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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

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 PETITION FOR LEAVE TO INTERVENE, REQUEST FOR HEARING AND CONTENTIONS OF RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
William C. Dennis, Esq.

COUNSEL FOR
ENTERGY NUCLEAR OPERATIONS, INC

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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 "Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut" ("Petition"), filed on November 30, 2007, by the State of Connecticut ("Connecticut" or "Petitioner"). The Petition responds to the United States Nuclear Regulatory Commission's ("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] On October 1, 2007, the Commission extended the period for filing requests for hearing until November 30, 2005.[3] By Order dated November 27, 2007, the Atomic Safety and Licensing Board ("ASLB" or "Board") directed Entergy and the NRC Staff to file their answers to all timely petitions to intervene on or before January 22, 2008.[4] As noted above, Connecticut filed its Petition on November 30, 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

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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* 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).

reasons why the Petitioner has satisfied the requisite criteria. Section IV below describes the standards governing the admissibility of Petitioner's contentions and addresses, in turn, each of the proposed contentions—explaining the reasons why they are inadmissible. 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.[5] Thus, a petitioner must demonstrate either that it satisfies the traditional elements of standing, or that it has presumptive standing based on geographic proximity to the proposed facility.[6]

1. Standing of State and Local Government Entities

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 that wishes to be a party in a proceeding for a facility located within its boundaries need not satisfy the standing requirements under

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

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

10 C.F.R. § 2.309(d)(1).[7] 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).[8]

A state agency may have standing to intervene although the facility is not within is boundaries.[9] In a recent *Vermont Yankee* decision regarding standing, the Licensing Board granted Massachusetts standing to intervene, although the facility is not within its boundaries.[10] In its petition, Massachusetts argued that because Vermont Yankee is located within 10 miles of it, an accident during the license renewal period could affect the residents, the environment, and the economy of Massachusetts.[11] The Board reasoned that "[u]nder the proximity presumption, a petitioner within the zone of possible harm from a reactor need not specifically plead injury, causation, and redressability," and granted standing.[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

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7 *See AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 194-95 (2006).

8 *See* 10 C.F.R. § 2.309(d)(2).

9 *See Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 145 (2006), *aff'd*, CLI-07-3, 65 NRC 13, *recons. denied*, CLI-07-13, 65 NRC 211 (2007).

10 *Id.*

11 *Id.*

12 *Id.* (citation omitted).

interest cognizable under Section 2.315(c).[13] Under this longstanding approach, the 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 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 the National Environmental Policy Act of 1969, as amended ("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]

2. Discretionary Intervention

Pursuant to 10 C.F.R. § 2.309(e), a presiding officer may consider a request for discretionary intervention where a party lacks standing to intervene as a matter of right under 10 C.F.R. § 2.309(d)(1). Discretionary intervention, however, may only be granted when at least

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

[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.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 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).

one petitioner has established standing and at least one contention has been admitted in the proceeding.[17] The regulation specifies that in addition to addressing the factors in 10 C.F.R. § 2.309(d)(1), a petitioner who seeks intervention as a matter of discretion, in the event it is determined that standing as a matter of right is not demonstrated, must specifically address the following factors set forth in 10 C.F.R. § 2.309(e) in its initial petition, which the Commission, ASLB, or the presiding officer will consider and balance:

(a) Factors weighing in favor of allowing intervention—

1. the extent to which its participation would assist in developing a sound record;

2. the nature of petitioner's property, financial or other interests in the proceeding;

3. the possible effect of any decision or order that may be issued in the proceeding;

(b) Factors weighing against allowing intervention—

4. the availability of other means whereby the petitioner's interest might be protected;

5 the extent to which petitioner's interest will be represented by existing parties; and

6. the extent to which petitioner's participation will inappropriately broaden the issues or delay the proceeding.

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[17] 10 C.F.R. § 2.309(e). *See also PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 21 n.14 (2007) ("[D]iscretionary standing [is] only appropriate when one petitioner has been shown to have standing as of right and admissible contention so that a hearing will be conducted.").

Of these criteria, the primary consideration concerning discretionary intervention is the first factor—assistance in developing a sound record.[18] The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention.[19]

B. Petitioner's Standing to Intervene

As a threshold matter, Connecticut seeks to intervene as a party to this proceeding pursuant to 10 C.F.R. § 2.309(d)(2).[20] In support of its Petition to Intervene, the State contends that even though Indian Point is not located within its boundaries, the facility's 50-mile ingestion pathway EPZ includes one-third of the State, including the city of Bridgeport and Fairfield County.[21] This proximity, according to Connecticut, authorizes it to intervene "as of right."[22] In the alternative, Connecticut asserts that such proximity provides a basis for intervention as an exercise of the Commission's discretion "under 10 C.F.R. § 2.309(d)(4) [sic]."[23]

As noted in Section II.4 above, to participate under 10 C.F.R. § 2.309(d)(2), a state agency that wishes to be a party to a proceeding for a facility *within its boundaries* need not address the standing requirements under 10 C.F.R. § 2.309(d)(1). To state the obvious, Indian Point is not located in Connecticut. States other than New York wishing to participate as a party

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[18] *See Portland Gen. Elec. Co.* (Pebble Springs Nuclear Power Plant, Units 1 and 2), CLI-76-27; 4 NRC 610, 616 (1979); *see also Pub. Utils. Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996).

