

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE SECRETARY**

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**In the Matter of  
Luminant Generation Company, LLC  
Comanche Peak Nuclear Power Plant  
Units 3 and 4  
Combined License Adjudication**

**Docket Nos. 52-034 and 52-035  
September 15, 2010**

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**MOTION TO REOPEN THE RECORD AND ADMIT CONTENTION REGARDING  
THE SAFETY AND ENVIRONMENTAL IMPLICATIONS OF  
THE NUCLEAR REGULATORY COMMISSION TASK FORCE REPORT ON  
THE FUKUSHIMA DAI-ICHI ACCIDENT**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.309 and 2.326, Intervenors hereby move to reopen the record in this proceeding to admit a new contention challenging the adequacy of the “Final Supplemental Environmental Impact Statement for Combined Licenses (COLs) for Comanche Peak Units 3 and 4” (NUREG-1943) (August 2010) (the “EIS”) on the basis that it fails to address the extraordinary environmental and safety implications of the findings and recommendations raised by the Nuclear Regulatory Commission’s Fukushima Task Force (the “Task Force”) in its report, “Recommendations for Enhancing Reactor Safety in the 21<sup>st</sup> Century: The Near-Term Task Force Review of Insights From the Fukushima Dai-ichi Accident” (July 12, 2011) (“Task Force Report”). Intervenors respectfully submit that reopening the record and admitting the new contention is necessary to ensure that the Nuclear Regulatory Commission (“NRC” or the “Commission”) fulfills its non-discretionary duty under the National Environmental Policy Act (“NEPA”) to consider the new and significant

information set forth in the Task Force Report before it issues a Combined License (“COL”) for Comanche Peak Units 3 and 4.

This Motion is supported by the Declaration by Dr. Arjun Makhijani (August 8, 2011) (the “Makhijani Declaration”), which is attached and incorporated by reference herein. The Motion is also supported by a Certificate Required by 10 C.F.R. § 2.323(b).

## **II. BACKGROUND**

On April 6, 2009, Intervenors filed a petition to intervene in the Comanche Peak 3 & 4 COL proceeding. The ASLB granted the petition, and after numerous filings, the contents of which are not relevant to this motion, on February 24, 2011, the board closed the record. On March 11, 2011, Intervenors filed a petition for review with the Commission related to the dismissal of certain contentions. On March 29, 2011, an order was entered extending the time for Commission review of the petition for review. The petition for review is still pending.

## **III. DISCUSSION**

Until a COL has been issued, the Commission retains jurisdiction to reopen the record for consideration of a new contention. Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 24 (2006). Nineteen overlapping factors, set forth in three regulations, govern motions to reopen and admit new contentions. *See* 10 C.F.R. §§ 2.309(c), 2.309(f), and 2.326; *see also* Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)(Oct. 28, 2010). This Motion and the accompanying new contention satisfy each of these factors.

In addition to satisfying the requirements for a motion to reopen, to be admitted for hearing, a new contention must also satisfy the six general requirements set forth in 10 C.F.R. § 2.309(f)(1), and the timeliness requirements set forth in either 10 C.F.R. § 2.309(f)(2) (governing

timely contentions) or 10 C.F.R. § 2.309(c) (governing non-timely contentions). As provided in the accompanying contention, each of the requirements set forth in 10 C.F.R. § 2.309(f)(1) is satisfied. Furthermore, Intervenors maintain that this motion and accompanying contention are timely, and the requirements of 10 C.F.R. § 2.309(f)(2) are also satisfied. In the event the Commission determines that this Motion and the accompanying contention are not timely, however, Intervenors also maintain that the requirements of 10 C.F.R. § 2.309(c) are satisfied.

**A. This Motion Satisfies the Standards For Reopening a Closed Hearing Record Set Forth in 10 C.F.R. § 2.326.**

Pursuant to 10 C.F.R. § 2.326, a motion to reopen a closed record must be timely, address a significant environmental issue, demonstrate that a materially different result would have been likely had the newly proffered evidence been considered initially, and be accompanied by an expert declaration. This motion satisfies the requirements of 10 C.F.R. § 2.326.

