

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Nicholas G. Trikouros
Dr. James Jackson

_____)	
In the Matter of)	Docket No. 52-011-ESP
)	
Southern Nuclear Operating Company)	ASLBP No. 07-850-01-ESP-BD01
)	
(Early Site Permit for Vogtle ESP Site))	January 10, 2007
_____)	

**SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER
IN RESPONSE TO PETITION FOR INTERVENTION**

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INTRODUCTION

Southern Nuclear Operating Company (“SNC”), applicant for an Early Site Permit (“ESP”) in the above-referenced proceeding, submits this Answer in response to the December 11, 2006 Petition for Intervention (“Petition”), as supplemented by the December 27, 2006 JNT Supplement to Petition for Intervention (“JNT Supplement”). The Petition was filed jointly by Center for a Sustainable Coast, Savannah Riverkeeper, Southern Alliance for Clean Energy, Atlanta Women’s Action for New Directions, and Blue Ridge Environmental Defense League (“Petitioners”). Petitioners seek intervention on the basis of seven contentions challenging the adequacy of SNC’s Environmental Report (“ER”). The ER was submitted to the United States Nuclear Regulatory Commission (“Commission” or “NRC”) as part of SNC’s application for an ESP to accommodate two additional nuclear reactors at the Vogtle Electric Generating Plant (“VEGP”) site. Petitioners fail to submit any admissible contentions, as required by 10 C.F.R. § 2.309, and, therefore, the Petition should be denied in its entirety.

BACKGROUND

I. Vogtle Electric Generating Plant

The VEGP is an existing licensed nuclear facility, hosting two pressurized water reactors. The site occupies 3,169 acres on the Savannah River in eastern Burke County, Georgia, and lies directly across the river from the Department of Energy’s Savannah River Site (“SRS”). The VEGP site and the existing units are owned by Georgia Power Company (“GPC”), Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, Georgia (collectively, the “Owners”).

SNC is a subsidiary of Southern Company and is a corporate affiliate of GPC. SNC is the licensed operator of the existing VEGP units.¹

II. The Environmental Report

On August 14, 2006, SNC submitted an ESP application in accordance with 10 C.F.R. Part 52.² Pursuant to 10 C.F.R. § 52.17, SNC selected the scope, and therefore the content, of its ESP application as follows:

[SNC] has developed an application to the [NRC] for an early site permit. An [ESP] represents NRC approval of a site or sites for one or more nuclear power facilities, separate from the filing of an application for a construction permit or combined license for such a facility In accordance with NRC regulations, SNC has included in its application this [ER] that analyzes impact to the environment from construction, operation, and decommissioning of two additional nuclear reactors at this site.

. . .

In accordance with NRC regulations, SNC is submitting this ESP application in order to obtain for the owners and the state of Georgia the option of including new nuclear capability in their future generation mix.

ER at 1.1-1 through -2.

As required by 10 C.F.R. § 52.17(a)(2),³ SNC's application contains a complete ER. SNC "submitted [the ER] as part of the ESP application to support the NRC decision that locating additional nuclear power facilities on the VEGP is environmentally acceptable" ER at 1.1-1. NRC rules describe the required contents of an ER at 10 C.F.R. § 51.45. These include a description of the project and the affected environment, an analysis of the impact of the

¹ SNC filed the ESP application on its own behalf and as the agent for the Owners.

² SNC submitted revision 1 to the ESP application on November 13, 2006. Revision 1 does not differ from the original application in any respect relevant to Petitioners' contentions.

³ This rule provides as follows: "A complete environmental report as required by 10 CFR 51.45 and 51.50 must be included in the application, provided, however, that . . . the report need not include an assessment of the benefits (for example, need for power) of the proposed action" 10 C.F.R. § 52.17(a)(2). Notably, the ER includes an assessment of benefits. *See* ER § 10.4.1.

project on the environment, and alternatives to the project. *See id.* The NRC has also adopted two guidance documents that help explain the requirements for preparing an ER.⁴

SNC's ER is comprehensive and thorough. It provides an exhaustive discussion of the proposed project (Chapter 1); the surrounding environment (Chapter 2); the existing plant's systems (Chapter 3); the environmental impacts of construction (Chapter 4); the environmental impacts of the operation of the proposed project (Chapter 5); environmental measurements and monitoring programs (Chapter 6); environmental impacts of postulated accidents involving radioactive materials (Chapter 7); the need for power (Chapter 8); alternatives to the proposed action (Chapter 9); and environmental consequences of the proposed action (Chapter 10), including unavoidable adverse environmental impacts, irreversible and irretrievable commitments of resources, the relationship between short-term uses and long-term productivity of the human environment, cost-benefit analysis, and cumulative impacts. The application and the ER were accepted by the Commission as complete and were docketed on September 19, 2006.

In 10 C.F.R. § 51.45(b)(3), the Commission makes it plain that the ER is intended "*to aid the Commission* in [satisfying] section 102(2)(E)" of the National Environmental Policy Act ("NEPA"). *Id.* § 51.45(b)(3) (emphasis added). The Commission's rules also give the Commission generic authority to "require an applicant . . . to submit such information to the Commission as may be useful *in aiding the Commission* in complying with section 102(2) of NEPA. The Commission will independently evaluate and be responsible for the reliability of

⁴ NRC Regulatory Guide 4.2 (NUREG-0099), "Preparation of Environmental Reports for Nuclear Power Stations," Rev. 2 (1976) ("Reg. Guide 4.2"); NUREG-1555, "Standard Review Plans for Environmental Reviews for Nuclear Power Plants" (1999) ("NUREG-1555"). While the provisions of NUREG-1555 are not mandatory requirements for an applicant's ER, they do describe the types of information and analyses which NRC staff may expect when reviewing an ER. *See* NUREG-1555 at iii.

any information which it uses.” *Id.* § 51.41 (emphasis added). Likewise, NRC guidance explains that in an ER an “applicant should present sufficient information . . . to allow staff evaluation of the potential environmental impact of constructing and operating the proposed facility.” Reg. Guide 4.2 at ix (emphasis added).

Importantly, therefore, an ER is a tool for the NRC to use in developing its own, independent environmental impact statement (“EIS”) under NEPA. Accordingly, the adequacy of an ER is judged solely upon the criteria of 10 C.F.R. § 51.45. Of course, the maximum the Commission could require in an ER is bounded by its own NEPA obligation. As the NRC has explained:

NEPA is subject to a “rule of reason,” meaning that the assessment need not include every environmental effect that could potentially result from the action, but rather “may be limited to effects which are shown to have some likelihood of occurring.” Thus, the proper inquiry under this standard is not whether an effect is “theoretically possible,” but rather whether it is “reasonably probable that that situation will obtain.”

Hydro Res., Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-04-23, 60 NRC 441, 447 (2004) (internal footnotes omitted). In other words, during the environmental review of an NRC licensing action, only “reasonably foreseeable” environmental impacts arising from the proposed action need be analyzed. *See Pub. Serv. Co. of Oklahoma* (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 141 (1978), *vac’d on other grounds*, 17 NRC 410 (1983).

Similarly, NEPA generally requires an analysis “formulated on the basis of *available* information.” *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 988 (9th Cir. 1985) (emphasis added). In fact, a federal agency (in this case, NRC) is only required to develop new data in certain circumstances. *See* 40 C.F.R. § 1502.22 (requiring an agency to gather new data to supplement “incomplete or unavailable information” if the missing information is “essential to

a reasoned choice among alternatives,” and the “overall costs of obtaining [the missing information] are not exorbitant”); *see also id.* § 1506.5(a).⁵

III. Petitioners’ Contentions

The Petition proposes seven contentions. The contentions are numbered and described by Petitioners as follows:

EC 1.1: The ER fails to use quantitative analysis and field surveys to assess baseline habitat conditions and species diversity and abundance in the projects [sic] area.

EC 1.2: The ER fails to identify and consider direct, indirect, and cumulative impacts of the proposed cooling system intake and discharge structures on aquatic resources.

EC 1.3: The ER fails to satisfy 10 C.F.R. § 51.45(b)(3) because it fails to address impacts to aquatic species in its discussion of alternatives. In particular, the ER’s discussion of the no-action alternative and of alternative cooling technologies fails to consider environmental and economic benefits of avoiding construction of the proposed cooling system.

EC 2: The ER fails to provide a thorough analysis of the disparate environmental impacts of the project on the minority and low-income communities residing in close proximity to the site.

EC 3: The ER fails to discuss the environmental implications of the substantial likelihood that spent fuel generated by the new reactors will have to be stored at the Vogtle site for more than 30 years after the reactors cease to operate, and perhaps indefinitely.

EC 4: The ER fails to address direct, indirect, and cumulative environmental impacts of intentional attacks on the proposed nuclear power plants, or to evaluate a reasonable range of alternatives for avoiding or mitigating those impacts.

EC 5: The ER fails to disclose and analyze an adequate range of alternatives to the proposal.

⁵ NRC rules do not require license applicants to generate new data except where specifically requested by NRC as necessary to reach a reasoned decision. Of course, the NRC staff often issues “Requests for Additional Information.” Such additional information obtained from an applicant may be used for the NRC’s NEPA analysis, but an “RAI” does not imply some failing with the applicant’s ER (or application as a whole). *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 329 (1999); *cf. Sacramento Muni. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146 (1993).

JNT Supplement at 2.⁶

Each contention alleges some deficiency with the ER. However, in every case, Petitioners have failed to support their contentions, or raise an issue of material fact as to how the ER falls short of the requirements applicable to an ER under 10 C.F.R. § 51.45. In essence, Petitioners complain that the ER should have done “more.” But because the ER satisfies 10 C.F.R. § 51.45, “more” is not required, and the contentions are not admissible.

DISCUSSION

In order for a petition to intervene to be granted, the petitioner must assert at least one admissible contention. *See* 10 C.F.R. § 2.309(f). In addition, the Board must determine whether a petitioner has standing under Section 2.309(d)(1).⁷

I. Legal Standards Governing Admissibility of Contentions

Regardless of Petitioners’ standing, the Petition must be denied in its entirety because none of the contentions satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). A request to intervene in a proceeding must be supported by at least one contention that:

- (i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide[s] a brief explanation of the basis for the contention;
- (iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;

⁶ Petitioners categorize all of their contentions as “Environmental.” *See* JNT Supplement.

⁷ Here, Petitioners base their standing on the representation of their members. *See* Petition at 3-5. The Petition attaches several declarations from individuals asserting that they have asked one or the other of the Petitioners to represent their interests in this matter. Petitioners cite no other basis for their standing, and have not requested discretionary intervention. SNC has no information at this time on which to challenge the accuracy of Petitioners’ declarations.

(iv) Demonstrate[s] 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[s] 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[s] 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.

10 C.F.R. § 2.309(f)(1). These requirements impose a "strict" standard for the admission of contentions. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). They are intended to focus hearings on "real, concrete issues" which are susceptible to resolution in an adjudicatory context. Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,189-90 (Jan. 14, 2004); *see Duke Energy Corp.*, 49 NRC at 334.

Accordingly, the Atomic Safety and Licensing Board ("ASLB") have explained that petitioners must do more than make allegations or conclusory statements in order to intervene in a proceeding. What is required is "a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." *Gulf States Util. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). A petition must provide "factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of [an a]pplicant's documents or that provides supporting reasons that tend to show that there is some specified omission from [the a]pplicant's documents." *Florida Power & Light Co.*

(Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509, 521 n.12 (1990). A petitioner must allege at least some “credible foundation” for each contention. *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 457 (1987). Absent adequate support that demonstrates a genuine dispute on a material issue, the contention is inadmissible:

In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board’s power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking.

Exelon Generation Co. (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 242 (2004); *see Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 265 (2004); *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 289-90 (2004).

Thus, the alleged causal connection between the proposed action and a particular environmental impact must be supported with expert analysis or other evidence to substantiate the allegation. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 (2004). Mere reference to a document, without more, does not provide an adequate basis for a contention. In order to support a contention, a petitioner must “clearly reference and then summarize the information being relied upon.” *Duke Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 465 (2001), *rev’d on other grounds*, 56 NRC 335 (2002).

Contentions must also be set forth with reasonable specificity and particularity. *See Duke Energy Corp.*, 49 NRC at 335 (1999); 10 C.F.R. § 2.309(f)(1). For a contention to be admissible, the petitioner 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.

Notice of Hearing, 71 Fed. Reg. 60,195, 60,196 (Oct. 12, 2006). Simply put, the petitioner must provide "supporting grounds" for its contention that the application does not consider some information required by law. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 19 (2001). An issue that does not directly controvert a position taken in the application is subject to dismissal. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998).

Moreover, contentions that challenge the regulatory positions of the NRC, or which fall outside the scope of the proceeding, are inadmissible. *See Exelon Generation Co.*, 60 NRC at 241. Contentions that challenge statutory requirements, the NRC's regulatory process, an NRC rule or proposed rule (including generic determinations established by NRC rulemaking), or that merely state a petitioner's view of what regulatory policy should be, fail to establish the requisite bases for admissibility. *Id.*

Finally, the materiality requirement of 10 C.F.R. § 2.309(f)(iv) demands that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75 (1996), *rev'd in part on other grounds*, 43 NRC 235 (1996); *see also Dominion Nuclear North Anna*, 60 NRC at 265-66. Clearly, in the case of contentions regarding the adequacy of an ER, the contention must

raise a genuine issue concerning a matter of fact or law necessary to the evaluations and findings the Commission must make to discharge its obligations under NEPA. *See Duke, Cogema, Stone & Webster*, 54 NRC at 454-55.

