

November 6, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SYSTEM ENERGY RESOURCES, INC.) Docket No. 52-009-ESP
)
(Early Site Permit for Grand Gulf ESP Site))

NRC STAFF ANSWER TO PETITIONERS' REQUEST FOR
ADMISSION OF LATE-FILED ENVIRONMENTAL CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission (“Staff”) hereby files its answer to the “Nuclear Information and Resource Service, Public Citizen, and Sierra Club Request for Admission of Late-Filed Environmental Contention,” dated October 12, 2006 (“Late-Filed Contention”). As discussed below, the Staff submits that the contention, which concerns terrorism, does not satisfy the Commission’s standards for late-filing, and does not meet the Commission’s legal standards for an admissible contention. Therefore, the request for admission of the late-filed contention by Nuclear Information and Resource Service (“NIRS”), Public Citizen (“PC”), and Sierra Club – Mississippi Chapter (“Sierra Club”) (collectively, “Petitioners”) should be denied.

BACKGROUND

On October 16, 2003, System Energy Resources, Inc. (“SERI”), submitted an application pursuant to 10 C.F.R. Part 52, Subpart A, in which it requested an early site permit (“ESP”) for a site within the existing site of the Grand Gulf Nuclear Station property in Claiborne County, Mississippi. The application included, *inter alia*, an environmental report (“ER”).

On January 7, 2004, the Commission published in the *Federal Register* a Notice of Hearing and Opportunity to Petition for Leave to Intervene (“Notice of Hearing”) concerning SERI’s ESP application. See 69 Fed. Reg. 2636 (Jan. 16, 2004). In response to the Notice of Hearing, the Petitioners, along with the National Association for the Advancement of Colored People (Claiborne County, Mississippi Branch) (“NAACP”),¹ filed a joint petition for leave to intervene in the proceeding on February 12, 2004, which was then supplemented on February 17, 2004, and May 3, 2004.² Although several of the Petitioners’ contentions addressed issues arising under the National Environmental Policy Act of 1969 (“NEPA”), none of those contentions addressed the environmental impacts of a terrorist attack on the Grand Gulf ESP facility.

In a decision dated August 6, 2004, the Atomic Safety and Licensing Board (“Board”) found that the Petitioners had representational standing because they demonstrated that at least one member of each of the NAACP, NIRS, PC, and the Sierra Club could be affected by the ESP. See *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 286-88 (2004), *aff’d on other grounds*, CLI-05-04, 61 NRC 10 (2005). The Board, nonetheless, denied the Petitioners’ request for intervention after finding that the Petitioners failed to submit at least one admissible contention. See *id.* at 298.

¹ Although the NAACP joined in the 2004 petition, it has not joined the Petitioners in the Late-Filed Contention. For simplicity, the term “Petitioners” is used to refer to both the 2004 petitioners as well as the petitioners for the instant Late-Filed Contention.

² See “Hearing Request and Petition to Intervene by [Petitioners],” dated February 12, 2004; “Amended Hearing Request and Petition to Intervene by [Petitioners],” dated February 17, 2004; “Contentions of [Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant,” dated May 3, 2004; “Waste Confidence Contentions of [Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant,” dated May 3, 2004.

In April 2006, the Staff issued its final Environmental Impact Statement (“FEIS”).³ The FEIS contained public comments that the NRC received during the scoping process concerning terrorist attacks as well as similar public comments the NRC received on the DEIS. See FEIS, Apps. D & E. Appendix E of the FEIS addressed these concerns when responding to comments in two subject areas: (1) postulated accidents and (2) safeguards and security. See FEIS, App. E at E-98 to E-99, E-100 to E-103. Although the FEIS stated the Commission’s established position that consideration of terrorism is beyond the scope of NEPA, it also discussed the security review that the Staff conducted as part of its safety analysis as well as the measures the NRC is taking to protect against and to minimize the consequences of a terrorist attack. See *id.*

On October 12, 2006, the Petitioners filed the instant request for admission of a late-filed environmental contention challenging the adequacy of the Staff’s environmental review for the Grand Gulf ESP. Specifically, the contention challenges the adequacy of the FEIS by making the following assertion:

The environmental impacts of a terrorist attack have not been addressed in the NEPA documents for the Grand Gulf [ESP].

Late-Filed Contention at 1-2. The Petitioners support their contention by pointing to the mandate issued by the U.S. Court of Appeals for the Ninth Circuit in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) (“*Mothers for Peace*”).⁴

³ See NUREG-1817, Final Report, *Environmental Impact Statement for an Early Site Permit (ESP) at the Grand Gulf ESP Site*, ADAMS Accession No. ML060900037. Issuance of the FEIS followed the procedural steps set out in 10 C.F.R. Part 51 in regard to scoping and issuance of a draft environmental impact statement (“DEIS”).

