

~~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)	Docket Nos. 52-034-COL
)	52-035-COL
(Comanche Peak Nuclear Power Plant Units 3 and 4))	September 4, 2009

**LUMINANT'S ANSWER OPPOSING LATE-FILED CONTENTIONS
REGARDING THE MITIGATIVE STRATEGIES REPORT**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h) and the Order of the Atomic Safety and Licensing Board ("Board") dated July 1, 2009, Luminant Generation Company LLC and Comanche Peak Nuclear Power Company LLC, applicants in the above-captioned matter (jointly, "Luminant"), hereby submit this Answer opposing "Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing" ("Request").

In the Request, the Intervenors seek admission of five contentions¹ related to the adequacy of a report filed by Luminant on May 22, 2009 with the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), entitled "Mitigative Strategies Report for Comanche Peak Units 3 & 4 in Accordance with 10 CFR 52.80(d)" ("Mitigative Strategies Report"). The contentions claim that the Mitigative Strategies Report is insufficient to satisfy the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2), which specify requirements for dealing with loss of

¹ To prevent confusion with other contentions filed by the Intervenors in this proceeding, the numbering system used in this Answer for the late-filed contentions includes an "MS" designation for "Mitigative Strategies."

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large areas of the plant due to fires or explosions. Additionally, the Intervenor request that a hearing related to these contentions use the hearing procedures in Subpart G to 10 C.F.R. Part 2.

As demonstrated below, the five contentions proffered by the Intervenor do not satisfy the contention admissibility requirements specified in 10 C.F.R. § 2.309(f)(1), and therefore should be rejected.² Additionally, the Intervenor have not justified their request to use Subpart G hearing procedures for any admitted contentions, and therefore this request should be denied.

II. PROCEDURAL BACKGROUND

On September 19, 2008, Luminant submitted an application to the NRC for combined licenses (“COLs”) for Comanche Peak Units 3 and 4 (“COLA”).³ The Sustainable Energy and Economic Development Coalition, Public Citizen, True Cost of Nukes, and Lon Burnam (jointly, “Intervenor”) filed a “Petition for Intervention and Request for Hearing” (“Petition”) on April 6, 2009, alleging 19 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).⁴ 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).⁵

Luminant filed a supplement to its COLA on May 22, 2009 that provided the NRC with the Mitigative Strategies Report, which addresses the requirements of Sections 52.80(d) and 50.54(hh)(2). The Mitigative Strategies Report was written using the guidance in NEI 06-

² In addition to proposing contentions that are not admissible, the Intervenor do not discuss, and therefore fail to demonstrate, how the contentions meet the late-filed contention requirements in 10 C.F.R. §§ 2.309(c) and (f)(2).

³ Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008).

⁴ Petition at 22.

⁵ Luminant’s Answer Opposing Petition for Intervention and Request for Hearing at 32-36 (May 1, 2009).

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12, "B.5.b Phase 2&3 Submittal Guideline," Rev. 2 (Dec. 2006),⁶ which has been endorsed by the Commission as an acceptable means for complying with these regulations.⁷ On July 1, 2009, the Board issued a Protective Order allowing the Intervenor to obtain access to the Mitigative Strategies Report,⁸ which they received on July 7, 2009.⁹

On July 14, 2009, the Intervenor notified the Board that they do not believe that Contention 7 is moot.¹⁰ Subsequently, on July 20, 2009, the Intervenor filed a brief to attempt to support this claim.¹¹ Thereafter, on July 27, 2009, both Luminant and the NRC Staff filed responsive briefs demonstrating that Contention 7 is moot,¹² to which the Intervenor replied on August 3, 2009.¹³ On August 6, 2009, the Board issued its ruling on the admissibility of contentions in the Petition, but deferred ruling on Contention 7 to consider the briefing on mootness.¹⁴ The Intervenor filed their Request, including the five contentions related to the adequacy of the Mitigative Strategies Report, on August 10, 2009.

⁶ Mitigative Strategies Report at 2.

⁷ Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926, 13,958 (Mar. 27, 2009) ("Final Security Rule").

⁸ Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished).

⁹ Letter from J. Rund, Counsel for Luminant, to R. Eye, Counsel for Petitioners (July 7, 2009).

¹⁰ Letter from R. Eye, Counsel for Petitioners, to Board (July 14, 2009).

¹¹ Petitioners' Brief Regarding Contention Seven's Mootness (July 20, 2009).

¹² Luminant's Response to Petitioners' Brief Regarding Mootness of Contention 7 (July 27, 2009); NRC Staff's Answer to Petitioners' Brief Regarding Contention Seven's Mootness (July 27, 2009).

¹³ Petitioners' Consolidated Response to NRC Staff's Answer and Applicant's Answer to Petitioners' Brief Regarding Contention Seven's Mootness (Aug. 3, 2009).

¹⁴ *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 NRC ___, slip op. at 44, 85 (Aug. 6, 2009).

III. LEGAL STANDARDS

A petitioner must show that a late-filed contention meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi).¹⁵ These requirements are discussed in detail in Luminant's May 1, 2009 Answer opposing the Petition, and a briefer discussion of the important contention admissibility requirements is set forth below.

Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." In addition, that section specifies that each 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 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; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.¹⁶

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."¹⁷ The Commission has stated that it "should not

¹⁵ See *Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station)*, CLI-93-12, 37 NRC 355, 362-63 (1993); see also *Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska)*, CLI-09-09, 69 NRC ___, slip op. at 42 (May 18, 2009) (stating that the timeliness of the late-filed contention need not be evaluated because the contention did not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)).

¹⁶ See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

¹⁷ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

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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.”¹⁸

The Commission’s rules on contention admissibility are “strict by design.”¹⁹ The rules were “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’”²⁰ As the Commission has stated:

Nor does our practice permit “notice pleading,” with details to be filled in later. Instead, we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them.²¹

The failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.²²

A contention that challenges an NRC rule is outside the scope of this proceeding because, absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding”²³ This includes contentions that advocate stricter requirements than agency rules impose.²⁴

¹⁸ *Id.*

¹⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

²⁰ *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Oconee*, CLI-99-11, 49 NRC at 334).

²¹ *N. Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

²² *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *see also* *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

²³ 10 C.F.R. § 2.335(a).

²⁴ *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff’d on other grounds*, CLI-01-17, 54 NRC 3 (2001).