In sum, a petitioner may not simply complain that an ER should have “more.” Instead, some clear and particularized flaw or failure of the ER, which is relevant to the Commission’s obligations, must be identified, explained and supported.

II. Petitioners’ Contentions Are Inadmissible

As explained below, each of Petitioners’ contentions fails to establish a genuine issue of fact or law material to the findings NRC must make in this proceeding. The contentions are inadequately supported, challenge the NRC’s regulatory process, and/or are immaterial to the NRC analysis of the environmental impacts of the construction and operation of the proposed new units under NEPA. Absent an admissible contention, the Petition does not satisfy the requirements of 10 C.F.R. § 2.309 and must be denied.

A. Petitioners’ First Set of Contentions (ECs 1.1, 1.2, and 1.3) Are Unsupported and Do Not Raise Issues of Material Fact.

Petitioners contend the ER does not properly identify the baseline conditions or address cooling system impacts to fisheries in the Savannah River. Petitioners have made three contentions on this issue: EC 1.1, EC 1.2, and E.C. 1.3.⁸ In essence, Petitioners argue that SNC should have relied on more or different data in its ER, and that additional analyses of cumulative impacts or alternatives are required. As demonstrated below, none of these individual contentions is admissible.

⁸ The Board provided Petitioners an opportunity to incorporate the statements in the introductory paragraphs to EC 1 into particular contentions, *see* Licensing Board Memorandum and Order (dated Dec. 18, 2006), which Petitioners chose not to do. *See* JNT Supplement.

1. *Petitioners’ “Baseline Conditions” Contention (EC 1.1) Is Inadmissible.*

EC 1.1 alleges deficiencies in the sources for the ER’s description of the “baseline” at the location of the proposed intake and discharge structures. In particular, Petitioners contend the ER fails to use “quantitative analysis” and “field surveys” to establish the baseline environmental conditions. Petitioners allege that, as a result of a lack of this type of data, the ER fails to establish an adequate environmental baseline for determining the impact of the proposed cooling system structures and fails to adequately identify the aquatic community in the vicinity of the proposed cooling system structures. This contention lacks factual support, lacks a basis in law, and does not raise a genuine issue of material fact. Each of these deficiencies renders the contention inadmissible.

- a. The ER properly assesses the “baseline” conditions, and EC 1.1 fails to set forth sufficient information to show that a genuine dispute exists with respect to the ER.

The ER contains a comprehensive description of aquatic conditions and ecology (*i.e.*, the “baseline”) at the site. *See, e.g.*, ER § 2.4.2. The ER describes at great lengths the current aquatic community, including the fisheries and any threatened, endangered or rare species in the project area. ER §§ 2.4.2.2, 2.4.2.3. Directly contrary to Petitioners’ allegation, the ER relies on copious amounts of “quantitative analyses” and “field surveys” in its assessment of these baseline conditions. *See* ER at 2.4-6 through -21.

For example, in setting forth the baseline conditions, the ER discusses and relies upon a 2005 study by the Academy of Natural Sciences (“Academy”). *See generally* ER § 2.4.2. “The [Academy] has monitored the aquatic communities of the middle Savannah River up- and downstream of [the VEGP] since 1951,” using four sampling stations. ER at 2.4-7. The Academy’s 2005 study provides an extensive amount of data concerning the existing aquatic

communities near VEGP and also identifies the long-term trends concerning those aquatic communities. *Id.* Importantly, the Academy’s ongoing monitoring efforts include “basic water chemistry and surveys of attached algae, aquatic macrophytes (aquatic vascular plants), aquatic macroinvertebrates, and fish.” *Id.*

In addition, the ER discusses and relies upon a wide array of other publications providing comprehensive information about the existing aquatic communities near VEGP including *Fishes of the Middle Savannah River Basin* (Marcy et al. 2005); *Comprehensive Cooling Water Study* (Du Pont 1987); and *The Fishes of the Savannah River Plant* (Bennett & McFarlane 1983). *See* ER § 2.4.2.2. Other studies and documents relied upon by SNC in the ER to describe the baseline aquatic conditions are listed in Section 2.4’s “References.” *See* ER at 2.4-22 through -26. Thus, contrary to EC 1.1, the ER clearly contains a comprehensive description of the baseline aquatic conditions and ecology at the site.

Similarly, Petitioners’ allegation that the ER fails to include a “site-specific description of the reach of the Savannah River adjacent to Plant Vogtle where the new intake and discharge structures are proposed,” Petition at 8, is incorrect. The ER in fact contains extensive information concerning the reach of the Savannah River adjacent to Plant Vogtle where the new intake and discharge structures are proposed. *See* ER §§ 2.3, 2.4. Thus, EC 1.1 is incorrect in alleging that the ER does not include quantitative analyses and field surveys to assess the baseline conditions in the project area. Furthermore, in the basis for EC 1.1, Petitioners allege the ER fails to identify threatened, endangered, or rare species in the project area, and that the ER “contains no data” concerning the habitat and upstream and downstream migration of anadromous and diadromous species. *See* Petition at 8. This allegation is inconsistent with the ER, which provides extensive information on threatened, endangered, and rare species, as well as anadromous and diadromous species. *See* ER § 2.4.2. The ASLB has made plain that a

contention that “mistakenly asserts the application does not address a relevant issue can be dismissed.” *System Energy Res.*, 60 NRC at 291 (internal string citations omitted).

Moreover, essentially all of the bases offered in support of EC 1.1 actually focus on alleged deficiencies in the sections of the ER dealing with “effects” or “impacts” analysis and not at all on alleged deficiencies with describing baseline conditions. As those discussions are not germane to a contention alleging deficiencies in the baseline, the basis offered in the Petition does not and cannot support EC 1.1. Specifically, the basis begins by identifying the requirement that an ER discuss impacts. Petition at 7. In succession, the Petition then offers several criticisms of the ER’s *impact* analysis.⁹ None of these complaints is relevant to whether the ER contains an adequate *baseline*.¹⁰ By definition, the pre-construction environmental baseline cannot include the presence of a to-be-constructed cooling water system at all, yet most of the Petitions’ basis for EC 1.1 addresses the effects of this very system.

In every respect, Petitioners’ claims are refuted by the ER. To present admissible contentions, Petitioners 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.

⁹ First, it challenges the conclusion on *impacts* to fisheries. *Id.* at 8. Next, Petitioners allege that the ER fails to examine potential *impacts* on habitat availability. *Id.* Then, the Petition alleges the ER: was required to “evaluate entrainment potential” *impacts* associated with the proposed cooling water intake structures; lacks an adequate discussion of the “potential *impacts* of the proposed discharge structure;” and is deficient in the “heat plume” analysis of *impacts* from the proposed cooling water discharge. *Id.* at 9 (emphasis added).

¹⁰ The ER does contain an extensive impacts analysis. *See generally* ER Chs. 4, 5, and 10.

10 C.F.R. § 2.309(f)(1)(vi). Petitioners’ generic assertion that the baseline fails to use quantitative data does not meet this standard. As such, Petitioners’ statements supporting EC 1.1 lack any factual basis and, therefore, this contention is inadmissible. *See* 10 C.F.R. § 2.309(f)(1)(vi).¹¹

b. Petitioners have identified no basis in law for EC 1.1.

“[A] contention must have a basis in fact or law” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 141 (2002). EC 1.1 appears to allege that the baseline information in the ER is inadequate, because it does not contain some of the details desired by Petitioners. However, as explained below, the details sought by Petitioners are not required by NRC regulations or guidance, and Petitioners have provided no basis for contending that such details are required by the applicable law, 10 C.F.R. Part 51.

NRC regulations provide that an ER must “contain . . . a description of the environment affected” 10 C.F.R. § 51.45(b). “Quantitative” data is not required for every aspect of the baseline ecology. In fact, the NRC has explained that in establishing the ecological baseline in the ER, “the initial inventory should establish the identity of the majority of terrestrial and aquatic organisms . . . and their relative (qualitative) abundances.” Reg. Guide 4.2 at 2-4. Only “important species” (*i.e.*, threatened or endangered) should be quantified. *Id.* Section 2.4.2.2.2 of the ER identifies the majority of the fish species, and the ER quantifies the presence of both federally-listed aquatic species. *See* ER §§ 2.4.2.2, 2.4.2.3, and Table 2.4-1. Accordingly, the

¹¹ The Declaration offered by Dr. Shawn Young is inapposite. The Commission recently explained that “an expert opinion that merely states a conclusion (*e.g.*, the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion” *USEC, Inc.* (American Centrifuge Plant), NRC Docket No. 70-7004, 2006 WL 895041, at *13 (2006) (internal quotations and citations omitted).

level of detail in the ER matches the level specified by NRC guidance and complies with NRC rules.

Also, contrary to the suggestions in EC 1.1, NRC rules do not require “field surveys” or “field studies” at the exact location of a to-be-constructed intake or discharge structure. Neither do NRC rules or Council on Environmental Quality’s (“CEQ”) regulations automatically require a license applicant to develop new data. NRC regulations require only that an ER “contain . . . a description of the environment affected,” 10 C.F.R. § 51.45(b), and permit a license applicant to base such a description on available data. *Cf. Friends of Endangered Species*, 760 F.2d at 988 (emphasis added). The ER satisfies this requirement, and Petitioners do not contend to the contrary.

Furthermore, Petitioners have provided no explanation or reasoning as to why additional information is necessary for a reasonable evaluation of the environmental impacts of the project under NEPA’s “rule of reason.” *See Hydro Res.*, 60 NRC at 447. The Commission recently explained in a separate licensing proceeding as follows:

Contentions admitted for litigation must be based on alleged facts or expert opinion pointing to an actual error or deficiency in the application, not petitioners’ “suggestions” or ideas of additional details or description that conceivably could be included. It is always possible to come up with more details or areas of discussion that could have been included in an application or Environmental Report. A petitioner’s mere “demand for more precision does not justify an NRC adjudicatory hearing.”

USEC, Inc., 2006 WL 895041, at *16 (internal quotations and citations omitted). Without a basis in fact or law for why a reasonable evaluation of the proposed action cannot be made based on the data presented in the ER, the Petition has not identified an issue “material to the findings the NRC must make to support” issuance of an ESP. *See* 10 C.F.R. § 2.309(f)(1)(iv).

Although Petitioners do not overtly challenge NRC’s regulations or guidance in this regard, EC 1.1 could be understood to imply that the NRC’s rules and policy governing the

requirements for ERs are inadequate. If so, such a contention is plainly not admissible. The Commission adheres to the “fundamental principle” of administrative law that rules are not subject to collateral attack in adjudicatory proceedings. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

In sum, Petitioners fail to set forth a legal or factual basis for their assertion that the ER must contain data from field surveys or field studies at the specific locations of the intake and discharge systems. Petitioners cite no legal requirement in that regard, and Petitioners provide no genuine issue of material fact regarding the baseline information in the ER (which is based upon decades of surveys of the Savannah River near the SRS and VEGP). Accordingly, the contention is not admissible.

2. *Petitioners’ “Direct, Indirect, and Cumulative Impacts of the Cooling System” Contention (EC 1.2) Is Inadmissible.*

In EC 1.2, Petitioners allege the “ER fails to identify and consider direct, indirect, and cumulative impacts of the proposed cooling system intake and discharge structures on aquatic resources.” JNT Supplement at 2. EC 1.2 is not admissible under 10 C.F.R. § 2.309(f) because it lacks the requisite factual and legal support and fails to present a genuine dispute of material fact.

a. EC 1.2 lacks the factual and legal support required for admissibility.

To be admissible, a contention must do more than present baseless assertions. *See Fansteel, Inc.*, 58 NRC at 203. In particular, a contention must contain legal or factual support for each basis offered in support of a contention. *Duke Energy Corp.*, 59 NRC at 130. EC 1.2 fails to contain either.

i. EC 1.2 lacks the requisite factual support to be admissible.

To satisfy the burden to provide factual support, the basis for each contention must contain “references to the specific portions of the [ER] . . . that the petitioner disputes and the supporting reasons for each dispute” 10 C.F.R. § 2.309(f)(1)(vi). EC 1.2 fails to provide this requisite factual basis for admissibility in at least three respects.

First, the beginning portion of EC 1.2 does not contain any references to the sections of the ER that Petitioners presumably dispute. Nor are there any supporting reasons for each dispute, as mandated by 10 C.F.R. § 2.309(f)(1)(vi). For example, EC 1.2 makes the following broad assertion without any supporting references and reasons to support the assertion:

the ER mistakenly relies on the performance standards that will be imposed under state-issued water quality permits. Both the intake and discharge are subject to regulation under the Clean Water Act; however, the mere fact that the new structures will comply with the regulatory requirements of the Clean Water Act does not mean that they will not cause significant impacts on aquatic species. The ER must describe and analyze the impacts of the proposed action, as well as the applicable regulatory requirements.

Petition at 10. These are precisely the kinds of unsupported assertions the ASLB has deemed inadmissible. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-12, 58 NRC 75, 81 (2003). Simply put, Petitioners fail to tie their factual allegations to specific portions of the ER. It is not the license applicant’s or the NRC’s responsibility to engage in that effort on a petitioner’s behalf. *See Exelon Generation Co.*, 60 NRC at 232 (“If a petitioner neglects to provide the requisite support to its contentions, it is not within the Board’s power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking.”).