⁴ The *Mothers for Peace* litigation arose from an application by Pacific Gas & Electric Company for a materials license authorizing construction and operation of a dry storage cask independent spent fuel storage installation (“ISFSI”) to be located at the Diablo Canyon Power Plant site. See *Mothers for Peace*, 449 F.3d at 1021.

For the reasons set forth below, the Staff respectfully submits that the Petitioners' Late-Filed Contention should be denied on the grounds that (1) the contention is impermissibly late, and the Petitioners have not demonstrated good cause or otherwise satisfied the other factors set forth in 10 C.F.R. § 2.309(c)(1) so as to support its admission, and (2) the contention fails to meet the Commission's standards for admissible contentions set forth in 10 C.F.R. § 2.309(f)(1).

DISCUSSION

I. Late-Filing Determination

A. Legal Standards for Late-Filed Petitions

The factors to be balanced when determining whether to entertain a late-filed petition are set forth in 10 C.F.R. § 2.309(c)(1), as follows:

- (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.

The petitioner, as the proponent of the admission of its late-filed petition, bears the burden of demonstrating that a balancing of these factors weighs in favor of entertaining its contention. See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998), *aff'd sub nom. National Whistleblower Ctr. v. NRC*, 208 F.3d 256 (D.C. Cir. 2000). It has long been held that the first factor, good cause for lateness, is the most important factor in the balancing test. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). The provisions of 10 C.F.R. § 2.309(f)(2) set forth circumstances relevant to the good cause factor that might trigger the opportunity to file a late contention – *i.e.*, the information upon which the contention is based was not previously available, is materially different than information previously available, and the contention is submitted in a timely fashion based on the availability of the subsequent information. See *Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994); *Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 69-73 (1992).

Absent a showing of good cause, a petitioner must make a “compelling” showing that the remaining factors outweigh the lack of good cause for the untimely filing. *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986). When there is not good cause, the factor set forth in 10 C.F.R. § 2.309(c)(1)(vii) – the extent to which the petitioner’s participation will broaden the issues or delay the proceeding – becomes of particular relevance, especially when the attempted intervention comes near the end of a proceeding. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983). With respect to the factor in 10 C.F.R. § 2.309(c)(viii) – the potential contribution to the development of a sound record – a petitioner is to set out with as much particularity as possible the precise issues it plans to cover and is to identify its

prospective witnesses and the contents of its proposed testimony. See *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982).

In evaluating the remaining factors, the factors in 10 C.F.R. § 2.309(c)(v) and (c)(vi) – the availability of other means to protect the petitioner’s interest and the ability of other parties to represent the petitioner’s interest – are less important factors, and are therefore entitled to less weight. See *Comanche Peak*, CLI-92-12, 36 NRC at 74. Similarly, the factors in 10 C.F.R. § 2.309(c)(ii)-(iv), which address issues related to a petitioner’s standing to intervene, are also less important. See *Puget Sound Power & Light Co.* (Skagit Nuclear Power Project, Units 1 & 2), ALAB-559, 10 NRC 162, 169 n.10 (1979).

For the reasons set forth below, the Staff submits that the Petitioners have failed to demonstrate that a balancing of these factors favors the admission of their late-filed environmental contention.

B. Petitioners Have Not Shown the Late-Filing Factors Weigh in Their Favor

1. Petitioners have not demonstrated good cause

The Petitioners’ Late-Filed Contention focuses on the asserted failure of the NRC to comply with NEPA by considering the environmental impacts of a terrorist attack. Late-Filed Contention at 1-2. While the Petitioners claim that the U.S. Court of Appeals for the Ninth Circuit’s decision in *Mothers for Peace* provides good cause for the failure to file on time because the mandate changes the legal requirements concerning NEPA review of terrorist acts, the Petitioners fail to adequately address why a contention addressing this subject was not filed sooner, and overstate the scope of the Ninth Circuit’s mandate.

First, the Petitioners fail to show good cause for failing to file this contention on time because the information upon which the contention is based was previously available and is not materially different than information previously available, and because the contention was not submitted in a timely fashion based on the availability of the purported new information.