IV. BACKGROUND ON 10 C.F.R. §§ 52.80(d) AND 50.54(hh)(2)

The requirements of Sections 52.80(d) and 50.54(hh)(2) stem from security orders issued to operating reactors by the NRC following the terrorist attacks on September 11, 2001.²⁵ Specifically, on February 25, 2002, the Commission imposed Order EA-02-026, which required operating reactor licensees to take interim compensatory measures “to address the generalized high-level threat environment in a consistent manner throughout the nuclear reactor community.”²⁶ Section “B.5.b” of this order imposed requirements regarding mitigating measures for large fires and explosions.²⁷ The regulatory guidance to comply with these requirements is found in NEI 06-12, which has been endorsed by the Commission.²⁸

On October 26, 2006, the Commission issued a proposed rule to impose new security regulations.²⁹ While the rulemaking addressed many parts of the NRC’s security regulations, it also proposed including provisions in Appendix C of 10 C.F.R. Part 73 that would require applicants and licensees to establish mitigative strategies for fires and explosions.³⁰ The Commission explained that this change would include the elements of the post-September 11 security orders that required licensees to preplan strategies to cope with beyond design basis events, “including those that may result in the loss of large areas of the plant due to explosions or fire.”³¹ Thus, the rulemaking was initiated to codify the B.5.b requirements.

²⁵ Final Security Rule, 74 Fed. Reg. at 13,926.

²⁶ All Operating Power Reactor Licensees; Order Modifying Licenses, EA-02-026, 67 Fed. Reg. 9792, 9792 (Mar. 4, 2002).

²⁷ Final Security Rule, 74 Fed. Reg. at 13,928.

²⁸ *Id.* at 13,958.

²⁹ Proposed Rule, Power Reactor Security Requirements, 71 Fed. Reg. 62,664 (Oct. 26, 2006) (“Proposed Security Rule”).

³⁰ *Id.* at 62,674.

³¹ *Id.*

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Following comments on the proposed rule, the Commission issued a supplemental proposed rule on April 10, 2008 that provided more details regarding the mitigative strategies requirements and concluded that these requirements more appropriately should be located at 10 C.F.R. § 50.54(hh).³² Thereafter, on March 27, 2009, the Commission published the final rule, which included Section 50.54(hh)(2) regarding mitigative strategies for loss of large areas of the plant due to fires and explosions and Section 52.80(d) that requires a COL applicant to provide a description and plans in a COLA for addressing the Section 50.54(hh)(2) requirements.³³

Specifically, 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, Section 50.54(hh)(2) 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.

Section 50.54(hh)(2) applies to licensees (and to applicants for licenses through the provisions in Section 52.80(d) and Section 50.34(i)). Section 50.54(hh)(2) does not apply to applicants for design certification and design approvals. In that regard, the rule does not require

³² Supplemental Proposed Rule, Power Reactor Security Requirements, 73 Fed. Reg. 19,443, 19,443-445 (Apr. 10, 2008) ("Supplemental Proposed Security Rule").

³³ Final Security Rule, 74 Fed. Reg. at 13,926-928.

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an applicant to perform design evaluations of fires and explosions, but instead to “develop and implement guidance and strategies.” This reflects the genesis of the rule, which is based upon Section B.5.b of the security orders that were issued to existing operating plants (*i.e.*, plants with a completed design). This should be contrasted with the recently-issued aircraft impact assessment rule in 10 C.F.R. § 50.150, which does require design evaluations and is applicable to design certification applicants, but has not been backfit onto existing operating plants.

V. THE LATE-FILED CONTENTIONS SHOULD BE REJECTED

A. Contention MS-1 – “Damage States”

Contention MS-1 states:

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 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. 32-36.³⁴

In short, Contention MS-1 claims that the Mitigative Strategies Report incorrectly omits a discussion and evaluation of a full spectrum of “damage states” (*i.e.*, the resulting effects to the plant of an event that causes large fires and explosions) that would be caused by a large

³⁴ Request at 5.

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commercial aircraft impact or other such event.³⁵ Contention MS-1 essentially consists of an attack upon the acceptability of NEI 06-12 for addressing Section 50.54(hh)(2).³⁶

As explained below, Contention MS-1 does not demonstrate a genuine dispute on a material issue of law or fact with Luminant's COLA. Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states, the Intervenor's confuse the requirements of 10 C.F.R. § 50.150 for aircraft impacts with those of Sections 52.80(d) and 50.54(hh)(2), and the Commission has already approved NEI 06-12 that was followed by Luminant in developing the Mitigative Strategies Report.³⁷ For these reasons, Contention MS-1 should be rejected.³⁸

1. Sections 52.80(d) and 50.54(hh)(2) Do Not Require Specification of Damage States

Contention MS-1 does not demonstrate an omission of any required information from the Mitigative Strategies Report. Contrary to the Intervenor's allegations, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant or licensee to identify or evaluate damage states, such as calculation of the impact of a large commercial aircraft or assessment of the impacts of fires or explosions on plant equipment. Instead, these regulations set forth performance-based standards

³⁵ *Id.* at 6-12. The Intervenor's interchangeably use the terms "damage states" and "numbers and magnitudes of fires and explosions."

³⁶ *Id.* at 7-9.

³⁷ *See* Final Security Rule, 74 Fed. Reg. at 13,958. Additionally, because Sections 52.80(d) and 50.54(hh)(2) do not require the Mitigative Strategies Report to include a discussion of damage states, the Intervenor's claim that the Report must include such a discussion essentially constitutes an impermissible challenge to these regulations, contrary to 10 C.F.R. § 2.335. Section 2.335 states that, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."

³⁸ The Intervenor's submitted a Declaration from Dr. Lyman, which states: "I have also reviewed contentions 1, 2 and 5 and agree with them." Declaration of Dr. Edwin S. Lyman in Support of Petitioner's Contentions at 2 (Aug. 10, 2009) ("Lyman Declaration"). This vague statement is insufficient to act as expert opinion in support of these contentions. He merely states that he agrees with the contentions; he does not state that he is adopting any statements in those contentions as his own. This should be contrasted with his position on Contentions MS-3 and 4, where he states that he is "responsible for the factual content and expert opinions" expressed in those contentions. *Id.* Therefore, the Lyman Declaration should not be considered as expert opinion for Contentions MS-1, 2, and 5.