[19] *See Nuclear Eng'g Co., Inc.* (Sheffield, IL Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978).

[20] Petition at 5.

[21] *Id.*

[22] *Id.*

[23] *Id.* The Applicant assumes that the Petition asserts Section 2.309(e) for discretionary intervention, as there is no such regulation as § 2.309(d)(4).

must meet the standing in some other way, such as having jurisdiction over a geographical area affected by the reactor operations.[24]

As discussed above, in a recent *Vermont Yankee* decision regarding standing, the Licensing Board granted Massachusetts standing to intervene, although the facility is not within its boundaries.[25] In its petition, Massachusetts argued that because Vermont Yankee is located within 10 miles of it, an accident during the license renewal period could affect the residents, the environment, and the economy of Massachusetts.[26] The Board reasoned that "[u]nder the proximity presumption, a petitioner within the zone of possible harm from a reactor need not specifically plead injury, causation, and redressability."[27] Therefore, the Board granted Massachusetts standing. Based on the Board's rationale in this recent decision, the Applicant does not object to Connecticut's standing to intervene in this proceeding pursuant to the proximity presumption.[28]

IV. PETITIONER'S PROPOSED CONTENTIONS ARE INADMISSIBLE

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.[29] The NRC will deny a petition to intervene and

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[24] *See Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 145 (2006), *aff'd*, CLI-07-3, 65 NRC 13, *recons. denied*, CLI-07-13, 65 NRC 211 (2007); see also *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC 56, 66-67 (2005).

[25] *Id.*

[26] *Id.*

[27] *Id.* (citation omitted).

[28] Although the Applicant does not object to Connecticut's standing to intervene in this proceeding, the Applicant notes that the Petitioner fails to explicitly address, let alone meet, the criteria for discretionary intervention set forth in 10 C.F.R. § 2.309(e).

[29] *See* 10 C.F.R. § 2.309(a).

request for hearing from a petitioner who has standing but has not proffered at least one admissible contention.[30] 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."[31]

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."[32] Finally, "Government entities seeking to litigate their own contentions are held to the same pleading rules as everyone else."[33]

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 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

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

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

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

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

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.[34]

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[35] 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."[36] Thus, the rules on contention admissibility are "strict by design."[37] Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a contention.[38]

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."[39] 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]."[40] Namely, an "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[41] The contention rules "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.'"[42]

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

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

36 *Id.*

37 *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).

38 *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).

39 10 C.F.R. § 2.309(f)(1)(i).

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

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

42 *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).

b. Petitioner Must Briefly Explain the Basis for the Contention

A petitioner must provide "a brief explanation of the basis for the contention."[43] This includes "sufficient foundation" to "warrant further exploration."[44] 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."[45] The Board, however, must determine the admissibility of the contention itself, not the admissibility of individual "bases."[46]

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."[47] 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.[48] (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 before the Board.[49] Any contention that falls outside the specified scope of the proceeding must be rejected.[50]

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,

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[43] 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).

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

[45] *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).

[46] *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'").

[47] 10 C.F.R. § 2.309(f)(1)(iii).

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

[49] *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 n.7 (1998).

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

absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[51] 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.[52] 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.[53] Accordingly, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.[54]

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."[55] 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 outcome of the licensing proceeding.'"[56] In this regard, "[e]ach contention must be one that, if proven, would entitle the petitioner to relief."[57] Additionally, contentions alleging an error or

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[51] *See* 10 C.F.R. § 2.335(a).

[52] *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).

[53] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 57-58 (2007) (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)).

[54] *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.

[55] 10 C.F.R. § 2.309(f)(1)(iv).

[56] *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.

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

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.[58]

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.[59] 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.[60]

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.[61] The petitioner must explain the significance of any factual information upon which it relies.[62]

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."[63] Any supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to Board scrutiny, "both

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[58] *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).

[59] *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).

[60] *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).

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

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

[63] *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).

for what it does and does not show."[64] The Board will examine documents to confirm that they support the proposed contention(s).[65] A petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[66] Moreover, vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.[67] The mere incorporation of massive documents by reference is similarly unacceptable.[68]

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."[69] Conclusory statements cannot provide "sufficient" support for a contention, simply because they are made by an expert.[70] In short, a contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits, but instead only 'bare assertions and speculation.'"[71]

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[64] *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).

