

II. PROCEDURAL BACKGROUND

On September 19, 2008, Luminant submitted an application to the NRC for COLs for Comanche Peak Units 3 and 4 (“COLA”).¹ The Sustainable Energy and Economic Development Coalition, Public Citizen, True Cost of Nukes, and Lon Burnam (jointly, “Petitioners”) filed a “Petition for Intervention and Request for Hearing” (“Petition”) on April 6, 2009, alleging nineteen separate contentions. The Petition included Contention 7, which claimed that the COLA is incomplete because it fails to address 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).² Luminant opposed the admission of Contention 7 for several reasons, including that Contention 7 would be moot once Luminant updated its COLA to address Sections 52.80(d) and 50.54(hh)(2).³

Luminant filed a supplement to its COLA on May 22, 2009 that provided the NRC with the Mitigative Strategies Report, which addressed the requirements of Sections 52.80(d) and 50.54(hh)(2). On July 1, 2009, the Board issued a Protective Order, which allowed the Petitioners to obtain access to the Mitigative Strategies Report.⁴ Once the Petitioners filed the required non-disclosure affidavits on July 7, 2009, Luminant transmitted the Mitigative Strategies Report to Petitioners.⁵ On July 14, 2009, the Petitioners notified the Board that they do not believe that Contention 7 is moot.⁶ Subsequently, on July 20, 2009, the Petitioners filed a brief supporting their claim that Contention 7 is not moot.⁷

¹ Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008).

² Petition at 22.

³ Luminant’s Answer Opposing Petition for Intervention and Request for Hearing at 32-36 (May 1, 2009).

⁴ Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished).

⁵ Letter from J. Rund, Counsel for Luminant, to R. Eye, Counsel for Petitioners (July 7, 2009).

⁶ Letter from R. Eye, Counsel for Petitioners, to Licensing Board (July 14, 2009).

⁷ Petitioners’ Brief Regarding Contention Seven’s Mootness (July 20, 2009).

III. LEGAL STANDARDS

The Commission has stated that there is “a difference between contentions that merely allege an ‘omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application.”⁸ “Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant . . . the contention is moot.”⁹ Once a contention of omission becomes moot, “the contention must be disposed of or modified.”¹⁰

IV. CONTENTION 7 IS MOOT AND SHOULD BE DISMISSED

A. Contention 7 Alleges the Omission of Information from the COLA

As noted above, Contention 7 claims that the COLA is incomplete because it does not contain information addressing the requirements in 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).¹¹ At the time the Petitioners filed Contention 7, Luminant’s COLA had not yet addressed the operational and programmatic aspects of Sections 52.80(d) and 50.54(hh)(2) because these provisions were not yet effective and were not yet regulatory requirements.¹² Because Luminant’s COLA did not address the requirements of Sections 52.80(d) and 50.54(hh)(2) when Contention 7 was filed, Contention 7 did not (and could not) challenge any specific information

⁸ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

⁹ *Id.* at 383.

¹⁰ *Id.* at 382.

¹¹ Petition at 22.

¹² These sections were published in the *Federal Register* on March 27, 2009, and, by the terms of that *Federal Register* notice, the rule was not effective until May 26, 2009. Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926, 13,926 (Mar. 27, 2009).

discussed in the COLA addressing these regulations. Therefore, as Petitioners acknowledge, Contention 7 is a contention of omission.¹³

B. The Mitigative Strategies Report Addresses the Requirements of Sections 52.80(d) and 50.54(hh)(2) and Renders Contention 7 Moot

After Contention 7 was filed, Luminant submitted to the NRC the Mitigative Strategies Report, which addresses the requirements of Sections 52.80(d) and 50.54(hh)(2).

Section 52.80(d) states that a COLA must include:

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.

In turn, Paragraph (hh)(2) of Section 50.54 states that:

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.

