

September 15, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO LUMINANT'S MOTION FOR SUMMARY DISPOSITION OF
CONTENTION 18 AND ALTERNATIVES CONTENTION A

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205(b) and Section II.E of the Atomic Safety and Licensing Board's (Board's) Initial Scheduling Order, dated October 28, 2009, the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby answers the motion filed August 26, 2010, by Luminant Generation Company LLC and Comanche Peak Nuclear Power Company LLC (jointly Applicant), requesting summary disposition in favor of the Applicant on Contention 18 and Alternatives Contention A.¹ Luminant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A; Statement of Material Facts on Which There is No Genuine Issue to

¹ While 10 C.F.R. § 51.104(a)(1) generally prevents the Staff from presenting its position on matters within the scope of the National Environmental Policy Act (NEPA) until the Final Environmental Impact Statement (FEIS) has been issued, the Commission has recognized that case-specific procedural orders can direct that hearings on the merits be held in advance of the FEIS. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392, 395-97 (2007). In the present case, the Board's Initial Scheduling Order requires that any motions for summary disposition regarding Contention 18 shall be filed no later than 30 days after issuance of the Draft Environmental Impact Statement (DEIS), and that responses to such motions shall be filed within 20 days after service of the motion. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), at 6 (LBP Oct. 28, 2009) (unpublished order) (Initial Scheduling Order). The circumstance giving rise to the Applicant's motion is the issuance of the DEIS on August 6, 2010. NUREG-1943, *Environmental Impact Statement for the Combined Licenses (COLs) for Comanche Peak Nuclear Power Plant Units 3 and 4 – Draft Report for Comment* (Aug. 2010) (ADAMS Accession No. ML102170030).

Be Heard; Joint Affidavit of Donald R. Woodlan, John T. Conly, Ivan Zujovic, David J. Bean, John E. Forsythe, and Kevin Flanagan; and Exhibits A – E (Aug. 26, 2010) (collectively Applicant’s Motion for Summary Disposition). The NRC Staff agrees that Contention 18 and Alternatives Contention A are moot and that the Applicant is entitled to summary disposition on these contentions because there is no genuine issue of material fact.

BACKGROUND

On September 19, 2008, the Applicant, pursuant to the Atomic Energy Act of 1954, as amended (AEA) and the Commission’s regulations, submitted an application for combined licenses (COL) for two US-Advanced Pressurized Water Reactors (US-APWRs) to be located adjacent to the existing Comanche Peak Nuclear Power Plant, Units 1 and 2, near Glen Rose in Somervell County, Texas (Application). Luminant Generation Company, LLC; Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 66,276 (Nov. 7, 2008). The Application references the standard design certification application for the US-APWR, including a design control document (DCD), submitted by Mitsubishi Heavy Industries, Ltd (MHI). The proposed units will be known as Comanche Peak Nuclear Power Plant, Units 3 & 4.

In response to the Notice of Hearing on the Application², published on February 5, 2009, the Sustainable Energy and Economic Development Coalition, Public Citizen, True Cost of Nukes, J. Nile Fisher, Nita O’Neal, Don Young, and Lon Burnam (collectively Intervenors) submitted a “Petition for Intervention and Request for Hearing” on April 6, 2009 (Petition), proposing several contentions, including the original Contention 18. Petition at 42. On August 6, 2009, the Board reformulated and admitted Contention 18. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-09-17, 70 NRC __, __ (Aug. 6, 2009) (slip op. at 82, 85).

² 74 Fed. Reg. 6177 (Feb. 5, 2009).