[65] *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).

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

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

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

[69] *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).

[70] *See American Centrifuge Plant*, CLI-06-10, 63 NRC at 472.

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

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,"[72] 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.[73] If a petitioner believes the Safety Analysis Report ("SAR") and the Environmental Report ("ER") fail to address a relevant issue, then the petitioner must "explain why the application is deficient."[74] A contention that does not *directly controvert a position taken by the applicant in the application* is subject to dismissal.[75] 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 by facts and a reasoned statement of why the application is unacceptable in some material respect.[76]

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[72] 10 C.F.R. § 2.309(f)(1)(vi).

[73] 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.

[74] 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.

[75] *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.

[76] *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).

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."[77] 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."[78] In its 2001 *Turkey Point* decision, the Commission explained in detail the scope of its license renewal review, its regulatory oversight process, and the meaning of "current licensing basis," or "CLB."[79] Key aspects of that decision and of other significant license renewal decisions are summarized below.

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

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

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

79 *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 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).

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 TLAAs.[80] 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.[81]

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."[82] 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.[83] Specifically, applicants must "demonstrate how their programs will be effective in managing the effects of aging during the proposed period of extended operation," at a "detailed . . . 'component and structure level,' rather than at a more generalized 'system level.'"[84] Thus, the "potential

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

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

82 *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 (1995).

83 *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).

84 *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.

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.[85]

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.[86] 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.[87] 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.[88]

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 programs" would be "both unnecessary and wasteful."[89] The Commission reasonably refused to

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85 *Id.* at 7.

86 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.

87 *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.

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

89 *Id.* at 7.

"throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review."[90]

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 environmental report ("ER") that complies with the requirements of Subpart A of Part 51.[91]

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 . . . ."[92] Only passive, long-lived structures and components are subject to AMR.[93] 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 components). The TLAAs involve in-scope systems, structures, and components; consider the

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90 *Id.* at 9.

91 NRC guidance for the license renewal process is set forth in the General 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.

92 10 C.F.R. § 54.29(a).

93 *See id.* § 54.21(a)(1).

effects of aging; and involve assumptions based on the original 40-year operating term.[94] An applicant must (i) show that the original TLAAs will remain valid for the extended operation period; (ii) modify and extend the TLAAs 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.[95]

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.[96] The GALL Report also contains recommendations concerning specific areas for which existing programs should be augmented for license renewal.[97] Thus, programs that are consistent with the GALL Report are generally accepted by the Staff as adequate to meet the license renewal rule.[98]

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94 *See id.* § 54.3.

95 *See id.* § 54.21(c)(1).

96 *See* GALL Report, Vol. 1, at 1.

97 *See id.* at 4.

98 *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.[99] 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."[100] In this regard, the ASLB recently stated that "monitoring is not proper subject matter for license extension contentions."[101] 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.*"[102]

2. Scope of Environmental Issues in License Renewal Proceedings

The NRC has promulgated regulations, 10 C.F.R. Part 51, to implement NEPA. In 1996, the Commission amended Part 51 to address the scope of its environmental review for LRAs.[103] 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

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[99] *See Turkey Point*, CLI-01-17, 54 NRC at 8-9, 23; *see also AmerGen Energy Co., LLC* (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.").

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

[101] Order Denying Pilgrim Watch's Motion for Reconsideration, ASLBP No. 06-848-02-LR at 5 (Jan. 11, 2008) (citations omitted) (emphasis added).

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

[103] *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).

evaluate and document those generic impacts that are well understood based on experience gained from the operation of the existing fleet of U.S. nuclear power plants.[104]

Generic issues are identified in the GEIS as "Category 1" impacts.[105] 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."[106] 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."[107] 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,[108] 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.[109] 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

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[104] *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.

[105] GEIS, Vol. 1, at 1-5 to 1-6.

[106] *Turkey Point*, CLI-01-17, 54 NRC at 11 (citing 10 C.F.R. Part. 51, Subpart. A, App. B).

[107] *Id.*

[108] 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 Univ. 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).

[109] 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.[110]

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.[111] 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.[112] 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.[113]

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.[114] In short, when first proposed, the NRC's Part 51 license renewal environmental regulations did not include the

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[110] 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.

[111] 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).

[112] 10 C.F.R. § 51.53(c)(3)(ii), (iv).

[113] 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)).

