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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

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ADJUDICATIONS STAFF

In the Matter of))	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.))	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)))	

**ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING
WESTCHESTER COUNTY'S NOTICE OF INTENTION TO
PARTICIPATE AND PETITION TO INTERVENE**

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PETITION TO INTERVENE**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h), Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant"), applicant in the above-captioned matter, hereby files its Answer opposing "Westchester County's Notice of Intention to Participate and Petition to Intervene" ("Petition") filed on December 7, 2007, by Westchester County ("Westchester" or "Petitioner"). The Petition responds to the United States Nuclear Regulatory Commission ("NRC" or "Commission") "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing," published in the *Federal Register* on August 1, 2007 (72 Fed. Reg. 42,134) ("Hearing Notice") concerning Entergy's application to renew the operating licenses for the Indian Point Nuclear Generating Units 2 and 3, also referred to as Indian Point Energy Center ("IPEC"). As discussed below, the Petitioner has not satisfied Commission requirements to intervene in this matter,

having failed to proffer at least one admissible contention. Therefore, pursuant to 10 C.F.R. § 2.309, the Petition should be denied in its entirety.

II. BACKGROUND

On April 23, 2007, as supplemented by letters dated May 3, 2007, and June 21, 2007, Entergy submitted an application to the NRC to renew the IPEC Unit 2 and Unit 3 operating licenses (License Nos. DPR-26 and DPR-64) for an additional 20 years (“Application”).¹ The Commission Hearing Notice stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a petition for leave to intervene within 60 days of the Notice (*i.e.*, October 1, 2007), in accordance with the provisions of 10 C.F.R. § 2.309.² Subsequently, on October 1, 2007, the Commission extended the period for filing requests for hearing until November 30, 2007.³

Thereafter, in a letter dated November 27, 2007, Westchester requested a thirty-day extension to submit an *amicus curiae* brief in this proceeding on or before December 31, 2007.⁴ On November 28, 2007, the Atomic Safety and Licensing Board (“ASLB” or “Board”) denied Westchester’s request, noting that “NRC regulations do not permit the submission of *amicus* briefs at this point in the proceeding.”⁵ The Board, however, ruled that Westchester may still participate in one of two ways: (1) pursuant to 10 C.F.R. § 2.315, it may participate as an “interested governmental body” with regard to *any admitted contention* within thirty days of the

¹ Entergy subsequently submitted one amendment to the Application on December 18, 2007. See Letter from F. Dacimo, Entergy Vice President, License Renewal, to NRC Document Control Desk (Dec. 18, 2007), available at ADAMS Accession No. ML073650195.

² 72 Fed. Reg. at 42,134 (Aug. 1, 2007).

³ Extension of Time for Filing of Requests for Hearing or Petitions for Leave To Intervene in the License Renewal Proceeding, 72 Fed. Reg. 55,834 (Oct. 1, 2007).

⁴ See Westchester County Government Request For an Extension of Time at 1 (Nov. 27, 2007).

⁵ See Licensing Board Order (Denying Westchester County’s Request for a 30-Day Extension of Time Within Which to Submit an *Amicus Curiae* Brief) at 1 (Nov. 28, 2007) (unpublished).

contention being admitted; or (2) pursuant to 10 C.F.R. § 2.309, it may seek to participate as a party to the proceeding.⁶ The Board further explained that if Westchester chose the latter option, it should file a Request for Hearing and Petition to Intervene on or before December 10, 2007.⁷

By Order dated November 27, 2007, the Board directed Entergy and the NRC Staff to file their answers to all timely petitions to intervene on or before January 22, 2008.⁸ As noted above, Westchester filed its Petition on December 7, 2007, to which Entergy now responds in accordance with the Board's schedule.

To be admitted as a party to this proceeding, Petitioner must demonstrate standing and must submit at least one admissible contention within the scope of this proceeding. Section III, below, describes the criteria for establishing standing under 10 C.F.R. § 2.309(d) and explains the reasons why the Petitioner has satisfied the requisite criteria. Section IV, below, describes the standards governing the admissibility of contentions and demonstrates that the Petitioner has not proffered any admissible contentions. Therefore, the Petition should be denied in its entirety.

III. STANDING

A. **Applicable Legal Standards and Relevant NRC Precedent**

Both the Commission Hearing Notice for this proceeding and NRC regulations require a petitioner to set forth: (1) the nature of its right under the Atomic Energy Act ("AEA") of 1954, as amended, to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.⁹ Thus, a petitioner must demonstrate either

⁶ *Id.* at 1-2.

⁷ *Id.* at 2.

⁸ *See* Licensing Board Order (Granting an Extension of Time to Clearwater Within Which to File Requests for Hearing) at 3 n.8 (Nov. 27, 2007) (unpublished).