**1. The Motion is Timely.**

The NRC has adopted a three-part standard for assessing timeliness. *See* 10 C.F.R. § 2.309(f)(2). The motion and accompanying contention are timely.

The information upon which the motion and accompanying contention are based was not previously available.

The availability of material information “is a significant factor in a Board’s determination of whether a motion based on such information is timely filed.” Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1723 (1985) (internal citations omitted). This Motion and the accompanying contention are based upon information contained within the Task Force Report, which was not released until July 12, 2011. Before issuance of the Task Force Report, the information material to the contention was simply unavailable.

The information upon which the motion and accompanying contention are based is materially different than information previously available.

Only five months ago, a nuclear accident occurred at the Fukushima Dai-ichi Nuclear Power Plant. In the wake of the accident, the Task Force was established and instructed by the NRC to provide:

A systematic and methodical review of [NRC] processes and regulations to determine whether the agency should make additional improvements to its regulatory system and to make recommendations to the Commission for its policy direction, in light of the accident at the Fukushima Dai-ichi Nuclear Power Plant.

Task Force Report at vii. In response to that directive, the Task Force made twelve “overarching” recommendations to “strengthen the regulatory framework for protection against natural disasters, mitigation and emergency preparedness, and to improve the effectiveness of NRC’s programs.” *Id.* at viii. In these recommendations the Task Force, for the first time since the Three Mile Island accident occurred in 1979, fundamentally questioned the adequacy of the current level of safety provided by the NRC’s program for nuclear reactor regulation.

In the EIS, the Commission assumed that compliance with existing NRC safety regulations was sufficient to ensure that the environmental impacts of accidents were acceptable. The information in the Task Force Report refutes this assumption and is materially different from the information upon which the EIS was based. *See* attached Makhijani Declaration.

The motion and accompanying contention are timely based on the availability of the new information.

Intervenors have submitted this motion and accompanying contention in a timely fashion. The NRC customarily recognizes as timely contentions that are submitted within thirty (30) days of the occurrence of the triggering event. Shaw Areva MOX Services, Inc. (Mixed Oxide Fuel Fabrication Facility), LBP-08-10, 67 NRC 460, 493 (2008). The Task Force Report, upon which the contention is based, was published on July 12, 2001. Because they were filed within thirty

(30) days of publication of the Task Force Report, this Motion and accompanying contention are timely.

**2. The Motion Addresses a Significant Environmental Issue.**

As stated in the Intervenor's contention and in the attached Makhijani Declaration at pars. 7-9, the environmental issues raised in this contention are significant and indeed they are exceptionally grave because the Task Force Report questions the adequacy of the NRC's current regulatory program to protect public health and safety and makes major recommendations for upgrades to the program.

**3. The Motion Demonstrates That a Materially Different Result Would Be Likely Had the Newly Proffered Evidence Been Considered Initially.**

As discussed in pars. 10-25 of the attached Makhijani Declaration, a materially different result would be likely had the NRC considered the new and significant information set forth in Task Force Report in its environmental analysis for Comanche Peak 3 & 4 COL. In particular, if severe accident mitigation alternatives ("SAMAs") were imposed as mandatory measures – as recommended by the Task Force – the outcome of the EIS could be affected in two major respects. First, the environmental analysis would have to consider the implication of the Task Force Review that compliance with current NRC safety requirements does not adequately protect public health and safety from severe accidents and their environmental effects. Second, for reactors that are unable to comply with new mandatory requirements, it could result in the denial of licenses. Third, the cost of adopting mandatory measures necessary to significantly improve the safety of currently operating reactors and proposed new reactors is likely to be significant.