See 10 C.F.R. § 2.309(f)(2). Although the Petitioners attempt to link their contention to the *Mothers for Peace* mandate, the alleged inadequacy in the FEIS should have been apparent at the time the Notice of Hearing was published in January 2004. If the Petitioners believed that the NRC was required to evaluate the environmental impacts of a terrorist attack, the Petitioners should have filed a contention alleging that SERI's ER failed to contain such information at the time they filed their other NEPA contentions in May 2004. See 10 C.F.R. § 2.309(f)(2) ("On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report."). Indeed, the contention Petitioners now seek to raise in this proceeding was presented in the *Diablo Canyon* proceeding some four years ago. Likewise, if the Petitioners believed that the information in the DEIS or the FEIS was materially different than previously available information, then the Petitioners should have submitted a late-filed contention shortly after the issuance of these documents in April 2005 and April 2006, respectively. Accordingly, the Petitioners have failed to demonstrate good cause for failing to file on time because the information upon which the Petitioners base their contention was previously available and was not materially different than information previously available.⁵

Admittedly, the Commission's position that the environmental impacts of a terrorist attack need not be considered under NEPA was clearly stated at this time.⁶ However, if the Petitioners disagreed with this determination, the Petitioners should have filed a contention

⁵ Furthermore, even if one were to accept that the *Mothers for Peace* decision is somehow relevant in assessing whether there was good cause for failure to file on time, the Petitioners could have filed this very contention shortly after the filing of the *Mothers for Peace* decision on June 2, 2006. Instead, the Petitioners waited until October 12, 2006, more than four months after the decision was filed, to submit their contention.

⁶ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002) ("*PFS*"); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358 (2002).

addressing this issue in 2004 and sought judicial review upon exhausting their administrative remedies.⁷ As the U.S. Court of Appeals for the Seventh Circuit explained in discussing waiver, “a litigant cannot simply sit back, fail to make good faith arguments and then, because of developments in the law, raise a completely new challenge.” *Old Ben Coal Co. v. DOL*, 62 F.3d 1003, 1007 (7th Cir. 1995) (holding there was no waiver because litigant consistently challenged claim). See also *Carr v. O’Leary*, 167 F.3d 1124, 1126-27 (7th Cir. 1999) (finding waiver of a defense where litigant failed to argue an extension of existing caselaw).

Second, the *Mothers for Peace* mandate does not alter Commission-wide policy and thus cannot provide good cause for consideration of a late-filed environmental contention. The Ninth Circuit ruled that an evaluation of terrorism was required in an environmental assessment for the ISFSI at Diablo Canyon. *Mothers for Peace*, 449 F.3d at 1035. In its decision, the Ninth Circuit specifically rejected the rationale for the Commission’s decision that the impacts of terrorism need not be considered under NEPA, a rationale that was stated in *PFS*. See *Mothers for Peace*, 449 F.3d at 1028. However, inasmuch as the licensee in the *Mothers for Peace* case has filed a petition for a writ of certiorari with the United States Supreme Court, the Ninth Circuit’s decision may yet be modified or reversed. See Petition for a Writ of Certiorari, *Pacific Gas & Elec. Co. v. San Luis Obispo Mothers For Peace* (Sep. 29, 2006) (No. 06-466), 2006 WL 2826275. Given the ongoing nature of these developments, the Commission has not altered its position regarding evaluation of the environmental impacts of a terrorist attack. Furthermore, the Grand Gulf ESP proceeding is not an adjudication in which the Ninth Circuit is a potential venue for review of the Commission’s final action. See 28 U.S.C. § 2343. Accordingly, the Board should continue to apply established Commission precedent until the

⁷ If the petitioner in the *Diablo Canyon* proceeding had taken the Petitioners’ approach and delayed filing their contention, the *Mothers for Peace* decision might never have issued.

Commission acts to reverse its position.⁸ In view of the foregoing, there is not good cause to admit this contention.⁹

2. Petitioners have not made a compelling showing on the remaining factors

With respect to the factor set forth in 10 C.F.R. § 2.309(c)(1)(vii), the Petitioners acknowledge that their “participation will broaden and delay this proceeding.” Late-Filed Contention at 9. Given that this proceeding is currently uncontested and the only remaining issues left to resolve are the mandatory hearing issues set forth in the Notice of Hearing, the admission of the Late-Filed Contention would greatly broaden the issues and delay the proceeding. The Board will hold a hearing on these issues in approximately three weeks, after which the Board expects to issue its decision in approximately 45 days. See “Notice (Change in Schedule)” (Oct. 17, 2006) (unpublished). Consequently, it is unlikely that the Board would be able to rule on the admissibility of the proposed late-filed contention until after the mandatory hearing has taken place. As the Appeal Board recounted in discussing this element of the late-filed contention analysis, “the admission of a new party just before a hearing starts is bound to confuse or complicate matters.” *Shoreham*, ALAB-743, 18 NRC at 402 (quoting *Virginia Elec. & Power Co.* (North Anna Station, Units 1 & 2), ALAB-289, 2 NRC 395, 400 (1975)). Surely the admission of a new party and litigation of a contention at this stage of a

⁸ See *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992) (“When the Board’s position is rejected in one circuit, after all, it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion.”); *Georgia Dep’t of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988) (“It is clear, of course, that an agency of the United States is not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States.”). See generally Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.9, at 132 (4th ed. 2002) (discussing widespread agency practice of nonacquiescence to adverse circuit court rulings); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 707, 715 (1989) (discussing agencies with policy of requiring that administrative law judges continue to follow agency policy despite adverse circuit court rulings).