On December 8, 2009, the Applicant notified the Board and the parties of an amendment to the Environmental Report (ER) relating to Contention 18. See Letter from Jon Rund, Counsel for Luminant, to Members of the Licensing Board, Notification of Filing Related to Contention 18, (Dec. 8, 2009) (Notification Letter). Attached to this letter was a copy of the Applicant's submission to the NRC, also dated December 8, 2009, of a supplement to the ER. See Attachment to Notification Letter, Letter from Rafael Flores, Luminant, to NRC Document Control Desk (Dec. 8, 2009) (Alternatives Submission). Subsequently, the Applicant filed a motion to dismiss Contention 18 as moot. Luminant's Motion to Dismiss Contention 18 as Moot (Dec. 14, 2009) (Motion to Dismiss). The Staff agreed with the Applicant that Contention 18 should be dismissed as moot. *Id.* at 6. The Intervenor's opposed the dismissal of Contention 18, and, in the alternative, proposed that Contention 18 be modified. Intervenor's Response Opposing Applicant's Motion to Dismiss Contention 18 as Moot (Jan. 4, 2010) (Motion Answer), at 7-9. In addition, on January 15, 2010, the Intervenor's filed six new contentions alleging omissions from and deficiencies in the Applicant's Alternatives Submission. Intervenor's Contentions Regarding the Applicant's Revisions to Environmental Report Concerning Alternatives to Nuclear Power (Jan. 15, 2010) (Intervenor's New Contentions). Both the Staff and the Applicant filed answers opposing Intervenor's new and amended alternatives contentions. Luminant's Answer Opposing New and Modified Contentions Regarding Alternative Energy Sources (February 10, 2010); NRC Staff Consolidated Response to Intervenor's Amended Contention 18 and Proposed Contentions Concerning Alternatives to Nuclear Power (February 4, 2010).

On June 25, 2010, a majority of the Board found Contention 18 moot in part based on the ER Update. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-10-10, 71 NRC __, __ (June 25, 2010) (slip op. at 4, 86). The Board also admitted, in part, portions of the Intervenor's new alternatives contentions, ALT-1, ALT-2, and ALT-3, and reformulated the admitted portions of these contentions into one contention, which the Board

designated as Alternatives Contention A. *Id.* at 4, 74-75, 86. The Board admitted Alternative Contention A only with respect to the omission from the Applicant's ER of a potential alternative to the proposed action: a "four part" combination of solar, wind, storage, and natural gas supplementation that the Board admitted in Alternatives Contention A. *Comanche Peak*, LBP-10-10, 71 NRC at ___ (slip op. at 4, 11-13, 58, 62, 68 – 72). The Board stated that the remaining portion of Contention 18 that was retained and not moot is identical to admitted Alternatives Contention A, and the two would be adjudicated as one contention. *Id.* at 75, 87.

On August 6, 2010, the NRC issued a Draft Environmental Impact Statement (DEIS) for CPNPP Units 3 and 4. NUREG-1943, *Environmental Impact Statement for the Combined Licenses (COLs) for Comanche Peak Nuclear Power Plant Units 3 and 4 – Draft Report for Comment* (Aug. 2010) (ADAMS Accession No. ML102170030). Section 9.2 of the DEIS includes information related to the environmental impacts of alternative energy sources, including but not limited to wind, solar, and natural gas. DEIS at 9-3 through 9-33.

On August 26, 2010, the Applicant filed its Motion for Summary Disposition. The Applicant's Motion demonstrates that summary disposition of Contention 18 and Alternatives Contention A in favor of the Applicant is warranted because the material facts presented in the Applicant's Motion are consistent with the conclusions and underlying factual findings in the DEIS, and there is no genuine issue of material fact regarding Contention 18 and Alternatives Contention A. Additionally, Contention 18 and Alternative Contention A are now moot because the DEIS has been issued and the information that these contentions allege was omitted from the ER's alternatives analysis is included in the alternatives analysis in the DEIS.

DISCUSSION

I. LEGAL STANDARDS

A. Dismissal of Contentions of Omission

The Commission has determined 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.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002). “When a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot.” *McGuire*, CLI-02-28, 56 NRC at 383 (citations omitted); *see also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-7, 59 NRC 259 (2004) (holding that because the applicant’s response addressed the alleged omission which was the subject of the contention, albeit “minimally,” the motion was granted).

B. Summary Disposition

The Commission’s rules “contemplate merits rulings by licensing boards based on the parties’ written submissions and oral arguments, except where a board expressly finds that ‘accuracy’ demands a full-scale evidentiary hearing.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385 (2001). Subpart L of the Commission’s rules authorizes informal adjudicatory decision-making by a licensing board after receiving written submissions and hearing oral arguments. *Shearon Harris*, CLI-01-11, 53 NRC at 385 (citing 10 C.F.R. § 2.1201 *et seq.* (Subpart L)) (other citation omitted).

The standards for summary disposition under 10 C.F.R. § 2.1205 are the same as those under 10 C.F.R. § 2.710(d)(2). 10 C.F.R. § 2.1205(c) (“In ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part”). A party is entitled to summary disposition as to all or any part of the matters involved in the proceeding “if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.710(d)(2). “The standards are based upon those the federal courts apply to motions for summary judgment under Rule 56 of

the Federal Rules of Civil Procedure.” *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC ___, ___ (Mar. 26, 2010) (slip op. at 11-12) (citing *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993)).

