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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/07/06

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 03/07/06

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Anthony J. Baratta
Nicholas G. Trikouros

In the Matter of NUCLEAR MANAGEMENT COMPANY, LLC (Palisades Nuclear Plant)	Docket No. 50-255-LR ASLBP No. 05-842-03-LR March 7, 2006

MEMORANDUM AND ORDER

(Ruling on Standing, Contentions, and Other Pending Matters)

I. Introduction

This proceeding involves the application of Nuclear Management Company, LLC (NMC), to renew the operating license for its Palisades Nuclear Plant for an additional twenty-year period commencing in 2011. A number of groups and individuals have jointly filed a petition in which they submit contentions challenging various safety and environmental aspects of the proposed license renewal. In this Memorandum and Order we address all matters still pending in this proceeding, including Petitioners' standing to participate in the proceeding, the admissibility of their contentions, and certain other matters, the most recent being a motion filed by Petitioners on January 27, 2006.

We confirm herein a ruling addressed verbally in oral argument on November 3, 2006. We also deny Petitioners' recent motion and find certain objections of Petitioners to an Order issued in December 2005 to be without merit, for reasons we explain herein. Finally, we find that Petitioners have established standing to participate in the proceeding, but that, despite having in some instances touched upon some serious topics, they have not submitted any admissible contentions under applicable NRC regulations and precedent. Therefore, although the NRC Staff will continue to review administratively the adequacy of the license renewal application, this Licensing Board must under relevant law terminate this adjudicatory proceeding.

II. Background

NMC filed its application for renewal of the Palisades operating license on March 22, 2005, and subsequently filed a supplement to the application on May 5, 2005.[1] In response to a Federal Register notice of opportunity for hearing on the proposed license renewal,[2] on August 8, 2005, Petitioners Nuclear Information and Resource Service (NIRS), West Michigan

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[1] *See* 70 Fed. Reg. 33,533 (June 8, 2005).

[2] *Id.*

Environmental Action Council (WMEAC), Don't Waste Michigan (DWM), the Green Party of Van Buren County (Green Party), the Michigan Land Trustees (MLT), and a number of individuals belonging to these organizations (Member-Intervenors), together filed a Request for Hearing and Petition to Intervene that included twelve contentions.[3] On August 25 this Licensing Board was established to preside over this proceeding, and has since issued several unpublished orders addressing various matters that have arisen in the proceeding.[4]

NMC and the Nuclear Regulatory Commission (NRC) Staff filed Answers to the Petition on September 2, 2005,[5] and on September 16, Petitioners filed a Combined Reply, in which, among other things, they withdrew Contentions 5, 6, 9, 10, 11, and one of two contentions originally numbered as 8.[6] In addition, Contention 4 was not addressed in the Reply, nor was it covered in oral argument, and we find that it also was effectively withdrawn. On September 26,

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[3]Request for Hearing and Petition to Intervene (Aug. 8, 2005) [hereinafter Petition].

[4]*See* Order (Regarding Schedule and Guidance for Proceedings) (Aug. 31, 2005) (unpublished); Order (Regarding Requests to Reschedule) (Sept. 6, 2005) (unpublished) [hereinafter 9/6/05 Order]; Order (Regarding Telephone Conference and Oral Argument on Contentions) (Sept. 7, 2005) (unpublished); Order (Regarding Matters Addressed at September 12 Telephone Conference) (Sept. 14, 2005) (unpublished); Order (Regarding Oral Argument and Limited Appearance Statements in South Haven, Michigan) (Oct. 13, 2005) (unpublished); Memorandum (Notice of Need for More Time) (Nov. 14, 2005) (unpublished); Order and Revised Notice (Setting Deadlines to Respond to Staff Notification of December 20, 2005) (Dec. 21, 2005) (unpublished) [hereinafter 12/21/05 Order and Revised Notice]; Order and Notice (Regarding Petitioners' Motion of January 27, 2006, and Expected Rulings on Motion, Standing, Contentions, and Other Pending Matters) (Jan. 30, 2006) [hereinafter 1/30/06 Order]; Notice (Regarding Expected Rulings on Standing, Contentions, and Other Pending Matters) (Feb. 27, 2006). Access to these and other documents making up the record of this proceeding may be found in the Electronic Hearing Docket, under the Electronic Reading Room tab on the NRC Public Website, at http://www.nrc.gov.

[5][NMC]'s Answer to the August 8, 2005 Request for Hearing and Petition to Intervene (Sept. 2, 2005) [hereinafter NMC Answer]; NRC Staff Answer Opposing Petition to Intervene and Request for Hearing (Sept. 2, 2005) [hereinafter Staff Answer].

[6]Petitioners' Combined Reply to NRC Staff and [NMC] Answers (Sept. 16, 2005) at 53 [hereinafter Petitioners' Reply].

2005, NMC and the NRC Staff filed motions to strike the Petitioners' Reply,[7] to which Petitioners filed a response on October 6, 2005.[8]

Oral argument on all pending matters was heard November 3-4, 2005.[9] At the beginning of oral argument the Licensing Board notified the parties of how it intended to handle the matters raised in the NMC and Staff motions to strike and provided the parties with an opportunity to make verbal arguments on the motions at that time.[10] The Board's ruling on these motions is stated below in Section IV.A.

After oral argument on the admissibility of all remaining contentions in the proceeding, there occurred three developments that have affected the timing of the issuance of this Memorandum and Order. First, on November 8, 2005, NRC Staff Counsel filed a letter with the Board, stating that the Staff was no longer asserting one quite significant argument relating to Petitioners' Contention 1.[11]

Second, on December 20, 2005, Staff Counsel notified the Licensing Board and parties, by e-mail transmission, that she had received a telephone call from Demetrios Basdekas, who had been named as an expert witness by the Petitioners in support of proposed Contention 1.[12]

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[7][NMC]'s Motion to Strike Petitioners' September 16, 2005 Combined Reply to NRC Staff and [NMC] Answers (Sept. 26, 2005) [hereinafter NMC Motion]; NRC Staff Motion to Strike Petitioners' Combined Reply to NRC Staff and [NMC] Answers to Petition to Intervene and Request for Hearing (Sept. 26, 2005) [hereinafter Staff Motion].

[8]Petitioners' Combined Response in Opposition to NRC Staff and [NMC] Motions to Strike (Oct. 6, 2005) [hereinafter Combined Response].

[9]The Board also heard limited appearance statements from members of the community on the evening of November 3, 2005, pursuant to 10 C.F.R. § 2.315.

[10]*See* Tr. at 23-33.

[11]Letter from Susan L. Uttal, Counsel for the NRC Staff, to Licensing Board (Nov. 8, 2005) [hereinafter Uttal 11/8/05 Letter].

[12]E-mail from Susan L. Uttal, Counsel for the NRC Staff, to Board Members, Parties, and NRC Office of the Secretary (Dec. 20, 2005, 1:42 p.m. EST) (copy on file with Licensing Board) [hereinafter Uttal 12/20/05 E-mail].

According to Counsel, Mr. Basdekas among other things stated that he had been in contact with Petitioners but had subsequently declined to be their expert in this proceeding.[13] Thereafter, the Board set deadlines of January 3 and 9, 2006, respectively, for Petitioners to respond to the information provided by Staff Counsel, and for Staff and the Applicant to reply to the Petitioners' response; these were timely filed by all parties.[14]

Third, on the afternoon of January 27, 2006, Petitioners through their Counsel filed a motion to strike the NMC and Staff January 9 Replies, stay the proceeding, and take the deposition of Staff Counsel, to which responses were filed by NMC and the NRC Staff on February 3, 2006, in accordance with a deadline set by the Board.[15] We address this motion as well as the objections of Petitioners, stated in their Response to our December 21, 2005, Order, below in Section IV.B

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[13] *Id.*

[14] 12/21/05 Order and Revised Notice; Petitioners' Response to Board Order on Matter of Expert Opinion (Jan. 3, 2006) [hereinafter Petitioners' Response]; [NMC]'s Reply to Petitioners' Response to Board December 21, 2005 Order Regarding Expert Opinion Allegedly Supporting Contention 1 – Palisades Reactor Embrittlement (Jan. 9, 2006) [hereinafter NMC Reply]; NRC Staff Reply to Petitioners' Response to Board Order (Jan. 9, 2006) [hereinafter Staff Reply].

[15] Petitioners' Motion to Strike Staff and NMC Responses to Board Order on Expert Witness Matter, to Stay Proceedings, and to Take Deposition of NRC Staff Counsel (Jan. 27, 2006) [hereinafter Petitioners' Motion]; 1/30/06 Order; [NMC]'s Answer to Petitioners' Motion to Strike, Stay Proceeding and Take Deposition (Feb. 3, 2006) [hereinafter NMC Response to Motion]; NRC Staff Answer to Petitioners' Motion to Strike Staff and NMC Responses to Board Order, to Stay Proceedings and to Take Deposition of NRC Staff Counsel (Feb. 3, 2006) [hereinafter Staff Response to Motion].

III. Board Ruling on Standing of Petitioners to Participate in Proceeding

A petitioner's standing, or right to participate in a Commission licensing proceeding, is grounded in section 189a of the Atomic Energy Act (AEA), which requires the NRC to provide a hearing "upon the request of any person whose interest may be affected by the proceeding."[16] The Commission has implemented this requirement in its regulations at 10 C.F.R. § 2.309.[17]

When determining whether a petitioner has established the necessary "interest" under Commission rules, licensing boards are directed by Commission precedent to look for guidance to judicial concepts of standing.[18] According to these concepts, to qualify for standing a petitioner must allege (1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[19] These three criteria are commonly referred to, respectively, as "injury in fact," causality, and redressability.[20] The requisite injury may be either actual or threatened,[21] but must arguably lie within the "zone of

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[16]42 U.S.C. § 2239(a)(1)(A) (2000).

[17]Subsection (d)(1) of section 2.309 provides in relevant part that the Board shall consider the following three factors when deciding whether to grant standing to a petitioner: the nature of the petitioner's right under the AEA to be made a party to the proceeding; the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the petitioner's interest. 10 C.F.R. § 2.309(d)(1)(ii)-(iv). The provisions of 10 C.F.R. § 2.309 were formerly found at 10 C.F.R. § 2.714, prior to a major revision of the Commission's procedural rules for adjudications in 2004.

[18]*See, e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

[19]*See Yankee*, CLI-98-21, 48 NRC at 195 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)).

[20]*Id.*

[21]*Id.* (citing *Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)).

interests" protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act (NEPA).[22]

NMC does not challenge any of the Petitioners' standing in this matter.[23] The NRC Staff does not contest the standing of the individual Petitioners based upon their living within 50 miles of the Palisades plant, which meets the longstanding "proximity presumption" principle in NRC adjudicatory proceedings. In addition, the Staff agrees that the organizational Petitioners have established "representational standing" to participate in the proceeding.[24]

We agree, based on their physical proximity to the Palisades plant, that the individual Petitioners have demonstrated standing to participate in this proceeding. We also agree, based upon affected members authorizing the Petitioner organizations to represent them in this proceeding, that the organizational Petitioners have also demonstrated standing to participate under AEA section 189a and the Commission's rules.[25]

IV. Board Analysis and Rulings on Motions and Pending Matters

A. NMC and NRC Staff Motions to Strike Petitioners' Reply

The September 2005 motions to strike filed by NMC and the NRC Staff raise the same issue and arguments — that is, that Petitioners in their Reply improperly raise new matters and/or expand arguments to an extent not included in their original filing and provide new documents not previously provided. Citing the Commission's Final Rule on the 2004 Changes

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[22] *See id.* at 195-196 (citing *Ambrosia Lake Facility*, CLI-98-11, 48 NRC at 6).

[23] NMC Answer at 2.

[24] Staff Answer at 2-9 (citing, *inter alia*, *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148-49, *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001); *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646 (1979); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-94 (1979); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-98-12, 47 NRC 343, 354, *aff'd in part and rev'd in part*, CLI-98-21, 48 NRC 185 (1998)).

[25] *See Yankee*, CLI-98-21, 48 NRC at 195; *Georgia Tech*, CLI-95-2, 42 NRC at 115; *Turkey Point*, LBP-01-6, 53 NRC at 146-50.

to the Adjudicatory Process, and related case law, NMC and the Staff argue that Petitioners' Reply goes beyond the Commission-defined standard that "[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or the NRC staff answer."[26] In response to NMC and the Staff, Petitioners argue that their Reply contains "legitimate amplification" of their original contentions and "flesh[es] out" the contentions and should thus be considered to that extent.[27] Petitioners also note the lack of any claim of prejudice or injury to NMC or the Staff, cite case law for the principle that "[t]echnical perfection is not an essential element of contention pleading,"[28] make various arguments that the original contentions and their treatment in the Reply are congruent,[29] and urge us to give them the benefit of the doubt in the case of "inarticulate draftsmanship."[30]

The Commission in the *LES* case upheld a Licensing Board determination that, although it would take into account any information from reply briefs that "legitimately amplified" issues presented in original petitions in that case, it would not consider instances of what "essentially constituted untimely attempts to amend their original petitions."[31] Because the reply briefs in

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[26]*See* Staff Motion at 2 (quoting Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)); *see also id.* at 2-4 (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004); *LES*, CLI-04-35, 60 NRC 619, 623 (2004)); NMC Motion at 3-7. NMC in its motion also makes specific arguments regarding each remaining contention, NMC Motion at 7-9, and the NRC Staff also refers to various additional case law regarding the contention admissibility standards. Staff Motion at 5-6.

[27]Combined Response at 2, 3.

[28]*Id.* at 4 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001)).

[29]*Id.* at 4-9.

[30]*Id.* at 9.

[31]*LES*, CLI-04-25, 60 NRC at 224; *see LES*, CLI-04-35, 60 NRC at 625. We note that the Commission in both *LES* rulings pointed out that a petitioner may in instances of exigent or unavoidable circumstances file a request for an extension of time to file an original hearing petition and contentions, an action which, as in this proceeding, was not done in *LES*. *LES*, CLI-04-25, 60 NRC at 225;

(continued...)

LES had not been accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2), they were not considered in determining the admissibility of the contentions.[32]

At the beginning of oral argument, this Board informed the participants that, while it would not "strike from the record" any portions of the Petitioners' Reply, it would also not, in ruling on the admissibility of contentions, consider anything in the Reply that does not focus on the matters raised in the Answers.[33] Thus, in making the following rulings, although anything that might constitute "legitimate amplification" or properly late-filed[34] material may be considered, the Board has not considered any material that would fall outside that permitted by the Commission in the authorities cited above. To the extent any part of the Reply has been considered, we so state in our discussion of the various contentions.

B. Petitioners' Objections to December 21, 2005, Board Order and Motion on Expert Witness Matters

On December 20, 2005, the Board received Staff Counsel's notification regarding a telephone call received from Demetrios Basdekas, named by Petitioners as their expert witness in support of proposed Contention 1.[35] According to Staff Counsel, Mr. Basdekas stated that he

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[31](...continued)
LES, CLI-04-35, 60 NRC at 623 (citing 69 Fed. Reg. at 2200).

[32]*See LES*, CLI-04-25, 60 NRC at 224 (citing *LES*, LBP-04-14, 60 NRC 40, 58 (2004)). We note the Commission's later remand to the Licensing Board of a request to consider several previously-rejected contentions under the late-filing criteria of 10 C.F.R. § 2.309(c), (f)(2), despite the fact that the Petitioner therein had addressed the late-filing criteria for the first time only in its interlocutory appeal to the Commission. *LES*, CLI-04-35, 60 NRC at 625. For this reason, in an abundance of caution and in order to give Petitioners every benefit of the doubt, we have also considered in making our rulings herein whether any of the late-filed support for those of Petitioners' contentions that would, if properly supported, be within the scope of license renewal proceedings, might be admissible under the late-filing criteria of 10 C.F.R. § 2.309(c), (f)(2).

[33]Tr. at 24-33.

[34]*See* 10 C.F.R. § 2.309(c), (f)(2).

[35]Uttal 12/20/05 E-mail.

had been in contact with Petitioners but subsequently declined to be their expert, and that he had had no site-specific information on the Palisades reactor and expressed no opinion on it.[36]

Petitioners' Response and Objections to December 21, 2005, Board Order

In response to our Order setting deadlines to respond to this notification, Petitioners through their Counsel begin by objecting to our Order, stating among other things that it "requires disclosures of matters that are covered by the attorney work-product privilege and attorney-client privilege"; that "the current status of their retention of expert assistance is immaterial, if not irrelevant, to the current posture of this proceeding"; and that they are "confused by the requirement that they respond to this Order."[37] Petitioners then go on to respond to the Order, indicating that Mr. Basdekas "consulted extensively with Petitioners in the weeks leading up to the filing" of their Petition, "actually co-wrote and edited the embrittlement contention,"[38] was their expert at the time of the preparation and submission of the petition,[39] and did "take Palisades-specific information into account."[40]

Petitioners also, however, state that the arrangement they had with Mr. Basdekas was only "tentative," involving "assist[ance] in the preparation of Contention 1" and uncertainty as to his

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[36] *Id.* In the e-mail, Staff Counsel writes that Mr. Basdekas stated to Staff Counsel that "although he was contacted by the petitioners regarding being their expert witness and had told them that he might be willing to help them after looking into the matter, he subsequently declined to serve as an expert witness in this matter," and had advised the Petitioners "that he was declining to be their expert"; and that he further stated that he had "informed the petitioners that, as a generic matter, the longer a reactor operates, the more embrittled the vessel becomes," but that he had "made no statements regarding the state of the Palisades reactor as he had no site specific information on which to base an opinion." *Id.* The address list for this e-mail included the Licensing Board, Counsel for all parties, and the Office of the Secretary of the Commission (through which it was effectively filed for inclusion in the record of this proceeding).

[37] Petitioners' Response at 1.

[38] *Id.* at 2.

[39] *Id.* at 3 (citing 10 C.F.R. § 2.309(f)(2)).