[114] *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."[115] 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."[116] 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 "[l]itigation of environmental issues in a hearing will be limited to unbounded category 2 and category 3 issues unless the rule is suspended or waived."[117] 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 LRAs.[118] The Commission ultimately approved the changes to the proposed rule and specifically endorsed SECY-93-032.[119] The Statement of Considerations for the final rule refers to SECY-93-032.[120]

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[115] *See* Proposed Rule, Environmental Review for Renewal of Operating Licenses, 56 Fed. Reg. 47,016, 47,027-28 (Sept. 17, 1991).

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

[117] SECY-93-032, Memorandum from James M. Taylor, Executive Director for Operations, 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).

[118] *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.

[119] *See* Memorandum from Samuel J. Chilk, Secretary, to James M. Taylor, Executive Director for Operations (Apr. 22, 1993), *available at* ADAMS Accession No. ML003760802.

[120] 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 foregoing conclusions in a formal adjudicatory decision,[121] and summarized 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.[122]

Accordingly, the Commission has held—most recently in the *Vermont Yankee* and *Pilgrim* licenser 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."[123] 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."[124] In fact, the U.S. Supreme Court has specifically upheld

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

[122] *Id.* at 12 (emphasis added).

[123] *Vermont Yankee*, CLI-07-3, 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.

[124] *Vermont Yankee*, CLI-07-3, 65 NRC at 21.

the Commission's authority to discharge its responsibilities under NEPA through generic rulemaking.[125]

3. Waiver of Regulations Under Section 2.335

In order to seek waiver of a rule in a particular adjudicatory proceeding, a petitioner must submit a petition pursuant to 10 C.F.R. § 2.335. The requirements for a 2.335 petition are as follows:

> The 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 (or provision of it) would not serve the purposes for which the rule or regulation was adopted.[126]

Further, such a petition,

> *must be accompanied by an affidavit* that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. *The affidavit must state with particularity* the special circumstances alleged to justify the waiver or exception requested.[127]

If the petitioner makes a prima facie showing, then the Board shall certify the matter to the Commission.[128] If there is no prima facie showing, then the matter may not be litigated, and "the presiding officer may not further consider the matter."[129] In this regard, the recent Commission decision in the *Millstone* case sets forth a four-part test for Section 2.335 petitions,

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[125] *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.").

[126] 10 C.F.R. § 2.335(b).

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

[128] *See id.* § 2.335(c), (d).

[129] *Id.* § 2.335(c).

under which the petitioner must demonstrate that it meets each of the following factors for a waiver to be granted:

i. The rule's strict application "would not serve the purposes for which [it] was adopted";

ii. The movant has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived";

iii. Those circumstances are "unique" to the facility rather than "common to a large class of facilities"; and

iv. A waiver of the regulation is necessary to reach a "significant safety problem."[130]

In summary, a Section 2.335 petition "can be granted only in unusual and compelling circumstances."[131]

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

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[130] *Millstone*, CLI-05-24, 62 NRC at 560 (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989); *Seabrook*, CLI-88-10, 28 NRC at 597).

[131] *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 16 (1988), *aff'd*, CLI-88-10, 28 NRC at 597, *recons. denied*, CLI-89-3, 29 NRC 234 (1989).

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.[132] 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 proceeding.[133] 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."[134] If the petitioner cannot make such a showing, then the issue must be dismissed prior to hearing.[135]

Incorporation by reference should be denied to parties who merely establish standing and then attempt to incorporate issues of other petitioners.[136] 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.[137] 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.'"[138]

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

[133] *Id.* at 132.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 133.

[137] *Id.*

[138] *Id.* (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

D. None of Connecticut's Proposed Contentions is Admissible

Connecticut proffers two inadmissible contentions. The first involves the alleged effects of a terrorist attack on spent fuel pools, and the other involves the alleged inadequacy of existing evacuation protocols/emergency planning.[139] In addition, Connecticut states that it "supports and adopts" the contentions of the State of New York filed on November 30, 2007.[140] Based on the discussion below, neither of Connecticut's two proposed contentions is admissible.

1. Proposed Contention EC-1 Regarding Spent Fuel Pools is Inadmissible

Connecticut alleges that the continued storage of spent fuel in spent fuel pools at Indian Point poses a "significant and reasonably foreseeable environmental risk of severe fires and offsite release of a large amount of radioactivity."[141] Connecticut further contends that the failure of Entergy and the NRC to take account of this threat is inconsistent with NEPA. Connecticut also contends that Entergy's LRA fails to satisfy the fundamental requirements of the AEA to ensure safe operation during the license renewal term because it does not include adequate design measures to prevent the occurrence of a fire in the spent fuel pool or to reduce its consequences.[142] Citing reports from the NRC, the Department of Energy ("DOE"), and the National Academy of Science ("NAS") involving, among other things, severe accidents in spent fuel pools (Generic Safety Issue 82), potential impacts of terrorist attacks, and the consequences of the Chernobyl accident, Connecticut asserts that "NRC has an affirmative legal obligation . . .