Second, where Petitioners cite to the ER, the reference is to portions of the ER which, on their face, provide the very analysis alleged to be lacking. For example, the Petition claims the

ER fails to characterize “chemical discharge . . . in terms of constituents and amount.” Petition at 11. As “support” for this allegation, the Petition cites to page 5.2-4 of the ER. Page 5.2-4, however, (i) identifies the table of expected chemical constituents, (ii) describes the discharge as containing concentrations at four times above ambient levels, (iii) quantifies the blowdown amount at 28,880 gpm, and (iv) characterizes this in terms of percent of river flow and dilution factor. ER § 5.2.3.1. Petitioners’ other allegations that the ER “fails” to consider particular impacts or “fails” to provide certain information are equally baseless.¹² Accordingly, EC 1.2 is incorrect in alleging that the ER “does not consider direct, indirect, and cumulative impacts.” Therefore, EC 1.2 lacks the basis required for admissibility under the NRC’s rules. *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), ASLB No. 50-271, 60 NRC 548, 557 (2004) (“Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed.”).

Third, to the extent that EC 1.2 might be understood to claim that the analyses in the ER are inadequate (instead of that such analyses are missing, as the text of EC 1.2 reads), Petitioners have provided no basis for such an assertion. The two instances where EC 1.2 references expert testimony do not provide the requisite expert support for admissibility. In the first instance,

¹² Specifically, EC 1.2 alleges that the ER fails to estimate the level of mortality from impingement and entrainment, *see* Petition at 10, yet the ER expressly includes that information, which is based on existing data from the Savannah River in the vicinity of the project and based on EPA’s regulations governing cooling water structures. *See* ER §§ 2.3, 2.4. EC 1.2 alleges that the ER fails to quantify or describe systematically the species composition and habitat in the vicinity of the intake and cooling structures, *see* Petition at 10, yet the ER clearly does so. *See* ER § 2.4. EC 1.2 alleges that the ER fails to disclose and analyze the potential impacts from the discharge structure, *see* Petition at 10, yet the ER clearly does so. *See* ER §§ 4.2, 4.3, 5.2, 5.3, 10.2, 10.5. EC 1.2 alleges that the ER fails to evaluate the potential impacts on the aquatic community from radiological, non-radiological and thermal pollution, *see* Petition at 11, yet the ER clearly does so. *See* ER § 2.3.2.1.2; *see also* ER §§ 3.3.2, 3.4.1.3.4, 3.6.3.2, 5.2.3.1, and Tables 3.3-1 and 3.6-1. EC 1.2 alleges that the ER fails to address potential impacts of thermal pollution on aquatic species at the point of discharge and downstream, *see* Petition at 12, yet the ER clearly does so. *See* ER §§ 5.3.2.1 and 5.3.2.2.1.

Petitioners cite a declaration from Dr. Shawn Young for the assertion that the “ER does not acknowledge the potential impacts on aquatic species from this discharge.” Petition at 12. The citation to Dr. Young’s declaration does nothing to explain this assertion, and in fact, it is entirely inconsistent with clear statements in the ER, which fully acknowledge the potential impacts on aquatic species from the ESP facility’s discharge. *See* ER § 5.3.2.2. In the second instance, Petitioners cite Dr. Young’s declaration for the assertion that there are “no field surveys evaluating the existing thermal plume and its interaction with the aquatic species and habitat utilization.” Petition at 13. Again, this statement is unsupported. Not only is this statement entirely inconsistent with the ER, *see* ER §§ 5.3.2.1, 5.3.2.2.1, but this statement also addresses the *baseline* and is not germane to EC 1.2, which alleges an absence of the analysis of *impacts*. *Cf. Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 326 (1998) (explaining that issues raised in a petition for intervention must be germane to the contentions).

As stated previously, the burden of presenting factual support for and explaining a contention belongs to Petitioners, not the Commission or the license applicant. *See Exelon Generation Co.*, 60 NRC at 242. The Petition never explains how these analyses in the ER are inadequate, or how a different analysis would have a significantly different outcome. Therefore, with respect to EC 1.2, Petitioners have failed to carry their burden. *See Duke Energy Corp.*, 54 NRC at 471 (dismissing “cumulative effects” contention as inadmissible where the ER described “four different types of cumulative impacts that have already been analyzed,” and the petitioner did not “provide[] any expert opinion or other documentation to support its assertion that such cumulative effects are significant and need to be considered in the [ER]”).

- ii. *EC 1.2 lacks the legal support required for admissibility and is contrary to NRC requirements for an ER's analysis of direct, indirect and cumulative effects.*

Neither does the Petition supply a legal basis for EC 1.2. Other than parroting 10 C.F.R. § 51.45(b) and the CEQ's definition of "cumulative impacts" found at 40 C.F.R. § 1508.7, Petitioners fail to provide any legal support for the suggestion that the ER's discussion of direct, indirect and cumulative effects is inadequate. *See* Petition at 10. For example, EC 1.2 states the ER "*mistakenly* relies on the performance standards that will be imposed under state-issued water quality permits." *Id.* (emphasis added). Yet Petitioners offer no legal basis as to why the ER was "mistaken."

Similarly, Petitioners state, without any legal citation or support, that compliance with the regulatory requirements of the Clean Water Act "does not mean that [the cooling water structures] will not cause significant impacts on aquatic species," and therefore, the "ER must describe and analyze the impacts of the proposed action" apart from compliance with applicable requirements. Petition at 10. The same is true with respect to Petitioners' assertion that the "ER fails to provide a *meaningful basis* to evaluate cumulative impacts" *Id.* at 13. Again, EC 1.2 simply fails to tie that statement to a legitimate legal basis to support its allegation that the ER is deficient. Such unsupported contentions are not admissible. *See Dominion Nuclear Connecticut, Inc.*, 55 NRC at 141.

There is no legal support available for Petitioners' position in any event. Chapters 4, 5 and 10 of NUREG-1555 set forth NRC's expectations with regard to the discussion of direct, indirect and cumulative effects in ERs.¹³ Consistent with NUREG-1555, the ER

¹³ Throughout NUREG-1555, NRC notes that certain specific information should be obtained from the ER, while other information should be obtained through other means. *See, e.g.*, NUREG-1555 at 1.1-1 through 1.1-2.

comprehensively addresses the direct and indirect impacts of construction and operation of the VEGP in Chapters 4 and 5, respectively. Additionally, consistent with NUREG-1555, the cumulative impacts of construction and operation are comprehensively addressed in Chapter 10 of the ER. Petitioners provide no legal citation or analysis as to why the ER's scrutiny of effects fails to comply with NRC rules. Neither do Petitioners provide any basis for how the ER is inconsistent with the guidance offered in NUREG-1555. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Petitioners' allegation that the ER should have contained "more" is not supported by the requirements of Part 51 and amounts to a complaint that the NRC's rules are insufficient. Such contentions are inadmissible. *See Carolina Power & Light Co*, 16 NRC at 2084.

- b. EC 1.2 is not material to the findings NRC must make to support the issuance of an ESP, and it does not raise a genuine issue of material fact.

Each contention must also 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," and that the contention "raises a genuine issue of material fact." 10 C.F.R. §§ 2.309(f)(iv), (vi). EC 1.2 is not "material" in these respects for at least two reasons.

First, EC 1.2's allegations related to the ER's reliance on Clean Water Act ("CWA") permits and CWA performance standards are immaterial to the findings that NRC must make because EPA has already decided, by notice and comment rulemaking, that the type of cooling system technology proposed for the ESP facility is the "best technology available." *See Regulations Addressing Cooling Water Intake Structures for New Facilities*, 66 Fed. Reg. 65,256 (Dec. 18, 2001). Section 316 of the CWA provides that EPA may not issue a permit to any facility (including the ESP facility) unless EPA first determines that the plant's design can assure "the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made." 33 U.S.C. §

1326(a). Moreover, the same section of the CWA requires that the “location, design, construction, and capacity of cooling water intake structures [must] reflect the best technology available for minimizing adverse environmental impact.” *Id.* § 1326(b).

Having already decided that the cooling system technology proposed for the VEGP is the “best technology available,” the CWA limits the extent to which NRC may review the adequacy of EPA’s determination with respect to cooling system structures, even in an impact analysis conducted under NEPA:

Nothing in [NEPA] shall be deemed to – (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

33 U.S.C. § 1371(c)(2)(A)-(B). In addressing a similar situation, the U.S. Court of Appeals for the First Circuit explained as follows:

Petitioner argues that under NEPA neither the [CWA] nor the EPA’s special expertise in matters of water quality permit the NRC to adopt the EPA findings without an independent inquiry into the effect [the new nuclear power plant] would have on the aquatic environment. There is no dispute that NEPA requires the NRC to factor any anticipated marine pollution into its cost-benefit analysis of the [license] application. The NRC accepts this duty but argues that it is justified in refusing to reach an independent judgment about matters determined by the EPA because those matters are committed by law to the special expertise of the EPA and because repetitious adjudication of the issue would be wasteful. *The NRC argues, and we agree, that [the NRC] can properly limit its concern to deciding whether permits should be issued given the aquatic impact as determined by EPA and other environmental impacts as determined by the NRC.*

New England Coal. on Nuclear Pollution v. NRC, 582 F.2d 87, 98 (1st Cir. 1978) (emphasis added).¹⁴ Accordingly, even if the ER were to go beyond the analysis supported by performance

¹⁴ See also *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1466 (1982) (explaining that NRC may treat EPA’s findings on the aquatic

standards under the CWA, as the Petition contends should occur, this result could have no material effect on the findings the Commission must make to issue the ESP. *See* 10 C.F.R. § 2.309(f)(iv). As such, EC 1.2 is inadmissible.¹⁵

Similarly, with respect to discharge impacts, EC 1.2 fails to raise a genuine issue of material fact. EC 1.2 attacks the ER for focusing on “computer modeling” to determine the impact of thermal discharges expected from the new discharge structures. Petition at 12. The ER’s use of computer modeling (specifically, EPA’s “CORMIX” model) is entirely consistent with NRC’s NEPA obligations for analyzing the impacts associated with not-yet-constructed discharge structures, and Petitioners have failed to demonstrate otherwise. *See* NUREG-1555 at 5.3.2.1-9 (citing EPA’s CORMIX Model “Users Manual” in the explanation of the requirements for an ER’s “description and assessment of the proposed plant’s hydrothermal discharge and associated physical impacts”). There is no dispute that the ER does apply the CORMIX Model. As the Petition does not explain why use of the computer code to model the discharge plume is inappropriate, this allegation does not raise a genuine issue of material fact. *See* 10 C.F.R. 2.309(f)(iv).

Accordingly, the bases for EC 1.2 are unsupported and immaterial and cannot support its admission.

impacts of a once-through cooling system as “conclusive”); *id.* at 1481 (explaining that “determination of the water quality impacts resulting from an effluent discharge are committed by law under sections 401, 402, and 511 of the Clean Water Act to the Environmental Protection Agency and the State. NRC must use EPA’s determination in its cost/benefit analysis rather than reaching its own determination. There is, thus, nothing to litigate on water quality impacts.”).

¹⁵ While ER Section 5.3.1.2 does note that the intake system will comply with applicable EPA regulations, it does not stop there. The ER goes on to provide a quantitative analysis of the amount of entrainment expected for the ESP facility and concludes that the impacts will be “small.” *See* ER § 5.3.1. The ER takes a similar approach with respect to chemical discharges, *see* ER § 5.2.3.1, and thermal discharges, *see* ER § 5.2.3.

3. *Petitioners' "Alternatives Analysis" Contention (EC 1.3) Is Inadmissible.*

Petitioners allege the ER “fails to address impacts to aquatic species in its discussion of alternatives.” JNT Supplement at 2. EC 1.3 goes on to allege “in particular” that “the ER’s discussion of the no-action alternative and of alternative cooling technologies fails to consider environmental and economic benefits of avoiding construction of the proposed cooling system.” *Id.*¹⁶ EC 1.3 is inadmissible because it lacks any genuine factual or legal basis.

The ER clearly addresses aquatic impacts associated with the no-action alternative. Contrary to Petitioners’ allegation, the evaluation of the no-action alternative in the ER does account for the environmental benefits of not constructing and operating the ESP facility. Specifically, Section 9.1 of the ER states that, under the no-action alternative, “the environmental impacts described and predicted in this report . . . would not occur at VEGP if the facility were not built.” ER at 9.1-2. As discussed above, Section 5.3 of the ER discusses the environmental impacts on fisheries. Therefore, through its reference to the remainder of the report (including Section 5.3), the evaluation of the no-action alternative does account for the environmental benefits of *not* constructing and operating the ESP facility. There is no requirement for (and it would not be reasonable to require of) the evaluation of the no-action alternative to repeat all of the impacts discussed elsewhere in the ER. Accordingly, EC 1.3 is inadmissible because it is inconsistent with the clear statements in the ER and, therefore, fails to provide the requisite factual basis. *See Entergy Nuclear Vermont Yankee*, 60 NRC at 557.

¹⁶ In most respects, EC 1.3 is simply a repackaging of the previous contentions. Whereas ECs 1.1 and 1.2 allege deficiencies in identifying the baseline conditions and counting impacts, EC 1.3 alleges deficiencies in counting the absence of those same impacts. Because the benefits of no-action are simply avoiding the impacts of the proposed action, EC 1.3 is largely repetitive.

