

November 7, 2006 (7:45am)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

\_\_\_\_\_  
In the Matter of )  
 )  
SYSTEM ENERGY RESOURCES, INC. )  
 )  
(Early Site Permit for Grand Gulf Site )  
\_\_\_\_\_ )

Docket No. 52-009 ESP

ASLBP No. 04-823-03-ESP

November 6, 2006

**ANSWER OF SYSTEM ENERGY RESOURCES, INC.  
TO REQUEST OF NUCLEAR INFORMATION AND  
RESOURCE SERVICE, PUBLIC CITIZEN, AND SIERRA CLUB  
FOR ADMISSION OF LATE-FILED ENVIRONMENTAL CONTENTION**

Pursuant to 10 C.F.R. § 2.309(h)(1), System Energy Resources, Inc. ("SERI" or "Applicant") is submitting this Answer in opposition to the "Nuclear Information And Resource Service, Public Citizen, And Sierra Club Request For Admission Of Late-Filed Environmental Contention," dated October 12, 2006 ("Request"). The Request seeks a hearing on a proposed "late-filed" contention concerning the adequacy of the Nuclear Regulatory Commission ("NRC" or "Commission") "Environmental Impact Statement for an Early Site Permit (ESP) at the Grand Gulf ESP Site, Final Report," NUREG-1817 (Apr. 2006) ("EIS"). The Request should be denied because it does not meet the requirements of 10 C.F.R. § 2.309 regarding untimely petitions, standing, and admissibility of contentions.

**BACKGROUND**

The NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene in the *Federal Register* on January 16, 2004, which stated:

In accordance with 10 CFR 2.714, any person whose interest may be affected by this proceeding and who desires to participate as a party shall file a written petition for leave to intervene. Petitions

must set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why the petitioner should be permitted to intervene with particular reference to the factors set forth in 10 CFR 2.714(d)(1), and the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene.

\* \* \*

All such petitions must be filed no later than 30 days from the date of publication of this notice in the Federal Register. Nontimely filings 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 petition, that the petition should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v).

*System Energy Resources, Inc; Notice of Hearing and Opportunity To Petition for Leave To Intervene Early Site Permit for the Grand Gulf ESP Site*, 69 Fed. Reg. 2636 (Jan. 16, 2004) (“Notice of Hearing”).

Nuclear Information and Resource Service (“NIRS”), Public Citizen, the Mississippi Chapter of the Sierra Club (“Sierra Club”) (collectively, “Petitioners”), and another organization that is not involved in the current Request, petitioned to intervene on February 12, 2004.

“Hearing Request And Petition To Intervene By The National Association For The Advancement Of Colored People Claiborne County, Mississippi Branch, Nuclear Information And Resource Service, Public Citizen, And Mississippi Chapter Of The Sierra Club” (Feb. 12, 2004).

Subsequently, in a March 2, 2004 issuance, the Commission decided that the proceeding should be conducted under the rules of practice it had adopted on January 14, 2004 and that Petitioners would have sixty days to file their proposed contentions in the proceeding. *See Dominion Nuclear North Anna* (Early Site Permit for North Anna), CLI-04-08, 59 NRC 113, 118-19 (2004). The deadline for submitting contentions was thus set at May 3, 2004. The Petitioners submitted various health and safety and environmental contentions on May 3, 2004.

“Contentions Of The National Association For The Advancement Of Colored People-Claiborne County, Mississippi Branch, Nuclear Information And Resource Service, Public Citizen, And Mississippi Chapter Of The Sierra Club Regarding Early Site Permit Application For Site Of Grand Gulf Nuclear Power Plant,” (May 3, 2004) (“Petitioners’ Contentions”).

Ultimately, the Atomic Safety and Licensing Board (“Board”) concluded that each of the Petitioners had established representational standing to intervene, but their request for hearing was denied because they failed to put forth a litigable contention pursuant to 10 C.F.R.

§ 2.309(f). *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277 (2004). Thus, Petitioners are not, and never have been, parties to this proceeding.

The NRC published notice of its intent to prepare an environmental impact statement concerning the SERI Grand Gulf ESP application in the *Federal Register* on December 31, 2003. 68 Fed. Reg. 75,656. Subsequently, NRC published a draft environmental impact statement for public comment on April 28, 2005. 70 Fed. Reg. 22,155. After receipt and consideration of public comment, the NRC issued the final EIS. 71 Fed. Reg. 18,369 (Apr. 11, 2006). Subsequently, in an Order dated August 1, 2006, the Board set the schedule for further proceedings, which provided for, *inter alia*, limited appearance statements on August 28, 2006 and a hearing on November 15-16, 2006. The start of the hearing subsequently was rescheduled to November 29, 2006. “Notice (Change in Schedule),” (Oct. 17, 2006).