⁹ *See* 72 Fed. Reg. at 42,135; 10 C.F.R. § 2.309(d)(1).

that it satisfies the traditional elements of standing, or that it has presumptive standing based on geographic proximity to the proposed facility.¹⁰

With regard to the latter, the Commission, historically, has offered state and local government entities (county, municipality or other subdivision) a choice as to how they may participate in a licensing proceeding. First, a state or local government entity may choose to participate formally, as a party to the proceeding, under 10 C.F.R. § 2.309. To participate as a party under 10 C.F.R. § 2.309(d)(2), a state must satisfy the same standards as an individual petitioner insofar as proffering at least one admissible contention, but a state or local government that wishes to be a party in a proceeding for a facility located within its boundaries need not satisfy standing requirements under 10 C.F.R. § 2.309(d)(1).¹¹ This also has been extended to include Federally-recognized Indian Tribes. States, local governments, and Federally-recognized Indian Tribes other than those that contain the facility within their boundaries must address the standing requirements of 10 C.F.R. § 2.309(d)(1).¹²

Second, in accordance with Section 274(l) of the AEA, as implemented by 10 C.F.R. § 2.315(c), a state or local government entity or Federally-recognized Indian Tribe which does not wish to participate as a formal party, may nevertheless choose to participate in the proceedings as an “interested” state or local government. This provision applies not only to the state in which a facility is or will be located, but also to those other states that demonstrate an interest cognizable under Section 2.315(c).¹³ Under this longstanding approach, the

¹⁰ See *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579-83 (2005).

¹¹ See *AmerGen Energy Co.*, LBP-06-07, 63 NRC at 194-95.

¹² See 10 C.F.R. 2.309(d)(2).

¹³ *Exxon Nuclear Co., Inc.* (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873, 876 (1977); see also, e.g., *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-74-32, 8 AEC 217 (1974).

governmental entity is not required to proffer an admissible contention of its own, but, rather, *within the scope of admitted contentions*, is afforded an opportunity to participate in the proceeding.

The mere filing by a state or local government of a petition to participate in an operating license application pursuant to 10 C.F.R. § 2.315(c) as an interested state, however, is not cause for ordering a hearing; the application can receive a thorough agency review, outside of the hearing process, absent indications of significant controverted matters or serious safety or environmental issues within the scope of the AEA and/or NEPA.¹⁴ As such, a state or local government entity may not participate as an “interested” state or local government entity unless there is a hearing (*i.e.*, another party has demonstrated standing and has proffered an admissible contention).¹⁵ Pursuant to the Board’s schedule, a petition to participate under Section 2.315(c) with regard to any admitted contention should be submitted within 30 days of the contention being admitted.¹⁶

B. Petitioner’s Standing to Intervene

As Westchester asserts, IPEC is located within its boundaries. Therefore, Westchester has standing to participate in this proceeding pursuant to 10 C.F.R. 2.309(d)(2). Pursuant to this same regulation, however, it must proffer at least one admissible contention to be admitted as a party to this proceeding. As explained below, Petitioner has not satisfied Section 2.309(f) and, as a result, its Petition must be denied in its entirety.

¹⁴ See *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 216 (1983); see also *Duquesne Light Co.*, LBP-84-6, 19 NRC at 426 (1984), citing *N. States Power Co.* (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 527 (1980).

¹⁵ See *Niagara Mohawk*, LBP-83-45, 18 NRC at 216.; *Duquesne Light Co.*, LBP-84-6, 19 NRC at 426.

¹⁶ See Licensing Board Order (Denying Westchester County’s Request for a 30-Day Extension of Time Within Which to Submit an *Amicus Curiae* Brief) at 2 (Nov. 28, 2007) (unpublished).

IV. PETITIONER HAS NOT PROPOSED A CONTENTION

A. Applicable Legal Standards and Relevant NRC Precedent

1. Petitioner Must Submit at Least One Admissible Contention Supported by an Adequate Basis

As explained above, to intervene in an NRC licensing proceeding, a petitioner must proffer at least one admissible contention.¹⁷ The NRC will deny a petition to intervene and request for hearing from a petitioner who has standing but has not proffered at least one admissible contention.¹⁸ As the Commission has observed, “[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding.”¹⁹

Additionally, “[a] contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.”²⁰ Finally, “Government entities seeking to litigate their own contentions are held to the same pleading rules as everyone else.”²¹

2. Proposed Contentions Must Satisfy the Requirements of 10 C.F.R. § 2.309(f) to be Admissible

Section 2.309(f)(1) requires a petitioner to “set forth with particularity the contentions sought to be raised,” and with respect to each contention proffered, satisfy six criteria, as discussed in detail below. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the

¹⁷ See 10 C.F.R. § 2.309(a).

¹⁸ *Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 5 (2001).

¹⁹ *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998).

²⁰ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

²¹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 568 (2005).

contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.²²

The purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²³ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”²⁴ Thus, the rules on contention admissibility are “strict by design.”²⁵ Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a contention.²⁶

a. *Petitioner Must Specifically State the Issue of Law or Fact to Be Raised*

A petitioner must “provide a specific statement of the issue of law or fact to be raised or controverted.”²⁷ The petitioner must “articulate at the outset the specific issues [it] wish[es] to litigate as a prerequisite to gaining formal admission as [a party].”²⁸ Namely, an “admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of

²² See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

²³ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

²⁴ *Id.*

²⁵ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *recons. denied*, CLI-02-1, 55 NRC 1 (2002).

²⁶ See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

²⁷ 10 C.F.R. § 2.309(f)(1)(i).

²⁸ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999).

the contested [application].”²⁹ The contention rules “bar contentions where petitioners have only ‘what amounts to generalized suspicions, hoping to substantiate them later.’”³⁰

b. Petitioner Must Briefly Explain the Basis for the Contention

A petitioner must provide “a brief explanation of the basis for the contention.”³¹ This includes “sufficient foundation” to “warrant further exploration.”³² Petitioner’s explanation serves to define the scope of a contention, as “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.”³³ The Board, however, must determine the admissibility of the contention itself, not the admissibility of individual “bases.”³⁴

c. Contentions Must Be Within the Scope of the Proceeding

A petitioner must demonstrate “that the issue raised in the contention is within the scope of the proceeding.”³⁵ The scope of the proceeding is defined by the Commission’s notice of opportunity for a hearing and order referring the proceeding to the Board.³⁶ (The scope of license renewal proceedings, in particular, is discussed in Section IV.B, *infra*.) Moreover, contentions are necessarily limited to issues that are germane to the specific application pending

²⁹ *Millstone*, CLI-01-24, 54 NRC at 359-60.

