UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-034-COL
LUMINANT GENERATION COMPANY LLC	)	52-035-COL
	)	
(Comanche Peak Nuclear Power Plant Units 3 and 4)	)	August 3, 2012

LUMINANT'S ANSWER OPPOSING NEW CONTENTION CONCERNING TEMPORARY STORAGE AND ULTIMATE DISPOSAL OF NUCLEAR WASTE AT COMANCHE PEAK NUCLEAR POWER PLANT

Steven P. Frantz
Timothy P. Matthews
Jonathan M. Rund
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
E-mail: tmatthews@morganlewis.com
E-mail: jrund@morganlewis.com

Counsel for Luminant

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I. INTRODUCTION

On July 9, 2012, the Sustainable Energy and Economic Development Coalition ("SEED") submitted "Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Comanche Peak Nuclear Power Plant" ("Motion" or "Proposed Contention"). Based on the recent D.C. Circuit *New York v. NRC* decision vacating and remanding the NRC's Waste Confidence Decision ("WCD") and Temporary Storage Rule ("TSR") update,[1] the Proposed Contention claims that the Comanche Peak Units 3 and 4 combined license ("COL") Environmental Impact Statement ("EIS") omits a discussion of "the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository."[2] Other groups filed essentially-identical contentions on the same day in numerous other licensing proceedings.

Pursuant to 10 C.F.R. § 2.309(h), Luminant Generation Company, LLC ("Luminant")

[1] *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

[2] Motion at 4.

files this Answer opposing the Proposed Contention. As demonstrated below, the Proposed Contention should be rejected as a threshold matter because SEED improperly filed it with the Atomic Safety and Licensing Board ("Board"), which no longer has jurisdiction over this proceeding.[3] Additionally, the Proposed Contention fails because the record is closed in this proceeding and, contrary to 10 C.F.R. § 2.326, SEED fails to demonstrate it should be reopened. Furthermore, SEED is no longer a party to this proceeding and has not demonstrated that it currently has standing to intervene pursuant to 10 C.F.R. § 2.309(d).

SEED also fails to satisfy the Commission's 10 C.F.R. § 2.309(f)(2) and (c)(1) timeliness requirements. The D.C. Circuit has not issued a mandate in *New York* and therefore, that decision has no legal effect in this proceeding. Accordingly, SEED has not demonstrated that the information upon which the Proposed Contention is based is materially different than information previously available, nor has SEED demonstrated that the non-timely factors weigh in favor of considering the Proposed Contention at this time.

The Proposed Contention also should be rejected because SEED fails to satisfy the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements. Because the D.C. Circuit has not issued a mandate in *New York*, the Proposed Contention lacks legal basis and constitutes an impermissible challenge to the TSR, contrary to 10 C.F.R. §§ 2.309(f)(1)(ii) to (iii) and 2.335(a). Even if the D.C. Circuit's mandate issues, the Proposed Contention should be rejected because Commission precedent holds that 10 C.F.R. § 2.309(f)(1)(iii) precludes the admission of a contention that concerns an issue that is, *or is about to become*, the subject of a rulemaking. The Commission's longstanding practice is to address long-term waste storage issues through

[3] Although SEED improperly filed the Proposed Contention with the Board, Luminant files this Answer with the Board in recognition that every tribunal has the inherent authority to determine, in the first instance, its own jurisdiction. *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-591, 11 NRC 741, 742 (1980).

rulemaking. Finally, to the extent any uncertainty exists on these issues, the Board should certify an appropriate question to the Commission rather than admit the Proposed Contention.

II. BACKGROUND

A. The Comanche Peak COL Proceeding

Luminant filed the Comanche Peak COL application in 2008. Several individuals and organizations, including SEED, were initially admitted as intervenors to the COL proceeding, but the Board subsequently dismissed all admitted contentions.[4] The Commission denied the intervenors' subsequent appeal, thereby terminating the contested portion of this proceeding.[5]

In August 2011, several individuals and organizations, including SEED, filed a motion with the Commission to reopen the record and admit a contention related to the Fukushima accident.[6] The Secretary referred the matter to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel,[7] who in turn established a new Board ("Fukushima Contention Board").[8] The Fukushima Contention Board denied the motion to reopen[9] and the Commission denied an appeal of that decision in March 2012.[10] Thus, the contested portion of this proceeding was not reopened and remains closed.

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4 *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 529, 600 (2010) (dismissing Contention 13).

5 *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), CLI-11-9, 74 NRC __, slip op. at 1 (Oct. 11, 2011).

6 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 (Aug. 11, 2011).