Also, the ER does contain a specific discussion of dry cooling as an alternative cooling technology. ER § 9.4.1.1. The ER contains many of the same analyses of dry cooling as EPA provided in its regulations governing cooling water system structures. *See* 66 Fed. Reg. 65,256 (Dec. 18, 2001). In fact, EPA has already gone to great lengths to explain why dry cooling should not be further considered. *See id.* at 65,282 (explaining “Why EPA Is Not Adopting Dry Cooling as the Best Technology Available for Minimizing Adverse Environmental Impact”). In summary, the ER explains that dry cooling towers are not suitable for the VEGP site due to their high capital and operating and maintenance costs and their detrimental effect on electricity production. EC 1.3 does not contest these facts or otherwise raise any genuine issue of material fact regarding the high costs and detrimental production impacts of dry cooling towers. Because these facts alone are sufficient to reject dry cooling towers as a reasonable alternative, the ER is not required to include a comparison of the environmental impacts of dry cooling towers with the wet cooling towers proposed for the ESP facility. *Cf. Hydro Res.*, 60 NRC at 447 (noting that only “reasonably probable” environmental impacts arising from the proposed action should be analyzed).

In addition, the Petition fails to set forth the requisite legal support for EC 1.3. The Petition makes the bald assertion that the Savannah River is host to “extremely sensitive biological resources,” that the “ER fails to evaluate the impacts of the proposed cooling system intake and discharge on threatened and endangered species,” and that additional discussion of dry cooling was required as a means of avoiding impacts on the species such as the shortnose sturgeon and the robust redhorse. Petition at 15. However, the Petition offers no factual or legal support for these statements. The Petition implies that “extremely sensitive biological resources” (a term which is neither found nor defined in any federal regulation) is equivalent to the presence of federally-listed species. The Petition provides no explanation or legal support for

this claim. *See* 10 C.F.R. 2.309(f)(v)(vi). Importantly, the ER points out that the Savannah River is not designated as critical habitat for any endangered species and further explains that impacts to species will not threaten their survival. ER §§ 4.3.2, 5.2.1, 5.3.1, 6.5.1. Moreover, Petitioners' allegation that the ER does not evaluate the impact on such species is without basis. Sensitive species, including the shortnose sturgeon and robust redhorse, are discussed in Section 2.4.2.3 of the ER. ER Section 5.3.2.2.1 evaluates the impact of the discharge structure on the shortnose sturgeon and other fishes, and concludes that the discharge would not pose a barrier to migrating fish, that thermally-sensitive fish would be able to avoid the discharge, and that the impacts would be small and would not require mitigation.

4. *Summary Related to Contentions 1.1, 1.2, and 1.3*

Contentions 1.1, 1.2 and 1.3 should be dismissed as inadmissible in their entirety.

B. Petitioners' Environmental Justice Contention (EC 2) is Unsupported and Does Not Raise an Issue of Material Fact or Law.

EC 2 is inadmissible because Petitioners fail to support the contention with sufficient bases and fail to raise a material factual or legal dispute. *See* 10 C.F.R. § 2.309(f). The only bases offered in support of this contention are that SNC's ER is deficient because it fails to adequately evaluate alleged disproportionate environmental impacts on minority and low-income communities relative to (i) subsistence fishing practices, (ii) pre-existing cancer rates, and (iii) their ability to evacuate. Petitioners do not identify any deficiencies in SNC's ER nor do they offer adequate support for their claim. For these reasons, EC 2 must be rejected in its entirety.

1. *Petitioners Have Not Identified a Deficiency in SNC's ER and Have Ignored Its Content.*

Contrary to the general assertion in the Petition, SNC's ER contains a thorough Environmental Justice ("EJ") analysis. *See* ER §§ 2.5.4, 4.4.3, 5.8.3. The analysis is guided by the NRC's Final Policy Statement on Environmental Justice, 69 Fed. Reg. 52,040 (Aug. 24,

2004) (hereinafter, “Final Policy Statement”); Reg. Guide 4.2; NUREG-1555; and Executive Order 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994). As stated in the Final Policy Statement:

the goal of an EJ portion of the NEPA analysis is (1) To identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. It is not a broad-ranging review of racial or economic discrimination.

69 Fed. Reg. at 52,048. SNC’s ER conforms to this policy and associated regulatory guidance because it includes a review of potential disproportionate impacts on low-income and minority communities surrounding the site. ER §§ 2.5.4, 4.4.3, 5.8.3.

The purpose of an EJ analysis is straightforward. “The focus of any ‘EJ’ review should be on identifying and weighing disproportionately significant and adverse environmental impacts on minority and low-income populations *that may be different from the impacts on the general population.*” 69 Fed. Reg. at 52,047 (emphasis added). Additionally, the Commission has held 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. At bottom, for the NRC, EJ is a tool, within the normal NEPA context, to *identify communities* that might otherwise be overlooked and *identify impacts due to their uniqueness* as part of the NRC’s NEPA review process.

Id. (internal citations omitted) (emphasis added). Thus, an EJ analysis consists of two pieces: (i) the identification of the presence of minority or low-income communities; and (ii) assessment of impacts that fall disproportionately on EJ communities due to some characteristics that are “peculiar” or “unique” to those populations.

The ER clearly identifies the presence of minority or low-income communities in the relevant area. Petitioners have not asserted that the identification of these groups is inadequate. It is important to note as a threshold matter that impacts that “fall equally on all members of the community,” are assessed in the EJ context by the overall impacts analysis. *See System Energy*

Res., Inc. (Early Site Permit for Grand Gulf ESP Site), 61 NRC 10, 20 (2005) (affirming Board’s ruling that petitioners’ EJ contention was not admissible because petitioners failed to offer any evidence that the impact would fall disproportionately on those below the poverty line). In other words, many impacts on the communities relevant to an EJ analysis are the same as those experienced by the general population in all nearby communities, and all that need be done is to identify the presence of those communities and provide the overall analysis of impacts applicable to all communities. SNC addressed those impacts in the relevant portions of the ER. *See* ER §§ 2.5.4, 4.4.3, 5.4, 5.8.3, 7.1, 7.2; *see also* Evacuation Plan, Part 5 of ESP.

Regarding the second category, the EJ analysis should assess other impacts that are exacerbated in some way by “unique” or “peculiar” characteristics of the EJ community. The ER also addresses this category of impacts. *See* ER §§ 2.5.4, 4.4.3, 5.8.3. As explained below, Petitioners have failed to identify – with the requisite level of specificity and/or support – any disproportionate, significant adverse impacts on the EJ communities relevant to this proceeding. Moreover, they often fail to acknowledge, much less take issue with, the relevant analyses set forth in the ER.

2. *EC 2 Lacks Adequate Factual Support.*

EC 2 is inadmissible because it is not supported by sufficient information to demonstrate an issue of material fact, as required by 10 C.F.R. § 2.309(f). In order to raise an issue of material fact in the EJ context, an EJ contention must:

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 environment that were not considered because the impacts to the community were not adequately evaluated.

69 Fed. Reg. at 52,047. As explained below, Petitioners’ proposed contention is defective because it lacks the requisite factual support demonstrating an adverse, significant and

disproportionate impact on a minority or low-income community identified in the ER. Nowhere in EC 2 have Petitioners identified, with the requisite specificity and particularity, any such defect in the EJ analysis set forth in the ER. Mere argument and supposition are insufficient to support admission of this proposed contention. *See* 10 C.F.R. § 2.309(f)(v); *see also USEC, Inc.*, 2006 WL 895041, at *2-3, 13 (explaining that contentions must be supported by fact and expert opinions, and by references to specific sources and documents on which the petitioner relies to support its petition).

Petitioners label the purported bases for their EJ contention as “A,” “B,” and “C.” Bases “A” and “B” merely allege that an EJ analysis is required and endorse SNC’s identification of EJ communities in the ER. These “bases” do not support admission of the contention in any way, as they simply do not raise an issue of fact or law. In basis “C,” Petitioners allege that SNC failed to consider three factors that might contribute to a disparate impact on EJ communities: (i) dependence on subsistence fishing, (ii) the present cancer rate in Burke County, and (iii) relative difficulty of low-income and minority populations to travel in the event of required evacuation. Contrary to Petitioners’ claims, however, the ER not only addresses each factor, but also provides a sound basis for concluding that no significant, disparate impacts stem from any of the factors. Thus, Petitioners’ assertions clearly fail to create a genuine dispute of fact or law concerning the analysis of EJ in the ER.

a. Subsistence Fishing

Petitioners claim that the ER “neglects subsistence fishing along the Savannah River within minority and low-income populations.” Petition at 18. This statement ignores the content of the ER and underscores the deficient nature of EC 2 from the outset.

Consistent with NUREG-1555, CEQ Guidance on Environmental Justice, and Executive Order 12,898, SNC collected and reported to NRC information regarding subsistence fishing in the area:

SNC also investigated the possibility of subsistence-living populations in the vicinity of VEGP by contacting local government officials, the staff of social welfare agencies, and local businesses concerning any known unusual resource dependencies or practices that could result in potentially disproportionate impacts to minority and low-income populations. SNC asked about the presence of minority, low-income, or migrant populations of particular concern, and whether subsistence living conditions were evident. No agency reported such dependencies or practices, as subsistence agriculture, hunting, or fishing, through which the populations could be disproportionately adversely affected by the construction project.

ER §§ 4.4.3, 5.8.3. The Petition does not cite to or reference, much less challenge, these sections of the ER. Petitioners offer no argument for why SNC's method for assessing the prevalence or impact of subsistence fishing is deficient. Thus, while the Petition claims "the ER does not recognize that subsistence fishing is an exposure pathway," Petition at 19, it stands mute regarding any purported deficiency in SNC's consideration of this issue. Lacking such information, detail, or explanation, Petitioners have failed to meet their burden, the proposed contention does not satisfy 10 C.F.R. § 2.309(f), and it clearly cannot be admitted to this proceeding. *See Exelon Generation Co.*, 60 NRC at 242.

Even looking beyond these deficiencies, interpreting the Petition in the most favorable light, the Petitioners' claims do not support the identification of either a significant, or a disproportionate, impact from subsistence fishing on the minority or low-income communities discussed in the ER. The claims are clearly without merit. Although the ER considers the possibility of subsistence fishing and concludes it is not a source of disproportionate impacts, the ER does assess the radiological impact on the hypothetical "maximum exposed individual" from fish consumption. The ER estimates that such an individual would consume an average of 21 kg

of fish per year, and concludes that the environmental and health impacts on such an individual would be “small.” See Table 5.4-2, ER § 5.9.3. Petitioners, again, do not even recognize, much less attempt to controvert, this analysis. In fact, one of the studies cited by Petitioners essentially confirms the applicability of the ER’s analysis to minority populations.¹⁷ The Petition, for example, is devoid of any evidence that average fish consumption significantly exceeds the basis for the analysis for a “maximally exposed individual.”

Furthermore, regardless of what the reports might be made to say about the quantitative significance of subsistence fishing in the relevant area, the Petition does little more than make fleeting reference to them. Petitioners offer no direct citations to the reports and provide little explanation of how this data is relevant to, much less at odds with, the direct and (undisputed) conclusion in the ER that “dependencies or practices, [such] as subsistence agriculture, hunting, or fishing, through which the populations could be disproportionately adversely affected by the construction project” are not present. ER §§ 4.4.3, 5.8.3. Petitioners simply have not provided any support for their implied claim that subsistence fishing is sufficiently prevalent in the area to render any impact associated with the activity “significant.”

In this regard, Petitioners offer no argument for why SNC’s method for assessing the prevalence of subsistence fishing is deficient. Moreover, instead of offering a report that demonstrates that subsistence fishing is prevalent, Petitioners merely cite a report that generally states that “African-Americans in particular commonly engage in subsistence fishing along the Savannah River.” Petition at 20 (citing Arjun Mahijani, Ph.D., and Michele Boyd, Institute for Energy and Environmental Research, *Nuclear Dumps by the Riverside: Threats to the Savannah River From Radioactive Contamination at the Savannah River Site* (2004)).

¹⁷ See Petition, Ex. 2.4 at 432 (identifying mean fish consumption having a statistical range that exceeds the 21 kg assumed by the ER by only 7.7%).

Similarly, Petitioner's statements regarding the presence of cesium in "target species" do not create a genuine dispute. Petitioners offer no factual support for the implication in their contention that the concentrations of Cs-137 in Savannah River game fish would increase as a result of issuance of the proposed ESP. In fact, neither SNC's radiological studies of the Savannah River (cited by Petitioners as evidence of Cs-137 in fish), nor any other analysis of subsistence fishing on the Savannah River, points to existing nuclear power plant operations as the current source of cesium in fish. Nor do they suggest that proposed additional units would cause such contamination.¹⁸ Without some factual support for the implication that cesium found in Savannah River fish would increase as a result of the requested ESP, the contention fails to create a dispute of fact supportive of its admissibility in this proceeding.

On top of this, Petitioners provide no facts or expert analysis to support a contention that the low concentrations of Cs-137 found in Savannah River fish impose a significant adverse health or environmental impact to subsistence fishermen anyway.¹⁹ No specific health effect from eating fish with Cs-137 in the levels cited by Petitioners is mentioned in the Petition.²⁰ In fact, Petitioners' exhibit states that a six-year study of cancer rates within a 50 mile radius of DOE's Savannah River Site, which is directly across the river from the VEGP site, "are about the same as in similar communities." Petition Ex. 2.7 at 1. Accordingly, the proposed EJ contention is not supported by the subsistence fishing discussion. *See, e.g., Dominion Nuclear Connecticut*, 60 NRC at 639.