⁹ The Petitioners’ argument regarding the need to prepare a supplement to the FEIS fails to provide good cause for filing an untimely contention for similar reasons – *i.e.*, there are no “significant new circumstances or information relevant to environmental concerns and bearing on the” Grand Gulf ESP because the *Mothers for Peace* mandate did not alter the Commission’s position in other proceedings.

currently uncontested proceeding would complicate matters even more. Without question, the addition of the Petitioners' proposed contention would broaden the issues remaining before the Board and would result in significant delay, and, accordingly, this factor strongly weighs against admission of this contention.¹⁰

The Petitioners assert that the factor in 10 C.F.R. § 2.309(c)(viii) weighs in favor of entertaining their contention because the Petitioners "will undoubtedly ensure the development of a sound record in this proceeding" because the Petitioners brought the *Mothers for Peace* mandate "to bear on this proceeding." Late-Filed Contention at 9. This factor may weigh in favor of entertaining a late-filed contention where a petitioner sets out with particularity the precise issues the petitioner plans to cover and identifies prospective witnesses and the contents of proposed testimony. See *Grand Gulf*, ALAB-704, 16 NRC at 1730. Here, however, the Petitioners did none of these things and give no indication as to how they can contribute in developing the record. Merely pointing out the existence of the Ninth Circuit's decision is insufficient to demonstrate that the Petitioners can be expected to assist in the development of a sound record. Accordingly, this factor weighs against consideration of the contention.

The Staff does not assert that the factors in 10 C.F.R. § 2.309(c)(v) and (c)(vi) – the availability of other means to protect Petitioners' interest and the ability of other parties to represent Petitioners' interest – weigh against admission of this contention. However, the Staff

¹⁰ The Petitioners attempt to minimize the weight that this factor should be given by pointing to the Commission's decision to postpone consideration of an appeal of a licensing board decision ruling on the admissibility of a terrorism-related environmental contention. See Late-Filed Contention at 9 (citing *Amergen Energy Co. LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC __ (Sept. 6, 2006) (slip op.)). Despite the Petitioners' assertion to the contrary, there is no inconsistency in having the Commission postpone consideration of that appeal and in having this Licensing Board weigh the Petitioners' inexcusable delay against the consideration of this contention. The *Oyster Creek* proceeding is at a relatively early stage (e.g., the supplement to the EIS will not be published for several months) and another petitioner and other contentions were admitted and are currently pending, so postponing the Commission's decision on that one contention does not prevent the proceeding from moving forward. In contrast, in this proceeding the Staff's review documents have been issued and the proceeding has been uncontested for more than two years.

notes that the NEPA scoping and comment process allowed the Petitioners the opportunity to participate in the formulation of the FEIS. Furthermore, to the extent that the Board may have questions regarding the discussion of environmental impacts in the FEIS, the Board may seek testimony from the Staff on this subject.

The remaining factors set forth in 10 C.F.R. § 2.309(c)(ii)-(iv) relate to the Petitioners' standing, which the Staff does not oppose. Although these factors weigh in the Petitioners' favor, the Staff notes that these are less important factors and are to be given less weight in the balancing test. *See Skagit Nuclear*, ALAB-559, 10 NRC at 169 n.10.

In sum, the Staff submits that the Petitioners have failed to establish good cause for the late filing of this environmental contention, inasmuch as the Petitioners could have submitted a contention addressing the same purported deficiency in the environmental review long ago. Further, the Petitioners' lack of good cause for filing this contention late is not overcome by a "compelling" showing that the other factors specified in 10 C.F.R. § 2.309(c)(1) favor its admission. *See Braidwood*, CLI-86-8, 23 NRC at 244. For these reasons, the Staff submits that the Late-Filed Contention should be rejected.

