

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)) May 2, 2011
)

**LUMINANT GENERATION COMPANY LLC'S ANSWER IN OPPOSITION TO
EMERGENCY PETITION TO SUSPEND LICENSING PROCEEDINGS**

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I. INTRODUCTION

Beginning on April 14, 2011, and continuing through April 21, 2011, several individuals and organizations filed with U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), on the dockets of several ongoing licensing proceedings, an Emergency Petition to Suspend Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident ("Petition").¹ Although the Petition was not filed on the docket of the Comanche Peak Nuclear Power Plant ("Comanche Peak") Units 3 and 4 combined license ("COL") proceeding, the caption for the Comanche Peak COL proceeding was included in the Petition filed in these other proceedings, and two intervenors in this proceeding, Public Citizen, Inc. and the Sustainable Energy and Economic

¹ See, e.g., Docket Nos. 52-027, 52-028, Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (original version dated Apr. 14-18, 2011; corrected version dated Apr. 18, 2011; served Apr. 14-21, 2011); Decl. of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 19, 2011) ("Makhijani Declaration"), available at ADAMS Accession No. ML111091154. All citations to the "Petition" in this Answer are to the corrected version of the Petition served on April 19, 2011, in Docket Nos. 52-027 and 52-028.

Development (“SEED”) Coalition, Inc. (collectively, “Petitioners”) were among the individuals and organizations signing the Petition.² Luminant Generation Company LLC (“Luminant”) is filing this Answer in opposition to the Petition with the Commission pursuant to 10 C.F.R. § 2.323(c) and the Commissioner’s Order dated April 19, 2011.³ As discussed below, the Petition should be denied in its entirety because it not only fails to comply with applicable procedural requirements, but also fails to demonstrate the requisite justification for the requested actions.

II. BACKGROUND

On September 19, 2008, Luminant submitted an Application to the NRC for COLs for Comanche Peak Units 3 and 4. A hearing notice, published on February 5, 2009, stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party must file a petition for leave to intervene in accordance with 10 C.F.R. § 2.309.⁴ Public Citizen, the SEED Coalition, and several other individuals and organizations timely filed a joint Petition to Intervene, which proposed a number of contentions.⁵ Several contentions were admitted for further litigation, but the Board subsequently dismissed those contentions and

² Luminant addresses only Petitioners’ request to suspend this proceeding because Petitioners’ request to suspend other proceedings is not cognizable in *this* individual adjudicatory proceeding. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 n.9 (2001). Furthermore, most of the organizations joining the Petition have never made a hearing request or sought permission to participate in this proceeding on any other basis. Therefore, any request by these other organizations has “no legitimate place” in this proceeding and hereafter we refer only to Public Citizen and the SEED Coalition as the Petitioners. *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 235 n.6 (2002); *Savannah River*, CLI-01-28, 54 NRC at 398.

³ Petitioners appropriately filed the Petition directly with the Commission because the contested portion of this proceeding has ended and the Board’s jurisdiction over this proceeding has lapsed. *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35 (2006) (finding a motion improperly filed with the licensing board because “the Board has already dismissed the case and no longer has jurisdiction over the matter”).

⁴ Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 6177, 6177 (Feb. 5, 2009).

⁵ Petition for Intervention and Request for Hearing (Apr. 6, 2009) (“Petition to Intervene”).

terminated the contested portion of this proceeding.⁶ Following the dismissal of the last pending contentions, Petitioners filed a Petition for Review of an earlier Board decision rejecting two proposed contentions relating to Luminant's Mitigative Strategies Report addressing the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).⁷ Both Luminant and the NRC Staff, in their respective answers, opposed the Petition for Review, which is now pending before the Commission.⁸

As noted above, between April 14 and 21, 2011, Petitioners filed, directly with the Commission, the instant Petition requesting that the Commission take the following actions:

- (1) suspend all decisions regarding the issuance of various reactor licenses and approvals, including COLs and design certifications, pending completion of the NRC Task Force evaluation of the agency's regulatory requirements, programs, and processes in light of the Fukushima Daiichi accident in Japan, following the March 11 earthquake and tsunami;
- (2) suspend all hearings on reactor-related or spent fuel-related issues identified for investigation in the Task Force's charter;
- (3) perform a National Environmental Policy Act ("NEPA") analysis of whether the earthquake and Fukushima Daiichi accident constitute new and significant information that must be considered in an environmental impact statement ("EIS");
- (4) perform a safety analysis of the regulatory implications of the earthquake and Fukushima Daiichi accident;
- (5) establish procedures and a timetable for raising new issues relevant to the Fukushima Daiichi accident in pending licensing proceedings;
- (6) suspend all decisions and proceedings pending the outcome of any independent investigation of the Fukushima Daiichi accident; and

⁶ See *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), LBP-11-4, 73 NRC __, slip op. at 40 (Feb. 24, 2011) (dismissing Contention 18 and Alternatives Contention A); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), LBP-10-10, 71 NRC __, slip op. at 86-87 (June 25, 2010) (dismissing Contention 13).