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for mitigative strategies assuming the loss of large areas of the plant due to fires or explosions.³⁹

By arguing that the Mitigative Strategies Report should evaluate the effects of fires and explosions and identify damage states, the Intervenors misinterpret the purpose and requirements of Sections 52.80(d) and 50.54(hh)(2). In essence, the Intervenors are contending that Luminant should perform design evaluations of fires and explosions, which is inconsistent with the nature of the rule.

a. The Plain Language of Sections 52.80(d) and 50.54(hh)(2) Does Not Require Specification of Damage States

The plain language of Sections 52.80(d) and 50.54(hh)(2) does not require that a COL applicant identify damage states. Section 52.80(d) only requires a COL applicant to provide 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.” This requirement does not state that an applicant must evaluate the effects of fires or explosions or identify specific damage states. The Intervenors appear to concede this point by stating that “[t]he regulation [Section 50.54(hh)(2)] does not specify the numbers and magnitudes of the fires and explosions that the applicant is to consider.”⁴⁰

As required by the plain language of Sections 52.80(d) and 50.54(hh)(2), Luminant’s 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. These descriptions and plans satisfy the regulations by addressing (i) fire fighting,

³⁹ 10 C.F.R. §§ 52.80(d), 50.54(hh)(2).

⁴⁰ Request at 6.

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(ii) operations to mitigate fuel damage, and (iii) actions to minimize radiological release.⁴¹ Thus, Luminant has complied with the requirements of Sections 52.80(d) and 50.54(hh)(2).

b. The Rulemaking Record for Sections 52.80(d) and 50.54(hh)(2) Demonstrates that Specification of Damage States Is Not Required

The rulemaking record for Sections 52.80(d) and 50.54(hh)(2) does not support the intervenors' argument that the Mitigative Strategies Report must evaluate specific accidents and their resulting damage states. In this regard, the Commission stated in the Statement of Considerations ("SOC") for the final rule that it "decided to maintain the language from the supplemental proposed rule that 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.*"⁴² Similarly, the Commission provided the following explanation in the SOC for the final rule:

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 initiating event for such large[] fires and explosions could be any number of beyond-design basis events.⁴³

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

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⁴² Final Security Rule, 74 Fed. Reg. at 13,933 (emphasis added); *see also* Supplemental Proposed Security Rule, 73 Fed. Reg. at 19,447 ("The rule contemplates that the initiating event for such large fires and explosions could be any number of design basis threat or beyond design basis threat events.")

⁴³ Final Security Rule, 74 Fed. Reg. at 13,957 (emphasis added).

EXEMPTION
Luminant

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describe “operational actions,” which in turn encompass fourteen elements listed in the SOC for the final rule.⁴⁴ Those elements are not tied to any particular fire or explosion.

During the rulemaking for Sections 52.80(d) and 50.54(hh)(2), the Commission considered and rejected arguments similar to those made by the Intervenors. In the SOC for the supplemental proposed rule, the Commission evaluated the following comment:

Comment: Another commenter stated that proposed Part 73, Appendix C [which was later moved to Section 50.54(hh)] does not specify what types of fires or explosions the licensee must prepare for, nor does it specify what areas of the plant are considered particularly susceptible to damage or destruction by fire or explosion.⁴⁵

Thus, similar to the Intervenors, the commenter wanted the rule to require evaluation of specific types of fires and explosions and specific damage states. The Commission provided the following response in the rulemaking:

Response: . . . The Commission did not intend to limit beyond-design basis scenarios to aircraft attacks but, instead called for the development of mitigation measures to generally deal with the situation in which large areas of the plant were lost due to fires and explosions, *whatever the beyond-design basis initiator*. . . . Accordingly, as with the original section B.5.b requirements, this proposed rule would apply only performance-based criteria so that individual licensees would have to determine the most appropriate site-specific measures that would meet the general performance criteria. . . . [T]he NRC does not believe it is necessary, or even practical, that the prescription suggested by the stakeholder be incorporated into supplemental proposed § 50.54(hh).⁴⁶

Given the Commission’s rejection of this comment, the Board should reject the Intervenors’ arguments in Contention MS-1.

⁴⁴ *Id.*

⁴⁵ Supplemental Proposed Security Rule, 73 Fed. Reg. at 19,445.

⁴⁶ *Id.* (emphasis added).

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c. The Statements in the SOC Cited by the Intervenors Do Not Demonstrate a Requirement to Specify Damage States

In the bases for Contention MS-1, the Intervenors identify various statements in the SOC for the final rule for Sections 52.80(d) and 50.54(hh)(2) and claim the statements indicate a requirement to consider aircraft attacks as a “baseline” for determining the scale of fires and explosions to be evaluated pursuant to Section 50.54(hh)(2).⁴⁷ The Intervenors, however, have misconstrued those statements.

First, some of the statements referenced by the Intervenors directly refer to the requirements of the aircraft impact rule in 10 C.F.R. § 50.150. For example, the Intervenors quote the following statement from the SOC: “the Commission has proposed in a separate rulemaking to require . . . an assessment of the effects of the impact of a large commercial aircraft on a nuclear power plant.”⁴⁸ However, that statement directly refers to the aircraft impact rule and does not provide support for the Intervenors’ argument that Section 50.54(hh)(2) requires an evaluation of aircraft attacks.

Additionally, other statements in the SOC referenced by the Intervenors apply to Section 50.54(hh)(1), not Section 50.54(hh)(2). For example, the Intervenors quote the following statement: “Licensees are required to develop procedures to facilitate the rapid entry of appropriate onsite personnel as well as offsite responders into their protected areas to deal with the consequences of an aircraft impact.”⁴⁹ However, this statement refers to a requirement in

⁴⁷ Request at 6-8 & nn.3-4.

⁴⁸ *Id.* at 6 n.3 (quoting Final Security Rule, 74 Fed. Reg. at 13,957).

⁴⁹ *Id.*

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Section 50.54(hh)(1), not a requirement in Section 50.54(hh)(2). COL applicants are not required to address the requirements in Section 50.54(hh)(1).⁵⁰

Furthermore, other statements from the SOC referenced by the Intervenor simply acknowledge that the requirements of Sections 52.80(d) and 50.54(hh)(2) are intended to mitigate a variety of events, including aircraft impacts. For example, the Intervenor refers to the following statement: "Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigative measures for large fires and explosions including (but not explicitly limited to) those caused by the impacts of large commercial aircraft."⁵¹ None of the statements in the SOC suggests that an applicant must evaluate aircraft impacts and identify damage states.