[40] *Id.* at 12; *see id.* at 4-11.

role "for the duration of the . . . proceeding," and that he had indicated on August 22, 2005 (two weeks after Petitioners filed their Request for Hearing and Petition to Intervene in this matter), "that he could not serve further as Petitioners' expert on embrittlement for personal reasons."[41]

Petitioners include extensive quotes of statements attributed to Mr. Basdekas, stating that they "have every intention, should that contention be admitted for hearing, of producing other testimony from one or more other experts, buttressed by the extensive legacy of analysis and thoughtful criticism which Mr. Basdekas produced as an engineer for the [NRC] for some 20 years."[42] They state that they have "actively sought to replace him," contacting several potential experts; and that they are presently "negotiating with an expert to join their intervention team, and are confident they will be prepared to go to trial once the ASLB admits their contention for hearing."[43]

NMC and NRC Staff Replies to Petitioners' Response and Objections

NMC replies by citing case law for the principle that parties to NRC proceedings have a "duty to apprise the Board of significant developments affecting the proceeding,"[44] and calling the opinion of Mr. Basdekas "the only purported support for the Petitioners' original contention."[45] The Staff in its Reply argues that Mr. Basdekas provided only "generic" information in support of Contention 1,[46] also notes portions of the oral argument in which

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[41] *Id.* at 3.

[42] *Id.*

[43] *Id.* at 12.

[44] NMC Reply at 2 (citing *Tenn. Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2, and 3), ALAB-677, 15 NRC 1387, 1394 (1982)).

[45] *Id.* at 2 (citing Tr. at 48).

[46] Staff Reply at 1.

reference is made by the Board to Mr. Basdekas being Petitioners' expert,[47] and asserts that Petitioners in their Response provide "nothing to rebut the information" provided in our order (citing Staff Counsel's e-mail of December 20, 2005).[48] Based on this last argument, Staff urges that "[t]herefore, it is also clear that any statement specific to Palisades that is found in the embrittlement contention is not the expert opinion of Mr. Basdekas, and no other authority is cited as support for any statement in the contention."[49]

Both NMC and the Staff argue that the new information about prior statements of Mr. Basdekas comes too late, and should have been provided with the original contention in order for them to be considered in ruling on the admissibility of Contention 1.[50]

Petitioners' January 27, 2006, Motion to Strike Staff and NMC Replies, Stay Proceedings, and Depose Staff Counsel

Petitioners move in their January 27 filing that we strike from the record Staff Counsel's December 20, 2005, e-mail, as well as the NMC and Staff January 9, 2006, Replies to the Petitioners' January 3, 2006, Response to the Board's December 21, 2005, Order.[51] Additionally and alternatively, Petitioners move the Board to stay this proceeding in order to allow them to depose NRC Staff Counsel and "allow Petitioners to reply more fully to the facts and arguments raised in those pleadings," apparently referring to the January 9, 2006, Replies.[52]

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[47] *Id.* at 3-4 (citing Tr. at 47, 48).

[48] *Id.* at 5.

[49] *Id.*

[50] *Id.* at 6-7; NMC Reply at 3-4.

[51] Petitioners' Motion at 1.

[52] *Id.*

NMC and NRC Staff Responses to Petitioners' Motion to Strike, Stay Proceedings, and Depose Staff Counsel

In addition to recounting certain arguments previously made in its January 9, 2006, Reply to Petitioners' January 3, 2006, Response to our December 21, 2005, Order, NMC asserts that Petitioners' Motion is baseless and should be denied.[53] The NRC Staff likewise argues that Petitioners' allegations are "baseless . . . , supported neither in fact nor in law."[54] The Staff opposes the relief requested by Petitioners and urges us not to consider the merits of the motion as it is "devoid of good cause for its untimeliness."[55] Noting that Petitioners failed at any time prior to Mr. Basdekas' telephone call to Staff Counsel to apprise the Board and parties that he had declined to serve as their expert, the Staff argues Staff Counsel was performing her duty when she notified the Board and parties of Mr. Basdekas' call, and that Petitioners' counsel should have provided the information regarding Mr. Basdekas even earlier.[56] NMC and the Staff also assert that there was no requirement that Staff Counsel provide the information in question in a motion, as no relief was sought.[57]

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[53]NMC Response to Motion at 1-3.

[54]Staff Response to Motion at 4.

[55]*Id.* at 1.

[56]*Id.* at 2-3, 9.

[57]*See id.* at 9; NMC Response to Motion at 2.

Board Analysis and Rulings on Petitioners' Objections to December 21, 2005, Board Order, and Petitioners' Motion to Strike, Stay Proceedings, and Depose Staff Counsel

Staff is correct that refraining from ruling on the merits of Petitioners' motion and denying it based on its untimeliness would be appropriate, particularly as no request to consider it despite its lateness was ever made.[58] We find, however, in light of some statements made by the Petitioners in these filings, that they should be addressed. We begin our analysis by looking to some fundamental standards of conduct and ethics.

— Standards of Conduct

We note first that all counsel have a continuing duty to update a tribunal "of any development which may conceivably affect the outcome" of litigation.[59] As noted by NMC and the Staff, NRC precedent also requires parties to NRC proceedings to alert adjudicatory bodies to information relevant to matters being adjudicated.[60] In addition, counsel have both an obligation to assure that representations made in all pleadings "to the best of [their] knowledge, information and belief . . . are true,"[61] and an ethical responsibility *not* to knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[62]

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[58]10 C.F.R. § 2.323(a) requires that a motion "must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."

[59]*Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 ((1985); *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 457-59 (4th Cir. 1993).

[60]NMC Response to Motion at 1; Staff Response to Motion at 9 & n.25; NMC Reply at 2 (citing *Browns Ferry*, ALAB-677, 15 NRC at 1394).

[61]10 C.F.R. § 2.304(c); *see also* FED. R. CIV. P. 11.

[62]MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (1980); OHIO DISCIPLINARY CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (2003).

— ***Discussion and Rulings***

We now examine the occurrences relating to the expert put forth in support of Petitioners' Contention 1, beginning with Staff Counsel's email of December 20, 2005. It is clear to us that Staff Counsel had a duty to inform the Board of the telephone call from Mr. Basdekas, if for no other reason than that she knew that this information was "conceivably" relevant to a ruling on Contention 1, in the eyes of at least one member of the Board.[63] Nor did the imparting of the information regarding the call she received from Mr. Basdekas violate any ethical prohibitions. He was not represented by Petitioners' Counsel and, as argued by Staff Counsel, the call was initiated by Mr. Basdekas and no deception or coercion was in any way involved.[64] Finally, there is no requirement that the information provided by Staff Counsel be in the form of a motion; the information was placed in the record, all parties were appropriately apprised of it, and Counsel was seeking no action on the part of the Board. In light of the preceding, we will not strike Staff Counsel's December 20 e-mail. We also find nothing in either NMC's or the NRC Staff's Replies to Petitioners' Response to our December 21 Order to warrant striking them from any consideration in this proceeding.

We would note that not only Staff Counsel, but all counsel including Petitioners' Counsel, had, and have, a duty to disclose any information that might "conceivably" affect the outcome of this proceeding to the Board and other parties. As pointed out by NMC and the Staff, expert support for a contention raising a technical issue can clearly be relevant to its admissibility (and by extension to the outcome) not only of a ruling on the admission of a contention, but also, through such a ruling, of the proceeding itself, since the failure to proffer an admissible

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[63] *See, e.g.*, Staff Reply to Motion at 3.

[64] Staff Response to Motion at 6 & n.16 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993) (discussing the ethics consequences of *ex parte* contacts with expert witnesses for other parties)).

contention will result in denial of a hearing petition.[65] The questions of one board member in oral argument also demonstrate that it was conceivable that the actual availability of Mr. Basdekas to provide expert assistance to Petitioners at any hearing could have been relevant to the admissibility of Contention 1.[66]

Nor do we find any grounds to order a stay or to permit Petitioners' Counsel to depose Staff Counsel. Depositions of opposing trial or litigation counsel are permitted only if "no other means exist to obtain the information," and the "information sought is relevant and non-privileged," and "crucial to the preparation of the case."[67] As the Staff points out, Mr. Basdekas is apparently in contact with Petitioners, and there is no apparent reason Petitioners cannot obtain any information about the communication with Staff Counsel from him rather than the Staff's litigation counsel. In addition, given that Mr. Basdekas is not involved in this proceeding at this point, we see no way in which any information that might be obtained about the

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[65] *See* discussion *infra* Section V.A.

[66] We note the following example, noted by Staff and NMC Counsel, in which a Board member stated, "Now, you have identified an expert who is retired from the NRC, and presumably that expert would be able to say things other than just give us a lesson on the dangers of embrittlement," followed shortly thereafter by the following exchange:

> Board member: " . . . if we were to admit this contention — "
> Petitioners' Counsel: "Right."
> Board member: "You have an expert, the expert can talk about what happened at the Palisades Plant."
> Petitioners' Counsel: "Right."

Tr. at 47-48. Later, in questioning Staff Counsel, the same Board member stated:

> . . . [t]here's also case law that says the contention rule should not be used [as] a fortress to deny intervention[,] that what you need is enough to indicate that further inquiry is appropriate. . . . Basically something to indicate that the petitioners are qualified, able to litigate the issue that they raise. So what we have here is [—] we have an allegation that the application is incomplete for failure to address the continuing crisis of embrittlement[,] supported by this factual allegation about early embrittlement and the identification of an expert who used to work with the NRC. So on the face of that it would seem that that provides something to indicate that further inquiry might be appropriate. *Id.* at 149-50.

[67] *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986); *see also Nationwide Mutual Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628-29 (6th Cir. 2002); *United States v. Philip Morris Inc.*, 209 F.R.D. 13, 17 (D.D.C. 2002).

communication between him and Staff Counsel would be even relevant, much less "crucial," to the matters at issue in this proceeding.

With respect to Petitioners' objections to our December 21, 2005, Order, we find no merit in them. The purpose of our Order was simply to require the filing of, and set deadlines for, responses to the information provided by Staff Counsel in the e-mail of December 20. Petitioners' argument through Counsel, to the effect that such a response would somehow run afoul of the attorney-client and work-product privileges, is without merit. Our Order required nothing that would constitute privileged information.[68]

As for the impact of our rulings in this section of this Memorandum and Order on Contention 1, our analysis of and ruling on its admissibility are based on the contention and its basis as written in the original Petition, with the sole exception that we will interpret the words, "Petitioners' expert on embrittlement," to mean only that Mr. Basdekas assisted Petitioners in drafting Contention 1, not that he would be relied upon or available to assist them at any hearing. As to the previous statements of Mr. Basdekas that are provided in Petitioners' Response, we will treat these in the same manner described in Section IV.A *supra*, regarding the additional factual information provided in Petitioners' Reply of September 16, 2005.[69]

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[68]We note that Petitioners have not even attempted to establish how any matters at issue might be covered under any privilege, and it is "'axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privilege[ ].'" *Von Bulow v. Von Bulow*, 811 F.2d 136, 144 (2d Cir.) (citation omitted), *cert. denied*, 481 U.S. 1015 (1987); *see Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982). In addition, it has been held, in response to claims of attorney-client and attorney work product privilege, that the identity of an expert retained by a party is discoverable. *MacGillivray v. Consol. Rail Corp.*, No. 91-0774, 1992 WL 57915, at *2-3 (E.D. Pa., Mar. 17, 1992) (citing *ARCO Pipeline Co. V. S/S Trade Star*, 81 F.R.D. 416, 417 (E.D. Pa. 1978)); *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971, 978-79 (1983). It would be absurd to find that the identity of a retained expert must be provided, but not whether an expert previously represented to have been retained is still, or is no longer, a party's expert.

[69]Even considering this information under the late-filing criteria of 10 C.F.R. § 2.309(c), (f)(2), it does not appear that this information was previously unavailable, that good cause exists for the failure to provide it earlier, or that other relevant criteria have been met by Petitioners.

V. Standards for Admissibility of Contentions

A. Regulatory Requirements and Commission Precedent on Contentions

To intervene in an NRC proceeding, a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).[70] Failure of a contention to meet any of the requirements of section 2.309(f)(1) is grounds for its dismissal.[71] Heightened standards for the admissibility of contentions originally came into being in 1989, when the Commission amended its rules to "raise the threshold for the admission of contentions."[72] The Commission has more recently stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had

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[70]10 C.F.R. § 2.309(f)(1) states that:

> (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
>
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention 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 which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
>
> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

[71]*See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

[72]Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,168 (Aug. 11, 1989); *see also Duke Energy Corp.* (Oconee Nucleaer Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[73]

The Commission has explained that the "strict contention rule serves multiple interests."[74] As stated by the Commission, these include the following (quoted in list form):

> First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies.
>
> Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing.
>
> Finally, the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.[75]

In February 2004 a new revision of the procedural rules came into effect. Although these rules no longer incorporate provisions formerly found at 10 C.F.R. § 2.714(a)(3), (b)(1) (2003), which permitted the amendment and supplementation of petitions and filing of contentions after the original filing of petitions,[76] they contain essentially the same substantive admissibility standards for contentions. In its Statement of Considerations adopting the new rules, the Commission reiterated the same principles that previously applied; namely, that "[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure

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[73] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citing *Oconee*, CLI-99-11, 49 NRC at 334).

[74] *Oconee*, CLI-99-11, 49 NRC at 334.

[75] *Id.* (citations omitted).

[76] Under the current rules contentions must be filed with the original petition, within 60 days of notice of the proceeding in the *Federal Register* (unless another period is specified). *See* 10 C.F.R. § 2.309(b)(3)(iii).

that the proceedings are effective and focused on real, concrete issues."[77] Additional guidance with respect to the requirements now found in subsections (i) through (vi) of section 2.309(f)(1) is also found in NRC case law.

10 C.F.R. § 2.309(f)(1)(i), (ii)

Sections 2.309(f)(1)(i) and (ii) require that a petitioner must, for each contention, "[p]rovide a specific statement of the issue of law or fact to be raised or controverted," and "[p]rovide a brief explanation of the basis for the contention." The Commission has stated that an "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[78] It has also been observed that a contention must demonstrate "that there has been sufficient foundation assigned for it to warrant further exploration."[79] The contention rules "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.'"[80]

10 C.F.R. § 2.309(f)(1)(iii)

Petitioners must also, as required at section 2.309(f)(1)(iii), "[d]emonstrate that the issue raised in the contention is within the scope of the proceeding." A contention must allege facts "sufficient to establish that it falls directly within the scope" of a proceeding.[81] Contentions are necessarily limited to issues that are germane to the application pending before the Board,[82]

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[77]69 Fed. Reg. 2182, 2189-90 (Jan. 14, 2004).

[78]*Millstone*, CLI-01-24, 54 NRC at 359-60.

[79]*See Pub. Serv. Co. of New Hampshire* (Seabrook Sation, Units 1 and 2), ALAB-942, 32 NRC 395, 428 (1990) (footnote omitted).

[80]*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003) (citing *Oconee*, CLI-99-11, 49 NRC at 337-39).

[81]*Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 411-12 (1991), *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991).

[82]*See Yankee*, CLI-98-21, 48 NRC at 204 & n.7.

and are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission's notice of opportunity for hearing.[83] A discussion of relevant regulatory and case law on the scope of license renewal proceedings is found in section V.B *infra*.

10 C.F.R. § 2.309(f)(1)(iv)

With regard to the requirement now stated at section 2.309(f)(1)(iv), that a petitioner must "[d]emonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding," the Commission has defined a "material" issue as meaning one in which "resolution of the dispute would make a difference in the outcome of the licensing proceeding."[84] The standards defining the "findings the NRC must make to support" a license renewal in this proceeding are set forth at 10 C.F.R. § 54.29.

10 C.F.R. § 2.309(f)(1)(v)

Contentions must also, as now stated at section 2.309(f)(1)(v):

> [p]rovide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue[.]

The Commission has explained that this requirement "does not call upon the intervenor to make its case at [the contention] stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention."[85] The requirement "generally is fulfilled when the sponsor

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[83]*See Pub. Serv. Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *see also Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

[84]54 Fed. Reg. at 33,172.

[85]*Id.* at 33,170.

of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and texts that provide such reasons."[86] A contention is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts."[87] As the Commission has explained:

> It is surely legitimate for the Commission to screen out contentions of doubtful worth and to avoid starting down the path toward a hearing at the behest of Petitioners who themselves have no particular expertise — or expert assistance — and no particularized grievance, but are hoping something will turn up later as a result of NRC Staff work.[88]

The requirements at § 2.309(f)(1)(v) have also been interpreted to require a petitioner "to provide the analyses and expert opinion showing why its bases support its contention,"[89] and to "provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention."[90] Further, a licensing board "may not make factual inferences on [a] petitioner's behalf."[91] However, a board should also "[b]ear[ ] in mind the general admonition that technical perfection is not an

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[86] *Id.* (citing *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987).

[87] *Id.* at 33,171.

[88] *Oconee*, CLI-99-11, 49 NRC at 342.

[89] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995).

[90] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180, *aff'd*, CLI-98-13, 48 NRC 26 (1998).

[91] *Georgia Tech*, LBP-95-6, 41 NRC at 305 (citing *Palo Verde*, CLI-91-12, 34 NRC 149).

essential element of contention pleading."[92] It has been stated that the "[s]ounder practice is to decide issues on their merits, not to avoid them on technicalities."[93]

10 C.F.R. § 2.309(f)(1)(vi)

Finally, Petitioners must, as stated at 10 C.F.R. § 2.309(f)(1)(vi), with each contention:

> [p]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

A petitioner must "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[94] If a petitioner does not

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[92] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 99 (2001) (citing *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979). in which it is stated that "[i]t is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed").

[93] *Houston Lighting*, ALAB-549, 9 NRC at 649.

[94] 54 Fed. Reg. at 33,170; *Millstone*, CLI-01-24, 54 NRC at 358. Also, under 10 C.F.R. § 2.309(f)(2):

> Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing 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."

(continued...)

believe these materials address a relevant issue, the petitioner is to "explain why the application is deficient."[95] A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.[96] An allegation that some aspect of a license application is "inadequate" or "unacceptable" does not give rise to a genuine dispute unless it is support by facts and a reasoned statement of why the application is unacceptable in some material respect.[97]

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[94](...continued)
Other portions of 10 C.F.R. § 2.309 address late-filing and other criteria for contentions and petitions to intervene. Section 2.309(c) provides as follows:

> (c) Nontimely filings. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:
> (i) Good cause, if any, for the failure to file on time;
> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
> (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
> (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
> (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
> (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
> (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

[95]54 Fed. Reg. at 33,170; *Palo Verde*, CLI-91-12, 34 NRC at 156.