7 Order of the Secretary (Aug. 30, 2011).

8 Establishment of Atomic Safety and Licensing Board (Sept. 6, 2011).

9 *PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant), LBP-11-27, 74 NRC __, slip op. at 15-16 (Oct. 18, 2011); Licensing Board Memorandum (Corrections Regarding LBP-11-27) (Oct. 20, 2011) (unpublished).

10 *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), CLI-12-7, 75 NRC __, slip op. at 15 (Mar. 16, 2012).

B. The Commission's Waste Confidence Decision

In 1984, in response to the D.C. Circuit's *Minnesota v. NRC* decision,[11] the Commission issued its initial WCD and TSR.[12] Since that time, the TSR has made clear that spent fuel storage environmental impacts following the cessation of operations need not be addressed in any reactor licensing proceeding EIS.[13] The Commission has thus clearly and consistently chosen to address waste storage issues generically through the TSR instead of litigating these issues in individual licensing proceedings.[14]

In response to an October 2008 proposed revision to the WCD and TSR,[15] SEED and several non-parties submitted joint comments on the proposed revisions.[16] After considering public comments, the Commission issued the WCD and TSR revisions in December 2010.[17]

Four states, an Indian community, and several environmental groups (but not SEED)

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11 *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

12 *See Rulemaking on the Storage and Disposal of Nuclear Waste* (Waste Confidence Rulemaking), CLI-84-15, 20 NRC 288, 293 (1984); Final Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,658 (Aug. 31, 1984); Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688, 34,694 (Aug. 31, 1984) ("Spent Fuel Requirements").

13 *See* Spent Fuel Requirements, 49 Fed. Reg. at 34,694; 10 C.F.R. § 51.23(b).

14 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC 98, 99 (2010) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 343 (1999)).

15 Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008).

16 Comments by Texans for a Sound Energy Policy, Alliance for Nuclear Responsibility, Beyond Nuclear, Blue Ridge Environmental Defense League, C-10 Research and Education Foundation, Don't Waste Michigan, Environmental Coalition on Nuclear Power, Friends of the Earth, Friends of the Coast Opposing Nuclear Pollution, Grandmothers, Mothers and More for Energy Safety, New England Coalition, Nuclear Information and Resource Service, Nuclear Free Vermont by 2012, Nuclear Watch South, Pilgrim Watch, Public Citizen, San Luis Obispo Mothers for Peace, the Snake River Alliance, Southern Alliance for Clean Energy, and the Sustainable Energy and [Economic] Development Coalition Regarding NRC's Proposed Waste Confidence Decision Update and Proposed Rule Regarding Consideration [of] Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operations (Feb. 6, 2009), *available at* ADAMS Accession No. ML090680891.

17 Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010).

challenged that rulemaking in the D.C. Circuit. On June 8, 2012, the D.C. Circuit issued a decision in *New York v. NRC*, vacating and remanding the WCD and TSR update. No mandate, however, has issued and parties are still evaluating their options, including potentially seeking rehearing or rehearing en banc.[18]

Notwithstanding the still-evolving developments in *New York*, on June 18, 2012, SEED and others filed a petition with the Commission in response to that decision requesting suspension of final licensing decisions in pending proceedings and additional public participation opportunities.[19] Both Luminant and the NRC Staff responded to the petition on June 25, 2012.[20] That petition remains pending before the Commission.

III. LEGAL STANDARDS

A. Licensing Board Jurisdiction Over Adjudicatory Proceedings

A licensing board has jurisdiction only over those matters that the Commission commits to it in the hearing notice and referral order that identifies the subject matters of the hearing.[21] Once a contested proceeding is terminated, jurisdiction passes back to the Commission, including jurisdiction over any new petitions, contentions, or motions.[22]

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18 *See New York v. NRC*, No. 11-1045, Clerk's Order (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc).

19 Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012).

20 Luminant Generation Company LLC's Answer Opposing Petition to Suspend Final Licensing Decisions Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012); NRC Staff's Answer to Petition to Suspend Final Decisions in all Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012).

21 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 151 (2001) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790 (1985)).

22 *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"); *Metro. Edison Co.* (Three Mile Island Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1326-27 (1982) (holding that a licensing board retains jurisdiction over a matter "at least until the issuance of its initial decision, but no later than either the filing of exceptions or the expiration of the period during which the Commission or an appeal board can exercise its right to review the record"); *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), Licensing Board Order

B. Requirements to Reopen the Record

As noted above, the Board dismissed the intervenors' contentions and the Commission denied the final appeal, and, therefore, SEED is not a party to this proceeding. In fact, there is no active contested proceeding. Under very similar circumstances—where a Board had dismissed all admitted contentions—the Commission held that a petitioner seeking to file a new petition or seeking to submit new or amended contentions must satisfy the Commission's reopening standards.[23] The requirements for a motion to reopen in 10 C.F.R. § 2.326(a) are threefold:

> (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;
>
> (2) The motion must address a significant safety or environmental issue; and
>
> (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.[24]

In codifying this standard, the Commission emphasized "the heavy burden involved" and characterized these requirements as "high" and "stringent."[25] As part of this burden, the request

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(Regarding Mr. Wojcicki's February 27, 2009 Filing; Notice of Termination of Proceeding) at 1 (Mar. 3, 2009) (unpublished order) (holding that order denying petitions to intervene "had the substantive effect of terminating the . . . proceeding before [this] Board").

