RAS 14980

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 WESTCAN, ET AL. PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

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January 22, 2008

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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 to the "Petition For Leave To Intervene With Contentions and Request For Hearing" jointly filed by Westchester Citizen's Area Network ("WestCAN"), Rockland County Conservation Association ("RCCA"), Public Health and Sustainable Energy ("PHASE"), Sierra Club-Atlantic Chapter, and New York State Assemblyman Richard Brodsky (jointly, "WestCAN" or "Petitioner") on December 10, 2007. 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) 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, Petitioner has not satisfied the Commission's 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's 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 Hearing 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, 2007.[3] On November 21, 2007, WestCAN requested an extension of time within which to file Requests for Hearing and Petitions to Intervene; this request was denied by the Atomic Safety and Licensing Board ("Licensing Board or "Board") on November 27, 2007 due to a procedural defect. On November 27, 2007, WestCAN again requested an extension of time within which to file Requests for Hearing and Petitions to Intervene; this request was denied by the Board on November 28, 2007 due to procedural defects. WestCAN submitted a third request for an extension of time within which to file Requests for Hearing and Petitions to Intervene on November 28, 2007; this request was

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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. 42,134 (Aug. 1, 2007).

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

granted by the Board on November 29, 2007, extending the deadline for filing Requests for Hearing and Petitions to Intervene by ten days, to December 10, 2007.[4]

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.[5] As noted above, WestCAN filed its Petition on December 10, 2007,[6] to which Entergy now responds in accordance with the Board's schedule.

To be admitted as a party to this proceeding, WestCAN must demonstrate standing and must submit at least one admissible contention within the scope of this proceeding. In Section III below, Entergy acknowledges that the Petitioner has demonstrated standing to participate as parties to this proceeding pursuant to 10 C.F.R. § 2.309(d)(1), but show that WestCAN has not demonstrated that it is entitled to discretionary intervention under 10 C.F.R. § 2.309(e). Section IV below describes the standards governing the admissibility of proposed contentions and demonstrates that none of WestCAN's proposed contentions is admissible. 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,

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4 Licensing Board Order (Granting an Extension of Time Within Which To File Requests For Hearing) (Nov. 29, 2007).

5 *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).

6 Although WestCAN's earlier requests for an extension of time for filing its petition included, in addition to the five petitioners noted above, Citizen's Awareness Network (CAN), CAN is not identified as a petitioner in WestCAN's December 10, 2007 Petition.

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.[7] 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.[8] These concepts, as well as organizational standing and discretionary intervention, are discussed below.

1. Traditional Standing

To determine whether a petitioner's interest provides a sufficient basis for intervention, "the Commission has long looked for guidance to current judicial concepts of standing."[9] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[10] These three criteria are commonly referred to as injury-in-fact, causality, and redressability, respectively.

First, a petitioner's injury in fact showing "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[11] The injury must be "concrete and particularized," not "conjectural" or "hypothetical."[12] As a result, standing will be denied when the threat of injury is too speculative.[13] Additionally, the alleged "injury in fact" must lie within "the zone of interests" protected by the statutes governing the

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

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

9 *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, N.M.), CLI-98-11, 48 NRC 1, 5-6, *aff'd sub nom. Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999)(citations omitted).

10 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. (1998).

11 *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

12 *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted).

13 *Id.*

proceeding—either the AEA or the National Environmental Policy Act of 1969, as amended ("NEPA").[14] The injury in fact, therefore, must generally involve potential radiological or environmental harm.[15]

Second, a petitioner must establish that the injuries alleged are fairly traceable to the proposed action—in this case, the renewal of IPEC Unit 2 and 3 operating licenses for an additional 20 years.[16] Although petitioners are not required to show that the injury flows directly from the challenged action, they must nonetheless show that the "chain of causation is plausible."[17] The relevant inquiry is whether a cognizable interest of the petitioner might be adversely affected by one of the possible outcomes of the proceeding.[18]

Finally, each petitioner is required to show that "its actual or threatened injuries can be cured by some action of the [NRC]."[19] In other words, each petitioner must demonstrate that the injury can be redressed by a decision in this proceeding. Furthermore, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[20]

2. Standing Based on Geographic Proximity

Under NRC case law, a petitioner may, in some instances, be presumed to have fulfilled the judicial standards for standing based on his or her geographic proximity to a facility or source

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[14] *Quivira Mining*, CLI-98-11, 48 NRC at 5.

[15] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 (2002).

[16] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

[17] *Id.*

[18] *Nuclear Eng'g Co. Inc.* (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

[19] *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

[20] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

of radioactivity.[21] "Proximity" standing rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working or living offsite but within a certain distance of that facility.[22] The NRC has held that the proximity presumption is sufficient to confer standing on an individual or group in proceedings conducted pursuant to 10 C.F.R. Part 50 for reactor construction permits, operating licenses, or significant license amendments.[23] The proximity presumption, which has been defined as being within a 50-mile radius of plants, applies to license renewal cases as well.[24]

3. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).[25] To intervene in a proceeding in its own right, an organization must allege just as an individual petitioner must that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and be redressed by a favorable decision.[26] General environmental and policy interests are insufficient to confer organizational standing.[27] Thus, for example, an organization's assertion "that it has an interest in state and federal environmental laws and in the

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21 *Peach Bottom*, CLI-05-26, 62 NRC at 580.

22 *Id.* (citations omitted).

23 *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)(citations omitted).

24 *See Carolina Power & Light Co.*, (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 52-54 (2007).

25 *Yankee*, CLI-98-21, 48 NRC at 195 (citing *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

26 *See Georgia Tech Research Reactor*, CLI-95-12, 42 NRC at 115.

27 *See Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

land, water, air, wildlife, and other natural resources that would be affected" is insufficient to establish standing.[28]

Where an organization is to be represented in an NRC proceeding by one of its members, the member must demonstrate authorization by that organization to represent it.[29] A partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law.[30] Any person appearing in a representative capacity must file with the Commission a written notice of appearance.[31] The notice of appearance must state the representative's name, address, telephone number, facsimile number, and e-mail address, if any; the name and address of the person or entity on whose behalf the representative appears, and the basis of his or her authority to act on behalf of the party.[32]

To invoke representational standing, an organization (1) must show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating geographic proximity in cases where the presumption applies, or by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability), (2) must identify that member by name and address, and (3) must show (preferably by affidavit) that the organization is authorized by that member to request a hearing on behalf of the member.[33] Where the affidavit of the member is

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28 *Id.* at 251-52.

29 *See, e.g., Georgia Tech Research Reactor*, CLI-95-12, 42 NRC at 115 (1995)(citation omitted).

30 *See* 10 C.F.R. § 2.314(b).

31 *See id.*

32 *See id.*

33 *See, e.g. N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000); *White Mesa*, CLI-01-21, 54 NRC at 250, *see also AmerGen Energy Co. LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 195 (2006).

devoid of any statement that he or she wants and has authorized the organization to represent his interests, the Board should not infer such authorization.[34]

4. 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 one petitioner has established standing and at least one contention has been admitted in the proceeding.[35] 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;

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[34] *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

[35] 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.").

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.

Of these criteria, the primary consideration concerning discretionary intervention is the first factor—assistance in developing a sound record.[36] The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention.[37]

B. Petitioner's Standing to Intervene

1. WestCAN Has Demonstrated Standing In its Own Right As Well As To Represent Its Members

WestCAN, through the declaration of Ms. Marilyn Elie,[38] asserts that it has standing as an organization in its own right, and as a representative of its members.[39] With respect to standing as an organization, WestCAN states that its office is located within 3 miles of Indian Point, and that the "new 20 year superceding licenses" could "increase the risk and harmful consequences of an offsite radiological release" and "could impact the value of its property, and interfere with the organizations [sic] rightful ability to conduct operations . . . ."[40]

Entergy infers from the Petition, as well as Ms. Elie's declaration, that WestCAN contends it has standing in its own right, based on the organization's proximity—approximately three miles—to the Indian Point site, and that renewal of the operating licenses for Indian Point

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[36] *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).

[37] *See Nuclear Eng'g*, ALAB-473, 7 NRC at 745 (requiring potential discretionary intervenor to show "that it is both willing and able to make a credible contribution to the full airing of the issues . . . in this proceeding").

[38] Exhibit A to the WestCAN Petition. Entergy notes, however, that while Ms. Elie's declaration indicates that she is a member and co-founder of WestCAN, and that WestCAN represents her in this matter, it fails to state that she is authorized to request, on behalf of that organization, that it be granted intervention as a party in its own right, pursuant to 10 C.F.R. § 2.314(b).

[39] Petition at 3 and 7-9. (Entergy notes that pages of the Petition are not numbered until page 23, although by our count, there are 25 preceding pages.)

[40] Petition at 6-7.

Units 2 and 3 could affect the organization's property, as well as its ability to conduct its operations.[41] For that reason, Entergy does not contest WestCAN's standing as an organization pursuant to 10 C.F.R. § 2.309(d)(1).

Regarding WestCAN's standing based on representation of it members, WestCAN attaches the declarations of Gary Shaw,[42] Jeanne D. Shaw,[43] Judy Allen,[44] and Elizabeth C. Segal,[45] all members of WestCAN, and each asserting that WestCAN represents his or her interest(s) in this matter. In addition, each asserts residence well within the 50-mile radius of the Indian Point facility. Inasmuch as each of these individuals, in his or her own right, has standing based on proximity, and has asserted that WestCAN represents his or her interests, Entergy does not contest WestCAN's standing as a representative of its members pursuant to 10 C.F.R. § 2.309(d).[46]

2. RCCA Has Demonstrated Standing In its Own Right, As Well As To Represent Its Members

The Petition contends, on behalf of the Rockland County Conservation Association, Inc. ("RCCA"), through the declaration of Ms. Dorice Madronero,[47] that RCCA has standing as an

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41 The Petition implies that WestCAN's interest could be affected by operation under renewed licenses. However, Ms. Elie's Declaration, offered in support of the Petition, is not clear about whether the effect on the organization's interest is attributable to renewal of the operating licenses, versus ongoing operations under the existing licenses. The Applicant infers that the purported effect is being attributed to operation under renewed licenses.

42 Exhibit E to the WestCAN Petition.

43 Exhibit F to the WestCAN Petition.

44 Exhibit G to the WestCAN Petition.

45 Exhibit H to the WestCAN Petition.

46 In light of the foregoing, it is not necessary to address WestCAN's assertion that it is entitled to participate as a matter of discretion. Petition at 8-9. Entergy notes, however, that WestCAN's arguments in this regard fail to address, in a substantive and meaningful way, the requirements of 10 C.F.R. § 2.309(e), and, as a consequence, intervention as a matter of discretion should be denied.

47 Exhibit B to the WestCAN Petition. Entergy notes, however, that while Ms. Madronero's declaration indicates that she is a president of RCCA, it fails to state that RCCA wishes to participate as a party in this proceeding, and that she has authorized WestCAN to request, on behalf of that organization, that it be granted intervention as a party in its own right, pursuant to 10 C.F.R. § 2.309(d)(1).

organization in its own right, and as a representative of its members.[48] With respect to standing as an organization, the Petition asserts that RCCA's office is located within 9 miles of IPEC, and that the "proposed 20 year superceding licenses could increase both the risk and harmful consequences of an offsite radiological release" and "could impact the value of its property, and interfere with the organizations [sic] rightful ability to conduct operations . . . ."[49]

Entergy infers from the Petition, as well as Ms. Madronero's declaration, that RCCA contends it has standing in its own right, based on the organization's proximity—approximately nine miles—to the Indian Point site, and that renewal of the operating licenses for Indian Point Units 2 and 3, could affect the organization's property as well as it ability to conduct its operations.[50] For that reason, Entergy does not contest RCCA's standing as an organization pursuant to 10 C.F.R. § 2.309(d)(1).

Regarding RCCA's standing based on representation of it's members, the Petition attaches the declarations of Connie Coker,[51] Janet Lee Burnet,[52] and Andrew Y. Stewart,[53] all members of RCCA, and each asserting that RCCA represents his or her interest(s) in this matter. In addition, the Petition asserts that each of the foregoing resides within the 50-mile radius of the Indian Point facility.[54] Inasmuch as each of these individuals, in his or her own right, has

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48 Petition at 4 and 9-11.

49 Petition at 9-10.

50 The Petition implies that RCCA's interest could be affected by operation under renewed licenses. However, Ms. Madronero's Declaration, offered in support of the Petition, is not clear about whether the effect on the organization's interest is attributable to renewal of the operating licenses, as opposed to ongoing operation under the existing licenses. The Applicant infers that the purported effect is being attributed to operation under renewed licenses.

51 Exhibit AAA to the WestCAN Petition.

52 Exhibit BBB to the WestCAN Petition.

53 Exhibit CCC to the WestCAN Petition.

54 Although the various declarations provide the respective individual's address, none contains a representation regarding the location of that address relative to the Indian Point site. And, as with Ms. Madronero's

standing based on proximity, and has asserted that RCCA represents his or her interests, Entergy does not contest RCCA's standing as a representative of its members.[55]

3. PHASE Has Demonstrated Standing In its Own Right As Well As To Represent Its Members

The Petition, on behalf of Public Health and Sustainable Energy ("PHASE"), supported by the declaration of Ms. Michel Lee,[56] asserts that PHASE has standing as an organization in its own right, and as a representative of its members.[57] With respect to standing as an organization, the Petition asserts that PHASE's office is located approximately 20 miles from Indian Point, and that the "proposed 20 year superceding licenses could increase both the risk and harmful consequences of an offsite radiological release" and "could impact the value of its property, and interfere with the organizations [sic] rightful ability to conduct operations . . . ."[58]

Entergy infers from the Petition, as well as Ms. Lee's declaration, that PHASE contends it has standing in its own right, based on the organization's proximity—approximately 20 miles—to the IPEC site, and that renewal of the operating licenses for Indian Point Units 2 and 3, could affect the organization's property as well as it ability to conduct its operations.[59] For that reason, Entergy does not contest PHASE's standing as an organization.

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declaration, these declarations do not appear to assert an interest, or affect thereon, attributable to license renewal, in contrast to current operation.

55 In light of the foregoing, it is not necessary to address RCCA's assertion that it is entitled to participate as a matter of discretion. Petition at 10-11. Entergy notes, however, that RCCA's arguments in this regard fail to address, in a substantive and meaningful way, the requirements of 10 C.F.R. § 2.309(e), and, as a consequence, intervention as a matter of discretion should be denied.

56 Exhibit DDD to the WestCAN Petition (incorrectly cited therein as Exhibit C; *see* Petition at 11).

57 Petition at 5 and 11-12.

58 Petition at 11.

59 The Petition implies that PHASE's interest could be affected by operation under renewed licenses. However, Ms. Lee's Declaration, offered in support of the Petition, is devoid of any reference to the action being considered by the NRC—renewal of the Indian Point Units 2 and 3 operating licenses. As with the WestCAN and RCCA requests, it is not clear whether the effect on PHASE's interest is attributable to renewal of the operating licenses, versus ongoing operations under the existing licenses. The Applicant infers that the purported effect is being attributed to operation under renewed licenses.

Regarding PHASE's standing based on representation of it members, the Petition attaches the declarations of Susan Shapiro,[60] Robert A. Jones,[61] and Maureen Ritter.[62] all members of PHASE, and each asserting that PHASE represents his or her interest(s) in this matter. In addition, the Petition asserts that each of the foregoing resides within the 50-mile radius of the Indian Point facility.[63] Inasmuch as each of these individuals, in his or her own right, has standing based on proximity, and has asserted that PHASE represents his or her interests, Entergy does not contest PHASE's standing as a representative of its members.[64]

4. The Sierra Club Has Demonstrated Standing In its Own Right

The Petition, on behalf of the Sierra Club, Atlantic Chapter ("Sierra Club"), as supported by the declaration of Ms. Susan Lawrence,[65] asserts that the Sierra Club has standing as an organization in its own right, and as a representative of its members.[66] With respect to standing as an organization, the Petition asserts that the Sierra Club has offices which are located within 50 miles from IPEC, and that the "proposed 20 year superceding licenses could increase both the risk and harmful consequences of an offsite radiological release" and "could impact the [sic] and interfere with the organizations [sic] rightful ability to conduct operations . . . ."[67]

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60 Exhibit EEE to the WestCAN Petition.

61 Exhibit FFF to the WestCAN Petition. We note that, without explanation, this declaration was provided in two versions, the language differing somewhat.

62 Exhibit GGG to the WestCAN Petition.

63 The declaration of Mr. Jones does not provide the distance from his residence to the Indian Point site, but we infer from the Petition (at 18), that it is within 20 miles.

64 In light of the foregoing, it is not necessary to address PHASE's assertion that it is entitled to participate as a matter of discretion. Petition at 11-12. Entergy notes, however, that PHASE's arguments in this regard fail to address, in a substantive and meaningful way, the requirements of 10 C.F.R. § 2.309(e) and, as a consequence, intervention as a matter of discretion should be denied.

65 Exhibit C to the WestCAN Petition (incorrectly cited therein as Exhibit D; *see* Petition at 12).

66 Petition at 5 and 11-13.

67 Petition at 13.

Entergy infers from the Petition, as well as Ms. Lawrence's declaration, that the Sierra Club contends it has standing in its own right, based on the organization's proximity—within 50 miles—to the IPEC site, and that renewal of the operating licenses for Indian Point Units 2 and 3 could affect the organization's property, as well as it ability to conduct its operations.[68] For that reason, Entergy does not contest the Sierra Club's standing as an organization.[69]

Regarding the Sierra Club's standing based on representation of it members, the Petition refers to a declaration of "Ms" without name, which it marks as Exhibit HHH.[70] A review of the Exhibits provided by WestCAN, however, includes, as Exhibit HHH, the declaration of NYC Council Member James Vacca, which appears to be unrelated to the Sierra Club's request. Moreover, the declaration of Ms. Lawrence, the only declaration provided in this regard, while stating that she represents the Sierra Club, does not expressly authorize the organization to represent her interest in this matter as a member. In light of the foregoing, the Sierra Club has not established that it has standing to intervene as a representative of its members.

5. New York State Assemblyman Richard L. Brodsky Has Demonstrated Standing

The Petition asserts that New York State Assemblyman Richard L. Brodsky has standing based on the proximity of his offices in Elmsford, New York—within 15 miles—to the IPEC site.[71] The Petition further asserts that Mr. Brodsky's ability to conduct "operations in an

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[68] The Petition implies that the Sierra Club's interest could be affected by operation under renewed licenses. However, Ms. Lawrence's Declaration, offered in support of the Petition, is devoid of any reference to the action being considered by the NRC—renewal of the Indian Point Units 2 and 3 operating licenses. As with the WestCAN, RCCA, and PHASE requests, it is less than clear whether the effect on the Sierra Club's interest is attributable to renewal of the operating licenses, versus ongoing operations under the existing licenses. The Applicant infers that the purported effect is being attributed to operation under renewed licenses.

[69] In light of the foregoing, it is not necessary to address PHASE's assertion that it is entitled to participate as a matter of discretion. Petition at 11-12. Entergy notes, however, that PHASE's arguments in this regard fail to address, in a substantive and meaningful way, the requirements of 10 C.F.R. § 2.309(e) and, as a consequence, intervention as a matter of discretion should be denied.

[70] *See* Petition at 12.

[71] Petition at 6-7, 14. *See also* Declaration of Richard L. Brodsky, Exhibit LLL to the WestCAN Petition.

uninterrupted and undisturbed manner" could be affected by renewal of the Indian Point operating licenses for a 20-year period. [72] Entergy does not contest that Mr. Brodsky has established standing based upon his proximity to the Indian Point site.[73]

C. WestCAN, RCCA, PHASE, the Sierra Club and Assemblyman Brodsky Should Be Consolidated Pursuant to 10 C.F.R. § 2.316

The Petition filed by WestCAN on December 10, 2007, is unclear with respect to whether it is filed as a joint petition on behalf of all named petitioners, collectively, or simply a single petition filed on behalf of each individual person. The Petition states that the several persons "are individually and collectively" referred to by various terms.[74] On the other hand, the Petition is signed by both Susan H. Shapiro and Richard L. Brodsky, explicitly stating that they represent the four organizations as well as Mr. Brodsky.[75] Beyond that, the Petition, as well as the supporting declarations referenced above, is silent with respect to the form of intended participation and representation.

In the event that the Board determines that one or more of the several WestCAN petitioners has standing and that at least one admissible contention has been proffered such that a hearing is called for, Entergy, out an abundance of caution, moves, pursuant to 10 C.F.R. § 2.316, to formally consolidate the foregoing individually-named petitioners for all purposes of this proceeding. Entergy submits that the Petitions and supporting declarations evidence a

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[72] Petition at 14-15.

[73] In light of the foregoing, it is not necessary to address the request that Mr. Brodsky is entitled to participate as a matter of discretion. Petition at 11-12. Entergy notes, however, that Mr. Brodsky's arguments in this regard fail to address, in a substantive and meaningful way, the requirements of 10 C.F.R. § 2.309(e) and, as a consequence, intervention as a matter of discretion should be denied. We further note that his status as a New York State Assemblyman is not, without a sufficient showing of standing, a compelling factor with respect to his entitlement to participate in this proceeding either as a matter of right or as a matter of discretion. *See* 10 C.F.R. § 2.309(d), (e); *see also Nuclear Eng'g., Inc.*, ALAB-473, 7 NRC at 45 (noting that the petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention).