¹⁸ Indeed, the study upon which Petitioners rely shows that Cs-137 levels in Savannah River fish were measured prior to the commencement of operation of VEGP 1 and 2, and have actually decreased over the period the units have operated. *See* Petition Ex. 2.1, at 4-29.

¹⁹ For example, all of the studies relied upon by Petitioners cite mercury contamination of fish as the primary source of concern for subsistence fishermen, not cesium.

²⁰ The current fish advisory for the State of South Carolina for the area describes the risk from radionuclides in the Savannah River as low. S.C. Dept. of Health & Environmental Control, <http://www.scdhec.gov/water/fist/fishfaq.htm#radioisotopes> (last visited Jan. 9, 2007).

Critically, even if a demonstration of a significant adverse impact could be gleaned from the Petitioners' purported basis, no disproportionate impact from the proposed project is sufficiently averred—much less demonstrated—on the face of the Petition or in the reports upon which it relies. Petitioners quote a report that claims the practice of subsistence fishing on the Savannah River is “more common” among African-Americans. Yet Petitioners fail to acknowledge the report bases its “more common” claim on another paper which found in its survey that minority fishermen on the Savannah River near plant Vogle were *underrepresented* as compared to the surrounding population at large. In other words, as opposed to being a disproportionate activity in minority communities, fishing on the Savannah River was, according to the survey relied on by Petitioners, less commonly practiced by minorities. Petition Ex. 2.4 at 430.²¹

Specifically, the sample population underlying the report upon which Petitioners rely consisted of 258 fishermen along the Savannah River, who were interviewed over a several month period. Of those 258, 70% were White, 28% were Black and 2% were other. The report states that “[34%] of the population in the counties adjacent to the stretch of river surveyed is Black” *Id.* Thus, the percentage of minority individuals engaged in subsistence fishing, *according to that study*, is less than the percentage of minorities in the relevant general population. This data relied upon by Petitioners as the factual basis for their contention, cannot

²¹ Petitioners similarly attempt to identify a disproportionate impact by citing a report for the proposition that Cs-137 increases when the fish is deep-fried. Petition at 22. However, the mass of Cs-137 contained in fish absolutely will not change due to cooking method, and the report relied on by Petitioners does not claim it will. Cooking may change the weight of a fish, but to imply this increases the amount of Cs-137 is at best misleading. *See* Petition, Ex. 2.6 at 231. Moreover, while Petitioners claim this is important because “over 80% of the people interviewed along the Savannah River deep-fried their fish regularly,” Petition at 22, Petitioners fail to explain that the study upon which that report relies found that only 28% of the fishermen interviewed were African-American.

raise an issue of material fact and does not support a contention based on alleged disproportionate impact based on race from subsistence fishing.²²

Nor does the Petition provide any support for the allegation that subsistence fishing has a disproportionate impact on *low-income communities*. First of all, the study relied upon by Petitioners to support their contentions includes data that indicates that the quantity of fish consumed across all income levels (17.25 – 18.93 kg) is less than the 21 kg per year analyzed in the ER. *See* Petition Ex. 2.4 at 434, Table V; ER at 5.4-7. Moreover the difference between the quantities of fish consumed by fishermen whose average income is less than \$20,000 per year (18.93 ± 1.88 kg) is not reported to be significantly different than the quantities consumed by fishermen whose average income was above \$20,000 (17.25 ± 2.82 kg). *See* Petition Ex. 2.4, Table V. The report itself characterizes this difference as “not significant.” *Id.*

Notably, although the report relied upon by Petitioners states that the average income of the fishermen surveyed (\$21,490) was less than the “regional income around SRS” (\$27,647), *see* Petition Ex. 2.4 at 430, this sparse information provides essentially no indication of whether the fishermen interviewed were disproportionately members of low-income populations. For instance, merely stating the average income of the individuals interviewed says nothing about whether there are other income-earners in the survey respondent’s household or whether the respondent was a dependent of an individual with a higher income. The study relied upon by Petitioners does not support a contention that low-income populations disproportionately consume fish from the Savannah River.

Therefore, by failing to provide any evidence of disparate, significant and adverse impacts, Petitioners have not met the requirements for an admissible EJ contention. *See System*

²² Petitioners also fail to acknowledge that the report they rely on expressly links its alleged impacts on subsistence fishing to the presence of the Savannah River Site, not possible future operations at Plant Vogtle.

Energy Res., 60 NRC at 291; Final Policy Statement, 69 Fed. Reg. at 52,040. Petitioners' basis is unsupported and the contention is inadmissible. *See* 69 Fed. Reg. at 52,047.

b. Cancer Rates

As with Petitioners' subsistence fishing arguments, this purported basis for EC 2 does not support its admissibility. Petitioners claim the EJ analysis in the ER inadequately considers an alleged disproportionate impact on low-income and minority populations arising from higher-than-average cancer rates in those groups. Petition at 23. SNC included in its ER a thorough evaluation of radiological consequences of normal operation, as well as from design basis and severe accidents, on the members of the public most at risk from operation, including on the most exposed minority and low-income populations. *See* ER §§ 5.4, 7.1, 7.2. Again, Petitioners have chosen to ignore the sections of the ER that discuss the impacts the project would have on cancer rates, and, for this reason alone, EC 2 is inadmissible.

In fact, Petitioners point to no portion of the ER as being supposedly inadequate on this front, and specifically do not cite the evaluation of the radiological impacts of normal operation, design basis accidents, or severe accidents set forth in the ER. *See* ER §§ 5.4, 7.1, 7.2. Rather, Petitioners state, without any support, that the cancer rates for the minority populations around Plant Vogtle, are "higher-than-average." Petition at 23. This allegation, however, flies in the face of the primary report upon which Petitioners rely, which begins:

After years of concern about unsafe living conditions around the Savannah River Site, which produces material for nuclear weapons, researchers announced that *most cancer rates in the area are about the same as in similar communities*. The University of South Carolina study did find more cases of cervical cancer among black women and cancer of the esophagus among black men than expected in a 22-county area in South Carolina and Georgia. And while researchers said more study is needed, *neither cancer is generally associated with exposure to radiation*.

Petition Ex. 2.7 (emphases added).²³ Again, assuming Petitioners mean to imply that the incidence of esophageal and cervical cancer is “peculiar” or “unique” to minority communities, they fail to offer any evidence of or support for the existence of “significant, disproportionate impact.” The vague assertion of “[m]ore cases . . . than expected,” *id.*, does not support the inference that minority and low-income communities have a higher rate of certain cancers than the general population of interest in the proceeding. The Petition does not even attempt to distinguish between cancer rates for African-Americans and the general population in Burke County – a distinction which would be a necessary prerequisite to establishing disproportionate impact based on race. Moreover, the very cancers relied upon by the Petitioners are characterized as not “generally associated with exposure to radiation.” *Id.* Petitioners have provided no factual support that suggests any such causal connection.

Petitioners also imply that the ER does not adequately consider health effects on children and fetuses. Petition at 23. This claim likewise lacks specificity and fails to even suggest that any purported significant adverse health impacts stemming from issuance of the proposed ESP fall disproportionately on minority or low-income populations. As in the case of *Duke Cogema Stone & Webster*, Petitioners have failed “to demonstrate through any expert opinion or supporting documentation that children and babies suffer more damage than do adults.” 54 NRC at 470. Similarly, Petitioners do not relate their “findings” to impacts on minority and low-income populations, as required to support admission of a purported EJ issue.

Again, to be admissible, Petitioners’ EC 2 must demonstrate that issuance of the requested ESP would result in a disproportionate significant adverse impact on the low-income and/or minority population groups discussed in the ER. Even taking Petitioners’ basis as true,

²³ It is noteworthy that Petitioners criticize the ER’s use of SRS data in EC 1.1, while relying on such data themselves in EC 2.

Petitioners wholly fail to connect this possible incidence of unrelated cancers in a minority population to issuance of the proposed ESP.

c. Ability to Evacuate

Finally, Petitioners claim that SNC “fails to consider the inability of low-income and minority populations around Plant Vogtle to respond or evacuate in the case of a nuclear accident.” Petition at 24. Paradoxically, Petitioners cite to both the Emergency Plan and the ER to “support” their claim that SNC “fails to consider” these populations. Petition at 25. Presumably, the contention implies that the analysis is insufficient; however, Petitioners fail to explain with specificity how that could be so. Petitioners simply note that, “low-income and minority communities dominate the area within the proposed EPZs [emergency planning zone].” Petition at 25. But this fact is not contested; it is clearly recognized in the ER. ER § 2.5.4. Consequently, impacts that affect the community in general necessarily affect these minority and low-income communities. *See System Energy Res., Inc.*, 61 NRC at 20 (finding that an impact was not disproportionate when it fell equally on all members of the community).²⁴

To the extent that those in the minority and low-income communities have some “peculiar” characteristic that must be considered, Petitioners seem to believe that it involves access to automobiles. In support of this belief, Petitioners rely solely on the recent difficulties experienced in evacuating low-income residents of New Orleans, Louisiana following Hurricane Katrina. “The evacuation plan functioned adequately for the population with automobiles, but utterly failed to protect the most vulnerable populations.” Petition at 25. This presumption is completely unsupported by fact, explanation or reference, and cannot serve as a legitimate basis

²⁴ In this vein, Petitioner seems to rely on the EIS for the Savannah River site as evidence of a disparate impact. Petition Ex. 2.9 (misidentified as 2.8 in the text). However, Petitioners offer no explanation of this report or of how it presents any evidence that (i) there was any disparate impact found by NRC in the MOX SRS EIS or (ii) that an accident would cause a disparate impact at VEGP.

for the proposed contention.²⁵ It is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Duke Cogema Stone & Webster*, 54 NRC at 422. The Petition improperly leaves it to the Board to fill these gaps without the benefit of reasonable explanation or factual support. For these additional reasons, EC 2 must be rejected as a matter of law.

Moreover, this portion of the basis for EC 2 ignores the fact that SNC has included a comprehensive evacuation plan in the EP, included as Part V of the ESP application, which specifically considers those without automobiles. Specifically, in accordance with NUREG/CR-6383, SNC's evacuation time estimates account for individuals who do not have access to a personal vehicle at the time of evacuation. The VEGP Emergency Plan (which is a joint plan encompassing the existing VEGP units and the ESP facility units) expressly provides for the provision of transportation to individuals who cannot evacuate on their own:

Privately owned vehicles will be the primary mode of transportation if evacuation is directed. Individuals who do not have their own means of transportation have been advised, to arrange their own transportation, if possible. If this is not possible, individuals are instructed to stay tuned to the radio or television and listen for the phone number to call to be picked up. Specially equipped vehicles will be dispatched directly to the homes of handicapped and/or non-ambulatory individuals requiring special transportation means.

VEGP EP § J.2.3. The EP also provides for the distribution of calendars to all households, businesses and facilities within the emergency planning zone ("EPZ"), that include detachable cards that individuals can use prior to an evacuation to notify SNC of the need for assistance. *Id.* § G. SNC emergency planning staff maintains a database of this information. *See Georgia Radiological Emergency Plan, Annex D – Plant Vogtle, Attachment H(d).*

²⁵ For example, the Petition does not address the differences between the urban and rural populations at issue or differences in the mobility of residents of New Orleans during a flood and the residents of the area surrounding the VEGP site in the event of an emergency.

These commitments are buttressed by the emergency plans of several local authorities.

The Georgia Radiological Emergency Plan states:

Privately owned vehicles will be the primary mode of transportation if evacuation is directed. County school buses, traveling their regular routes will provide transportation to those individuals lacking personal transportation. Standard Operating Procedures (SOP) for the case of handicapped individuals is maintained in the Burke County EOC. A roster of the individuals residing within the Plume Exposure Pathway EPZ is included in the SOP. Special equipped vehicles will be dispatched directly to the homes of handicapped and/or non-ambulatory individuals requiring special transportation means. The EMA Director will coordinate with the Burke County Health Department and Burke County Department of Family and Children Services on Implementation of the SOP to assure that the handicapped are safely evacuated from the area and proper care provided.

Id. Similarly, the South Carolina Operational Radiological Emergency Response Plan provides:

Emergency transportation services are the primary responsibility of the affected county. County procedures and the means for the evacuation of residents who may be immobilized through institutional confinement or other factors are contained in county EOPs.

....

Evacuees who do not have transportation and confined persons who require special transportation will be provided transportation by the affected county. State assistance may be requested. Special transportation needs are addressed in the Aiken, Allendale and Barnwell county EOPs.

South Carolina Operational Radiological Emergency Response Plan, Vogtle Site Specific Plan, Part 5 Section IV(B)(5)(b), (6)(h). Finally, the coordinated Barnwell County emergency plans provide for the use of public vehicles for the transport of individuals in the EPZ without access to private vehicles in the event of evacuation.²⁶

²⁶ See Barnwell County Emergency Operations Plan Annex F – Q2, Vogtle Electric Generating Plant, Section IV(K); ANNEX Q2, Fixed Nuclear Facility (FNF) Radiological Emergency Response Plan (RERP) to the Aiken County Emergency Operations Plan (EOP), Vogtle Electric Generating Plant, Section IV(K)(2); and ANNEX Q2, Fixed Nuclear Facility (FNF) Radiological Emergency Response Plan (RERP) to the Aiken County Emergency Operations Plan (EOP), Vogtle Electric Generating Plant, Section IV(K)(2).