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[139] Because Connecticut failed to label its contentions as the Commission requested, the Applicant has labeled Petitioner's proposed contentions as EC-1 and EC-2 herein. *See* Hearing Notice, 72 Fed. Reg. at 42,135.

[140] Petition at 1.

[141] Petition at 2.

[142] Petition at 2-3.

to consider the consequences to human health and safety and the environment from an accident or attack on the accumulated stored fuel . . . ."[143]

Entergy opposes the admission of proposed Contention EC-1 on the grounds that it: (1) raises issues that are neither within the scope of this proceeding nor material to the Staff's license renewal findings, contrary to 10 C.F.R. § 2.309(f)(1)(iii)-(iv); (2) fails to establish a genuine dispute with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi); (3) directly contravenes controlling Commission legal precedent; and (4) collaterally attacks the NRC's Part 51 regulations, contrary to 10 C.F.R. § 2.335(a).

To the extent Petitioner is asserting that Entergy and the NRC must, as part of license renewal, address the potential impacts of a terrorist attack on the Indian Point spent fuel pools, the Commission and its Licensing Boards have consistently held that the NRC Staff does not need to consider, as part of its safety or environmental review, terrorist attacks on nuclear power plants seeking renewed licenses.[144] In *Oyster Creek*, the Commission recently reiterated the principal bases for its refusal to admit contentions asserting that the license renewal process requires consideration of postulated terrorist attacks on the plants seeking renewed licenses:

> Terrorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to the detrimental effects of aging. Consequently, they are beyond the scope of, not material to, and inadmissible in, a license renewal proceeding. Moreover, as a general matter, NEPA imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor license renewal applications. The 'environmental' effect caused by third-party miscreants is simply too far removed from the natural or expected consequences of agency action to require a

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[143] *Id.* at 14-16.

[144] *See, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002); *Millstone*, CLI-04-36, 60 NRC at 638; *Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 756 (2005); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007), *appeal filed sub nom. N.J. Dept. of Envtl. Prot. v. NRC*, No. 07-2271 (3d Cir.).

> study under NEPA. [T]he claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of that impact."[145]

The Commission also expressly rejected the assertion that the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*[146] requires the NRC and its licensees to address the environmental costs of a successful terrorist attack on a nuclear plant seeking to renew its operating license.[147] In *Oyster* Creek, the Commission stated that:

> A license renewal proceeding is distinguishable from the situation considered in *San Luis Obispo Mothers for Peace*, where the NRC had before it a proposal to construct a dry cask storage facility at a nuclear reactor site. Unlike the situation in that case, a license renewal application does not involve new construction. So there is no change to the physical plant and thus no creation of a new "terrorist target."[148]

The Commission further explained that, while it was required to comply with the Ninth Circuit's remand in the *Diablo Canyon* proceeding, it "is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question."[149] Such an obligation, the Commission observed, "would defeat any possibility of a conflict between the Circuits on important issues."[150] As such, in *Oyster Creek* the Commission held that the Board had properly applied its settled precedents on the NEPA-terrorism issue.[151]

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145 *Oyster Creek*, CLI-07-08, 65 NRC at 129 (internal quotations and citations omitted).

146 *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom. Pac. Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, 127 S. Ct. 1124, (Jan. 16, 2007) (No. 06-466).

147 *Id.*

148 *Oyster Creek*, CLI-07-08, 65 NRC at 130 n.25.

149 *Id.* at 129.

150 *Id.*

151 *Id.* at 128-29.

The Commission's *Oyster Creek* decision thus requires that this Board reject proposed Contention EC-1. Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed.[152]

Proposed Contention EC-1 also must be rejected because it impermissibly challenges NRC safety and environmental regulations found in 10 C.F.R. Part 51, contrary to 10 C.F.R. § 2.335(a). With respect to the NRC's Part 51 regulations, proposed Contention EC-1 improperly challenges the findings in the GEIS; *i.e.*, that the risk from sabotage is small and that the associated environmental impacts are adequately addressed by a generic consideration of internally-initiated severe accidents. The GEIS provides that:

> The regulatory requirements under 10 CFR part 73 provide reasonable assurance that the risk from sabotage is small. Although the threat of sabotage events cannot be accurately quantified, the commission believes that acts of sabotage are not reasonably expected. Nonetheless, if such events were to occur, the commission would expect that resultant core damage and radiological releases would be no worse than those expected from internally initiated events. Based on the above, the commission concludes that the risk from sabotage . . . at existing nuclear power plants is small.[153]

In the GEIS, the Commission thus discussed sabotage as the potential initiator of a severe accident.[154] The Commission generically determined the risk to be of small significance for all nuclear power plants.[155] Thus, no separate NEPA analysis is required to evaluate the potential environmental impacts of a terrorist attack, because the GEIS analysis of severe accident

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[152] *Va. Elec. & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-584, 11 NRC 451, 463-65 (1980); *Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 859, 871-72 (1986).