As required by Sections 52.80(d) and 50.54(hh)(2), the Mitigative Strategies Report includes descriptions and plans for implementing guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities. Importantly, these

¹³ Petitioners' Brief Regarding Contention Seven's Mootness at 4.

descriptions and plans specifically address (i) fire fighting, (ii) operations to mitigate fuel damage, and (iii) actions to minimize radiological release.¹⁴

As a result, the Mitigative Strategies Report has rendered this contention of omission moot by updating the COLA to include 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. Therefore, the Board should dismiss Contention 7.¹⁵

C. The Petitioners Fail to Identify Any Omitted Information Required by Law

The Petitioners claim that Contention 7 is not moot because the Mitigative Strategies Report (1) does not indicate whether the magnitude of the fires and explosions addressed in the report are on scale with the impact that would be caused by a large commercial aircraft; (2) contains commitments that have not yet been implemented by Luminant; and (3) incorporates by reference a Mitsubishi report on this topic.¹⁶ None of these claims was made (or could have been made) in Contention 7. Furthermore, as demonstrated below, these claims fail to identify any legally required information that has been omitted from the Mitigative Strategies Report.

The Petitioners are challenging the substance of the Mitigative Strategies Report. To the extent that the Petitioners wish to challenge the adequacy of the Mitigative Strategies Report, they must, within the timeframe set forth in the Board's July 16, 2009 Order, file new or amended contentions that fully comply with the requirements in 10 C.F.R. § 2.309(f)(1).

14 (b)(4)

¹⁵ See *McGuire-Catawba*, CLI-02-28, 56 NRC at 382-83.

¹⁶ Petitioners' Brief Regarding Contention Seven's Mootness at 9.

EXEMPTION 4 LUMINANT

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

In this regard, the Petitioners' criticisms of the Mitigative Strategies Report cannot be used as a basis for avoiding dismissal of Contention 7 on the grounds of mootness. For example, in similar circumstances in *Duke Energy*, the Commission stated:

The Intervenors' previous concern was Duke's failure to acknowledge the Sandia study. Now their concern relates to *how* Duke and the NRC Staff applied the Sandia information in their latest SAMA analyses. This is a new concern based on revised analyses using different containment failure probability estimates than those used in the Environmental Reports. The appropriate vehicle for the Intervenors' new challenge was an amended contention.

If we did not require an amended or new contention in "omission" situations, 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.¹⁷

Similarly, in *Vermont Yankee*, the licensing board stated:

Nevertheless, in context, it is clear that NEC Contention 4 focused on the omission, not the quality, of any seismic and structural analysis of the cooling system under EPU conditions. This was inevitable, because at the time there was no such analysis, and therefore no way that NEC could review or challenge its adequacy.

Now however, NEC raises a number of alleged flaws in Entergy's seismic and structural analysis, claiming that they fall within the umbrella of NEC Contention 4. This is an effort to "transform" an admitted contention of omission into a broad series of disparate new claims and is not conducive to the fair and efficient management of this proceeding.¹⁸

In summary, Petitioners are attempting to transform Contention 7 from a contention stating that the COLA omitted the information required by Section 52.80(d), into a new set of disparate claims that the Mitigative Strategies Report is deficient in the manner in which it

¹⁷ *McGuire-Catawba*, CLI-02-28, 56 NRC at 382-83.

¹⁸ *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-24, 62 NRC 429, 432 (2005) (citations omitted).

addresses Section 52.80(d). None of those disparate claims was previously raised by Petitioners, and the claims are not sufficient to forestall dismissal of Contention 7 on the grounds of mootness. If Petitioners desire to raise these new claims, they must submit a new contention.

In any event, as discussed below, Petitioners' new claims are legally baseless.