### ARGUMENT

#### A. The Request Should Be Denied Under the Standards Applicable to Nontimely Intervention Petitions

As the background discussion shows, the NRC set May 3, 2004 as the deadline for submitting proposed contentions in this proceeding. *Dominion Nuclear North Anna, LLC*,

CLI-04-08, 59 NRC at 119. Consequently, the Request, which was filed on October 12, 2006, is more than two years late. 10 C.F.R. § 2.309(c) provides:

(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.

1. *Factor (i): Petitioners Have Not Shown Good Cause for Their Failure to File on Time*

To assess whether Petitioners have demonstrated good cause for their failure to file their now-late proposed contention on time, the Board must consider when sufficient information was reasonably available to support the late-filed contention and how long Petitioners took to file their request once the information became available. *See Private Fuel Storage, L.L.C.*

(Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 46-48, *aff'd*, CLI-99-10, 49 NRC 318 (1999).

Petitioners rely, as their sole basis for showing good cause for their lateness, on the fact that their Request was filed 30 days after the United States Court of Appeals for the Ninth Circuit issued its mandate in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006). Request at 1, 7. They assert that “[p]rior to this mandate, the binding law concerning [National Environmental Policy Act (“NEPA”)] review of terrorist acts was that none was required. . . . This has now changed and provides good cause for the late-filed contention.” Request at 7.

The decision in *San Luis Obispo Mothers for Peace*, which was issued on June 2, 2006, concerned a license to operate an independent spent fuel storage installation at the Diablo Canyon site under 10 C.F.R. Part 72. *Pacific Gas & Elec. Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-06-23, slip op. at 1 (Sept. 6, 2006). The NRC had prepared an environmental assessment (“EA”) and found the proposed action would not result in a significant impact. Several intervenors, including San Luis Obispo Mothers for Peace and Sierra Club, requested a hearing and raised several contentions. Their proposed contention regarding the environmental impacts of terrorist acts was rejected based on prior NRC precedents, which had found that NEPA does not require consideration of terrorist acts.

The court found that this was a legal, not factual, conclusion. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1027. It then reviewed and rejected the four reasons the Commission had given for its finding and held that the EA prepared in reliance on it is not adequate. Accordingly, the court remanded to the NRC for further proceedings. *Id.* at 1035. As the Commission has noted, the court did not

impose any interim remedy, direct the Commission to impose one, or specify the procedures the Commission must follow on remand. On the contrary, the court gave the Commission maximum procedural leeway. The court stated that it was not “circumscribing the procedures that the NRC must employ” and that “[t]here remain . . . a wide variety of actions [the NRC] may take on remand.”

*Pacific Gas & Elec. Co.*, CLI-06-23, slip op. at 2 (quoting *San Luis Obispo Mothers for Peace*, 449 F.3d at 1035) (alterations in original).

Contrary to Petitioners’ assertion, issuance of the court’s mandate did not change the binding law applicable to the Grand Gulf ESP application. Thus, Petitioners’ sole basis for claiming that there was good cause for their late filing is premised on a mistake of law. The Ninth Circuit’s mandate remanded the case to the NRC for further action by the NRC in that proceeding. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1035. The Ninth Circuit did not require the NRC to change its regulations or to take any other action that would affect the Grand Gulf ESP application.

Even if the decision in *San Luis Obispo Mothers for Peace* established a legal principle that binds future NRC action, it would not be binding on the NRC in other circuits.<sup>1</sup> Courts of appeals have recognized that “[e]ven were the [agency] to acquiesce in an unfavorable judicial interpretation in one circuit, it would surely not be obliged to do so in other circuits that had not decided the question.” *Ayuda*, 880 F.2d at 1330-31. Further, “an unfavorable ruling in one circuit would not prevent the [agency] from continuing to follow its interpretation of the statute in other cases nationwide.” *Id.* at 1331. In this regard, a circuit court’s decision “does not have the effect of setting a nationwide agency standard,” given that “[f]ederal appellate courts can, and do, differ in their conclusions as to the law affecting agency action.” *Frock v. United States*

---

<sup>1</sup> Indeed, “[w]hether an agency is *required* as a matter of law to acquiesce in an unfavorable ruling when future cases arise in the same circuit court of appeals is a matter of much debate.” *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1331 n.4 (D.C. Cir. 1989) (emphasis in original).

*R.R. Retirement Board*, 685 F.2d 1041, 1046 (7th Cir. 1982). If the Ninth Circuit's determination in *San Luis Obispo Mothers for Peace* governed the NRC's interpretation of NEPA in all proceedings and in all other circuits, then the effect "would be to make [that] circuit the ultimate decisionmaker simply because it was the first court presented with the issue." *Id.*

Since this proceeding does not involve any actions within the Ninth Circuit, *San Luis Obispo Mothers for Peace* could not have changed applicable binding law. Consequently, issuance of the mandate of the Ninth Circuit in *San Luis Obispo Mothers for Peace* does not effect any change in the law applicable to this proceeding. Since Petitioners base their claim of good cause for lateness solely on their assertion of a change in the "binding law," and there has not been any such change, they have failed to show good cause for their lateness.