[74] *See* Petition at 1-2.

[75] *See* Petition at 387.

fundamental unity in interest as well as contentions proffered, such that consolidation would not prejudice any individual petitioner. Entergy further submits that consolidation will better assure administrative efficiency and avoid duplication and confusion in this proceeding. In this regard, Entergy also requests that the Licensing Board direct that an appropriate notice of appearance be filed by WestCAN's authorized representative, as required by 10 C.F.R. § 2.314.[76]

IV. PETITIONER'S PROPOSED CONTENTIONS ARE INADMISSIBLE

A. Applicable Legal Standards and Relevant NRC Precedent

1. Petitioner Must Submit At Least One Admissible Contention With An Adequate Basis

As explained above, to intervene in an NRC licensing proceeding, a petitioner must propose at least one admissible contention.[77] 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.[78] 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."[79] 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."[80]

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[76] *See also* 10 C.F.R. § 2.305(e).

[77] *See* 10 C.F.R. § 2.309(a).

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

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

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

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 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.[81]

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[82] 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."[83] Thus, the rules on contention admissibility are "strict by design."[84] Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a contention.[85]

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

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

83 *Id.*

84 *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).

85 *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).

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."[86] 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]."[87] Namely, an "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[88] The contention rules "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.'"[89]

b. Petitioner Must Briefly Explain the Basis for the Contention

A petitioner must provide "a brief explanation of the basis for the contention."[90] This includes "sufficient foundation" to "warrant further exploration."[91] The 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."[92] The Board, however, must determine the admissibility of the contention itself, not the admissibility of individual "bases."[93]

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86 10 C.F.R. § 2.309(f)(1)(i).

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

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

89 *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).

90 10 C.F.R. § 2.309(f)(1)(ii); *see* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

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

92 *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).

93 *See La. Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) ("NEF") ("licensing boards generally are to litigate 'contentions' rather than 'bases'").

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."[94] 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.[95] (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.[96] Any contention that falls outside the specified scope of the proceeding must be rejected.[97]

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."[98] 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.[99] Similarly, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must be rejected by

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94 10 C.F.R. § 2.309(f)(1)(iii).

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

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

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

98 *See* 10 C.F.R. § 2.335(a).

99 *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).

the Board as outside the scope of the proceeding.[100] Accordingly, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.[101]

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."[102] 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.'"[103] In this regard, "[e]ach contention must be one that, if proven, would entitle the petitioner to relief."[104] 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.[105]

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[100] *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)).

[101] *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.

[102] 10 C.F.R. § 2.309(f)(1)(iv).

[103] *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.

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

[105] *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).

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.[106] 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.[107]

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.[108] The petitioner must explain the significance of any factual information upon which it relies.[109]

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."[110] 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."[111] The Board will examine documents to confirm that they

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[106] *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).

[107] *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).

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

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

[110] *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).

[111] *See Yankee*, LBP-96-2, 43 NRC at 90, *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

support the proposed contention(s).[112] A petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[113] Moreover, vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.[114] The mere incorporation of massive documents by reference is similarly unacceptable.[115]

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."[116] Conclusory statements cannot provide "sufficient" support for a contention, simply because they are made by an expert.[117]. 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.'"[118]

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,"[119] 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

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[112] *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).

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

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

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

[116] *Private Fuel Storage,* LBP-98-7, 47 NRC at 181 (emphasis added); *see also USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 61 NRC 451, 472 (2006) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

[117] *See American Centrifuge Plant*, CLI-06-10, 61 NRC at 472.

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

[119] 10 C.F.R. § 2.309(f)(1)(vi).

applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[120] If a petitioner does not believe these materials address a relevant issue, then the petitioner is to "explain why the application is deficient."[121] A contention that does not *directly controvert a position taken by the applicant in the application* is subject to dismissal.[122] 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.[123]

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."[124] 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

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[120] 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.

[121] 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.

[122] *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.

[123] *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).

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

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."[125] 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."[126] Key aspects of that decision and of other significant license renewal decisions are summarized below.

In brief, 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. 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 for the period of extended operation or are subject to an evaluation of time-limited aging analyses ("TLAA").[127] 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."[128]

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[125] *Turkey Point*, CLI-01-17, 54 NRC at 7.

[126] *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 renewal application must be submitted to identify any change to the CLB that materially affects the content of the LRA, including the UFSAR supplement. *See* 10 C.F.R. § 54.21(b). The license renewal Updated Final Safety Analysis Report ("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 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 ("AMR")] or evaluation of [TLAAs] in accordance with § 54.21." 10 C.F.R. § 54.37(b).

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

[128] *See id.* §§ 51.71(d) and 51.95(c).

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."[129] 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.[130] 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.'"[131] 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.[132]

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*

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[129] *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 (May 8, 1995).

[130] *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).

[131] *Turkey Point*, CLI-01-17, 54 NRC at 8 (quoting Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,462). 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.

[132] *Id.* at 7. 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.

process (*e.g.*, security and emergency planning issues) on the other.[133] 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.[134] 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.[135]

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."[136] 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."[137]

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 Updated Final Safety Analysis Report ("UFSAR") (and periodic

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[133] 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.

[134] *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.

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

[136] *Id.* at 7.

[137] *Id.* at 9.

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.[138]

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 . . . ."[139] Only passive, long-lived structures and components are subject to AMR.[140] 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 effects of aging; and involve assumptions based on the original 40-year operating term.[141] 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)

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[138] 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.

[139] 10 C.F.R. § 54.29(a).

[140] *See id.* § 54.21(a)(1).

[141] *See id.* § 54.3.

otherwise demonstrate that the effects of aging will be adequately managed during the renewal term.[142]

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.[143] The GALL Report also contains recommendations concerning specific areas for which existing programs should be augmented for license renewal.[144] Thus, programs that are consistent with the GALL Report are generally accepted by the Staff as adequate to meet the license renewal rule.[145]

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.[146] Likewise, the question of whether

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[142] *See id.* § 54.21(c)(1).

[143] *See* GALL Report, Vol. 1, at 1.

[144] *See id.* at 4.

[145] *See id.* at 3.

[146] *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.").

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."[147] In this regard, the ASLB recently stated that "monitoring is not proper subject matter for license extension contentions."[148] 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.*"[149]

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.[150] 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 those generic impacts that are well understood based on experience gained from the operation of the existing fleet of U.S. nuclear power plants.[151]

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

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

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

150 *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).

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

Generic issues are identified in the GEIS as "Category 1" impacts.[152] 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."[153] 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."[154] 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,[155] 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.[156] 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 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.[157]

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

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

[154] *Id.*

[155] NRC regulations require an LRA to 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).

[156] 10 C.F.R. § 51.53(c)(3)(ii).

[157] 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.

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.[158] 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.[159] 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.[160]

This definition is consistent with NEPA case law.[161]

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

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158 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).

159 10 C.F.R. § 51.53(c)(3)(ii), (iv).

160 RG 4.2, Supp. 1, Preparation of Supplemental Environmental Reports for Application to Renew Nuclear Power Plant Operating Licenses, 4.2-S-4 (Sept. 2000) ("RG 4.2S1"), *available at* ADAMS Accession No. ML003710495.

161 *See, e.g., 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)).

162 *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."[163] 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."[164] 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."[165] 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.[166] The Commission ultimately approved the changes to the proposed rule and specifically endorsed SECY-93-032.[167] The Statement of Considerations for the final rule refers to SECY-93-032.[168]

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

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

[165] 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.)

[166] *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.

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

[168] 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.[169] There, the Commission summarized the appropriate procedural vehicles for "revisiting" generic environmental determinations relevant to license renewal:

> 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.[170]

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."[171] 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."[172] In fact, the U.S. Supreme Court has specifically upheld

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[169] *Turkey Point*, CLI-01-17, 54 NRC at 12, 22-23.

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

[171] *Vermont Yankee*, CLI-07-03, 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.

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

the Commission's authority to discharge its responsibilities under NEPA through generic rulemaking.[173]

3. Waiver of Regulations Under 10 C.F.R. § 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.[174]

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.[175]

If the petitioner makes a prima facie showing, then the Board shall certify the matter to the Commission.[176] If there is no prima facie showing, then the matter may not be litigated, and "the presiding officer may not further consider the matter."[177] The recent Commission decision in the

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[173] *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.").

[174] 10 C.F.R. § 2.335(b).

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

[176] *See id.* § 2.335 (c), (d).

[177] *Id.* § 2.335(c).

Millstone case sets forth a four-part test for Section 2.335 petitions, under which the petitioner must demonstrate that it satisfies each of the following four criteria:

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."[178]

In summary, a Section 2.335 petition "can be granted only in unusual and compelling circumstances."[179]

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.

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[178] *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 573, 597 (1988).

[179] *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).

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.[180] 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.[181] If the primary sponsor of a contention withdraws from the proceeding, then the remaining petitioner must demonstrate that it can independently litigate the issue.[182] If the petitioner cannot make such a showing, then the issue is subject to dismissal prior to hearing.[183] Incorporation by reference also should be denied to parties who merely establish standing and then attempt to incorporate issues of other petitioners.[184]

Incorporation by reference 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.[185] As the Commission has explained, "[o]ur contention-pleading rules are designed, in part, 'to ensure that full adjudicatory hearings

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

[181] *Id.* at 132.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 133.

[185] *Id.*

are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.'"[186]

D. None of WestCAN's Proposed Contentions is Admissible[187]

As demonstrated below, WestCAN has failed to proffer an admissible contention in its Petition. As a threshold matter, Applicant notes that WestCAN's Petition purports to contain 51 contentions.[188] This total count is plagued by a host of deficiencies, however. For example, a number of the proposed contentions are overlapping in nature and are grouped together into a single contention in one section of the petition; *e.g.*, Contentions 22-25.[189] At the same time, the Petition houses separate Contentions numbered 11A and 11B, and Contention 21 cannot be found, Contention 46 is expressly omitted, and there are two contentions labeled as Contention 50. In light of WestCAN's failure to specifically and accurately identify separately-numbered contentions, for purposes of this response, Entergy has addressed the proposed grouped Contentions 22-25 as a single contention, accompanied by multiple bases. In any event, as set forth below, none of the associated arguments set forth by WestCAN in its Petition—whether viewed as one or multiple contentions—constitutes, or supports the admission of, a litigable contention pursuant to 10 C.F.R. § 2.309(f)(1).

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[186] *Id.* citing *Oconee*, CLI-99-11, 49 NRC at 334.

[187] Entergy does not dispute that WestCAN may supplement and amend its contentions in the future, Petition at 21-22, *provided*, however, that it satisfies the requirements of 10 C.F.R. § 2.309(f)(2), with respect to supplementation and amendment of contentions. With respect to WestCAN's suggestion that discovery and cross-examination should be permitted, Petition at 22-23, it has failed to demonstrate the need for such procedures, as called for by 10 C.F.R. §§ 2.309(g) and 2.310(d), and its request should be denied.

[188] Petition at 23.

[189] Although WestCAN refers to a grouping of its Proposed Contentions 20-26, Petition at 98, the Petition provided to the Applicant reflects a grouping of Proposed Contentions 22-25, and has no Proposed Contention discretely numbered 26 further underscoring the disarray inherent in WestCAN's Petition. *See* Petition at 165-187.

1. Proposed Contention 1

> Contention 1: Co-mingling three dockets, and three DPR licenses under a single application is in violation of C.F.R. Rules, Specifically 10 C.F.R. 54.17(d) as well as Federal Rules for [sic] Civil Procedure rule 11(b).[190]

Proposed Contention 1 alleges that the Applicant has violated NRC regulations and the Federal Rules of Civil Procedure by "co-mingling three dockets" and submitting a single application for the renewal of the Indian Point Unit 2 and 3 operating licensees. In support of this contention, Petitioner cites 10 C.F.R. § 54.17(d), and contends that "co-mingling" of renewal applications for Units 2 and 3 is inappropriate because each plant has or has had separate dockets, separate "DPR" numbers, separate owners and license holders for most of the plants' 30 years of operation, separate architects/engineers, distinctly different CLBs, separate onsite plant inspection teams, different sets of licensing commitments, and different enforcement histories.[191] According to Petitioner, this makes NRC review of the application "overly complex, unclear, and unduly confusing."[192] Finally, with respect to Unit 1, Petitioner submits that Entergy violates unspecified provisions of "10 CFR" "by not distinguishing the current Safestor [sic] status of Unit 1 decommissioning, and in fact seeking approval to make use of Unit 1 systems and/or components/infrastructure for extended operation of Unit 2, and to a lesser degree Unit 3."[193]

Entergy opposes the admission of Proposed Contention 1 on the grounds that it lacks specificity, lacks a factual or legal foundation, raises issues that are beyond the scope of this proceeding and immaterial to the NRC's licensing decision, fails to establish a genuine dispute with the Applicant on a material issue of law of or fact, improperly challenges Part 54 and the

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[190] Petition at 28.

[191] Petition at 28-31.

[192] *Id.* at 28.

[193] *Id.* at 29.

regulatory process, and seeks relief that is unavailable in this forum, contrary to 10 C.F.R. § 2.309(f)(1)(i), (ii), (iii), (iv), (v) and (vi).

First, WestCAN offers no credible legal basis for its assertion that an applicant must submit separate license renewal applications for each unit at a site. Petitioner suggests that Section 54.17(d) requires such an approach, but that provision states: "An applicant may combine an application for a renewed license with applications for other kinds of licenses." The phrase "other kinds of licenses" refers to source, byproduct, or special nuclear material licenses that may be incident to, and necessary for, continued operation of the plant. Section 54.17(d) does not preclude an applicant from addressing multiple units within a single license renewal application. Indeed, the NRC's Standard Review Plan ("SRP") for review of license renewal applications contemplates such an approach, indicating that, to be docketed, an application must, *inter alia*, identify the "specific *unit(s)* applying for license renewal."[194]

Second, the NRC routinely has reviewed and approved single license renewal applications that address multiple units. The NRC-approved license renewal applications for Browns Ferry (Units 1, 2, and 3), Brunswick (Units 1 and 2), and Nine Mile Point (Units 1 and 2) provide three recent examples.[195] In fact, the NRC has approved single license renewal applications encompassing not only multiple reactor units, *but different facilities on different sites*. The latter include the license renewal applications for the North Anna/Surry, Catawba/McGuire, and Dresden/Quad Cities facilities. Clearly, the licensees for the aforementioned facilities successfully addressed units of varying ages, designs, licensing bases within a single renewal application. Insofar as WestCAN argues that a single license renewal

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[194] NUREG-1800, Rev. 1, "Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants" (Sept. 2005), Tbl. 1.1-1 at 1.1-5 (emphasis added).

[195] *See* http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html (providing links to the cited license renewal applications and the Staff's related safety and environmental review documents).

application is inappropriate here, it lacks statutory or regulatory authority, impermissibly challenges the Part 54 regulatory process, and ignores relevant regulatory precedent.

Third, WestCAN provides no reasoned explanation as to why the decommissioning status of Unit 1 is litigable in this proceeding. WestCAN similarly fails to explain *what* "procedure governed by 10 CFR" are violated by the "use of Unit 1 systems and/or components/infrastructure for extended operation" of Units 2 or 3,[196] or how such alleged violation constitutes a material deficiency with respect to the LRA; *i.e.*, one that is related to the detrimental effects of aging on Units 2 and 3. Entergy is seeking to renew the operating licenses for Units 2 and 3, not the provisional operating license for Unit 1. As Section 1.2 of the LRA clearly states:

> Indian Point Energy Center Unit 1 (Provisional Operating License No. DPR-5) shares the site and surrounding area with Units 2 and 3. Unit 1 was permanently shut down on October 31, 1974, and has been placed in a safe storage condition (SAFSTOR) until Unit 2 is ready for decommissioning.
>
> Although the extension of the IP1 license is not a part of this license renewal application, IP1 systems and components interface with and in some cases support the operation of IP2 and IP3. Therefore, IP1 systems and components were considered in the scoping process (see Section 2.1.1). The *aging effects* of Unit 1 SSCs within the scope of license renewal for IP2 and IP3 will be adequately managed so that the intended functions will be maintained consistent with the current licensing basis throughout the period of extended operation.[197]

Thus, Unit 1 is relevant *only* to the extent that its systems and components interface with, and in some cases would support, the continued operation of Units 2 and 3, such that the effects of aging on those Unit 1 systems or components must be considered under 10 C.F.R. Part 54. WestCAN, however, does not identify any specific and material deficiency in the LRA relative

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[196] Petition at 29.

[197] LRA at 1-7 (emphasis added).

to Entergy's consideration of Unit 1 systems and components. Indeed, WestCAN fails to cite any specific pages or sections of the LRA, and makes only vague statements about the "decommissioning" status of IP1[198] WestCAN thus fails to establish a genuine material dispute.

Finally, insofar as the Staff has docketed the LRA and initiated its detailed technical review, WestCAN, in effect, challenges that docketing decision. Such a contention is neither within the scope of this proceeding nor the subject of relief available in this forum. Specifically, "[a]s the Commission has made clear, how thoroughly the Staff conducts its preacceptance review process and whether its decision to accept an application for filing was correct are not matters of concern in [an] adjudicatory proceeding."[199] The proper focus of this case, is instead, on the adequacy of the LRA as it has been accepted and docketed for licensing review, not the Staff's docketing determination. As discussed above, Proposed Contention 1 fails to identify and explain, with requisite basis and specificity, any material deficiencies in the LRA.

In summary, the Board must deny the admission of Proposed Contention 1. It lacks specificity and foundation, fails to controvert the application on a material issue of law or fact, and impermissibly challenges NRC regulations and procedures, contrary to 10 C.F.R. § 2.309(f)(1)(i), (iv) and (vi).

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[198] *Comanche Peak*, LBP-92-37, 36 NRC at 384.

[199] *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 242 (citing *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC at 395-96; *New Eng. Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978)).

2. Proposed Contention 2

Contention 2: The NRC routinely violates § 51.101(b) in allowing changes to the operating license [sic] be done concurrently with the renewal proceedings.[200]

In Proposed Contention 2, WestCAN alludes to three instances which, in its view, constitute violations of 10 C.F.R. § 51.101(b), and which prejudice the license renewal process such that the LRA cannot be approved.[201] Section 51.101(b) provides:

> While work on a required program environmental impact statement is in progress, the Commission will not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:
>
> (1) Is justified independently of the program;
>
> (2) Is itself accompanied by an adequate environmental impact statement; and
>
> (3) Will not prejudice the ultimate decision on the program. Absent any satisfactory explanation to the contrary, interim action which tends to determine subsequent development or limit reasonable alternatives, will be considered prejudicial.

Before addressing the scope of this contention, we would note that WestCAN's reliance on 10 C.F.R. § 51.101(b) is misplaced. As explicitly provided by the regulation, its limitations apply in the context of actions associated with a programmatic environmental impact statement. That regulation is simply inapposite here, where any action that may be authorized relies on both a generic (in contrast to "programmatic") environmental impact statement as well as a site-specific supplement to it, and more importantly, does not entail approval of programmatic actions.

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[200] Petition at 31.

[201] Petition at 31-34.

Turning then to the three instances which WestCAN believes violate 10 C.F.R. § 51.101(b), the first pertains to Entergy's July 28, 2007 request for NRC approval of the transfer of the Indian Point Units 2 and 3 operating licenses to Entergy Nuclear Operations.[202] This transfer would result, WestCAN contends, in "substantial reorganization of Entergy's corporate structure and LLC holdings, affecting the fiscal responsibility and liabilities of Indian Point 1, Indian Point 2 and Indian Point 3. The NRC wrongfully this [sic] license transfer application the middle [sic] of the relicensing proceedings."[203]

The proposed transfer referred to by WestCAN in this proposed contention, in fact, encompasses a proposed indirect transfer of more than the Indian Point units—it would also include the transfer of the Pilgrim Nuclear Power Station, James A. Fitzpatrick Nuclear Power Plant, Vermont Yankee Nuclear Power Station, Palisades Nuclear Plant, and Big Rock Point. Entergy Nuclear Operations on behalf of itself and the named owners of these facilities, filed its original request on July 30, 2007 (not on July 28, 2007, as stated in this contention, Petition at 31; *see* Exhibit S to the Petition). The NRC published six separate notices in the *Federal Register* regarding this application (*i.e.*, one for each plant subject to the indirect transfer) on January 16, 2008.[204] As those notices indicate, any person whose interest may be affected by the Commission's action on the indirect license transfer requests may request a hearing and file a petition for leave to intervene in the indirect transfer proceeding.[205] The upshot is that the indirect license transfer to which WestCAN alludes is a separate NRC licensing action subject to a separate hearing opportunity—it is not relevant or subject to dispute in this proceeding.

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[202] *See* ADAMS Accession No. ML072220219.

[203] Petition at 31. WestCAN incorporates its proposed Contention 3 by reference. *Id.* at 32.

[204] *See* 73 Fed. Reg. 2948-58 (Jan. 16, 2008) (the IPEC notice begins on page 2955).