⁷ Intervenors' Petition for Review Pursuant to 10 C.F.R. § 2.341 (Mar. 11, 2011) (Sensitive Unclassified Non-Safeguards Information) ("Petition for Review").

⁸ Luminant's Answer in Opposition to Intervenors' Petition for Review of LBP-10-5 (Mar. 21, 2011) (Sensitive Unclassified Non-Safeguards Information); NRC Staff Answer to Intervenors' Petition for Review (Mar. 21, 2011) (Sensitive Unclassified Non-Safeguards Information).

(7) request that the President establish an independent investigation of the Fukushima Daiichi accident.⁹

As discussed further below, these various requests lack technical or regulatory basis and should be denied.

III. LEGAL STANDARDS

A. Procedural Requirements for Suspension of Proceedings

As an initial matter, the Petition does not comport with any of the specific forms of authorized pleading specified in the NRC Rules of Practice.¹⁰ The Commission has, however, provided some guidance through its rulings on somewhat similar petitions seeking suspension of proceedings. For example, following the September 11 terrorist attacks, the Commission determined that a petition requesting suspension of the *Diablo Canyon* independent spent fuel storage installation (“ISFSI”) proceeding, pending the Commission’s comprehensive review of anti-terrorist measures at licensed facilities, should be treated as a general motion under the Rules of Practice (then designated as 10 C.F.R. § 2.730, but now designated as 10 C.F.R. § 2.323).¹¹ More recently, the Commission determined in its *Oyster Creek* decision that joint petitions filed in four license renewal proceedings requesting suspension of those proceedings pending requested revisions to the license renewal process should likewise be treated as motions brought under 10 C.F.R. § 2.323.¹² Barring further guidance, therefore, the Petition is most appropriately considered as a motion under this regulation and is treated as such herein.

⁹ Petition at 1-3, 28-29.

¹⁰ For example, NRC regulations address stays in 10 C.F.R. §§ 2.342 and 2.1213, but those regulations are not applicable in this situation. Even if these regulations did apply, Petitioners have not addressed the factors for a stay. For example, Petitioners have not demonstrated that they will prevail in this proceeding or that they will be irreparably injured if the proceeding were to move forward.

¹¹ *Diablo Canyon*, CLI-02-23, 56 NRC at 237.

¹² See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484-85 (2008).

Two provisions of 10 C.F.R. § 2.323 are of particular relevance to the Commission’s consideration of the Petition. First, motions must be made no later than 10 days after the occurrence or circumstance from which the motion arises.¹³ Second, a motion must be rejected if it does not include a certification that the moving party has made a sincere effort to contact other parties in the proceeding and resolve the issues raised in the motion.¹⁴

B. Substantive Standards for Suspension of Proceedings

As a threshold matter, it is important to recognize that the Commission considers suspension of licensing proceedings a “drastic” action that is not warranted absent “immediate threats to public health and safety.”¹⁵ Following the September 11 terrorist attacks, the Commission considered a number of requests to suspend proceedings or hold them in abeyance in the exercise of the Commission’s inherent supervisory authority pending the Commission’s comprehensive review of measures to protect against terrorism.¹⁶ In the *Private Fuel Storage* ISFSI proceeding, the leading case on the subject, the Commission set forth the standard for requests to suspend or hold a proceeding in abeyance and considered whether moving forward with the adjudication (1) “will jeopardize the public health and safety;” (2) “prove an obstacle to fair and efficient decision-making;” or (3) “prevent appropriate implementation of any pertinent rule or policy changes that might emerge from [the Commission’s] important ongoing

¹³ 10 C.F.R. § 2.323(a).

¹⁴ 10 C.F.R. § 2.323(b).

¹⁵ *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (refusing request to suspend all license transfer proceedings involving a particular transferee while the Commission examined effects of ownership by limited liability companies).

¹⁶ See *Diablo Canyon*, CLI-02-23, 56 NRC at 236-37; *Savannah River*, CLI-01-28, 54 NRC at 398-99; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390-91 (2001); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 377 (2001).

evaluation of its terrorism related policies.”¹⁷ As explained below, the instant Petition meets none of these standards.