[153] NUREG-1437, Vol. 1, § 5.3.3.1

[154] *Id.*

[155] *Id.*

consequences bounds the potential consequences that might result from a large scale radiological release, irrespective of the initiating cause.

Finally, to the extent that Proposed Contention EC-1 alleges that the Applicant must consider the consequences of some unnamed accident in the spent fuel pool, other than an accident caused by terrorism, this also falls outside the scope of this proceeding and constitutes an impermissible challenge to the Commission's regulations.[156] Recently, in the *Vermont Yankee* and *Pilgrim* license renewal proceedings, the Commission upheld the Licensing Board decisions rejecting a similar contention alleging that Entergy should have discussed the consequences of severe accidents in the spent fuel pools.[157] The Commission found that the contention falls outside the scope of a license renewal proceeding, "which focuses on those detrimental effects of aging that are not addressed as a matter of ongoing agency oversight and enforcement."[158]

The Commission held that "any contention on a 'category one' issue amounts to a challenge to our regulation that bars challenges to generic environmental findings"[159] and is, therefore, inadmissible. In addition, Proposed Contention EC-1 contains vague references to documents, is not specific, and, therefore, fails to demonstrate that a genuine dispute exists, pursuant 10 C.F.R. §2.309(f)(1)(vi).[160] At no point does the Petitioner challenge the analysis in the ER. For these reasons, Proposed Contention EC-1 should be rejected.

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156 *See Vermont Yankee*, CLI-07-3, 65 NRC at 17; 10 C.F.R. §§ 2.309(f)(1)(iii), 2.335(a).

157 *Id.* at 19-21.

158 *Id.* at 20 (citing *Turkey Point*, CLI-01-07, 54 NRC at 7-8, 21-23).

159 *Id.* at 20.

160 The Petitioner makes a few passing references to Generic Safety Issue 82. *See* Petition at 15 n.4, 6. Generic Safety Issue 82 has been addressed by the NRC in NUREG-0933, A Prioritization of Generic Safety Issues (Sept. 2007), and has no bearing on license renewal or managing the effects of aging.

In sum, by contending that Entergy and the NRC must address the environmental consequences of a successful terrorist attack or some other unnamed accident on the Indian Point spent fuel pools, Petitioner improperly challenges the GEIS and the Commission's regulations in 10 CFR Part 51. As noted above, the rulemaking process, not this adjudicatory proceeding, is the proper forum for seeking to modify generic determinations made by the Commission.[161]

For the foregoing reasons, the Board must deny proposed EC-1. As discussed above, Proposed Contention EC-1 raises issues that are neither within the scope of this proceeding or material to the Staff's license renewal findings, contrary to 10 C.F.R. § 2.309(f)(1)(iii)-(iv), (2) fails to establish a genuine dispute with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi), (3) directly contravenes controlling Commission legal precedent, and (4) collaterally attacks the NRC's Part 51 regulations, contrary to 10 C.F.R. § 2.335(a).

2. Proposed Contention EC-2 Regarding Evacuation Protocols Is Inadmissible

Connecticut also argues that NRC's failure to evaluate alleged deficiencies in the existing emergency evacuation protocols for Indian Point as part of the license renewal process constitutes a violation of NEPA.[162] According to the Petitioner, a reviewing agency is required to consider the effects of the action, as well as the past, present, and reasonably-foreseeable

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[161] As the Commission explained in *Turkey Point*, petitioners with "new and significant" information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule pursuant to 10 C.F.R. § 2.335. The requirements for seeking such a waiver are set forth in 10 C.F.R. § 2.335(b), which provides 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 (or a provision of it) would not serve the purposes for which the rule or regulation was adopted." *See* 10 C.F.R. § 2.335(b) (emphasis added). Petitioner has ignored this procedure in proposed Contention EC-1. Regardless, even if Petitioner had sought such a waiver, it has failed to meet is burden to demonstrate the existence of "special circumstances" and/or "new and significant information." Instead, Petitioner raises only generic considerations that would apply to virtually any reactor at any site. The Commission has stated unambiguously that "[w]aiver of a Commission rule is simply not appropriate for a generic issue. *Haddam Neck*, CLI-03-7, 58 NRC 1, 8 (2003) (citing *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980)).