[205] *See, e.g.*, 73 Fed. Reg. at 2955.

Furthermore, WestCAN fails to explain how the pending license transfer action is connected to the provisions of 10 C.F.R. § 51.101(b), such the pending license renewal proceeding is somehow inconsistent with its terms. In any event, this basis for the contention is excessively vague in terms of explaining any apparent nexus of the license transfer matter to this license renewal proceeding and, for that reason alone, fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(i) and (ii) in terms of providing the requisite specificity and basis. Furthermore, the license transfer matter is clearly outside the scope of this license renewal proceeding as noticed in the *Federal Register* on August 1, 2007.

The second example provided by WestCAN references the fire protection exemption granted to Entergy by the NRC on September 28, 2007.[206] WestCAN contends, without legal rationale, that approval of the exemption somehow conflicts with the requirements of 10 C.F.R. § 51.101(b), and was granted without public comment or hearing, and "without the required Safety Evaluation."[207]

WestCAN's unexplained and unsupported assertion that NRC action on the fire protection exemption request is somehow improper is simply incorrect. The exemption requested—relief from certain provisions of the NRC's fire protection requirements in 10 C.F.R. § 50.48 and Appendix R to Part 50 in connection with IP3—is wholly independent of the pending license renewal proceeding. It is a matter germane to current-term operation of the plant and is thus outside the scope of this proceeding.[208]

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[206] Petition at 32-33. WestCAN also incorporates by reference its proposed Contention 12. The NRC published a Notice of the exemption in the *Federal Register* on October 4, 2007 (Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 3, LLC, Indian Point Nuclear Generating Station Unit No. 3; Revision to Existing Exemptions, 72 Fed. Reg. 56798).

[207] *Id.*

[208] *Turkey Point*, CLI-01-17, 54 NRC at 7-9 (NRC declined to "throw open the full gamut of provisions in a plant's licensing basis to re-analysis during the license renewal review," noting that such safety issues are "routinely monitored and assessed by ongoing agency oversight and agency-mandated license programs").

Moreover, the Commission's approval is thoroughly documented in a technical analysis which was, in fact, described in detail in the *Federal Register* as part of the exemption approval.[209] And, contrary to WestCAN's suggestion, the exemption did not result in an "amendment" of the Unit 3 operating license, for which prior notice and an opportunity for hearing need be afforded, and the Revision to Existing Exemptions published in the *Federal Register* does not suggest otherwise. Thus, as with respect to the first purported "instance" of a regulatory violation, WestCAN fails to proffer accurate facts and has not supported its claim that the exemption it cites is violative of the provisions in 10 C.F.R. §51.101(b).

The third "instance" identified by WestCAN as a basis supporting Proposed Contention 2 states that: "On or about October 2nd, are [sic] making rule making changes that allow latitude in terms of fatigue analysis or other forms [sic] wear on reactor vessel components that would [sic] extensive analysis for an additional 20 years. That under these rulemaking change [sic] of thermal shock rule, they would not be required to meet these current standards. Instead they use alternative standards that would reduce safety margins."[210] While the statement of this basis is unclear, it appears to reference a Notice of Proposed Rulemaking published by the NRC on October 3, 2007, regarding contemplated revisions to 10 C.F.R. § 50.61.[211]

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[209] *See* Entergy Nuclear Operations, Inc.; Entergy Nuclear Indian Point 3, LLC, Indian Point Nuclear Generating Unit No. 3; Revisions to Existing Exemptions, 72 Fed. Reg. 56,798-801 (Oct. 4, 2007); *see also* Letter to M. Balduzzi (Entergy) from J. Boska (NRC NRR) att. (July 11, 2007) (Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Order No. EA-02-026), *available at* ADAMS Accession No. ML071920023.

[210] Petition at 33-34.

[211] Alternate Fracture Toughness Requirements for Protection Against Pressurized Thermal Shock Events, 72 Fed. Reg. 56,275, 56,276 (Oct. 3, 2007) (proposed rule). As stated in the *Federal Register* notice:

> The NRC's Office of Nuclear Regulatory Research (RES) has completed a research program to update the PTS regulations. The results of this research program conclude that the risk of through-wall cracking due to a PTS event is much lower than previously estimated. This finding indicates that the screening criteria in 10 CFR 50.61 are unnecessarily conservative and may impose an unnecessary burden on some licensees. Therefore, the NRC is proposing a new rule, 10 CFR 50.61a, which would provide alternative screening criteria and corresponding embrittlement correlations based on the updated technical basis.

The proposed rule solicited public comment by December 17, 2007.[212] Until such time as there may be a change in the Commission's regulations, Entergy is required to adhere to existing requirements. WestCAN's proposed contention does not suggest otherwise, but recognizes that Entergy may be able use alternate requirements in the event that, at some time in the future, the rule is revised to permit it. WestCAN does not explain, however, how such possible use of new and as-yet-to-be-promulgated standards at some undefined point in the future bear on the currently-pending license renewal proceeding, or might "prejudice" the process. Its assertion in this regard is simply too vague to satisfy the criteria of 10 C.F.R. § 2.309(f)(1)(i) and (ii), which require that a contention be stated with sufficient specificity and basis.[213]

Accordingly, WestCAN has failed to show how the foregoing "instances" provide a basis for its assertion that 10 C.F.R. § 51.101(b) has been violated and, for that reason, Proposed Contention 2 should be denied in its entirety.

> The updated embrittlement correlation is the projected increase in the Charpy V-notch 30 ft-lb transition temperature for reactor vessel materials resulting from neutron radiation and is calculated using equations 5 through 7 of the proposed rule. The proposed rule would be voluntary for all holders of a PWR operating license under 10 CFR Part 50 or a combined license under 10 CFR Part 52, although it is intended for licensees with reactor vessels that cannot demonstrate compliance with the more restrictive criteria in 10 CFR 50.61. The requirements of 10 CFR 50.61 would continue to apply to licensees who choose not to implement 10 CFR 50.61a.

[212] *Id.*

[213] *See Seabrook*, CLI-89-3, 29 NRC at 241 (noting that the NRC "expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point").

3. Proposed Contention 3

> Contention 3: The NRC violated its own regulations § 51.101(b) by accepting a single License Renewal Application made by the following parties: Entergy Nuclear Indian Point 2, LLC ("IP2 LLC") Entergy Nuclear Indian Point 3, LLC ("IP3 LLC"), and Entergy Nuclear Operations, LLC. (Entergy Nuclear Operations), some of which do not have a direct relationship with the license.[214]

The gist of WestCAN's complaint in Proposed Contention 3 seems to be that "any transfer of the licenses in the middle of an LRA proceeding brings into scope Entergy's entire corporate structure and complex financial qualification review to continue operating the licenses during the license renewal period of 20 years."[215] Petitioner asserts that the requested indirect transfer of control "would result in substantial reorganization of Entergy's corporate structure and LLC holdings, affecting the fiscal responsibility and liabilities of Indian Point 1, Indian Point 2 and Indian Point 3.[216] Petitioner essentially accuses Entergy Corporation, the parent corporation of Entergy Nuclear Operations, Inc., of engaging in legal legerdemain to limit its "fiscal liability." Petitioner also suggests that the transfer request will compromise the Staff's review of Entergy's LRA by diverting Staff attention and resources.[217] Petitioner contends that this is particularly problematic given the Government Accountability Office's ("GAO") purported finding that past NRC license transfer reviews have involved inadequate assessments of fiscal responsibility.[218]

Entergy opposes the admission of this contention insofar as it is beyond the narrow scope of this proceeding and immaterial to the Staff's license renewal findings, contrary to 10 C.F.R. § 2,309(f)(1)(iii) and (iv). The contention also lacks adequate factual or expert support and fails

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[214] Petition at 34.

[215] Petition at 39.

[216] *Id.* at 37-38

[217] *Id.* at 39.

[218] *Id.*

to establish a genuine dispute on a material issue, thereby failing to satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi). And, like the preceding contentions, it fails to identify any material deficiencies in the LRA via specific references thereto.

Turning to the first deficiency, the contention is outside the scope of this proceeding in more than one respect. First, it in essence improperly challenges the Staff's decision to docket the application and commence its full licensing review. As discussed above, "[t]he decision whether to accept the [license application] for docketing is made by the NRC Staff, and that decision is not subject to review by this Board."[219] In this regard, the contention clearly does not raise a material issue.

Second, the contention raises financial issues that have no place in this proceeding. At its core, Proposed Contention 3 is a challenge to Entergy's financial qualifications. The Commission has made clear, however, that such claims are not within the scope of a license renewal proceeding. Specifically, in a 2004 rulemaking concerning this very subject, the Commission stated:

> *With this final rule, the NRC believes that review of financial qualifications of non-electric utility licensee applicants at license renewal is not necessary.* The resulting process for oversight of financial qualifications is sufficient to ensure that the NRC has adequate warning of adverse financial impacts so that the NRC can take timely regulatory action to ensure public health and safety and the common defense and security. The resulting process has two components: (1) A formal review of major triggering events, and (2) monitoring financial health between the formal reviews due at the "triggering events." The relevant triggering events are (1) initial operating license application, (2) license transfer, and (3) transition from an electric utility to a non-electrical utility, either with or without transfer of control of the license. In addition, the NRC can review a licensee's financial qualifications at any point during the term of the license if there is evidence of a decline in the

[219] *Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 743 (2005) (citing *New England Power Co.*, 7 NRC 271, 280 (1978)).

> licensee's financial health. The NRC believes that there are no unique financial circumstances associated with license renewal because the NRC has no information indicating a licensee's revenues and expenses change due to license renewal.[220]

As a result, 10 C.F.R. § 50.33(f)(2) now expressly states: "An applicant seeking to renew or extend the term of an operating license for a power reactor need not submit the financial information that is required in an application for an initial license."

An applicant's financial qualifications similarly are not within the scope of any of the Category 2 environmental issues that must be addressed pursuant to 10 C.F.R. § 51.53(c)(3). For example, in the *Susquehanna* license renewal proceeding, the Licensing Board concluded that financial issues of the sort raised here are outside the scope of a license renewal hearing.[221] There, the petitioner questioned "the current owner/applicant's ability to meet 'its financial obligations associated with the operation, decontamination and decommissioning of the [plant].'"[222] The Board denied admission of the proposed contention, in part, because it fell outside the scope of the proceeding and raised no issues material to the Staff's findings on the LRA.[223] Here, WestCAN's financial-based arguments similarly are beyond the scope of this proceeding and can have no bearing on its outcome.

Although Proposed Contention 3 must be denied for the foregoing reasons, it also suffers from major factual deficiencies. First, WestCAN suggests that the indirect license transfer application somehow renders information in the LRA incomplete or inaccurate.[224] Entergy notes

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[220] *See* Financial Information Requirements for Applications To Renew or Extend the Term of an Operating License for a Power Reactor, 69 Fed. Reg. 4439 (Jan. 30, 2004) (emphasis added).

[221] *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2, LBP-07-4, 65 NRC 281, 316 (2007).

[222] *Id.* at 313.

[223] *Id.*

[224] Petition at 34.

that the relevant information presented in Chapter 1 of the LRA regarding the identity of the IPEC Unit 2 and 3 owners and license renewal applicants remains accurate, despite the pending license transfer application. The fact that Entergy has submitted an indirect transfer request, approval of which is pending, does not alter this fact. Further, any material changes to information contained in the LRA that might result from future NRC approval of the indirect transfer request would be reflected in the annual updates to the LRA that Entergy is required to provide pursuant to 10 C.F.R. § 54.21(b).

Second, the indirect transfer of control sought by Entergy will have none of the adverse repercussions suggested by WestCAN.[225] As stated in the June 30, 2007, application to the NRC, the indirect transfer of control results from certain restructuring transactions that will involve the creation of new intermediary holding companies and/or changes to existing intermediary holding companies within the Entergy corporate structure.[226] As the hearing notice related to the transfers indicates, Entergy Nuclear Operations, Inc. will continue to operate the facilities, and Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC will continue to own the facilities.[227] Importantly, the notice also correctly states that "[n]o physical changes to the Indian Point Nuclear Generating Unit Nos. 1, 2, and 3 or operational changes are being proposed in the application."[228] Thus, there is no basis for Petitioner's claims that Entergy is seeking to eschew fiscal responsibility, or that the proposed indirect transfer of control poses, in some undefined way, a threat to the public health and safety.

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[225] Petition at 34-35 (asserting, *e.g.*, that the current license does not correctly describe the owners of Units 2 and 3, causing undue confusion of ownership with respect to "future decisions"; and that Entergy Nuclear Operation [sic] Inc. cannot "be a party to the LRA . . . because it lacks the necessary direct relationship between the Licensees and Entergy Nuclear Operations).

[226] *See also* 73 Fed. Reg. at 2955 (describing the proposed corporate restructuring as it relates to IPEC).

[227] *Id.*

[228] *Id.*

Finally, the NRC Staff's review of and action on the indirect transfer is a distinct action, legally separate from its review in this proceeding. The NRC's ultimate determination with respect to Entergy's request for an indirect transfer of control will be the subject of a separate opportunity to request a hearing under Subpart M of the NRC's Rules of Practice.[229] Given the frequency with which license transfers occur, the agency has no doubt allocated sufficient resources to perform the associated technical, financial, and legal reviews.[230] Thus, contrary to Petitioner's claims, Entergy's request for NRC approval of an indirect transfer of control will not adversely impact the Staff's review of the Indian Point LRA.

For the above reasons, the Board must deny admission of Proposed Contention 3, as it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v) and (vi).

4. Proposed Contention 4

> Contention 4: The exemption granted by the NRC on October 4, 2007 reducing Fire Protection standards are [sic] Indian Point 3 are a violation of § 51.101(b), and do not adequately protect public health and safety.[231]

In this contention, WestCAN seeks to contest the exemption from certain fire protection requirements, granted by the NRC on September 28, 2007.[232] As discussed above in connection with WestCAN's Proposed Contention 2, WestCAN contends, without legal rationale or factual support, that approval of the exemption somehow conflicts with the requirements of 10 C.F.R. § 51.101(b), was granted without public comment or hearing, and "without the required Safety

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[229] *See id.*; *see also* 10 C.F.R. § 2.1301; 10 C.F.R. § 2.105(d) and n.199, *supra*. *See, e.g., Duquense Light Co. et al.* (Beaver Valley Power Station, Units 1 & 2), CLI-99-23, 50 NRC 21, 22 (1999).

[230] Petitioner's reliance on the referenced GAO report (Exhibit X) is misplaced. That report, for which Petitioner provides no specific page citations, relates to the NRC's requirements and procedures for ensuring that nuclear power plants owned by limited liability companies comply with the Price-Anderson Act's liability requirements. It is not a study of the adequacy of the NRC's license transfer review process. In any event, the adequacy of the Staff's review is beyond the scope of this proceeding.

[231] Petition at 40.

[232] *See* Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 3, LLC, Indian Point Nuclear Generating Station Unit No. 3.; Revision to Existing Exemptions, 72 Fed. Reg. 56,798 (Oct. 4, 2007).

Evaluation," and in several respects, fails to adequately protect public health and safety, notably because it fails to include consideration of "a deliberate act of sabotage or terrorism" as required by NRC's regulations.[233]

To restate Entergy's response to Proposed Contention 2, by way of summary:

> WestCAN's assertion that the NRC's action on the fire protection exemption request was somehow improper is simply incorrect. The exemption requested – relief from certain provisions of the NRC's fire protection requirements in 10 C.F.R. § 50.48 and Appendix R to Part 50 in connection with Indian Point Unit 3 – is wholly independent of the pending license renewal proceeding. But, significantly, the Commission's approval was thoroughly documented in a technical analysis which was, in fact, published in full in the *Federal Register* as part of the approval.[234] And, contrary to WestCAN's suggestion, the exemption did not result in an "amendment" of the Unit 3 operating license, for which prior notice and an opportunity for hearing need be afforded, and the Revision to Existing Exemptions published in the *Federal Register* does not suggest otherwise.

Although WestCAN goes on at great length to recount the history of fire protection requirements at the NRC (in large part generic and irrelevant to Indian Point Units 2 and 3, or matters encompassed by the LRA), [235] it fails to establish that the issues it seeks to raise—which are attributed by WestCAN directly and solely to the exemption—are properly before this Board in the context of the license renewal proceeding. Indeed, but for its misplaced references to 10 C.F.R. §§ 51.101(b) and 54.30,[236] it is evident that the matters they wish to litigate have no bearing on aging management issues pertinent to proposed plant operations in the renewal period, that is, after 2013 and 2015. Rather, from WestCAN's statement of issues, it is abundantly clear that they wish to challenge the exemption itself, and nothing appropriately

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[233] Petition at 40-60.

[234] *See* 72 Fed. Reg. at 56,798-801.

[235] *See* Petition at 44-56.

[236] *See* Petition at 43. Just what issue WestCAN seeks to raise regarding 10 C.F.R. § 54.30 is essentially undefined, and cannot be further addressed herein.

before the Board in this license renewal proceeding.[237] For this reason alone, Proposed Contention 4 should be denied.

Beyond that, WestCAN, other than to cite the above-noted sections of the Commission's regulations, fails to establish any legal or factual foundation for its assertion that the exemption granted is contrary to the provisions of 10 C.F.R. § 51.101(b). In this regard, WestCAN plainly misunderstands the import of that regulation. Rather than preclude individual licensing-type actions, Section 51.101(b) calls for independent environmental justification of such action *while work on a related programmatic environmental statement is in progress.* That situation plainly does not exist *vis-à-vis* the fire protection exemption granted in September 2007: (a) the exemption granted is not related to an ongoing programmatic activity; and (b) in any event, was reviewed and justified independently, as fully described in the *Federal Register* notice published on October 4th, regarding the NRC Staff's safety evaluation, as well as in an earlier notice, dated September 28, 2007, which published the NRC's Environmental Assessment and Finding of No Significant Environmental Impact.[238]

Finally, WestCAN's insistence that the exemption from fire protection provisions of 10 C.F.R. § 50.48 and Appendix R is in some fashion flawed because it fails to comply with the requirements of 10 C.F.R. Part 73, also is baseless. Not only has WestCAN failed to establish the pertinence of such issue to the pending Part 54 license renewal proceeding, but it also fails to establish any regulatory linkage between Parts 50 and 73; one calling for fire protection, the

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[237] *See* Petition at 57-60.

[238] *See* note 206, *supra; see also* 72 Fed. Reg. at 56,801 ("Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment,.") (citing Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Station Unit No. 3; Environmental Assessment and Finding of No Significant Impact, 72 Fed. Reg. 5524 (Sept. 28, 2007)).

other for safeguards and security measures, beyond the Energy Policy Act of 2005 mandate that fires be considered in connection with the design basis threat ("DBT") rulemaking.[239]

For the reasons discussed above, Proposed Contention 4 should be denied in its entirety. To the extent that WestCAN believes that there is an ongoing concern about day-to-day operation of the facility in the context of fire protection, a petition under 10 C.F.R. § 2.206 is the appropriate procedural vehicle for seeking relief. Such relief cannot be granted in this proceeding and renders the contention of fatally flawed pursuant to 10 C.F.R. § 2.309(f)(1)(iv).

5. Proposed Contention 5

> Contention 5: The Fire Protection Program described in the Current License Basis Documents including the unlawfully approved exemptions to Appendix R, the Safety Evaluation and the amended license for Indian Point 3 fail to adequately protect the health and safety of the public, and fail to meet the requirements of 10 CFR 50 and Appendix R.[240]

Even more clearly than the preceding contention, Proposed Contention 5 is an unabashed challenge to the fire protection exemption granted to Entergy by the NRC in September 2007.[241] But unlike Proposed Contention 4, this contention, despite a lengthy recitation of fire protection history and lore, makes *no* pretext whatsoever that the contention involves any matter—factual or legal—that might arguably relate to license renewal and the NRC Staff's associated review of aging management issues during the period of extended operation.[242] It is patently a challenge to a matter germane to current plant operations, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iii) and (iv), and must be summarily denied as beyond the scope of the proceeding and immaterial to the NRC license renewal findings.

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[239] *See* answer to Proposed Contention 6, in Section IV.D.6.

[240] Petition at 60.

[241] Petition at 60-81.

[242] *Turkey Point*, CLI-01-17, 54 NRC at 7-9.

6. Proposed Contention 6

> Contention 6: Fire Protection Design Basis Threat. The Applicant's License Renewal Application fails to meet the requirements of 10 CFR § 54.4 "Scope," and fails to implement the requirements of the Energy Policy Act of 2005.[243]

Continuing along the same path of inadmissible contentions, Proposed Contention 6 again seeks to link the fire protection requirements of 10 C.F.R. § 50.48 and Appendix R, the fire protection exemption granted to Entergy with respect to Indian Point Unit 3 by the NRC in September 2007, and the provisions of 10 C.F.R. Part 73, which address physical protection measures, to this proceeding. This linkage, WestCAN suggests, is required by the Energy Policy Act of 2005: "The Applicant's LRA fails to comply with applicable law with respect to fire protection. Fire protection is one of the twelve specific components within the DBT rule. This exemption affects the current operating license, and will be carried over into the proposed new superceding license."[244]

Notwithstanding WestCAN's reference to the LRA, Proposed Contention 6 is, essentially, yet another challenge to the fire protection exemption granted by the Commission. After vaguely describing the Commission's rulemaking associated with 10 C.F.R. Part 73, stemming from the mandates of the Energy Policy Act of 2005 (Section 651, Nuclear Facility and Materials Security, in particular),[245] the proposed contention, in the end, seeks to undermine the credibility of the scenario upon which it believes Entergy's exemption request was based.[246] Said description, however, lacks any nexus to license renewal and the instant proceeding.