The movant bears the initial burden of showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials that accompany its dispositive motion. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999). If the opposing party fails to counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, the movant's facts will be deemed admitted. *Advanced Medical Systems*, CLI-93-22, 38 NRC at 102-03; see also 10 C.F.R. § 2.710(b) (“[A] party opposing the motion may not rest upon the mere allegations or denials of his answer,” but rather, “must set forth specific facts showing that there is a genuine issue of fact”). “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original). “‘Only disputes over facts that might affect the outcome’ of a proceeding would preclude summary disposition.” *Pilgrim*, CLI-10-11, 71 NRC at ___ (slip op. at 12) (quoting *Liberty Lobby*, 477 U.S. at 248). In addition, the Commission will reject attempts to add new arguments in an answer to a summary disposition motion that could have been raised earlier. See *Pilgrim*, CLI-10-11, 71 NRC at ___ (slip op. at 29-31). In *Pilgrim*, the new arguments were rejected because they were not fairly encompassed by the contention at issue in the motion for summary disposition, as originally pled and admitted, and because the intervenor did not attempt to amend the contention to add the new arguments. *Id.* at ___ (slip op. at 31).

II. CONTENTION 18 AND ALTERNATIVE CONTENTION A ARE MOOT AND THERE IS NO GENUINE ISSUE OF MATERIAL FACT

To determine whether there is a genuine issue of material fact, it is important to first determine which issues are in dispute. Under NRC practice, the issues in dispute are determined by the scope of the admitted contention. See *Pilgrim*, CLI-10-11, 71 NRC at ___ (slip op. at 28). The scope of a contention is defined both by its terms and its bases. *Id.* The scope of an admitted contention is also based on the board's discussion of the contention when admitting it. See *id.* at ___ (slip op. at 13-16) (discussing the licensing board decision admitting the contention to determine the admitted contention's scope).

In this case, the Board admitted, in part, Contention 18 and Alternatives Contention A, and held that they would be adjudicated as one contention. *Comanche Peak*, LBP-10-10, 72 NRC at ___ (slip op. at 75, 87). The new, reformulated Contention 18 is as follows:

The Comanche Peak Environmental Report is inadequate because it fails to include consideration of alternatives to the proposed Comanche Peak Units 3 and 4, consisting of combinations of renewable energy sources such as wind and solar power, with technological advances in storage methods and supplemental use of natural gas, to create baseload power.

Comanche Peak, LBP-09-17, 70 NRC ___ (slip op. at 82, 85). The new, reformulated Alternatives Contention A, is as follows:

The Applicant has not considered the feasibility under NEPA of an alternative consisting of a combination of solar and wind energy, energy storage methods including CAES and molten salt storage, and natural gas supplementation, to produce baseload power, with specific regard to:

- (a) The reasonable availability of the four parts of such combination for consolidation into an integrated system to produce baseload power;
- (b) The feasibility of the use of such combination in the area of Texas served by the Comanche Peak plant;
- (c) The extent to which there may be efficiencies arising from overlapping uses of land for each of the four parts of the combination as well as for other reasonable purposes; and
- (d) If it is shown that such an alternative is environmentally preferable, the extent to which operation and maintenance costs of solar in such combination may be a comparative benefit.

Comanche Peak, LBP-10-10, 71 NRC ___ (slip op. at 74-75, 86-87). Contention 18 and Alternatives Contention A, as reformulated and admitted by the Board, raise issues concerning the Applicant's omission from the alternatives analysis in the ER of an evaluation of a four-part combination of alternatives consisting of wind and solar, energy storage methods such as CAES and molten salt, and supplemental natural gas. *Comanche Peak*, LBP-10-10, 71 NRC ___ (slip op. at 2, 6, 10, 13-14, 44, 50, 52-53, 58, 68).