1. Section 52.80(d) Does Not Require an Assessment of the Magnitude of the Fires and Explosions Caused by an Aircraft Impact

First, the Petitioners claim that Contention 7 is not moot because the Mitigative Strategies Report does not indicate whether the magnitude of the fires and explosions addressed in the report are on scale with the impact that would be caused by a large commercial aircraft.¹⁹

According to the Petitioners, the Mitigative Strategies Report should have predicted or projected the size of the fires and explosions that would result from an aircraft impact.²⁰

This claim does not demonstrate an omission from the Mitigative Strategies Report. Sections 52.80(d) and 50.54(hh)(2) do not require an applicant or licensee to calculate the impact of a large commercial aircraft or to assess the impacts of fires or explosions. Instead, these regulations set forth performance-based standards for mitigative strategies assuming the loss of large areas of the plant due to explosions or fires.²¹

Furthermore, the following explanation in the statement of considerations for these provisions makes clear that an aircraft-specific assessment is not required:

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*

¹⁹ Petitioners' Brief Regarding Contention Seven's Mootness at 2-7.

²⁰ *Id.*

²¹ 10 C.F.R. §§ 52.80(d), 50.54(hh)(2). By taking this deterministic approach, the Commission recognized that the resulting 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." Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. at 13,933.

linked to an aircraft impact. The rule contemplates that the initiating event for such large fires and explosions could be any number of beyond-design basis events.²²

As this language indicates, Section 50.54(hh)(2) does not require an applicant or licensee to postulate or assess any particular fire or explosion. Instead, the rule requires an applicant to describe “operational actions,” which in turn encompass fourteen elements listed in the statement of considerations.²³ Those elements are not tied to any particular fire or explosion.

In this regard, the Petitioners appear to be confusing the provisions in Section 50.54(hh)(2) with the provisions in the Commission’s new rule in 10 C.F.R. § 50.150 on aircraft impact assessments. Section 50.150 requires an assessment of the impacts of specific commercial aircraft and an evaluation of the plant’s “design features and functional capabilities.”²⁴ Unlike Section 50.150, Section 50.54(hh)(2) does not require an applicant to specify or assess the impacts of any particular fires and explosions or to evaluate the design of the plant.²⁵

In accordance with the requirements in Section 50.54(hh)(2), Luminant included as part of the Mitigative Strategies Report a description and plans for implementing guidance and strategies to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities. Luminant was not, however, required to include an assessment of the magnitude of the fires and explosions that might result from an aircraft impact. Accordingly, the Petitioners’

²² Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. at 13,957 (emphasis added).

²³ *Id.*

²⁴ *Id.*

²⁵ Furthermore, an aircraft impact assessment is not required for COL applicants that reference a design certification that performs such an assessment. See 10 C.F.R. § 50.150(a)(3)(v). The Petitioners also appear to conflate the requirements in 10 C.F.R. § 50.54(hh)(2) with the requirements in 10 C.F.R. § 50.54(hh)(1). See Petitioners’ Brief Regarding Contention Seven’s Mootness at 2-3 n.2. However, COL applicants are not required to address the requirements in Section 50.54(hh)(1). See 10 C.F.R. § 52.80(d).

claim regarding the need to specify the magnitude of the fires and explosions caused by an aircraft impact does not demonstrate an omission of any required information.

2. Section 52.80(d) Does Not Require Implementation of Mitigative Strategies at the COLA Stage

Second, the Petitioners claim that Contention 7 is not moot because several regulatory commitments have not yet been completed.²⁶ However, this claim does not demonstrate an omission from Luminant's Mitigative Strategies Report. The plain language of Section 52.80(d) does not require implementation of regulatory commitments at the COLA stage. Section 52.80(d) requires only that a COLA include a "description *and plans for implementation*" of these mitigative strategies.²⁷

This understanding is supported by the statement of considerations for Section 52.80(d), which explains that "[t]he Commission reviews the program description provided in the application as part of the licensing process and performs subsequent inspections of procedures and plant hardware to verify implementation."²⁸ In further describing the mitigative strategies, the Commission also indicated that they are "similar to those operational programs for which a description of the program is provided and reviewed by the Commission as part of the [COLA] *and subsequently the more detailed procedures are implemented by the applicant and inspected by the NRC before plant operation.*"²⁹ Thus, a COL applicant is not required to have detailed procedures for mitigative strategies prior to issuance of a COL, but instead is only required to

²⁶ Petitioners' Brief Regarding Contention Seven's Mootness at 7-9.