Moreover, the determination of whether a petitioner had good cause for its failure to file on time must be based on when sufficient information was reasonably available to support the contention, and how long thereafter it took for the contention to be submitted. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-99-3, 49 NRC 40, 46-48, *aff'd*, CLI-99-10, 49 NRC 318 (1999); *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-01-13, 53 NRC 319, 324 (2001). Petitioners herein had access to sufficient information at the outset of the proceeding—in February 2004—to proffer the contention they now seek to raise. Such information included the Environmental Report ("ER"), which did not discuss the impact of terrorist acts, and the relevant NRC precedents, including those cited in the Request at 4, which made clear that it was Commission policy not to consider such impacts in EAs and environmental impact statements.

Petitioners obviously also were aware of the possibility of a terrorist attack; indeed, their proposed site safety analysis contention 2.2 was premised on their views concerning "an

adequate level of security in the post-9/11 threat environment.” Petitioners’ Contentions at 7. Consequently, when Petitioners’ contentions were filed on May 3, 2004, they had sufficient information to formulate their currently-proffered contention. Moreover, they certainly had such information when the NRC published the draft environmental impact statement in April 2005, when it published the final EIS in April 2006, and when the Ninth Circuit issued its decision on June 2, 2006.

The Request cites three Commission decisions, dating back to 2002, which held that environmental impact statements did not need to discuss the impacts of successful terrorist attacks on the proposed facilities. Request at 4. The Request does not assert that the existence of those precedents prevented Petitioners from raising their contention in 2004, and any such assertion would not be supportable. After those decisions were announced in December 2002, the Commission followed those precedents and rejected a similar contention in *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-01, 57 NRC 1, 6-8 (2003).

When Petitioners were preparing their original proposed contentions for the Grand Gulf ESP proceeding, the request of San Luis Obispo Mothers for Peace *et al.* for review of this aspect of CLI-03-01 already was pending before the Ninth Circuit. Petitioners were represented in this proceeding by Diane Curran (*see* Petitioners’ Contentions at 32), who also was representing San Luis Obispo Mothers for Peace *et al.* in the petition for review of CLI-03-01 before the Ninth Circuit, *see San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016. In fact, Sierra Club, one of the Petitioners here, was among the parties represented by Ms. Curran in the Ninth Circuit proceeding.<sup>2</sup>

---

<sup>2</sup> The current attorney for Petitioners in this proceeding, Pat Gallagher, recognized this fact in an October 12, 2006, posting concerning the Request on the environmental law blog of the Sierra Club web site, which

Thus, when Petitioners filed their contentions in this proceeding, their attorney was arguing to the Court of Appeals on behalf of one of the Petitioners (*i.e.*, Sierra Club) and others, that the NRC precedents were wrong. Petitioners clearly knew of such arguments. Thus, in 2004, Petitioners not only knew that the ER did not discuss the impacts of a postulated successful terrorist attack on a nuclear plant at the Grand Gulf ESP site, but also knew that the NRC precedents supporting the principle that such events did not have to be considered in environmental reviews were under attack and might be reversed.

It also should be noted that during the time between the commencement of this proceeding, in February 2004, and the date of issuance of the decision in *San Luis Obispo Mothers for Peace* in early June 2006, intervenors in other NRC proceedings did proffer contentions regarding the purported environmental impacts of terrorist acts. Thus, the existence of the NRC precedents cited by Petitioners did not prevent those other intervenors from filing such contentions. For example, the recent NRC Order in the Oyster Creek license renewal proceeding, which is cited by the Request at 9, arises from contentions proffered by the State of New Jersey on November 14, 2005. *See AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-07, slip op. at 10-15 (Feb. 27, 2006). NIRS, as a party in that Oyster Creek proceeding (*see id.*), knew of the New Jersey contentions.<sup>3</sup>

---

describes the Ninth Circuit proceeding as “another one of our cases (teaming up with the organization Mothers for Peace.)” <http://www.sierraclub.org/environmentallaw/blog/> (last visited November 6, 2006 at 9:04 AM EST).

<sup>3</sup> Other examples include intervention petitions filed by Ms. Curran on behalf of the Attorney General of Massachusetts on May 26, 2006, in the license renewal proceedings for the Pilgrim Nuclear Plant and the Vermont Yankee Nuclear Plant. Although the focus of the Attorney General’s contentions is the alleged vulnerability of spent fuel pools, the petitions argue that, under NEPA, NRC must consider terrorist acts and that the NRC erred in its decisions in *Private Fuel Storage, L.L.C.*, CLI-02-25, and *Pacific Gas & Elec. Co.*, CLI-03-12, and specifically notes that CLI-03-12 was then on appeal to the U.S. Court of Appeals for the Ninth Circuit. *See* ADAMS No. ML061640065, at pages 14-15, 42-47 of the intervention petitions.

