AND JULY 1, 2009 PROTECTIVE ORDER~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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

**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**

The Intervenor hereby move that the oral arguments and all other hearings in this Docket related to the fires and explosions regulations (10 C.F.R. § 50.54(hh)(2)) be conducted in public pursuant to 10 C.F.R. § 2.328. Information subject to this Motion includes, but are not necessarily limited to, the Intervenor's Contentions related to the fires and explosions regulations, the fact assertions and arguments as presented by the parties in the pleadings related to the subject regulations and contentions, and NEI 06-12.¹ Accordingly, the contents of the pleadings/documents specified below should be subject to public argument/hearing under 10 C.F.R. § 2.328 and made available in the NRC's Public Document Room and online in the Agencywide Documents Access and Management System (ADAMS):

1. NEI 06-12, Revision 2,
2. "Petitioners' Brief Regarding Contention Seven's Mootness," July 20, 2009,
3. "Luminant's Response to Petitioners' Brief Regarding Mootness of Contention 7," July 27, 2009,
4. "NRC Staff's Answer to Petitioners' Brief Regarding Contention Seven's Mootness," July 27, 2009,
5. "Petitioners' Consolidated Response to NRC Staff's Answer and Applicant's Answer To Petitioners' Brief Regarding Contention Seven's Mootness," August 3, 2009
6. "Intervenor's 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,

¹ This motion does not anticipate that the detailed information in the Applicant's fires and explosions submittal dated May 22, 2009, would be presumptively required to be covered in a public hearing.

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Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions
FOIA-2, 10-045

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7. "Luminant's Answer Opposing Late-filed Contentions Regarding the Mitigative Strategies Report," September 4, 2009,
8. "NRC Staff's Answer to Intervenors' Contentions and Request for Subpart G Hearing," September 4, 2009,
9. "Intervenors' Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)," September 11, 2009,
10. the *instant* motion, and
11. all future pleadings/documents filed related to the fires and explosions regulations absent proper designation under 10 C.F.R. § 2.390 and order from the Panel exempting the subject materials from the public hearing requirement of 10 C.F.R. § 2.328.

Background

On April 6, 2009, the Intervenors filed Contention Seven in their Petition to Intervene regarding the Applicant's compliance with the provisions of 10 C.F.R. § 50.82 and 10 C.F.R. § 50.54(hh)(2) (fires and explosions regulations).² Subsequently, the Applicant submitted documentation (the submittal) on May 22, 2009 that purports to comply with 10 C.F.R. § 50.82 and 10 C.F.R. § 50.54(hh)(2). Based on the submittal the Applicant moved to have the original Contention Seven dismissed as moot. Staff agreed with Applicant that Contention Seven contention should be dismissed as moot. The Intervenors oppose the motion. The motion is set for oral argument on November 12, 2009 by the Order of this Panel (October 9, 2009).

Pursuant to the Panel's Order of July 1, 2009 the Intervenors filed five additional fires and explosions contentions. These contentions have been designated the "SUNSI" contentions because they have their origin in the Applicant's submittal of May 22, 2009. The submittal has been designated by the Applicant as subject to 10 C.F.R. § 2.390. For guidance on compliance with the fires and explosions regulations the Applicant referenced to and relied on NEI 06-12.³ The entirety NEI 06-12 has been

² See Petition, Contention Seven, pp.22-26.

³ Cover letter to Applicant's submittal of May 22, 2009.

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designated as restricted under 10 C.F.R. § 2.390 because it purportedly includes "security-related information" and each page of the document is designated accordingly.⁴

Despite the designation of the entirety of NEI 06-12 as subject to 10 C.F.R. § 2.390, its foreword includes the admission that only "some of the information contained herein is sensitive and should be handled in accordance with 10 C.F.R. § 2.390."⁵ (emphasis added) Intervenors contend that the vast majority of NEI 06-12 is required to be the subject of public hearing under 10 C.F.R. § 2.328 because it is neither security related nor otherwise subject to non-disclosure under 10 C.F.R. § 2.390. The Intervenors further contend that the only part of NEI 06-12 that might, arguably, be subject to nondisclosure is related to the extreme damage mitigation guidelines (EDMG) in Appendix C of NEI 06-12.⁶ However, the balance of the NEI 06-12 should be subject to disclosure under the open hearings requirement of 10 C.F.R. § 2.328.

To the extent that the Applicant/Staff assert(s) applicability of restrictions on disclosure during a public argument/hearing the Applicant/Staff has/have the burden to make specific designations of the portions of documents that should not be subject to 10 C.F.R. § 2.328 and Intervenors have the right to contest such designations.

Similarly, the factual assertions, arguments and authorities included in the documents filed in this docket, as specified above, related to the fires and explosions contentions should be subject to the open hearing requirements of 10 C.F.R. § 2.328.

⁴ NRC cited NEI 06-12 as an "acceptable method for current reactor licensees to comply with the mitigative strategies requirement ... The Commission is currently developing a draft regulatory guide that consolidates this guidance and addresses new reactor designs." 74 Fed. Reg. 13926, 13958.