[96]*See Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

[97]*Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990).

As the D.C. Circuit Court of Appeals has observed, in a case cited by the Commission in its Statement of Consideration for the 1989 revisions to the Rules of Practice,[98] "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[99] However, notwithstanding the burden the contention admissibility rules impose on petitioners to put forth a sufficient factual basis, the Commission has also stated that this "does not shift the ultimate burden of proof from the applicant to the petitioner."[100] Continuing, the Commission observed in *Yankee*:

> Nor [do the contention admissibility rules] require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need not proffer facts in "formal affidavit or evidentiary form," sufficient "to withstand a summary disposition motion." . . . On the other hand, a petitioner "must present sufficient information to show a genuine dispute" and reasonably "indicating that a further inquiry is appropriate."[101]

B. Scope of Subjects Admissible in License Renewal Proceedings

Commission regulations and case law address in some detail the scope of license renewal proceedings, which generally concern requests to renew 40-year licenses for additional 20-year terms.[102] The regulatory authority relating to license renewal is found at 10 C.F.R. Parts 51 and

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[98]54 Fed. Reg. at 33,171.

[99]*Conn. Bankers Ass'n v. Bd. of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980).

[100]*Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citing 54 Fed. Reg. at 33,171).

[101]*Id.* (citing *Georgia Tech*, CLI-95-12, 42 NRC at 118); *see Gulf States Utilities Co.*, CLI-94-10, 40 NRC at 51.

[102]10 C.F.R. § 54.31(b) provides that:

> [a] renewed license will be issued for a fixed period of time, which is the sum of the additional amount of time beyond the expiration of the operating license (not to exceed 20 years) that is requested in a renewal application plus the remaining number of years on the operating license currently in effect. The term of any renewed license may not exceed 40 years.

(continued...)

54. Part 54 concerns the "Requirements for Renewal of Operating Licenses for Nuclear Power Plants," and addresses safety-related issues in license renewal proceedings. Part 51, concerning "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions," addresses the environmental aspects of license renewal. The Commission has interpreted these provisions in various adjudicatory proceedings, probably most extensively in a decision in the 2001 *Turkey Point* proceeding.[103]

Safety-Related Issues in License Renewal Proceedings

Various sections of Part 54 speak to the scope of safety-related issues in license renewal proceedings. First, 10 C.F.R. § 54.4, titled "Scope," specifies plant systems, structures, and components within the scope of this part. Sections 54.3, 54.21, and 54.29 provide additional definition of what is encompassed within a license renewal review, limiting the scope further to aging-related issues associated with the functions of the preceding plant systems, structures, and components.[104] Applicants must "demonstrate how their programs will be effective in managing the effects of aging during the proposed period of extended operation," at a "detailed . . . 'component and structure level,' rather than at a more generalized 'system level.'"[105]

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[102](...continued)
10 C.F.R. § 50.51(a) states in relevant part that "[e]ach [original] license will be issued for a fixed period of time to be specified in the license but in no case to exceed 40 years from date of issuance."

[103]*See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-13 (2001); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363-64 (2002); *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998), *motion to vacate denied*, CLI-98-15, 48 NRC 45 (1998); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 NRC 123, 125 (1998); *Turkey Point*, CLI-00-23, 52 NRC 327, 329 (2000); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 90, *aff'd*, CLI–04-36, 60 NRC 631 (2004).

[104]*See* Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461 (May 8, 1995).

[105]*Turkey Point*, CLI-01-17, 54 NRC at 8 (citing 60 Fed. Reg. at 22,462).

The Commission in *Turkey Point* stated that, in developing 10 C.F.R. Part 54 beginning in the 1980's, it sought "to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term."[106] Noting that the "issues and concerns involved in an extended 20 years of operation are not identical to the issues reviewed when a reactor facility is first built and licensed," the Commission found that requiring a full reassessment of safety issues that were "thoroughly reviewed when the facility was first licensed" and continue to be "routinely monitored and assessed by ongoing agency oversight and agency-mandated licensee programs" would be "both unnecessary and wasteful."[107] Nor did the Commission "believe it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review."[108]

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[106] *Id.* at 7.

[107] *Id.*

[108] *Id.* at 9. "Current licensing basis" (CLB) is described by the Commission in *Turkey Point* as follows:

> ["CLB" is] a term of art comprehending the various Commission requirements applicable to a specific plant that are in effect at the time of the license renewal application. The current licensing basis consists of the license requirements, including license conditions and technical specifications. It also includes the plant-specific design basis information documented in the plant's most recent Final Safety Analysis Report, and any orders, exemptions, and licensee commitments that are part of the docket for the plant's license, *i.e.*, responses to NRC bulletins, generic letters, and enforcement actions, and other licensee commitments documented in NRC safety evaluations or licensee event reports. *See* 10 C.F.R. § 54.3. The current licensing basis additionally includes all of the regulatory requirements found in Parts 2, 19, 20, 21, 30, 40, 50, 55, 72, 73, and 100 with which the particular applicant must comply. *Id.*
> . . . . The [CLB] represents an "evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety." 60 Fed. Reg. at 22,473. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement.

Id.

The Commission chose, rather, to focus the NRC license renewal safety review "upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs," which it considered "the most significant overall safety concern posed by extended reactor operation."[109] The Commission has also framed the focus of license renewal review as being on "plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation."[110] An issue can be related to plant aging and still not warrant review at the time of a license renewal application, if an aging-related issue is "adequately dealt with by regulatory processes" on an ongoing basis.[111] For example, if a structure or component is already required to be replaced "at mandated, specified time periods," it would fall outside the scope of license renewal review.[112]

Environmental Issues in License Renewal Proceedings

Regulatory provisions relating to the environmental aspects of license renewal include, most significantly, 10 C.F.R. §§ 51.53(c), 51.95(c), and 51.103(a)(5), and Appendix B to Subpart A. Section 51.53(c) requires a license renewal applicant to submit with its application an environmental report (ER), which "must contain a description of the proposed action, including the applicant's plans to modify the facility or its administrative control procedures as described in accordance with § 54.21," and "describe in detail the modifications directly affecting the environment or affecting plant effluents that affect the environment."[113] The report is not

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[109] *Id.* at 7.

[110] *Id.* at 10 (citing 60 Fed. Reg. at 22,469) (alteration in original).

[111] *Id.* at 10 n.2.

[112] *Id.*

[113] 10 C.F.R. § 51.53(c)(2); *see id.* § 51.53(c)(1).

required to contain analyses of environmental impacts identified as "Category 1," or "generic," issues in Appendix B to Subpart A of Part 51, but "must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term," for issues identified as "Category 2," or "plant specific," issues in appendix B to subpart A.[114]

As required under 10 C.F.R. § 51.95(c), the Commission in 1996 adopted a "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (GEIS), published as NUREG-1437, which provides data supporting the table of Category 1 and 2 issues in Appendix B.[115] Issuance of the 1996 GEIS was part of an amendment of the requirements of Part 51 undertaken by the Commission to establish environmental review requirements for license renewals "that were both efficient and more effectively focused."[116]

Issues on which the Commission found that it could draw "generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants," were, as indicated above, identified as "Category 1" issues.[117] This categorization was based on the Commission's conclusion that these issues involve "environmental effects that are essentially similar for all plants," and that they thus "need not be assessed repeatedly on a site-specific basis, plant-by-plant."[118] Accordingly, under Part 51 license renewal applicants may in their

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[114] 10 C.F.R. § 51.53(c)(3)(i), (ii).

[115] *See* NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (May 1996) [hereinafter GEIS]; Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (June 5, 1996), *amended by* 61 Fed. Reg. 66,537 (Dec. 18, 1996); 10 C.F.R. Pt. 51, Subpt. A, App. B n.1.

[116] *Turkey Point*, CLI-01-17, 54 NRC at 11.

[117] *Id.* at 11 (citing 10 C.F.R. Pt. 51, Subpt. A, App. B).

[118] *Id.*

site-specific ERs refer to and adopt the generic environmental impact findings found in Table B-1, Appendix B for all Category 1 issues.[119]

On other issues, however, the Commission was not able to make generic environmental findings, and therefore applicants must provide a plant-specific review of all these Category 2 environmental issues.[120] These issues are characterized by the Commission as involving environmental impact severity levels that "might differ significantly from one plant to another," or impacts for which additional plant-specific mitigation measures should be considered; for such issues applicants must provide plant-specific analyses of the environmental impacts.[121] For example, the "impact of extended operation on endangered or threatened species varies from one location to another," according to the Commission, and is thus included within Category 2.[122]

Finally, section 51.103 defines the requirements for the "record of decision" relating to any license renewal application, including the standard that the Commission, in making such a decision pursuant to Part 54, "shall determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable."[123]

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[119] *Id.* (citing 10 C.F.R. § 51.53(c)(3)(i)).

[120] *Id.* (citing 10 C.F.R. Pt. 51, Subpt. A, App. B).

[121] *Id.*

[122] *Id.*

[123] 10 C.F.R. § 51.103(a)(5).

VI. Petitioners' Contentions, Party Arguments, and Board Analysis and Rulings

With the preceding general contention requirements and license renewal scope principles in mind, we turn now to the Petitioners' five contentions now remaining in this proceeding.

A. Contention 1 (Regarding Embrittlement of Reactor Pressure Vessel)

Contention 1 states as follows:

> **The license renewal application is untimely and incomplete for failure to address the continuing crisis of embrittlement.**[124]

The basis provided for Contention 1 states:

> The Petitioners allege that the Palisades license renewal application is fundamentally deficient because it does not adequately address technical and safety issues arising out of the embrittlement of the reactor pressure vessel and unresolved Pressure Thermal Shock ("PTS") concerns that might reasonably result in the failure of the reactor pressure vessel ("RPV"). The Palisades nuclear power station is identified as prone to early embrittlement of the reactor pressure vessel, which is a vital safety component. As noted in the opinion of Petitioners' expert on embrittlement, Mr. Demetrios Basdekas, retired from the Nuclear Regulatory Commission, the longer Palisades operates, the more embrittled its RPV becomes, with decreasing safety margins in the event of the initiation of emergency operation procedures. Therefore, a hearing on the public health and safety effects of a prospective additional twenty years of operation, given the present and prospective embrittlement trend of the RPV[,] is imperative to protecting the interests of those members of the petitioning organization who are affected by this proceeding.[125]

NMC Response to Contention 1

The Applicant claims that Contention 1 is inadmissible because it "(i) fails to challenge the Application and demonstrate the existence of a genuine dispute on a material issue of fact or law; (ii) fails to provide a factual basis to support any dispute with the Application; and (iii) improperly challenges Commission regulations."[126] NMC argues that the Petitioners "provide *neither* explanation *nor* factual basis for their claim that the Application is 'deficient,'"

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[124]Petition at 4.

[125]*Id.*

[126]NMC Answer at 10.

because, "[c]ontrary to the Petitioners' bald claim, the Application addresses the technical and safety issues related to RPV embrittlement in accordance with applicable NRC regulations."[127]

NMC further urges that, under 10 C.F.R. § 54.21(c)(1), it may choose one of three ways to address time-limited aging analyses such as neutron embrittlement of the reactor pressure vessel (RPV), including demonstrating that existing analyses "remain valid for the period of extended operation," revising existing analyses to demonstrate their validity "to the end of the period of extended operation," or "demonstrating that the effects of aging on the intended function(s) will be adequately managed for the period of extended operation."[128] Stating that it has chosen the third option, NMC cites several specific sections of the application in which its plan is asserted to comply with 10 C.F.R. § 50.61, which governs "Fracture toughness requirements for protection against pressurized thermal shock events."[129]

NMC argues that it demonstrates that the effects of embrittlement will be adequately managed for the period of extended operation through compliance with section 50.61(b)(7), by submitting information to the NRC at least three years before it is projected to exceed the pressurized thermal shock (PTS) criterion defined in the regulations,[130] as to whether it will either undertake the safety analysis required by section 50.61(b)(4) or perform a thermal-annealing treatment of the reactor vessel under section 50.61(b)(7).[131] NMC argues that Petitioners nowhere take issue with any aspect of the program described in the Application,

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[127] *Id.*

[128] *Id.* at 10-11 (quoting from 10 C.F.R. § 54.21(c)(1)).

[129] *Id.* at 11-12.

[130] As stated at 10 C.F.R. § 50.61(a)(2) & (8), "*Pressurized Thermal Shock Event* means an event or transient in pressurized water reactors (PWRs) causing severe overcooling (thermal shock) concurrent with or followed by significant pressure in the reactor vessel," and "*PTS screening criterion* means the value of RT_{PTS} [a reference temperature] for the vessel beltline material above which the plant cannot continue to operate without justification." *See* 10 C.F.R. § 50.61(a)(3)-(7).

[131] NMC Answer at 11-13.

as required under 10 C.F.R. § 2.309(f)(1)(vi).[132] Nor, it is argued, do Petitioners provide any factual basis challenging the Application's program for managing RPV embrittlement.[133]

Finally, NMC suggests that Contention 1's "challenge of the adequacy of the steps provided for by the Application is a collateral attack on the NRC regulations fully embraced by the Application," because it "advocate[s] stricter requirements than those imposed by the regulations."[134]

NRC Staff Response to Contention 1

The NRC Staff argues that Contention 1 is inadmissible because it "lacks basis, support and specificity, . . . is immaterial, and fails to establish that a genuine dispute exists on a material issue of law or fact."[135] According to the Staff, the contention makes "generic statements that are unsupported by any documentary evidence or affidavit by an expert witness" and "fail[s] to provide references to . . . relevant portions of NMC's application," thereby failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).[136] Staff also argued, both in its initial pleading and in oral argument, that Contention 1 is "beyond the scope of this proceeding because it raises issues that are subject to regulations independent of license renewal,"[137] referring to 10 C.F.R. § 50.61, but withdrew this argument after oral argument.[138]

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[132] *Id.* at 13.

[133] *Id.* at 14.

[134] *Id.* (citing *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982)).

[135] Staff Answer at 12.

[136] *Id.* at 12-13; *see also* text accompanying notes 61, 62.

[137] *Id.* at 13; *see also, e.g.*, Tr. at 134, 234.

[138] Uttal 11/8/05 Letter.

Petitioners' Reply on Contention 1

Apart from urging that Contention 1 is within the scope of license renewal proceedings,[139] contesting NMC's argument that Contention 1 improperly challenges NRC regulations,[140] and raising certain arguments concerning the provisions of 10 C.F.R. § 50.61 (referring to various sections of the Application),[141] Petitioners' Reply primarily provides additional support for the contention, of the sort that might have been included in the original basis for the contention.[142] Petitioners also assert that certain NRC documents related to a planned revision of the Pressure Thermal Shock rule have been unavailable to them, and that the standard for admitting Contention 1 should therefore be lowered, arguing in conclusion that they have in any event made a "minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[143] Various additional arguments were made in oral argument, generally addressing the same areas, which we note to the extent we find them relevant in our discussion below.

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[139]Petitioners' Reply at 2.

[140]*Id.* at 17-20.

[141]*Id.* at 5-9.

[142]*Id.* at 2-4, 6-23.

[143]*Id.* at 23 (citing *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51; *see also id.* at 22-23.

Licensing Board Ruling on Contention 1

We wish to emphasize at the outset that we find the subject matter of this contention, embrittlement of the reactor pressure vessel, to be a very serious topic, with regard to Palisades or indeed any nuclear power plant.[144] Moreover, embrittlement is clearly within the

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[144]To provide context for the technical matters relating to Contention 1, the technical members of the Licensing Board provide the following summary:

Radiation-induced embrittlement, a material degradation phenomenon unique to nuclear power reactors, occurs when plant components are exposed to sufficiently high levels of neutron radiation to cause changes in the properties of the material of which the components are made. The reactor pressure vessel is the most significant component relevant to embrittlement, because it, unlike other components, cannot easily be replaced. As suggested by Petitioners in the basis for Contention 1, the longer any plant operates, the more embrittled the RPV becomes, with decreasing safety margins in the event of an abnormal occurrence.

The phenomenon of radiation embrittlement occurs when a neutron from the reactor core strikes an atom of the material making up the reactor vessel, thereby knocking the atom out of position. Over time as more and more atoms are hit, the mechanical properties of the material change. The material becomes harder to deform and loses its ability to withstand deformation without breaking or fracturing, particularly at low temperatures. The process is a serious safety concern because it can lead to failure of the reactor pressure vessel.

The NRC recognizes that RPV embrittlement and the associated risk of pressurized thermal shock (PTS) events may become serious safety concerns during the operating life of pressurized water reactors (PWRs). As stated by the Commission in the Statement of Considerations for the current PTS rules:

> [i]n these [PTS] events, rapid cooling of the reactor vessel internal surface causes a temperature distribution across the reactor vessel wall. This temperature distribution produces a thermal stress on the reactor vessel . . . . The magnitude of the thermal stress varies with the rate of change of temperature, and with time during the transient, and its effect is compounded by coincident pressure stresses.
>
> . . . .
>
> As long as the fracture resistance of the reactor vessel material is relatively high, these events are not expected to cause vessel failure. However, the fracture resistance of the [RPV] material decreases with the integrated exposure to fast neutrons during the life of a nuclear power plant. . . . If the fracture resistance of the vessel has been reduced sufficiently by neutron irradiation, severe PTS events could cause small flaws that might exist near the inner surface to propagate into the vessel wall. The assumed initial flaw might be enlarged into a crack through the vessel wall of sufficient extent to threaten vessel integrity and, therefore, core cooling capability. 50 Fed. Reg. 29,937, 29,938 (July 23, 1985).

The PTS rule at 10 C.F.R. § 50.61(b), which applies to PWRs throughout their operating life, requires plants to project the course that embrittlement will take over the reactor's operating life. Methods and equations that a licensee must use to make these projections are prescribed at section 50.61(c), based on the neutron flux, or number of neutrons passing through the material per unit of time per unit area, to which the reactor vessels materials are subject. Under section 50.61(b)(2), screening criteria have been established to ensure that embrittlement does not progress to the extent that it represents a safety hazard.