2. The Intervenor Confuses the Requirements of Sections 52.80(d) and 50.54(hh)(2) with the Requirements of Section 50.150 for Aircraft Impacts

The Intervenor confuses the provisions in Sections 52.80(d) and 50.54(hh)(2) with the provisions in 10 C.F.R. § 50.150. 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." Unlike Section 50.150, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify or assess the impacts of any particular fires and explosions or to evaluate the design of the plant.

In the SOC for the final rule for Sections 52.80(d) and 50.54(hh)(2), the Commission explained the difference between the mitigative strategies regulations and the aircraft impact assessment regulations as follows:

⁵⁰ See 10 C.F.R. § 52.80(d).

⁵¹ Request at 7 n.3 (quoting Final Security Rule, 74 Fed. Reg. at 13,958).

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The Commission regards the two rulemakings to be complementary in scope and objectives. The aircraft impact rule will focus on enhancing the design of future nuclear power plants to withstand large commercial aircraft impacts, with reduced reliance on human activities (including operator actions). Section 50.54(hh)(2) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigative measures for large fires and explosions including (but not explicitly limited to) those caused by the impacts of large commercial aircraft.⁵²

The differences between the requirements in Sections 52.80(d) and 50.54(hh)(2) and the requirements in Section 50.150 are significant. For example, Section 50.150(a)(2) requires specific aircraft impact characteristics (*e.g.*, aircraft size, fuel loading, speed, and angle) to be evaluated as part of the aircraft impact rule. No such requirements are provided in connection with Sections 52.80(d) and 50.54(hh)(2).

The intervenors' confusion of the aircraft impact assessment rule in Section 50.150 with Section 50.54(hh)(2) is further indicated by the intervenors' references to NEI 07-13, "Methodology for Performing Aircraft Impact Assessments for New Plant Designs," Rev. 07 (May 2009), Public Version.⁵³ NEI 07-13 is explicitly intended for use in implementing Section 50.150,⁵⁴ not Section 50.54(hh)(2).

Furthermore, if the intervenors' interpretation of Section 50.54(hh)(2) were to be accepted, it would essentially render Section 50.150 redundant and unnecessary. If applicants and licensees were required to assess the effects of aircraft impacts and other beyond design basis events and identify damage states in order to satisfy Section 50.54(hh)(2), Section 50.150

⁵² Final Security Rule, 74 Fed. Reg. at 13,958.

⁵³ *See, e.g.*, Request at 3, 5, 10-11.

⁵⁴ NEI 07-13 at v-vi.

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would be meaningless; *i.e.*, Section 50.54(hh)(2) would encompass Section 50.150.⁵⁵ As the U.S. Supreme Court has held, a regulation should not be interpreted in a manner that renders it superfluous with other regulations.⁵⁶ Because the Intervenor is urging an interpretation of Section 50.54(hh)(2) that would render Section 50.150 superfluous, their interpretation should be rejected.

In summary, the Intervenor conflates the requirements in Section 50.150 with those in Section 50.54(hh)(2). Contrary to the Intervenor's arguments, Section 50.54(hh)(2) does not require an evaluation of damage caused by aircraft impacts. Instead, such a requirement is contained in Section 50.150.

3. The Commission Has Approved NEI 06-12 as a Method for Satisfying Section 50.54(hh)(2)

As acknowledged by the Intervenor, the Mitigative Strategies Report follows the guidance in NEI 06-12.⁵⁷ NEI 06-12 makes clear that there is no requirement to predict the various damage states because prediction of these damage states "is not possible" due to the "endless combinations and permutations of potential damage states."⁵⁸ The Intervenor attacks Luminant's reliance on NEI 06-12. The Intervenor implies that NEI 06-12 is insufficient for

⁵⁵ The Intervenor refers to a passage in NEI 07-13 which states that uncertainties such as hot shorts and spurious actuations are best addressed through Section 50.54(hh) instead of by Section 50.150. Request at 10. Contrary to the Intervenor's arguments, this statement from NEI 07-13 does not mean that Section 50.54(hh) requires evaluation of the potential for generation of hot shorts and spurious actuations from an aircraft impact. Instead, this passage from NEI 07-13 simply indicates that Section 50.54(hh) encompasses the effects of such uncertainties, such as hot shorts and spurious actuations, because it assumes that large areas of the plant are lost, and therefore the components therein are not functional. Furthermore, the Intervenor's interpretation of NEI 07-13 is belied by NEI 06-12, which does not require an explicit evaluation of hot shorts, spurious actuations, or other uncertainties.

⁵⁶ See *Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668-69 (2007) (rejecting an interpretation of a regulation because it would render the regulation entirely superfluous with other regulations and stating "we have cautioned against reading a text in a way that makes part of it redundant" (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001))).

⁵⁷ Request at 7; see also Mitigative Strategies Report at 2.

⁵⁸ NEI 06-12 at 1.

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satisfying Section 50.54(hh)(2) because NEI 06-12 does not provide for evaluation of damage states.⁵⁹

The Intervenor's argument must fail because the Commission itself has already approved the use of NEI 06-12 for satisfying the requirements of Section 50.54(hh)(2). Specifically, the Commission stated in the SOC for the final rule:

*The Commission issued guidance (Safeguards Information) to current reactor licensees on February 25, 2005, and additionally endorsed NEI 06-12, Revision 2, by letter dated December 22, 2006, as an acceptable method for current reactor licensees to comply with the mitigative strategies requirement. These two sources of guidance provide an acceptable means for developing and implementing the mitigative strategies.*⁶⁰

Furthermore, the Commission stated in the SOC for the final rule that "[n]ew applicants for . . . combined licenses under part 52 are required to develop and implement procedures that employ mitigative strategies similar to those now employed by current licensees."⁶¹ NEI 06-12 provides those procedures employed by current licensees. Thus, Luminant has appropriately followed the guidance in NEI 06-12. The Intervenor's criticisms of and challenges to NEI 06-12 do not provide an appropriate basis for a contention in light of the Commission's explicit approval of NEI 06-12.

Luminant's adherence to approved guidance is entitled to significant weight in demonstrating regulatory compliance. The Commission has ruled in the past that compliance with guidance documents "constitutes reasonable assurance" of compliance with applicable

⁵⁹ Request at 7-9.

⁶⁰ Final Security Rule, 74 Fed. Reg. at 13,958 (emphasis added); see also Supplemental Proposed Security Rule, 73 Fed. Reg. at 19,447.