Contention 18 and Alternatives Contention A, as contentions of omission, challenge the absence of a discussion in the Applicant's alternatives analysis of the feasibility of a four-part combination of alternatives consisting of wind, solar, technological advances in energy storage, and natural gas. Subsequent to the Board's ruling retaining part of Contention 18 and admitting a reformulated Alternatives Contention A, the NRC Staff issued the DEIS, in which the NRC staff considered a spectrum of energy alternatives that were reasonable for the ERCOT region, and developed for comparison with the proposed project a combination of wind and solar, each with storage; a combination of sources including biomass, municipal solid waste, and geothermal; and natural gas. DEIS at 9-28 through 9-33. The NRC staff determined that, given the purpose and need of the proposed project to produce 3200 MW(e) of additional baseload electrical power, an energy source such as coal or natural gas would have to be a significant contributor to any reasonable alternative energy combination. DEIS at 1-6, 9-28 through 9-33. The NRC staff concluded that combinations of alternative generation sources, supplemented by natural gas to produce baseload power comparable to the purpose and need of the proposed project, are not environmentally preferable to the proposed CPNPP Units 3 and 4. *Id.* at 9-32. As summarized in Table 9-5 of the DEIS, the NRC staff evaluated the environmental impacts of electric generation from nuclear, coal, natural gas, and a combination of alternatives, on land use, water use and quality, ecology, socioeconomics, waste management, environmental justice, historic and cultural resources, air quality, human health, and carbon dioxide (CO₂).

DEIS at 9-33. The NRC staff determined that there are no environmentally preferable, technically reasonable alternatives to the proposed CPNPP Units 3 and 4. DEIS at 9-32.

The NRC Staff, not the Applicant, is required under NEPA to prepare the DEIS and identify and discuss all reasonable alternatives, including a combination of alternatives that might compare with the proposed project. *Comanche Peak*, LBP-10-10, 71 NRC __ (slip op. at 14) (“the requirements of NEPA are directed to Federal agencies and the primary duties of NEPA accordingly fall on the NRC Staff in NRC proceedings”); *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC __, __ (July 8, 2009) (slip op. at 26) (“Under NEPA, it is NRC, not the applicant, that must prepare the EIS and identify and discuss all reasonable alternatives.”) (citations omitted). The ER is not the EIS, and the regulations do not require the ER to be equivalent to the EIS. *Levy County*, LBP-09-10, 70 NRC __ (slip op. at 27-28). While the NRC requires a COL applicant to submit an ER that contains sufficient data and analysis, the purpose of that requirement is to aid the Commission in meeting its obligation under NEPA to develop an independent analysis in the EIS. *Levy County*, LBP-09-10, 70 NRC __ (slip op. at 27-28).

The DEIS prepared by the Staff to meet its obligations under NEPA includes a discussion of a combination of alternatives that includes the four-part combination of alternatives the Board found must be considered, as admitted in Contention 18 and Alternatives Contention A. *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (quoting *Systems Energy Resources, Inc.* (Early Site Permit for Grand Gulf Site), CLI-05-4, 61 NRC 10, 13 (2005)). Because the DEIS alternatives analysis includes a combination alternative which includes the four parts upon which the admitted contentions are based (solar, wind, energy storage, and natural gas supplementation), the alternatives analysis no longer omits the combination alternative. Contention 18 and Alternatives Contention A, which challenge omissions from the Applicant’s ER, are now moot. *McGuire*, CLI-02-28, 56 NRC at 383 (citations omitted).

The NRC staff agrees with the material facts presented in the Applicant's Motion. Further, the material facts presented in the Applicant's Motion are consistent with and do not differ materially from the conclusions and underlying factual findings in the DEIS, and are also consistent with facts presented by the Intervenors. The material facts presented by the Applicant demonstrate that Contention 18 and Alternatives Contention A should be dismissed in their entirety because there exists no genuine issue of material fact and the Applicant is entitled to a decision as a matter of law. 10 C.F.R. § 2.710(d)(2); see also *Pilgrim*, CLI-10-11, 71 NRC at ___ (slip op. at 12) (stating that only disputes over facts with the potential to affect the outcome of the proceeding would preclude summary disposition).

CONCLUSION

Contention 18 and Alternatives Contention A, both contentions of omission, were rendered moot by the issuance of the NRC's DEIS, which includes a thorough analysis of the four-part combination of alternatives described in the contentions. The NRC staff also agrees that summary disposition of Contention 18 and Alternatives Contention A is warranted because there exists no genuine issue of material fact relevant to these contentions, and under applicable regulations, the Applicant is entitled to a decision as a matter of law.

/Signed (electronically) by/
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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER IN TO LUMINANT'S MOTION FOR SUMMARY DISPOSITION ON CONTENTION 18 AND ALTERNATIVE CONTENTION A have been served upon the following persons by Electronic Information Exchange this 15th day of September, 2010:

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Dated at Rockville, Maryland
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