³⁰ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 424 (2003) (quoting *Oconee*, CLI-99-11, 49 NRC at 337-39).

³¹ 10 C.F.R. § 2.309(f)(1)(ii); Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

³² *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 428 (1990) (footnote omitted).

³³ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991).

³⁴ *See La. Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) (“licensing boards generally are to litigate ‘contentions’ rather than ‘bases’”).

³⁵ 10 C.F.R. § 2.309(f)(1)(iii).

³⁶ *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

before the Board.³⁷ Any contention that falls outside the specified scope of the proceeding must be rejected.³⁸

A contention that challenges any NRC rule (or seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking) is outside the scope of the proceeding because, absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”³⁹ 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.⁴⁰ Similarly, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must be rejected by the Board as outside the scope of the proceeding.⁴¹ Accordingly, a contention that simply states the petitioner’s views about what regulatory policy should be does not present a litigable issue.⁴²

d. Contentions Must Raise a Material Issue

A petitioner must 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.”⁴³ The standards defining the findings that the NRC must make to support issuance of renewed operating licenses in this proceeding are set forth in 10 C.F.R. § 54.29. As the Commission has observed, “[t]he dispute at issue is ‘material’ if its resolution would ‘make a difference in the

³⁷ *Yankee*, CLI-98-21, 48 NRC at 204 n.7.

³⁸ *See, e.g., Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

³⁹ *See* 10 C.F.R. § 2.335(a).

⁴⁰ *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff’d*, CLI-01-17, 54 NRC 3 (2001).

⁴¹ *Shearon Harris*, LBP-07-11, 66 NRC at 57-58 (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)).

⁴² *See Peach Bottom*, ALAB-216, 8 AEC at 20-21, 21 n.33. Within the adjudicatory context, however, a petitioner may submit a request for waiver of a rule under 10 C.F.R. § 2.335(b). Conversely, outside the adjudicatory context, a petitioner may file a petition for rulemaking under 10 C.F.R. § 2.802 or request that the NRC Staff take enforcement action under 10 C.F.R. § 2.206.

⁴³ 10 C.F.R. § 2.309(f)(1)(iv).

outcome of the licensing proceeding.”⁴⁴ In this regard, “[e]ach contention must be one that, if proven, would entitle the petitioner to relief.”⁴⁵ Additionally, contentions alleging an error or omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.⁴⁶

e. Contentions Must Be Supported by Adequate Factual Information or Expert Opinion

A petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately, and failure to do so requires that the contention be rejected.⁴⁷ The petitioner’s obligation in this regard has been described as follows:

[A]n intervention petitioner has an *ironclad obligation* to examine the *publicly available documentary material pertaining to the facility in question* with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section [2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.⁴⁸

Where a petitioner neglects to provide the requisite support for its contentions, the Board may not make assumptions of fact that favor the petitioner or supply information that is lacking.⁴⁹

The petitioner must explain the significance of any factual information upon which it relies.⁵⁰

⁴⁴ *Oconee*, CLI-99-11, 49 NRC at 333-34; *see also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172.

⁴⁵ USEC, Inc. (American Centrifuge Plant), Notice of Receipt of Application for License, 69 Fed. Reg. 61,411, 61,412 (Oct. 18, 2004).

⁴⁶ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89, *aff’d*, CLI-04-36, 60 NRC 631 (2004).

⁴⁷ *See* 10 C.F.R. § 2.309(f)(1)(v); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996).

⁴⁸ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added).

⁴⁹ *See Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

⁵⁰ *See Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003).

With respect to factual information or expert opinion proffered in support of a contention, “the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention.”⁵¹ Any supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to Board scrutiny, “both for what it does and does not show.”⁵² The Board will examine documents to confirm that they support the proposed contention(s).⁵³ A petitioner’s imprecise reading of a document cannot be the basis for a litigable contention.⁵⁴ Moreover, vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.⁵⁵ The mere incorporation of massive documents by reference is similarly unacceptable.⁵⁶

In addition, “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 as it is alleged to provide a basis for the contention.”⁵⁷ Conclusory statements cannot provide “sufficient” support for a contention, simply because they are made by an expert.⁵⁸ In short, a contention “will be ruled inadmissible if the petitioner ‘has

⁵¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998).

⁵² *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

⁵³ *See Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

⁵⁴ *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995).

⁵⁵ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

⁵⁶ *See Tenn. Valley Auth.* (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

⁵⁷ *Private Fuel Storage, L.L.C.*, LBP-98-7, 47 NRC at 181 (emphasis added); *see also USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

⁵⁸ *See American Centrifuge Plant*, CLI-06-10, 63 NRC at 472.

offered no tangible information, no experts, no substantive affidavits, but instead only ‘bare assertions and speculation.’”⁵⁹

f. Contentions Must Raise a Genuine Dispute of Material Law or Fact

With regard to the requirement that a petitioner “provide sufficient information to show . . . a genuine dispute . . . with the applicant . . . on a material issue of law or fact,”⁶⁰ the Commission has stated that the petitioner must “read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant.⁶¹ If a petitioner believes the Safety Analysis Report and Environmental Report (“ER”) fail to adequately address a relevant issue, then the petitioner is to “explain why the application is deficient.”⁶² A contention that does not *directly controvert a position taken by the applicant in the application* is subject to dismissal.⁶³ An allegation that some aspect of a license application is “inadequate” or “unacceptable” does not give rise to a genuine dispute unless it is supported

⁵⁹ *Fansteel*, CLI-03-13, 58 NRC at 203 (quoting *GPU Nuclear*, CLI-00-6, 51 NRC at 207).