[162] Petition at 17.

future actions, including emergency planning.[163] Connecticut maintains that it is unacceptable for the NRC to "decline to examine the environmental impacts resulting from the need to evacuate citizens from the EPZ [emergency planning zone] or the impacts of a deficient evacuation plan and process."[164]

Entergy opposes the admission of Proposed Contention EC-2 on the grounds that it: (1) constitutes an impermissible challenge to the Commission's regulations, contrary to 10 C.F.R. § 2.335(a); (2) raises issues that are neither within the scope of this proceeding or material to the Staff's license renewal findings, contrary to 10 C.F.R. § 2.309(f)(1)(iii)-(iv); (3) directly contravenes controlling Commission legal precedent; and (4) fails to establish a genuine dispute with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

The plain language of the Commission's regulations regarding emergency planning is as follows: "No finding under [Section 50.74] is necessary for issuance of a renewed nuclear power reactor operating license."[165] In the *Turkey Point* proceeding, the Commission specifically addressed emergency planning in the scope of license renewal:

> Issues like emergency planning – which already are the focus of ongoing regulatory processes – do not come within NRC safety review at the license renewal stage . . . .[166]

The Commission elaborated on its rationale regarding emergency planning in the scope of license renewal in the *Millstone* proceeding.[167] As the Commission explained:

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[163] *Id.* at 17-18.

[164] *Id.* at 18.

[165] 10 C.F.R. § 50.47(a)(1)(ii).

[166] *Turkey Point*, CLI-01-17, 54 NRC 3, 10-11.

[167] *Millstone*, CLI-05-25, 62 NRC at 551.

> Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the Millstone license renewal application. Consequently, it makes no sense to spend the parties' and our own valuable resources litigating *allegations of current deficiencies* in a proceeding that is *directed to future-oriented* issues of aging.[168]

Based on the Commission's clear position that emergency planning is not within the scope of license renewal, Connecticut's Proposed Contention EC-2 regarding the sufficiency of evacuation protocols and emergency planning constitutes an impermissible challenge to Commission regulations and binding Commission precedent. Therefore, the proposed contention is outside the scope of this proceeding.[169]

In support of proposed Contention EC-2, Petitioner cites to a report by Mr. James Lee Witt regarding the "deficiencies in the emergency evacuation plan for the Indian Point EPZ."[170] Petitioner cites to the conclusion in the Witt report that the "safe evacuation of the area surrounding Indian Point is highly unlikely, if not impossible."[171] For the reasons discussed above, however, this conclusory statement does not constitute a material issue within the scope of this proceeding, pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

Further, Connecticut argues that under NEPA, "a reviewing agency is required to consider the impact on the environment resulting from the total effects of the contemplated action and other past, present and 'reasonably foreseeable' future actions."[172] Connecticut asserts that the "NRC's review of the potential impacts resulting from the operation of two

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[168] *Id.* at 561 (emphasis added); *see also Shearon Harris,* LBP-07-11, 66 NRC at 92.

[169] However, within the adjudicatory context, 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.

[170] Petition at 16.

[171] *Id.*

[172] *Id.* at 17 (citing 40 C.F.R. § 1508.7).

nuclear reactors . . . for an additional 20 years must include an analysis of the impacts of the emergency evacuation plan for Indian Point, and whether it is *meaningful and effective*."[173]

Despite its reliance on NEPA, the Petitioner does not assert any actual deficiencies in the Applicant's ER. In addition, Petitioner fails to acknowledge that emergency plans are periodically reviewed as part of the ongoing regulatory process in order to ensure that they are adequate, under the existing license.[174] Therefore, Proposed Contention EC-2 fails to establish a genuine dispute with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

For the foregoing reasons, the Board must deny Proposed Contention EC-2. As discussed above, this contention (1) constitutes an impermissible challenge to the Commission's regulations, contrary to 10 C.F.R. § 2.335(a), (2) raises issues that are neither within the scope of this proceeding nor material to the Staff's license renewal findings, contrary to 10 C.F.R. § 2.309(f)(1)(iii)-(iv), (3) directly contravenes controlling Commission legal precedent, and (4) fails to establish a genuine dispute with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

3. Adoption of the State of New York's Contentions Is Not Possible Due to the Inadmissibility of Proposed Contentions EC-1 and EC-2

In its "Introduction," the Petitioner states that it "supports and adopts" the contentions of the New York Attorney General, pursuant to 10 C.F.R. § 2.309(f)(3).[175] Connecticut's statement regarding adoption, however, is insufficient to grant it admission to this proceeding. As discussed above, co-sponsorship of contentions is generally permitted under 10 C.F.R. § 2.309(f)(3). The Commission has ruled, however, that incorporation by reference must be

[173] *Id.* at 18 (emphasis added).

[174] *See Turkey Point*, CLI-01-17, 54 NRC at 9.