⁶¹ Final Security Rule, 74 Fed. Reg. at 13,957.

regulatory requirements.⁶² Here, where Luminant has followed the guidance of NEI 06-12 that has been specifically approved by the Commission itself and not just the NRC Staff, use of this guidance is entitled to even more deference. Thus, the Intervenor's challenges to NEI 06-12 in Contention MS-1 should be rejected because they are inconsistent with the Commission's intent in enacting Section 50.54(hh)(2).

4. Summary

There is no requirement in Sections 52.80(d) and 50.54(hh)(2) for an applicant to evaluate any particular fires or explosions or to identify damage states. The Intervenor's arguments to the contrary are inconsistent with the SOC and NEI 06-12, which has been explicitly approved by the Commission for use in implementing the rule. Accordingly, Contention MS-1 should be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(iv) and (vi) and § 2.335.

B. Contention MS-2 – Mitigative Strategies Are Not Based on Damage States

Contention MS-2 states:

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.⁶³

Similar to Contention MS-1, Contention MS-2 claims that the Mitigative Strategies Report is deficient because the strategies identified in the Mitigative Strategies Table ("MST") contained in the Mitigative Strategies Report do not address damage states. As explained below,

⁶² See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC ___, slip op. at 6 (Oct. 6, 2008); see also *Petition for Emergency & Remedial Action*, CLI-78-6, 7 NRC 400, 407 (1978) ("If there is conformance with regulatory guides, there is likely to be compliance with" the regulations.).

⁶³ Request at 12-13.

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NRC regulations do not require evaluation of damage states. Additionally, Contention MS-2 incorrectly argues that all guidelines and strategies must be developed now. For these reasons, Contention MS-2 should be rejected.

1. Contention MS-2 Makes the Same Arguments as Contention MS-1 and Should Be Rejected for the Same Reasons

The arguments in Contention MS-2 simply repeat arguments from Contention MS-1. The Intervenors concede as much by stating that “[t]his omission contention addresses similar deficiencies as discussed in Contention One” and stating that they are incorporating the arguments from Contention MS-1 by reference.⁶⁴

Since Contention MS-2 is encompassed by Contention MS-1, Contention MS-2 should be rejected for the same reasons discussed above with respect to Contention MS-1. Simply stated, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states.

Furthermore, the basic premise of Contention MS-2 is faulty. Contention MS-2 argues that adequate mitigative strategies cannot be developed without identification of the number and magnitude of fires and explosions and their resulting damage states. This premise is belied by NEI 06-12. NEI 06-12 provides for development of “a flexible response capability” for addressing a variety of extreme conditions involving the spent fuel pool and reactor.⁶⁵ As discussed above, this approach in NEI 06-12 has been accepted by the Commission as an acceptable method for satisfying Section 50.54(hh)(2).⁶⁶

⁶⁴ *Id.* at 13. The Intervenors argue that “[t]here are numerous instances in the MST that anticipate specific actions that are dependent on specifications of the damage states” and they cite to specific items in the MST (1.2.4, 1.2.9, 3.3, 3.4, and 3.5) that they claim are deficient because it is unknown whether the items account for “the full spectrum of damage states.” *Id.* at 14. These arguments are encompassed within the more general arguments in Contention MS-1.

⁶⁵ NEI 06-12 at 1.

⁶⁶ *See* Final Security Rule, 74 Fed. Reg. at 13,958.

2. Contention MS-2 Incorrectly Implies that the Event Guidelines Should Be Developed Prior to Issuance of the COL

Contention MS-2 also mentions that some of Luminant's "event guidelines" have not yet been developed. Footnote 7 and the text of the Request discuss various items in the MST that identify commitments to develop event guidelines in the future. It is unclear whether the Intervenor is contending that the event guidelines must be developed prior to issuance of the COL. To the extent that the Intervenor intends that Contention MS-2 include such an argument, the argument is without any legal basis.

The plain language of Section 52.80(d) does not require implementation of regulatory commitments (such as development of procedures or event guidelines) at the COLA stage. Section 52.80(d) requires only that a COLA include a "description *and plans for implementation*" of these mitigative strategies.⁶⁷ This understanding also is supported by the SOC 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."⁶⁸

In summary, Section 52.80(d) does not require that the event guidelines and other procedures be developed to support issuance of the COL. Instead, the rule only requires a description of the guidelines and procedures and identification of plans for their implementation. The actual event guidelines may be developed after issuance of the COL, and will be subject to NRC inspection at that time. Thus, to the extent that the Intervenor is arguing that the event guidelines must be developed now, that argument is inconsistent with Section 52.80(d) and should be rejected in accordance with 10 C.F.R. § 2.335.

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

⁶⁸ Final Security Rule, 74 Fed. Reg. at 13,958.

C. Contention MS-3 – Dose Assessment

Contention MS-3 states:

(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.⁶⁹

As explained below, NRC regulations do not require disclosure of the information identified by the Intervenor. Additionally, Contention MS-3 is not adequately supported by expert opinion or factual information. For these reasons, Contention MS-3 should be rejected.

1. **Sections 52.80(d) and 50.54(hh)(2) Do Not Require the Information Identified by the Intervenor**

Contention MS-3 argues that the Mitigative Strategies Report is deficient because it “fails to substantiate its assertion that the existing dose projection models . . . are adequate,” it does not provide “an appropriately detailed and accurate [dose] model,” and it does not include “a dose assessment necessary to establish that the mitigative strategies could be implemented without reliance on extraordinary or heroic actions.”⁷⁰

⁶⁹ Request at 15.