As noted in the Statement of Considerations, these screening criteria are set conservatively and

(continued...)

scope of license renewal, as the Staff now recognizes,[145] and as evidenced by references to pressurized thermal shock, the reactor vessel, and related concepts in the license renewal rules. The issue is undoubtedly a matter that warrants close attention by all concerned.

We now look to whether Petitioners have, in Contention 1 and its supporting basis, complied with the remainder of the provisions of 10 C.F.R. § 2.309(f)(1) and relevant case law. We find the contention falls short in several particulars, most importantly those relating to the requirements of subsections (ii), (v), and (vi).

We begin our analysis by observing, with respect to the requirement under section 2.309(f)(1)(ii) for a "brief explanation of the basis for the contention," that although the basis for Contention 1 is brief, and provides some explanation, it contains only one reference that is arguably specific to the Palisades plant — that it has been "[i]dentified as prone to early embrittlement of the reactor pressure vessel."[146] Certainly, it might be said that one cannot have both brevity and also extensive specificity. But it is not unreasonable to require enough specificity in the explanation offered in the basis for a contention, such that a matter relating to

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[144](...continued)
represent a level of embrittlement at which there can be a reasonable assurance that there is no undue risk to health and safety because of potential PTS events. 50 Fed. Reg. at 29,939. When a PWR is projected to exceed the screening criteria, the licensee must demonstrate that continued plant operation does not present an undue threat to public health or safety.

Under section 50.61(b)(3), flux reduction programs are the preferred method to avoid exceeding the PTS criterion, because such programs slow the progress of the embrittlement process itself. The rule recognizes, however, that it may not always be possible to slow the embrittlement process sufficiently to keep a reactor from exceeding the screening criteria at some point, in which case a licensee is required under 50.61(b)(4) to "submit a safety analysis to determine what, if any, modifications to equipment, systems, and operations are necessary to prevent potential failure of the reactor vessel as a result of postulated PTS events if continued operation beyond the screening criterion is allowed," and to submit this analysis three years before the RPV is projected to exceed the screening criteria. Under section 50.61(b)(5) the NRC evaluates this safety analysis and decides, on a case-by-case basis, whether to permit continued operation once the screening threshold has been reached. As a final resort, section 50.61(b)(7) permits a licensee to anneal the reactor pressure vessel according to requirements specified in 10 C.F.R. § 50.66. If none of these methods satisfies NRC regulatory requirements, the reactor is not permitted to operate. 10 C.F.R. § 50.61(b)(6)-(7).

[145]*See* Uttal 11/8/05 Letter.

[146]Petition at 4.

a particular facility is stated in sufficient detail that it clearly states an issue that is susceptible to litigation with regard to that facility. We find Petitioners have not done this in Contention 1.

Although some of the information provided by Petitioners in their September 2005 Reply and their January 2006 Response is more specifically related to the Palisades plant, we find that none of this meets the late-filing criteria of 10 C.F.R. § 2.309(c), (f)(2), as none of it appears to have previously been unavailable. One exhibit provided with the Reply is from a 1970 report, many exhibits or referenced items are documents produced in the 1990's, and the most recent document is a March 2005 letter. Nor do we find any good cause for Petitioners not to have provided this information with the original petition, nor any other reason to consider it under other relevant criteria. Our analysis herein is therefore based only on that information actually provided in the original petition in support of Contention 1.

Most of this information is general and provides no specifics regarding, for example, the "present and prospective embrittlement trend of the RPV" of the Palisades plant, which would distinguish it from any other nuclear power plant.[147] For example, the statement that "the longer Palisades operates, the more embrittled its RPV becomes, with decreasing safety margins in the event of the initiation of emergency operation procedures,"[148] is obvious, and presents no specific issue susceptible to litigation. In sum, it cannot be said that Contention 1 explains "with specificity, particular safety or legal reasons requiring rejection of the contested [Application]."[149]

We also find Contention 1 to be deficient with regard to the requirement under section 2.309(f)(1)(v) that a petition "[p]rovide a concise statement of the alleged facts or expert opinion which support the . . . petitioner's position on the issue and on which the petitioner intends to

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[147]Petition at 4.

[148]*Id.*

[149]*Millstone*, CLI-01-24, 54 NRC at 359-60.

rely at hearing," and also provide "references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue."

Taking the statements in the basis for Contention 1 at face value, Petitioners have provided no expert support for any allegations specific to the Palisades plant, even viewing the contention as being "merely inartfully drafted."[150] They refer to no documents or other sources on which they plan to rely at any hearing, and the facts provided are, as indicated above, general and non-specific to the Palisades plant, apart from the somewhat vague reference to the plant being "prone to early embrittlement of the reactor pressure vessel."[151] Making sense of this, particularly in the absence of any documents, sources or expert on which Petitioners plan to rely at hearing, demands inferences we do not find to be warranted in this case; in other words, not enough has been provided to warrant "further inquiry."[152]

Petitioners also fail to meet the requirement of section 2.309(f)(1)(vi) that they "[p]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," which information must:

> include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

Obviously, the Petitioners and NMC differ with regard to whether the license renewal should be granted, but the actual issue raised by the contention is not stated with specificity or clarity; no

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[150] *See* Staff Reply at 9.

[151] Petition at 4.

[152] *Yankee*, CLI-96-7, 43 NRC at 249. We would note that the mere possibility, expressed in Petitioners' January 3 Response to our December 21 Order, that Petitioners might in the future find an expert who could provide the assistance necessary to define clearly the issues in question and effectively litigate them, does not warrant admitting the contention at this stage of the proceeding, when we must rule on such questions of admissibility based on what has been provided to this point.

reference is made to any specific portion of the Application; and any "identification" of any failure "to contain information on a relevant matter as required by law" is meager at best.

In the contention itself, the Application is asserted to be "incomplete for *failure* to address the continuing crisis of embrittlement."[153] But in the basis, the Application is challenged as being "fundamentally deficient because it does not *adequately* address [embrittlement- and PTS-related] technical and safety issues"[154] that are not otherwise specified. It cannot be ascertained whether the drafters of Contention 1 actually even read the Application. In any event, no sections or specific contents of it are referenced to identify any specific inadequacy, and the asserted "failure to address" embrittlement is not explained with any specificity or tied in any way to the actual Application.

With respect to subsections (i), (iii), and (iv) of section 2.309(f)(1), we would not deny the contention on the basis of any of these requirements. We would, however, make the following additional observations on Contention 1:

First, the lack of specificity that runs through Contention 1 is also somewhat problematic with regard to the requirement to "[d]emonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding," under section 2.309(f)(1)(iv). Petitioners have made no reference to any of the findings required under section 54.29, which defines the standards for issuance of a renewed license. A conclusion that the application was either "untimely and incomplete for failure to address the continuing crisis of embrittlement," as asserted in the contention, or "deficient because it does not *adequately* address technical and safety issues arising out of embrittlement of the [RPV] and unresolved [PTS] concerns that might reasonably result in the failure of the

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[153]Petition at 4 (emphasis added).

[154]*Id.* (emphasis added).

[RPV]," as alleged in the basis to the contention, would obviously make a difference in the outcome of this proceeding. Petitioners do not, however, explain at all how such a conclusion would be reached *on NMC's License Renewal Application itself.* Thus, although an appropriately supported contention on embrittlement would clearly be material to the findings necessary for relicensing under section 54.29, Petitioners' demonstration that its contention as written raises such a material issue is minimal, in the sense of showing any meaningful ability to litigate any "pertinent" and "concrete" issue of concern.[155]

In addition, regarding the requirement of section 2.309(f)(1)(iii) that a demonstration be made that "the issue raised in the contention is within the scope of the proceeding," we have observed above that embrittlement is within the scope of a license renewal proceeding. But, as discussed above, the Petitioners provide very little with regard to the particular way in which embrittlement is an issue susceptible to litigation in this proceeding. The question of the extent to which compliance with 10 C.F.R. § 50.61 will satisfy the provisions of Part 54, specifically sections 54.21 and 54.29, appears to be a thorny and difficult matter. This suggests that any contention relating to this issue should be clearly stated and well supported. This was not, however, achieved by Petitioners in this proceeding.

Finally, we would note that in reaching our ruling on Contention 1, as well as the remaining contentions, we recognize that the new rule's omission of comparable provisions for amendment of petitions as of right, as permitted under prior rules,[156] might in certain

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[155] *See* 69 Fed. Reg. at 2189-90.

[156] Prior to adoption of the Part 2 Revision that went into effect in February 2004, petitioners were not required to file any contentions until after they had filed a petition for leave to intervene and after the licensing board had scheduled a prehearing conference, *see* previous version 10 C.F.R. § 2.714 (b)(1), and were allowed to amend and supplement their petitions within certain time periods as a matter of right in NRC adjudication proceedings, *see* previous version 10 C.F.R. § 2.714(a)(3). This allowed for a greater opportunity to focus and articulate precisely issues raised in contentions. The current rules require interested persons to file contentions 60 days after the Federal Register notice is published, 10 C.F.R. § 2.309(b)(3)(iii), and any amendments filed thereafter must meet the requirements of § 2.309(f)(2).

circumstances place some petitioners in a difficult position. This would be particularly true for those pressed for opportunity and time to research and develop relevant technical and legal issues and arguments, or lacking easy access to experts or counsel competent in NRC practice, to assist them in timely drafting contentions meeting the strict contention admissibility requirements. But, as noted *supra*,[157] no request for extension to address any such concerns was made in this proceeding.

B. Contention 2 (Regarding Alleged Contamination of Drinking Water)

Petitioners' Contention 2 states:

> **Excessive radioactive and toxic chemical contamination in local drinking water due to emissions from Palisades nuclear power plant as part of its daily, "routine" operations.**[158]

The basis for this contention is the following:

> The radioactive and toxic chemical emissions from the Palisades nuclear power plant into the waters of Lake Michigan contaminate the recently-installed drinking water supply intake for the City of South Haven, built just offshore from Van Buren State Park and just downstream from the Palisades reactor, due to the direction of the flow of Lake Michigan's waters and the very close proximity of the Palisades reactor to the South Haven drinking water supply intake. U.S. National Oceanographic and Atmospheric Administration models confirm the direction of water flow in Lake Michigan toward the intake. Petitioners-Intervenors hope to produce public records of toxics and radiation testing of the water source to evidence this public health problem.[159]

NMC Response to Contention 2

NMC argues Petitioners' Contention 2 is inadmissible on two grounds: first, "the substance of the assertions . . . are outside the scope of this proceeding"; and second, the "assertions are vague and unsupported by any factual basis."[160] NMC contends the issue of radioactive and

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[157] *See supra* note 31.

[158] Petition at 4.

[159] *Id.* at 4-5.

[160] NMC Answer at 14.

chemical emissions from the Palisades plant is not related to aging-management or time-limited aging analyses, but relates rather to the plant's daily operations, and therefore is not within the scope of this license renewal proceeding.[161]

NMC urges that, insofar as Petitioners' contention seeks to raise an issue under NEPA, it "represents a challenge to the scope of the environmental review specified in 10 C.F.R. § 51.53(c) and to the NRC's generic environmental findings in the GEIS and Appendix B to 10 C.F.R. Part 51."[162] NMC notes that under Appendix B radiation exposure to the public during the renewal term is categorized as a Category 1 issue, "determined to be small, based on a generic finding that radiation doses to the public will continue at current levels associated with normal operations."[163] In addition, NMC points out that the discharge of chlorine and other biocides, the discharge of metals, as well as the discharge of sanitary wastes and minor chemical spills are also classified as resolved Category 1 issues.[164]

In support of their second ground for objecting to Contention 2 — that it is vague and unsupported by any factual basis — NMC argues that Petitioners fail to identify what toxic and radioactive substances are allegedly being released from the plant, and fail to provide any facts or expert opinion in support of their contention. NMC insists Petitioners' statement that they "'*hope to produce* public records of toxics and radiation testing'" is inadequate to meet the Commission's pleading requirements.[165]

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[161] *Id.* at 15.

[162] *Id.*

[163] *Id.* (citing 10 C.F.R. Pt. 51, Subpt. A, App. B., Table B-1).

[164] *See id.*

[165] *Id.* at 16 (quoting Petition at 5 (emphasis added by NMC)).

NRC Staff Response to Contention 2

The Staff argues Contention 2 is inadmissible on the grounds that it lacks basis and support, is beyond the scope of this proceeding, is immaterial, and fails to establish that a genuine dispute exists on a material issue of law or fact.[166] Asserting that Petitioners fail to support their claim with specific factual information or references to specific portions of NMC's Application, the Staff argues that Petitioners make only generalized and unsupported arguments and, as such, fail to meet the Commission's pleading requirements.[167]

Petitioners' Reply on Contention 2

In their Reply, Petitioners assert that emissions are related to aging, in that deteriorating reactor systems will increase the amounts of toxic chemicals and radioactivity released over time.[168] Petitioners also provide additional facts, along with a reference to experts they have consulted, to support the contention.[169] During oral argument, among other things, Petitioners contended that they could not provide more specific information in support of the contention as to "data on the radioactive content of the water in and around the intake" because "it's not possible at the present time because of it's [sic] current use" and because it is "owned by Pacific Gas and Electric."[170]

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[166] *See* Staff Answer at 14.

[167] *Id.* at 14-15.

[168] Petitioners' Reply at 23.

[169] *Id.* at 23-35.

[170] Tr. at 201.

Licensing Board Ruling on Contention 2

We find Petitioners' Contention 2 to be inadmissible either as a safety or an environmental issue. In the *Turkey Point* proceeding, the Licensing Board struck as beyond the scope of the license renewal proceeding a contention similar to Petitioners' Contention 2, in which the same argument made by Petitioners herein regarding deteriorating systems could also have been made.[171] That contention alleged that "the aquatic resources of Biscayne National Park will become contaminated with radioactive material, chemical wastes, and herbicides during the license renewal term."[172] The Board, upheld by the Commission, held that such a contention "does not raise any aspect of the Applicant's aging management review or evaluation of the plant's systems, structures, and components subject to time-aging analysis."[173] We find Petitioners have likewise shown no admissible aging issues with regard to Contention 2.

To the extent the contention is considered as an environmental claim, it is also inadmissible. As discussed above, "Category 1" issues under 10 C.F.R. Part 51, Appendix B, "are not subject to further evaluation in any license renewal proceeding."[174] Petitioners' contention — that a license renewal for the Palisades plant will result in excessive radioactive and toxic chemical contamination of the local drinking water — may be viewed as a Category 1 issue covered under the heading "Radiation exposures to public (license renewal term)."[175] According to Appendix B the issue of continued radiation exposure during the license renewal period is deemed to have a small significance level with an expectancy that the "[r]adiation doses to the

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[171] *Turkey Point*, LBP-01-6, 53 NRC at 163-64.

[172] *Id.* at 163.

[173] *Id.* at 164; CLI-01-17, 54 NRC at 5-6.

[174] *Turkey Point*, LBP-01-6, 53 NRC at 153.

[175] 10 C.F.R. Pt. 51, Subpt. A, App. B, Table B-1.

public will continue at current levels associated with normal operations."[176] In addition, Appendix B categorizes the discharge of chlorine or other biocides, sanitary waste and minor chemical spills, and certain metals in waste water all as Category 1 issues.[177] Although at oral argument Petitioners' Counsel tried to characterize the contention as raising Category 2 issues so as to make it admissible, his arguments were not persuasive with regard to any of these.[178]

For the preceding reasons, Petitioners' Contention 2 is rejected. Finally, because the subject of the contention is outside the scope of a license renewal proceeding as defined by the Commission, the late-filed information may thus not be considered by us in making our ruling, even if this information were to meet the relevant late-filing criteria.

C. Contention 3 (Regarding Storage of Spent Fuel)

Petitioners' Contention 3 states as follows:

> **The Palisades reactor has no place to store its overflowing irradiated nuclear fuel inventory within NRC regulations.**[179]

The basis provided for Contention 3 states:

> The indoor irradiated fuel storage pool reached capacity in 1993. But the outdoor dry cask storage pads at Palisades, both the older one nearer Lake Michigan and the newer one further inland, are in violation of NRC earthquake regulations. 10 C.F.R. § 72.212(b)(2)(i)(B) requires that:
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> > Cask storage pads and areas have been designed to adequately support the static and dynamic loads of the stored casks, considering potential amplification of earthquakes through soil-structure interaction, and soil liquefaction potential or other soil instability due to vibratory ground motion. . . .
>
> According to the Petitioners' anticipated expert, Dr. Ross Landsman, former U.S. Nuclear Regulatory Commission Region III dry cask storage inspector, the older pad violates the liquefaction portion of this regulation, and the new pad violates the amplification portion of the regulation. Petitioners contend that neither the older nor new

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[176] *Id.*

[177] *See id.*

[178] *See* Tr. at 188-201.

[179] Petition at 5.

dry cask storage pads at the Palisades plant were designed in consideration of the factors contained in the cited regulation.[180]

NMC Response to Contention 3

NMC argues that Contention 3 raises issues outside the scope of license renewal both because spent fuel storage does not fall within in the scope of the proceeding as defined in 10 C.F.R. Part 54, and because, as noted by the Commission in the 1999 *Oconee* proceeding, dry cask storage independent spent fuel storage installations (ISFSIs) are licensed under Part 72, which contains its own license renewal procedures.[181] Even if spent fuel storage were within the scope of the proceeding, NMC urges, Contention 3 would be inadmissible because it fails to raise any aging-related issue.[182] Further, NMC avers, Contention 3 is barred by the Waste Confidence Rule, as stated at 10 C.F.R. § 51.23(a).[183]

To the extent the Petitioners seek to raise a NEPA issue, Contention 3 challenges and runs afoul of both the Waste Confidence Rule and the GEIS, according to NMC, noting that the Commission in *Oconee* dismissed a contention dealing with onsite waste storage of spent fuel because this is a Category 1 issue.[184]

Finally, NMC argues that Contention 3 is not supported by a basis demonstrating a genuine issue, citing earlier studies of the storage cask pads and stating that seismic analysis of the

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[180] *Id.* (ellipsis in original).