[23] *Va. Elec. & Power Co.* (Combined License for North Anna Unit 3), CLI-12-14, 75 NRC __, slip op. at 11 (June 7, 2012) ("The courts of appeals have repeatedly approved our practice of closing the hearing record after resolution of the last 'live' contention, and of holding new contentions to the higher 'reopening' standard."); *see also Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009) (holding that, when the Board has "already denied the intervention petition, a motion to file new or amended contentions must address the motion to reopen standards") (internal quotations omitted); *Millstone*, CLI-06-4, 63 NRC at 37 (applying reopening factors to new contentions filed after petition to intervene had been denied); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-1, 35 NRC 1, 3, 7 (1992) (applying reopening factors to new contentions filed after adjudicatory proceedings dismissed pursuant to settlement).

[24] 10 C.F.R. § 2.326(a). Although the Commission once held that only a "party" may move to reopen a closed record, in a subsequent decision the Commission indicated that a non-party may seek late intervention by addressing both the standards for late intervention in 10 C.F.R. § 2.309(c) and the standard for reopening the record in 10 C.F.R. § 2.326(a). *See Millstone*, CLI-09-5, 69 NRC at 124.

[25] Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

to reopen must be accompanied by an affidavit that separately and specifically supports each of the applicable criteria in Section 2.326(a).[26]

C. Standards for Non-Timely Filings

In addition to the requirements for reopening, NRC regulations also provide that a petitioner may submit a new contention only upon a favorable balancing of the eight factors in 10 C.F.R. § 2.309(c)(1).[27] Those factors are: (1) good cause, if any, for the failure to file on time; (2) the nature of the petitioner's right to be made a party; (3) the nature and extent of the petitioner's interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the petitioner's interest; (5) the availability of other means whereby the petitioner's interest will be protected; (6) the extent to which the petitioner's interests will be represented by existing parties; (7) the extent to which the petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.[28]

The burden is on the petitioner to demonstrate "that a balancing of these factors weighs in favor of granting the petition."[29] The eight factors in Section 2.309(c)(1) are not of equal importance—factor one, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[30] If good cause is lacking, then a "compelling showing" must be made as

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26 10 C.F.R. § 2.326(b).

27 10 C.F.R. § 2.326(d) ("A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c)."); *see also* Luminant Generation Company LLC; Application for the Comanche Peak Nuclear Power Plant Units 3 and 4; Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene, 74 Fed. Reg. 6177, 6178 (Feb. 5, 2009) ("Non-timely requests and/or petitions and contentions will not be entertained absent a determination . . . that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 C.F.R. § 2.309(c)(1)(i)-(viii).").

28 10 C.F.R. § 2.309(c)(1)(i)-(viii).

29 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

30 *Millstone*, CLI-09-5, 69 NRC at 125-126 ("[Section 2.309(c)(1)] sets forth eight factors, the most important of which is 'good cause' for the failure to file on time.").

to the remaining factors to outweigh the lack of good cause.[31] After good cause, the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) is the most significant factor.[32]

D. Standards for Late-Filed Contentions

A late-filed contention also must meet the requirements of 10 C.F.R. § 2.309(f)(2), which provides that a petitioner may submit a new or amended contention only with leave of the presiding officer upon a showing that:

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

E. Substantive Requirements for a Petition to Intervene and Contention Admissibility

In order for any petition to intervene to be granted, a petitioner must demonstrate standing under 10 C.F.R. § 2.309(d) and proffer at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f)(1).[33] To establish standing, a petitioner must state:

> (i) The name, address and telephone number of the petitioner;
>
> (ii) The nature of petitioner's right to be made a party to the proceeding;
>
> (iii) The nature and extent of the petitioner's property, financial or other interest in the proceeding; and
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> (iv) The possible effect of any decision or order that may be

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[31] *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

[32] *See, e.g., Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976).

[33] 10 C.F.R. §2.309(a).

issued in the proceeding on the petitioner's interest.[34]

Additionally, any new contention must meet all of the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[35] These requirements are discussed in detail in Luminant's May 1, 2009 Answer opposing the initial Petition to Intervene and a brief discussion of the key contention admissibility requirements is set forth below.