IV. ARGUMENT

A. The Petition Should Be Summarily Dismissed on Procedural Grounds

Turning first to procedural matters, the Commission should dismiss the Petition because Petitioners failed to comply with several applicable requirements, each of which constitutes an adequate independent reason for dismissal.

First, although the caption of the Petition refers to Comanche Peak Units 3 and 4, the Petition was never actually filed on the docket for this proceeding. Therefore, the Petition is not properly before the Commission in this proceeding and should be summarily dismissed.

Second, a motion must be made no later than 10 days after the occurrence or circumstance from which the motion arises.¹⁸ The Petition cites a number of potential trigger events, including the March 11 Tohoku-Taiheiyou-Oki earthquake and resulting tsunami; the March 18 issuance of NRC Information Notice 2011-05, “Tohoku-Taiheiyou-Oki Earthquake Effects On Japanese Nuclear Power Plants;” the Commission’s March 23 approval of an action plan to review the accident at the Fukushima Daiichi facility; and the April 1 release of the charter for the Task Force responsible for assessing NRC regulatory requirements, programs, and processes in view of the Fukushima Daiichi accident.¹⁹ All of these events occurred *more than* 10 days preceding the initial filing of the Petition in another proceeding.

¹⁷ *Private Fuel Storage*, CLI-01-26, 54 NRC at 380.

¹⁸ 10 C.F.R. § 2.323(a).

¹⁹ See NRC Information Notice 2011-05, Tohoku-Taiheiyou-Oki Earthquake Effects On Japanese Nuclear Power Plants (Mar. 18, 2011), available at ADAMS Accession No. ML110760432; Staff Requirements Memorandum on COMGBJ-11-0002 - NRC Actions Following the Events in Japan (Mar. 23, 2011), available at ADAMS Accession No. ML110820875; Charter for the NRC Task Force to Conduct a Near-Term Evaluation of the Need for Agency Actions Following the Events in Japan (Mar. 30, 2011), available at ADAMS Accession No. ML11089A045.

Furthermore, although the Petitioners attach an April 12 *New York Times* article to their filing to show that information about the Fukushima Daiichi accident continues to change and be augmented in the process, that fact was clear and widely acknowledged well before April 12, and cannot be considered in any way as “new” circumstances giving rise to the relief requested in the Petition or otherwise tolling the filing deadline.²⁰ In fact, NRC Information Notice 2011-05 explicitly made that very point—noting that the situation “continues to evolve.”²¹ The Commission has made clear in other contexts that a petitioner may not rely on documents that merely summarize or collect existing information to justify the timeliness of a filing.²² Therefore, the Petition is untimely and should be rejected.

Third, a motion must be rejected if it does not include a certification by the moving party that it has made a sincere effort to contact the other parties and resolve the issues raised in the motion.²³ No such certification is included with the Petition. Moreover, Petitioners made no attempt to contact Luminant or its counsel to resolve the issues raised in the Petition. In fact, Luminant was not even informed by the Petitioners that the Petition was contemplated. Accordingly, the Petition is procedurally defective and should be denied as a matter of law.

²⁰ See Petition at 23 (*citing* Att. 1, Matthew L. Wald, “Japan’s Reactors Still Not Stable,” N.Y. Times, Apr. 12, 2011, at A6, <http://www.nytimes.com/2011/04/13/world/asia/13safety.html>). Although the Makhijani Declaration references an April 15 document discussing hydrogen generation, this document clearly was not the trigger for the Petition, as it is dated the day *after* the Petition was first filed in other proceedings. See Makhijani Declaration ¶ 32.

²¹ NRC Information Notice 2011-05 at 1.

²² See *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC __, slip op. at 17-18 (Sept. 30, 2010); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 238 (2006) (“the *information* contained in AmerGen’s April 2006 responses to the NRC Staff’s AMP Questions is by no means new, nor was it previously unavailable”), *aff’d*, CLI-09-7, 69 NRC 235, 272 (2009).

²³ 10 C.F.R. § 2.323(b).