⁶⁰ 10 C.F.R. § 2.309(f)(1)(vi).

⁶¹ Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *Millstone*, CLI-01-24, 54 NRC at 358.

⁶² Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *Palo Verde*, CLI-91-12, 34 NRC at 156.

⁶³ *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992) (emphasis added). Further, regarding challenges to the NRC Staff’s findings, the Commission has unequivocally held that

The adequacy of the applicant’s license application, not the NRC staff’s safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the [content of the] SER are not cognizable in a proceeding.

U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 NRC 438, 456 (2006) (quoting Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. at 2202).

by facts and a reasoned statement of why the application is unacceptable in some material respect.⁶⁴

B. Scope of Subjects Admissible in License Renewal Proceedings

The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and pertinent Commission regulations.”⁶⁵

Broadly speaking, license renewal proceedings concern requests to renew 40-year reactor operating licenses for additional 20-year terms. The NRC regulations governing license renewal are contained in 10 C.F.R. Parts 51 and 54.

Pursuant to Part 54, the NRC Staff conducts a technical review of the license renewal application (“LRA”) to assure that public health and safety requirements are satisfied. Pursuant to Part 51, the NRC Staff completes an environmental review for license renewal, focusing upon the potential impacts of an additional 20 years of nuclear power plant operation. As the Commission has observed, “[b]oth sets of agency regulations derive from years of extensive technical study, review, inter-agency input, and public comment.”⁶⁶ In its 2001 *Turkey Point* decision, the Commission explained in detail the established scope of its license renewal review process, its regulatory oversight process, and the meaning of “current licensing basis,” or “CLB.”⁶⁷ Key aspects of that decision and of other significant license renewal decisions are summarized below.

⁶⁴ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521, 521 n.12 (1990).

⁶⁵ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22.

⁶⁶ *Turkey Point*, CLI-01-17, 54 NRC at 7.

⁶⁷ See *id.* at 6-13. Because the CLB may change while the NRC Staff is conducting its review, each year following submittal of an LRA (and at least three months before scheduled completion of the NRC Staff review), an amendment to the LRA must be submitted to identify any change to the CLB that materially affects the content of the LRA, including the Updated Final Safety Analysis Report (“UFSAR”) supplement. See 10 C.F.R. § 54.21(b). The license renewal UFSAR supplement provides a summary of the programs and activities for managing the effects of aging and evaluation of time-limited aging analyses (“TLAAs”) for the

As further explained below, under the governing regulations in Part 54, the review of LRAs is confined to matters relevant to the extended period of operation requested by the applicant, which are not reviewed on a continuing basis under existing NRC inspection and oversight processes, including the Reactor Oversight Process (“ROP”). The safety review is limited to the plant systems, structures, and components (as delineated in 10 C.F.R. § 54.4) that will require an aging management review (“AMR”) for the period of extended operation or are subject to an evaluation of time-limited aging analyses (“TLAAs”).⁶⁸ In addition, the review of environmental issues is limited by rule by the generic findings in NUREG-1437, Generic Environmental Impact Statement (“GEIS”) for License Renewal of Nuclear Plants.⁶⁹

1. Scope of Safety Issues in License Renewal Proceedings

a. Overview of the Part 54 License Renewal Process and LRA Content

The Commission has stated that “[a]djudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff’s review) necessarily examines only the questions our safety rules make pertinent.”⁷⁰ The Commission has specifically limited its license renewal safety review to the matters specified in 10 C.F.R. §§ 54.21 and 54.29(a)(2), which focus on the management of aging of certain systems, structures and components, and the review of TLAAs.⁷¹ Specifically, applicants must “demonstrate how their programs will be effective in managing the effects of

period of extended operation. After issuance of a renewed operating license, the annual Final Safety Analysis Report (“FSAR”) update required by 10 C.F.R. § 50.71(e) must include any structures, systems and components “newly identified that would have been subject to an aging management review or evaluation of time-limited aging analyses in accordance with § 54.21.” 10 C.F.R. § 54.37(b).

⁶⁸ See 10 C.F.R. §§ 54.21(a) and (c), 54.29, and 54.30.

⁶⁹ See *id.* §§ 51.71(d) and 51.95(c).

⁷⁰ *Turkey Point*, CLI-01-17, 54 NRC at 10; see also Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,482 n.2.

⁷¹ See *Turkey Point*, CLI-01-17, 54 NRC at 7-8; *Duke Energy Corp.* (McGuire Nuclear Station, Units I and 2), CLI-02-26, 56 NRC 358, 363 (2002).

aging during the proposed period of extended operation,” at a “detailed . . . ‘component and structure level,’ rather than at a more generalized ‘system level.’”⁷² Thus, the “potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs” is the issue that defines the scope of the safety review in license renewal proceedings.