The Commission recently reiterated that its contention admissibility rules are "strict."[36] "[T]he NRC in 1989 revised its rules to prevent the admission of 'poorly defined or supported contentions,' or those 'based on little more than speculation.' The agency deliberately raised the contention-admissibility standards to relieve the hearing delays that such contentions had caused in the past."[37] Prior to the amended rule, "intervenors were able to trigger hearings after merely 'copying contentions from another proceeding involving another reactor,' even though many of these intervenors often had 'negligible knowledge' of the issues 'and, in fact, no direct case to present.'"[38]

The purpose of the six 10 C.F.R. § 2.309(f)(1) admissibility criteria is to focus litigation

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34 10 C.F.R. § 2.309(d).

35 *See, e.g.*, *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC __, slip op. at 6-7 (June 7, 2012) (stating that contentions must meet the "strict contention standards under 10 C.F.R. § 2.309(f)," including the admissibility and timeliness standards). That section specifies that each contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

36 *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC __, slip op. at 31 (Mar. 27, 2012); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) (characterizing the contention admissibility rules as "strict by design").

37 *Davis-Besse*, CLI-12-8, slip op. at 3-4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

38 *Id.* at 4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

on concrete issues and thereby ensure a clear and focused record for decision.[39] The Commission has stated that it should not have to expend resources on the hearing process unless there is an issue that is susceptible to resolution in an NRC hearing.[40] Thus, a licensing proceeding is not the proper forum to attack an NRC rule or regulation.[41] Similarly, the Commission will "not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[42]

IV. ARGUMENT

A. The Motion Should Be Dismissed as Improperly Filed with the Board

As discussed above, SEED and several others were initially admitted as parties to the COL proceeding, but the initial Board subsequently dismissed all admitted contentions.[43] The Commission rejected the intervenors' subsequent appeal, thereby terminating the contested portion of this proceeding.[44] At that point, the Board's jurisdiction over this proceeding lapsed.[45]

In August 2011, several individuals and organizations, including SEED, filed a motion

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39 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

40 *Id.*

41 *See, e.g.*, *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

42 *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Douglas Point*, ALAB-218, 8 AEC at 85).

43 *See Comanche Peak*, LBP-11-4, slip op. at 40 (dismissing Contention 18 and Alternatives Contention A); *Comanche Peak*, LBP-10-10, 71 NRC at 600 (dismissing Contention 13).

44 *Comanche Peak*, CLI-11-9, slip op. at 1.

45 *See North Anna*, CLI-12-14, slip op. at 12-13 (explaining that the Board lost jurisdiction once it completed action on the last remaining contention); *Millstone*, CLI-06-4, 63 NRC at 35 (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"); *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 & 2), Licensing Board Memorandum and Order (Regarding BREDL's New Contention Eleven) at 1, 4-5 (Apr. 29, 2009) (unreported) (finding that the Board lost jurisdiction to rule on the admissibility of a proffered contention after it denied the petition to intervene and the period in which the Commission could exercise its right to review the record had expired).

with the Commission to reopen the record and admit a new contention.[46] The proposed contention was referred to a Fukushima Contention Board, which denied the motion to reopen the record.[47] The Commission rejected an appeal of that decision in March 2012.[48] Thus, the proceeding remains closed. Accordingly, Luminant respectfully submits that the Board no longer has jurisdiction over this proceeding and therefore, the Board should dismiss the Proposed Contention as improperly filed with the Board.[49]

B. The Motion Fails to Meet the Standards to Reopen in 10 C.F.R. § 2.326

Even if the Board were to consider SEED's filing, the Motion should be denied for failing to even address—much less meet—the requirements set forth in 10 C.F.R. § 2.326 to reopen a closed record. The Commission has made clear that the hearing record closes after resolution of the last "live" contention and any new contentions are held to the higher reopening standard.[50] Thus, once the record is closed, any new or amended contentions must address the reopening requirements.[51]

SEED, however, has not addressed any of the factors in 10 C.F.R. § 2.326(a) and has not included an affidavit addressing why the three reopening criteria have been met. For these

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46 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 (Aug. 11, 2011).

47 *Bell Bend*, LBP-11-27, 74 NRC __, slip op. at 15-16.

48 *Comanche Peak*, CLI-12-7, slip op. at 15.

49 *See North Anna*, CLI-12-14, slip op. at 12-13 (explaining that the Board lost jurisdiction once it completed action on the last remaining contention); *Millstone*, CLI-09-5, 69 NRC at 120-21 (noting that, absent a new referral to the Board, the Commission would have retained jurisdiction over new or amended contentions filed after the Board had already denied a petition to intervene); *Millstone*, CLI-06-4, 63 NRC at 35 (finding a motion improperly filed before licensing board when "the Board ha[d] already dismissed the case and no longer ha[d] jurisdiction over the matter").