[175] Petition at 1.

denied to parties who merely establish standing and then attempt to incorporate issues of other petitioners.[176] Incorporation by reference is also improper in cases where a petitioner has not independently established compliance with requirements for admission in its pleadings by submitting at least one admissible contention of its own.[177]

Connecticut has failed to proffer any admissible contentions of its own for the reasons discussed in Section IV.D above. Therefore, Connecticut's co-sponsorship/adoption of New York's contentions is insufficient to warrant admitting Connecticut as a party.

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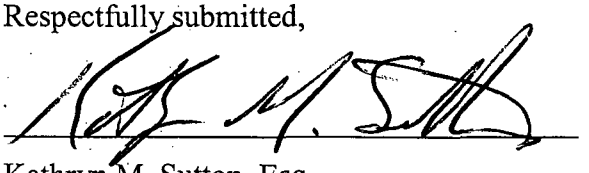
[176] *Consol. Edison Co.*, CLI-01-19, 54 NRC at 133.

[177] *Id.* In addition, Connecticut has failed to meet the procedural requirement of either agreeing that the Attorney General of New York shall act as its representative or jointly designating a representative who has the authority to act on behalf of the Petitioners, contrary to 10 C.F.R. § 2.309(f)(3).

IV. CONCLUSION

For the reasons set forth above, Connecticut has failed to proffer an admissible contention contrary to 10 C.F.R. § 2.309(f)(1). Therefore, its Petition to Intervene should be denied in its entirety.

Respectfully submitted,



Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.

MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 739-5738
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com
E-mail: martin.o'neill@morganlewis.com

William C. Dennis, Esq.
Assistant General Counsel

ENTERGY NUCLEAR OPERATIONS, INC.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3202
Fax: (914) 272-3205
E-mail: wdennis@entergy.com

COUNSEL FOR
ENTERGY NUCLEAR OPERATIONS, INC

Dated in Washington, D.C.
this 22nd day of January 2008

1-WA/2878127.8

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 Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut" 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.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ocaamail@nrc.gov)

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: lgm1@nrc.gov)

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

Administrative Judge
Kaye D. Lathrop
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: kdl2@nrc.gov)

Office of the Secretary *
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: hearingdocket@nrc.gov)

Sherwin E. Turk, Esq.
Lloyd B. Subin, Esq.
Beth N. Mizuno, Esq.
Office of the General Counsel
Mail Stop – O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: set@nrc.gov)
(E-mail: lbs3@nrc.gov)
(E-mail: bnm1@nrc.gov)

Zachary S. Khan
Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: zxk1@nrc.gov)

Nancy Burton
147 Cross Highway
Redding Ridge, CT 06876
(E-mail: NancyBurtonCT@aol.com)

Manna Jo Greene
Environmental Director
Hudson River Sloop Clearwater
112 Market Street
Poughkeepsie, NY 12601
(E-mail: mannajo@clearwater.org)

Justin D. Pruyne, Esq.
Assistant County Attorney, Litigation Bureau
of Counsel to Charlene M. Indelicato, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
(E-mail: jdp3@westchestergov.com)

Stephen C. Filler, Board Member
Hudson River Sloop Clearwater, Inc.
303 South Broadway, Suite 222
Tarrytown, NY 10591
(E-mail: sfiller@nylawline.com)

Diane Curran, Esq.
Harmon, Curran, Spielberg, & Eisenberg,
L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
(E-mail: dcurran@harmoncurran.com)

Phillip Musegaas, Esq.
Victor M. Tafur, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
(E-mail: phillip@riverkeeper.org)
(E-mal: vtafur@riverkeeper.org)

Thomas F. Wood, Esq.
Daniel Riesel, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
(E-mail: driesel@sprlaw.com)

Robert D. Snook, Esq
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(E-mail: Robert.Snook@po.state.ct.us)

Andrew M. Cuomo, Esq.
Attorney General of the State of New York
John J. Sipos, Esq.
Assistant Attorney General
The Capitol
Albany, NY 12224-0341
(E-mail: john.sipos@oag.state.ny.us)

Joan Leary Matthews, Esq.
Senior Counsel for Special Projects
Office of General Counsel
New York State Department of
Environmental Conservation
625 Broadway
Albany, NY
(E-mail: jlmatthe@gw.dec.state.ny.us)

Susan H. Shapiro, Esq.
21 Perlman Drive
Spring Valley, NY 10977
(E-mail: Palisadesart@aol.com
mbs@ourrocklandoffice.com)

John LeKay
Heather Ellsworth Burns-DeMelo
Remy Chevalier
Bill Thomas
Belinda J. Jaques
FUSE USA
351 Dyckman Street
Peekskill, NY 10566
(E-mail: fuse_usa@yahoo.com)

* Original and 2 copies

Mauri T. Lemoncelli