The NRC’s license renewal regulations thus deliberately and sensibly reflect the distinction between *aging management issues*, on the one hand, and the *ongoing regulatory process* (e.g., security and emergency planning issues) on the other.⁷³ The NRC’s longstanding license renewal framework is premised upon the notion that, with the exception of aging management issues, the NRC’s ongoing regulatory process is adequate to ensure that the CLB of operating plants provides and maintains an acceptable level of safety.⁷⁴ As the Commission explained in *Turkey Point*:

[CLB is] a term of art comprehending the various Commission requirements applicable to a specific plant that are in effect at the time of the license renewal application. . . . The [CLB] represents an “evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.” 60 Fed. Reg. at 22,473. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement.⁷⁵

For that reason, the Commission concluded that requiring a full reassessment of safety issues that were “thoroughly reviewed when the facility was first licensed” and continue to be “routinely monitored and assessed by ongoing agency oversight and agency-mandated licensee

⁷² *Turkey Point*, CLI-01-17, 54 NRC at 8 (quoting Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,462 (May 8, 1995)). If left unmitigated, detrimental aging effects can result from, for example, metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage. *See id.* at 7-8.

⁷³ Specifically, in developing Part 54, the NRC sought “to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term.” *Id.* at 7.

⁷⁴ *See* Final Rule, Nuclear Power Plant License Renewal; Revisions, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991). The term “current licensing basis” is defined in 10 C.F.R. § 54.3. *See also* 10 C.F.R. §§ 54.29, 54.30.

⁷⁵ *Turkey Point*, CLI-01-17, 54 NRC at 9.

programs” would be “both unnecessary and wasteful.”⁷⁶ The Commission reasonably refused to “throw open the full gamut of provisions in a plant’s current licensing basis to re-analysis during the license renewal review.”⁷⁷

In accordance with 10 C.F.R. §§ 54.19, 54.21, 54.22, 54.23, and 54.25, an LRA must contain general information, an Integrated Plant Assessment (“IPA”), an evaluation of TLAAs, a supplement to the plant’s UFSAR (and periodic changes to the UFSAR and CLB) during NRC review of the application, changes to the plant’s Technical Specifications to manage the effects of aging during the extended period of operation, and a supplement to the ER that complies with the requirements of Subpart A of Part 51.⁷⁸

An IPA is a licensee assessment reviewed by the NRC that demonstrates that a nuclear power plant’s structures and components requiring AMR in accordance with 10 C.F.R. § 54.21(a) for license renewal have been identified and that “actions have been identified and have been or will be taken . . . , such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB”⁷⁹ Only passive, long-lived structures and components are subject to AMR.⁸⁰ Passive structures and components are those that perform their intended functions without moving parts or changes in configuration (*e.g.*, reactor vessel, piping, steam generators), and are not subject to replacement based on a qualified life or specified time period (*i.e.*, “long-lived” structures and

⁷⁶ *Id.* at 7.

⁷⁷ *Id.* at 9.

⁷⁸ NRC guidance for the license renewal process is set forth in the Generic Aging Lessons Learned Report (NUREG-1801) (“GALL Report”), the Standard Review Plan for License Renewal (NUREG-1800), and Regulatory Guide (“RG”) 1.188, Standard Format and Content for Applications to Renew Nuclear Power Plant Operating License. NUREG-1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, and its supplement, provide guidance for implementing 10 C.F.R. Part 51 environmental requirements, which ensure compliance with NEPA.

⁷⁹ 10 C.F.R. § 54.29(a).

⁸⁰ *See id.* § 54.21(a)(1).

components). The TLAAAs involve in-scope systems, structures, and components; consider the effects of aging; and involve assumptions based on the original 40-year operating term.⁸¹ An applicant must (i) show that the original TLAAAs will remain valid for the extended operation period; (ii) modify and extend the TLAAAs to apply to a longer term, such as 60 years; *or* (iii) otherwise demonstrate that the effects of aging will be adequately managed during the renewal term.⁸²

To meet the requirements of Part 54, applicants generally rely upon existing programs, such as inspection, testing and qualification programs. Some new activities or program augmentations also may be necessary for purposes of license renewal (*e.g.*, one-time inspections of structures or components). The NRC's GALL Report, which provides the technical basis for the Standard Review Plan for License Renewal, contains the NRC Staff's generic evaluation of existing plant programs and documents the technical bases for determining the adequacy of existing programs, with or without modification, in order to effectively manage the effects of aging during the period of extended plant operation. The evaluation results documented in the GALL Report indicate that many existing programs are adequate to manage the aging effects for particular structures or components for license renewal without change.⁸³ The GALL Report also contains recommendations concerning specific areas for which existing programs should be augmented for license renewal.⁸⁴ Thus, programs that are consistent with the GALL Report are generally accepted by the Staff as adequate to meet the license renewal rule.⁸⁵

⁸¹ *See id.* § 54.3.

⁸² *See id.* § 54.21(c)(1).

⁸³ *See* GALL Report, Vol. 1, at 1.

⁸⁴ *See id.* at 4.