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[243] Petition at 81.

[244] Petition at 82.

[245] 42 U.S.C. 16041, amending, as relevant here, section 170E of the Atomic Energy Act of 1954, as amended, directing the NRC to initiate a rulemaking to revise the design basis threats, defined in 10 C.F.R. Part 73.

[246] Petition at 82-86.

Thus, much like the preceding proposed contentions, this contention also seeks to have admitted an issue pertinent, perhaps, to current operations. It does not raise a matter within the scope of issues relevant and admissible in a license renewal proceeding.[247] As a result, it too must be rejected as a matter of law.

7. Proposed Contention 7

> Contention 7: Fire initiated by a light airplane strike risks penetrating vulnerable structures.[248]

In this contention, again bereft of any reference to the LRA or to requirements within the scope of license renewal under 10 C.F.R. Part 54, WestCAN proffers a contention which seeks to challenge both the requirements of 10 C.F.R. Part 73 and the fire protection exemption granted by the NRC in September 2007.[249] In fact, but for the passing mention of the exemption in the last paragraph,[250] the entirety of the discussion alleges shortcomings in the NRC's physical protection requirements in Part 73.

It is evident that this proposed contention not only raises issues outside the scope of matters appropriately considered in license renewal, it also impermissibly challenges NRC regulations.[251] Accordingly, it must be denied in its entirety.

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[247] *Turkey Point*, CLI-01-17, 54 NRC at 7-9.

[248] Petition at 86.

[249] Petition at 86-92. The various exhibits referenced, Petition at 87, make abundantly clear the generic focus of this contention on the Part 73 rule, and not the license renewal application. (We also note that WestCAN's Exhibits FP 13 and FP 15 appear to be duplicates, notwithstanding the suggestion, Petition at 87, that the latter is "a 2005 updated report" – both exhibits provided to the Applicant bear the same "Order Code RS21131, state "Updated August 9, 2005" and are six pages in length.)

[250] *Id.* at 92.

[251] 10 C.F.R. § 2.335(a).

8. Proposed Contention 8

Contention 8: The NRC improperly granted Entergy's modified exemption request reducing fire protection standards from 1 hour to 24 minutes while deferring necessary design modifications.[252]

This proposed contention, like the several preceding contentions, is without pretext of any connection to the instant license renewal proceeding, a blatant attack on the exemption granted by the NRC in September 2007.[253] As such, for reasons discussed above in the context of Proposed Contentions 4-7, this proposed contention, too, must be denied in its entirety.

9. Proposed Contention 9

Contention 9: In violation of promises made to Congress the NRC did not correct deficiencies in fire protection, and instead have reduced fire protection by relying on manual actions to save essential equipment.[254]

This proposed contention, generically challenging the adequacy of the NRC's basic fire protection requirements, makes passing mention of the exemption, but concludes by demanding that the NRC issue an order requiring unspecified and undefined "retrofits to bring Indian Point 3 into compliance."[255]

Thus, like the previous proposed contentions that also are outside the scope of this proceeding as they relate to fire protection, Proposed Contention 9 is an impermissible challenge to Commission regulations, as well as a request for enforcement action based on current operation of the facility. To the extent it wishes to challenge the regulatory framework for fire protection, WestCAN's remedy lies in a petition for rulemaking pursuant to 10 C.F.R. § 2.802; to the extent it wishes to ask that the NRC initiate an enforcement action to address some inchoate matter of noncompliance, its course is through a petition pursuant to 10 C.F.R. § 2.206. In any

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[252] Petition at 92.

[253] *See* Petition at 92-95.

[254] *Id.* at 95.

[255] *Id.* at 95-98.

event, however, Proposed Contention 9 seeks relief which the Board cannot grant and, for these many reasons, is not admissible and should be denied in its entirety.

10. Proposed Contention 10

> Contention 10: (Unit 2) Cable separation for Unit 2 is non-compliant, fails to meet separation criteria and fails to meet Appendix R criteria. This has been a known issue since 1976; and again in 1984, yet remains non-compliant today.[256]

This proposed contention alleges that electrical separation in Unit 2 "was done under unapproved criteria as noted in Contentions 22-26."[257] The thrust of this contention seems to be that, with respect to cable separation in Unit 2, the Applicant has failed to use approved design criteria and, as a consequence, the aging management program in the LRA is "meaningless."[258]

As discussed more fully below in response to Proposed Contentions 22-25, Entergy opposes the admission of Proposed Contention 10 on the ground that it fails to satisfy any of the admissibility standards set forth in 10 C.F.R. § 2.390(f)(1). Specifically, Proposed Contention 10 should not be admitted because WestCAN has failed to: (1) provide a *specific* statement of the issue of law or fact that it wishes to raise or controvert contrary to 10 C.F.R. § 2,309(f)(1)(i); (2) provide a *brief explanation* of the factual or legal bases of the contention contrary to 10 C.F.R. § 2.309(f)(1)(ii); (3) demonstrate that the issues raised are within the scope of this license renewal proceeding contrary to 10 C.F.R. § 2.309(f)(1)(iii); (4) demonstrate that the issues raised are material to the NRC's licensing decision in this case contrary to 10 C.F.R. § 2.309(f)(1)(iv); (5) provide adequate factual and/or expert support for the proposed contention contrary to 10 C.F.R. § 2.309(f)(1)(v); and (6) demonstrate that a genuine dispute exists with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). In addition, Proposed

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[256] *Id.* at 98.

[257] *Id.*

[258] *Id.* at 99.

Contention 10 improperly challenges the Commission's regulations at 10 C.F.R. Part 54 and other aspects of the NRC's regulatory process.

It is apparent from WestCAN's vague description of the issue it seeks to raise that the matter lacks the requisite specificity to be admitted in this proceeding. WestCAN states, in only the most conclusory terms, that cable separation in Unit 2 violates General Design Criteria as well as Appendix R, and, for that reason, the "aging management program described in the Applicants' LRA is meaningless."[259]

Furthermore, Proposed Contention 10 is premised on an erroneous assumption; *i.e.*, that Indian Point Unit 2 *must* comply with the GDC.[260] WestCAN, with no identification of a specific GDC that is allegedly being violated, simply asserts that "[t]his approach fundamentally violates general design criteria, and does not comply with even the draft criteria issued July 11, 1967 or with Appendix R criteria."[261]

The GDC, which are contained in Appendix A to 10 C.F.R. Part 50, establish minimum requirements for the principal design criteria for water-cooled nuclear power plants. As set forth in NRR Office Instruction LIC-100, Revision 1, *the GDC are not applicable to plants with construction permits issued prior to May 21, 1971.* The construction permits for Indian Point Units 2 and 3 were issued before that date; on October 14, 1966, and August 13, 1969, respectively. Thus, the GDC do not apply to those plants. Indeed, one of Petitioner's exhibits (Exhibit M) confirms this fact and sets forth the Commission's sound rationale for not applying the GDC to such plants. In the Staff Requirements Memorandum ("SRM") associated with SECY-92-223, the Commission stated:

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[259] *Id.*

[260] Petition at 98.

[261] *Id.*

> The Commission (with all Commissioners agreeing) has approved the staff proposal in Option 1 of this paper in which the staff will not apply the [GDC] to plants with construction permits issued prior to May 21, 1971. At the time of promulgation of Appendix A to 10 CFR Part 50, the Commission stressed that the GDC were not new requirements and were promulgated to more clearly articulate the licensing requirements and practice in effect at that time. While compliance with the intent of the GDC is important, *each plant licensed before the GDC were formally adopted was evaluated on a plant specific basis, determined to be safe, and licensed by the Commission.* Furthermore, current regulatory processes are sufficient to ensure that plants continue to be safe and comply with the intent of the GDC. Backfitting the GDC would provide little or no safety benefit while requiring an extensive commitment of resources. Plants with construction permits issued prior to May 21, 1971 do not need exemptions from the GDC.[262]

The foregoing, in conjunction with WestCAN's vague statement that "[t]his issue relates to Appendix B of the Applicants LRA," fails to satisfy even the most generous reading of the basis and specificity requirements of 10 C.F.R. § 2.309(f)(1)(i) and (ii). Furthermore, the issues raised by WestCAN relate to the adequacy of the CLB. As such, they are not within the scope of license renewal or material to the Staff's review of the LRA, contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (iv). Finally WestCAN provides no citations to the relevant portions of the LRA in its contention, nor does it attempt to explain how the "aging program" to which it obliquely alludes is deficient. As the Commission stated in *Oconee*, "it is not unreasonable to expect a petitioner to provide additional information corroborating the existence of an actual safety problem. Documents, expert opinion, or at least a fact-based argument are necessary."[263] WestCAN has provided none of the types of support specified by the Commission. Accordingly, Proposed Contention 10 lacks adequate support and does not provide sufficient information to

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[262] Memorandum from Samuel J. Chalk, Secretary to James M. Taylor, Executive Director for Operations, "Subject: SECY-92-223 – Resolution of Deviations Identified During the Systematic Evaluation Program" (Sept. 18, 1992) (WestCAN Exhibit M).

[263] *Oconee*, CLI-99-11, 49 NRC at 342.

show that a genuine dispute exists with the Applicant, contrary to 10 C.F.R. § 2.309(f)(1) (v), and (vi). It should be summarily denied.

11. Proposed Contention 11A

> Contention 11A: (Unit 2 and Unit 3): The Fire protection program as described on page B-47 of the Appendix B of the Applicant's LRA does not include fire wrap or cable insulation as part of its aging management program.[264]

WestCAN, in this proposed contention, contends that the LRA is deficient because it does not have an aging management program for fire insulation, which, it argues, is required by 10 C.F.R. § 54.4(a)(3). WestCAN further claims that this alleged omission, in light of the cable separation and insulation design deficiencies it suggests in its Proposed Contentions 5–10, purportedly renders the LRA inadequate and inaccurate.[265]

To the extent that Proposed Contention 11A challenges a current operational program (as WestCAN explicitly suggests),[266] WestCAN's course of action is through a petition for NRC action under 10 C.F.R. § 2.206. The Board herein cannot grant it such relief, thereby rendering the proposed contention inadmissible in this respect per 10 C.F.R. § 2.309(f)(1)(iii) and (iv). But further, in terms of setting forth a contention with adequate basis and specificity, the proposed contention must fail. Other than a cursory statement with respect to the issue it wishes to raise, the Petition sets forth no foundation—no referenced expert affidavits or declaration or the like—that might lend support to its argument.[267]

Moreover, WestCAN's continued reliance on the prior fire-protection exemption, discussed at length in other proposed contentions, does not remedy these shortcomings as detailed above. WestCAN has not established that any of these contentions have a nexus to

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[264] *Id.* at 99.

[265] *Id.* at 101.

[266] *Id.*

[267] *See Yankee*, CLI-96-7, 43 NRC at 262.

license renewal. More is required by the NRC's admissibility requirements before a contention can be admitted and a full hearing is warranted. The Commission promulgated those requirements to focus the adjudicatory process on disputes "susceptible to resolution," to provide notice of the "specific grievances" of petitioners, and 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."[268] WestCAN has not come remotely close to meeting the Commission's threshold adjudicatory requirements and their underlying purposes.

Notwithstanding these pleading infirmities, WestCAN's allegations concerning the exclusion of "fire wrap" and "cable insulation" from the IPEC Fire Protection Program are misdirected. Fire wrap is addressed in Sections 2 and 3 of the LRA. *See* LRA Table 2.4-4, Bulk Commodities – Component Subject to Aging Management Review, at 2.4-38; LRA Table 3.5.2-4 Bulk Commodities – Summary of Aging Management Review, at 3.5-70. As LRA Table 3.5.2-4 indicates, fire wrap is addressed by the Fire Protection Program.

Cable insulation is addressed in LRA Section 3.6, Electrical and Instrumentation and Controls. *See* LRA Table 3.6.1, Summary of Aging Management Programs for the Electrical and I&C Components Evaluated in Chapter VI of the GALL Report, at 3.6-9 (item # 3.6.1-3); LRA Table 3.6.2-1, Electrical Components – Summary of Aging Management at 3.6-15. Table 3.6.2-1 indicates that cable insulation is addressed through the Non-EQ Insulated Cables and Connections Program, which is described in Section B.1.25 of Appendix B of the LRA. As reflected in LRA Table 3.6.2-1, that program is consistent with the GALL Report aging management program.

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[268] Oconee, CLI-99-11, 49 NRC at 334.

In view of the above, WestCAN has not met its obligation under 10 C.F.R. § 2.309(f)(1)(vi) to review all pertinent portions of the LRA and to identify with particularity a genuine dispute with the Applicant. Whether viewed as a direct challenge to the content of the LRA or as a contention of omission, Proposed Contention 11A should fail. Entergy has provided the information WestCAN claims is excluded, and WestCAN does not claim that the information is inadequate or deficient.

12. Proposed Contention 11B

> Contention 11B: Environmental Impacts of an increase in risk of fire damage due to degraded cable insulation is not considered thus the Applicants' LRA is incomplete and inaccurate, and the Safety Evaluation supporting the SAMA analysis is incorrect.[269]

This proposed contention posits that the LRA for Indian Point Unit 3 does not comply with the requirements of Criterion 3 of the GDC, as well as Appendix R, Sec. G.2 (and the other alternate requirements of that section because "it does not provide 'enclosure of cable and equipment and associated non-safety circuits of one redundant train in a fire barrier having a 1-hour rating'").[270] In turn, WestCAN further suggests that the ER Severe Action Mitigation Alternatives ("SAMA") analysis fails to consider "the risk of electrical circuits important to safety for failing to perform their function due to loss of redundant trains by fire and does not compare the costs of those larger consequences against the cost of mitigating the accident by upgrading the relevant cable and equipment enclosures to meet the requirements of Section G.2 of Appendix R."[271]

As with Proposed Contention 10, which this contention incorporates, Proposed Contention 11B is not admissible. As more fully explained in Entergy's response to Proposed

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[269] Petition at 101.

[270] *Id.* at 102.

[271] *Id.*

Contention 10,[272] the thrust of this matter bears on basic design aspects of the facility, alleging design deficiencies that, in turn, purportedly bear on the SAMA analysis prepared for license renewal. As a threshold matter, IPEC Units 2 and 3 are not subject to the GDC. Further, to the extent WestCAN is challenging the underlying design of the facility, such matters are beyond the scope of this proceeding and are inadmissible as a matter of law. As the Commission has admonished repeatedly, "review of a license renewal application does not reopen issues relating to a plant's current licensing basis, or any other issues that are subject to routine and ongoing regulatory oversight and enforcement."[273] Petitioner's claim is a textbook example of a contention that must be ruled inadmissible on these grounds. Moreover, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(ii) and (v), WestCAN has failed to provide any basis or factual support for its claims in this proposed contention.

Even when contorted and recast as a "SAMA contention," Proposed Contention 11B still fails to meet the Commission's admissibility requirements. WestCAN's single sentence regarding SAMA analysis, which contains no references to the IPEC ER and the SAMA analysis contained therein, is grossly insufficient. Proposed Contention 11B without question fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1), by virtue of its conclusory nature and complete lack of factual or expert opinion support. Section 4.21.5.4 of the ER (at 4-63 to 4-71) and Sections E.1.3.2 and E.3.3.2 of Appendix B to the ER provide detailed information regarding the fire analysis component of the IPEC IPEEE and SAMA analyses, including the conservative assumptions built into those analyses. Petitioner makes no mention of those ER sections and certainly does not challenge their content or adequacy in any way.

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[272] *Supra* at 55-58.

[273] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 117-18 (2006) (citing *Turkey Point*, CLI-01-17, 54 NRC at 8-9).

Additionally, Proposed Contention 11B flies in the face of a key Commission admonition concerning proposed SAMA contentions. The Commission has held that SAMA analysis requires a weighing of the *cost* to implement the SAMA with the reduction in *risks* to public health, occupational health, offsite and onsite property.[274] As such, petitioners who "do[] nothing to indicate the approximate relative cost and benefit of the SAMA" are not entitled to a full adjudicatory hearing.[275] The Commission aptly observed that, "[w]ithout any notion of cost, it is difficult to assess whether a SAMA may be cost-beneficial and thus warrant serious consideration."[276] Thus, even if Petitioner's proposal to "upgrade" IPEC cable and equipment enclosures could be construed as a SAMA (rather than a clear challenge to an NRC-approved exemption and the IPEC CLB), Petitioner fails to show it would be cost-beneficial. In conclusion, the Commission's observation in *McGuire* could hardly be more befitting to WestCAN and its Proposed Contention 11B: "The Commission is unwilling to throw open its hearing doors to Petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions about the ease and viability of their proposed SAMA."[277]

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[274] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 7-8 8 n.14 (2002).

[275] *Id.* at 11-12.

[276] *Id.* at 12.

[277] *Id.*

13. Proposed Contention 12

> Contention 12: Entergy either does not have, or has unlawfully failed to provide the Current License Basis' (CLB) for Indian Point 2 and 3, accordingly the NRC must deny license renewal.[278]

This proposed contention asserts that the CLB for Indian Point Units 2 and 3 are unknown and have not been made available to external stakeholders. The latter failure, WestCAN contends, is contrary to the requirements of 10 C.F.R. § 54.3.[279] Based on the foregoing, WestCAN then argues that it did not have access to CLB information and should not have been required to file its petition for leave to intervene and request for hearing until it had such access.[280] WestCAN also complains that "[n]either the NRC staff nor the Applicant had made the list of such grants of Exemptions, Exceptions and Deviations available to Stakeholders and interested parties, despite multiple requests."[281] In the end, it argues that the LRA must be denied because of the unavailability of such a list, and "because the Current License Basis is required for license renewal under 10 CFR 2.336 [is] unavailable and unknown."[282]

Once again, WestCAN's Proposed Contention fails to satisfy the requirement of 10 C.F.R. § 2.309(f). Entergy opposes the admission of proposed Contention 12 on the grounds that it (1) lacks a factual or legal foundation, contrary to 10 C.F.R. § 2.309(f)(1)(i); (2) raises issues beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii); and (3) fails

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[278] Petition at 103.

[279] *Id.*

[280] Petition at 103-106.

[281] *Id.* at 106. Entergy notes that WestCAN refers to purported requirements in 10 C.F.R. § 2.390 (Petition at 103) and 10 C.F.R. § 2.309 (Petition at 104) that the CLB must be made available to them. Although it is unclear whether WestCAN intended to cite both regulations, or simply transposed numbers, neither, in fact, contains such explicit requirement, although the former generally guides the public availability of Commission documents.

[282] *Id.* The regulation cited, 10 C.F.R. § 2.336, addresses the discovery process to be implemented *in the event* that, in the first instance, a hearing is granted. It is simply premature and unnecessary to speculate at this juncture what information might be called for and provided in the future.

to establish a genuine dispute with Applicant on a material issue, contrary to 10 C.F.R. § 2.309(f)(1)(vi). First, the proposed contention impermissibly challenges 10 C.F.R. Part 54—and thus is beyond scope—because it asserts that Entergy is required to compile and make available the entire CLB for IPEC as part of the LRA process. WestCAN is fundamentally mistaken. The Commission specifically considered and rejected that notion in the 1991 and 1995 license renewal rulemakings, noting that "[c]ompilation of the CLB is unnecessary to perform a license renewal review."[283] The Commission discussed this issue at length in the 1995 Statement of Considerations, in which it rejected Public Citizen's suggestion that the plant-specific CLB should be compiled and that the NRC should verify compliance with the CLB as part of the license renewal process.[284] First, the Commission explained the basis for its disagreement with Public Citizen:

> The Commission disagrees with the commenter, and points out that the proposed rule did not explicitly require the renewal applicant to compile the CLB for its plant. The Commission rejected a compilation requirement for the previous license renewal rule for the reasons set forth in the accompanying SOC (56 FR at 64952). The Commission continues to believe that a prescriptive requirement to compile the CLB is not necessary. Furthermore, submission of documents for the entire CLB is not necessary for the Commission's review of the renewal application. . . .[T]here is no compelling reason to consider, for license renewal, any portion of the CLB other than that which is associated with the structures and components of the plant (*i.e.*, that part of the CLB that can suffer detrimental effects of aging). All other aspects of the CLB have continuing relevance in the license renewal period as they do in the original operating term, but without any association with an aging process that may cause invalidation. From a practical standpoint, an applicant must consult the CLB for a structure or component in order to perform an aging management review. The CLB for the structure or component of interest contains the

[283] Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,465, 22,481; Final Rule, Nuclear Power License Renewal; Revisions, 56 Fed. Reg. at 64,967.

[284] Note that the CLB is fully defined in 10 C.F.R. § 54.3(a).