⁵ NEI 06-12, p.i.

⁶ The Intervenors do not concede that the EDMG is subject to nondisclosure. The burden is on the Applicant to show that nondisclosure is justified under 10 C.F.R. § 2.390.

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The Panel entered an Order on October 9, 2009 that stated "significant" parts of the oral arguments would be closed to the public. The Order did not designate any particular portion of the hearing that would be closed to the public. The Intervenor recognize that even if the *instant* motion is sustained portions of the Applicant's submittal and perhaps other subject matter may yet be precluded from a public hearing. (See e.g. footnote 1 *supra*.)

This motion is timely because there has been no ruling concerning what parts of the hearing are to be closed to the public.

Arguments and Authorities

The requirement for a public hearing applies to this proceeding.

The *instant* motion is intended to apply to all arguments and hearings in this matter. Of most immediate concern is the oral argument set for November 12, 2009. The Intervenor contend that the requirements of 10 C.F.R. § 2.328 apply to oral arguments. Whether 10 C.F.R. § 2.328 applies to oral arguments or only to evidentiary hearings was discussed *In the Matter of Virginia Electric and Power Company* (North Anna Power Station, Unit 3), 68 N.R.C. 679, 2008 WL 6722789 (N.R.C. Nov 07, 2008). The Panel acknowledged that the term "hearing" is undefined and could apply only to evidentiary hearings. On the other hand, the Panel acknowledged that there are no regulations that prescribe how contention admissibility oral arguments are to be conducted. Without deciding whether 10 C.F.R. § 2.328 applies to contention admissibility oral arguments, the Panel acknowledged that it is the Commission's policy that NRC proceedings should be open to the public and that generally the public is allowed to attend contention admissibility oral arguments. 68 N.R.C. at 684-85.

Additionally, the overriding consideration of open proceedings is particularly important in the context of nuclear plant licensing. The Atomic Energy Act requires that licensing nuclear plants only be

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done if the public interest is served. 42 U.S.C. 2133(d). Accordingly, 10 C.F.R. § 2.328 presumes public hearings for good reason. The public's interest is not served by conducting nonpublic hearings except in the most compelling circumstances and no such showing has been made related to NEI 06-12 or other submittal related pleadings/documents filed in this adjudication. In the context of the subject adjudication, the balancing test between protection of the public's interest and protection of the Applicant's interests should favor public hearings. *Fitzgerald v. Hampton*, 467 F.2d 755 (D.C.Cir.1972) (finding right of public access to Civil Service Commission administrative hearing); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F.Supp. 569 (D.Utah 1985) (finding right of public access to Mine Safety and Health Administration investigative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir.1987); *Pechter v. Lyons*, 441 F.Supp. 115 (S.D.N.Y.1977) (ruling immigration judge abused his discretion in excluding public from deportation hearing); *United States v. Miami Univ.*, 294 F.3d 797, 824 (6th Cir.2002) (university disciplinary board proceedings); *Brown & Williamson Tobacco Corp. v. Fed. Trade. Comm'n*, 710 F.2d 1165, 1177-79 (6th Cir.1983) (civil action against administrative agency); *Whiteland Woods, L.P. v. West Whiteland*, 193 F.3d 177, 181 (3d Cir.1999) (municipal planning meeting); *Cal-Almond, Inc. v. United States Dept. of Agric.*, 960 F.2d 105, 109 (9th Cir.1992) (USDA's voters list).

Proceedings conducted in accordance with 10 C.F.R. § 2.328 that disclose NEI 06-12 will not jeopardize security of Comanche Peak Units 3 & 4 because, as a so-called "guidance document", no site-specific information about Comanche Peak Units 3 & 4 (such as Applicant's Mitigative Strategies Table or site-specific fire suppression capacities) is disclosed.

The pleadings specified above concern either the Applicant's omission to identify the full spectrum of damage states to which its mitigative strategies apply or the Applicant's deferral to the future of tasks related to the fires and explosions regulations. This is not security related information that justifies closure of the arguments.

The Mootness Pleadings

In the Intervenor's mootness brief there is no discussion of technical details of the Applicant's mitigative strategies. The brief focuses on the omission of relevant information. There is nothing in the brief that compromises security of the Applicant's present or proposed plants.

In the Applicant's and Staff's Answers to the Intervenor's mootness brief there is no reference to technical aspects of the mitigative strategies. Both answers are comprised almost exclusively legal arguments. There is nothing in the answers that compromise security of the Applicant's present or proposed plants.

The Intervenor's Consolidated Response is comprised mostly of legal arguments on the omission contentions. There is nothing in the consolidated response that compromises security of the Applicant's present or proposed plants.

The New Fires and Explosions Contentions

Contention MS-1⁷

Contention MS-1 addresses the Applicant's failure to specify the number and magnitude(s) of fires and explosions anticipated from an initiating event such as the impact of one or more large commercial airliners. The only technical information referenced therein is from the publicly available version of NEI 07-13. Contention MS-1 should be argued in a public hearing because there is nothing in it that compromises security of the Applicant's present or proposed plants.