To their detriment, Petitioners ignore the EP and provide no argument or evidence as to why these emergency procedures will not be adequate to evacuate those segments of the population that are without transportation, even assuming for the purpose of argument that those individuals are members of minority or low-income population groups – an assumption unsupported by Petitioners.²⁷ Thus, to the extent that Petitioner’s evacuation basis for EC 2 relies upon a purported failure of the VEGP EP to consider the special needs of individuals without personal modes of transportation, the basis lacks factual support and contradicts the clear language of the EP and, therefore, must be dismissed.²⁸

Accordingly, Petitioners have not provided “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.” *See* 69 Fed. Reg. at 52,047. EC 2 is due to be dismissed.

²⁷ Notably, the Petition only alleges “Environmental Contentions.” JNT Supplement at 2. Therefore, any objection to the Emergency Plan would not be germane to contentions in the Petition. Petitioners in the System Energy Resources ESP proceeding asserted a similar basis for their EJ contention, alleging that the applicant’s EP was deficient because it failed to consider, among other allegedly discriminatory economic issues, the fact that the local county government was unprepared to respond to a radiological or security emergency because of “the high level of poverty” in the county. *See System Energy Res.*, 61 NRC at 20. The Board dismissed the contention, holding that it failed to identify any significant and disproportional environmental impact on the minority or low-income population. *Id.* Petitioners’ evacuation basis similarly lacks a sufficient nexus to the physical or human environment and should be dismissed.

²⁸ Neither does the Petition create any factual dispute over whether the evacuation procedures for that portion of the population without automobiles are sufficient to avoid the asserted difficulty in evacuating individuals without personal transportation. Petitioners do not even discuss the EP and provide no evidence that these emergency procedures will not be adequate to evacuate those segments of the population that are without transportation, even assuming for the purpose of argument that those individuals are members of minority or low-income population groups.

C. EC 3 Is Inadmissible Because It Is an Impermissible Challenge to the Commission’s Waste Confidence Rule and Raises Issues That Are Clearly Beyond the Scope of This Proceeding.

In EC 3, Petitioners assert that “[t]he ER for the Vogtle ESP is deficient because it fails to discuss the environmental implications of the substantial likelihood that spent fuel generated by the new reactors will have to be stored at the Vogtle site for more than 30 years after the reactors cease to operate, and perhaps indefinitely.” Petition at 26. In general, concerns relating to the ultimate disposal of spent fuel have been generically addressed by the Commission through its rulemaking process – resulting in the Waste Confidence Decision.²⁹ Petitioners argue, however, that “[t]he Waste Confidence Decision does not support SNC’s failure to address this issue in the ER, because it has been outdated by changed circumstances and new and significant information.” Petition at 26. As a basis for their proposition that the current Waste Confidence Decision is no longer viable and should be reviewed in this proceeding, Petitioners assert that (i) there have been further delays in the projected beginning of operations at Yucca Mountain, (ii) new reactor licensing was not contemplated by the 1990 Waste Confidence Decision, and (iii) the 1990 Waste Confidence Decision was issued prior to the attacks of September 11, 2001. *See* Petition at 30. As demonstrated below, this adjudicatory proceeding is not the proper forum for Petitioners to challenge the validity of the Waste Confidence Rule, and EC 3 should be rejected as an inappropriate challenge to the Commission’s rules.

Nearly identical contentions were proposed in all of the prior three ESP applications (Clinton, Grand Gulf and North Anna). In each of those proceedings, the ASLB ruled that such contentions were inadmissible. *Exelon Generation Co.*, 60 NRC 229; *Dominion Nuclear North Anna*, 60 NRC 253; *System Energy Res.*, 60 NRC 277. The main factors cited in rejecting those challenges to the ESP applicants’ reliance on the Waste Confidence Rule were (i) the proposed

²⁹ *See* 10 C.F.R. § 51.23(a).

contentions constituted an impermissible challenge to the Commission's regulations, (ii) Petitioners did not request or present adequate grounds for a waiver of the Waste Confidence Decision under 10 C.F.R. § 2.335(b), and (iii) the proposed contentions raised a matter that was not within the scope of those proceedings. *See Exelon Generation Co.*, 60 NRC at 246-47; *Dominion Nuclear North Anna*, 60 NRC at 268-70; *System Energy Res.*, 60 NRC at 296-97. These same factors hold true in the instant proceeding and must lead to rejection of EC 3.

1. EC 3 Is an Impermissible Challenge to the Commission's Regulations.

Pursuant to the Waste Confidence Rule, “no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license . . . is required in any environmental report, environmental impact statement, [or] environmental assessment” 10 C.F.R. § 51.23(b). The Commission's Waste Confidence Rule is based on the findings of the Commission's Waste Confidence Decision. *See Final Waste Confidence Decision*, 49 Fed. Reg. 34,658 (Aug. 31, 1984). That decision assessed the degree of assurance that radioactive waste can be disposed of safely; when such disposal or offsite storage would be available; and whether radioactive waste can be stored safely on site after expiration of existing facility licenses until offsite disposal or storage is available. The Commission reevaluated its initial Waste Confidence Decision in 1990, and affirmed, with some changes, the findings of the original decision. *See Review and Final Revision of Waste Confidence Decision*, 55 Fed. Reg. 38,474 (Sept. 18, 1990). The Commission also amended 10 C.F.R. § 51.23 to conform to the revised findings. *See id.* On December 6, 1999, the Commission issued a status report on the Waste Confidence Decision, concluding that “experience and developments since 1990 *confirm* the Commission's 1990

Waste Confidence findings.” Status Report on the Review of the Waste Confidence Decision, 64 Fed. Reg. 68,005 (Dec. 6, 1999) (emphasis added).

The ASLB is without authority to reconsider, as the Petitioners have proposed, the validity of the Waste Confidence Rule promulgated by the Commission. The concerns raised by Petitioners have been generically resolved by the Commission through its rulemaking process and adequately addressed through the codified Waste Confidence Rule. *See* 10 C.F.R. § 51.23(a). Because the Commission has decided to address generically matters related to the ultimate disposal of spent fuel through its rulemaking process, Petitioners cannot, in an adjudicatory proceeding, attack the pertinent rule. Specifically, NRC regulations state that “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source materials, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding” 10 C.F.R. § 2.335(a).³⁰ As the Commission made clear in *Duke Energy Corp.*, “[i]f [p]etitioners are dissatisfied with our generic approach to the [waste storage] problem, *their remedy lies in the rulemaking process, not in this adjudication.*” 49 NRC at 345 (emphasis added); *see also Connecticut Yankee Atomic Power Co. (Haddam Neck Plant)*, CLI-03-7, 58 NRC 1, 7 (2003) (stating that “[i]f our safety regulations are in any way inadequate and need revision, the appropriate vehicle to ask the Commission to set a new standard is a petition for rulemaking under 10 CFR § 2.802”). Indeed, to date, the Commission’s Waste Confidence Rule has evolved through the use of the rulemaking process and related notice and comment procedures, not on an ad hoc basis in individual adjudications.

³⁰ Moreover, in individual adjudicatory proceedings, the Commission repeatedly has sought to “make clear. . . that a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings.” *N. Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1)*, CLI-99-6, 49 NRC 201, 217 n. 8 (1999) (citing *Massachusetts v. NRC*, 924 F.2d 311, 330 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991)).

Similar principles were espoused in the rulings in the Clinton, Grand Gulf and North

Anna ESP proceedings:

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.

Exelon Generation Co., 60 NRC at 241 (internal citations omitted) (emphasis added); *see also*

Dominion Nuclear North Anna, 60 NRC at 264; *System Energy Res.*, 60 NRC at 288-89.

In *Duke Energy*, the Commission summed up its position on adjudicatory challenges to the Waste Confidence Rule as follows:

The Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license-by-license, when reviewing individual applications. High level waste storage and disposal, we have said, "is a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive reconsideration of the matter." 61 Fed. Reg. 66,537, 66,538 (Dec. 11, 1996). The petitioners have presented no reason for the Commission to depart from its generic waste storage determinations in this proceeding and instead litigate the question in an individual case.

49 NRC at 345.

The Waste Confidence Rule, on its face, illustrates that it was designed to dispense with the need for NRC adjudications to address the impacts associated with the ultimate disposal of spent fuel and high-level waste. The Waste Confidence Decision applies directly to this proceeding and, therefore, the Commission's regulations prohibit the admission of EC 3. It is an impermissible, unauthorized challenge to the Commission's regulations in violation of 10 C.F.R. § 2.335 and should be rejected.

Petitioners allege the Waste Confidence Rule does not apply to this proceeding because “[w]hen the NRC issued the 1990 Waste Confidence Decision, the prospect of new reactor licensing was virtually nonexistent.” Petition at 30. This position is baseless and contrary to the Waste Confidence Rule. According to the Waste Confidence Rule:

The 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 . . . of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). The Commission stated that it has confidence that waste generated by “any reactor” will be safely managed. Moreover, the regulatory history of the Waste Confidence Rule demonstrates an intention to cover new reactors. Specifically, the Commission noted that “[t]he availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after the expiration of these reactors’ [operating licenses]. The same would be true of the spent fuel discharged from any new generation of reactor designs.” 55 Fed. Reg. at 38,503-04; *see also Exelon Generation Co.*, 60 NRC at 247; *Dominion Nuclear North Anna, LLC*, 60 NRC at 269; *System Energy Res., Inc.*, 60 NRC at 296 (“[W]hen the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors.”). Therefore, in light of the plain language of the rule, the Waste Confidence Rule applies to this proceeding and EC 3 is an impermissible challenge to this applicable regulation.

2. *Petitioners Have Not Requested a Waiver Under 10 C.F.R. § 2.335(b) or Provided Adequate Support to Obtain Such Waiver.*

The only provision in NRC rules that allows for a challenge to an existing NRC regulation is the waiver provision set forth in 10 C.F.R. § 2.335(b). Under 10 C.F.R. § 2.335(b), the Commission has provided that litigants, in an adjudicatory proceeding subject to 10 C.F.R. Part 2, may request that a Commission rule or regulation “be waived or an exception made for a particular proceeding.” The Commission has specified that “[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.” *Id.* Moreover, the Commission has stated unambiguously that “[w]aiver of a Commission rule is simply not appropriate for a generic issue.” *Connecticut Yankee Atomic Power Co.*, 58 NRC at 8.³¹

The Commission requires that any request for such waiver or exception “be accompanied by an affidavit that identifies . . . the subject matter of the proceeding as to which the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.” 10 C.F.R. § 2.335(b). Additionally, “[t]he affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.” *Id.* In order to establish special circumstances that would support a waiver, the petitioner “must allege *facts not in common with a large class of facilities* that were not considered, either explicitly or by

³¹ The Petitioners’ request is directly analogous to the request made by the intervenor in the Haddam Neck license termination proceeding. That intervenor requested that the Commission reconsider the adequacy of the dose standard (25 mrem/year) set forth in 10 C.F.R. § 20.1402. There, the Commission held: “Without referring to any special circumstances peculiar to the Haddam Neck site, [the intervenor] simply asks the Commission to reconsider the standard itself. We will not do so in this adjudicatory proceeding.” *Connecticut Yankee Atomic Power Co.*, 58 NRC at 8.

necessary implication, in the rulemaking proceeding for the rule sought to be waived.” *Private Fuel Storage*, 47 NRC at 238 (emphasis added).

In the instant case, the Petitioners have not requested a waiver (*see* Petition at 26-31), and the circumstances of this proceeding clearly do not meet any of the requirements imposed by the Commission on petitioners wishing that a rule be waived or an exception be granted. Specifically, the Petitioners have failed to establish that application of the Waste Confidence Rule in this particular proceeding would not serve the purpose for which the rule was adopted.³² Moreover, to support EC 3, Petitioners have provided only generic considerations that would apply to any reactor or site – rather than providing “special circumstances” that might exist with respect to the proposed reactors at the Vogtle site, which are the subject of this proceeding.³³ In this regard, EC 3 seeks reconsideration of the Waste Confidence Decision as it pertains to all spent nuclear fuel, wherever it might or will be produced and stored and is “nothing more than a generalization regarding [Petitioners’] views of what applicable policies ought to be.” *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982), *vac’d in part on other grounds*, 16 NRC 1647 (1982). Such a broad petition for a waiver does not meet the standard in 10 C.F.R. § 2.335.

Similarly, Petitioners have failed to demonstrate that “the circumstances involved are ‘unusual and compelling’ such that . . . a waiver is necessary to address the merits of a ‘significant safety problem’” with such significance being “viewed in the context of any other protective measures that are in place to prevent safety problems.” *Private Fuel Storage*, 47 NRC at 239. Petitioners state that the Waste Confidence Rule “must be re-examined in light of new

³² Petitioners also fail to show, within the context of NEPA, that there are special circumstances that would cause the rule not to serve its purpose.

³³ Here, Petitioners’ contention refers to: “U.S. facilities”; “number of companies”; “nuclear power plant sites”; “reactor sites”. Petition at 30-31.

information regarding the threat of intentional attack[s] against U.S. facilities.” Petition at 31. But such an assertion falls far short of demonstrating “a significant safety problem” which lacks adequate “protective measures.” Petitioners provide no information suggesting that the Commission’s security regulations and additional measures taken since September 11, 2001, are inadequate to protect against a design basis threat.³⁴ To the extent Petitioners may be implying that NRC’s requirements do not provide reasonable assurance that spent fuel can be stored safely, their contention should be viewed as an impermissible challenge to the regulations in 10 C.F.R. Part 73. To the extent Petitioners may be suggesting that spent fuel storage is unsafe without protection against an attack by an enemy of the state, their contention is barred by 10 C.F.R. § 50.13.