> information describing the functional requirements necessary to determine the presence of any aging degradation.[285]

Second, the Commission explained why and how the CLB already is available for review by the NRC and members of the public:

> The definition of CLB in Sec. 54.3(a) states that a plant's CLB consists, in part, of "a licensee's written commitments . . . that are docketed . . . ." *Because these documents have already been submitted to the NRC and are in the docket files for the plant, they are not only available to the NRC for use in the renewal review, they are also available for public inspection and copying in the Commission's public document rooms.* Furthermore, the NRC may review any supporting documentation that it may wish to inspect or audit in connection with its renewal review. If the renewed license is granted, those documents continue to remain subject to NRC inspection and audit throughout the term of the renewed license. The Commission continues to believe that resubmission of the documents constituting the CLB is unnecessary.[286]

Finally, the Commission rejected the argument that the CLB requires "reverification," stating as follows:

> [T]he Commission had concluded when it adopted the previous license renewal rule that a reverification of CLB compliance as part of the renewal review was unnecessary (56 FR at 64951-52). Public Citizen presented no information questioning the continuing soundness of the Commission's rationale, and *the Commission reaffirms its earlier conclusion that a special verification of CLB compliance in connection with the review of a license renewal application is unnecessary.* The Commission intends, as stated by the commenter, to examine the plant-specific CLB as necessary to make a licensing decision on the continued functionality of systems, structures, and components subject to an aging management review and a license renewal evaluation. This activity will likely include examination of the plant itself to understand and verify licensee activities associated with aging management reviews and actions being taken to mitigate detrimental effects of aging. After consideration of all comments concerning the compilation of the CLB, *the Commission has*

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[285] Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,474.

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

> *reconfirmed its conclusion made for the previous rule that it is not necessary to compile, review, and submit a list of documents that comprise the CLB in order to perform a license renewal review.*[287]

In view of the above, Proposed Contention 12 lacks a legal basis and raises issues that can have no bearing on the outcome of this proceeding. It also lacks adequate factual or expert support. In particular, the supposed "GAO investigation" report cited by Petitioner (WestCAN Exhibit X) is actually a 2003 NRC Office of the Inspector General Event Inquiry report concerning NRC oversight of operations at IPEC Unit 2.[288] The report specifically concerns issues related to compliance with certain current term design basis commitments, and hence has no nexus to license renewal. Thus, the report, which Petitioner inexcusably fails to explain or reference with any specificity, provides no factual basis for WestCAN's claims in this license renewal proceeding. The Licensing Board should "not be expected to sift unaided through large swaths [of voluminous petitioner exhibits] in order to piece together and discern a party's particular concerns or the grounds for its claims."[289]

In sum, the Board must reject Proposed Contention 12, as it does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(ii)-(vi).

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

[288] Office of the Inspector General Event Inquiry, NRC Enforcement of Regulatory Requirements and Commitments at Indian Point, Unit 2, Case No. 01-01S (Apr. 25, 2003) (WestCAN Exhibit X).

[289] *Hydro Resources, Inc.*, (P.O. Box 15910, Rio Randro, NM 87147) CLI-01-4, 53 NRC 31, 46 (2001).

14. Proposed Contention 13

> Contention 13: The LRA is incomplete and should be dismissed, because it fails to present a Time Limiting [sic] Aging Analysis and Adequate Aging Management Plan, and instead makes vague commitments to manage the aging of the plant at uncertain dates in the future, thereby making the LRA a meaningless and voidable "agreement to agree."[290]

In short, WestCAN generally, and without explanatory detail, contends that the NRC cannot approve the LRA because it allegedly contains "uncertain," "undefined," and "unenforceable" commitments.[291]

Entergy opposes the admission of Proposed Contention 13 because it (1) is not supported by facts or expert opinion, contrary to 10 C.F.R. § 2.309(f)(1)(v); (2) fails to raise 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); and (3) impermissibly challenges 10 C.F.R. Parts 50 and 54, contrary to 10 C.F.R. § 2.335(a). Ironically, WestCAN's proposed contention suffers from the very defect of which it complains—vagueness or lack of specificity. WestCAN completely fails to provide references to *specific* portions of the application that it disputes, nor provide supporting reasons for each dispute, as required by 10 C.F.R. § 2.309(f)(1). Instead, it refers generically to undefined Aging Management Plans and TLAAs. The only example provided by WestCAN is an alleged commitment made by Entergy over 30 years ago "to design and build a closed cooling system," the relevance of which in this proceeding is unclear and left unaddressed by WestCAN.[292] Indeed, WestCAN devotes most of its "supporting" discussion to unfounded criticism of the NRC and a less than cogent explication of the so-called "agreement to agree."[293]

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[290] Petition at 106.

[291] *Id.* at 106-112.

[292] Petition at 111.

[293] *Id.* at 109-10.

That discussion cannot suffice, as another flaw, for the factual or documentary support necessary to justify admission of the contention pursuant to 10 C.F.R. § 2.309(f)(1)(v).

Finally, by rebuking the NRC for its reliance on applicant/licensee commitments, WestCAN mounts yet another impermissible challenge to the regulatory process, presumably implicating both Part 50 and 54. Applicant/licensee commitments, whether made in a license application or associated documents (*e.g.*, UFSAR), are a common and necessary component of current term and renewal licensing and regulatory processes. Such commitments are, by definition, part of the CLB as defined in 10 C.F.R. § 54.3(a). NRC licensees must comply with commitments that are part of the licensing basis for their facilities, even if such commitments do not take the form of formal license conditions.[294] To the extent Petitioner is challenging this aspect of the regulatory process, integral to Parts 50 and 54, it is seeking relief which the Board cannot grant and raising an issue beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). Furthermore, both the Commission and its Licensing Boards have "long declined to assume that licensees will refuse to meet their obligations"[295] or "to impute to [a licensee] an intention to act in derogation of its formal commitment to the NRC Staff."[296] Thus, Proposed Contention 13 must be denied in its entirety.

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[294] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 21 (2003).

[295] *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003).

[296] *Oyster Creek*, LBP-06-07, 63 NRC at 207.n.14.

15. Proposed Contention 14

> Contention 14: The LRA submitted fails to include Final License Renewal Interim Staff Guidance. For example, LR-ISG 2006-03, "Staff guidance for preparing Severe Accident Mitigation Alternatives."[297]

WestCAN asserts that the LRA fails to follow the guidance contained in Interim Staff Guidance ("ISG") LR-ISG-2006-03. [298] As WestCAN acknowledges, in LR-ISG-2006-03, the NRC endorsed the use of NEI-05-01, Revision A, by license renewal applicants.[299] Specifically, the Staff "recommend[ed] that applicants for license renewal follow the guidance provided in NEI-05-01, Revision A," insofar as it "describes existing NRC regulations and facilitates complete preparation of SAMA analysis submittals."[300]

Entergy opposes the admission of Proposed Contention 14 because it 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). WestCAN's assertion that Entergy did not follow LR-ISG-2006-03 is incorrect and contrary to the LRA. At the time Entergy submitted the LRA, LR-ISG-2006-03 had been issued in draft form for public comment. As discussed in NEI 95-10, the NRC encourages applicants for license renewal to address proposed ISGs in their applications. Consistent with the NRC's direction, Entergy specifically addressed LR-ISG-2006-03 as follows:

> This ISG [LR-ISG-2006-03], issued for comment by the NRC, recommends that applicants for license renewal use guidance document NEI 05-01, Rev. A when preparing SAMA analyses. *The IPEC SAMA analysis provided as a part of Appendix E is*

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297 Petition at 112.

298 Letter to A. Marion (NEI) from P. Gillespie (NRC NRR), encl. at 1 (Aug. 10, 2006) (Proposed License Renewal Interim Staff Guidance LR-ISG-2006-03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives (SAMA) Analyses), *available at* ADAMS Accession No. ML062220367.

299 NEI 05-01, Severe Accident Mitigation Alternatives (SAMA) Analysis Guidance Document, Rev. A (Nov. 2005), *available at* ADAMS Accession No. ML060530203.

300 *Id.*

consistent with the guidance of NEI 05-01 as discussed in this ISG.[301]

Thus, Entergy did in fact prepare the IPEC SAMA analysis in accordance with NEI 05-01, Revision A. Proposed Contention 14 fails to identify any deficiency in the LRA.[302] It is therefore inadmissible and should be denied.

16. Proposed Contention 15

> Contention 15: Regulations provide that in the event the NRC approves the LRA, the old license is retired, and a new superseding license will be issued, as a matter of law § 54.31. Therefore all citing [sic] criteria for a new license must be fully considered including population density, emergency plans and seismology, etc.[303]

In its proposed contention, WestCAN recognizes that a superseding operating license will be issued to Entergy in the event that its LRA is approved by the NRC. It follows, according to WestCAN, that a necessary underpinning for issuance of a "new" license is a full review and evaluation of the facility using the requirements of all siting criteria.[304] As explained below, it is at this juncture that Proposed Contention 15 diverts from 10 C.F.R. Part 54.

With little more than a recitation of the Commission's siting criteria, WestCAN would have it that, to the extent a "new" license requires a full evaluation of the NRC's geology/seismology, hydrology, population/siting (including atmospheric dispersion modeling), emergency planning, security planning, water quality and nearby industrial, military and transportation facilities requirements, such an evaluation must be duplicated prior to issuance of a renewed operating license. This proposed contention is an unabashed, broadside challenge to

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[301] LRA at 2.1-21 (emphasis added).

[302] In any case, NRC guidance documents do not carry the binding effect of regulations. As such, a licensee is free either to rely on the guidance or to take alternative approaches to meet its legal requirements, as long as those approaches are found acceptable by the Commission or NRC Staff. *See Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC at 398.

[303] Petition at 113.

[304] Petition at 113-123. In support of this proposed contention, WestCAN seeks to incorporate its Proposed Contentions 16, 17, 18, 19, 20, 35, 36, 37, 49 and 50.

the entire regulatory framework for license renewal set forth in 10 C.F.R. Part 54, and must be rejected pursuant to 10 C.F.R. § 2.335(a).

WestCAN's proposition is utterly devoid of any apparent recognition of the lengthy, public rulemaking process that carefully crafted an appropriate regulatory framework for the renewal of operating licenses, or of the myriad Commission and Licensing Board adjudicatory decisions interpreting and upholding the proper scope of agency review of license renewal applications. As more fully addressed in the introductory discussion of this Answer,[305] the Commission has specifically limited its license renewal safety review to the scope of matters specified in 10 C.F.R. §§ 54.21 and 54.29(a)(2). The focus of the license renewal review as defined therein is limited to the management of aging of certain systems, structures and components, and the review of "time-limited aging analyses," so as to ensure continuation of intended functions, consistent with the CLB, throughout a period of extended plant operation.[306] 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.'"[307] 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 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

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[305] *See* Section IV.B.1., *supra.*

[306] *See Turkey Point*, CLI-01-17, 54 NRC at 7-8; *McGuire*, CLI-02-26, 56 NRC at 363.

[307] *Turkey Point*, CLI-01-17, 54 NRC at 8 (quoting Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,462). 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 Turkey Point*, CLI-01-17, 54 NRC at 7-8.

operation, and a supplement to the ER that complies with the requirements of Subpart A of 10 C.F.R. Part 51.

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 SRP 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.[308] The GALL Report also contains recommendations concerning specific areas for which existing programs should be augmented for license renewal.[309] Thus, programs that are consistent with the GALL Report are generally accepted by the Staff as adequate to meet the license renewal rule.[310]

> In much the same way, 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."[311] 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

[308] *See* GALL Report, Vol. 1, at 1.

[309] *See id.* at 4.

[310] *See id.* at 3.

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

> proceedings.[312] 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.[313] 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.[314]

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."[315] 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."[316]

WestCAN's choice is clear: To the extent it believes that the regulatory framework for license renewal is so broadly and generically deficient—and the scope of its proposed contention makes clear that it transcends simply Indian Point—it may file a petition for rulemaking pursuant to 10 C.F.R. § 2.802. In this proceeding, however, this proposed contention should be denied as it seeks relief the Board cannot grant it, pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

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312 *Turkey Point*, CLI-01-17, 54 NRC at 7 (emphasis added).

313 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.

314 *See* Final Rule, Nuclear Power Plant License Renewal; Revisions, 56 Fed. Reg. at 64,946. The term "current licensing basis" is defined in 10 C.F.R. § 54.3. *See also* 10 C.F.R. §§ 54.29, 54.30.

315 *Id.* at 7.

316 *Id.* at 9.

17. Proposed Contention 16

> Contention 16: An Updated Seismic Analysis for Indian Point must be conducted and Applicant must Demonstrate that Indian Point can avoid or mitigate a large earthquake. Indian Point Sits Nearly on Top of the Intersection of Two Major Earthquake belts.[317]

This proposed contention recommends that the Applicant be required to perform a seismic analysis before renewal of the operating licenses.[318] Relying on disassociated quotations from a number of individuals, and anecdotal information concerning the effects of earthquake activity on the Kashiwazaki-Kariwa plant in Japan, as well as the discovery of fault lines at Yucca Mountain, WestCAN suggests that the seismic risks review for Indian Point is outdated and needs to be redone.[319] In this regard, it contends that seismic activity at Indian Point entails special risks, claiming that earthquake risks were not considered in the context of the spent fuel pools during the initial licensing of the facilities.[320] It apparently believes that the latter is a matter of concern because of the high-density storage used, as well as the presence of an independent spent fuel storage facilities at the site; the casks for which, it alleges, are not adequately designed for the seismic risk present. WestCAN adds, without clear explanation, that the risks associated with the spent fuel pools and casks are both additive and "likely multiplicative."[321] WestCAN further claims, in this proposed contention, that the effects of aging—embrittlement, corrosion, rust, heat, exposures to chemical agents and constant radiological bombardment—have weakened the facility, rendering it more vulnerable to seismic

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[317] Petition at 123.

[318] *Id.* at 123-140.

[319] *Id.* at 125.

[320] *Id.* at 131-133.

[321] *Id.* at 135-137.

activity.[322] For this reason, WestCAN contends that this constitutes "new and significant information" that must be considered.[323]

Entergy opposes the admission of Proposed Contention 16. The contention raises issues that are beyond the scope of this proceeding and immaterial to the NRC's license renewal review, lacks adequate factual or expert support, and fails to show that a genuine dispute exists with the Applicant on a material issue of law or fact , contrary to 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi). In brief, the contention really is a challenge to the adequacy of the CLB for Units 2 and 3, specifically the seismic design of those units. As such, it raises issues related to the "safe ongoing operation" of IPEC, rather than to "matters peculiar to plant aging or to the license extension period."[324] In this regard, it also seeks to re-open issues that were considered and resolved 30 years ago by the NRC's Atomic Safety and Licensing Appeal Board.[325]

Although it is concealed by WestCAN's tortuous logic, the thrust of Proposed Contention 16 is apparent in the concluding paragraph of the contention: "Thus, the seismic *design basis* of Indian Point may not legitimately be grandfathered in for the sake of allowing the plant's continued operation."[326] This single statement—and *a fortiori* the entire contention—is rife with issues that exceed the scope of this proceeding and lack any nexus to license renewal, rendering it inadmissible as a matter of law.

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[322] *Id.* at 137-138.

[323] *Id.* at 138.

[324] *See American Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 133 (2007) (noting that such issues are properly raised in a petition to the NRC for relief under 10 CFR § 2.206 (providing for petitions for enforcement relief)).

[325] *See Consol. Edison Co. of N.Y., Inc.* (Indian Point Units 1, 2 and 3), ALAB-436, 6 NRC 547 (1977); *see also* Transcript of Meeting of Advisory Committee on Reactor Safeguards, Joint Subcommittee on Indian Point/Seismic Activity (June 16, 1978).

[326] *Id.* at 140.

Toward its objective of contesting the basic seismic design of IPEC Units 2 and 3, WestCAN provides a number of third-hand quotes attributable to Dr. Sykes and Mr. Seeber regarding seismic risk and spent fuel pool vulnerabilities.[327] Irrespective of the merits of those statements, Proposed Contention 16 plainly raises issues beyond the scope of this proceeding. The seismic design of Unit 2 and 3 clearly is a CLB issue and is not material to the Applicant's and NRC Staff's reviews of Units 2 and 3 pursuant to 10 C.F.R. Part 54.[328] Thus, again, WestCAN's choice is clear: It may file a petition pursuant to 10 C.F.R. § 2.206, asking the Commission for appropriate action, or a petition for rulemaking to amend the scope of Part 54, pursuant to 10 C.F.R. § 2.802. But in the context of this proceeding, the contention is inadmissible and must be dismissed, in its entirety.

18. Proposed Contention 17

> Contention 17: The population density within the 50 mile Ingestion Pathway EPZ of Indian Point is over 21 million, the population within in [sic] the 10 mile plume exposure pathway EPZ exceeds 500,000.[329]

WestCAN asserts that changes in population density mandate a reassessment because this matter "directly affects the ability to evacuate the communities surrounding Indian Point."[330] As with its other Proposed Contentions, this too seeks to raise a matter of current operational concern, not one within the scope of 10 C.F.R. Part 54. Moreover, it clearly constitutes an effort to reexamine matters decided in initial licensing and beyond the scope of license renewal.

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[327] Dr. Sykes and Mr. Seeber submitted declarations in support of the New York State Attorney General Proposed Contentions 14 and 15 in this proceeding. To the extent WestCAN raises seismic issues similar to those raised by New York State and its purported experts, Entergy refers the Board to its responses to New York State Proposed Contentions 14 and 15 for further discussion of those issues.

[328] The NRC Staff has previously noted that seismic issues of the type raised by WestCAN and New York State in this proceeding "are not pertinent to any consideration of a facility license renewal." *See* Letter from C. Holden, NRC to A. Matthiessen, Riverkeeper (Dec. 15, 2004), att. at 5, *available at* ADAMS Accession No. ML042990090.

[329] Petition at 140.

[330] *Id.* at 141.

Notably, to the extent WestCAN seeks to litigate this issue because of its nexus to emergency planning, the Commission explicitly has found that matter to be outside the scope of issues to be resolved in the context of license renewal.[331]

As discussed previously, the Commission concluded that requiring a 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."[332] 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."[333] Emergency planning is an issue not calling for reanalysis in connection with license renewal.[334] As the Commission explained in *Turkey Point*, its seminal decision on the scope of license renewal proceedings:

> For an example of how the ongoing regulatory process works to maintain safety, we can look at the issue of emergency planning. The Commission has various regulations establishing standards for emergency plans. *See* 10 C.F.R. §§ 50.47, 50.54(s)-(u); Appendix E to Part 50. These requirements are independent of license renewal and will continue to apply during the renewal term. They include provisions to ensure that the licensee's emergency plan remains adequate and continues to meet sixteen performance objectives. Through mandated periodic reviews and emergency drills, "the Commission ensures that existing plans are adequate throughout the life of any plant even in the face of changing demographics, and other site-related factors. . . . [D]rills, performance criteria, and independent evaluations provide a process to ensure continued adequacy of emergency preparedness." 56 Fed. Reg. at 64,966. Emergency planning, therefore, is one of the safety issues that need not be re-examined within the context of license renewal.[335]

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[331] *See Turkey Point*, CLI-01-17, 54 NRC at 10 (noting that emergency planning, which is a focus of ongoing regulatory processes, "does not come within NRC safety review at the license renewal stage").

[332] *Id.* at 7.

[333] *Id.* at 9.

[334] *Turkey Point*, CLI-01-17, 54 NRC at 7.

[335] *Id.* at 9.

Accordingly, this proposed contention utterly fails to comply with 10 C.F.R. § 2.309(f)(1), and must be denied in its entirety.

19. Proposed Contention 18

> Contention 18: Emergency Plans and evacuation plans for the four counties, surrounding are inadequate to protect public health and safety, due to limited road infrastructure, increased traffic and poor communications.[336]

WestCAN, in this proposed contention, seeks to challenge the overall adequacy of current emergency plans for Indian Point.[337] Relying on a 2003 report prepared by James Lee Witt for the State of New York, WestCAN alleges there are fundamental inadequacies in emergency plans for Indian Point, requiring a reexamination of such plans in this proceeding. In the alternative, it urges that "a comprehensive evaluation of any and all resulting Environmental Impacts and Costs of such accident pathway caused by failure of the Emergency Plans must be included in the EIS of the LRA . . . ."[338]

Again, this proposed contention is simply outside the scope of the aging-management matters to be considered in license renewal, as discussed above in response to Proposed Contention 17. As the Commission recently reiterated in the Millstone license renewal proceeding (in which it affirmed the Board's rejection of an emergency planning contention):

> Of course, *all* our Part 50 regulations are aimed, directly or indirectly, at protecting public health and safety. But that does not mean that they are all suitable subjects for litigation in a license renewal proceeding. They are not. In fact, the primary reason we excluded emergency-planning issues from license renewal proceedings was to limit the scope of those proceedings to "age-related degradation unique to license renewal." Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by [a] license

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[336] Petition at 142.

[337] *Id.* at 142-149.

[338] *Id.* at 146-149.

> 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.[339]

Accordingly, Proposed Contention 18 fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1), and must be denied in its entirety.