50 *North Anna*, CLI-12-14, slip op. at 11.

51 *Millstone*, CLI-09-5, 69 NRC at 124; *see also Millstone*, CLI-06-4, 63 NRC at 37 (applying reopening factors to new contentions filed after petition to intervene had been denied); *Comanche Peak*, CLI-92-1, 35 NRC at 3, 7.

reasons alone, the Board should reject the Proposed Contention.[52] Furthermore, as discussed briefly below, even if SEED had attempted to address the reopening standards, it plainly does not meet them.

1. A Motion to Reopen is Not Timely

As further discussed below in Sections IV.C.1 and IV.D, SEED's contention is not timely because the issues are not procedurally ripe to permit the filing of a contention.[53] In short, the Proposed Contention is premature because the D.C. Circuit has not yet issued its mandate. Accordingly, any motion to reopen is not timely.[54]

2. SEED Fails to Identify a Significant Environmental Issue

To raise a significant environmental issue, "new information must paint a '*seriously* different picture of the environmental landscape.'"[55] Nothing in the Proposed Contention, however, identifies anything altering the environmental landscape. Indeed, the Proposed Contention does not even discuss any actual Comanche Peak Units 3 and 4 environmental impacts, but instead focuses on potential changes to legal requirements. Accordingly, the Proposed Contention fails to raise a significant environmental issue.

3. SEED Fails to Demonstrate a Materially Different Result is Likely

SEED fails to demonstrate that a materially different result would be likely, contrary to 10 C.F.R. § 2.326(a)(3). Indeed, SEED concedes that the D.C. Circuit has not issued a mandate

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52 *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-1, 37 NRC 1, 2 (1993).

53 *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 437 (1999) (denying as premature a motion to amend a contention to contest an applicant exemption request that had yet to be granted).

54 Because SEED does not address the nontimely contention standards in 10 C.F.R. § 2.309(c), it also fails to meet the requirement in 10 C.F.R. § 2.326(d) to address these standards in a motion to reopen. This provides an independent basis for rejecting the Proposed Contention.

55 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

in *New York* and therefore, a materially different result is not possible at this time.[56] Moreover, SEED does not address any specific environmental impacts for Comanche Peak Units 3 and 4, much less how those impacts would require a materially different result in this proceeding. Therefore, a materially different result is not possible here.

* * * *

In summary, SEED has not submitted the required motion to reopen the closed record in this proceeding and one would not be granted even if it had been submitted. Therefore, the Motion is deficient and should be rejected.

C. The Motion Fails to Meet the 10 C.F.R. § 2.309(c)(1) Non-Timely Filing Requirements

In addition to meeting the 10 C.F.R. § 2.326(a) requirements, any motion to reopen the record also must meet the requirements for non-timely filings in 10 C.F.R. § 2.309(c)(1).[57] SEED, however, completely ignores these requirements. This failure to address the Section 2.309(c)(1) factors is alone a sufficient basis to reject SEED's Motion.[58] Nonetheless, even if the Section 2.309(c)(1) factors are considered, the Proposed Contention should be denied based on the balancing of those factors. As discussed below, SEED has not demonstrated the necessary "good cause" under Section 2.309(c)(1)(i). Nor has SEED made a "compelling showing" as to the remaining factors to outweigh the lack of good cause.[59] Accordingly, the balance of the factors under Section 2.309(c)(1) warrants the Motion's denial.

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56 Motion at 2.

57 10 C.F.R. § 2.326(d).

58 *See, e.g.*, *Millstone*, CLI-09-5, 69 NRC at 126 ("The Board correctly found that failure to address the requirements [of 10 C.F.R. §§ 2.309(c) and (f)(2)] was reason enough to reject the proposed new contentions."); *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 & n.10 (1998) ("Indeed, the Commission has itself summarily dismissed petitioners who failed to address the . . . factors for a late-filed petition.").

59 *See Braidwood*, CLI-86-8, 23 NRC at 244.

1. SEED Has Not Shown Good Cause for Failing to File on Time

The most important of the 10 C.F.R. § 2.309(c)(1) factors, good cause, requires a "judgment about when the matter is sufficiently factually concrete and *procedurally ripe* to permit the filing of a contention."[60] SEED fails to demonstrate that the Proposed Contention is procedurally ripe because the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. In fact, the mandate will not issue, at the earliest, until late August 2012, if at all.[61] Because the mandate is the certified copy of the final judgment and the order that makes the decision effective, the *New York* decision has no "legal effect on this proceeding."[62] Accordingly, SEED has not demonstrated good cause.