[181] NMC Answer at 16-17 (citing 10 C.F.R. §§ 54.4, 72.42(b), 72.212(a)(3); *Oconee*, CLI-99-11, 49 NRC at 344 n.4).

[182] NMC Answer at 18 (citing *Turkey Point*, CLI-01-17, 54 NRC at 23).

[183] *Id.* at 18. Section 51.23 states in relevant part that "[t]he Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations." 10 C.F.R. § 51.23(a).

[184] NMC Answer at 18-19 (citing *Oconee*, CLI-99-11, 49 NRC at 343).

new pads is a current design issue being addressed by NRC Staff through the normal regulatory process.[185]

NRC Staff Response to Contention 3

The Staff asserts most of the same arguments offered by NMC.[186]

Petitioners' Reply on Contention 3

Petitioners again argue that the dry cask storage pads violate NRC regulations, contending that it is "impossible to disconnect the dry cask storage pad problems from the proposed license extension,"[187] and provide additional facts and support for the contention in their Reply.[188] In addition, Petitioners assert that the Waste Confidence Rule "places *false* confidence in the availability of a geologic repository in the U.S. by the year 2025, . . . biases the NRC in favor of approving a license for the proposed Yucca Mountain [site,] . . . [and] biases the NRC in favor of approving a 20-year license extension at Palisades."[189] Petitioners distinguish *Oconee* because there was "not firm evidence of regulatory violation concerning onsite waste storage" in that proceeding.[190] In a more general fashion, Petitioners argue (1) that the Board may not inquire into the merits of the contention when determining admissibility; and (2) because "it appears [that Contention 3] would easily meet the operating

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[185]NMC Answer at 19-20 (citing NRC Information Notice 95-28, Emplacement of Support Pads for Spent Fuel Dry Storage Installations at Reactor Sites (June 5, 1995) at 3).

[186]*See* Staff Answer at 15-16.

[187]Petitioners' Reply at 39.

[188]*Id.* at 35-42.

[189]*Id.* at 39.

[190]*Id.* at 39-40.

license standard for a safety issue, the panel must admit their contention for the *continuation* of that operating license for 20 years beyond its expiration."[191]

During oral argument Petitioners' Counsel discussed the possibility of filing a request for a waiver of the application of relevant rules relating to the subject matter of Contention 3, as permitted under 10 C.F.R. § 2.335(b).[192] To the knowledge of the Board, however, no such request was ever actually filed.

Licensing Board Ruling on Contention 3

Notwithstanding Petitioners' arguments, we find Contention 3 to be inadmissible because it is outside the relatively narrow scope of a license renewal proceeding as defined by the Commission in its rules and relevant case law.[193] Petitioners may seek to raise alleged regulatory violations in a petition pursuant to 10 C.F.R. § 2.206, requesting that the NRC Staff take an enforcement action. And any person may also file a request for waiver under section 2.335(b), or a rulemaking petition, regarding any NRC regulation.[194] But Petitioners have not raised an admissible issue for a license renewal proceeding under relevant rules and law; nor, to the extent they may even arguably be viewed as having requested a waiver of any rule, have

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[191] *Id.* at 41-42.

[192] Tr. at 216-20, 264, 271.

[193] *See Oconee*, CLI-99-11, 49 NRC at 343; *Turkey Point*, CLI-01-17, 54 NRC at 6. Again, we also note that, even were certain additional facts offered by Petitioners in their Reply and at oral argument to be considered, since the subject of the contention is outside the scope of a license renewal proceeding, the additional facts would not be relevant in this proceeding even were they to meet the late-filing criteria.

[194] In this regard, however, we note that the Commission recently denied a petition for rulemaking on the Waste Confidence Rule, explicitly finding that the rule does not bias the agency towards granting a license for Yucca Mountain. *See* State of Nevada; Denial of a Petition for Rulemaking, 70 Fed. Reg. 48,329 (Aug. 17, 2005).

they demonstrated any grounds for any such waiver that would make the contention admissible.[195] We must therefore reject this contention.

D. Contention 7 (Regarding Alleged Non-radiological Contamination of Water)

Contention 7 states as follows:

Non-radiological persistent toxic burdens to area water sources.[196]

The basis offered in support of this contention is as follows:

> The impact of 20 additional years of pollution by toxics [sic] disclosed but not adequately controlled under requirements of the National Pollutant Discharge Elimination System will directly affect water quality of nearby sources, including Lake Michigan. In 2000, for example, Palisades was found to be in "continuing noncompliance" for its apparent multiple misuses of Betz Clam-Trol in Lake Michigan for the dispersion of mussels and clams affecting the water intakes. *See* http://www.epa.gov/region5/water/weca/reports/mi4qtr01.txt.
>
> NPDES violations also contradicts [sic] the spirit, intention and explicit recommendation of The International Joint Commission. In its "Ninth Biennial Report on Great Lakes Water Quality," the Commission's Recommendation #16 (at p. 42) urges that "[g]overnments monitor toxic chemicals used in large quantities at nuclear power plants, identify radioactive forms of the toxic chemicals and analyze their impact on the Great Lakes ecosystem."[197]

NMC Response to Contention 7

NMC argues Petitioners' Contention 7 is inadmissible because it raises an issue beyond the scope of this proceeding and the NRC's jurisdiction, and because it "lacks any basis and fails to establish a genuine dispute concerning a material issue."[198] With respect to their first argument, NMC contends that the issue of whether or not Palisades plant is releasing toxic pollutants into area water sources does not concern the management of aging or time-limited

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[195] *See* Tr. at 216-20, 264; 10 C.F.R. § 2.335; *Turkey Point*, CLI-01-17, 54 NRC at 10. Petitioners are, of course, free to raise any request for waiver to the Commission.

[196] Petition at 7.

[197] *Id.*

[198] NMC Answer at 25.

aging analyses as required under 10 C.F.R. Part 54.[199] Additionally, NMC argues that, to the extent the contention seeks to raise an issue under NEPA, it represents a challenge to the scope of environmental review provided under 10 C.F.R. § 51.53(c), as well as to the GEIS and Appendix B to 10 C.F.R. Part 51, in that the allegations relate to generically resolved Category 1 issues determined to be small, including the discharge of chlorine and other biocides, the discharge of metals, and the discharge of sanitary wastes and minor chemical spills.[200] Furthermore, NMC asserts, Contention 7 is barred pursuant to section 511 of the Federal Water Pollution Control Act.[201] According to NMC, the "[National Pollution Discharge Elimination System] Permit for Palisades establishes specific limits for the use of Betz Clam-Trol, and the sufficiency of these limits is not subject to NRC review," because responsibility for the regulation of nonradiological pollutants rests with the EPA.[202]

NMC also argues that Petitioners' citation to an Environmental Protection Agency Quarterly Non-Compliance Report does not provide a proper basis for their allegation of "'multiple misuses of Betz Clam-Trol'" at Palisades.[203] According to NMC, the report indicates noncompliance by the Palisades plant with respect to Betz Clam-Trol in November 2000, but NMC believes that this was due to a data entry error, and in any event the report provides no indication of a current or significant problem.[204]

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[199] *See id.*

[200] *Id.* (citing 10 C.F.R. Pt. 51, Subpt. A, App. B, Table B-1; GEIS § 4.4.2.2 and Table 4.4).

[201] *Id.* at 26 (citing 33 U.S.C. § 1371(c)(2)).

[202] *Id.* at 26 (citing 10 C.F.R. § 51.10(c)).

[203] *Id.* at 26 (quoting Petition at 7).

[204] *Id.* at 26 & n.10.

NRC Staff Response to Contention 7

The Staff argues Contention 7 is inadmissible as it lacks specificity and support, is beyond the scope of this proceeding, is immaterial, and fails to establish that a genuine dispute exists on a material issue of law or fact.[205] The Staff asserts that the contention is a challenge to the adequacy of the requirements set out under the Federal Water Pollution Act (the "Clean Water Act") and the National Pollutant Discharge Elimination System, and as such, is beyond the jurisdiction of the Board.[206] The Staff insists that the issue raised in the contention is "solely within the purview of the Michigan Department of Environmental Quality . . . , which administers the Clean Water Act within the jurisdiction of the State of Michigan."[207] Although an applicant is required by 10 C.F.R. § 51.45(d) to "list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action," the Staff argues that the adequacy of any such permit is not within the Commission's jurisdiction.[208]

Petitioners' Reply on Contention 7

Petitioners, in addition to providing additional facts in support of Contention 7, argue in response to the final Staff argument noted above, that the contention should be admitted because it falls under 10 C.F.R. § 54.4(a)(2), as a "nonsafety-related system[ ], structure[, or] component whose failure could prevent satisfactory accomplishment of any of the functions identified in paragraphs (a)(1)(i), (ii), or (iii) of this section"[209] (*i.e.*, to ensure "(i) [t]he integrity of the reactor coolant pressure boundary; (ii) [t]he capability to shut down the reactor and maintain

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[205] *See* Staff Answer at 22.

[206] *See id.* (citing *Millstone*, LBP-04-15, 60 NRC at 93).

[207] *Id.* at 22.

[208] *Id.* at 22-23.

[209] Petitioners' Reply at 43-44 (quoting 10 C.F.R. § 54.4(a)(2)).

it in a safe shutdown condition; or (iii) [t]he capability to prevent or mitigate the consequences of accidents which could result in potential offsite exposures"[210]). According to Petitioners, "[n]onreporting of important, and required, information about toxic releases obscures any meaningful evaluation of the functioning of nonsafety features of Palisades which will be necessary to plant operations during the license extension period."[211] Petitioners provide additional alleged facts to support this argument in their Reply.

Licensing Board Ruling on Contention 7

We find this contention, as stated in the initial petition, also to be outside the scope of this license renewal proceeding, and must reject it, based on much the same analysis as stated in our ruling on Contention 2, above. Even considering Petitioners' late-filed argument and assertions at oral argument regarding the clogging of water intakes, these lack sufficient specificity to render the contention admissible. In addition, because this contention is outside the scope of license renewal, we do not consider the late-filed information provided, in keeping with our rulings above. Of course, as indicated above, Petitioners may request action relating to the matters addressed in and regarding Contention 7 in a petition under 10 C.F.R. § 2.206.

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[210]10 C.F.R. § 54.4(a)(1)(i)-(iii).

[211]Petitioners' Reply at 44-45.

E. Contention 8 (Regarding Environmental Justice)

Contention 8 states as follows:

Environmental justice denied by the continuing operations of Palisades.[212]

Petitioners provide the following basis for this contention:

Palisades nuclear generating station is the source of environmental justice violations. Located within a predominantly African-American and low-income township, Palisades provides woefully inadequate tax revenues to the host community, considering the large adverse impacts and risks the reactor inflicts. Palisades' African-American employees have traditionally been stuck in the dirtiest and most dangerous jobs at the reactor, with little to no prospects for promotion. Some of Palisades' African American employees have also experienced death threats at the work place, including nooses hung in their lockers or in public places to symbolize lynching, an attempt to silence their public statements for workplace justice.

Palisades license extension application also has inadequately addressed the adverse impacts that 20 additional years of operations and waste generation would have on the traditional land uses, spiritual, cultural, and religious practices, and treaty rights of various federally-recognized tribes in the vicinity of the plant and beyond, as well as effects upon non-federally recognized tribes governed by international law. Only three tribes were contacted by the NRC by August 8th, 2005, and invited to participate in the license extension proceedings, which effectively excluded a number of tribes within the 50-mile zone around the reactor. For this reason alone, the August 8, 2005 deadline for requesting a hearing to intervene against the Palisades license extension should be extended, until all tribes with the 50-mile zone and beyond, which have ties to the power plant site and its environs, are contacted.

Also, Palisades' license extension application inadequately addresses the adverse socio-economic impacts of a catastrophic radiation release due to reactor core embrittlement leading to core rupture, as they would be found among the low-income Latin American agricultural workplace of the Palisades area. Too, possible synergistic effects of such catastrophic radiation releases combined with the toxic chemical exposures these low income Latin-American agricultural workers already suffer on the job have not been evaluated.

Finally, there is an unacceptable lack of Spanish language emergency evacuation instructions and notifications to serve the Spanish speaking Latino population within 50 miles of the Palisades reactor, especially migrant agricultural workers.[213]

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[212]Petition at 7.

[213]*Id.* at 7-8.

NMC Response to Contention 8

NMC challenges this contention as being outside the scope of this proceeding, failing to challenge the application and demonstrate a genuine dispute on a material issue of fact or law, and failing to provide an adequate factual basis to support any dispute with the Application.[214] At bottom, NMC asserts, none of Petitioners' claims in support of this contention address the "'essence of an environmental justice claim' arising under NEPA in a NRC proceeding, – *i.e.*, '*disproportionately high and adverse human health and environmental effects*' on minority and low-income populations that may be different from the impacts on the general population."[215] Instead, NMC claims, Petitioners "supply only vague allegations of inadequacies in the Application, without identifying any single specific deficiency" meeting the quoted standard.[216]

NMC points out that the allegations regarding the workplace do not concern disparate environmental impacts.[217] Regarding the allegations about "traditional land uses, spiritual, cultural, and religious practices and treaty rights," NMC asserts these are vague and identify no deficiency in any specific section of the Application, which in fact does contain several sections relating to cultural issues, including sections on minority populations, the area economic base, social services and public facilities, land use planning, historic and archaeological resources, housing impacts, and offsite land use.[218] Nor, argues NMC, do Petitioners provide any basis to show that any specific minority population will be subject to disproportionately high and adverse

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[214]NMC Answer at 28.

[215]*Id.* at 28-29 (quoting *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 153 (2002) (quoting in part Exec. Order No. 12,898, 3 C.F.R. 859)) (citing Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,042, 52,045 (Aug. 24, 2004) [hereinafter NRC EJ Policy Statement]).

[216]*Id.* at 29.

[217]*Id.* at 29-30.

[218]*Id.* at 30 (quoting Petition at 8).

environmental impacts.[219] In addition, NMC states that not three but eleven tribes were invited to participate, from as far away as Oklahoma.[220]

On the socio-economic impacts of a catastrophic accident release, NMC asserts that no factual basis has been provided for this and states that, in any event, "societal and economic impacts from severe accidents" have been deemed "small for all plants" in the GEIS and Appendix B to 10 C.F.R. Part 51, Subpart A, such that this cannot be raised in this proceeding absent a waiver.[221] NMC also characterizes the allegation regarding Spanish language emergency evacuation instructions as outside the scope of this proceeding as well as vague and unsupported.[222]

NRC Staff Response to Contention 8

The Staff also opposes this contention, repeating many of the same arguments provided by NMC, and noting as well that the Commission has stated that only disparate environmental impacts cognizable under NEPA are admissible as environmental justice claims in NRC proceedings.[223] Staff quotes the Commission's Policy Statement for the principle that admissible contentions are "those which allege, with the requisite documentary basis and support as required by 10 C.F.R. Part 2, that the proposed action will have *significant adverse* impacts on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated."[224] Noting the Commission's ruling in the

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[219] *Id.*

[220] *Id.* at 31.

[221] *Id.*

[222] *Id.* at 32.

[223] Staff Answer at 25-30.

[224] *Id.* at 27 (quoting NRC EJ Policy Statement, 69 Fed. Reg. at 52,047).

PFS proceeding that NEPA "[does] not call for an investigation into disparate economic benefits as a matter of environmental justice," Staff states that Petitioners' claims regarding tax revenues are not admissible.[225] Staff also argues that Petitioners' claims regarding employment discrimination, notice to tribes, and emergency planning are beyond the scope of this proceeding.[226]

Staff does agree that Petitioners' allegation that the Application has not sufficiently addressed the "adverse socio-economic impacts of a catastrophic radiation release . . . as they would be found among the low-income Latin American agricultural workforce of the Palisades area" would not necessarily be beyond the scope of this proceeding.[227] The contention is not admissible in the Staff's view, however, because, although the contention indicates the presence of a low-income minority population near Palisades, it does not "identify a disproportional environmental impact on this population relative to the general population," and thus "fails to raise a genuine dispute on a material issue of law or fact because it lacks the requisite support."[228]

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[225] *Id.* at 28 (quoting *PFS*, CLI-02-20, 56 NRC at 154; citing *id.* at 159).

[226] *Id.* at 29-30 (citing NRC EJ Policy Statement, 69 Fed. Reg. at 52,047; and, regarding emergency planning, *Turkey Point*, CLI-01-17, 54 NRC at 9; *Millstone*, 60 NRC at 640).

[227] *Id.* at 30 (quoting Petition at 8 (alteration in original)).

[228] *Id.*

Petitioners' Reply on Contention 8

In their Reply on this contention Petitioners provide a significant amount of information, but none of it appears to have been unavailable at the time of filing of the original petition, except for a reference to an August 2005 telephone conversation,[229] and an August 2005 newspaper article,[230] and the information relating to these items is not sufficiently specific that we find it would alter our ruling below. Nor do we find any good cause for failure to submit any of the rest of the information that was previously available with the original petition, nor do we find that any of this information would have an impact on our ruling below, in any event, for the reasons therein explained.

Licensing Board Ruling on Contention 8

In the *LES* proceeding, the Commission held that environmental justice issues are considered in NRC proceedings only to the extent required by NEPA, stating that "NRC's goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities [by assessing impacts] peculiar to those communities."[231] The Commission also, as cited above, in 2004 issued a Policy Statement on Environmental Justice, in which it made the same findings, stating that the "goal of an EJ portion of the NEPA analysis" also includes identifying "significant impacts, if any, that will fall disproportionately on minority and low-income communities."[232] The Commission indicated that "admissible contentions in this area are those which allege, with the requisite documentary basis and support as required by 10 CFR Part 2, that the proposed action will have significant adverse impacts on the physical or human

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[229]Petitioners' Reply at 48, 52.

[230]*Id.* at 56.

[231]*Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998).