B. The Petition Provides No Basis for Suspending the Proceeding, Requiring Supplemental NEPA Documentation, or Establishing Special Procedures

1. Petitioners Do Not Provide a Sufficient Basis for Suspending the Proceeding

Even if the Commission were to address the merits of the Petition, it should be rejected for failure to include adequate bases and justification for suspension of the Comanche Peak COL proceeding. As explained above, following the September 11 terrorist attacks, the Commission considered similar petitions that requested the suspension of various licensing proceedings pending the Commission's comprehensive review of measures to protect against terrorism. In the *Private Fuel Storage* proceeding, the Commission stated that in addressing this very question, it considered whether moving forward with the adjudication (1) "will jeopardize the public health and safety;" (2) "prove an obstacle to fair and efficient decision-making;" or (3) "prevent appropriate implementation of any pertinent rule or policy changes that might emerge from [the Commission's] important ongoing evaluation of its terrorism related policies."²⁴ As discussed below, none of these considerations justifies suspension of the Comanche Peak COL proceeding.

a. *Moving Forward with the Proceeding Poses No Immediate Threat to Public Health and Safety*

The Petition provides no basis upon which to conclude that continuation of the Comanche Peak COL proceeding would present any threat to public health and safety. To the contrary, in an April 12, 2011, written statement before the U.S. Senate, Chairman Jaczko stated:

The NRC's primary responsibility is to ensure the adequate protection of the public health and safety of the American people. Toward that end, we have been very closely monitoring the

²⁴ *Private Fuel Storage*, CLI-01-26, 54 NRC at 380. The Commission applied the same standard in a wide-variety of licensing proceedings. See *Diablo Canyon*, CLI-02-23, 56 NRC at 237-38 (ISFSI); *Savannah River*, CLI-01-28, 54 NRC at 399 (mixed oxide fuel fabrication facility); *McGuire-Catawba*, CLI-01-27, 54 NRC at 389-90 (reactor license renewal).

activities in Japan and reviewing all currently available information. Review of this information, combined with our ongoing inspection and licensing oversight, gives us *confidence* that the U.S. plants *continue to operate safely.*²⁵

The Chairman further outlined the key factors that assure the Commission that reactors in the U.S. continue to operate safely, as well as the Commission's plans to identify lessons learned from the Fukushima Daiichi accident and to evaluate whether the NRC should adopt additional regulatory or policy improvements.²⁶ Thus, because the Commission has concluded that *continued operation* of power plants does not pose an imminent risk to public health and safety, there certainly is no reason to believe that any danger to public health and safety would result from mere continuation of this *pending initial licensing proceeding.*

As part of the Commission's plans to identify lessons learned, an NRC Task Force is examining a broad range of issues relating to the Fukushima Daiichi accident, including issues related to external events, station blackout, severe accident measures, 10 C.F.R. § 50.54(h)(2) (*i.e.*, accident mitigation measures for large fires and explosions), and emergency preparedness.²⁷ The NRC Task Force is expected to provide its initial observations, conclusions, and recommendations—including topics for assessment in a longer-term review—approximately 90 days after it commenced its review; *i.e.*, around July 1, 2011.²⁸

²⁵ Written Statement by Gregory B. Jaczko, Chairman, NRC, to U.S. Senate Environment and Public Work Committee and Clean Air and Nuclear Safety Committee at 3 (Apr. 12, 2011), *available at* ADAMS Accession No. ML111020070 (emphasis added).

²⁶ *See id.* at 6-9.

²⁷ NRC, Press Release, NRC Appoints Task Force Members and Approves Charter for Review of Agency's Response to Japan Nuclear Event (Apr. 1, 2011), *available at* ADAMS Accession No. ML110910479.

²⁸ *See id.* at 1.

Given the current NRC review schedule, a final decision on the Comanche Peak COL application should be issued sometime in late 2013.²⁹ As the COL proceeding moves forward, the NRC Task Force review may or may not result in changes pertinent to proposed Comanche Peak Units 3 and 4. Moving forward with the proceeding, however, is not inconsistent with the ongoing NRC Task Force review and will not foreclose implementation of any improvements and lessons learned from the Fukushima Daiichi accident. Even if the Commission were to grant the COLs before all of the lessons learned from the Fukushima Daiichi accident are fully implemented, construction would not be completed until several years later at the earliest. Accordingly, there is simply no risk of any immediate threat to public health and safety as a result of the continuation of the Comanche Peak COL proceeding, and suspension of this proceeding is unnecessary to ensure that any issues identified during the Task Force review are incorporated at Comanche Peak Units 3 and 4.

b. *Moving Forward with the Proceeding Would Not Prove to Be an Obstacle to Fair and Efficient Decisionmaking*

The Commission has long emphasized its commitment to efficient and expeditious processing of applications and any associated hearings.³⁰ While the NRC Task Force review of issues relating to the Fukushima Daiichi accident is pending, there are safety and environmental issues that still must be resolved in this proceeding, many with no connection to the accident in

²⁹ See Letter from David B. Matthews, NRC, to Rafael Flores, Luminant, Encl., Comanche Peak Combined License Application Review Milestones (Mar. 2, 2011) (“Safety Review Milestones”), available at ADAMS Accession No. ML110310442 (listing target date for completing the mandatory hearing process as November 2013).