**4. The Makhijani Declaration Fully Supports and Sets Forth the Factual Bases for This Motion.**

As required by 10 C.F.R. § 2.326(b), this Motion is supported by a declaration that sets forth the factual and technical bases for Intervenors' claims that the criteria of 10 C.F.R. § 2.326(a) have been satisfied. *See* Makhijani Declaration. As demonstrated in his declaration, Dr. Makhijani is a highly qualified expert who is familiar with the Task Force Report. The information in the Makhijani Declaration meets the NRC's standard for admissibility of evidence because it is relevant, material, reliable, and not repetitious. 10 C.F.R. § 2.337(a). The Motion relies on the Task Force Report itself, which was prepared by highly qualified members of the NRC staff. *See* William Magwood, Briefing on the Progress of the Task Force Review of NRC Processes and Regulations Following the Events in Japan, p. 5, lines 9-13 (May 12, 2011) (“[We] brought our A-team to this task. You know, this agency has the best expertise in nuclear safety in the world, bar none. And we’ve brought our best and brightest to this work . . .”).

**B. The New Contention Satisfies the Standards For Non-Timely Contentions Set Forth in 10 C.F.R. § 2.309(c).**

A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions set forth in 10 C.F.R. § 2.309(c). 10 C.F.R. § 2.326(d). Under § 2.309(c), determination on any “nontimely” filing of a contention must be based on a balancing of eight factors, the most important of which is “good cause, if any, for the failure to file on time.” Crow Butte Res., Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008). As set forth below, each of the factors favors admission of the accompanying contention.

## **1. Good Cause.**

Good cause for the late filing is the first, and most important element of 10 C.F.R. § 2.309(c)(1). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000). Newly arising information has long been recognized as providing the requisite “good cause.” See Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 571, 577 (1982), citing Indiana & Michigan Elec. Co. (Donald C. Cook Nuclear Plant, Units 1 & 2), CLI-72-75, 5 AEC 13, 14 (1972). Thus, the NRC has previously found good cause where (1) a contention is based on new information and, therefore, could not have been presented earlier, and (2) the intervenor acted promptly after learning of the new information. Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 69-73 (1992).

As noted above, the information on which this motion and accompanying contention are based is taken from the Task Force Report, which was issued on July 12, 2011 and analyzes NRC processes and regulations in light of the Fukushima accident, an event that occurred a mere five months ago. This Motion and accompanying contention are being submitted less than thirty (30) days after issuance of the Task Force Report.

Accordingly, the Intervenors have good cause to submit this motion and the accompanying contention now.

## **2. Nature of the Intervenors’ Right to be A Party to the Proceeding.**

Intervenors were previously admitted as parties in the Comanche Peak 3 & 4 COL proceeding, based upon standing declarations. Luminant Generation Co., LLC (Comanche Peak Units 3 & 4), ASLBP-09-17. In support of this motion, Intervenors are submitting declarations from Intervenors reflecting their continuing relationship and representation. The declarations of

the organizations' principal officers provide that: (1) the organization continues to represent the interests of its members who previously filed standing declarations in the Comanche Peak 3 & 4 COL proceeding, (2) there has been no substantial change in the organization's status or standing regarding its participation in this proceeding, and (3) there has been no material change in the factual bases upon which the members' standing declarations were based, including, without limitation, the proximity of each individual's residence to Comanche Peak 3 & 4. Accordingly, Intervenor continue to have a right to be a party to this proceeding.