⁷⁰ (b)(4)

(b)(4)

EXEMPTION 4 LUMENAS

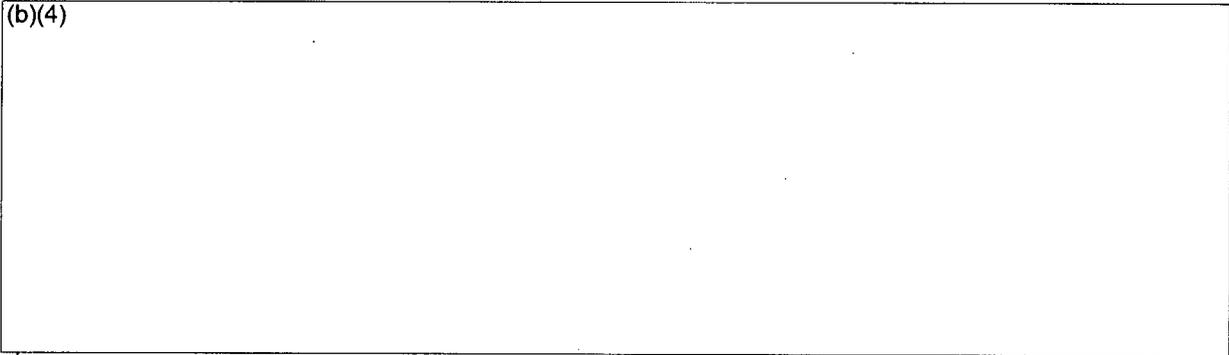
EXEMPTION 4 LUMENAS

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Sections 52.80(d) and 50.54(hh)(2), the corresponding rulemaking documents, and NEI 06-12 do not require any of this information to be included in the Mitigative Strategies Report.

Furthermore, the Intervenor has not identified any such requirements.

(b)(4)



EXEMPTION 4 LUNEMMS

There is nothing in this Item that would require a COLA to contain the dose assessment model, to provide an evaluation of its existing model, or to provide a dose assessment.

The NRC contention admissibility regulations, 10 C.F.R. § 2.309(f)(1)(vi), require that “if the petitioner believes that the application fails to contain information on a relevant matter as required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner’s belief.” The Intervenor has not identified any failure to provide information required by Section 50.54(hh)(2). Therefore, Contention MS-3 should be rejected for failure to satisfy Sections 2.309(f)(1)(vi) and 2.335. Additionally, because Section 50.54(hh)(2) does not require the information specified in this contention, the contention does not identify an issue that is material to this proceeding and the contention should be rejected for failure to satisfy Section 2.309(f)(1)(iv).

2. Contention MS-3 Is Not Adequately Supported

This contention is professed to be supported by the Declaration of Dr. Edwin S. Lyman.⁷¹ However, his Declaration does not provide a sufficient analysis to dispute the Mitigative

⁷¹ Lyman Declaration at 2.

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Strategies Report. In fact, his Declaration contains no analysis or factual statements whatsoever, but instead simply states that Dr. Lyman is responsible for the factual statements and opinions in Contention MS-3.⁷²

The Commission has stated that “an 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.”⁷³ Additionally, conclusory statements cannot provide “sufficient” support for a contention, simply because they are made by an expert.⁷⁴ For these reasons, Contention MS-3 is inadequately supported, contrary to 10 C.F.R. § 2.309(f)(1)(v).⁷⁵

Furthermore, at least one licensing board has criticized the approach of wholesale adoption of legal pleadings in an affidavit, because a petitioner should distinguish its legal pleadings from the substantive facts and opinions expressed by its purported expert.⁷⁶ The Commission has also rejected this practice in the context of a motion to reopen the record, stating that blurring this distinction “undermines [a board’s] ability to differentiate between the

⁷² *Id.*

⁷³ *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006).

⁷⁴ *Id.*

⁷⁵ (b)(4)

as a sufficient means for satisfying the requirements of Sections 52.80(d) and 50.54(hh)(2). Additionally, heroic actions are discussed below in response to Contention MS-4.

⁷⁶ *See Entergy Nuclear Vt. Yankee LLC (Vermont Yankee Nuclear Power Station)*, LBP-04-28, 60 NRC 548, 560 n.16 (2004).

EXEMPTION 4 N E F

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legal pleadings and the facts and opinions expressed by the expert.”⁷⁷ The Lyman Declaration should be rejected for these reasons as well.⁷⁸

D. Contention MS-4 – Assumption in NEI 06-12 Regarding “Heroic Action”

Contention MS-4 states:

(b)(4)

As explained below, Contention MS-4 is outside the scope of this proceeding because

Contention MS-4 itself contests NEI 06-12, and not the Mitigative Strategies Report.

Furthermore, Contention MS-4 is not material because NRC regulations do not require the Mitigative Strategies Report to include the information identified by the Intervenor. For these and other reasons discussed below, Contention MS-4 should be rejected.

1. Contention MS-4 Challenges NEI 06-12 and Not the Mitigative Strategies Report

The literal language of Contention MS-4 challenges NEI 06-12.⁸⁰ The Contention itself does not mention the Mitigative Strategies Report. Although the basis for Contention MS-4 does mention the applicant’s submittal,⁸¹ licensing boards admit contentions, not bases.⁸² Because Contention MS-4 does not challenge the Mitigative Strategies Report, it should be rejected

⁷⁷ *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC __, slip op. at 79 n.318 (Apr. 1, 2009) (quoting *Vermont Yankee*, LBP-04-28, 60 NRC at 560 n.16).

⁷⁸ *Cf. U.S. Dept. of Energy* (High Level Waste Repository), LBP-09-06, 69 NRC __, slip op. at 41-45 (May 11, 2009), in which a licensing board accepted use of affidavits that adopted specific paragraphs of the bases for a contention (rather than the contention as a whole).

⁷⁹ Request at 17.

⁸⁰ *Id.* at 4, 17.

⁸¹ *Id.* at 17.

⁸² *See La. Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) (“licensing boards generally are to litigate ‘contentions’ rather than ‘bases’”).

EXEMPTION 4 NEI

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pursuant to 10 C.F.R. § 2.309(f)(1)(iii) for failure to raise an issue within the scope of this proceeding and 10 C.F.R. § 2.309(f)(1)(vi) for failure to raise a genuine dispute of material fact with respect to the COLA.

Additionally, the Intervenor's challenge to the assumptions in NEI 06-12 should be rejected because the Commission has already approved use of NEI 06-12 as an appropriate means to satisfy the requirements of Sections 52.80(d) and 50.54(hh)(2).⁸³ As explained in Section V.A.3 above with respect to Contention MS-1, the Intervenor's challenges to NEI 06-12 are inconsistent with the Commission's intent in enacting Section 50.54(hh)(2).

2. Contention MS-4 Seeks Information that Is Not Required by Sections 52.80(d) and 50.54(hh)(2)

The bases for Contention MS-4 state that the Mitigative Strategies Report must include (1) "procedures . . . to determine which individual(s) would receive higher doses of radiation" than the doses received by individuals carrying out the Emergency Plan, and (2) "information individuals would receive for training" about the magnitude of exposures that might be incurred during implementation of the mitigative actions.⁸⁴

Sections 52.80(d) and 50.54(hh)(2), the corresponding rulemaking documents, and NEI 06-12 do not require this information to be included in the Mitigative Strategies Report. The Intervenor has not cited to anything in the regulations or regulatory guidance that would require such procedures or training (as distinct from general training on radiation protection, which will be provided to emergency response personnel as stated in MST Item 1.1.19).