20. Proposed Contention 19

> Contention 19: Security Plans. Stakeholders contend that the way the force-on-force (FOF) tests are conducted do not prove that the Indian Point security force is capable to defend the facility against a credible terrorist attack or sabotage. The LRA does not address how Security, as required under section 10 CFR 100.12(f) and 10 CFR Part 73, will be managed during the proposed additional 20 years of operation against sabotage/terrorist forces with increasing access to sophisticated and advance weapons.[340]

Plodding down the same well-worn path of inadmissible contentions, WestCAN here proposes to litigate another aspect of the IPEC CLB—this time the adequacy of Entergy's security plans and readiness.[341] In so doing, WestCAN raises another matter that is subject to ongoing NRC regulatory oversight and is outside the scope of license renewal. As the Licensing Board explained in the Vermont Yankee license renewal proceeding:

> The Commission has repeatedly stated that security-related issues are beyond the scope of a license renewal review. In *McGuire/Catawba*, the Commission examined whether terrorism contentions are "sufficiently related to the effects of plant aging to fall within the scope of the" safety portion of a license renewal proceeding. CLI-02-26, 56 NRC at 364. Upon examining the regulatory history to the license renewal rules, the Commission concluded that "[t]errorism contentions are, by their very nature, directly related to security and are therefore, under our 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." *McGuire*, CLI-02-26, 56 NRC at 364. The Commission repeated this principle in *Millstone* when it

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339 *Millstone*, CLI-05-24, 62 NRC at 560-61 (internal footnotes and citations omitted; emphasis in original).

340 Petition at 149-150.

341 *Id.* at 149-157.

> affirmed a Licensing Board decision ruling that terrorism issues are not within the scope of license renewal proceedings. CLI-04-36, 60 NRC at 638. In doing so, the Commission specifically stated "security issues at nuclear power reactors, while vital, are simply not among the aging-related questions at stake in a license renewal proceeding." *Id.*[342]

Thus, in accordance with 10 C.F.R. § 2,309(f)(1)(iii) and (iv), Proposed Contention 18 must be denied for its failure to raise an issue that is both within the scope of this proceeding and material to the Staff's findings on the IPEC license renewal application.

21. Proposed Contention 20

> Contention 20: The LRA does not satisfy the NRC's underlying mandate of Reasonable Assurance of Adequate Protection of Public Health and Safety.

Swept into a single proposed contention, WestCAN seeks to amalgamate a compendium of alleged failures on the part of the NRC to take appropriate enforcement action in connection with Indian Point. In support, it provides a catalogue of disassociated examples of purported radioactive releases (spent fuel pool leaks, leaks of strontium-90, cesium-137, and tritium), emergency planning deficiencies (sirens, evacuation plans), siting of the facility on the Ramapo fault, vulnerability to terrorist attack, boric acid corrosion of the vessel heads for both Units 2 and 3, steam generator tube issues, impending failure of a steel containment plate, storage of low-level waste as spent fuel, and insufficient decommissioning funds.[343] But beyond this catalogue of conjecture, WestCAN has failed to raise an issue, in the context of Proposed Contention 20, with a demonstrated nexus to 10 C.F.R. Part 54. This failure is conspicuous, notwithstanding its sweeping conclusion that the "LRA does not offer an aging management plan

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[342] *Vermont Yankee*, LBP-06-20, 64 NRC at 172-73 (internal footnote omitted). *See also* Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,475 (stating that "physical protection (security) [is] not subject to physical aging processes" that are the focus of the NRC's license renewal review); 56 Fed. Reg. at 64,967 (stating that "a review of the adequacy of existing security plans is not necessary as part of the license renewal process").

[343] Petition at 157-165.

that will give Reasonable of [sic] Public Health and Safety at Indian Point, and therefore the NRC must deny the Applicant's LRA."[344]

The matters identified by WestCAN in this proposed contention are clearly matters subject to ongoing regulatory oversight, and fall well beyond the scope of 10 C.F.R. Part 54.[345] In sum, WestCAN has failed to establish, with the requisite basis and specificity that the matters identified constitute a contention satisfying any of the criteria of 10 C.F.R. § 2.309(f)(1). For this reason, Proposed Contention 20 must be rejected in its entirety.

22. Proposed Contentions 22-25

> Contentions 22-25: Indian Point was not required to comply with federally approved General Design Criteria, which constitutes a clear and flagrant violation of the Administrative Procedures Act, and Entergy's LRA fails to remediate the error, leaving Indian Point without adequate safety margins and the New York Metropolitan region without adequate assurance of public health and safety.[346]

WestCAN argues that the Applicant followed "trade industry-endorsed commentary," rather than applicable regulations, and that the Aging Management Programs proposed by Entergy are based upon misrepresentations of the actual GDC. It accuses both Entergy and the NRC (for allegedly failing to enforce Entergy's compliance with the GDC) of having violated the Administrative Procedure Act ("APA"). As discussed below, WestCAN purports to provide specific examples of failures to meet the GDC and concludes that the CLB for IPEC Unit 2 is "unknown and unmonitored."

Entergy opposes the admission of Proposed Contentions 22-25 on the grounds that they fail to satisfy any of the admissibility standards set forth in 10 C.F.R. § 2.390(f)(1). In short,

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344 *Id.* at 165.

345 Each, for that matter, relates to an issue receiving current and ongoing attention by the Applicant (as well as the NRC), in its appropriate framework, be it remediation or ongoing adherence to long-lived programs (for example, collection of decommissioning funds).

346 Petition at 165.

Contentions 22-25 should not be admitted because WestCAN has failed to: (1) provide a *specific* statement of the issue of law or fact that the Petitioner wishes to raise or controvert, contrary to 10 C.F.R. § 2.309(f)(1)(i); (2) provide a *brief explanation* of the factual or legal bases of the contention, contrary to 10 C.F.R. § 2.309(f)(1)(ii); (3) demonstrate that the issues raised are within the scope of this license renewal proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii); (4) demonstrate that the issues raised are material to the NRC's licensing decision in this case, contrary to 10 C.F.R. § 2.309(f)(1)(iv); (5) provide adequate factual and/or expert support for the proposed contention, contrary to 10 C.F.R. § 2.309(f)(1)(v); and (6) demonstrate that a genuine dispute exists with the Applicant on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). In addition, Proposed Contentions 22-25 improperly challenge the Commission's regulations at 10 C.F.R. Part 54 and other aspects of the NRC's regulatory process, contrary to 10 C.F.R. § 2.335.

a. *Proposed Contentions 22-25 Lack Adequate Specificity and Basis*

First, among the many reasons supporting rejection of Proposed Contentions 22-25 is their failure to satisfy the specificity and basis requirements of 10 C.F.R. § 2.309(f)(1)(i) and (ii). The NRC's contention admissibility rules "insist upon some 'reasonably specific factual and legal' basis for [a] contention."[347] As such, "presiding officers may not admit open-ended or ill-defined contentions lacking in specificity or basis."[348] WestCAN's lengthy and desultory presentation—which purportedly encompasses five separate contentions—is exactly the type of "open-ended" and "ill-defined" presentation barred by the NRC's "strict contention rule."

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[347] *Millstone*, CLI-01-24, 54 NRC at 359 (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,168, 33,171).

[348] *Id.*

For example, over the course of more than 20 pages, WestCAN raises purported "issues" stemming from asserted yet undefined violations of the APA; repeatedly challenges the adequacy of the CLB for IPEC Unit 2, including Entergy's compliance with the GDC; questions the validity of relying on certain regulatory guidance; questions prior NRC adjudicatory decisions; and alleges misconduct by Entergy and the Commission, including purported historical legal violations and "regulatory failures."[349] In so doing, Proposed Contentions 22-25 lack the requisite specificity and basis, as they do not specify how the various claims relate to the LRA or even 10 C.F.R. Part 54, and should accordingly be dismissed in their entirety pursuant to 10 C.F.R. § 2.309(f)(1). Indeed, their admission would frustrate the very purposes of the Commission's strict pleading requirements, which include, among others, focusing the hearing process on real disputes "susceptible to resolution" in an adjudication.

b. Proposed Contentions 22-25 Do Not Raise a Material Issue within the Scope of License Renewal

More importantly, proposed Contentions 22-25 fail to raise any issue that is within the scope of this proceeding or material to the Staff's licensing decision. As discussed above, "[t]he scope of license renewal is narrow."[350] A proposed contention that "does not raise any aspect of the Applicant's aging management review or evaluation of the plant's systems, structures, and components subject to time-limited aging analysis" is inadmissible.[351] Similarly, a contention is not admissible if it fails to raise a material issue; *i.e.*, an issue whose resolution would make a difference in the outcome of the licensing proceeding.[352]

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[349] Petition at 165-186.

[350] *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).

[351] *Turkey Point*, CLI-01-17, 54 NRC at 16 (quoting *Turkey Point*, LBP-01-6, 53 NRC at 164).

[352] Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172.

As best Applicant can discern, WestCAN alleges that Entergy—a private company—has violated the APA, purportedly by failing to comply with certain GDC.[353] WestCAN further asserts that the NRC has violated the APA by allowing the licensee to operate Unit 2 while in alleged violation of its operating license.[354] WestCAN's assertion that Entergy and/or the NRC violated the APA is misguided and reflects a complete misunderstanding of the purpose and applicability of that statute. The APA governs the manner in which *federal agencies* conduct formal rulemaking and adjudications and defines the applicable standards of judicial review.[355] The APA applies only to agencies of the U.S. Government; it does not apply to private entities like Entergy. Any suggestion by Petitioner that Entergy has violated the APA is without legal basis. Moreover, alleged historical violations of the APA by the NRC, presumably during original licensing, are clearly beyond the limited scope of this license renewal proceeding.

In addition, WestCAN's aspersions on the integrity of the Applicant and NRC offer no support for the admission of the proposed contentions.[356] It is well-established that contentions concerning the adequacy of the NRC Staff's review of a license application (as opposed to the application itself) are inadmissible in licensing hearings.[357]

Putting aside WestCAN's flawed legal premise (*i.e.*, that Entergy and/or the NRC have previously violated the APA and that such violations are cognizable in this forum), the various

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353 Petition at 165, 173-176.

354 *Id.* at 174.

355 According to the *Attorney General's Manual on the Administrative Procedure Act* (1947) (at 41), drafted after the 1946 enactment of the APA, the basic purposes of the APA are: (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rulemaking process; (3) to establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) to define the scope of judicial review.

356 *See, e.g., Millstone*, CLI-01-24, 54 NRC at 366 (citation omitted); *petition for recons. denied,* CLI-02-1, 55 NRC at 3-4 ("Allegations of management improprieties or poor 'integrity' . . . must be of more than historical interest: they must relate directly to the proposed licensing action.").

357 *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC at 395-96; *see also Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 121-22, 121 n.67 (citing reactor cases in which this principle has been applied).

bases proffered by WestCAN in support of proposed Contentions 22-25 relate principally—and improperly—to alleged inadequacies in the CLB for Unit 2. For example, WestCAN asserts:

- "Entergy's predecessors in interest . . . misrepresented the specific General Design Criteria (GDC) which formed the basis of the Safety Evaluation Report granting the licenses . . . for Indian Point's operation and subsequently remained in violation of the terms of its operating license and with federal rules for decades. Entergy never corrected the obvious error. . . ."[358]

- "The as-built construction of the facility does not comply with the safety evaluation report, the operating license, or the CFR."[359]

- "[T]he plant design, programs and procedures *were licensed to trade industry-endorsed commentary* as opposed to the General Design Criteria, for the LRA and subsequently approved by the Atomic Energy Commission under the 1970 Safety Evaluation Report (See Exhibit K) . . . ."[360]

- "Licensee's failure to adhere to a legally enforceable General Design Criteria substantially reduces safety margins for safe plant operation, by severely reducing detection of and the consequential mitigation of accident conditions resulting in substantial reduction in protecting the health and safety of the public."[361]

- "In fact, Indian Point was not in compliance with 10 CFR 50 Appendix A then, *and is not in compliance with 10 CFR 50 Appendix A now.* (See current 2006 Unit 2 UFSAR submitted as a part of the LRA."[362]

- "The IP2 Final Safety Analysis Report (FSAR) does not address Criterion 35 at all. In neglecting to do so, the IP2 FSAR leaves the General Design Criteria meaningless in its intent to protect the health and safety of the public, and places the plant in clear violation of 10 CFR 50 Appendix A."[363]

The foregoing arguments fall outside the scope of this proceeding because they contest the adequacy of the CLB and current design basis. *See* 10 C.F.R. § 54.30. The CLB represents "an evolving set of requirements and commitments for a specific plant that are modified as

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[358] Petition at 166.

[359] *Id.*

[360] *Id.* at 168 (emphasis in original).

[361] *Id.* at 172-173.

[362] *Id.* at 174 (emphasis added).

[363] *Id.* at 180 (emphasis in original)

necessary over the life of a plant to ensure continuation of an adequate level of safety."[364] The NRC addresses and maintains current plant licensing bases through ongoing agency oversight, review, and enforcement. The NRC chose to "focus[] the renewal process on [passive] plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation."[365]

Consistent with that focus, the Commission deliberately chose not to "throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review."[366] As such, the NRC does not treat a license renewal review as the equivalent of a *de novo* review for an initial construction permit or operating license. Nonetheless, that is precisely the result WestCAN seeks here.

Furthermore, WestCAN's impermissible challenge to the Indian Point CLB is premised on an erroneous assumption; *i.e.*, that Indian Point Unit 2 *must* comply with the GDC. Specifically, WestCAN complains "the plant design, programs and procedures *were licensed to trade industry-endorsed commentary* as opposed to the General Design Criteria and subsequently approved by the Atomic Energy Commission under the 1970 Safety Evaluation Report . . . ."[367] WestCAN presents a chronology of events that ostensibly supports its claim, and avers that "[t]he licensee's failure to adhere to a [sic] legally enforceable General Design Criteria substantially reduces safety margins for safe plant operation, by severely reducing detection of and the consequential mitigation of accident conditions resulting in substantial reduction in protecting the health and safety of the public."[368]

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[364] Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,473.

[365] *Id.* at 22,469.

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

[367] Petition at 168.

[368] *Id.* at 172-173.

As discussed previously, the GDC, which are contained in Appendix A to 10 C.F.R. Part 50, establish minimum requirements for the principal design criteria for water-cooled nuclear power plants. As set forth in NRR Office Instruction LIC-100, Revision 1, *the GDC are not applicable to plants with construction permits issued prior to May 21, 1971.*[369] The construction permits for Indian Point Units 2 and 3 were issued before that date, on October 14, 1966, and August 13, 1969, respectively. Thus, the GDC do not apply to those plants. Indeed, one of WestCAN's exhibits (Exhibit N) confirms this fact and sets forth the Commission's sound rationale for not applying the GDC to such plants.[370]

In addition, WestCAN's "chronology" makes reference to a February 1980 Commission Confirmatory Order.[371] The events associated with that Order further illustrate the utter lack of foundation for WestCAN's claims concerning alleged noncompliance with the GDC. Specifically, on February 11, 1980, the Commission issued a Confirmatory Order that, among other things, required (per item F.3) the "[c]onduct of a study to determine and document the method by which its plant complies with current safety rules and regulations, in particular those

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[369] NRR Office Instruction (LIC-100, Rev. 1) "Control of Licensing Bases for Operating Reactors" (Jan. 2004) at 2.14 and Att. 2.

[370] In the Staff Requirements Memorandum ("SRM") associated with SECY-92-223, the Commission stated:

> The Commission (with all Commissioners agreeing) has approved the staff proposal in Option 1 of this paper in which the staff will not apply the [GDC] to plants with construction permits issued prior to May 21, 1971. At the time of promulgation of Appendix A to 10 CFR Part 50, the Commission stressed that the GDC were not new requirements and were promulgated to more clearly articulate the licensing requirements and practice in effect at that time. While compliance with the intent of the GDC is important, *each plant licensed before the GDC were formally adopted was evaluated on a plant specific basis, determined to be safe, and licensed by the Commission.* Furthermore, current regulatory processes are sufficient to ensure that plants continue to be safe and comply with the intent of the GDC. Backfitting the GDC would provide little or no safety benefit while requiring an extensive commitment of resources. Plants with construction permits issued prior to May 21, 1971 do not need exemptions from the GDC.

[371] Petition at 171.

contained in 10 C.F.R. Part 20 and 50."[372] On August 11, 1980, Consolidated Edison ("ConEd") submitted its response to the Order.[373] The Commission replied to ConEd's letter on January 19, 1982, stating: "Our audit of your submittal indicates that the Indian Point Unit No. 2 design and operation does meet the applicable regulations. This letter serves to resolve item F.3 in our Order of February 11, 1980."[374] Accordingly, WestCAN's allegations of noncompliance with the GDC lack any valid factual or legal basis and do not provide an adequate basis for admissibility per the requirements of 10 C.F.R. § 2.309(f)(1)(i).

c. Proposed Contentions 22-25 Lack Adequate Factual or Expert Support and Fail to Establish a Genuine Dispute with the Applicant

Even *assuming* the issues raised by WestCAN were somehow within the scope or material to the outcome of this proceeding, Proposed Contentions 22-25 lack the necessary factual or expert support and fail to raise a genuine dispute relative the application as required by 10 C.F.R. § 2.309(f)(1)(v). WestCAN's scant references to specific portions of the LRA, coupled with its misguided focus on CLB-related issues, underscore its failure to controvert the application on a material issue of law or fact.[375] Additionally, as demonstrated below, WestCAN's arguments lack adequate factual or expert support and are fraught with factual errors.

WestCAN's statements regarding GDC 35 and 45 are two particularly egregious examples of WestCAN's failure to furnish adequately-supported and accurate information. For

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372 Letter from A. Schwencer, NRC, to William J. Cahill, Jr., Consolidated Edison Company of New York, Inc. (Feb. 11, 1980), Enclosure 2 (Confirmatory Order) at 8.

373 Letter from Peter Zarkas, Consolidated Edison Company of New York, Inc., to Harold R. Danton, NRC (Aug. 11, 1980).

374 Letter from Steven A. Varga, NRC, to John D. O'Toole, Consolidated Edison Company of New York, Inc. (Jan. 19, 1982).

375 *See* 10 C.F.R. § 2.309(f)(1)(i) (requiring that a petitioner provide "a specific statement of the issue of law or fact to be raised or controverted").

example, WestCAN claims that the IPEC Unit 2 FSAR does not address Criterion 35 (related to emergency core cooling) "at all."[376] WestCAN provides no factual or expert basis for this claim, and simply overlooks the fact that the requirements for emergency core cooling systems are addressed in Section 1.3 of the UFSAR.

WestCAN also argues that LCO 3.4.13 permits reactor containment pressure leakage from primary to secondary systems in "quantities [that] are much larger than reasonable limits implicit under [GDC] 35."[377] WestCAN hypothesizes that "[t]his non-conservative quantity may have contributed to the root cause of the 2000 [steam generator] tube rupture accident and is intolerable as an acceptable quantity for age management of the RCS leakage."[378] WestCAN, however, provides no documentary or expert support for these conclusory assertions, relying instead upon a postulated correlation between a sudden and rapid steam generator tube leak and allowable reactor containment pressure leakage. Loss of coolant accident via steam generator tube rupture is an accident scenario analyzed for the current operating term. As such, it falls outside the scope of this proceeding. Steam Generator Integrity, AMP B.1.35, addresses tube integrity.

Similarly, in assailing Entergy for its alleged noncompliance with GDC 45 (concerning cooling water system inspections), WestCAN states that "Indian Point 2 has chosen instead to rely on water chemistry tests which are meaningless for assessing bolt integrity."[379] WestCAN fails again to provide sufficient factual or expert support to support its conclusory statements. Instead, it refers the Board, generally, to Exhibit P, which is comprised of undated presentation

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[376] Petition at 180.

[377] *Id.* at 182.

[378] *Id.*

[379] *Id.* at 182-183.

slides apparently prepared by an individual named Karl Jacobs. The slides contain information related to the IPEC license renewal scoping process and to the IPEC Unit 2 and Unit 3 reactor pressure vessels. WestCAN offers no comprehensible explanation of how Exhibit P is relevant to WestCAN's claim regarding GDC 45, let alone how it supports WestCAN's contention. The Board cannot make inferences on WestCAN's behalf.[380]

WestCAN's reference to the Declaration of Ulrich Witte (Exhibit Q.1) likewise offers no support.[381] That declaration contains only vague and unsubstantiated allegations of deficiencies in the design (*e.g.*, spent fuel pool leaks, leaks from underground piping, "design basis event tube rupture") and licensing bases (*e.g.*, purported noncompliance with GDC) for IPEC Unit 2 and past instances of licensee/regulatory misconduct. It provides no technical analysis or other reasoned explanation that constitutes expert opinion and which might assist the Board in assessing the admissibility of WestCAN's claims.[382] Indeed, aside from a passing reference to "aging programs for the reactor's systems," the Witte declaration contains no apparent link to license renewal. WestCAN quotes LRA Section "A.2.1.141," but fails to provide any explanation of *why* it believes LRA Section *A.2.1.41* is deficient.[383] The Board cannot make

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[380] *See Palo Verde*, CLI-91-12, 34 NRC at 155.

[381] Although Entergy has not explicitly challenged the qualifications of all of Petitioner's purported experts in this Answer, inasmuch as Entergy does not for purposes of 10 C.F.R. § 2.309(f) address the merits of the proposed contentions, Entergy reserves the right to challenge the qualifications of the purported experts in the event any proposed contention is admitted.