⁸⁵ *See id.* at 3.

b. Scope of Adjudicatory Hearings on Part 54 License Renewal Issues

Contentions seeking to challenge the adequacy of the CLB for the IPEC facility are not within the scope of this license renewal proceeding.⁸⁶ Likewise, the question of whether Entergy is currently in compliance with the IPEC CLB is beyond the scope of this proceeding, because “the Commission’s on-going regulatory process – which includes inspection and enforcement activities – seeks to ensure a licensee’s current compliance with the CLB.”⁸⁷ In this regard, the ASLB recently stated that “monitoring is not proper subject matter for license extension contentions.”⁸⁸ Thus, for example, under 10 C.F.R. § 50.47(a)(1), issues pertaining to emergency planning are excluded from consideration in license renewal proceedings, because “[e]mergency planning is, by its very nature, *neither germane to age-related degradation nor unique to the period covered by the . . . license renewal application.*”⁸⁹

2. Scope of Environmental Issues in License Renewal Proceedings

The NRC has promulgated regulations, 10 C.F.R. Part 51, to implement the National Environmental Policy Act of 1969, as amended (“NEPA”). In 1996, the Commission amended Part 51 to address the scope of its environmental review for LRAs.⁹⁰ To make Part 51 more efficient and focused, the NRC divided the environmental requirements for license renewal into generic and plant-specific components. The NRC prepared a GEIS to evaluate and document

⁸⁶ *Turkey Point*, CLI-01-17, 54 NRC at 8-9, 23; *see also AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-07-17 (slip op. at 14 n.17) (Dec. 18, 2007) (finding any challenge to the CLB to be outside the scope of the proceeding because such issues are “(1) not germane to aging management concerns; (2) previously have been the subject of thorough review and analysis; and, accordingly (3) need not be revisited in a license renewal proceeding.”).

⁸⁷ *Oyster Creek*, LBP-07-17 (slip op. at 14 n.17). An example of an ongoing NRC inspection and enforcement activity is the ROP.

⁸⁸ Order Denying Pilgrim Watch’s Motion for Reconsideration, ASLB No. 06-848-02-LR, at 5 (Jan. 11, 2008) (citations omitted) (emphasis added).

⁸⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 561 (2005).

⁹⁰ *See* Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467 (June 5, 1996), *amended by* 61 Fed. Reg. 66,537 (Dec. 18, 1996).

those generic impacts that are well understood based on experience gained from the operation of the existing fleet of U.S. nuclear power plants.⁹¹

Generic issues are identified in the GEIS as “Category 1” impacts.⁹² These are issues on which the Commission found that it could draw “generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants.”⁹³ The Commission concluded that such issues involve “environmental effects that are essentially similar for all plants,” and thus they “need not be assessed repeatedly on a site-specific basis.”⁹⁴ The NRC has codified its generic findings in Table B-1, Appendix B to Subpart A of 10 C.F.R. Part 51.

Under 10 C.F.R. § 51.53(c)(3)(i), a license renewal applicant may, in its site-specific ER,⁹⁵ refer to and, in the absence of new and significant information, adopt the generic environmental impact findings found in Appendix B, Table B-1, for all Category 1 issues. An applicant, however, must address environmental issues for which the Commission was not able to make generic environmental findings.⁹⁶ Specifically, an ER must “contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term,” for

⁹¹ See NUREG-1437, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants*, Final Report, Vols. 1 & 2 (May 1996), available at ADAMS Accession Nos. ML040690705 and ML040690738.

⁹² GEIS, Vol. 1 at 1-5 to 1-6.

⁹³ *Turkey Point*, CLI-01-17, 54 NRC at 11 (citing 10 C.F.R. Pt. 51, Subpt. A, App. B).

⁹⁴ *Id.*

⁹⁵ NRC regulations require that an LRA include an ER describing the environmental impacts of the proposed action and alternatives. See 10 C.F.R. § 51.53(c), § 54.23. The ER is intended to assist the NRC Staff prepare the agency’s independent environmental impact statement. See *Curators of the University of Mo.*, CLI-95-8, 41 NRC 386, 396 (1995) (citing NRC regulations). The NRC Staff ultimately prepares a draft and final site-specific supplement to the GEIS for each plant, using the ER and other independent sources of information. See 10 C.F.R. §§ 51.71(d), 51.95(c).

⁹⁶ 10 C.F.R. § 51.53(c)(3)(ii).

those issues listed at 10 C.F.R. § 51.53(c)(3)(ii) and identified as “Category 2,” or “plant specific,” issues in Table B-1.⁹⁷

Furthermore, in its ER, an applicant must include “any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware,” even if a matter would normally be considered a Category 1 issue.⁹⁸ The supplement to the GEIS similarly must include evaluations of site-specific Category 2 impacts and any “new and significant information” regarding generic Category 1 impacts.⁹⁹ NRC regulatory guidance defines “new and significant information” as follows:

(1) information that identifies a significant environmental issue that was not considered in NUREG-1437 and, consequently, not codified in Appendix B to Subpart A of 10 CFR Part 51, or (2) information that was not considered in the analyses summarized in NUREG-1437 and that leads to an impact finding different from that codified in 10 CFR Part 51.¹⁰⁰

In the ongoing *Vermont Yankee* and *Pilgrim* license renewal proceedings, the presiding Licensing Boards discussed the regulatory history of the “new and significant information” provision, and applied that provision in rejecting certain proposed contentions.¹⁰¹ In short, when first proposed, the NRC’s Part 51 license renewal environmental regulations did not include the

⁹⁷ The Commission has described those issues as involving environmental impact severity levels that “might differ significantly from one plant to another,” or impacts for which additional plant-specific mitigation measures should be considered. *Turkey Point*, CLI-01-17, 54 NRC at 11.

⁹⁸ 10 C.F.R. § 51.53(c)(3)(iv); see also *Turkey Point*, CLI-01-17, 54 NRC at 11; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 290 (2002).

⁹⁹ 10 C.F.R. § 51.53(c)(3)(ii), (iv).