³⁰ See, e.g., *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 18, 24 (1998).

Japan or the issues identified in the Task Force Charter.³¹ Under these circumstances, there is, again, no basis for suspending the ongoing licensing proceeding.

Commission practice is to carefully limit and confine orders delaying proceedings to the duration and scope necessary to promote the dual goals of public safety and timely adjudication.³² Even after the accident at Three Mile Island, Unit 2 (“TMI-2”) on March 28, 1979, the Commission chose *not* to suspend ongoing licensing proceedings, but instead, on June 5, 1979, temporarily stopped issuing licenses for a short period pending its initial assessment of the accident.³³ Shortly thereafter, in October 1979, the Commission issued an Interim Statement of Policy announcing the Commission itself would decide whether to grant final approval of new construction permits, limited work authorizations, and operating licenses.³⁴

Later, in November 1979, the Commission provided additional guidance on this procedural change and explained that it did not impact the issuance of operating licenses in uncontested cases and cases where the Board issued an initial decision before the effective date of the Statement of Policy.³⁵ The November 1979 Statement of Policy also made clear that Boards should apply existing safety regulations and policies with the understanding that the analysis of the TMI-2 accident was ongoing and changes to regulations and regulatory policies may be forthcoming.³⁶

³¹ See Safety Review Milestones (listing target completion date for FSER as June 2013); Letter from David B. Matthews, NRC, to Rafael Flores, Luminant (Feb. 19, 2010), *available at* ADAMS Accession No. ML100260655 (listing target completion date for FEIS as May 23, 2011).

³² *Private Fuel Storage*, CLI-01-26, 54 NRC at 381.

³³ See *id.* at 381-82 (discussing the Commission’s actions following the TMI-2 accident, including the temporary pause in licensing initiated by an unpublished order dated June 5, 1979); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 784-85 (1983) (same).

³⁴ Interim Statement of Policy and Procedure, 44 Fed. Reg. 58,559, 58,559 (Oct. 10, 1979).

³⁵ See Domestic Licensing Proceedings; Modified Adjudicatory Procedures, 44 Fed. Reg. 65,049, 65,051 (Nov. 9, 1979).

³⁶ See *id.* at 65,050.

Following issuance of lessons learned reports on the TMI-2 accident, the Commission provided further guidance on the litigation of TMI-related issues in a December 1980 Revised Statement of Policy. Therein, it made clear that existing regulations regarding late-filed contentions and the reopening of hearing records were to be applied by individual Boards.³⁷ Thus, Petitioners are simply incorrect in asserting that NRC “suspended all licensing decisions until conclusion of the lessons learned process” following the TMI-2 accident.³⁸

Similarly, following the September 11 terrorist attacks, the Commission denied several requests to suspend a number of types of proceedings.³⁹ In these cases, the Commission emphasized the strong public interest in moving forward with proceedings in an efficient and expeditious manner.⁴⁰ As with these cases, suspending all further proceedings would be contrary to the Commission’s goal of providing “prompt yet fair resolution of contested issues in adjudicatory proceedings.”⁴¹ This is true with regard to the Comanche Peak COL proceeding, as well, which should continue in an efficient and expeditious manner.

³⁷ *Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses*, CLI-80-42, 12 NRC 654, 661 (1980). The December 1980 Revised Statement of Policy has since been rescinded. *Statement of Policy on Litigation of TMI-Related Issues In Power Reactor Operating License Proceedings; Revocation of Superseded Policy Statement Concerning TMI-Related Procedures*, 54 Fed. Reg. 7897, 7898 (Feb. 23, 1989).

³⁸ Petition at 22. Although the first operating license following the TMI-2 accident was not issued until August 1980, the Commission did not preclude new plants that had already received operating licenses from commencing operations until the conclusion of the lessons learned process. *See NUREG-1350*, Vol. 22, Information Digest, 2010-2011, App. A at 102, 106 (Aug. 2010) (indicating that Edwin I. Hatch Nuclear Plant, Unit 2 began commercial operations in September 1979, and North Anna Power Station, Unit 2 received its OL in August 1980). In addition, the NRC rejected a petition requesting that all similar operating reactors be immediately shut down. *Petition to Suspend All Operating Licenses for Pressurized Water Reactors*, DD-81-8, 13 NRC 767, 767 (1981). The NRC also rejected a petition requesting suspension of further licensing of nuclear facilities pending completion of a study and report on the Chernobyl accident. *See Potential Implications of Chernobyl Accident for All NRC-Licensed Facilities*, DD-87-21, 26 NRC 520, 520-21 (1987).