### **3. Nature of Intervenor's Interest in the Proceeding.**

Intervenor seek to protect their members' health, safety, and lives, as well as the health and safety of the general public and the environment by ensuring that the NRC fulfills its non-discretionary duty under NEPA to consider the new and significant information set forth in the Task Force Report before it issues a COL for Comanche Peak 3 & 4. Moreover, as each of the members represented by organization Intervenor in this proceeding live within fifty (50) miles of Comanche Peak 3 & 4, Intervenor have an interest in this proceeding because of the "obvious potential for offsite consequences" to those members' health and safety. Diablo Canyon, 56 NRC at 426-27, citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

### **4. Possible Effect of an Order on Intervenor's Interest in the Proceeding.**

As noted above, Intervenor's interest in a safe, clean, and healthful environment would be served by the issuance of an order requiring the NRC to fulfill its non-discretionary duty under NEPA to consider new and significant information before making a licensing decision. *See* Silva v. Romney, 473 F.2d at 292. Compliance with NEPA ensures that environmental issues are given



full consideration in “the ongoing programs and actions of the Federal Government.” Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 n. 14 (1989).

**5. Availability of Other Means to Protect the Intervenors’ Interests.**

With regard to this factor, the question is not whether other parties may protect Intervenors’ interests, but rather whether there are other means by which Intervenors may protect their own interests. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975). Quite simply, no other means exist. Only through this hearing do Intervenors have a right that is judicially enforceable to seek compliance by NRC with NEPA before the COL for Vogtle Units 3 and 4 is issued, permitting these new reactors to operate and impose severe accident risks on the individuals represented by Intervenors.

**6. Extent the Intervenors’ Interests are Represented by Other Parties.**

No other party can represent Intervenors’ interests in protecting the health, safety, and environment of their members. No other intervenors have been admitted in this matter. As such, Intervenors’ interests cannot be represented by any other party.

**7. Extent That Participation Will Broaden the Issues.**

While Intervenors’ participation may broaden or delay the proceeding, this factor may not be relied upon to deny this Motion or exclude the contention because the NRC has a non-discretionary duty under NEPA to consider new and significant information that arises before it makes its licensing decision. Marsh, 490 U.S. at 373-4. Moreover, any resulting delay from granting Intervenors’ participation in this proceeding would not prohibit certain construction activities. No construction at the Comanche Peak 3 & 4 site is currently being conducted. Accordingly, granting this motion will not cause an unreasonable delay in this proceeding.

### **Extent to which Intervenors Will Assist in the Development of a Sound Record.**

Intervenors will assist in the development of a sound record, as their contention is supported by the expert opinion of a highly qualified expert, Dr. Arjun Makhijani. *See* Makhijani Declaration; *see also* Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 6 (2008) (finding that, when assisted by experienced counsel and experts, participation of a petitioner may be reasonably expected to contribute to the development of a sound record). Furthermore, as a matter of law, NEPA requires consideration of the new and significant information set forth in the Task Force Report. *See* 10 C.F.R. § 51.92(a)(2). A sound record cannot be developed without such consideration.

#### **C. The New Contention Satisfies the Standards For Admission of Timely Contentions Set Forth in 10 C.F.R. § 2.309 (f)(2).**

As discussed in Section III.A.1 above, the NRC has adopted a three-part standard for assessing timeliness. *See* 10 C.F.R. § 2.309(f)(2). The motion and accompanying contention satisfy each of these standards.

#### **D. The New Contention Satisfies the Standards For Admission of a New Contention Set Forth in 10 C.F.R. § 2.309(f)(1).**

As discussed in the accompanying contention, the standards for admission of a contention set forth in 10 C.F.R. § 2.309(f)(1) are satisfied.

## **IV. CONCLUSION**

For the foregoing reasons, this motion should be granted and the accompanying contention admitted.

Respectfully submitted this 11th day of August 2011.

/s/ Robert V. Eye  
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**CERTIFICATE REQUIRED BY 10 C.F.R. § 2.323(b)**

I certify that on August 11, 2011, I contacted counsel for the applicant and the NRC Staff in an attempt to obtain their consent to this motion. Applicant opposes such. Staff indicated that until a review of the motion a position would not be taken. Staff expressed that they reserved the right to respond to the motion.

*Electronically signed by*

Robert V. Eye

*s/*

## CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2011 a copy of the above and foregoing was served by the Electronic Information Exchange on the following recipients:

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