2. SEED Has Not Made a Compelling Showing on the Remaining Factors

Because SEED fails to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), the remaining factors would have to weigh heavily in its favor for the Proposed Contention to be admitted.[63] They do not. Factors two, three, and four of 10 C.F.R. § 2.309(c)(1) are essentially the same factors used to determine standing under 10 C.F.R. § 2.309(d)(ii) to (iv). Here, SEED has failed to proffer *any* facts, through a declaration or other means, to demonstrate that it has standing in this proceeding. Accordingly, factors two, three, and four all weigh against SEED.

In addition, should the Commission proceed with a rulemaking, as it has consistently done in the past on this issue, that generic proceeding would provide SEED with adequate means

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60 *Private Fuel Storage*, LBP-99-21, 49 NRC at 437 (emphasis added) (denying as premature a motion to amend a contention to contest an applicant exemption request that had yet to be granted).

61 *See* Fed. R. App. P. 41(b) (indicating that a mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate); *New York v. NRC*, No. 11-1045, Clerk's Order (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc). In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. *See* Fed. R. App. P. 41(d)(2).

62 *See* Motion at 6.

63 *Braidwood*, CLI-86-8, 23 NRC at 244.

to protect its interests (factor five). As such, that factor also weighs against SEED.[64]

The Proposed Contention, if admitted, would require initiation of an entirely new contested hearing, with mandatory disclosures and the involvement of new experts and personnel, on an issue that impacts the nuclear industry as a whole. Accordingly, admission of the Proposed Contention could significantly and unnecessarily delay this proceeding. Thus, the most important of the remaining factors, the potential for the broadening of issues or delay in the proceeding (factor seven), weighs heavily against SEED.[65]

Furthermore, SEED provides no indication that its participation would contribute to the development of a sound record (factor eight). The Commission has stated that to make a showing on this factor, a petitioner should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.[66] SEED has failed to satisfy any of those requirements. Thus, SEED provides no basis to suggest it is capable of assisting in the development of a sound record concerning the long-term spent fuel storage issues raised in the Proposed Contention.

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In summary, having failed to establish good cause and make a compelling showing on the remaining factors, the balance of the untimely factors weighs against SEED. Therefore, the Proposed Contention should be denied.

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64 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565-66 (2005) (finding that opportunity to petition for rulemaking and opportunity to comment on pending petition for rulemaking provides a means for petitioner to protect its interests).

65 *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 167 (1993) (holding that "the potential for delay if the petition is granted, weighs heavily against" petitioners because "[g]ranting [the] request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule").

66 *See Braidwood*, CLI-86-8, 23 NRC at 246.

D. The Proposed Contention Fails to Satisfy the 10 C.F.R. § 2.309(f)(2) Timeliness Requirements

SEED claims to have satisfied 10 C.F.R. § 2.309(f)(2) because the Proposed Contention is based on a new legal development, the D.C. Circuit's *New York* decision, which provides new information that is materially different than previously-available information.[67] However, as discussed above, the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Because it is the mandate that makes the decision effective, the *New York* decision has no legal effect on this proceeding.[68] Accordingly, SEED points to no materially different information and therefore, fails to satisfy Section 2.309(f)(2)(ii).

E. SEED Fails to Meet the Requirements for a Petition to Intervene and Contention

In addition to the timeliness requirements, SEED also must demonstrate standing under 10 C.F.R. § 2.309(d) and that the Proposed Contention is admissible under Section 2.309(f)(1).[69] As discussed below, SEED fails to meet either of those requirements.

1. SEED Has Not Demonstrated Standing, Contrary to 10 C.F.R. § 2.309(d)

When a proceeding has been closed and a former intervenor in that proceeding seeks to reopen the proceeding in order to admit a new contention, it must demonstrate that it has standing. As stated by the *Vogtle* COL licensing board:

> With the first licensing board's May 2010 unchallenged summary disposition ruling in favor of SNC regarding the sole admitted contention in this proceeding (i.e., contention SAFETY-1), the contested portion of this case was terminated. As a consequence, to interpose a new contention now requires the submission of a "fresh intervention petition" that fulfills the applicable standards that govern such filings, presumably including an appropriate

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67 *See* Motion at 7.

68 *See Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451, 466 (1976) (explaining that "[a] court acts only through its mandate" and that "[w]hen a mandate is stayed, a decision has no binding effect") (citation omitted).

69 10 C.F.R. § 2.309(a).

standing demonstration.[70]

SEED, however, fails to establish standing, contrary to 10 C.F.R. §2.309(d). In fact, SEED has failed to even address the standing requirement.