Even if there were some basis for excusing Petitioners' failure to file their contention in 2004, Petitioners have provided no explanation of why they did not file their Request within a reasonable time after issuance of the decision of the Ninth Circuit in *San Luis Obispo Mothers for Peace* on June 2, 2006. The Request does not claim that there was any delay in Petitioners becoming aware of the decision, and it is apparent that they must have learned of it within a few days. Sierra Club is, after all, a party in the Ninth Circuit case and would have received prompt notice from the court. In addition, while it is not clear if Diane Curran is still representing the Petitioners in this proceeding, she continues to represent NIRS and Public Citizen in the other proceedings. Cf. *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), "Order (Scheduling Prehearing Teleconference)," (Sept. 6, 2006) and its associated Certificate of Service. In fact, on June 22, 2006, less than three weeks after issuance of the decision in *San Luis Obispo Mothers for Peace*, NIRS and Sierra Club, along with a number of other organizations, discussed that decision in a filing with the Board in the Palisades plant license renewal proceeding. See ADAMS ML061800159. In short, if not in 2004, Petitioners clearly should have submitted their Request no later than June, and not waited until the eve of the hearing in this proceeding to file it.

Finally, the Board knows that representatives of each of the Petitioners repeatedly discussed the decision in *San Luis Obispo Mothers for Peace* during their respective limited appearance statements in this proceeding on August 28, 2006. See Transcript at 27-28 (Ms. Kemp on behalf of Public Citizen), 34-35 (Mr. Gunther on behalf of NIRS), and 38-39 (Mr. Miller on behalf of Sierra Club). Petitioners failed even to file their Request within a reasonable time after August 28, 2006, when they declared their familiarity with the decision of the Ninth

Circuit. Consequently, Petitioners have failed to show that there was good cause for their failure to file on time.

2. *Factors (ii), (iii) and (iv): Petitioners Have Failed to Show that their Interests Will Be Affected*

Factors (ii), (iii) and (iv) of 10 C.F.R. § 2.309(c) are the same as the factors used to determine standing under 10 C.F.R. § 2.309(d)(ii-iv). The Request addresses these factors at page 8, but fails to meet the NRC's requirements for doing so with particularity. Instead, Petitioners merely rely on the Board's August 2004 determination that they had standing to intervene at that earlier stage in the proceeding and make vague, general statements about their members' interests without any reference to the current circumstances of specific individuals or their authorization to represent the interests of such individuals in this proceeding. Such reliance and general assertions are insufficient to satisfy Petitioners' burden to establish standing, or to meet their burden under Section 2.309(c).

In *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156 (1993), the Commission rejected a request that relied on an earlier finding on the petitioners' standing. It held that prospective petitioners have an "affirmative duty" to establish standing in each proceeding in which they seek to participate and cannot rely on previous demonstrations of standing, absent certain circumstances. 37 NRC at 163. In that case, Citizens for Fair Utility Regulation ("CFUR") successfully petitioned to intervene in the Comanche Peak Units 1 and 2 operating license proceeding, but then later withdrew from the proceeding in 1982. The operating license hearing subsequently was dismissed in 1988, after the applicant and the sole remaining intervenor reached a settlement agreement. CFUR unsuccessfully attempted to re-intervene in the proceeding on two occasions between 1988 and

1993, and filed a third petition for late intervention after the NRC Staff issued a low-power license to operate Comanche Peak Unit 2.<sup>4</sup>

In its ruling on CFUR's third petition for late intervention, the Commission noted that CFUR was not relieved of its obligation to establish standing—even though it had previously been granted intervenor status in the *same proceeding*: “Under our regulations, each potential intervenor must demonstrate that it meets the interest requirements of 10 C.F.R. §[2.309(d)]; i.e., that it has ‘standing’ to participate in the proceeding.” *Id.* at 162. In its third petition, CFUR relied on its previous submissions in the proceeding and general statements of potential adverse effects on the interests of its members, stating:

[B]ecause of the numbers of filings CFUR has made in this docket, it respectfully requests the Commission to incorporate by reference CFUR's previous filings establishing its background and standing, as well as the affidavits of CFUR members who live and work and play in the vicinity of the Comanche Peak plant and whose lives and safety could be adversely affected by operation of and/or any accident at or inadvertent release of radiation from the nuclear power plant. Both the Commission and the NRC staff in previous orders and responses have recognized and established in fact that CFUR has standing through its members to intervene in this docket.

*Id.* (quoting CFUR petition).

The Commission held that “a prospective petitioner has an affirmative duty to demonstrate that it has standing in *each* proceeding in which it seeks to participate since a petitioner's status can change over time and the bases of its standing in an earlier proceeding may no longer obtain.” *Id.* at 163. The Commission further noted that, “in certain situations, a petitioner may seek to rely on prior demonstrations of standing if those prior demonstrations are

---

<sup>4</sup> Despite the termination of the operating license proceeding in 1988, the Commission noted that, because the NRC had issued only a low-power license for Unit 2 at the time CFUR filed its third petition, a proceeding still existed with respect to that Unit in which CFUR could seek intervention. However, there was no opportunity for intervention in the licensing proceeding as it pertained to Unit 1, because the NRC had issued a full-power license for that Unit. *Id.* at 160.