¹⁰⁰ RG 4.2, Supp. 1, Preparation of Supplemental Environmental Reports for Application to Renew Nuclear Power Plant Operating Licenses, at 4.2-S-4 (Sept. 2000), available at ADAMS Accession No. ML003710495 (“RG 4.2S1”). See also *Nat’l Comm. for the New River, Inc. v. FERC*, (373 F.3d 1323, 1330 (D.C. Cir. 2004) (referring to “new information [regarding the action which] shows that the remaining action will affect the quality of the environment ‘in a significant manner or to a significant extent not already considered’”) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989)).

¹⁰¹ See *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 155-59 (2006), *aff’d*, CLI-07-3, 65 NRC 13, *recons. denied*, CLI-07-13, 65 NRC 211 (2007); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 288, 294-300 (2006) *aff’d*, CLI-07-3, 65 NRC 13, *recons. denied*, CLI-07-13, 65 NRC 211 (2007).

current provision, 10 C.F.R. § 51.53(c)(3)(iv), regarding “new and significant information.”¹⁰² The NRC added the provision in response to suggestions by the Environmental Protection Agency (“EPA”) and the Council on Environmental Quality (“CEQ”) that the NRC expand “the framework for consideration of significant new information.”¹⁰³ At that time, in SECY-93-032, the NRC Staff had explained that adding Section 51.53(c)(3)(iv) would not affect license renewal adjudications because “[I]tigation of environmental issues in a hearing will be limited to unbounded category 2 and category 3 issues unless the rule is suspended or waived.”¹⁰⁴ In a public briefing concerning SECY-93-032, as well as the EPA and CEQ comments, NRC confirmed that a successful petition for rulemaking (if the new information was generic), or a petition for a rule waiver (if the new information was plant-specific), would be necessary to litigate previously-determined generic findings at NRC adjudicatory hearings on license renewal applications.¹⁰⁵ The Commission ultimately approved the changes to the proposed rule and specifically endorsed SECY-93-032.¹⁰⁶ The Statement of Considerations for the final rule refers to SECY-93-032.¹⁰⁷

¹⁰² See Proposed Rule, Environmental Review for Renewal of Operating Licenses, 56 Fed. Reg. 47,016, 47,027-028 (Sept. 17, 1991).

¹⁰³ Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,470.

¹⁰⁴ SECY-93-032, Memorandum from James M. Taylor, Executive Director for Operations (“EDO”), to the Commissioners, “Subject: 10 CFR Part 51 Rulemaking on Environmental Review for Renewal of Nuclear Power Plant Operating Licenses” at 4 (Feb. 9, 1993), available at ADAMS Accession No. ML072260444. (Category 2 and 3 issues were eventually combined into Category 2).

¹⁰⁵ See Pub. Meeting Tr., Briefing on Status of Issues and Approach to GEIS Rulemaking for Part 51, at 20-22 (Feb. 19, 1993), available at ADAMS Accession No. ML072070193.

¹⁰⁶ See Memorandum from Samuel J. Chilk, Secretary, to James M. Taylor, EDO (Apr. 22, 1993), available at ADAMS Accession No. ML003760802.

¹⁰⁷ Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,474.

In *Turkey Point*, the Commission reaffirmed the forgoing conclusions in a formal adjudicatory decision and summarized¹⁰⁸ the appropriate procedural vehicles for “revisiting” generic environmental determinations relevant to license renewal as follows:

Our rules thus provide a number of opportunities for individuals to alert the Commission to *new and significant information* that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. See 10 C.F.R. § [2.335] [internal citation omitted]. Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking. See 10 C.F.R. § 2.802. Such petitioners may also use the SEIS notice-and-comment process to ask the NRC to forgo use of the suspect generic finding and to suspend license renewal proceedings, pending a rulemaking or updating of the GEIS. See 61 Fed. Reg. at 28,470; GEIS at 1-10 to 1-11.¹⁰⁹

Accordingly, the Commission has held—most recently in the *Vermont Yankee* and *Pilgrim* license renewal proceedings—that because the generic environmental analyses of the GEIS have been incorporated into NRC regulations, “the conclusions of [those] analys[es] may not be challenged in litigation unless the rule [10 C.F.R. § 51.53(c)(3)(i)] is waived by the Commission for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding.”¹¹⁰ The Commission emphasized that “[a]djudicating Category 1 issues site by site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.”¹¹¹ In fact, the U.S. Supreme Court has specifically upheld

¹⁰⁸ *Turkey Point*, CLI-01-17, 54 NRC at 12, 22-23 (2001).

¹⁰⁹ *Id.* at 12 (emphasis added).

¹¹⁰ *Vermont Yankee*, CLI-07-13, 65 NRC at 17-18; see also *Turkey Point*, CLI-01-17, 54 NRC at 12; *Vermont Yankee*, LBP-06-20, 64 NRC at 155-59; *Pilgrim*, LBP-06-23, 64 NRC at 288, 294-300 *Shearon Harris*, LBP-07-11, 66 NRC at 64 (citing the foregoing cases). The *Pilgrim* and *Vermont Yankee* decisions have been appealed to the United States Court of Appeals for the First Circuit in *Massachusetts v. NRC*, Docket Nos. 07-1482 and 07-1493.

¹¹¹ CLI-07-3, 65 NRC at 21.

the Commission's authority to discharge its responsibilities under NEPA through generic rulemaking.¹¹²

C. Co-Sponsorship of Contentions and Incorporation by Reference

Pursuant to 10 C.F.R. § 2.309(f)(3), contentions may be sponsored by two or more requestors/petitioners. Specifically, 10 C.F.R. § 2.309(f)(3) states:

If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

10 C.F.R. § 2.309(f)(3). While the regulation acknowledges that two or more petitioners may co-sponsor a contention, it does not address whether the petitioner who seeks co-sponsorship may be granted party status merely by incorporating contentions only by reference to another party's pleading.