Although SEED may have intended to rely on the Board's August 2009 determination that it had standing to intervene at that earlier stage in the proceeding, SEED's Motion fails to provide any information suggesting that its earlier filings, including its previously submitted declarations, remain accurate. The Commission has explained that, a petitioner may rely on prior determinations of standing if the petitioner: (1) specifically identifies its prior standing determinations, and (2) shows that its prior standing determinations correctly reflect the current status of its standing.[71] Here, SEED's Motion has provided no information related to standing. Accordingly, the Motion should be summarily denied.

2. SEED Has Not Submitted an Admissible Contention, Contrary to 10 C.F.R. § 2.309(f)(1)

SEED also must demonstrate that the Proposed Contention meets all of the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi). As discussed below, SEED fails to satisfy the Commission's substantive admissibility requirements

a. The Proposed Contention Lacks Legal Basis and Challenges the TSR, Contrary to 10 C.F.R. §§ 2.309(f)(1)(ii)-(iii) and 2.335(a)

Based on the D.C. Circuit's recent *New York* decision, SEED claims that the Comanche Peak EIS improperly omits a required environmental evaluation of spent fuel storage for the time period after the cessation of operations.[72] However, as discussed above, the D.C. Circuit has not yet issued its mandate returning the proceeding to the Commission. Because the mandate is the

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[70] *So. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), LBP-10-21, 72 NRC 616, 640 (2010), *aff'd*, CLI-11-8, 74 NRC __ (Sept. 27, 2011).

[71] *Comanche Peak*, CLI-93-4, 37 NRC at 163.

[72] Motion at 4.

certified copy of the final judgment and the order that makes the decision effective, no evaluation or other action is "required" by the *New York* decision at this time.[73] Accordingly, the Proposed Contention lacks a legal basis, contrary to 10 C.F.R. § 2.309(f)(1)(ii). Indeed, the Commission has specifically held that it is premature for a party to request relief based upon a court decision before the mandate issues.[74]

Furthermore, because the mandate has not yet issued, the Proposed Contention constitutes an impermissible challenge to the TSR. The contention demands a spent fuel storage environmental impact evaluation in this proceeding for the period after the cessation of operations.[75] The current regulation, however, makes clear that "no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license . . . for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis."[76] Unless and until the mandate issues, the current TSR remains in effect. Accordingly, the Proposed Contention constitutes an impermissible challenge to that regulation and should be rejected pursuant to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).

Recognizing that the Motion lacks a legal basis, SEED asks the Board to hold consideration of the Proposed Contention in abeyance pending the mandate's issuance.[77] An abeyance, however, would be inconsistent with NRC case law. In the *Indian Point* proceeding,

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73 *See id.*

74 *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-06-23, 64 NRC 107, 109 (2006) (denying premature motion seeking procedural relief in advance of an appellate court's mandate).

75 *See* Motion at 4.

76 10 C.F.R. § 51.23(b).

77 Motion at 2.

the Commission directed the Board to deny two waste confidence contentions notwithstanding a similar request by an intervenor to hold the contention admissibility ruling in abeyance pending future potential action.[78] Licensing boards also have rejected requests to admit previous waste confidence contentions and hold them in abeyance pending prospective later developments.[79] Likewise, SEED's abeyance request should be rejected.

SEED also fails to address the considerable uncertainty underlying the Motion's central assumptions, including when (and whether) the mandate will issue. An admissible contention cannot be based on such speculative guesswork. As discussed above, the Commission refuses to admit contentions "based on little more than speculation."[80] This speculation provides an additional basis for rejecting the Proposed Contention and not holding it in abeyance.

b. The Proposed Contention Raises Issues That Are Likely to Become the Subject of Rulemaking, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

Even if the mandate were to issue, Commission precedent clearly dictates that the Board cannot admit a contention that raises an issue that is, or is about to become, the subject of a rulemaking.[81] As the Commission made clear in *Indian Point*, its longstanding practice has been to address long-term waste storage issues generically through rulemaking rather than litigating issues case-by-case in individual adjudicatory proceedings.[82] The Commission does so for the

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78 *See Indian Point*, CLI-10-19, 72 NRC at 100; *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), Answer of the State of New York to Hudson River Sloop Clearwater, Inc.'s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-Level Radioactive Waste at Indian Point at 16 (Nov. 19, 2009), *available at* ADAMS Accession No. ML100820028.

79 *See, e.g.*, *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 977 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 251 (2009); *Luminant Generation Co.* (Comanche Peak Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 341 (2009).

80 *Davis-Besse*, CLI-12-8, slip op. at 4 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

81 *See Indian Point*, CLI-10-19, 72 NRC at 100; *Oconee*, CLI-99-11, 49 NRC at 345.