The Applicant's Answer to Contention MS-1 consists of an argument that there is no regulatory requirement for specification of damage states and that the requirements of the fires and explosions regulations should not be discussed in the context of the aircraft impact design rule, 10 C.F.R. § 50.150.

⁷ The Intervenor will reference the fires and explosions contentions by MS-1 – MS-5.

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There is neither reference to nor discussion of the Applicant's submittal. Nothing in the Applicant's Answer could reasonably compromise security at the Applicant's existing or proposed plants.

Likewise, the Staff's Answer to Contention MS-1 does not rely on the specifics of the Applicant's submittal. There is nothing Staff discusses that could reasonably compromise security at the Applicant's existing or proposed plants.

Contention MS-2

Contention MS-2 focuses on seventeen specific items in the Applicant's Mitigative Strategies Table (MST) that reference various events and event guidelines that Intervenors contend should be evaluated in light of the full spectrum of damage states. The references to the MST are not security related and could not reasonably compromise security at the Applicant's existing or proposed plants. To the extent that the Panel concludes the references to the MST represent a possible security compromise such could be barred from reference in the public portion of the hearing and/or redacted from pertinent pleadings.⁸

The Applicant's and Staff's Answer to Contention MS-2 contain no reference to the submittal or other technical information. There is nothing Applicant and Staff discuss related to Contention MS-2 that could reasonably compromise security at Applicant's existing or proposed plants.

Contention MS-3

Contention MS-3 posits that the MST fails to adequately substantiate the assertion that the dose projection models are adequate under the full spectrum of damage states. The reference to the MST's

⁸ However the burden is on the Applicant to show that nondisclosure in public arguments/hearings is justified under 10 C.F.R. § 2.390.

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assertion of adequacy of dose projection is not a security related matter and disclosure would not reasonably cause compromised security at the Applicant's existing or proposed plants.

The Applicant's and Staff's Answers make legal arguments but do not reference the MST. There is nothing the Applicant and Staff discuss related to Contention MS-3 that could reasonably compromise security at the Applicant's existing or proposed plants.

Contention MS-4

(b)(4)

EXEMPTED 4 NRI

In the event that the mitigative strategies fail the need for heroic actions to deal with the damage state becomes more probable. There are no references to the Applicant's submittal in this contention and nothing that would compromise security at the Applicant's existing or proposed plants.

The Applicant's and Staff's Answers focus on legal arguments and make no reference to the submittal. There is nothing the Applicant and Staff discuss related to Contention MS-4 that could reasonably compromise security at the Applicant's existing or proposed plants.

Contention MS-5

Contention MS-5 addresses the Applicant's assumptions about its pumping capacity and whether it is adequate under the full spectrum of damage states. There is a reference to a specific pumping capacity. However, use of high-capacity pumps for fire suppression is common knowledge and is not reasonably considered classified information and should not be a basis to bar such information from a public argument/hearing.

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The Applicant's Answer does quote from the MST but the reference is not technical or security related information.⁹ Otherwise its arguments are legal in nature and do not implicate security at existing or proposed plants.¹⁰

The Staff's Answer makes no reference to the submittal otherwise lacks information that could reasonably compromise security at the Applicant's existing or proposed plants.

Intervenors' Consolidated Response

The Intervenors' Consolidated Response addresses legal arguments, references NEI 06-12 but does not reference the Applicant's submittal. Therefore there is nothing in the response that could reasonably compromise security at the Applicant's existing or proposed plants.

The disclosure of NEI 06-12 will not jeopardize security of Comanche Peak Units 3 & 4 because the preparers of the document admit that, only "some" information therein is "sensitive".

Any assertion of the Applicant or Staff that the NEI 06-12 should be barred from the public hearing requirements of 10 C.F.R. § 2.328 because it would compromise plant security is betrayed by the Foreword to NEI 06-12 that acknowledges the "guideline and conditions are not generally considered Safeguards Information." The foreword then acknowledges that only some unspecified portion is sensitive information: "However, some of the information contained herein [in NEI 06-12] is sensitive and should be handled in accordance with 10 C.F.R. § 2.390."

Presently, the entirety of NEI 06-12 is exempt from the public hearing requirements and this cannot be justified even based on the admission that only some fraction is "sensitive." The burden should

⁹ Applicant's Answer, p.30.

¹⁰ Applicant's Answer, pp. 27-31.

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be on the Applicant to initially identify the portions of NEI 06-12 that are "sensitive" and not subject to the public hearing requirements of 10 C.F.R. § 2.328.

Conclusion

For the above and foregoing reasons the Intervenors urge this motion be granted.

Certification

Counsel for Intervenors hereby certifies pursuant to 10 C.F.R. § 2.323(b) that opposing counsel was contacted regarding this motion but such contact did not resolve the issues raised herein.

Respectfully submitted,

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November 2, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2009 a copy of "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" 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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