[232]NRC EJ Policy Statement, 69 Fed. Reg. at 52,048.

environment that were not considered because the impacts to the community were not adequately evaluated."[233] There must be some "nexus to the physical environment."[234]

Although some of the issues raised by Petitioners may be addressable elsewhere, we agree that most would not be admissible under the preceding authority. For example, the very serious allegations concerning discrimination against and harassment of African-American employees might fall under Title VI of the Civil Rights Act, but we do not have jurisdiction to hear them. And the Commission has definitively ruled that emergency planning issues are not pertinent in license renewal proceedings, both in the *Turkey Point* proceeding, and more recently in the *Millstone* proceeding.[235]

A possible exception is Petitioners' allegation of "adverse socio-economic impacts of a catastrophic radiation release due to reactor core embrittlement leading to core rupture, as they would be found among the low-income Latin American agricultural workforce of the Palisades area."[236] However, no facts that would tend to show impacts falling disproportionately on this community have even been alleged.

With regard to Native Americans, we note that, to the extent facts have been alleged, at least one — that only three tribes were contacted — is incorrect, in that it appears to be undisputed that NRC Staff contacted eleven tribes, and during oral argument Petitioners could not contradict this.[237] The remainder of the allegations concerning Native Americans do not

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[233] *Id.* at 52,047.

[234] *Id.* at 52,044.

[235] *Turkey Point*, CLI-01-17, 54 NRC at 9-10; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560-61 (2005).

[236] Petition at 8.

[237] Tr. at 291-92; *see also* Staff Answer at 29 n.7. We note Petitioners' statement through Counsel that information on ADAMS at the time of filing the petition indicated that only three contacts were made, Tr. at 291, which might excuse Petitioners not knowing about the eleven contacts, but which would not

(continued...)

appear to be specific or well-supported enough to warrant admitting a contention based on them, and none of the allegations address specific sections of the application in which the applicant goes into some detail about how it intends to address demographic issues including transient, minority, and low-income populations; social services; land use planning; and historic and archaeological resources. The information provided in Petitioners' Reply and at oral argument on this subject area would not change this sufficiently to alter our ruling, due to the sparsity and somewhat general nature of the information, and due to the continuing lack of any significant reference to the actual Application, which we find to be pertinent here, in part because of the extent and detail of the Application on the listed demographic issues.

In the preceding circumstances, and based on the Commission's definition of the environmental justice issue in its Policy Statement and in the *LES* and *PFS* proceedings, we must also reject Contention 8.

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[237](...continued)
change our ruling, in that this fact in itself provides insufficient support for an admissible contention on environmental justice.

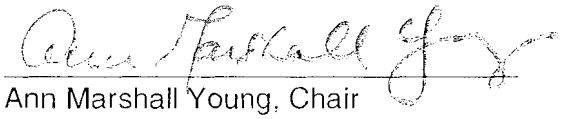
VII. CONCLUSION and ORDER

In conclusion, although Petitioners have established standing to participate in this proceeding, they have shown no good cause not to rule on their contentions at this time, and, their objections and motion having been denied, and not having proffered any admissible contention, they have not established grounds for granting a hearing in this proceeding.

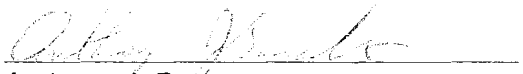
Based, therefore, upon the preceding rulings, findings, and conclusion, it is, this 7th day of March, 2006, ORDERED that this proceeding be TERMINATED.

This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311. Any petitions for review meeting applicable requirements set forth in that section must be filed within ten (10) days of service of this Memorandum and Order.

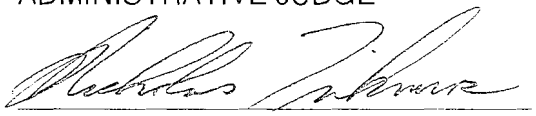
THE ATOMIC SAFETY
AND LICENSING BOARD



Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE



Anthony J. Baratta
ADMINISTRATIVE JUDGE[238]



Nicholas Trikouros
ADMINISTRATIVE JUDGE[238]

Rockville, Maryland
March 7, 2006[239]

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[238]Judges Baratta and Trikouros do not join the separate statement of the Board Chairman. They disagree with the premise that an ethical violation has occurred warranting such a statement. In their view, all necessary considerations have been adequately addressed in the decision, which is not furthered by what is set forth in the separate statement.

[239]Copies of this Order were sent this date by Internet e-mail transmission to all participants or counsel for participants.

Additional Statement of Administrative Judge Ann Marshall Young

As the lawyer member of the licensing board, I consider that I have a responsibility to address certain aspects of some matters that are the subject of Section IV.B of our Memorandum and Order, primarily relating to ethical duties and standards of conduct for lawyers, which are not covered in our joint Memorandum and Order. Several allegations of ethical violations have been made in recent filings in this proceeding, and the duty of tribunals to whom such allegations are made is a serious one, which warrants close and careful attention. Allegations of this sort raise sensitive issues, concerning lawyers' reputations, identity in the community, and means of making a living. Consideration of such allegations requires balance, which involves neither undue harshness nor avoidance of actual problems.

The duty of trial judges "to deter and correct misconduct of attorneys with respect to their obligations as officers of the court" is related to the need to "support the authority of the [tribunal] and enable the [proceeding to go forward] with dignity."[1] But more importantly, the primary interest involved is the public interest — the basis for and purpose of this duty lies in the need to "safeguard the administration of justice and to protect the public from the misconduct or unfitness of those who are members of the legal profession."[2] Lawyer judges would thus seem to bear a particular responsibility to fulfill this duty.

In this proceeding, some of the allegations of ethical violations are tied to substantive issues having to do with the admissibility of one of the contentions proffered by Petitioners, and I will in this Statement thus also address to a certain extent some of the legal standards that govern the admissibility of contentions in proceedings such as this one, as well as the relevance of these

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[1] *Daniels v. Alander*, 844 A.2d 182, 187-88 (Conn. 2004) (quoting *In re Dobson*, 572 A.2d 328, 334 (Conn. 1990), *cert. denied Dodson v. Superior Court*, 498 U.S. 896 (1990)).

[2] *Id.* at 187 (quoting *Burton v. Mottolese*, 835 A.2d 998, 1032 (Conn. 2003).

issues and standards to the ethical matters in question. With regard to all of these interrelated issues, I believe all of the parties, most particularly the Petitioners, all of whose contentions we deny in the foregoing Memorandum and Order, deserve more complete explanation than we have included in our joint Memorandum and Order. For all of the preceding reasons, therefore, I add my own following comments to the decision issued today.

Standards of Professional Conduct for Lawyers

As indicated in our Memorandum and Order, the standards of conduct for lawyers come from codes of ethics, rules of procedure, as well as common law and precedent. Any lawyer must become aware of and comply with all such standards, and must also become familiar with and competent in the substantive law of any field of law in which the lawyer practices.[3] With regard to those standards of conduct most prominently at issue in this proceeding, in addition to the more specific duties noted in our Memorandum and Order, of alerting NRC adjudicatory bodies to information relevant to matters being adjudicated,[4] assuring that representations made in all pleadings "to the best of [their] knowledge, information and belief . . . are true,"[5] and *not* knowingly "mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer,"[6] counsel have a broader, more general duty of candor and good faith. This duty, which is related to the duty to

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[3]The first rule of professional conduct requires that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

[4]*See Tenn. Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2, and 3), ALAB-677, 15 NRC 1387, 1394 (1982); *see also* the Board's Memorandum and Order at 14 n.60.

[5]10 C.F.R. § 2.304(c); *see also* FED. R. CIV. P. 11.

[6]MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (1980); OHIO DISCIPLINARY CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(5) (2003).

update a tribunal "of any development which may conceivably affect the outcome" of litigation,[7] has been held applicable in administrative adjudication before various federal agencies.[8] Although counsel also have duties to their clients, *e.g.*, to represent clients zealously, there is a "degree of candor necessary for effective disposition of cases . . . that counsel owes as an officer of the court."[9]

The Fourth Circuit Court of Appeals has described the purpose and scope of this duty of candor that is placed on lawyers as follows, in the *Shaffer* case:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions — all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.
>
> While no one would want to disagree with these generalities about the obvious, it is important to reaffirm, on a general basis, the principle that lawyers, who serve as officers of the court, have the first line task of assuring the integrity of the process. Each lawyer undoubtedly has an important duty of confidentiality to his client and must surely advocate his client's position vigorously, but only if it is truth which the client seeks to advance. The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end. . . .
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> While Rule 3.3 articulates the duty of candor to the tribunal as a necessary protection of the decision-making process, . . . and Rule 3.4 articulates an analogous duty to opposing lawyers, neither of these rules nor the entire Code of Professional

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[7] *Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)); *see also United States v. Shaffer Equipment Co.*, 11 F.3d 450, 457-59 (4th Cir. 1993).

[8] *See, e.g., RKO General, Inc., v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (referring to the duty of candor as "an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate," which is "basic, and well known"); *Jaskiewicz v. Mossinghoff*, 822 F.2d 1053, 1057 & n.15 (Fed. Cir. 1987) (referring to the possibility of sanctions against an attorney for breach of a duty of candor and good faith imposed by a rule of the Patent and Trademark Office, or violation of a rule of the ABA Model Code of Professional Responsibility).

[9] *Cunningham v. Sears, Roebuck & Co.*, 854 F.2d 914, 916 (6th Cir. 1988).

> Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process.[10]

Avoidance of evasive responses to a tribunal has been held to fall within a lawyer's duty of candor.[11] Moreover, the ethical rule that prohibits the making of false statements, as well as failing to correct such statements, is not limited to affirmative misstatements, but also applies to failures to correct misstatements made in a lawyer's presence by another lawyer.[12] In addition, the use of exaggerated allegations by one attorney against another, or against a tribunal, is strongly disfavored. As the Commission has recently pointed out, "the use of intemperate and disrespectful rhetoric . . . has no place in filings before the Commission or its Boards."[13]

Violation of these standards governing lawyer conduct affects not only the individuals immediately involved, but also is all too related to the decline of professionalism in the law that has been lamented by many in recent years.[14] Fulfilling the "first line task of assuring the integrity of the process" thus demands that those of us in the profession of law attend carefully to any questions of violation of standards, as well as to the purposes and ideals underlying them and informing how they should be applied in individual situations. For it has been in individual acts on the part of individual lawyers that any decline in professionalism has come about, and it is in attention by individual lawyers to specific and concrete circumstances as they arise that it may be reversed. The standards of conduct discussed in our Memorandum and

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[10] *Shaffer*, 11 F.3d at 457-58. This language, or portions of it, has been quoted by several other courts as being worthy of note. *See, e.g., Ausherman v. Bank of America Corp.*, 212 F. Supp. 2d 435, 442-43 (D. Md. 2002); *In re Bock*, 297 B.R. 22, 31-32 (Bankr. W.D.N.C. 2002).

[11] *In re Discipline of Timothy J. Wilka*, 638 N.W.2d 245, 249 (S.D. 2001).

[12] *Daniels v. Alander*, 844 A.2d. at 188.

[13] *Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-06, 63 NRC __, __ (slip op. at 4 n.18) (Feb. 2, 2006); *see* Staff Response to Motion at 4 n.11.

[14] *See, e.g.*, Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5 (1998), in which Justice O'Connor argues that a decline in professionalism among lawyers is responsible for the diminishing image and reputation of lawyers in society.

Order, and above, offer specific guidance on how to approach some of the circumstances and allegations that have recently arisen in this proceeding.

Applying these standards in this proceeding in the appropriate balanced and measured manner requires that the starting point be the actual assertions made in the recent pleadings. Recounting portions of these in some detail is necessary in order to address the extent to which the various allegations of inappropriate conduct are well-founded, unfounded, or, in some instances, exaggerated and therefore inappropriate themselves.

Parties' Allegations – Petitioners

Petitioners in their January 3, 2006, Response to our December 21, 2005, Order, in which we required a response to Staff Counsel's December 20 e-mail, suggest that the "strong implication [of our Order is] that Petitioners have committed an unspecified wrong."[15] Referring to the "NRC staff's objections to the use of former NRC employees to provide expert information to the ASLB, claiming that they are barred by statute." Petitioners state that this suggests "that the Petitioners could be in trouble both for having had Mr. Basdekas as their expert, and for no longer having him."[16] On the basis of the preceding, Petitioners "object that there is no foundation apparent in the Board's Order for its issuance."[17] In addition, they urge the Board:

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[15]Petitioners' Response at 1.

[16]*Id.* at 2. Petitioners' reference is to the Staff's request, made in oral argument, that certain statements of opinion of another expert be redacted from that expert's Declaration in Support of Petitioners' Contention 3, based on such opinion being in violation of 18 U.S.C. § 207. *See* Tr. at 29. The Staff argument, in effect, was that the other expert's opinions contravene portions of section 207 prohibiting any former federal employee from attempting to influence any action relating to any matter in which the person participated while an employee. *See* 18 U.S.C. § 207(a)(1)(B); Staff Response to Motion at 11.

[17]Petitioners' Response at 2. Petitioners appear to consider the matter of their expert to be largely a discovery question, noting that 10 C.F.R. § 2.336(a) requires disclosure of trial experts "within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene," and arguing that they "have already provided far more information about the status of their expert situation than the rules of the Commission require." *Id.* at 12.

> . . . to conclude that this inquiry into the matter of experts needlessly prejudices the Petitioners' pursuit of the embrittlement contention (as, for example, by causing a "chill" which potential experts may want to have no part of); that it is potentially violative of attorney work-product and attorney-client privilege; that it has yielded no information useful to deciding issues on their merits; and that the Order implicates matters that are beyond the purview of the Board to consider insofar as it may have any bearing on the forthcoming ruling on Contention 1.
>
> That Petitioners lost their expert is not a "significant development" (the ASLB's phrase in the December 21 order) which should have caused Petitioners to have to engage, on sudden notification, in several rounds of consultations, research and brief-writing, all of it squarely in the heart of the holiday season.[18]

In their later Motion, in addition to reiterating several arguments made in their January 3 Response, Petitioners refer to the NMC and Staff January 9 Replies (discussed in the next two sections of this Statement) as including "smears and attacks"; suggest that "the ASLB may be losing control of these proceedings by allowing procedural and ethical irregularities to determine the direction of the decisions to be rendered on Petitioners' contentions," and argue that "as a matter of fairness" they "must be allowed to investigate the Basdekas conversation with NRC Staff attorney Uttal, and to articulate a substantive defense to the spin and innuendo campaign which NMC and the Staff have launched."[19] They suggest that NMC and the Staff "give the lie to their cynical tactics."[20]

The "procedural and ethical irregularities" to which Petitioners refer are not altogether clear, but are apparently intended to include an allegation that the Staff has attempted to "intimidat[e]" Mr. Basdekas with statements on the extent to which a former NRC employee is prohibited from participating in an NRC proceeding.[21] It is averred that "Mr. Basdekas was definitely concerned

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[18] *Id.* at 13.

[19] Petitioners' Motion at 2.

[20] *Id.*

[21] *Id.* at 3.

about the threat," and that it "is possible that his concern [about any such legal prohibition] influenced him to contact attorney Uttal."[22]

Petitioners further assert that Staff Counsel "had no legitimate business transmitting the information she obtained from Mr. Basdekas to the ASLB," that her e-mail "almost treats the Board as peers," that she should have filed the information in a formal motion but engaged instead in a "strategem of 'trial by ambush,'" and that the Staff "misuses the various explanations given by Petitioners as a means of bullying them for *more* information."[23] Petitioners allege that Staff Counsel in speaking with Mr. Basdekas violated an ethical rule prohibiting communication with a party represented by counsel, asserting that Petitioners "have not waived the privileged relationship they enjoy with Mr. Basdekas."[24]

Petitioners "seek the board's guidance," going on to urge that they believe "this entire issue should be dismissed and all reliance on the information (or alleged information) excluded from the record."[25] "If the ASLB determines to enter some ruling in this case which relies in any way upon the information or unsworn representations proffered by any party," Petitioners seek a stay of the proceeding "and ask the Board to lay out a course for the adjudication of the expert opinion issue that will allow Petitioners to fairly explore and respond to the proffered 'evidence.'"[26] Petitioners argue that, "[h]aving been portrayed as duplicitous regarding the status of Demetrios Basdekas," they "must be allowed" to depose Staff Counsel, claiming that such a course is required by "fairness," particularly if the Board intends to rely in any way on Staff

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[22] *Id.*

[23] *Id.* at 3-4.

[24] *Id.* at 7; *see id.* at 5-7.

[25] *Id.* at 7.

[26] *Id.*

Counsel's statement in her December 20, 2005, e-mail, which they prefer we would strike from the record, along with the Replies of NMC and the NRC Staff.[27] Petitioners conclude:

> Either the Staff's and NMC's gaming of these proceedings must be terminated, or Petitioners must be allowed to counter the pending allegations. As matters stand, the Respondents have unfairly prejudiced the perception of Petitioners' embrittlement contention, have violated attorney work-product and attorney-client privilege, have not developed any information genuinely useful to deciding the core issues on their merits, and have seriously undermined the procedural rules which govern these proceedings. In fact, this license extension proceeding has been hijacked by what Petitioners submit is baseless consideration of an issue not properly before the Board.
>
> Petitioners urge the Board to enforce the rules fairly as to all parties as it determines what to do next. However hurried a tribunal may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement, because the only fair and reasonable alternative thereto is complete abandonment. [28]

Attached to Petitioners' Motion are the declaration of Alice Hirt, the designated member-representative of the Western Michigan Environmental Action Coalition, and a print-out of an August 2, 2005, e-mail from Demetrios Basdekas to Ms. Hirt, Mr. Paul Gunter of NIRS, and Petitioners' Counsel Terry Lodge.[29] In her declaration, after referring to the e-mail from

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[27] *Id.* at 7; *see id.* at 7-8.

[28] *Id.* at 8.

