UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of

Luminant Generation Company, LLC **Docket Nos. 52-034 and 52-035**

Comanche Peak Nuclear Power Plant **September 29, 2014**

Units 3 and 4

Combined License Adjudication

MOTION TO REOPEN THE RECORD FOR COMANCHE PEAK UNITS 3 & 4 NUCLEAR POWER PLANT

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.326, Petitioners Rep. Lon Burnam and SEED Coalition hereby move to reopen the record in this proceeding to admit a new Contention challenging the failure of the Nuclear Regulatory Commission ("NRC") to make predictive safety findings in this licensing proceeding regarding the disposal of nuclear waste.[1] Petitioners respectfully submit that reopening the record and admitting the new contention is necessary to ensure that the NRC fulfills its statutory obligation under the Atomic Energy Act ("AEA") to protect public health and safety from the risks posed by irradiated reactor fuel generated during the reactor's license term.

[1] The Contention, entitled "Failure to Make Atomic Energy Act-Required Safety Findings Regarding Spent Fuel Disposal Feasibility and Capacity," is attached and incorporated by reference.

Several overlapping factors, set forth in three regulations, govern motions to reopen and admit new contentions. This motion and the accompanying Contention satisfy each of these factors. *See* 10 C.F.R. §§ 2.309(c), 2.323, and 2.326.

II. JURISDICTION

Until issuance of its initial final decision, a Licensing Board has jurisdiction to reopen a proceeding. *See* 10 C.F.R. §§ 2.318(a), 2.713(a), 2.319(m), and 2.341; Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326, 1327 (1982). After that, jurisdiction lies with the Commission.

III. THIS MOTION SATISFIES THE STANDARDS FOR REOPENING A CLOSED HEARING RECORD SET FORTH IN 10 C.F.R. § 2.326(a).

10 C.F.R. § 2.236(a) provides three criteria which must be satisfied for this motion to be granted:

> (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
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> (2) The motion must address a significant safety or environmental issue; and
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> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Id.

This motion and the accompanying contention satisfy all three criteria, as discussed below.

A. This Motion is Timely.

Pursuant to 10 C.F.R. § 2.323(a)(2), motions must be filed within "ten (10) days after the occurrence or circumstance from which the motion arises." This motion to reopen is timely, having been filed ten (10) days from the date the NRC issued the Continued Storage of Spent Nuclear Fuel Rule (the "Continued Storage Rule") and the supporting Generic Environmental

Impact Statement for Continued Storage of Spent Nuclear Fuel (the "GEIS"). 79 Fed. Reg. 56,238-56,263 (Sept. 19, 2014); 79 Fed. Reg. 56,263-56,264 (Sept. 19, 2014).

B. This Motion and the Accompanying Contention Address a Significant Safety Issue.

This motion and the accompanying Contention raises the significant safety issue that the NRC has made no currently valid findings of confidence or reasonable assurance that the hundreds of tons of radioactive spent fuel that will be generated during any reactor's 40-year license term or subsequent relicensing term can be disposed of safely in a repository. The NRC must make these predictive safety findings in this reactor licensing proceeding in order to fulfill its statutory obligation under the Atomic Energy Act ("AEA") to protect public health and safety from the risks posed by irradiated reactor fuel.[2] This motion and the accompanying Contention address significant issues associated with the storage and disposal of spent fuel.

C. This Motion and the Accompanying Contention Would Likely Produce a Materially Different Result in this Proceeding.

In the past, the NRC has made generic safety findings regarding the storage and disposal of spent fuel in its Waste Confidence Decision.[3] The Continued Storage Rule does not make such safety findings. As explained more fully in the accompanying Contention, the NRC must

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[2] *See* Atomic Energy Act Section 182, 42 U.S.C. § 2232; *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C. Cir. 1987). Further, as the court held in *New York v. NRC*, the NRC must also support confidence and assurance findings on spent fuel storage and disposal with "an EIS or, in the alternative, an EA that concludes with a finding of no significant impact." 681 F. 3d 471, 478 (D.C. Circuit 2012). The GEIS does not address confidence and assurance findings on safety and environmental issues associated with spent fuel storage and disposal.