[382] *See Private Fuel Storage*, LBP-98-7, 47 NRC at 181, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998) (noting that "the Board is not to accept uncritically the assertion that . . . an expert opinion supplies the basis for a contention").

[383] Petition at 183-84.

inferences on WestCAN's behalf.[384] Thus, neither Exhibit P nor the Witte declaration supports admission of the proposed contention.[385]

Finally, Proposed Contentions 22-25 impermissibly challenge 10 C.F.R. Part 54 and the agency's regulatory process to implement regulations housed therein.[386] In short, by seeking to litigate the adequacy of the Unit 2 design and licensing bases, WestCAN collaterally attacks Section 54.30, which expressly removes issues concerning the adequacy of the CLB from the scope of a license renewal proceeding. WestCAN also contravenes the NRC's determination that the GDC do not apply to plants with construction permits issued prior to May 21, 1971. Finally, WestCAN takes issue with industry and NRC reliance on regulatory guidance documents that have been developed or otherwise endorsed by the NRC.[387] It suffices to say that the use of guidance documents by applicants and the NRC is a longstanding practice and an integral part of the NRC regulatory process as set forth in Title 10 of the *Code of Federal Regulations*. Further, as demonstrated above, WestCAN fails to establish any material dispute relative to Entergy's compliance with the applicable regulations, as contained 10 C.F.R. Part 54.

In sum, the Board must deny the admission of proposed Contentions 22-25. WestCAN fails to establish, with the requisite specificity and basis, the existence of genuine dispute on a material issue of law or fact. In addition, WestCAN raises issues that exceed the scope of this proceeding—for which no relief can be granted—and improperly challenges the regulatory process. WestCAN has met none of the criteria set forth in Section 2.309(f)(1).

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384 *See Palo Verde*, CLI-91-12, 34 NRC at 155.

385 *See Private Fuel Storage*, LBP-98-7, 47 NRC at 181, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998) ("[A]n expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion at it is alleged to provide a basis for the contention.").

386 *See* 10 C.F.R. § 2.335(a).

387 *See* Petition at 184.

23. Proposed Contention 27

Contention 27: The LRA for Indian Point 2 & Indian Point 3 is insufficient in managing the environmental Equipment Qualification required by federal rules mandated that are required to mitigate numerous design basis accidents to avoid a reactor core melt.[388]

WestCAN next contends that the NRC must deny the LRA because it "is insufficient to demonstrate compliance with either 10 CFR50.49(e)(5) or 10CFR54."[389] After purporting to discuss the applicable NRC requirements and prescribed content of an LRA, Petitioner offers a number of bases for its proposed contention. Most of Petitioner's arguments relate to the NRC's competence or performance as a regulator. Nevertheless, WestCAN's lengthy and meandering discussion contains the following principal arguments:

- Entergy wrongly claims credit in the LRA for Table 3.6.1, and for the EQ analysis in Section 4.4.[390]
- The NRC has violated the law by accepting unqualified components and using a flawed approval process that is based upon industry guidance. Petitioner accuses the NRC of procuring or accepting a "rudimentary" or "high school quality" economic analysis (but provides no citation to, or a lucid description of, the allegedly-defective analysis). Petitioner then asserts that issues concerning 10 CFR § 50.49 "were subsequently investigated by numerous parties," and that "many components were found unqualified to function for 40 years let alone 60 years." Petitioner suggests that such components are presently installed at IPEC Units 2 and 3. Finally, Petitioner claims that unspecified "Brookhaven test results" indicate that "degradation beyond the qualified life of the cables may be too severe for the insulation material to withstand and still be able to perform during an accident."[391]
- The NRC recognized its alleged errors and then "bypassed the APA" by attempting to "cover up the violation by using an unlawful procedural process of probabilistic cost analysis (PRA) [sic] and cost benefit analysis. . . ."[392]
- In doing so, the NRC set aside "significant technical concerns" expressed by the

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388 *Id.* at 187.

389 *Id.* at 187-202.

390 *Id.* at 187.

391 *Id.* at 188.

392 *Id.* at 200.

Advisory Committee on Reactor Safeguards ("ACRS"), as reflected in Regulatory Information Summary ("RIS") 2003-09 and dissenting views associated with the closure of Generic Safety Issue 168 ("GSI-168"). With regard to this point, Petitioner suggests that "[a]combination of condition-monitoring techniques may be needed since no single technique is currently demonstrated to be adequate to detect and locate degradation of Instrumentation and Control Cables (I&C) cables."[393]

- The GAO has "noticed the approach taken by the NRC and Entergy on other issues, yet Entergy has failed to comply with the regulations."[394]

Finally, Petitioner states that the contention is supported by the declaration of Ulrich Witte, who it claims is an expert on EQ issues.[395]

Entergy opposes the admission of Proposed Contention 27 on the grounds that it: (1) raises issues that are outside the scope of the proceeding and/or not material to the Staff's license renewal findings, contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (iv); (2) lacks adequate factual or expert support, contrary to 10 C.F.R. § 2.309(f)(1)(v); (3) fails to raise a concrete and genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi); and (4) impermissibly challenges NRC regulations, contrary to 10 C.F.R. § 2.335(a).

First, while the environmental qualification of electrical components is within the scope of license renewal (*see* 10 C.F.R. § 54. 21(a)(3); NUREG-1800, Rev. 1 at § 4.4), the specific issues raised by WestCAN fall outside the scope of this proceeding. Specifically, WestCAN principally objects to the *process* by which the NRC Staff reviews the EQ portion of an LRA, including the Staff's disposition of GSI-168, as reflected in RIS 2003-09.[396] As discussed above, neither the adequacy of the Staff's regulatory processes (including the development and

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[393] *Id.* at 198-201.

[394] *Id.* at 201.

[395] *Id.* at 200.

[396] *Id.* at 195-199.

implementation of regulations and guidance), nor the adequacy of its technical review can be the subject of an admissible contention in this proceeding.[397]

To the extent WestCAN attempts to contest the adequacy of the LRA, it falls far short of doing so in a manner that would support admission of its contention. Specifically, WestCAN's assertion that Entergy wrongly claims credit in the LRA for Table 3.6.1, and for the EQ analysis in Section 4.4, is conclusory and lacks requisite detail and specificity.[398] It lacks any support in the form of factual information or expert opinion.. WestCAN, including its designated expert, fails to explain why the *application* is deficient in some material respect, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

Contrary to WestCAN's claim, Entergy's LRA complies with NRC requirements and guidance. Under 10 C.F.R. Part 54, some aging evaluations for EQ components are TLAAs for purposes of license renewal (*i.e.*, EQ evaluations that specify a qualification duration of at least 40 years, but less than 60 years). As set forth in 10 C.F.R. § 54.21(c)(1), there are three methods by which an applicant may verify that TLAAs are adequate: (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. As reflected in its LRA, Entergy has selected the last option; *i.e.*, to demonstrate its ability to manage the aging effects of the electrical components during the renewal period *under its current EQ program*. *See* LRA at Table 3.6.1; p. 4.4-1; App. A at A-21; and App. B at B-39 to B-41.

This demonstration is presented in Section B.1.10 of Appendix B (pp. B-39 to B-40). Section B.1.10 states that the EQ Program "is consistent with the program defined in NUREG-

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[397] 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

[398] *Millstone*, CLI-01-24, 54 NRC at 359-60.

1801, Section X.E.1, Environmental Qualification (EQ) of Electrical Components [*i.e.*, the GALL Report]." In Chapter X of the GALL Report, the NRC Staff has evaluated the EQ program (as implemented consistent with 10 C.F.R. § 50.49) and determined that it is an acceptable aging management program to address environmental qualification according to 10 C.F.R. § 54.21(c)(1)(iii). NUREG-1800, Revision 1, in turn, states that a license renewal applicant may reference the GALL Report in its application.

As part of its EQ program, Entergy is required to perform re-analysis of an aging evaluation to extend the qualification of a component on a routine basis pursuant to 10 C.F.R. § 50.49(e). Section B.1.10 of the license renewal application confirms this fact:

> The reanalysis of an aging evaluation could extend the qualification of the component. If the qualification cannot be extended by reanalysis, the component is to be refurbished, replaced, or requalified prior to exceeding the period for which the current qualification remains valid. A reanalysis is to be performed in a timely manner (that is, sufficient time is available to refurbish, replace, or requalify the component if the reanalysis is unsuccessful).[399]

Thus, the approach used by Entergy in its LRA complies with 10 C.F.R. § 54.21(c)(1)(iii) and applicable NRC guidance. WestCAN fails to show otherwise, and instead seeks to challenge the NRC's EQ process itself, in contravention of longstanding precedent on the scope of admitted contentions.[400]

For the above reasons, the Board must deny the admission of proposed Contention 27 as it fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).

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[399] *See also* App. A, § A.2.1.9, at A-21 (stating that "[a]s required by 10 CFR 50.49, EQ components are refurbished, replaced, or their qualification extended prior to reaching the aging limits established in the evaluations").

[400] 10 C.F.R. § 2.309(f)(1)(iii).

24. Proposed Contention 28

> Contention 28: The License's ineffective Quality Assurance Program violates fundamental independence requirements of Appendix B, and its ineffectiveness furthermore triggered significant cross cutting events during the past eight months that also indicate a broken Corrective Action Program, and failure of the Design Control Program, and as a result invalidate statements crediting these programs that are relied upon in the LRA.[401]

WestCAN argues that Entergy's Quality Assurance Program violates 10 C.F.R. Part 50, Appendix B, and that significant recent cross-cutting events indicate that its Corrective Action and Design Control Programs are "broken." WestCAN contends that these alleged deficiencies render the "[a]ctual condition of the plant in terms of a baseline for managing aging [] unknown," and "essentially invalidate those specific programs that credit the current material condition of the plant" for purposes of license renewal.[402]

Entergy opposes the admission of Proposed Contention 28 on the ground that it clearly falls outside the scope of this license renewal proceeding. As discussed above, the Commission has specifically limited the NRC's safety review—and thus any related adjudicatory proceeding—to the matters specified in 10 C.F.R. §§ 54.21 and 54.29(a), which focus on the management of aging of certain systems, structures, and components, and on the review of time-limited aging analyses. The Commission, therefore, purposefully excluded issues relating to a plant's CLB—including operational and programmatic issues—because they "are effectively addressed and maintained by ongoing agency oversight, review, and enforcement."[403] In the Statement of Considerations for its 1995 license renewal rulemaking, the Commission removed any and all ambiguity on this subject:

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401 Petition at 202-203.

402 *Id.* at 202-205.

403 *Millstone*, CLI-04-36, 60 NRC at 637-38.

> When the design bases of systems, structures, and components can be confirmed either indirectly by inspection or directly by verification of functionality through test or operation, a reasonable conclusion can be drawn that the CLB is or will be maintained. This conclusion recognizes that the portion of the CLB that can be impacted by the detrimental effects of aging is limited to the design-bases aspects of the CLB. *All other aspects of the CLB, e.g., quality assurance, physical protection (security), and radiation protection requirements, are not subject to physical aging processes that may cause noncompliance with those aspects of the CLB.*
>
> Although the definition of CLB in Part 54 is broad and encompasses various aspects of the NRC regulatory process (*e.g.*, operation and design requirements), the Commission concludes that a specific focus on functionality is appropriate for performing the license renewal review. *Reasonable assurance that the function of important systems, structures, and components will be maintained throughout the renewal period, combined with the rule's stipulation that all aspects of a plant's CLB (e.g., technical specifications) and the NRC's regulatory process carry forward into the renewal period, are viewed as sufficient to conclude that the CLB (which represents an acceptable level of safety) will be maintained.* Functional capability is the principal emphasis for much of the CLB and is the focus of the maintenance rule and other regulatory requirements to ensure that aging issues are appropriately managed in the current license term.[404]

Thus, WestCAN's alleged concerns regarding Entergy's Quality Assurance, Corrective Action, and Design Control Programs are beyond the scope of this proceeding. The Board must deny the admission of Proposed Contention 28, as it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

25. Proposed Contentions 29-32

Proposed Contentions 29-32 do not raise new matters in controversy, but rather are offered by WestCAN as additional examples of what they perceive, in Proposed Contention 28,

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[404] Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. at 22,475 cols. 2 & 3 (emphasis added).

to be QA problems which undermine the LRA.[405] The Applicant believes these examples are more appropriately viewed as additional bases for Proposed Contention 28 and is treating them as such. Given the fundamental failure of WestCAN to satisfy the requirements of 10 C.F.R. § 2.309(f) with respect to the admissibility of Proposed Contention 28, as explained above, these additional examples should likewise be rejected in their entirety.

26. Proposed Contention 33

> Contention 33: The EIS Supplemental Site Specific Report of the LRA is misleading and incomplete because it fails to include refurbishment plans meeting the mandates of NEPA, 10 CFR 51.53 post-construction environmental reports and of 10 CFR 51.21, Issue Summary.[406]

WestCAN argues that, in Section 3.3 of the ER, Entergy states that "there are no such refurbishment activities planned and/or anticipated at this time."[407] WestCAN accuses Entergy of having omitted mention of its plans for a major refurbishment, as reflected by ordering a Replacement Reactor Vessel Heads for Indian Point Unit 2. WestCAN gleans this knowledge from a slide contained in a March 2007 presentation by Doosan Heavy Industries & Construction Co., Ltd., deeming it evidence of Applicant's "plans for refurbishment. . . ."[408] WestCAN characterizes Entergy's alleged omission as a deliberate attempt "to hide significant environmental, health and safety concerns" in violation of 10 C.F.R. §§ 50.5 and 50.9. WestCAN also asserts that Entergy has failed to evaluate the environmental impacts associated with the refurbishment in accordance with Part 51 requirements.[409]

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[405] Petition at 205-208.

[406] *Id.* at 208-209.

[407] *Id.* at 210.

[408] *Id.* at 212, Exhibit DD to WestCAN Petition.

[409] *Id.* at 208-226.

Entergy opposes admission of Proposed Contention 33 on the grounds that it: (1) lacks a proper factual or legal foundation, contrary to 10 C.F.R. § 2.309(f)(1)(ii)(v); (2) raises issues outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii); and (3) 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). As set forth in Section 3.3 of the ER, 10 C.F.R. § 51.53(c)(2) requires that a license renewal applicant's environmental report provide a description of the proposed action, "including the applicant's plans to modify the facility or its administrative control procedures *as described in accordance with Section 54.21.*" The objective of the review required by Section 54.21—the Integrated Plant Assessment or IPA—is to determine whether the detrimental effects of aging could preclude certain systems, structures, and components from performing in accordance with the CLB during the extended operation period. The results of Entergy's IPA are documented in Chapter 3 of the LRA.

LRA Section 3.1.2.1, in particular, addresses the materials, environments, aging effects requiring management, and aging management programs for the reactor coolant system components, including the reactor vessel. Significantly, Section 3.1.3 concludes:

> The reactor vessel, internals, reactor coolant system and steam generator components that are subject to aging management review have been identified in accordance with the requirements of 10 CFR 54.21. The aging management programs selected to manage the effects for the reactor vessel, internals, reactor coolant system and steam generator components are identified in Section 3.1.2.1 and in the following tables. A description of these aging management programs is provided in Appendix B, along with the demonstration that the identified aging effects will be managed for the period of extended operation.
>
> *Therefore, based on the demonstrations provided in Appendix B, the effects of aging associated with the reactor coolant system components will be managed such that there is reasonable assurance*

that the intended functions will be maintained consistent with the current licensing basis during the period of extended operation.[410]

Section 3.3 of the ER appropriately reflects the results of the IPA. It states that "[the] evaluation did not identify the need for refurbishment of structures or components *for purposes of license renewal* and there are *no such refurbishment activities planned at this time.*"[411] Section 3.3 of the ER further explains that, "[a]lthough routine plant operational and maintenance activities will be performed during the license renewal period, these activities are not refurbishments as described in Sections 2.4 and 3.1 of the GEIS and will be managed in accordance with appropriate Entergy programs and procedures."[412]

The upshot is that WestCAN's proposed contention lacks a legal or factual foundation and fails to demonstrate that the application or ER are deficient in some material respect. As discussed above, Entergy has complied fully with the applicable Part 51 and Part 54 requirements. Moreover, contrary to WestCAN's claims, Entergy has not deliberately omitted or misrepresented information in violation of Sections 50.5 or 50.9 (or their Part 54 counterparts).

WestCAN's proposed contention also is outside the scope of this proceeding insofar as it collaterally attacks generic findings made by the NRC Staff in its GEIS. Contrary to WestCAN's representation,[413] the NRC, in the GEIS, recognizes that "the license renewal rule does not require any specific repairs, refurbishment, or modifications to nuclear facilities, but only that appropriate actions be taken to ensure the continued functionality of SSC's in the scope

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[410] LRA at 3.1.11 (emphasis added).

[411] ER at 3.23 to 3.24 (emphasis added).

[412] *Id.* at 3.24.

[413] Petition at 211. WestCAN's apparent amazement that other Entergy facility license renewals similarly have not called for refurbishment, Petition at 216-18, reflects its lack of understanding of the issue, not on the validity of those applications.

of the rule.[414] Thus, to determine if an activity need be addressed in the context of "refurbishment"—a term not defined in the Commission's regulations or GEIS—it is first necessary to determine if it affects an SSC within the scope of the rule. If so, then it is necessary to determine if the action is necessary to ensure its continued functionality. Here, while the Reactor Vessel Head is "in-scope," replacement is not necessary to ensure its continued functionality. WestCAN's assertion that the heads at the Indian Point units have been degraded is without basis.[415]

Another indication of whether an activity may be within the type of activities contemplated as refurbishment is how extensive a work effort it entails. For example, the GEIS postulates that a refurbishment activity will occur "during four outages plus a single large outage devoted to major items."[416] The examples of refurbishment activities in the GEIS envision efforts of this magnitude.

Entergy's long-lead time planning, notwithstanding its order for replacement reactor vessel heads, on the other hand, stands in stark contrast to the foregoing. The LRA itself makes clear that the Reactor Vessel Head is subject to aging management through appropriate programs,[417] and head replacement is not envisioned as a necessary measure to ensure functionality of the vessel in the period of renewal. Rather, replacement of the heads is viewed by Entergy to be a discretionary matter, to be handled as a routine operational and maintenance activity.[418] A decision to proceed with fabrication of the heads, one to be made in the future, will be predicated on economic considerations related to potential cost reductions, not on concerns

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[414] GEIS § 2.4, at 2-30.

[415] Petition at 213.

[416] GEIS § 3.8.2.3 at 3-45.

[417] *See* LRA § 3.1 and Tables 3.1.2-1-IP2 and 3.1.2-1-IP3.

[418] ER § 3.3 at 3-24.

regarding continued functionality of the heads themselves.[419] For purposes of understanding the relatively routine nature of a reactor vessel head replacement, no major refurbishment outage is planned for this effort;[420] it should be recalled that vessel heads are removed from vessels and reinstalled every time a reactor is refueled.

As the GEIS indicates (and specifically accounts for), "[l]icensees may also choose to undertake various refurbishment and upgrade activities at their nuclear facilities to better maintain or improve reliability, performance, and economics of power plant operation during the extended period of operation."[421] Such activities "would be performed at the option of the licensee and . . . are in addition to those performed to satisfy the license renewal rule requirements."[422] Any decision by Entergy to replace the reactor pressure vessel heads for IPEC Units 2 and 3 for economic reasons would fall into this latter category. In fact, the document cited by WestCAN reflects Entergy's decision to purchase certain "long lead" components to facilitate *possible* replacement of the reactor pressure vessel heads in the future.

In sum, Proposed Contention 33, beyond WestCAN's *ipse dixit* assertions, fails to provide a concise statement of the alleged facts or expert opinions which support the Petition, including references to sources and documents on which it intends to reply, as required by 10 C.F.R. § 2.309(f)(1)(v), or, beyond its baseless insinuations of wrongdoing, include specific references to the application and environmental report which it disputes, as called for by 10 C.F.R. § 2.309(f)(1)(iv). Accordingly, this proposed contention should be denied in its entirety.

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[419] *See* Letter from Fred R. Dacimo, Entergy, to U.S. Nuclear Regulatory Commission, Attn: Document Control Desk, NL-08-006, "Subject: Reply to Request for Additional Information Regarding Environmental Review for License Renewal Application, Response for RAI 3, at 3-4 (Jan. 4, 2008).

[420] *Id.*

[421] GEIS § 2.6.1 at 2-33.