[29] Mr. Basdekas' e-mail states as follows:

> Here are my comments/suggestions on the subject draft contention. My additions/changes to the text you sent me Paul are identified below in **bold, underlined** text. Let me reiterate that, even though I have been helping you with some technical aspects of PTS, I have not made a final decision as to whether I will participate as an expert witness in the Palisades proceedings. I have a lot of things to sort out before I can make such a commitment. You may use my name as you propose in the draft contention, but with the understanding I just reiterated. After the end of this week I will not be available until sometime in September. I believe that the non-DBA nature of vessel rupture is not necessary to be brought at this time. . . . .
>
> . . . .
>
> Here are my contributions to the draft contention:
> 1. The **operating** license renewal application is untimely and incomplete. At the outset, the Petitionersâ€™ [sic] wish to raise their concern that the Palisades license renewal application is fundamentally deficient because it does not adequately address the safety issues arising out of the embrittlement of the reactor pressure vessel and **related** Pressure Thermal Shock issues that might reasonably result in the failure of the reactor pressure vessel. The Palisades nuclear power station is identified as prone to the early embrittlement of the reactor pressure vessel, a vital safety component. As identified by

(continued...)

Mr. Basdekas and the fact that she attended the November 3-4, 2005, oral argument, Ms. Hirt describes a telephone conversation she had with Mr. Basdekas within the two weeks following the oral argument, in which she described to him comments at oral argument that she characterized as being negative toward him.[30]

Parties' Allegations – NMC

NMC argues in its January 9 Reply to Petitioners' Response to our December 21 Order that Petitioners "had a duty to apprise the Board of significant developments affecting the

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[29](...continued)
the Petitionersâ€™ [sic] expert opinion of Demetrios Basdekas, retired Nuclear Regulatory Commission **staff member**, the longer **the** Palisades **plant , or any plant** operates, the more embrittled its reactor **vessel** becomes with **attendant** decreasing safety margins in the event of the initiation of emergency **actions, which may be encumbered by equipment failures and/or operator errors, leading to overcooling under pressure, or Pressurized Thermal Shock (PTS) of the reactor vessel.** Therefore, a hearing on the safety impacts of an additional twenty years of operation and embrittlement of the reactor pressure vessel is imperative to protecting the public health and safety affected by this proceeding.

The Nuclear Regulatory Commission is in the process of revising the PTS Rule and we believe that its promulgation should precede any Operating Licence renewal proceedings. Hence, we, thereby, move that the Palisades Operating License renewal proceedings be postponed until such time as the Revised PTS Rule is promulgated and challenges to its validity may be brought forth within the scope of the Palisades Operating License Renewal proceedings.

Petitioners' Motion, Attachment: E-mail transmission from Demetrios Basdekas to Ms. Hirt, Mr. Paul Gunter of NIRS, and Petitioners' Counsel Terry Lodge (Aug. 2, 2005) [hereinafter Basdekas E-mail].

[30]Petitioners' Motion, Attachment: Declaration of Alice Hirt (Jan 27, 2006) [hereinafter Hirt Declaration). In her declaration Ms. Hirt states, in relevant part, as follows:

> Although Mr. Basdekas had long since resigned as an expert witness for the Petitioners-Intervenors by November 2005, sometime within the 14 days after the November prehearing conference, I spoke with him by telephone. I told him that his name had come up in a not-too-positive context, referring to the record comments by NRC Staff Attorney Uttal that she had never heard of Mr. Basdekas, who is a former NRC staff engineer.
>
> I further described to Mr. Basdekas the NRC Staff's objection to the affidavit testimony of Dr. Ross Landsman which we Petitioners had proffered in support of one of our contentions. I explained to Mr. Basdekas that the NRC Staff counsel had brought up at the hearing 18 U.S.C. Sect. 207, a federal law that restricts former federal workers from providing expert testimony before courts and other tribunals under some circumstances. From this point in conversation and in later conversations I had with him, Mr. Baskedas become solely focused about how soon he could see those pages of the November 3-4 transcript in which his name was mentioned.

proceeding," particularly in light of the early date on which Mr. Basdekas declined to be their expert, and suggests that Petitioners in their Response "inappropriately denigrate[ ] both the Board and the Staff."[31] In addition, NMC makes various arguments to the effect that Petitioners' suggestion that Mr. Basdekas' decision not to serve as their expert was "immaterial and irrelevant," is "erroneous,"[32] stating that Basdekas' decision is material and relevant under the requirement at 10 C.F.R. § 2.309(f)(1)(v) for a "concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue *and on which the petitioner intends to rely at hearing*. . . ."[33] NMC asserts that Petitioners' provision of new statements by Basdekas, to "backfill the loss of their expert," is too late and should not be considered by us.[34] Finally, NMC argues that, "[n]ow lacking even [the] minimal support [of Mr. Basdekas as their expert], the contention is clearly inadmissible . . . ."[35]

In its response to Petitioners' January 27 Motion, NMC asserts that Petitioners' allegation that it had "smeared" Petitioners is unfounded, as it provided precedent for its prior arguments. NMC also reiterates the legal support for the duty to alert NRC adjudicatory bodies to new relevant and material information, again asserting that the issue of whether Petitioners' Contention 1 is supported by expert opinion is a matter properly before the Board under 10 C.F.R. § 2.309(f)(v); argues that Petitioners' allegations of improper conduct on the part of the NRC Staff are baseless, and that their "attack" on Staff Counsel is "frivolous" and provides no

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[31] NMC Reply at 2.

[32] *Id.* at 3.

[33] *Id.* at 3.

[34] *Id.* at 4.

[35] *Id.*

basis to depose counsel; and makes further legal arguments against the actions sought in Petitioners' Motion.[36] NMC concludes:

> . . . Clearly, whether Petitioners contention is supported by any expert opinion is a matter properly considered by the Board (see 10 C.F.R. § 2.309(f)(v)), and the only irregularity in this proceeding has been Petitioners' failure to inform the Board that Mr. Basdekas had declined to serve as Petitioners' expert. It is unfortunate that, rather than recognizing they should have informed the Board of this information, Petitioners instead make silly claims and requests that would only disrupt this proceeding further. Rather than brooking such disruption, the Board should deny Petitioners' Motion and, in the interest of maintaining a fair and orderly proceeding, proceed with the prompt issuance of its decision ruling on Petitioners' proposed contentions.[37]

Parties' Allegations – NRC Staff

In addition to the arguments described in our Memorandum and Order, the Staff in its January 9 Reply to Petitioners January 3 Response challenges the accuracy of some of Petitioners' statements about Mr. Basdekas having "consulted extensively" with them,[38] and submits additional arguments on why Contention 1 should be ruled inadmissible, based on the new information provided in Petitioners' Response.[39] Among other things, the Staff asserts that any argument by Petitioners that the contention was "merely inartfully drafted and that an expert, one Mr. Basdekas, has site specific knowledge that told him that the embrittlement at Palisades is of a special nature," should not be considered by us.[40]

In its Response to Petitioners' Motion the Staff suggests that Petitioners' "baseless and frivolous attacks on Staff counsel should not be permitted by the Board."[41] The Staff asserts

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[36]NMC Response to Motion at 1-3.

[37]*Id.* at 3-4.

[38]Staff Reply at 5 & n.4.

[39]*See id.* at 5-15.

[40]*Id.* at 9; *see id.* at 12-13.

[41]Staff Response to Motion at 4 n.11 (quoting *Nuclear Management Co, LLC* (Monticello Nuclear Generating Plant), CLI-06-06, 63 NRC at __ (slip op. at 4 n.18), in which the Commission noted that "the (continued...)

that Counsel's communication with Mr. Basdekas was proper in that Mr. Basdekas was not a represented person, not covered under ABA Model Rule 4.2, and that no other possible ethical problems existed with such communication — Mr. Basdekas' status with Petitioners was not confidential, Staff argues, and, given the requirements of 10 C.F.R. § 2.309(f)(v) for expert opinion to support contentions, his opinion is relevant to the subject of our decision on Contention 1.[42] Further, Staff argues, while its Counsel fulfilled an ethical obligation to provide the notification in question to the Board and parties, Petitioners' Counsel misrepresented the status of Petitioners' purported expert during oral argument, in violation of ABA Model Rule 3.3, which "forbids lawyers from 'knowingly mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer.'"[43]

Nor, according to the Staff, did its Counsel misrepresent any of Mr. Basdekas' statements; instead, Staff contends, Petitioners actually confirm Staff Counsel's statements in her e-mail, through provision of Mr. Basdekas' own earlier e-mail to Petitioners, in which he specifically indicated that his statement applied to all nuclear plants, not just Palisades.[44] Moreover, Petitioners' statement in their Motion that they "used Basdekas' version of the embrittlement contention — which adds a specific reference to Palisades — precisely as Mr. Basdekas had

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[41](...continued)
use of intemperate and disrespectful rhetoric . . . has no place in filings before the Commission or its Boards.").

[42] *Id.* at 5-7 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993) (discussing the ethics consequences of *ex parte* contacts with expert witnesses for other parties).

[43] *Id.* at 8-9 (citing MODEL RULES OF PROF'L CONDUCT R.3.3(a)(1); *Browns Ferry*, ALAB-677, 15 NRC at 1394; Tr. at 48); *see id.* at 7-9.

[44] *Id.* at 10.

written it,"[45] is, according to the Staff, "yet another misrepresentation to the Board by Petitioners' counsel."[46] The Staff also disputes Petitioners' allegation of intimidation, noting that Mr. Basdekas had declined to be Petitioners' expert four months prior to contacting Staff Counsel,[47] and that it was Mr. Basdekas who initiated the contact with Staff Counsel.[48]

Duties of Counsel in this Proceeding

— Relevance of Information on Expert's Availability

As should be obvious from the preceding summaries of the parties' recent filings, much of the argument relating to Mr. Basdekas, and whether it should have been disclosed that he had in August 2005 declined to be Petitioners' expert on embrittlement, centers on the relevance of his availability for any hearing to any of the rulings the Board is required to make in this proceeding. For this reason, before addressing directly how the various duties of lawyers specifically come into play in the proceeding, I will focus on this issue of relevance to a somewhat greater extent and in a bit more detail than we provide in our Memorandum and Order.

The issue of relevance arose with Mr. Basdekas' December 20, 2005, call to Staff Counsel, and Counsel's subsequent e-mail to the Board and parties.[49] The Board then issued the December 21, 2005, Order, noting the contents of the e-mail, and that "[i]n view of this very significant development . . . the Board would like a response from Petitioners"; permitting

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[45]Petitioners' Motion at 5.

[46]Staff Response to Motion at 10.

[47]*Id.* at 11-12.

[48]*Id.* at 12-13.

[49]*See* the Board's Memorandum and Order at 10 n.37.

replies by the Staff and NMC; and setting deadlines for these.[50] The need for a response arose out of the unusual nature of the information conveyed in the e-mail, namely, that the person identified as the "Petitioners' expert on embrittlement" was said to have telephoned Staff Counsel and made the statements Counsel recounted, a somewhat remarkable circumstance in itself; as well as out of the possibility that this information, if true, might arguably, or "conceivably," be relevant to Petitioners' ability to litigate effectively the issues put forth in Contention 1 and its proffered basis, if admitted.

We note in our Memorandum that certain verbal exchanges between myself and both Petitioners' Counsel and Staff Counsel during oral argument indicated at that time that it was "conceivable," at least, that Mr. Basdekas' actual availability for any hearing that might be granted in the proceeding on Contention 1 could have been relevant to a determination on the admissibility of Contention 1.[51] Additional clarification on this issue may be helpful.

Concern about the ability of petitioners to effectively litigate legally appropriate issues is part of what underlies the contention admissibility standards. As the Commission explained in the *Oconee* case,

> By raising the admission standards for contentions, the Commission intended to obviate serious hearing delays caused in the past by poorly defined or supported contentions.
> . . . .
> . . . Admitted intervenors often had negligible knowledge of nuclear power issues . . . . Congress therefore called upon the Commission to make "fundamental changes" in its

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[50] 12/21/05 Order and Revised Notice at 1. As to Petitioners' concern that the "strong implication" of our Order was "that Petitioners ha[d] committed an unspecified wrong," Petitioners' Response at 1, until we were informed by Petitioners themselves, in their January 3, 2006, Response, that their "tentative" expert had declined to assist them on August 22, 2005 (only two weeks after they filed their Petition), we were actually quite open, in issuing our December 21, 2005, Order, to any explanation that might indicate that Staff Counsel had misunderstood the situation or, for example, that Petitioners had indeed lost their expert but that this was recent, unexpected, unavoidable, and/or involved other circumstances. In any event, we ultimately do not in our consideration of Contention 1 take into account the actual failure to provide the information prior to responding to our December Order, as this circumstance, although questionable from the standpoint of Counsel's duties as a lawyer (as I discuss herein), is not relevant to the admissibility of the contention.

[51] *See* Memorandum and Order at 16 & n.66.

> public hearing process to ensure that "hearings serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by *qualified intervenors*." H.R. Rep. No. 97-177, at 151 (1981).[52]

Notably, the Commission in discussing the contention admissibility standards also uses language suggesting that whether petitioners have "expert assistance" can be related to how "qualified" petitioners may be to effectively litigate issues put forth in contentions, and whether contentions should therefore be admitted.[53]

Petitioners in NRC proceedings show that they are "qualified" to litigate their contentions in a hearing through the drafting of their contentions and bases therefor, which may include demonstration that they have expert assistance to address the issues they raise — sometimes in the form of an affidavit or written statement of the expert's opinion, although this is not required.[54] The importance of such demonstration of expert assistance in rulings on the admissibility of contentions depends on how well a contention and its basis, apart from such demonstration, meet the relatively strict requirements of 10 C.F.R. § 2.309(f)(1), as interpreted through a fairly extensive body of case law.

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[52] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) (emphasis added). The Commission also stated as follows:

> This is not to say that our contention rule should be turned into a "fortress to deny intervention." [*Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)]. The Commission and its boards regularly continue to admit for litigation and hearing contentions that are material and supported by reasonably specific factual and legal allegations. *See, e.g.*, [*North Atlantic Energy Services Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-21 (1999)]; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, *aff'd*, CLI-98-13, 48 NRC 26 (1998)

Id. at 335.

[53] *See id.* at 342; *see also* section V.A of the Board's Memorandum and Law at 22, in our discussion of the requirements of 10 C.F.R. § 2.309(f)(1)(v).

[54] *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 118 (1995)).

Of course, given the nature of law and the possibility of informed disagreement on most legal issues, the admissibility requirements of 10 C.F.R. § 2.309(f)(1) and case law precedent interpreting them may not always lead ineluctably to completely clear-cut and completely agreed-upon rulings on admissibility of contentions — particularly when read in conjunction with relevant rules and case law on substantive and technical matters — and the precise ways in which expert support may play into such rulings can vary. The following three hypothetical situations illustrate this.

In some situations, the support offered for a contention may be clear on its face, and the substance of such support specified and explained to such an extent that it clearly constitutes information demonstrating a genuine dispute on an in-scope material issue and otherwise meeting the requirements of 10 C.F.R. § 2.309(f)(1). In such a situation, if part of the support offered is the clear statement of an expert that *on its face* is sufficient, taken in combination with whatever other support is offered, to satisfy the contention admissibility requirements, then the actual availability of an expert named in the contention's basis will not be relevant to the admissibility of the contention. Once the contention is admitted, new expert support for a hearing on the issues raised in the contention may be obtained if the original expert is no longer available for any reason.

In other cases the support for a contention may be so deficient on its face, in putting forth a genuine dispute on an in-scope material issue or otherwise meeting the requirements of section 2.309(f)(1), that it must clearly be denied. In this situation, the availability of any expert cited would also be irrelevant to the admissibility of the contention, because even with the expert support offered the contention is clearly inadmissible.

In some cases, however, notwithstanding that the support for a contention is weak and that the contention might not meet every "technicalit[y]"[55] of the specific criteria of section 2.309(f)(1), it may appear that a valid and significant issue has been raised, with "reasonably specific factual and legal allegations"[56] and sufficient support that "further inquiry"[57] might be warranted — possibly because a petitioner is found to be "qualified"[58] and able to litigate effectively the significant issue raised, *by virtue of* expert assistance[59] that may not be clearly stated in the form of an opinion on a pertinent subject but that is represented in the basis of the contention to be relied upon for, and therefore *available* at, any hearing on the contention. In this example, the actual availability or unavailability of such an expert to assist in litigating a contention might result in a "scales of justice," otherwise evenly balanced, tipping in one or the other direction on the issue of the admissibility of the contention.

Even though there may be differing views on which of these three "types" any given contention falls within, the third example demonstrates how information about the actual availability of an expert can "conceivably affect" the outcome of a ruling on the admission of a contention and thereby the outcome of a proceeding, and the resulting relevance of the information recounted in Staff Counsel's December 20 e-mail (and need for a response from Petitioners and appropriate argument by all parties on it). I provide this explanation not to suggest how any such information has or has not played into any ruling in this case, but solely

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[55] *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979); *see also* Memorandum and Order, Section V.A, p. 23.

[56] *Oconee*, CLI-99-11, 49 NRC at 335.

[57] *Yankee*, CLI-96-7, 43 NRC at 249 (citing *Georgia Tech*, CLI-95-12, 42 NRC at 118); *Conn. Bankers Ass'n v. Bd. of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980); *see also* Memorandum and Order, Section V.A, p. 25.

[58] *Oconee*, CLI-99-11, 49 NRC at 334.

[59] *See id.* at 342; *see also* Memorandum and Order, section V.A at 22.

to illustrate how the availability or unavailability of an expert "may conceivably affect the outcome" of an NRC adjudicatory proceeding with regard to a particular contention and its admissibility under the standards of 10 C.F.R. § 2.309(f)(1).[60]

— ***Counsel's Duty to Disclose***

The preceding demonstrates the appropriateness of Staff Counsel's December 20, 2005, notification.[61] As to Petitioners' Counsel, a duty to disclose this information certainly arose during oral argument, after it became clear that one Board member considered the question, whether the Petitioners' cited expert would appear at any hearing to assist Petitioners in litigating Contention 1, to be at least arguably, or "conceivably,"[62] relevant to the issue of whether Petitioners had demonstrated sufficient basis for Contention 1 to warrant "further inquiry."[63]

More specifically, at one point, in questioning Petitioners' Counsel, I (the Board member in question) stated, "Now, you have identified an expert who is retired from the NRC," and then stated shortly thereafter, "if we were to admit this contention . . . [y]ou have an expert, the expert can talk about what happened at the Palisades plant. . . . Okay. What's the impact of

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[60] *Pastore*, 469 U.S. at 240; *Shaffer*, 11 F.3d at 459

[61] As to the form of the notification being in an e-mail rather than a formal motion or other pleading, as stated in the Board's Memorandum and Order, at 15, the information was provided to all parties and placed in the record, and no relief was being sought. Moreover, one of the benefits often associated with administrative adjudication is that, when appropriate, allowing for greater informality can both promote greater efficiency and reduce costs for parties. Although Petitioners raise a question suggesting some appearance of familiarity between Staff Counsel and the Board, an appearance that should of course always be avoided, in this instance the information was imparted to all, there is nothing inherent in it suggesting anything inappropriate, and the Board did not take it as such. Informality should not in any event be equated with familiarity, and if the dignity of the proceeding is not compromised, then there would seem to be nothing improper in an e-mail communication on subject matter not requiring a formal motion or other pleading.