[3] *See, e.g.*, 1984 Waste Confidence Decision, 49 Fed. Reg. 34658, 34659-60; 1990 Waste Confidence Decision Review, 55 Fed. Reg. 38474, 38474-75; 2010 Waste Confidence Decision Update, 75 Fed. Reg. 81037, 81057-58.

therefore make new generic Waste Confidence findings or make those findings in every licensing or relicensing proceeding in order to fulfill its statutory obligation under the AEA. AEA Section 182, 42 U.S.C. § 2232; *Union of Concerned Scientists.*

If the Petitioners prevail on the Contention, the NRC will be required to either (1) conduct a new technical safety analysis of the feasibility of spent fuel disposal and the capacity of future repositories to accommodate the spent fuel that will be generated by reactors now under licensing and re-licensing review, or (2) deny the license. In addition, if the Petitioners prevail, it will result in preparation of an environmental impact statement ("EIS") or environmental assessment ("EA") of the environmental impacts of spent fuel disposal and reasonable alternatives for avoiding those impacts. As discussed in Section 6 of Dr. Makhijani's declaration, the NRC currently has no such EIS or EA or any other relevant or up-to-date analysis on which it could rely. Finally, if the NRC fully assesses the safety risks and associated costs of spent fuel storage and disposal, its cost-benefit analysis may lead to the materially different decision not to issue a license in this proceeding. Declaration of Dr. Arjun Makhijani, § 7; Declaration of Mark Cooper (Attachment A), Paragraphs 4-5.

IV. THIS MOTION SATISFIES THE STANDARDS FOR REOPENING A CLOSED HEARING RECORD SET FORTH IN 10 C.F.R. § 2.326(b).

10 C.F.R. § 2.326(b) requires that a motion to reopen the record must be accompanied by affdavits that set forth the factual and/or technical bases for the movant' claim that the criteria of Section 2.326(a) have been satisfied. The claims regarding satisfaction of 10 C.F.R. § 2.236(a) that are made in Section III above are supported by the declarations of Dr. Arjun Makhijani and Mark Cooper. Therefore this motion complies with 10 C.F.R. § 2.239(b).

V. THIS MOTION AND THE ACCOMPANYING CONTENTION SATISFY THE STANDARDS FOR CONTENTIONS FILED AFTER THE DEADLINE SET FORTH IN 10 C.F.R. §§ 2.326(d) AND 2.309(c).

10 C.F.R. § 2.326(d) provides that "[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b)." This motion and the accompanying new contention meet the requirements of 10 C.F.R. § 2.309(c), which calls for a showing that:

> (i) The information upon which the filing is based was not previously available;
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> (ii) The information upon which the filing is based is materially different than information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

First, the information on which the contention is based -- i.e., the issuance of the Continued Storage Rule – was not publicly available until September 19, 2014.

Second, the information in the Continued Storage Rule is materially different than previously available information because the Continued Storage Rule does not include the safety findings that were included in all the prior versions of the Waste Confidence Decision and on which the NRC previously relied for licensing of reactors. *See New York v. NRC*, 681 F.2d 471, 476-77 (D.C. Cir. 2012).

Third, the Contention is timely because it has been submitted within 30 days of September 19, 2014, the date the NRC issued the Continued Storage Rule and GEIS. *Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 493 (2008) ("Many times, boards have selected 30 days as [the] specific presumptive time period" for timeliness of contentions filed after the initial deadline).

VI. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(B)

CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(b)

Petitioners certify that on September 26, 2014, we contacted counsel for the applicant and the NRC staff in an attempt to obtain their consent to this Motion. Counsel for the applicant indicated opposition to the petition and contention. Counsel for the NRC staff responded as follows: "The NRC Staff does not oppose your filing the contention and petition, but based on the representation in your email, the Staff does not have enough information to take a position on whether the contention and petition meet the NRC's requirements. The Staff will respond to the contention and petition in accordance with NRC requirements when filed."

VII. CONCLUSION

The issues Petitioners seek to raise in reopening this matter are material to the findings the NRC must make pursuant to the AEA before a license is issued. We therefore request that the record be reopened and the Contention be admitted.

Respectfully submitted this 29th day of September, 2014.

Signed (electronically) by

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September 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2014 a copy of the above and foregoing motion to reopen the record was served by the Electronic Information Exchange on the following recipients:

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September 29, 2014