(1) specifically identified and (2) shown to correctly reflect the current status of the petitioner's standing." *Id.* It determined that CFUR could not rely on its previous standing demonstrations, because its most recent submission concerning standing was its 1988 petition for late intervention (filed four years earlier), and CFUR had "not demonstrated that these documents reflect the status of its current membership or the basis for its current claim of standing." *Id.* Consequently, the Commission held that the petition was deficient.

Here, too, Petitioners' request for late intervention is deficient. Indeed, Petitioners' limited discussion of standing is strikingly similar to that of CFUR's deficient petition. Similar to CFUR, Petitioners failed to submit any affidavits in support of their Request. Instead, Petitioners rely on their previous filings in this proceeding through general reference to affidavits filed by their organizational members in May 2004 and the Board's previous finding of standing in LBP-04-19. *See* Request at 8. Petitioners also make vague allegations of possible adverse effects on the "informational rights," as well as safety and health interests, of their members. *Id.*

Significantly, like CFUR, Petitioners have failed to demonstrate that the affidavits filed in support of their original petition in May 2004—nearly two-and-a-half years ago—reflect the status of their current membership or the basis for their current claim of standing. Nowhere in the Request is there any indication that the individuals—who, more than two years ago, submitted affidavits upon which Petitioners base their standing—still authorize the petitioning organizations to represent their interests or even remain members of those organizations. Without such an affirmative statement, Petitioners cannot rely on their prior demonstration of standing. Accordingly, Petitioners' have failed to demonstrate that factors (ii), (iii) and (iv) provide support for their untimely request or that they have standing to intervene under 10 C.F.R. § 2.309(c).

3. *Factor (v): There Are No Other Means Available to Petitioners*

Factor (v) concerns the availability of other means for Petitioners to protect their interests. As discussed in the preceding section, Petitioners have not shown that their interests are affected by this proceeding. If Petitioners' interests were affected, then there would be no other proceeding in which Petitioners could seek revision of the Grand Gulf ESP EIS. It should be recognized, however, that the Commission is considering the appropriate action in light of the Ninth Circuit's decision (*cf. Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generation Station), CLI-06-24, slip op. at 2 (Sept. 6, 2006)), and likely will take action on its own if it concludes that it has such a duty.

4. *Factor (vi): No Other Parties Represent Petitioners' Interests*

The only parties to this proceeding are SERI and the NRC Staff, neither of which advocates revision of the Grand Gulf ESP EIS. Therefore, to the extent that Petitioners' interests, as set forth in its proposed contention, may be affected by this proceeding, such interests will not be protected by any other party.

5. *Factor (vii): Petitioners' Participation Would Broaden the Issues and Delay the Proceeding*

The Request concedes that participation by the Petitioners would both broaden the issues and delay the proceeding. Request at 9. This is clearly correct. Since the current scope of issues in this proceeding does not include any issues about the environmental impacts of successful terrorist attacks, it is obvious that granting the Request would broaden the issues.

The current schedule in this proceeding anticipates that the hearing will commence on November 29, 2006, and continue thereafter from day to day until completion. "Notice (Change in Schedule)," (Oct. 17, 2006). There is not enough time before November 29, 2006 for the Board to rule on the Request and for the parties to prepare for hearing on a new contention.

Since the Board already has notified the Commission that it will be unable to meet the Commission's expectation that it will file its decision in this matter by November 30, 2006, there can be no doubt that further delays in the start of the hearing will result directly in further delaying the Board's decision.<sup>5</sup>

6. *Factor (viii): Petitioners Have Not Demonstrated That They Would Assist In Developing A Sound Record*

The Request says, in essence, that the Petitioners' contribution will be to raise the issue. Request at 9. The Request contains no offer of any expertise on the risk of terrorist acts or their impacts. As noted above, since the Commission already has under consideration its action in response to the decision in *San Luis Obispo Mothers for Peace*, even raising the issue at this stage is not a meaningful contribution. Consequently, Petitioners have not demonstrated that they would assist in developing a sound record.

7. *The Balance Among the Eight Factors Weighs Strongly Against the Request*

As shown above, factors (i) and (vii) weigh strongly against the Request, and factors (ii), (iii), (iv) and (viii) also weigh against it.<sup>6</sup> Factors (v) and (vi) would support the Request, but only if the Petitioners had shown that their interests were affected by this proceeding.