[62] *See supra* note 7.

[63] *See supra* note 57.

that?"[64] At each of the points marked by the ellipses Petitioners' Counsel responded, "Right." Later, in questioning Staff counsel, I stated:

> There's also case law that says the contention rule should not be used [as] a fortress to deny intervention[,] that what you need is enough to indicate that further inquiry is appropriate. . . . Basically something to indicate that the petitioners are qualified, able to litigate the issue that they raise. So what we have here is [—] we have an allegation that the application is incomplete for failure to address the continuing crisis of embrittlement[,] supported by this factual allegation about early embrittlement and the identification of an expert who used to work with the NRC. So on the face of that it would seem that that provides something to indicate that further inquiry might be appropriate.[65]

Counsel thus had two direct opportunities to correct the obvious misimpression, initially created by the reference to "Petitioners' expert on embrittlement" in the basis for Contention 1 in the Petition and further fostered by Counsel's affirmative response in oral argument, that Mr. Basdekas, formerly an NRC employee, would assist Petitioners at any hearing on Contention 1 — in a context in which this was of significance to a Board member in deliberating whether to admit Contention 1. And Counsel had further opportunity to correct his previous affirmative statement, at any point during the remainder of oral argument, which continued the same day the quoted statements were made, and the following morning. Counsel's failure to disclose the true situation with regard to Mr. Basdekas is questionable at the very least.

Giving Counsel the benefit of every doubt, however, it appears possible, based on an overall picture of his conduct to date in this proceeding as the Petitioners' attorney, that some level of confusion and disorganization on Counsel's part may have played some role in his failure to disclose the information in question.[66] I would therefore not find that Counsel's conduct in this proceeding has risen to a level that would require any discrete action regarding

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[64]Tr. at 47-48; *see* Memorandum and Order, p. 16 n.67.

[65]Tr. at 149-50.

[66]I will assume that the failure was not related to the sort of "clever device[ ] . . . to mislead" noted by the *Shaffer* Court. *Shaffer*, 11 F.3d at 458.

it. I do, however, in view of the entire situation as it has evolved with regard to Mr. Basdekas, feel a responsibility to remove any confusion about Counsel's (1) duty to update any tribunal, including this one, "of any development which may conceivably affect the outcome" of any litigation[67]; (2) ethical responsibility *not* to knowingly "make a false statement of fact or law to a tribunal or fail to correct a [previous] false statement"[68]; and (3) even broader "duty of candor" as an "officer of the court."[69] And Counsel has a responsibility to familiarize himself with, and pay due attention to, these duties, compliance with any of which would have led him to make the appropriate disclosure, in the words of Justice O'Connor, "honestly and directly."[70]

— Counsel's Duties Related to Contention Pleading

Given the relationship of the situation at hand as it has developed in recent months to the initial pleading in this proceeding, some attention to the issue of contention pleading in NRC adjudications is also in order. As should be clear at this point, the contention admission stage of an NRC proceeding is in many cases the most critical stage, in that it is generally at this stage that it is determined whether a hearing will be held to litigate issues raised by petitioners.[71] For this reason, how well contentions and their bases are drafted, and how well the contentions are supported, in the context of the strict contention admissibility requirements, is of great importance for petitioners wanting a full hearing on their various contentions. Attention to detail — in becoming familiar with relevant regulatory requirements and case law, and in drafting the contentions and bases — is crucial.

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[67] *See supra* note 7.

[68] *See supra* note 6.

[69] *See supra* notes 9, 10.

[70] O'Connor, *supra* note 14, at 8.

[71] Of course, in some proceedings, such as enforcement cases, a party against whom such a case is brought has a *right* to a hearing. *See* 10 C.F.R. § 2.202(a)(3), (c).

It is also important to note, with regard to section 2.309(f)(1)(iii) of the contention admissibility requirements, that the scope of an admissible contention in a license renewal proceeding will be narrower than in some other types of proceedings. For example, the Commission in the *Turkey Point* case, quoting from its earlier rulemaking on license renewal, stated that it

> cannot conclude that its regulation of operating reactors is "perfect" and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all NRC requirements. However, based upon its review of the regulatory programs in this rulemaking, the Commission does conclude that (a) its program of oversight is sufficiently broad and rigorous to establish that the added discipline of a formal license renewal review against the full range of current safety requirements would not add significantly to safety, and (b) such a review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety.[72]

As discussed in Section V.B of our Memorandum and Order, the Commission has spoken to the scope of license renewal proceedings both in regulations and case law, which any petitioner seeking a hearing in a license renewal proceeding must be prepared to address.[73]

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[72] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001) (quoting Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,945 (Dec. 13, 1991)).

[73] A reasonable starting point in the license renewal regulations would be section 54.29, mentioned in our ruling on Contention 1 in the Board's Memorandum and Order. *See* Memorandum and Order, pp. 26, 40. Section 54.29 addresses the "[s]tandards for issuance of a renewed license," stating that:

> A renewed license may be issued by the Commission up to the full term authorized by § 54.31 if the Commission finds that:
>
> (a) Actions have been identified and have been or will be taken with respect to the matters identified in paragraphs (a)(1) and (a)(2) of this section, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the [current licensing basis, or CLB], and that any changes made to the plant's CLB in order to comply with this paragraph are in accord with the Act and the Commission's regulations. These matters are:
>
> (1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under § 54.21(a)(1); and
>
> (2) time-limited aging analyses that have been identified to require review under § 54.21(c).

(continued...)

The interrelationships between the various license renewal rules is relatively complex, and the relationship between these rules, the contention admissibility rules, and other rules governing particular technical issues relating to nuclear power plants can also be complex.[74] Thus it is particularly important in license renewal proceedings that petitioners and their counsel become familiar with not only the regulations and case law on contention admissibility, but also those on license renewal and the scope of these proceedings.

It appears this was not done as effectively as it might have been by Petitioners and their Counsel in this proceeding, and Counsel, presumed to have the knowledge, training and skill to deal with such issues, bears the responsibility for this. Yet it appears, considering Counsel's statement at oral argument that the contention drafting was done in a "committee type fashion,"[75] that some or all of the drafters were non-attorneys. Thus it is not surprising that it appears quite possible that there was some confusion on the part of the drafters of Contention

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[73](...continued)

(b) Any applicable requirements of subpart A of 10 CFR part 51 have been satisfied.

(c) Any matters raised under § 2.335 have been addressed.

Any petitioner would also need to be familiar with other parts of Part 54, particularly those noted in our Memorandum and Order at Section V.B, as well as Part 51, and relevant case law pertaining to both sections. *See* Memorandum and Order, p. 26 n.103.

[74]One such relationship that arose during oral argument was the relationship between 10 C.F.R. § 50.61, having to do with embrittlement, and Part 54. As Staff Counsel observed, a contention "could be formulated that would say compliance with 50.61 is not enough to meet part 54." Tr. at 138. There was various discussion regarding section 50.61 during oral argument, including, for example, on NMC's past determinations that it would not be "reasonably practicable" to install neutron shields to reduce fluence, as provided at section 50.61(b)(3), and whether cost effectiveness should play into such determinations, *see, e.g., id.* at 58-65, 154-56, 172-73, 259-61; and on NMC's plan to manage the effects of aging and embrittlement by submitting information to the NRC in compliance with section 50.61(b)(7) at least three years before it is projected to exceed the PTS criterion in 2014, which would also be three years into the sought 20-year term, *see, e.g., id.* at 36, 53-57, 65-69, 82-83, 91-92, 94-96. Staff Counsel also, of course, argued that this contention does not really assert that compliance with section 50.61 is "not enough to meet part 54," stating, "that's not the contention here." *Id.* at 138. And indeed, there is no reference at all to section 50.61 in the contention.

[75]Tr. at 34; *see id.* at 178.

1,[76] both with regard to Mr. Basdekas' status as either "Petitioners' expert on embrittlement"[77] or only their "tentative"[78] expert at the time of submission of the Petition, and with regard to his actual statement, which in his e-mail but not the contention contained the words "or any plant."[79] As to the latter, this makes no difference in the outcome on Contention 1, as it has in any event been clear from the outset that the only statement specifically attributed to Mr. Basdekas indeed applies to any nuclear power plant. But these examples do suggest an unfortunate lack of attention to detail on the part of the drafters.[80]

Regardless of who drafted the contention, however, Counsel has, as noted above, an obligation to assure that the representations made in all pleadings "to the best of his or her knowledge, information and belief . . . are true."[81] He also has an obligation to serve his clients with the "thoroughness and preparation reasonably necessary for the representation" he undertakes.[82] Counsel is held to a higher standard of conduct based upon his professional status as an attorney, and any lawyer should always bear in mind that any violation of any ethical standard or other requirement placed on him or her as an officer of the court not only reflects badly on the lawyer, but also ill-serves the lawyer's client — among other ways, by

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[76]I am mindful of Counsel's representations in oral argument that the drafting of Contention 1 and other contentions was "essentially done and accomplished in a committee type of fashion," Tr. at 34, "involving many many dozens of volunteer hours . . . ." Tr. at 178.

[77]Petition at 2.

[78]Petitioners' Response at 3; *see* Basdekas E-mail, *supra* note 29.

[79]*Id.*

[80]Additional attention to detail would have been appropriate, as indicated in our Memorandum and Order, with regard to various of the contention admissibility requirements of section 2.309(f)(1).

[81]10 C.F.R. § 2.304(c); *see also* FED. R. CIV. P. 11.

[82] MODEL RULES OF PROF'L CONDUCT R. 1.1; *see supra* note 3.

virtue of the fact that in many instances inadequacies on the part of counsel will necessarily play into the legal rulings a tribunal must, as part of its duties, make.

I recognize that the June 2005 *Federal Register* Notice regarding the application herein at issue might itself be viewed as being somewhat confusing in its recitation at one point of some of the contention-pleading requirements but not others.[83] A citation to the correct rules is found in the notice, however,[84] and Counsel should at a minimum have consulted these rules.[85] Close attention to them would have placed Petitioners, through their Counsel, with whatever expert assistance they had, in a much better position to draft admissible contentions.[86]

— ***Counsel's Duties Regarding Tone of Discourse***

Counsel would also do well to bear in mind the general inappropriateness of "intemperate and disrespectful rhetoric,"[87] as well as its ineffectiveness in representing a client's position. Of course, in the "heat of battle" in litigation, strong feelings may arise, which may sometimes

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[83] *See* 70 Fed. Reg. at 33,534. For example, no mention is made of the requirement at 10 C.F.R. § 2.309(f)(1)(vi) to refer to specific sections of the application.

[84] *See id.* We also note that, two paragraphs above the arguably confusing language, the following statements are found:

> Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's Public Document Room (PDR), . . . and is accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at http://www.nrc.gov/reading-rm/adams/html. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff at 1-800-397-4209, or by email at pdr@nrc.gov.

Id.

[85] For example, had he done so, he would have known of the requirement for references to sections of the application. *See supra* note 83.

[86] I note Counsel's statement of "some misunderstanding of exactly what the expectations were," made in the context of discussing the drafting of the contentions. Tr. at 178. His candor in this instance is noted, and it is recognized that his representation of Petitioners may be in part in the nature of public service, depending on his fee arrangements with them. But this, if true, would still not in any way diminish his duty of competent representation of his clients. *See supra* note 3.

[87] *Monticello*, CLI-06-06, 63 NRC at __ (slip op. at 4 n.18).

be accompanied by emphatic language, and it would be inappropriate to find all such language to be intemperate or disrespectful. The question is one of limits and boundaries of appropriateness. When I consider the parties' pleadings that have been filed since our December 21 Order, I view them from this perspective.

In such light, I do not find NMC's or the Staff's filings to cross any limit or boundary of "intemperate or disrespectable" language. Nor do I find anything in either NMC and the Staff's January 9 Replies that would constitute a "smear" or "attack," as alleged by Petitioners through their Counsel,[88] and to the contrary find the allegation to be exaggerated, at least. I do find NMC's references to "silly claims and requests"[89] to be somewhat condescending, and not the most desirable language to use in a legal setting. The reference is unnecessary, and unnecessarily likely to heighten the level of rancor in any highly-contested dispute; and while it might be stated verbally in a manner that would offend less, in writing it is less acceptable. But this reference is really somewhat tame in comparison to some of the exaggerated allegations used by Petitioners' Counsel, particularly in their most recent filing.

A review of Petitioners' January 27 Motion reveals a number of examples that are at least immoderate in tone and often are mere allegations with no supporting examples or authority provided — for example, references to a "spin and innuendo campaign,"[90] "bullying,"[91] and the proceeding being "hijacked by . . . baseless consideration of an issue not properly before the

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[88]Petitioners' Motion at 2.

[89]NMC Response to Motion at 4.

[90]Petitioners' Motion at 2.

[91]*Id.* at 4.

Board,"[92] just to name a few. Whatever the reasons for these and similar other expressions, the general tenor of them leaves something to be desired, and Counsel should be aware, not only of the negative impact and ineffectiveness of such an approach, but also of his duty as an officer of the court to conduct himself with more dignity, befitting a member of the legal profession.

Allegations of Intimidation

Regarding alleged "intimidation" of Mr. Basdekas by Staff Counsel,[93] after carefully considering all of the information relating to his call to Staff Counsel and the surrounding circumstances, I find no indication of any intimidation. Counsel appropriately saw it as her obligation to raise the issue of the compliance of another expert relied on by Petitioners with the requirements of 18 U.S.C. § 207, and, as Staff points out, the Staff never objected to the testimony of Mr. Basdekas, because his testimony would not have fallen under the restrictions that assertedly applied to the other expert.[94] Although it appears Mr. Basdekas was concerned as a result of Ms. Hirt's call to him about matters discussed at oral argument,[95] his own call to Staff Counsel (likely to set the record straight regarding his involvement with Petitioners) indicates he was not intimidated.

Nor should any of the circumstances relating to Mr. Basdekas, and any disclosures that were or should have been made regarding his availability, in any way discourage or "chill" any participation by any expert in any proceeding. Without doubt, it may be difficult for some

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[92] *Id.* at 8. I would note that in the paragraph following this last reference, Petitioners through their Counsel urge that "the integrity of procedural rules is dependent upon consistent enforcement." *Id.* I agree with this statement, and hope that my explanation herein provides a clearer view of what this involves.

[93] Petitioners' Motion at 3.

[94] *See* Staff Response to Motion at 11.

[95] *See* Petitioners' Motion at 3; *id.*, Hirt Declaration.

petitioners to find experts to assist them in challenging proposed actions regarding nuclear power plants. And sometimes experts not mentioned in contentions may be called as witnesses in hearings. Assuming no relevant legal prohibitions, the participation of experts to assist petitioners, both at the contention stage of proceedings through the provision of statements and opinions as required by 10 C.F.R. § 2.309(f)(1)(v), as well as at the hearing stage through consultation and testimony in the litigation of admitted contentions, should be encouraged, in order to promote more effective litigation of real and significant issues in adjudicatory proceedings.

Final Thoughts

In closing, I would note that this Licensing Board, like all others, is bound by existing law and rules, and indeed our integrity and independence as judges is grounded in our following such law and rules, applying them in all our rulings, and not being swayed by any other influence, from whatever source. All parties, including petitioners, are also bound by such law, and any party wishing to prevail in an NRC adjudication proceeding can do so only through compliance with existing law and rules, including the strict requirements of the contention admissibility rules and all other relevant law. I appreciate that this may be difficult for some petitioners, and hope that this Statement, taken together with our summary of the law on the admissibility of contentions in Section V.A of our Memorandum and Order, makes clearer the steps that must be followed by petitioners and their counsel in NRC adjudicatory proceedings. To the extent one disagrees with existing law, including regulations governing matters at issue in this proceeding, this is best addressed through means other than adjudication; for example, through a petition for rulemaking or a request for waiver of a rule under 10 C.F.R. § 2.335(b).

Finally, I would point out two additional items of which Petitioners may wish to take note. First, in the *Turkey Point* proceeding, the Commission stated that "any change to a plant's

licensing basis which requires a license amendment – *i.e.*, a change in the technical specifications – will itself offer an opportunity for hearing in accordance with Section 189 of the Atomic Energy Act."[96] Some of the matters discussed at oral argument in this proceeding dealt with the possibility of such an opportunity for a hearing with regard to future actions related to embrittlement,[97] and Petitioners may wish to prepare for any such opportunity in light of the findings, conclusions, and comments in this Board's Memorandum and Order and this Additional Statement. Further, they may wish to provide any information they have on any environmental justice or other relevant environmental issues, as part of the SEIS notice-and-comment process with regard to the Palisades plant. The *Turkey Point* decision of the Commission provides additional guidance on the SEIS process.[98]

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[96] *Turkey Point*, CLI-01-17, 54 NRC at 10.

[97] *See* Tr. at 84, 86-87, 110-18, 124-29, 182-85, 228-29.

[98] *See Turkey* Point, CLI-01-17, 54 NRC at 11-13.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NUCLEAR MANAGEMENT COMPANY, LLC	)	Docket No. 50-255-LR
	)	
	)	
(Palisades Nuclear Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON STANDING, CONTENTIONS, AND OTHER PENDING MATTERS) (LBP-06-10) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-255-LR
LB MEMORANDUM AND ORDER (RULING ON STANDING, CONTENTIONS, AND OTHER PENDING MATTERS) (LBP-06-10)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 7th day of March 2006