82 *See Indian Point*, CLI-10-19, 72 NRC at 99 (citing *Oconee*, CLI-99-11, 49 NRC at 343).

specific purpose of avoiding inefficiencies of case-by-case adjudication of generic issues.[83] Thus, if the mandate issues, the Proposed Contention would still be inadmissible because it may reasonably be expected that the Commission will continue this practice and institute a rulemaking addressing the issues on remand.

The *New York* decision rejected the notion that the Commission must examine each site individually and allows the Commission to continue its traditional generic approach.[84] Moreover, the issues identified by the D.C. Circuit are eminently suitable for generic resolution, as the Commission has consistently done for this issue. SEED presents no basis to believe that risks from spent fuel storage differ significantly from site to site, or that there is anything unique about Comanche Peak Units 3 and 4. To the contrary, SEED expressly declines to take a position on whether the issues raised by the court should be resolved generically or in site-specific proceedings.[85] Thus, unless and until the Commission directs otherwise, *Indian Point* governs and the Board should presume the Commission will proceed generically through rulemaking. Accordingly, the Board should deny the Proposed Contention pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

Luminant recognizes that the Commission has not yet announced how it intends to address the issues identified in the *New York* decision.[86] Therefore, to the extent the Board has any uncertainty concerning whether the Commission will proceed with a generic rulemaking, the Board should certify a question pursuant to 10 C.F.R. § 2.319(l) to the Commission for its

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83 *See id.* at 100.

84 *New York*, 681 F.3d at 483.

85 *See* Motion at 5.

86 SEED has placed this issue before the Commission for decision in its June 18, 2012 Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings. The Board should defer to Commission direction on this issue.

determination.[87] Such certification also would avoid the potential for inconsistent treatment with the various other proceedings in which similar contentions have been filed.

V. CONCLUSION

As discussed above, SEED improperly filed the Motion with the Board and fails to demonstrate that the contested proceeding should be reopened. SEED likewise fails to show standing or that the 10 C.F.R. § 2.309(c)(1) and (f)(2) non-timely filing requirements are met. The Proposed Contention also fails to satisfy the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements. For all these reasons, the Motion and Proposed Contention should be denied.

Respectfully submitted,

Signed (electronically) by Jonathan M. Rund
Steven P. Frantz
Timothy P. Matthews
Jonathan M. Rund
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
E-mail: tmatthews@morganlewis.com
E-mail: jrund@morganlewis.com

Counsel for Luminant

Dated in Washington, D.C.
this 3rd day of August 2012

[87] *See* 10 C.F.R. §§ 2.319(l), 2.341(f)(1). The mandate would invalidate the 2010 WCD and TSR update. According to precedent, the prior WCD and TSR may remain effective because the D.C. Circuit has not undertaken review or issued a decision vacating the prior TSR. *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757-58 (D.C. Cir. 1987) (holding that a decision vacating an agency rule "necessarily reinstated" the previous rule); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that vacating an agency rule has the "effect of reinstating the rules previously in force"); *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litigation*, 818 F. Supp. 2d 214, 238-39 (D.D.C. 2011) (holding that once the court vacated an agency rule for failing to conduct a NEPA review prior to finalizing the rule, the prior rule would be reinstated despite the argument that the prior rule suffered from the same legal flaws because the prior rule was not before the reviewing court). To the extent any uncertainty exists concerning this issue, the Board can likewise certify such a question to the Commission for its determination.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-034-COL
LUMINANT GENERATION COMPANY LLC	)	52-035-COL
	)	
(Comanche Peak Nuclear Power Plant Units 3 and 4)	)	August 3, 2012

CERTIFICATE OF SERVICE

I certify that, on August 3, 2012, a copy of "Luminant's Answer Opposing New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Comanche Peak Nuclear Power Plant" was served electronically with the Electronic Information Exchange on the following recipients:

Administrative Judge
Amy Marshall Young, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
E-mail: ann.young@nrc.gov

Administrative Judge
Dr. Gary S. Arnold
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Administrative Judge
Dr. Alice C. Mignerey
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Mail Stop T-3F23
E-mail: acm3@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Susan H. Vrahoretis, Esq.
Anthony Wilson, Esq.
Laura R. Goldin, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
E-mail: Susan.Vrahoretis@nrc.gov;
Anthony.Wilson@nrc.gov;
Laura.Goldin@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Robert V. Eye, Esq.
Counsel for SEED
Kauffman & Eye
112 SW 6th Ave., Suite 202
Topeka, KS 66603
E-mail: bob@kauffmaneye.com

Signed (electronically) by Jonathan M. Rund
Jonathan M. Rund
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-5061
Fax: 202-739-3001
E-mail: jrund@morganlewis.com

Counsel for Luminant

DB1/ 70479889