II. Contention Admissibility

A. Legal Standards for the Admission of Contentions

Notwithstanding the preceding grounds for rejecting the Late-Filed Contention, an alternative basis for rejecting this contention also exists. In accordance with 10 C.F.R. § 2.309(a), a petition for leave to intervene must demonstrate standing under

10 C.F.R. § 2.309(d),¹¹ and must proffer at least one admissible contention as required by

10 C.F.R. § 2.309(f)(1). For each contention, a petitioner 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 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.

The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. 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, & 3), CLI-91-12, 34 NRC 149, 155 (1991).

¹¹ As discussed previously, the Board found that the Petitioners had representational standing in 2004. To the extent that the information contained in the affidavits upon which the Board relied on in making this determination remains valid, the Staff does not oppose the Petitioners' standing.

Speculative assertions do not provide an adequate basis for admitting a contention. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996). All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000). The requirement of materiality dictates that any contention alleging deficiencies or errors in an application indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. See *Grand Gulf ESP Site*, LBP-04-19, 60 NRC at 290.

For the reasons set forth below, the Staff submits that the Petitioners have failed to submit an admissible contention.

B. Petitioners Have Not Met the Standards for an Admissible Contention with Respect to Their Late-Filed Environmental Contention

Petitioners assert that the *Mothers for Peace* mandate “invalidates the NRC’s policy, applied in this proceeding, that a NEPA analysis of a nuclear facility does not require a review of impacts associated with a terrorist attack” and that the Board and the Commission “must comply with the Court of Appeals’ mandate, admit the late-filed contention . . . and correct its failure to comply with NEPA.” Late-Filed Contention at 3. As a basis for their contention, the Petitioners point to 10 C.F.R. § 51.92(a)(2), which requires that the NRC prepare a supplement to its FEIS when there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” See Late-Filed Contention at 4-5. The Petitioners assert that the *Mothers for Peace* mandate constitutes information that is significant information because the rationale for excluding terrorism impacts for the NEPA review in the Grand Gulf ESP mirrors the rationale that was explicitly rejected in *Mothers for Peace*. See Late-Filed Contention at 6-7.

As set forth above, the Petitioners must provide a basis for their contention and show that the issue they seek to raise is within the scope of the proceeding and material to a finding the NRC must make regarding the Grand Gulf ESP. See 10 C.F.R. § 2.309(f)(1)(ii)-(iv). However, the Petitioners do not provide a sufficient basis for their contention and fail to demonstrate that the environmental impacts of terrorism fall within the scope of the NRC's NEPA review and would be material to the NRC findings in this proceeding. To the contrary, the Commission's well-established position on this issue demonstrates that the environmental impacts of a terrorist attack are not subject to review under NEPA. See, e.g., *PFS*, CLI-02-25, 56 NRC at 348-57. The Commission has not, to date, altered this position.¹² Therefore, the Petitioners have not provided an adequate basis for their contention and have not demonstrated that this contention is within the scope of this proceeding or that the issue raised in the contention is material to findings the NRC must make to support the Grand Gulf ESP.

In sum, the Staff submits that the Petitioners have failed to submit an admissible contention, inasmuch as the contention fails to provide an adequate basis and fails to demonstrate the environmental impacts of a terrorist attack fall within the scope of the NRC's NEPA review and are material to the required NRC findings in this proceeding. For these reasons, the Staff submits that the late-filed environmental contention is inadmissible.

¹² Petitioners overstate the reach of the *Mothers for Peace* mandate, which is not "binding law" in this proceeding. To the contrary, the Ninth Circuit acknowledged that there "remain open to the [Commission] a wide variety of actions it may take on remand." *Mothers for Peace*, 449 F.3d at 1035. Given the many options before the Commission, it is premature to speculate on whether the Commission will change its position in all pending adjudications. Absent such a change in the Commission's position, the Board should continue to apply established Commission precedent.

CONCLUSION

Based on the foregoing, the Staff submits that Petitioners' Late-Filed Contention does not meet the standards for late-filed requests set forth in 10 C.F.R. § 2.309(c)(1), and does not meet the standards for admission of contentions set forth in 10 C.F.R. § 2.309(f)(1).

Accordingly, Petitioners' Late-Filed Contention should be rejected.

Respectfully submitted,

/RA/

Jonathan M. Rund
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 6th day of November, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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SYSTEM ENERGY RESOURCES, INC.) Docket No. 52-009-ESP
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(Early Site Permit for Grand Gulf ESP Site))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO PETITIONERS' REQUEST FOR ADMISSION OF LATE-FILED ENVIRONMENTAL CONTENTION" in the above-captioned proceeding have been served on the following by electronic mail and with copies by deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by an asterisk (*), through electronic mail and with copies by deposit in the U.S. Mail on this 6th day of November, 2006:

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