The Commission, however, has addressed this issue. In a license transfer proceeding involving Indian Point, Units 1 and 2, two intervenors (Town of Cortland and Citizens Awareness Network ("CAN")) sought to adopt each other's contentions.¹¹³ The Commission held that where both petitioners have independently met the requirements for participation, the Presiding Officer may provisionally permit petitioners to adopt each other's issues early in the

¹¹² See *Balt. Gas & Elec. v. NRDC*, 462 U.S. 87, 100-01 (1983) ("Administrative efficiency and consistency of decision are both furthered by a generic determination of [environmental impacts] without needless repetition of the litigation in individual proceedings."); see also *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (citations omitted) ("[I]t is hornbook administrative law that an agency need not – indeed should not – entertain a challenge to a regulation, adopted pursuant to notice and comment, in an adjudication or licensing proceeding.").

¹¹³ See *Consol. Edison Co. (Indian Point, Units 1 and 2)*, CLI-01-19, 54 NRC 109, 131-33 (2001).

proceeding.¹¹⁴ If the primary sponsor of a contention withdraws from the proceeding, then the remaining petitioner must demonstrate that it has the “independent ability to litigate [the] issue.”¹¹⁵ If the petitioner cannot make such a showing, then the issue must be dismissed prior to hearing.¹¹⁶

Incorporation by reference should be denied to parties who merely establish standing and then attempt to incorporate issues of other petitioners.¹¹⁷ Incorporation by reference also would be improper in cases where a petitioner has not independently established compliance with requirements for admission in its own pleadings by submitting at least one admissible contention of its own.¹¹⁸ As the Commission indicated, “[o]ur contention-pleading rules are designed, in part, ‘to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.’”¹¹⁹

D. Westchester Has Failed to Proffer a Contention

In its Petition, Westchester does not proffer a single contention of its own. In fact, Westchester does nothing more than assert that it “jointly sponsors and adopts all the contentions filed by New York State. . . .”¹²⁰ As described in Section IV.C above, simply stating “me too” is not sufficient grounds to be admitted as a party to this proceeding.

The Commission has held that incorporation by reference or adoption of contentions is *improper* in cases where a petitioner has not independently established compliance with the requirements for admission in its own pleadings by submitting at least one admissible

¹¹⁴ *Id.* at 132.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 133.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing *Oconee*, CLI-99-11, 49 NRC at 334).

¹²⁰ Petition at 1. Note that Westchester, in doing so, deferred to New York State as the lead on such issues.

contention.¹²¹ Similarly, incorporation by reference is *improper* where parties merely establish standing and, without more, simply incorporate issues of other petitioners.¹²² That is precisely the situation here. Westchester County has established standing but nothing more. Therefore, Westchester's co-sponsorship/adoption of New York's contentions is insufficient to warrant admitting Westchester as a party to this proceeding.¹²³

¹²¹ *Indian Point*, CLI-01-19, 54 NRC at 133 (emphasis added).

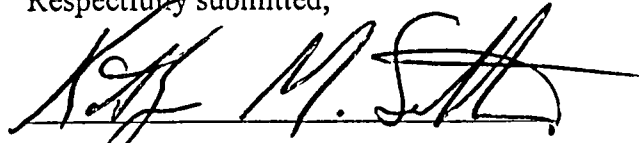
¹²² *Id.* To hold otherwise could result in a potentially unmanageable proceeding. For example, if any member of the public living within 50 miles of Indian Point could submit a petition to intervene, establish standing, and simply adopt another party's contentions, the number of parties to the proceeding would be virtually unlimited. Clearly, that is not the intent of the Commission's regulations in 10 C.F.R. Part 2.

¹²³ Westchester's bare statement of support for New York State's asserted entitlement to a hearing under Subpart G of 10 C.F.R. Part 2, including full discovery examination, lends no substantive support to New York's demand, which similarly addresses none of the requisite criteria for use of Subpart G procedures in lieu of the norm—Subpart L. *See* Petition at 1. Westchester, like New York, has failed to provide any explanation regarding why this proceeding should be conducted under Subpart G of 10 C.F.R. Part 2. Furthermore, as the Applicant indicates in its January 22, 2008 Answer Opposing the Request for Hearing and Petition to Intervene of New York State, the Applicant maintains that none of New York's proposed contentions is admissible.

V. CONCLUSION

Although Westchester has standing to intervene in this proceeding, it has failed to proffer an admissible contention pursuant to 10 C.F.R. § 2.309(f). Therefore, its Petition to Intervene should be denied in its entirety.

Respectfully submitted,



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this 22nd day of January 2008

1-WA/2878006.8

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

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3))	January 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer of Entergy Nuclear Operations, Inc. Opposing Westchester County's Notice of Intention to Participate and Petition to Intervene" were served this 22nd day of January 2008 upon the persons listed below, by first class mail and e-mail as shown below. Due to the size of the multiple exhibits to be filed in this proceeding, the exhibits have been provided in hard copy only, via first class mail.

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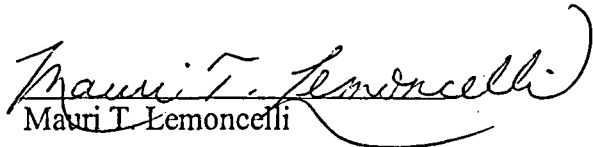
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