Insofar as EC 3 might be construed as a request for a waiver of 10 C.F.R. § 51.23 in this proceeding, Petitioners do not comply with or meet the procedural and substantive standards for such a waiver imposed by Section 2.335 and Commission precedent. For the reasons described above, the EC 3 relating to waste confidence issues is inadmissible.

3. *EC 3 Raises a Matter That Is Not Within the Scope of This Proceeding.*

EC 3 impermissibly raises a matter that is not within the scope of this proceeding. Absent a showing of “special circumstances” under 10 CFR § 2.335(b), which the petitioners

³⁴ 10 C.F.R. § 73.1 requires licensees to protect against certain design basis threats involving acts of radiological sabotage, which is defined as a determined violent external assault, attack by stealth, or deceptive actions, of several persons who are well trained, have inside assistance, possess suitable weapons and hand carried equipment and a four-wheeled drive land vehicle. Indeed, the attacks of September 11th have prompted the NRC to change its Design Basis Threat for reactors, *see* NRC Press Release, *NRC Approves Changes to the Design Basis Threat and Issues Orders For Nuclear Power Plants to Further Enhance Security*, No. 03-053 (Apr. 29, 2003), and to propose generic changes to the Design Basis Threat, *see* 71 Fed. Reg. 62,664 (Oct. 26, 2006).

have not made, this matter must be addressed through a Commission rulemaking. As noted by the ASLB's ruling on a similar Waste Confidence contention in the Clinton ESP proceeding:

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 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

See Exelon Generation Co., 60 NRC at 231-32. Moreover, in holding that the Waste Confidence contention was inadmissible in the Clinton ESP proceeding, the ASLB acknowledged that “the contention and its supporting bases raise *a matter that is not within the scope of this proceeding*” *Id.* at 244 (emphasis added). The ASLB should hold that Petitioners' Waste Confidence contention is, likewise, beyond the scope of this proceeding.

At bottom, EC 3 fails to establish a genuine dispute with Southern Nuclear on a material issue of law or fact and seeks relief that cannot be granted in this adjudicatory proceeding. Petitioners' request for “reconsideration” of the Commission's Waste Confidence Rule must be pursued by petition for rulemaking.

D. Petitioners' Contention Regarding Intentional Attacks (EC 4) is Inadmissible.

In EC 4, Petitioners assert that the ER for the Vogtle ESP is inadequate to satisfy NEPA and 10 C.F.R. § 51.45(b)-(c), because it does not address the possibility of intentional attacks on the proposed units. *See* Petition at 32. As a basis for EC 4, Petitioners allege that (i) the ER “fails to address the environmental impacts of intentional attacks on the proposed nuclear power plants, or to evaluate a reasonable range of alternatives for avoiding or mitigating those impacts,” and (ii) the ER “fails to address the cumulative impacts of an intentional attack on the existing Plant Vogtle, or to evaluate a reasonable range of alternatives for avoiding or mitigating those

impacts.” Petition at 32. EC 4, however, is inadmissible because it is contrary to established Commission precedent and Petitioners rely on legal authority that is neither established nor binding in this proceeding.

1. Established Commission Precedent Does Not Require a Terrorism Analysis as Part of the ER.

Based on long-standing precedent of the Commission, NEPA does not require a terrorism analysis. See *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Duke Cogema Stone & Webster*, 56 NRC 335 (2002) (construction permit); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002) (license renewal); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002) (license amendment proceeding to expand spent fuel pool storage capacity). In these cases, the Commission has repeatedly and unequivocally ruled that effects of terrorist attacks need not be considered under NEPA. Specifically, the Commission has held:

[A]n EIS is not an appropriate format to address the challenges of terrorism. The purpose of an EIS is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about “worst case” scenarios and how to prevent them.

Private Fuel Storage, 56 NRC at 347 (emphasis added). NEPA’s mandate “is to consider a broad range of environmental effects that are reasonably likely to ensue as a result of a major agency action, not to engage in speculation about what might happen as a result of criminal terrorist activities.” *Id.* at 352. Consistent with the ASLB’s prior rulings, the Commission’s analysis need not include speculation about potential consequences of terrorism at the site of new reactors. Consequently, there is no requirement for an ER to contain such an analysis. Certainly,

given the rulings discussed above, such an analysis would not be material to the Commission's issuance of the ESP. *See* 10 C.F.R. § 2.309(f)(iv).

In the benchmark case on this issue, *Private Fuel Storage*, the Commission detailed four principal reasons for holding that NEPA does not require a terrorism review: (i) the possibility of a terrorist attack is speculative and too far removed from the natural or expected consequences of agency action to require a study under the "rule of reason" inherent in NEPA; (ii) the risk of a terrorist attack at a nuclear facility cannot be adequately determined; (iii) NEPA does not require a "worst case" analysis, which creates a distorted picture of the project's impacts; and (iv) NEPA is not an appropriate forum for considering sensitive security issues. *Id.* at 349-56.

In general, Petitioners are requesting the Commission to reconsider its decision in *Private Fuel Storage*. *See* Petition at 32-33. As a threshold matter, this request is not a sufficient basis for a contention before the ASLB, because the ASLB is bound by Commission precedent. *See, e.g., Virginia Elec. & Power Co.*, (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 465 (1980) (noting that the Board's obligation to follow Commission precedent would preclude acceptance of the intervenor's contention). In any event, the Petitioners have not provided a sufficient basis for their request. In particular, they have not presented any information that would call into question any of the four principal reasons in *Private Fuel Storage* for not requiring terrorism analysis under NEPA, let alone showing that all four reasons are no longer valid. Therefore, Petitioners have not provided an adequate basis pursuant to *Private Fuel Storage* for the ASLB to mandate a terrorism analysis as part of this proceeding.

2. *EC 4 Is Based on Case Law Which Is Neither Established Nor Binding in This Proceeding.*

Petitioners rest their argument that the ER should consider intentional attacks on the recent decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)

(“*Mothers for Peace*”), stating “the Ninth Circuit reversed the Commission’s refusal, as a matter of law, to consider the environmental impacts of terrorist attacks in its licensing decisions.” Petition at 32-22. On this basis, Petitioners claim that “the Commission should apply the decision to *all of its licensing decisions*, including the Vogtle ESP decision.” Petition at 33 (emphasis added). However, *Mothers for Peace* is not binding on the NRC outside of the Ninth Circuit and therefore is not binding in this proceeding.³⁵ Petitioners themselves concede that the Ninth Circuit’s decision “*is not binding* on the NRC outside of the Ninth Circuit.” Petition at 33 (emphasis added).

Moreover, contrary to Petitioners’ assertion, the Ninth Circuit did not change the binding law which is applicable to the Vogtle ESP application. The Ninth Circuit’s mandate remanded the case to the NRC for further action by the NRC in that proceeding. *Mothers for Peace*, 449 F.3d at 1035.³⁶ The Ninth Circuit did not require the NRC to change its regulations or to take any other action that would affect the Vogtle ESP application. 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

³⁵ *Mothers for Peace* is not binding on NRC in proceedings outside the Ninth Circuit. Initially, we note that the decision in *Mothers for Peace* is inconsistent with the decisions in other federal circuits. See, e.g., *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743 (3d Cir. 1989). In any event, 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, Inc. v. Thornburgh*, 880 F.2d 1325, 1330-33 (D.C. Cir. 1989). 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 R.R. Ret. Bd.*, 685 F.2d 1041, 1046 (7th Cir. 1982).

³⁶ Also, a Petition for a Writ of Certiorari of the Ninth Circuit’s decision in *Mothers for Peace* is currently pending before the United States Supreme Court. See Petition for Writ of Certiorari, *Pac. Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (U.S. Sept. 29, 2006).

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.”

Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-23, 2006 WL 2584712, at *2 (Sept. 6, 2006) (quoting *Mothers for Peace*, 449 F.3d at 1035) (alterations in original).

Since this proceeding does not involve any actions within the Ninth Circuit, *Mothers for Peace* does not change the binding law applicable to the Vogtle ESP, and the ASLB is bound by the Commission’s established precedent on this issue.

3. *EC 4 Is an Impermissible Challenge to the Regulatory Position of the Commission.*

As currently specified in NRC regulations, an applicant is not required to provide design features or other measures to protect against attacks or destructive acts by an enemy of the United States, whether a foreign government or other person. *See* 10 C.F.R. § 50.10. This provision is applicable to ESP proceedings, as provided in 10 C.F.R. § 52.18. To the extent that Petitioners assert that an analysis of terrorist attacks must be a part of the general requirements for ESP applications and other proceedings, this adjudicatory proceeding is not the proper forum. It is well established that an adjudication is not the proper forum for challenging applicable requirements or the basic structure of the agency’s regulatory process. *See Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff’d in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Importantly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is the subject of a pending rulemaking, is inadmissible.³⁷ *See* 10 C.F.R. § 2.335; *Potomac Elec. Power Co.* (Douglas Point Nuclear

³⁷ The terrorist attacks analysis issue also is currently the subject of a rulemaking pending before the Commission. *See* Final Rule to Update 10 C.F.R. Part 52 “Licenses, Certifications, and Approvals for Nuclear Power Plants,” SECY-06-0220 (October 31, 2006), proposed 10 C.F.R. § 52.10.

Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *Yankee Atomic Elec. Co.*, 43 NRC at 251. By the same token, a contention that simply states a petitioner's views about what regulatory policy should be does not present a litigable issue. *See Peach Bottom*, 8 AEC at 20-21 and n.33.

Moreover, NRC regulations state that “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding” 10 CFR § 2.335(a).³⁸ As the Commission made clear in *Duke Energy*, “if petitioners are dissatisfied with our generic approach . . . , *their remedy lies in the rulemaking process, not in this adjudication.*” 49 NRC at 345 (emphasis added); *see Connecticut Yankee Atomic Power Co.*, 58 NRC at 7 (“If our safety regulations are in any way inadequate and need revision, the appropriate vehicle to ask the Commission to set a new standard is a petition for rulemaking under 10 CFR § 2.802.”). NRC regulations in 10 C.F.R. § 50.13 prohibit any consideration of terrorist attacks in evaluating the

³⁸ In individual adjudicatory proceedings, the Commission repeatedly has sought to “make clear. . . . that a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings.” *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1) CLI-99-6, 49 NRC 201, 217 n.8 (1999) (citing *Massachusetts v. NRC*, 924 F.2d 311, 330 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 170-71 (1995); *American Nuclear Corp.* (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 708-10 (1986); *Peach Bottom*, 8 AEC at 21 n.33; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).

design of a facility, and do not mandate a review of terrorist attacks as part of the ER. Therefore, any effort to change this generic approach or advocate stricter requirements than NRC's regulations currently impose, should not be a part of this adjudicatory proceeding.

Moreover, a nearly identical contention was filed in the Grand Gulf ESP proceeding. In that proceeding, the Commission removed the issue from the ASLB's consideration and plans to rule on the contention generically for the industry. See *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-06-28, 2006 WL 3251415 (Nov. 9, 2006). In removing this issue from the ASLB in the Grand Gulf proceeding, the Commission noted "[w]hichever way the Board ruled on the contention, *its decision would inevitably come before the Commission.*" *Id.* at 1. The Commission further stated that

The Ninth Circuit's recent decision in *San Louis [sic] Obispo Mothers for Peace v. NRC*, which found fault in the Commission's established view on NEPA/terrorism, has created an unusual situation calling into question interim decisions in several proceedings. As a result, the Commission has before it a number of requests for clarification on how this decision affects current and future NEPA reviews. Fundamentally, this is a question of law and policy, which calls for a Commission determination.

Id. (internal citation omitted).

Because *Mothers for Peace* is not binding in this proceeding, the ASLB should adhere to the Commission's long-standing precedent on this issue. Applying this established precedent, the Petitioners have failed to present sufficient evidence to support a holding that Part 51 mandates a terrorism review in the ER. Moreover, because EC 4 requires a change in the Commission's generic approach that would affect several other proceedings and applicants, the Petitioners' request is an improper challenge to the Commission's regulations and is more appropriate for the Commission's rulemaking process.

4. *Petitioners Have Not Requested a Waiver Under 10 C.F.R. § 2.335(b) or Provided Adequate Support to Obtain Such Waiver.*

The only provision in the NRC's rules that allows for a challenge to the Commission's generic approach in this proceeding is the waiver provision set forth in 10 C.F.R. § 2.335(b). The Commission has specified that "[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.335(b). Moreover, the Commission has stated unambiguously that "[w]aiver of a Commission rule is simply not appropriate for a generic issue." *Haddam Neck*, 58 NRC at 8 (citing *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-80-16, 11 NRC 674, 675 (1980)).³⁹

Furthermore, the Commission requires that any request for such waiver or exception "be accompanied by an affidavit that identifies . . . the subject matter of the proceeding as to which application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.335(b). Additionally, "[t]he affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested." *Id.* In order to establish special circumstances that would support a waiver, the petitioner "must allege facts not in common with a large class of facilities that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding for the rule sought to be waived." *Private Fuel Storage*, 47 NRC at 238.