³⁹ *See Diablo Canyon*, CLI-02-23, 56 NRC at 236; *Savannah River*, CLI-01-28, 54 NRC at 397; *McGuire-Catawba*, CLI-01-27, 54 NRC at 390; *Private Fuel Storage*, CLI-01-26, 54 NRC at 378.

⁴⁰ *See Diablo Canyon*, CLI-02-23, 56 NRC at 239; *Savannah River*, CLI-01-28, 54 NRC at 400; *McGuire-Catawba*, CLI-01-27, 54 NRC at 389-90; *Private Fuel Storage*, CLI-01-26, 54 NRC at 381, 383.

⁴¹ *Private Fuel Storage*, CLI-01-26, 54 NRC at 381 (quoting *Statement of Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 19).

c. *Moving Forward with the Proceeding Will Not Hamper Implementation of Any Potential Rule or Policy Changes*

Petitioners also assert that the proceeding should be suspended pending the Task Force’s investigation of the Fukushima Daiichi accident because the “current climate of uncertainty” prevents the NRC from making a “definitive finding” on safety issues as required by the Atomic Energy Act.⁴² This conclusory statement is offered without any applicable basis in fact or law. It is clear from the Chairman’s statements that the Commission continues to have confidence that plants are operating safely under the current regulatory program.

Furthermore, speculation about the possible outcome of the Task Force review (*i.e.*, potential recommendations to improve the regulatory program) is not a compelling reason to delay this ongoing proceeding because moving forward will not prevent appropriate implementation of any rule or policy changes arising from the NRC’s review of the Fukushima Daiichi accident. If the Task Force recommendations result in a rule or policy change, then the Commission has ample authority to modify requirements by rule, regulation, or order—both for applicants and licensees.⁴³ Therefore, notwithstanding the pure conjecture in the Makhijani Declaration suggesting that the Task Force review will reveal some “inadequacy” in NRC regulations,⁴⁴ there is no need to delay the Comanche Peak COL proceeding to ensure that the public will realize the full benefit of the ongoing regulatory review.

⁴² Petition at 26 (*citing Power Reactor Dev. Corp. v. Int'l Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 402 (1961)).

⁴³ See *Diablo Canyon*, CLI-02-23, 56 NRC at 240; *Savannah River*, CLI-01-28, 54 NRC at 400; *Private Fuel Storage*, CLI-01-26, 54 NRC at 383-84. See generally 42 U.S.C. § 2201(b) (2006); 10 C.F.R. §§ 2.202, 50.109, 52.98.

⁴⁴ Makhijani Declaration ¶ 16.

2. Petitioners Are Incorrect in Asserting that Supplemental NEPA Documentation Is Required

Petitioners next argue that NEPA requires that NRC consider new and significant information resulting from its ongoing consideration of the Fukushima Daiichi accident and which could affect the outcome of the environmental analysis in individual licensing proceedings.⁴⁵ Thus, according to Petitioners, suspension of this proceeding is necessary to protect the integrity of the NEPA process.⁴⁶

Although it appears Petitioners are asking that NRC prepare some sort of generic NEPA evaluation of the Fukushima Daiichi accident and any resulting NRC Task Force recommendations, there is no dispute that, in this proceeding, NRC has prepared a Draft EIS (“DEIS”).⁴⁷ In accordance with existing regulations and guidance, severe accidents and severe accident mitigation alternatives (“SAMAs”) were already considered as part of this NEPA review process.⁴⁸ The Petition identifies nothing suggesting that the existing evaluation of these issues in this proceeding is incorrect or inadequate.⁴⁹

Furthermore, it is important to recognize that existing NRC regulations already require new and significant information to be addressed in ongoing licensing proceedings. Specifically,

⁴⁵ Petition at 26-28.

⁴⁶ *Id.* at 27.

⁴⁷ See NUREG-1943, Environmental Impact Statement for Combined Licenses (COLs) for Comanche Peak Nuclear Power Plant Units 3 and 4, Draft Report for Comment (Aug. 2010), available at ADAMS Accession Nos. ML102170030, ML102170036.