The NRC contention admissibility regulations, 10 C.F.R. § 2.309(f)(1)(vi), require that "if the petitioner believes that the application fails to contain information on a relevant matter as

⁸³ See Final Security Rule, 74 Fed. Reg. at 13,958.

⁸⁴ Request at 17.

required by law, [then the contention must provide] the identification of each failure and the supporting reasons for the petitioner's belief." The Intervenor's have not identified any reasons to believe that the allegedly missing information is required by law. Therefore, Contention MS-4 does not satisfy Sections 2.309(f)(1)(vi) and 2.335 and should be rejected. Additionally, because Section 50.54(hh)(2) does not require the information specified in this contention and the contention does not identify an issue that is material to this proceeding, the contention should be rejected for failure to satisfy Section 2.309(f)(1)(iv).

3. Contention MS-4 Is Not Adequately Supported

Contention MS-4 argues that the Mitigative Strategies Report must assume that "extraordinary actions" will be required for nuclear plant fires that do not respond to the mitigative actions identified in the applicant's submittal.⁸⁵

Contention MS-4 does not provide any support for its claim that Luminant's mitigative strategies will not be adequate for fires, or that Luminant will need to take "extraordinary actions." Rather than provide justification or even identify which of the mitigative strategies are inadequate or what extraordinary actions may be needed, Contention MS-4 simply provides conclusory statements.

This contention professes to be supported by the expert opinion of Dr. Lyman, but he has not provided any analysis to dispute the Mitigative Strategies Report. Dr. Lyman does not provide a reasoned basis or explanation, but instead simply adopts the conclusory statements in Contention MS-4 to the effect that Luminant's mitigative actions will not be adequate for suppressing fires and that "extraordinary actions" will be required.⁸⁶ The Commission has stated

⁸⁵ *Id.*

⁸⁶ *Id.*; Lyman Declaration at 2.

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that “an 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.”⁸⁷ Additionally, conclusory statements cannot provide “sufficient” support for a contention, simply because they are made by an expert.⁸⁸ Furthermore, as discussed above with respect to Contention MS-3, an affidavit that simply adopts a contention does not constitute adequate support for the contention.

For these reasons, Contention MS-4 is inadequately supported, and should be rejected for failure to satisfy 10 C.F.R. § 2.309(f)(1)(v).

4. Sections 52.80(d) and 50.54(hh)(2) Do Not Require Specification of Damage States

Contention MS-4 incorporates by reference the arguments in Contention MS-1 regarding the alleged need for the Mitigative Strategies Report to specify damage states.⁸⁹ For the same reasons discussed in Contention MS-1, these arguments in Contention MS-4 should be rejected. Contrary to the Intervenor’s arguments, Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states. Because the regulations do not require the information specified in this contention, the contention does not identify an issue that is material to this proceeding and the contention should be rejected for failure to satisfy Sections 2.309(f)(1)(iv) and 2.309(f)(1)(vi).

E. Contention MS-5 – Assumption Regarding Unlimited Water Supply

Contention MS-5 states:

⁸⁷ *USEC, CLI-06-10, 63 NRC at 472.*

⁸⁸ *Id.*

⁸⁹ Request at 17-18.

(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.⁹⁰

EMERGENCY
LUMINANT

Similar to Contention MS-1, Contention MS-5 also claims that the Mitigative Strategies Report is deficient because it omits damage states. As explained below, Contention MS-5 is not material and does not demonstrate a genuine dispute on a material issue of law or fact. The contention simply repeats the arguments from Contention MS-1, which do not support an admissible contention. Additionally, Contention MS-5 misconstrues the Mitigative Strategies Report and does not provide any support to challenge the assumption on water availability. For these reasons, Contention MS-5 should be rejected.

1. Contention MS-5 Makes the Same Arguments as Contention MS-1 and Should Be Rejected for the Same Reasons

Contention MS-5 incorporates by reference the arguments in Contention MS-1.⁹¹ The Intervenor's state that "[t]his is an omission contention and like others related to the submittal, is based on the failure to discuss the full spectrum of damage states assumed."⁹² The Intervenor's arguments are all based on the premise that Luminant omitted evaluation of the "full spectrum of damage states" from the Mitigative Strategies Report and discussion of the impact of those

⁹⁰ *Id.* at 18.

⁹¹ *Id.*

⁹² *Id.*

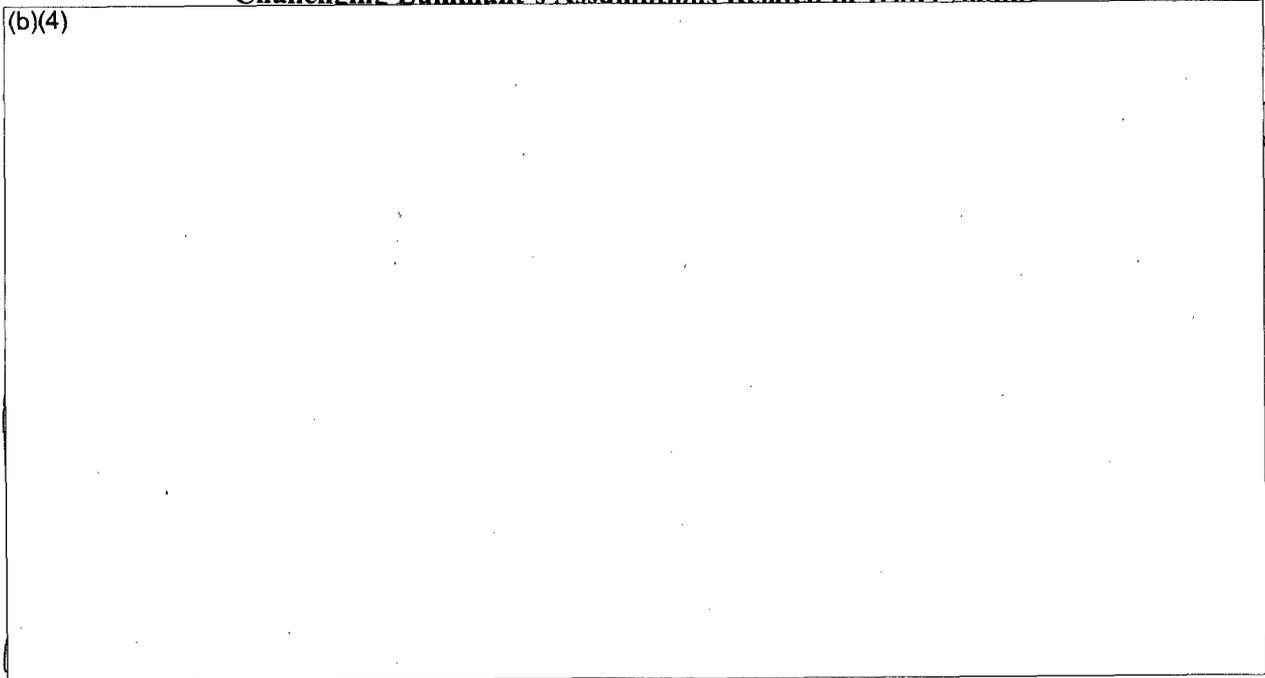
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damage states on water availability, including for fire suppression and cooling.⁹³ These arguments are encompassed within the more general arguments in Contention MS-1.⁹⁴