If only the number of factors was significant, then the balance would clearly weigh against the Request. In fact, NRC precedent makes clear that the eight factors are not of equal importance; the absence of good cause for late filing (factor (i)) and the likelihood of substantial broadening of the issues and delay of the proceeding (factor (vii)) are most telling. It is a long-

---

<sup>5</sup> The issue raised by factor (vii) is the likelihood of delaying the proceeding. Such a delay would be significant even if there would not be any delay of the issuance of a license or operation of a plant. *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 23 (1986); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 29-30 (1996).

<sup>6</sup> The Request contends that the broadening of issues and delay of the proceeding "is a positive aspect of admitting the late-filed contention." Request at 9. To the contrary, such effects on the proceeding clearly weigh against admission of a late-filed contention. See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation) LBP-99-6, 49 NRC 114, 119 (1999).

standing principle of NRC adjudication that “the delay factor is a particularly significant one indeed—barring the most compelling countervailing consideration—an inexcusably tardy petition would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedules.” *Project Management Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 395 (1976) (quoting *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 650-51 (1975)). Of the eight factors, factors (v) and (vi) are entitled to the least weight. See *Private Fuel Storage, L.L.C.*, LBP-00-18, 51 NRC 146, 154 (2000) (citing *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986)).

Here, Petitioners have failed to show good cause for their late filing and they admit that granting the Request would broaden the issues and delay the proceeding. They also have not shown that any of the other factors provides a compelling reason to grant the Request. Consequently, the balance of factors under 10 C.F.R. § 2.309(c) strongly favors denial of the Request.

B. Petitioners Have Not Shown That They Have Standing

As discussed above in connection with the discussion of 10 C.F.R. § 2.309(c)(ii-iv), Section 2.309(d) and the Commission’s January 7, 2004 Notice of Hearing, require Petitioners to “set forth *with particularity*” their interest in this proceeding and how that interest may be affected by the results of the proceeding. 69 Fed. Reg. 2636 (Jan. 14, 2004) (emphasis added). Instead, Petitioners merely rely on the Board’s August 2004 determination that in 2004 they had standing to intervene. Petitioners do not provide any details regarding the specific members they seek to represent and how the interests of those members would be affected by this proceeding, let alone supply supporting affidavits. Such vague, general statements about their members’

interests and reliance on findings in an earlier stage in the proceeding are insufficient to satisfy Petitioners' burden to establish standing. *Texas Utils. Elec. Co.*, CLI-93-4, 37 NRC at 163.

C. Petitioners' Proposed Contention is Not Admissible

In addition to failing to satisfy the criteria for admission of a late-filed intervention petition, and failing to demonstrate their standing, Petitioners also have not submitted a contention that meets the admissibility standards of 10 C.F.R. § 2.309(f)(1). Section 2.309(f)(1) requires a petitioner to "set forth with particularity the contentions sought to be raised," and with respect to each contention proffered, the 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.

A contention that fails to meet any one of these requirements must be rejected. *System Energy Res., Inc.*, LBP-04-19, 60 NRC 277, 288 (2004).

In addition, with respect to the “materiality” requirement described in Section 2.309(f)(1)(iv), the Commission has observed that “[t]he dispute at issue is ‘Material’ if its resolution would ‘make a difference in the outcome of the licensing proceeding.’” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34. The Board must refuse to admit a contention, which, “if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.” Notice of Hearing, 69 Fed. Reg. at 2637. In addition, proposed contentions alleging a deficiency or error in an application also must “indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment.” *System Energy Res., Inc.*, LBP-04-19, 60 NRC at 290.

Under Section 2.309(f)(1)(v), a contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)). So too will “vague, unparticularized issues” (*Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 27 (2003)) and “open-ended or ill-defined contentions lacking in specificity or basis” (*Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001)). As the Commission has observed, a petitioner “must do more than submit ‘bald or conclusory allegation[s]’ of a dispute with the applicant.” *Id.* at 358. If a petitioner fails to provide the requisite support for its contentions, a Licensing Board may neither make factual

assumptions that favor the petitioner, nor supply information that is lacking. *System Energy Res., Inc.*, LBP-04-19, 60 NRC at 290.

Finally, Section 2.309(f)(1)(vi) requires a petitioner to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. For a contention to be admissible, it must refer to those portions of the license application that the petitioner disputes and indicate supporting reasons for each dispute. *System Energy Res., Inc.*, LBP-04-19, 60 NRC at 290-291; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 19. As the Commission recently explained,

[R]equiring the substance and presentation of contentions to be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself. It also precludes an intervenor from making general allegations, with the hope of generating through discovery sufficient facts to show there is a genuine dispute.

*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004). If the petitioner does not believe that the application adequately addresses a relevant issue, then the petitioner is required to explain with particularity why the application is deficient. *System Energy Res., Inc.*, LBP-04-19, 60 NRC at 290-291. Additionally, in such cases, the petitioner must provide “supporting grounds” for its contention that the application must but does not “consider some information required by law.” *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 19. Furthermore, a contention that does not directly controvert a position taken in the application is subject to dismissal, as is a contention that mistakenly asserts the application fails to address a relevant issue. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998) (and cases cited therein).