⁴⁸ See *id.* at 5-90 to 5-100. See generally 10 C.F.R. § 51.75(c)(2); NUREG-1555, Environmental Standard Review Plan: Standard Review Plans for Environmental Reviews for Nuclear Power Plants §§ 7.2, 7.3 (Mar. 2000).

⁴⁹ Although the Makhijani Declaration generally discusses issues related to severe accidents, it only addresses prior generic NRC evaluations of severe accidents and spent fuel pool accidents without any attempt to link information from the Fukushima Daiichi accident to the relevant evaluations in *this* proceeding. See Makhijani Declaration ¶¶ 29-31. None of the documents discussed in the Makhijani Declaration considers the risks or consequences of accidents at the Comanche Peak site or involving US-APWRs. Moreover, the Makhijani Declaration makes no attempt to explain how those prior NRC evaluations or the Fukushima Daiichi accident are relevant to the probability or consequences of accidents evaluated in the Comanche Peak COL application or DEIS.

NRC regulations require that an EIS be supplemented if there are (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts.⁵⁰ The Petition fails to acknowledge this existing regulatory requirement, much less explain why it is insufficient in these circumstances or why suspension of this proceeding is otherwise necessary to ensure compliance with NEPA. Absent any such showing, it is inappropriate to suspend all proceedings as an “open-ended placeholder” for the filing of potential future contentions or motions to reopen the record based on the ungrounded presumption that the NRC Staff will fail to follow its own regulations.⁵¹

Petitioners also claim that NRC must prepare a supplemental EIS or environmental assessment (“EA”) assessing the significance of the Fukushima Daiichi accident simply because NRC allegedly has conceded that new information based on the accident could have a significant effect on regulatory programs.⁵² In accordance with NRC regulations, an EIS need not be supplemented merely because the NRC is investigating the implications of the Fukushima Daiichi accident or any other new information. Instead, a supplemental EIS need only be prepared to address *significant* new circumstances or information relevant to environmental concerns and *bearing on the proposed action or its impacts.*⁵³

⁵⁰ See 10 C.F.R. §§ 51.71(a)(2), 51.92(a)(2).

⁵¹ *S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), LBP-09-3, 69 NRC 139, 158 (2009); see also *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) (“[I]n the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises.”).

⁵² See Petition at 4 n.2, 27-28.

⁵³ See 10 C.F.R. §§ 51.71(a)(2), 51.92(a)(2).

In order to be “significant,” new information must present a “seriously different picture” of the environmental impact of the proposed project from what was previously considered.⁵⁴ “It is not enough that the information may be worthy of further inquiry or may be considered important research.”⁵⁵ The Petition provides nothing indicating that this high standard will be met and instead only speculates about potential new information that “could have a significant effect on its regulatory programs and the outcome of its licensing decisions for individual reactors.”⁵⁶ Such conjecture is, again, inadequate to support the Petition or to justify the requested relief.

Petitioners are also incorrect in claiming that NRC must prepare an EA even if it concludes that new information, based on the Fukushima Daiichi accident, does not meet the standards for supplementing an EIS. NEPA does not require that the NRC generate an EA or any NEPA-document as part of its evaluation of whether information is significant for purposes of supplementing an EIS.⁵⁷ Instead, as noted above, NRC regulations only require the preparation of a supplemental EIS to address *significant* new circumstances or information relevant to the proposed action.⁵⁸

⁵⁴ *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); accord *Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).

⁵⁵ *Wisconsin*, 745 F.2d at 420.

⁵⁶ Petition at 26-27 (emphasis added).

⁵⁷ See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 379 (1989) (upholding an agency’s decision not to supplement an EIS based on the agency’s supplemental information report); *Hedges v. Abraham*, 300 F.3d 432, 446 (4th Cir. 2002) (holding that an agency is entitled to conduct a preliminary inquiry to determine whether changed circumstances are significant); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 566 (9th Cir. 2000) (finding that an agency may use “non-NEPA environmental evaluation procedures” to determine whether supplementation of an EA or an EIS is necessary). See generally Daniel R. Mandelker, NEPA Law and Litigation, § 10:49, at 10-187 (2nd ed. 2010) (“An agency does not have to prepare an environmental assessment as the basis for deciding to prepare a supplemental impact statement. It may instead rely on a ‘non-NEPA’ document, such as a supplementary report or a reevaluation, as the basis for making this decision.”).

⁵⁸ See 10 C.F.R. §§ 51.71(a)(2), 51.92(a)(2).