Since Contention MS-5 is encompassed by Contention MS-1, Contention MS-5 should be rejected for the same reasons discussed above for Contention MS-1. Sections 52.80(d) and 50.54(hh)(2) do not require an applicant to specify damage states. Because the regulations do not require the information specified in this contention, the contention does not identify an issue that is material to this proceeding and the contention should be rejected for failure to satisfy Section 2.309(f)(1)(iv) and (vi).

2. Contention MS-5 Mischaracterizes the MST and Provides No Support for Challenging Luminant's Assumptions Related to Water Supply

(b)(4)



⁹³ *Id.* at 18-19.

⁹⁴ In this regard, the Intervenor challenge reliance on the availability of a “portable 1000 gpm pump as a major component in fire suppression, core cooling and SFP cooling” because the Intervenor claim that these assumptions do not account for all damage states. *Id.* at 19. However, the Mitigative Strategies Report does not identify such a portable 1000 gpm pump.

⁹⁵ *Id.* at 18.

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(b)(4)

EXEMPTION 4 LUNENANT

⁹⁶ MST at 9.

⁹⁷ *Id.* (emphasis added).

⁹⁸ Comanche Peak, Units 3 and 4, Final Safety Analysis Report, Rev. 0, Section 2.4.1.2.2.

EXEMPTION 4
LUMINANT

(b)(4)

The

Intervenors have provided no factual information or expert opinion that would call into question the adequacy of this vast amount of water for the purposes of component cooling water. Because the Intervenors have not provided any support for questioning the adequacy of this water supply, Contention MS-5 should be dismissed for failure to satisfy 10 C.F.R. § 2.309(f)(1)(v).⁹⁹

VI. THE INTERVENORS' REQUEST FOR SUBPART G HEARING PROCEDURES SHOULD BE REJECTED

The Intervenors have requested the use of Subpart G hearing procedures for litigation of their contentions related to the Mitigative Strategies Report.¹⁰⁰ As discussed below, the Intervenors' request is inconsistent with 10 C.F.R. § 2.310(d) and should be rejected.

The regulations in 10 C.F.R. Part 2 establish several hearing tracks. Of particular relevance to COL proceedings, Subpart L establishes informal hearing procedures and Subpart G establishes formal hearing procedures. The selection of the appropriate hearing track depends upon the nature of the contentions. Specifically, 10 C.F.R. § 2.310(d) presumes use of Subpart L unless the proceeding involves "resolution of 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 issues of motive or intent of the party or eyewitness material to the resolution of the contested matter."¹⁰¹

⁹⁹ See also *Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 262 (1996).

¹⁰⁰ Request at 19-20.

¹⁰¹ When it issued these regulations, the Commission stated that given the provision in Section 2.310(d), "Subpart L procedures would be used, as a general matter, for hearings on power reactor construction permit and operating license applications under Parts 50 and 52." *Changes to Adjudicatory Process*, 69 Fed. Reg. at 2206.

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The only support the Intervenor provides for their request to use Subpart G hearing procedures is that they anticipate that Luminant will argue that the Mitigative Strategies Report meets the requirements of Section 50.54(hh)(2), which “sets up a material fact issue related to the assumptions about the full spectrum of damage states. Live testimony on the contentions herein is necessary because the credibility of the witnesses sponsoring such testimony would be in issue.”¹⁰²

This argument does not provide adequate justification for use of Subpart G hearing procedures. None of the proposed contentions, if admitted, would require eyewitness or other fact-specific testimony pertaining to a past activity, motive, or intent. Therefore, under Section 2.310(d), there is no basis for applying the formal hearing procedures in Subpart G.

For several reasons, the Intervenor’s claim that the credibility of witnesses is in issue is not sufficient to warrant use of Subpart G procedures. First, the Intervenor incorrectly focuses on the credibility of all witnesses, rather than eyewitnesses as required by Section 2.310(d). Additionally, the Intervenor’s argument could apply to any contention that involves witnesses (*i.e.*, all contentions except for contentions that involve solely legal issues). If such an argument were to be accepted, Subpart G proceedings would be the norm. However, that would be inconsistent with the Commission’s intent in establishing the Subpart L hearing process as the preferred alternative for COL proceedings. Subpart G hearing procedures are not appropriate when, as here, witnesses will be addressing technical issues (as distinct from past events involving eyewitnesses). In this regard, the Commission recently rejected an argument that

¹⁰² Request at 19-20.

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Subpart G hearing procedures “would be helpful in resolving complex technical issues,” and characterized imposition of Subpart G hearing procedures as an “extraordinary” action.¹⁰³

Accordingly, the Board should reject the Intervenors’ request to use Subpart G hearing procedures for failure to satisfy the standards in Section 2.310(d).

VII. CONCLUSION

For the foregoing reasons, the late-filed contentions submitted by the Intervenors should be rejected and the Intervenors’ request for Subpart G hearing procedures should be denied.

Respectfully submitted,

Signed (electronically) by Steven P. Frantz

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¹⁰³ *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC ___, slip op. at 49-51 (June 25, 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

) September 4, 2009
)

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2009 a copy of "Luminant's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report" was served by the Electronic Information Exchange on the following recipients:

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