1. *The Proposed Contention Is Not Sufficiently Specific*

The Request describes the “contention” in a page and a half of legal argument about the applicability to this proceeding of the decision in *San Luis Obispo Mothers for Peace*. The contention alleges that neither the draft nor final EIS for the Grand Gulf ESP addresses the impacts of a terrorist attack and that, in light of the Ninth Circuit’s *San Luis Obispo Mothers for Peace* ruling, a new assessment of such impacts is required under NEPA. Request at 5. The basis for the contention is Petitioners’ assertion that the Ninth Circuit ruling applies “with equal force” to this proceeding. *Id.* at 6. Petitioners’ argument is not sufficiently specific to state a contention because Petitioners do not indicate the changes they seek in the final EIS on the Grand Gulf ESP. This lack of specificity is particularly highlighted by Petitioners’ argument that the interests of their members would be adversely affected without an “assessment of the impacts associated with a terrorist attack *and corresponding mitigation measures and alternatives that would prevent or lessen such impacts.*” *Id.* at 8 (emphasis added). In contrast, elsewhere the Request asserts that all the Petitioners seek is an “analysis of the range of environmental impacts likely to result in the event of a terrorist attack.” *Id.* at 7.

The Board already has found that the discussion of specific plant design alternatives is outside the scope of this proceeding, since the regulations governing the application do not require it to specify any particular plant design. *System Energy Res., Inc.*, LBP-04-19, 60 NRC at 292. If the contention is that the EIS must consider design alternatives, then it constitutes an impermissible challenge<sup>7</sup> to 10 C.F.R. § 52.17, which provides applicants considerable flexibility concerning the level of design and detail to be included in ESP applications. *Id.* Consequently, a clear statement of the contention is essential. The Request falls short of this standard.

---

<sup>7</sup> See, e.g., *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 16 (an adjudicatory proceeding is not the proper forum for challenging the validity of previously-issued NRC rules and regulations).

2. *The Alleged Basis for the Contention Is Not Adequate*

The Request relies on *San Luis Obispo Mothers for Peace* as the sole basis for the proposed contention; it does not cite any other source of information concerning the adequacy of the Grand Gulf ESP EIS. The Request does not provide any reason for questioning whether the EIS's discussion of the impacts of severe accidents already covers the range of environmental impacts likely to result in the event of a successful terrorist attack. See EIS, Section 5.10.2, "Severe Accidents," at 5-68.

The Request cites the requirement for a supplement to a final environmental impact statement in 10 C.F.R. § 51.92 if there are significant new circumstances or information relevant to environmental concerns and hearing on the impacts of the proposed action. Request at 5. Petitioners do not, however, provide any basis for concluding that the impacts of successful terrorist attacks would be significant to the specific proposed action at issue in this proceeding, which is approval of an ESP. Consequently, the Request does not provide sufficient bases to support the contention.

3. *Petitioners Have Not Demonstrated That the Proposed Contention Is Within the Scope of the Proceeding*

The Request does not show that the proposed late-filed contention falls within the scope of the NRC's environmental review of the Grand Gulf ESP application. As discussed above, the focus of the proposed contention is not clear. Consequently, Petitioners have not demonstrated that it falls within the scope of this proceeding. As the proponents of the proposed contention, Petitioners bear the burden of making this demonstration. See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001). The Request fails to meet this burden.

4. *Petitioners Have Not Demonstrated That the Contention Raises a Material Issue*

The Request does not demonstrate that the contention raises a material issue. The Request does not show that any conclusion in the final EIS would change if the NRC took into account the impacts of a successful terrorist attack. Neither does the Request even assert that the impacts of a successful terrorist attack are likely to be outside the range of impacts of potential severe accidents discussed in the final EIS. *See* EIS, Section 5.10.2, “Severe Accidents.”

Contrary to the assertions in the Request, the decision in *San Luis Obispo Mothers for Peace* did not consider whether a description of the impacts of plant operation could be legally adequate without an explicit discussion of the impacts of terrorist acts. Rather, the court considered and rejected the NRC’s reasons for denying admission of a timely contention that such impacts should be discussed in an environmental impact statement. The court did not, however, direct the NRC to supplement the environmental impact statement at issue in that proceeding. Rather, it remanded to the NRC for further consideration, explicitly stating that it was not directing the NRC to take any specific course in the remanded proceeding. *See San Luis Obispo Mothers for Peace*, 449 F.3d at 1035. The court did not find that every environmental impact statement must discuss the impact of terrorist acts. Moreover, the NRC has issued numerous environmental impact statements since 1970 that did not specifically discuss the impacts of successful terrorist acts. The court did not find that all of those environmental impact statements were inadequate.

