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Administrative Judge
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Re: Mootness question from oral argument on Oct. 28, 2010

Dear Judges Young, Mignery and Arnold,

During the oral argument on October 28, 2010, you directed that Intervenors provide legal authority related to mootness in light of the Applicant's consideration of the combination of

alternatives specified in Alternatives Contention A. Alternatives Contention A was based on the Applicant's omission of consideration 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..."¹ In the Applicant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A the combination of alternatives was addressed.²

The mootness of contentions of omission was addressed in the *Oyster Creek* case. "As with all contentions of omission, if the applicant supplies the missing information — or, as relevant here, if the applicant performs the omitted analysis — the contention is moot (*Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)*, CLI-02-28, 56 NRC 373, 383 (2002))."³ The Applicant's consideration of the combinations alternative in its motion for summary disposition supplies some of the missing information encompassed in Alternatives Contention A. However, the issue of whether the Applicant has considered site-specific aesthetic impacts has not been addressed.⁴ Additionally, whether the alternatives are practicable is not resolved as a matter of law.⁵ Hence, there are continuing issues that are controverted even in light of the Applicant's factual statement in its motion for summary disposition.

In the case of *In the Matter of Georgia Institute of Technology* (Georgia Tech Research Reactor, 42 N.R.C. 191, 194 (1995)), mootness of contentions was considered. "Mootness, in our view, is not necessarily dependent upon a party's view that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists. See, generally, *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2)*, 37 NRC 192 (1993)." The *instant* case is subject to the mootness rule in *In the Matter of Georgia Institute of Technology* because of the continuing controversy related to whether the site-specific aesthetic impacts of the

¹ Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant Units 3 & 4), LBP-10-10, slip op. pp. 74-75, (June 25, 2010).

² Luminant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A, pp. 16-37.

³ In the Matter of Amergen Energy Company, LLC (*Oyster Creek Nuclear Generating Station*), 68 N.R.C. 5, 13 (2008)

⁴ Intervenors' Response to Luminant's Motion for Summary Disposition of Contention 18 and Alternatives Contention A, pp. 6-8.

⁵ *Id.* at 2-6.

alternatives have been considered⁶ pursuant to and practicability of the alternatives specified in Alternatives Contention A. And there is an ongoing controversy concerning the practicability of the combination of alternatives.⁷

Yours truly,

Robert V. Eye

⁶ *In the Matter of Public Service Co. of New Hampshire, et. al.*, (Seabrook Station, Units 1 and 2), 7 N.R.C. 477, 504-508.

⁷ *Utahans for Better Transp. V. U.S. Dept. of Transp.*, 305 F.3d 1152, 1172 (10th Cir. 2002)