3. Petitioners Do Not Provide a Sufficient Basis for Changing Well-Established Procedural Regulations

Petitioners also request that the Commission allow the future filing of new yet-to-be-defined contentions and motions to reopen closed hearing records within 60 days following the publication of any future proposed regulatory measures or environmental decisions resulting from the reviews related to the Fukushima Daiichi accident.⁵⁹ According to Petitioners, the establishment of this procedural toehold is needed, purportedly because it may be difficult to judge the timeliness of future motions to add new contentions or to reopen the record.⁶⁰

NRC regulations and case law already provide clear and uniform standards to determine the timeliness of motions to add new contentions or to reopen the record.⁶¹ This situation is no different and warrants no such special treatment. Indeed, even after the TMI-2 accident, the Commission made clear that it expected adherence to these well-established procedural requirements.⁶² Similarly, in responding to requests to suspend licensing proceedings pending the NRC's regulatory review following the events of September 11, the Commission again made clear that its regulations already establish appropriate standards for late-filed contentions and motions to reopen the record.⁶³ Thus, as the Commission stated, the "hearing rules . . . contain sufficient flexibility to deal with any new developments that occur during the pendency of this proceeding."⁶⁴

⁵⁹ Petition at 3, 23-24, 29.

⁶⁰ *Id.* at 23.

⁶¹ See 10 C.F.R. §§ 2.309(f)(2), 2.323(a); *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC __, slip op. at 10 n.43 (Mar. 10, 2011) (indicating that the Commission and its Boards generally consider approximately 30 to 60 days as the limit for timely filings based on new information).

⁶² See *Statement of Policy*, CLI-80-42, 12 NRC at 661.

⁶³ See *Private Fuel Storage*, CLI-01-26, 54 NRC at 383; *Savannah River*, CLI-01-28, 54 NRC at 400 n.12 (citing the then-in-place regulations on late-filed contentions and motions to reopen the record).

⁶⁴ *Savannah River*, CLI-01-28, 54 NRC at 400.

Petitioners also generally claim that, given their limited resources, it would be an unfair burden to require the filing of new contentions or motions to reopen the record before NRC has completed its analysis of the Fukushima Daiichi accident in the first instance.⁶⁵ This argument amounts to nothing more than a generic attack on NRC regulations that require the filing of contentions, at the initiation of the adjudicatory process, before the NRC Staff has completed its review, and that any new contentions be introduced if and when new, material information justifies such late filings.⁶⁶ In the *McGuire-Catawba* license renewal proceedings, the Commission rejected similar arguments in responding to requests to suspend licensing proceedings pending NRC's regulatory review following the events of September 11.

Specifically, the Commission held:

[Petitioner] will suffer no cognizable injury from going forward with the hearing process. We are unpersuaded by [petitioner]'s assertion that the "piecemeal" nature of the adjudication "makes it impossible to perform a complete or effective evaluation of the issues . . . within the scope of the current hearing" and "is wasteful of [the petitioner's] resources." . . . We have repeatedly rejected such resource-related arguments in prior proceedings, and do so again here. As we stated . . . in *Indian Point*, CLI-01-8, 53 NRC at 229-30, "litigation invariably results in the parties' loss of both time and money. We cannot postpone cases for many weeks or months simply because going forward will prove difficult for litigants or their lawyers."⁶⁷

In summary, no efficiency is gained by establishing special procedures for Petitioners to file new contentions or motions to reopen the record. Instead, efficiency is maintained through compliance with the current requirements; *i.e.*, if Petitioners can develop well-founded new contentions for review based upon truly new and materially different information, they are allowed to make appropriate filings.

⁶⁵ Petition at 24.

⁶⁶ See 10 C.F.R. § 2.309.

⁶⁷ *McGuire-Catawba*, CLI-01-27, 54 NRC at 391.

V. CONCLUSION

Suspending the initial licensing proceeding for Comanche Peak Units 3 and 4 is an extraordinary remedy that is not warranted and should not be granted. Petitioners have not made a compelling demonstration that such extraordinary relief is warranted in this proceeding, as their Petition is laden with the procedural and substantive deficiencies discussed above. NRC rules are sufficiently robust, flexible, and comprehensive to deal with any new developments that occur in the future as a result of the tragic accidents at Fukushima Daiichi. Accordingly, for all of these reasons, the Petition should be denied in its entirety.

Respectfully submitted,

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Dated in Washington, DC
this 2nd day of May 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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)) May 2, 2011
)

CERTIFICATION OF SERVICE

I hereby certify that, on May 2, 2011, a copy of "Luminant Generation Company LLC's Answer in Opposition to Emergency Petition to Suspend Licensing Proceedings" was served electronically with the Electronic Information Exchange on the following recipients:

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