The Request cites, without explanation, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). There, the Supreme Court noted that “an agency need not supplement an EIS every time new information comes to light after the EIS is finalized . . . if the new information is sufficient to show that the remaining action will ‘affec[t] the quality of the human

environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." 490 U.S. at 373-74 (footnotes omitted). Petitioners have not shown that the impacts of terrorist acts would affect the quality of the human environment to a significant extent not already considered in the Grand Gulf ESP EIS. Consequently, Petitioners have not shown that a material issue is raised by the proposed contention.

5. *The Request Does Not Provide a Concise Statement of Supportive Facts and Opinion*

As a general proposition, a contention that seeks to raise a pure issue of law may not need to provide a statement of supportive facts and opinion. In this instance, however, the issue sought to be raised by the proffered contention is not a pure question of law because the environmental impact statement requirements depend on a clear understanding of the proposed action and its potential environmental impacts. To meet the requirements of Section 2.309(f)(v), Petitioners would need to provide a factual basis for concluding that the discussion of the impacts of operating a nuclear plant at the Grand Gulf ESP site already provided in the Grand Gulf ESP EIS is not adequate to inform the public of the range of environmental impacts associated with the proposed action. Petitioners have made no effort to do so.

6. *The Request Does Not Show There Is a Genuine Dispute*

The Request does not make any effort to show that a genuine dispute exists with SERI on any issue. There is no reference to the application in the Request, let alone an effort to show that there is a dispute with the Applicant. The closest the Request comes to a reference to the application is its citation to two places in the EIS where, in responding to public concerns about terrorism, the NRC "stated that such concerns were remote and speculative." Request at 6. This brief reference to the EIS is not enough to show there is a genuine dispute.

In particular, Petitioners have not identified any statements they dispute concerning the range of impacts that might result from plant operation, which includes severe accidents. Thus, the contention may amount to nothing more than an assertion that the EIS must state that one possible cause of the accidents discussed is a successful terrorist act. Without a clear specification of the portions of the application that it disputes, Petitioners have not met their burden of demonstrating that there is a genuine dispute appropriate for litigation.

### CONCLUSION

The Request should be denied in its entirety for multiple reasons. First, it does not satisfy the criteria in 10 C.F.R. § 2.309(c), because it was filed inexcusably late and, if granted, would significantly broaden the issues and delay this proceeding. The Request also should be denied because Petitioners failed to comply with the requirements of 10 C.F.R. § 2.309(d) to demonstrate with particularity their standing to intervene in this proceeding. Finally, the Request should be denied because it fails to articulate a litigable contention, as required by 10 C.F.R. § 2.309(f).

Respectfully submitted,



---

Kathryn M. Sutton  
Paul M. Bessette  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
Phone: 202-739-3000  
Counsel for System Energy Resources, Inc.

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

\_\_\_\_\_ )  
In the Matter of )

SYSTEM ENERGY RESOURCES, INC. )

(Early Site Permit for Grand Gulf ESP Site) )  
\_\_\_\_\_ )

**Docket No. 52-009-ESP**

**ASLBP No. 04-823-03-ESP**

**November 6, 2006**

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "ANSWER OF SYSTEM ENERGY RESOURCES INC. TO REQUEST OF NUCLEAR INFORMATION AND RESOURCE SERVICE, PUBLIC CITIZEN, AND SIERRA CLUB FOR ADMISSION OF LATE-FILED ENVIRONMENTAL CONTENTION" in the captioned proceeding have been served as shown below by deposit in the United States Mail, first class, this 6th day of November, 2006. Additional service has also been made this same day by electronic mail as shown below.

Lawrence G. McDade, Chair  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(Email: [LGM1@nrc.gov](mailto:LGM1@nrc.gov))

Dr. Nicholas G. Trikouros  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [NGT@nrc.gov](mailto:NGT@nrc.gov))

Dr. Richard E. Wardwell  
Administrative Judge  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [REW@nrc.gov](mailto:REW@nrc.gov))

Office of the Commission Appellate  
Adjudication  
Mail Stop 0-16C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov))

Office of the Secretary  
ATTN: Docketing and Service  
Mail Stop: 0-16C1  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov))

Debra Wolf  
Law Clerk  
Atomic Safety and Licensing Board  
Mail Stop: T-3F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(E-mail: [DAW1@nrc.gov](mailto:DAW1@nrc.gov))

Robert M. Weisman, Esq.  
Ann P. Hodgdon, Esq.  
Jonathan M. Rund, Esq.  
Office of the General Counsel  
Mail Stop 0-15D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail: [RMW@nrc.gov](mailto:RMW@nrc.gov), [APH@nrc.gov](mailto:APH@nrc.gov),  
[JMR@NRC.gov](mailto:JMR@NRC.gov))

Pat Gallagher, Esq.  
Sierra Club  
85 Second Street, 2nd Floor  
San Francisco, CA 94105  
(E-mail: [pat.gallagher@sierraclub.org](mailto:pat.gallagher@sierraclub.org))



Kathryn M. Sutton  
Counsel for System Energy Resources, Inc.