³⁹ That intervenor requested that the Commission reconsider the adequacy of the dose standard (25 mrem/year) set forth in 10 C.F.R. § 20.1402. There, the Commission held: "Without referring to any special circumstances peculiar to the Haddam Neck site, [the intervenor] simply asks the Commission to reconsider the standard itself. We will not do so in this adjudicatory proceeding." *Haddam Neck*, 58 NRC at 8.

In the instant case, Petitioners have not requested a waiver and they have failed to establish that they meet any of the requirements imposed by the Commission on petitioners wishing that a Commission’s generic approach be waived. *See* Petition at 26-31. To support EC 4, Petitioners have provided only generic considerations that would apply to any reactor or site – rather than providing “special circumstances” that might exist with respect to the proposed reactors at the Vogtle site, which are the subject of this proceeding.⁴⁰

Insofar as EC 4 might be construed as a request for a waiver of the Commission’s generic approach to the terrorist attacks issue in this proceeding, Petitioners do not comply with or meet the procedural and substantive standards for such a waiver imposed by 10 C.F.R. § 2.335 and Commission precedent. For the reasons described above, EC 4 is inadmissible.

E. Petitioners’ Range of Alternatives Contention (EC 5) Is Unsupported, Does Not Raise an Issue of Material Fact, and Is Beyond the Scope of the Proceeding.

Petitioners’ contention that the alternatives analysis in the ER is insufficient is inadmissible because it lacks: (i) the requisite specificity; (ii) the supporting reasons or bases; (iii) any alleged facts or expert opinion in support of the contention; and (iv) sufficient information to demonstrate that there exists a genuine issue of material fact, as required by 10 C.F.R. § 2.309(f). In addition, the contention is inadmissible because it presents issues which are outside of the scope of these proceedings and which are immaterial to the issuance of an ESP. *See* 10 C.F.R. § 2.309(f)(iv) and (v).

Petitioners’ bases for their contention are, essentially, that the Georgia Public Service Commission (“GPSC”) has not taken certain steps. First, they argue the information contained in the ER is premature and incomplete because Georgia Power’s 2007 Integrated Resource Plan

⁴⁰ Here, Petitioners’ contention refers to “new nuclear plants” (Petition at 32); “proposed nuclear power plants”; NRC “licensing decisions.” Petition at 32-33.

("IRP") will not be reviewed and approved by the GPSC until later in 2007. Petition at 37. Likewise, Petitioners assert that demand management could offset the need for new capacity, which would be determined by the GPSC. Petition at 37-38.

1. Petitioners' Assertion That NRC Should Wait for the 2007 IRP Does Not Support Admissibility.

The Petitioners' basis lacks sufficient specificity to identify a genuine issue of material fact or law and is not supported by specific references to any facts, expert opinions, or legal authority. 10 C.F.R. § 2.309(f)(vi). To be admissible, a contention must do more than make broad statements regarding the applicant's analyses and the underlying data – it must provide a specific basis for contesting the analyses and data. *See Florida Power & Light Co.*, 54 NRC at 19-20. EC 5 does not. Instead, the Petition vaguely alleges that the analysis is "incomplete" and "premature." Petition at 37. The Petition does not explain this assertion and contains no specific reference to the ER, no supporting facts or analysis, and no legal citations to demonstrate that the ER's discussion of alternatives is insufficient. Petitioners offer only the assumption that, because future data may become available at a later point in time, current data must be inaccurate. Petitioners have provided no explanation or authority for this presumption, and they cannot.

The current Georgia Power IRP (the 2004 IRP) contains updated and accurate information. ER §§ 8.2, 8.3. The Georgia Power IRP process ensures this result. Georgia Power's IRP is filed every three years and annual updates are filed for each of the next two years. *Id.*⁴¹ These annual updates continually revise and improve the current IRP and ultimately result in the next triennial IRP filing. *Id.* Thus, at any given time, the current IRP contains accurate data and analyses. (For example, the current IRP was updated in 2006). Once the 2007

⁴¹ *See also* Ga. Comp. R. & Regs. 515-3-3.05-.06.

IRP is filed, Petitioners might equally complain that the 2010 IRP has not yet been reviewed. Petitioners have identified no legal authority that requires SNC to wait for the review and approval of Georgia Power's 2007 IRP.⁴² Accordingly, the Petitioners have not raised and supported an issue of material fact as required by 10. C.F.R. § 2.309(vi).

Moreover, it is clear SNC has satisfied its obligations under 10 C.F.R. Part 51. The NRC has established that a state-approved need for power analysis can serve as the basis for satisfying the Commission's need for power requirements. *See* NUREG-1555 at 8.2.1-2. SNC utilized the current IRP (which was approved by the Georgia Public Service Commission) as the basis for its need for power analysis. ER at 8.1-1 and 8.2-1. There is no dispute that SNC has done so. Given that NRC guidance specifically allows for such use of a state-approved IRP in a need for power analysis, *see* NUREG-1555 at 8.2.1.2, Petitioners' implication that the ER is invalid or deficient on this issue is inadmissible because Petitioners fail to identify such alleged deficiency or the legal basis for their contention. *See Carolina Power & Light Co.*, 16 NRC at 2073; *see also* 10 C.F.R. § 2.309(f)(iii).

EC 5 also is based on complaints that the Georgia PSC has not reviewed the need for power, the participation of co-owners of the facility, or a specific proposal for building new nuclear reactors. Petition at 37-38. These assertions are inadmissible because each lacks an adequate basis as required by 10 C.F.R. § 2.309(f). Not only do Petitioners neglect to identify what NRC regulations or guidelines SNC has allegedly violated, Petitioners also fail to provide any explanation of why or how SNC's need for power analysis does not meet the NRC requirements. In short, the NRC determines whether there is a reasonable basis for the need for

⁴² The only case to which Petitioners cite, *Environmental Law & Policy Center v. NRC*, 470 F.3d 676, 680 (7th Cir. 2006), merely summarizes the Board's reasoning that an applicant *may* postpone certain analyses until the applicant requests an actual construction permit. The Board did not, however, conclude that the applicant *must* wait on some future, not yet compiled, information.

power and not whether there is an actual need for power. Petitioners have not identified how SNC has failed to satisfy this requirement. With regard to Petitioners' assertion that the GPSC has not reviewed any proposal for building new nuclear units, SNC notes that the GPSC accounting order enables Georgia Power to record costs and expenses incurred in the development of the ESP and COL applications, which therefore enables Georgia Power to pursue such ESP and COL activities. GPSC Final Order, Docket No. 22449-U (June 22, 2006). Accordingly, Petitioners' contention with regard to the need for power analysis is inadmissible since it raises issues beyond the scope of this proceeding, is immaterial to the findings the NRC must make in this proceeding, and fails to provide sufficient information to show that a genuine issue of law or fact exists. 10 C.F.R. § 2.309(f)(iii), (iv) and (vi).

2. *The ER Analyzes Energy Efficiency, and Petitioners' Contention Is Unsupported.*

Petitioners' second basis alleges that the ER does not adequately analyze energy efficiency through the use of demand side resources as an "alternative." *See* Petition at 37-38. This basis fails for similar reasons. First, Petitioners fail to identify and explain the significance of any alleged inadequacies or deficiencies of SNC's analysis of Demand Side Management ("DSM") programs and the results thereof. Instead, Petitioners' made generalized assertions that "[t]he ER fails to present the fuller scenario and analyses for demand side options available to the Georgia utilities" Petition at 38. Second, in Section 9.2.1.3 of the ER, SNC analyzes DSM as an alternative and determines that DSM programs are insufficient to meet future demand in any event. This analysis acknowledges that energy conservation could offset a small fraction of the energy needed, but conservation alone would not be a reasonable alternative to the proposed project because VEGP would be intended as baseline generation. *Id.* § 9.2.1.3. While Petitioners cite generally to a 2005 study by ICF, they do not present any specific facts, expert

analysis, or documentation that actually calls into question the adequacy of SNC's analyses of energy efficiency or demand-side management alternatives, or facts that would lead to a different result regarding those alternatives.

Moreover, the ER is part of an application that makes clear the purpose for the ESP application is to preserve the option of nuclear fuel diversity. ER at 1.1-1 through -2. Whatever the ultimate future demand or capacity needs may be, the purpose of the ESP is to preserve the possibility of serving baseload demand with nuclear fueled generation. In that instance, energy efficiency is not an alternative as it cannot also serve the purpose of preserving nuclear fuel as a possible option for serving demand, whatever the ultimate level of demand is.

3. *Petitioners' Complaints Regarding Combined Heat and Power, Biomass, and IGCC Do Not Support the Contention and Are Immaterial.*

Petitioners also string together a series of generalized assertions that the ER fails to adequately consider various energy alternatives such as Combined Heat and Power ("CHP"), biomass, and Integrated Gasification Combined Cycle ("IGCC"). Petition at 39 n.47. These assertions are inadmissible because they lack an adequate basis for contesting the data and analyses set forth in the ER, fail to provide any specific facts, expert testimony or legal authority in support of the contention, and fail to provide sufficient information to demonstrate a material issue of fact or law. *See* 10 C.F.R. § 2.309(f)(1). Petitioners assert the ER is deficient because it does not address CHP as a potential energy alternative. Although Petitioners neither define the term nor attach the reports they cite to the Petition, "CHP" is generally understood to be "the strategic placement of electric power generating units at or near customer facilities to supply on-site energy needs . . . [for] the simultaneous production of useful thermal and power output." *See* EPA, Combined Heat & Power Partnership, *available at* http://www.epa.gov/chp/what_is_chp.htm (last visited Jan. 10, 2007). In general, CHP

generators are relatively small and widely distributed. See U.S. Department of Energy, Combined Heat and Power Units located in Georgia, available at <http://www.eea-inc.com/chpdata/States/GA.html> (last visited Jan. 10, 2007). According to the report cited by Petitioners, only the “technical potential” for 6445 MW of CHP exists, and is therefore not available for purchase by GPC. See Petition at 39 n.47; see also Energy & Environmental Analysis, Inc., The Potential for Combined Heat & Power, available at <http://www.eesi.org/briefings/2005/Climate%20&%20Energy/2.23.05/Hedman%20Presentation%202.23.05.pdf> (last visited Jan. 10, 2007). As such, CHP is not an appropriate alternative to baseload generation, and an analysis of CHP as an alternative for baseload generation was not warranted and would be immaterial to the Commission’s issuance of an ESP.

The ER also analyzes a number of well-known biomass sources and determines that such sources are not suitable alternatives to nuclear baseload for reasons relating primarily to size, capacity factor, and lack of suitability as a baseload generation source. See ER § 9.2.2.6. The ER references a University of Georgia study in its analysis of the feasibility of generating electricity from biomass fuel sources in Georgia. See ER at 9.2-10 (referencing Curtis *et al.* 2003). That study assessed firing technologies, including gasification, and feedstocks such as pecan hulls, pine bark, and poultry litter. It concluded some options are more cost-effective than others but none is competitive with existing generation facilities. Importantly, the contention fails to present any information that would alter the ER’s conclusion that biomass related fuels are not a reasonable alternative to the proposed action. *Id.* at 9.2-11.

Petitioners further allege that Section 9.2.2.11 of the ER is deficient because it does not include an overall risk comparison of IGCC and that such a comparison has not been reviewed by the GPSC. Section 9.2.2.11 provides a discussion of IGCC technology that is based on an analysis of cited literature and Southern Company’s own experience in supporting an

experimental application of the technology. *Id.* This analysis reveals a sufficient basis for concluding that IGCC is not a reasonable alternative. There is no requirement to use a particular methodology in comparing alternatives and Petitioners' contention offers no basis for concluding that a risk-based approach would change these analytical results. *See* NUREG-1555 at 9.2.2. Georgia Power may provide a risk-based analysis of alternatives at some later date, the fact that the GPSC has not reviewed such a comparison is irrelevant to this proceeding or the requirements for an ER. As such, the contention presents no material fact to suggest that a risk-based analytical methodology would have different results than the ER analysis and the contention identifies no legal requirement that the ER include a risk-based analysis. *See* 10 C.F.R. § 2.309(f)(vi).

In this vein, Petitioners also argue that the Benefit-Cost Balance analysis in Section 10.4.1.2 of the ER is deficient because it does not include biomass and IGCC as options. Petition at 39 n.47. There is no requirement for the ER to compare costs and benefits for alternative generating technologies. *See* NUREG-1555 at 10.4.1. Indeed, Petitioners do not identify any such requirement nor do they provide any facts that suggest that such a cost-benefit analysis would alter the ER's conclusions. Accordingly, Petitioners' contention is inadmissible because it lacks the requisite specificity, supporting facts, expert opinion, or legal authority, and fails to demonstrate a genuine issue of material fact. *See* 10 C.F.R. § 2.309(f)(v) and (vi).

III. Use Of Informal Hearing Procedures

10 C.F.R. § 2.309(g) provides that a petitioner, if it desires the hearing governed by the procedures on 10 C.F.R Subpart G, must set forth in its petition the reasons the contentions require formal adjudicatory procedures. The Petition at issue here fails to assert that the formal adjudicatory procedures of 10 C.F.R. Subpart G are necessary for the resolution of the

contentions. Accordingly, any hearing arising out of the contentions should be governed by the informal hearing provisions of 10 C.F.R. Subparts C and L.

CONCLUSION

Based on the foregoing, the Petitioners have failed to submit a contention that complies with all of the requirements of 10 C.F.R. § 2.309. The Petition must be denied in its entirety.

Respectfully submitted,

[Original signed by M. Stanford Blanton]

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