²⁷ 10 C.F.R. § 52.80(d) (emphasis added).

²⁸ Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. at 13,958.

²⁹ *Id.* at 13,933 (emphasis added). *See also id.* at 13,955 ("Regarding the requirements of § 50.54(hh)(2), the NRC views the mitigative strategies as similar to those operational programs for which a description of the program is provided as part of the license application and that will be implemented before plant operation. The Commission plans to review the program description provided in the application as part of the licensing process and perform subsequent inspections of procedures and plant hardware to verify implementation.").

provide a description of the guidance and strategies. Accordingly, the Petitioners' argument regarding Luminant's implementation of regulatory commitments in the Mitigative Strategies Report does not demonstrate an omission of information.

3. NRC Regulations Permit Incorporation by Reference of the Mitsubishi Mitigative Measures Evaluation

Third, the Petitioners claim that Contention 7 is not moot because the COLA incorporates by reference the "Mitigative Measures Evaluation for the US-APWR" ("Mitsubishi Mitigative Measures Evaluation") that was filed on the docket of the design certification application for the US-APWR.³⁰ According to the Petitioners, Luminant's Mitigative Strategies Report is "deficient" because "the COLA must stand on its own" and may not incorporate by reference the Mitsubishi Mitigative Measures Evaluation.³¹

This claim does not demonstrate an omission from Luminant's Mitigative Strategies Report. 10 C.F.R. § 52.8(b) and Section 161(h) of the Atomic Energy Act, 42 U.S.C. § 2201(h), both authorize an application to incorporate by reference information contained in other applications or reports filed with the NRC. Thus, as a matter of law, the sections of the Mitsubishi Mitigative Measures Evaluation that the Petitioners contend are omitted from the COLA are indeed part of Luminant's Mitigative Strategies Report. Accordingly, this claim does not demonstrate an omission of information from the Mitigative Strategies Report.

³⁰ Petitioners' Brief Regarding Contention Seven's Mootness at 8-9. See Letter from Yoshiki Ogata, Mitsubishi Heavy Industries, Ltd., to NRC Document Control Desk (Nov. 14, 2008), available at ADAMS Accession No. ML091100585 (cover letter only).

³¹ Petitioners' Brief Regarding Contention Seven's Mootness at 8-9.

V. CONCLUSION

For the foregoing reasons, Luminant's Mitigative Strategies Report has rendered Contention 7 moot. Accordingly, the Board should find that Contention 7 is not admissible.

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

Steven P. Frantz

Jonathan M. Rund

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

Phone: 202-739-3000

Fax: 202-739-3001

E-mail: sfrantz@morganlewis.com

Counsel for Luminant

Dated in Washington, D.C.
this 27th day of July 2009

**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))

Docket Nos. 52-034-COL
52-035-COL

July 27, 2009

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2009 a copy of "Luminant's Response to Petitioners' Brief Regarding Mootness of Contention 7" was served by the Electronic Information Exchange on the following recipients:

Administrative Judge
Ann Marshall Young, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, D.C. 20555-0001
E-mail: ann.young@nrc.gov

Administrative Judge
Dr. Alice C. Mignerey
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, D.C. 20555-0001
E-mail: acm3@nrc.gov

Administrative Judge
Dr. Gary S. Arnold
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, D.C. 20555-0001
E-mail: gxa1@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

James Biggins
Susan H. Vrahoretis
Marcia J. Simon
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
E-mail: James.Biggins@nrc.gov;
Susan.Vrahoretis@nrc.gov;
Marcia.Simon@nrc.gov

Robert V. Eye
Counsel for the Petitioners
Kauffman & Eye
112 SW 6th Ave., Suite 202
Topeka, KS 66603
E-mail: bob@kauffmaneye.com

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Signed (electronically) by Steven P. Frantz
Steven P. Frantz
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

Counsel for Luminant