[422] *Id.*

27. Proposed Contention 34

> Contention 34: Stakeholders contend that accidents involving the breakdown of certain in scope parts, components and systems are not adequately addressed [sic] Entergy's LRA for Indian Point 2 and Indian Point 3[423]

In this proposed contention, WestCAN lists 21 "in scope parts, components and systems [that] are not adequately addressed in Entergy's LRA for Indian Point 2 and Indian Point 3."[424] Its catalogue of allegedly-inadequately reviewed in-scope parts, components and systems include (a) boric acid corrosion effects on valve packing and valve body-to-bonnet gaskets; (b) reactor vessel internals bolting; (c) the fuel rod control system; (d) the severe duty valves (for example, feedpump recirculation control valves, feedwater regulating valves, atmospheric dump valves, condenser dump valves, feedwater discharge check valve, feedpump discharge check valves, and pressurizer spray valves; (e) piping exposed to a briny water environment in regard to microbial corrosion and zebra mussels; (f) cable degradation, especially in underground wet circuits; (g) the reactor vessel in terms of neutron embrittlement and fracture toughness; (h) consideration of refurbishment, for example regarding feedwater heaters; (i) consideration of primary water stress corrosion cracking ("PWSCC"), for example, with respect to the heat affected zones of the stub runner/divider plate weld; (j) PWSCC in connection with Alloy 600 and its weld metals; (k) fatigue of metal components, especially in areas difficult to examine visually to reach; (m) a failure of the LRA to address beyond design basis events; (n) obsolescence in regard to the digital upgrade of rod control logic and power cabinets; (o) risks associated with low-temperature flow accelerated corrosion; (p) problems associated with availability of spare parts; (q) availability of a sufficient number of knowledgeable engineers; (r) premature failure of

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[423] Petition at 226.

[424] *Id.* at 227-233.

coatings; (s) obsolescence of original equipment installed for instrumentation, control and safety system applications; (t) neutron embrittlement of the reactor vessel; and (u) cables.[425]

Entergy opposes admission of this proposed contention. Although providing a vague enumeration of items which, in its view, have not been adequately addressed in the LRA (or ER), WestCAN has wholly failed to present a contention that satisfies the pleading requirements in terms of specificity, basis, a concise statement of the facts or expert opinions (and references) which might support its contention and on which it intends to rely, and significantly, *references* to specific portions of the Application which it contests or specific requirements it alleges have not been satisfied.[426] Indeed, other than its shopping list, WestCAN has simply ignored the fundamental requirement of the Commission's regulations regarding contentions set forth in Section 2.309. WestCAN 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.[427] As previously discussed herein, a 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.[428]

Where a petitioner, such as WestCAN, neglects to provide the requisite support for its contentions, the Board may not make assumptions of fact that favor the petitioner or supply

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[425] *Id.* at 227-233.

[426] 10 C.F.R. § 2.309(f)(1).

[427] *See* 10 C.F.R. § 2.309(f)(1)(v), CLI-96-7, 43 NRC at 262.

[428] *Catawba*, 16 NRC at 468, *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added).

information that is lacking.[429] The petitioner must explain the significance of any factual information upon which it relies.[430]

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."[431] Applying the law to Proposed Contention 34, it must be denied in its entirety.

28. Proposed Contention 35

> Contention 35 Leak-Before-Break analysis is unreliable for welds associated with high energy line piping containing certain alloys at Indian Point 2 & Indian Point 3.[432]

WestCAN generally avers that the Applicant's Leak-Before-Break ("LBB") analysis is "unreliable and does not provide an adequate aging management plan."[433] WestCAN complains that the LBB analysis "is unreliable," based on "[i]ndustry guidance and emerging regulatory funded studies" that raise a potential safety issue that is not addressed in the LRA, which relies on "out of date" studies such as WCAP-10977 and WCAP-10931.[434] WestCAN also asserts that recent events at the V.C. Summer nuclear power plant and "other PWR plants" call into question the use of LLB analyses for butt welds associated 82/182 alloys.[435] WestCAN also states that the NRC has issued Confirmatory Action Letters ("CALs") confirming licensees' commitments to put in place "more timely inspection and [weld] flaw prevention measures, more aggressive

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429 *See Palo Verde*, CLI-91-12, 34 NRC at 155.

430 *See Fansteel*, CLI-03-13, 58 NRC at 204-05.

431 *Private Fuel Storage*, LBP-98-7, 47 NRC at 181, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

432 Petition at 234.

433 *Id.*

434 *Id.* at 237-38.

435 *Id.*

monitoring of RCS leakage, and more conservative leak rate thresholds for a plant to shut down to investigate a possible [coolant water] leak."[436]

In further support of its claim, WestCAN cites to a number of 2005-2007 *Journal News* reports regarding purported "serious piping issues" at IPEC.[437] WestCAN maintains that the locations of piping systems that are susceptible to stress corrosion "may not" qualify for LBB relief, and that the LRA does not respond to the potential safety threat of stress corrosion of weld alloys.[438] WestCAN contends that the NRC must deny the LRA because it does not contain a "reliable and adequate Aging Management Plan regarding piping and welds . . . ."[439]

Entergy opposes the admission of Proposed Contention 35 on the grounds that it lacks reasonable specificity, raises issues beyond the scope of this proceeding, lacks adequate factual or expert support, and 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)(i),(iii), (v) and (vi). The proposed contention is unduly vague; WestCAN has not provided the Board or parties with sufficient notice of WestCAN's "specific grievances."[440]

WestCAN's vague references to "stress corrosion" and "weld alloys" *appear* to relate to generic NRC safety concerns regarding flaws in certain welds containing materials known as Alloy 82 and Alloy 182 in the reactor coolant systems of pressurized water reactors ("PWRs").[441] The NRC's concerns arose in October 2006, as a result of the discovery of flaws

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[436] *Id.* at 238.

[437] *Id.* at 235-237.

[438] *Id.* at 237.

[439] *Id.* at 239.

[440] *Oconee*, CLI-99-11, 49 NRC at 334.

[441] The NRC's website contains detailed information concerning reactor coolant system welds. *See* "Reactor Coolant System Weld Issues," *at* http://www.nrc.gov/reactors/operating/ops-experience/pressure-boundary-integrity/weld-issues/index.html.

in pressurizer welds at the Wolf Creek plant. In March 2007, the NRC issued CALs to 40 NRC licensees with PWR plants to confirm their commitments to complete specified inspections and other activities. Because IPEC Units 2 and 3 were not among the plants specifically affected by the weld issue, they did not receive CALs. Nonetheless, the weld-related issue addressed by the CALs, to which WestCAN is presumably alluding, is a current operating term issue. It is being addressed accordingly through the NRC's ongoing regulatory oversight program and is thus beyond the scope of this license renewal proceeding.[442]

Additionally, WestCAN's assertions that recent studies somehow render Entergy's LBB analyses invalid or outdated similarly lack any reasonably specific, expert-endorsed explanation. Specifically, WestCAN mentions a NUREG report by title,[443] but provides no specific page citations.[444] "Mere reference to documents does not provide an adequate basis for a contention."[445]

As noted above, WestCAN also cites various historical events at IPEC that it claims constitute "pipe integrity problems."[446] It utterly fails to explain, however, how, if at all, those events relate to the management of aging effects during the license renewal term or demonstrate a specific deficiency in the LRA related to the LBB analysis. For example, the events cited by WestCAN relate principally to the detection of tritium in groundwater and issues involving the

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[442] *See Turkey Point*, CLI-01-17, 54 NRC at 8-9.

[443] "Probabilities of Failure and Uncertainty Estimate Information for Passive Components – A Literature Review," NUREG/CR-6936.

[444] Petition at 238. Moreover, NUREG/CR-6936 does not even address WCAP-10977 or WCAP-10931, much less show that they are "out of date."

[445] *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998) (citation omitted).

[446] Petition at 235.

plant's steam generators.[447] WestCAN makes no attempt to explain how these past events—which clearly are operational issues that were "effectively addressed and maintained by ongoing agency oversight, review, and enforcement"[448]—relate to the management of aging of structures, systems, and components for purposes of license renewal or to the review of time-limited aging analyses.

Mere references to documents, including the *Journal News*, are not sufficient to support admission of a proposed contention.[449] 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.[450] That burden includes explaining the relevance and significance of any factual information upon which it relies.[451] WestCAN does not explain the alleged relevance or significance of the cited events to Entergy's LBB analyses.

Additionally, WestCAN makes no attempt to directly controvert the relevant portions of the LRA.[452] Section 4.7.2 of the LRA expressly addresses LBB as a time-limited aging analysis. As explained in that section, LBB analyses evaluate postulated flaw growth in piping, and consider the thermal aging of the cast austenitic stainless steel ("CASS") piping and fatigue transients that drive flaw growth over the operating life of the plant.[453] Section 4.7.2 concludes:

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447 As indicated in LRA Section 4.7.2, LBB involves reactor coolant loop pipes. None of the historical events cited by WestCAN involves reactor coolant loop pipes. Thus, the events cited by WestCAN are irrelevant to LBB analysis and provide no factual basis for its contention.

448 *Millstone*, CLI-04-36, 60 NRC at 638 (citing *Turkey Point*, CLI-01-17, 54 NRC at 9).

449 Vague references to documents do not meet the requirement in 10 C.F.R. § 2.309(f)(1)(v); *i.e.*, the Petitioner must identify specific portions of the documents on which it relies. *See Seabrook*, CLI-89-3, 29 NRC at 240-41.

450 *See Yankee*, CLI-96-7, 43 NRC at 262.

451 *See id.*

452 A contention that does not *directly controvert a position taken by the applicant in the application* is subject to dismissal. *See Comanche Peak*, LBP-92-37, 36 NRC at 384.

453 LRA at 4.7-1.

> The calculated fatigue crack growth for 40 years was very small (less than 50 mils) regardless of the material evaluated. As noted in Section 4.3.1, the projections for 60 years of operation indicate that the numbers of significant transients for IP2 or IP3 will not exceed the design analyzed values. Thus, the IP2 and IP3 analyses will remain valid during the period of extended operation in accordance with 10 CFR 54.21(c)(1)(i).[454]

WestCAN ignores Section 4.7.2 of the LRA, and does not controvert the information and conclusions set forth therein, as required by 10 C.F.R. § 2.309(f)(1)(vi), to show that a genuine dispute exists with the applicant on a material issue of law or fact. Plainly, no such dispute exists here. The various events cited by WestCAN bear no discernible or reasonable relationship to thermal aging of CASS or fatigue crack growth—and it makes no attempt to elucidate such a relationship. Instead, it baldly asserts that "[l]ocations of piping systems that are susceptible to stress corrosion *may* not qualify for LBB relief."[455] Contrary to Section 2.309(f)(1)(i) and (v), WestCAN fails to identify the piping systems purportedly at issue, and presents no factual or expert support its conclusory assertions regarding stress corrosion.[456] Nor does it adequately explain the basis for its contention. Rather, it raises current operating term issues that are outside the scope of this proceeding, fails to provide a concise statement of alleged facts or expert opinion that support the contention, and fails to provide sufficient information to show that a genuine dispute exists with the Applicant. For all of these reasons, Proposed Contention 35 is inadmissible pursuant to 10 C.F.R. § 2.309(f).

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[454] *Id.* at 4.7-2.

[455] Petition at 237.

[456] The LRA identifies numerous programs that will be used to address the issue of stress corrosion cracking as it relates to aging management during the period of extended operation. Such programs include, for example, the Water Chemistry – Primary and Secondary, the Inservice Inspection Program, and the Thermal Aging and Neutron Irradiation Embrittlement of Cast Austenitic Stainless Steel (CASS) Program. Petitioner fails to identify any of these programs, let alone suggest that they are deficient in any way.

29. Proposed Contention 36

Contention 36: Entergy's License Renewal Application Does Not Include an Adequate Plan to Monitor and Manage Aging of Plant Piping Due to Flow-Accelerated Corrosion During the Period of Extended Operation.[457]

WestCAN asserts that the LRA does not include an adequate plan to monitor and manage the aging of plant piping due to FAC, as required by 10 C.F.R. § 54.21(a)(3). WestCAN cites Entergy's proposal, consistent with the GALL Report, to use a computer model called CHECWORKS to determine the scope and the frequency of inspections of components that are susceptible to FAC.[458] WestCAN contends that the CHECWORKS model cannot be used to determine inspection frequency at IPEC Unit 2 because that unit (1) recently increased its operating power level by about 5 percent, and (2) experienced an unprecedented steam generator tube rupture event.[459] As such, WestCAN states that "[t]he profiles required for CHECWORKS and the grid check points are unsubstantiated based upon these two significant changes."[460] WestCAN concludes that ". . . Entergy cannot assure the public that the minimum wall thickness of carbon steel piping and valve components will not be reduced by FAC to below ASME code limits during the period of extended operation."[461]

Proposed Contention 36 is inadmissible because it fails to satisfy the contention admissibility criteria specified in 10 C.F.R. § 2.309(f)(1). First, the contention does not directly controvert the LRA, and thereby fails to establish a genuine dispute with the Applicant, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Second, it lacks adequate factual or expert opinion support, contrary to 10 C.F.R. § 2.309(f)(1)(v). Additionally, insofar as it challenges Entergy's reliance

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457 Petition at 239.

458 *Id.* at 242.

459 *Id.*

460 *Id.*

461 Petition at 243.

on the CHECWORKS code, it raises issues outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). Finally, Proposed Contention 36 fails to raise a concern that is material to the outcome of the Staff's review of the LRA, contrary to 10 C.F.R. § 2.309(f)(1)(iv). Thus, Proposed Contention 36 is inadmissible in its entirety.

A contention that does not directly controvert a position taken by the applicant, in the application, is subject to dismissal.[462] Here, Petitioner has failed to clear that hurdle, by *not* demonstrating that the LRA is deficient is some *material* respect.[463] The IPEC FAC Program complies with 10 C.F.R. § 54.21, as well as the GALL Report, contrary to Petitioner's claim.[464] As the LRA states, the IPEC FAC Program is consistent with the program described in the Section XI.M17, "Flow-Accelerated Corrosion," of the GALL Report.[465] As described in the GALL Report, an acceptable FAC program:

> relies on implementation of the [EPRI] guidelines in the Nuclear Safety Analysis Center (NSAC)-202L-R2 for an effective [FAC] program. The program includes performing (a) an analysis to determine critical locations, (b) limited baseline inspections to determine the extent of thinning at these locations, and (c) follow-up inspections to confirm the predictions, or repairing or replacing components as necessary.[466]

The GALL Report further states that, "[t]o ensure that all the aging effects caused by FAC are properly managed, the program includes the use of a predictive code, such as CHECWORKS, that uses the implementation guidance of NSAC-202L-R2 to satisfy the criteria

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[462] *Comanche Peak*, LBP-92-37, 36 NRC at 384.

[463] *Turkey Point*, LBP-90-16, 31 NRC at 521 & n.12.

[464] Petition at 243.

[465] LRA, App. B at B-54.

[466] GALL Report, Vol. 2, Rev. 1, Ch. XI, at XI M-61.

specified in 10 C.F.R. Part 50, Appendix B" concerning control of special processes.[467] Significantly, the GALL Report states as follows with respect to CHECWORKS:

> CHECWORKS or a similar predictive code is used to predict component degradation in the systems conducive to FAC, as indicated by specific plant data, including material, hydrodynamic, and operating conditions. CHECWORKS is acceptable because it provides a bounding analysis for FAC. CHECWORKS was developed and benchmarked by using data obtained from many plants. The inspection schedule developed by the licensee on the basis of the results of such a predictive code provides reasonable assurance that structural integrity will be maintained between inspections.[468]

Thus, Entergy's use of CHECWORKS is consistent with longstanding industry practice and the GALL Report. The NRC has stated explicitly that "[a]n applicant may reference the GALL report in a license renewal application to demonstrate that the programs at the applicant's facility correspond to those reviewed and approved in the GALL report and that no further staff review is required."[469] Indeed, the GALL Report "has been referenced in numerous license renewal applications [] as a basis for aging management reviews to satisfy the regulatory criteria contained in 10 CFR [§ 54.21]."[470]

Additionally, to the extent Proposed Contention 36 contests the adequacy of CHECWORKS, it is a direct challenge to an NRC-approved method. The GALL Report, like other NRC guidance, is intended to facilitate licensee compliance with NRC requirements in Part 54 and to establish uniformity in the Part 54 regulatory process. As noted above, the GALL Report states that CHECWORKS is acceptable because it provides a bounding analysis for FAC,

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[467] *Id.*

[468] *Id.* at XI M-61 to M-62.

[469] *Id.* at iii.

[470] GALL Report, Vol. 1, Rev. 1, at 2.

was developed and benchmarked by using data obtained from many plants, and provides reasonable assurance that structural integrity will be maintained between inspections.

WestCAN also has *not* provided adequate factual or expert support to support the admission of its proposed contention. Petitioner provides no reasoned explanation or technical analysis to support its claim that "the CHECWORKS model cannot be used to determine the inspection frequency at [IPEC]."[471] Petitioner baldly asserts that it could take ten or more years of inspection data collection to properly benchmark the CHECWORKS models for use at IPEC.[472] Petitioner, however, provides absolutely no definition of "benchmarking," nor does it describe what that process entails. More importantly, WestCAN provides no expert opinion or references to documents to support its conclusory assertions.

The limited "factual support" furnished by WestCAN in its Petition is grossly inadequate, and does not pass muster under 10 C.F.R. § 2.309(f)(1)(v). For example, WestCAN includes an excerpt from the transcript of a January 26, 2005 meeting of the ACRS Thermal Hydraulic Phenomena Subcommittee (specifically an exchange between Rob Alersick of Entergy and Dr. Graham Wallis of the ACRS).[473] While that excerpt contains discussion of CHECWORKS, WestCAN makes no meaningful attempt to "connect the dots" by explaining how that discussion serves to establish a deficiency in the LRA. The January 2005 meeting concerned a request for an EPU of 8 percent (roughly twice the recent stretch power uprates approved for IPEC) at the Waterford Plant. Petitioner makes no attempt to explain how the plant-specific data discussed

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[471] Petition at 242.

[472] *Id.* at 243.

[473] Transcript of ACRS Thermal Hydraulic Phenomena Subcommittee Meeting (Jan. 26, 2005) (*available at* ADAMS Accession No. ML050400613) ("ACRS Jan. 26, 2005 Tr."). WestCAN incorrectly identifies the date of this meeting as January 26, 2003.

during that ACRS meeting are relevant to the Indian Point FAC Program and Entergy's use of CHECWORKS for purposes of license renewal.

Moreover, when put in context, the statements quoted by Petitioner cannot be construed to mean that Waterford's reliance on CHECWORKS was unacceptable, let alone Entergy's use of the model. Petitioner simply ignores subsequent exchanges between members of the ACRS Subcommittee and industry or NRC representatives that provide important additional insights into the Waterford plant's use of CHECWORKS. The gist of that dialogue is that, while CHECWORKS sometimes underestimates wear rates, it also yields precise and accurate results in many cases, and is not the only tool or source of information relied upon by a licensee in determining inspection priorities.[474] Moreover, licensees can and do make appropriate adjustments both with respect to the scope of their inspections and calibration of their CHECWORKS models.[475] Thus, the statements cited by Petitioner do not directly controvert a position taken by Entergy in its Application.

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[474] *See, e.g.*, ACRS Transcript at 240-48; 355-57.

[475] For example, during the meeting, Mr. Rob Aleksick of CSI Technologies, an individual whom, by his own account, is very familiar with FAC issues and the use of CHECWORKS, stated during the meeting:

> Some [CHECWORKS] runs results are imprecise and some more precise. And we look at both accuracy and precision. Programmatically we account for that, that reality, by treating those runs that have what we call well calibrated results, *i.e.*, precise and accurate results coming out of the model that are substantiated by observations, we treat those piping segments differently programmatically than we do areas where the model is less good. If the model results do not correlate well with reality, different actions are taken primarily increased inspection coverage to increase our level of confidence that those systems can continue to operate safely.
>
> In addition to the CHECWORKS results many other factors are considered to assure that the piping retains its integrity, chief among these are industry experience as exchanged through the EPRI sponsored CHUG group. Plant experience local to Waterford in this case. And the FAC program owner maintains an awareness of the operational status of the plant so that, for example, modifications or operational changes that occur are taken into account in the inspection of the secondary site FAC susceptible piping.

ACRS Transcript at 245-56.

WestCAN's statement that IPEC has "a track record of broken pipes due to corrosion" similarly fails to provide the requisite factual support for its contention.[476] WestCAN provides no documentary references to substantiate this claim, and does not explain how its assertion bears on the adequacy of the IPEC FAC Program or the reliability of the CHECWORKS model.

Finally, Proposed Contention 36 fails to explain how the asserted deficiencies in CHECWORKS present a safety concern and/or are material to the outcome of the Staff's licensing review. 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.[477] Here, Petitioner has failed to establish such a link. In any case, as noted above, the GALL Report states that CHECWORKS is acceptable.

For the foregoing reasons, Proposed Contention 36 wholly fails to satisfy the requirements of 10 C.F.R. § 2.309(f) and should be denied.

30. Proposed Contention 37

> Contention 37 The LRA and the UFSAR's for Indian Point inadequately address the currently existing (known and unknown) environmental affects [sic] and aging degradation issues of ongoing leaks, and fail to lay out workable aging management plans for leaks and critical safety systems.[478]

The thrust of WestCAN's contention is that the AMPs for underground piping and tanks are insufficient and will result in leakage of radioactive liquids and/or other fluids.[479] Petitioner also claims that the aging management of these underground systems does not include adequate inspection, maintenance, remediation, and monitoring programs.[480]

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476 Petition at 243.

477 *Millstone*, LBP-04-15, 60 NRC at 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004).

478 Petition at 244.

479 *Id.* at 244-262.

480 *Id.* at 252.

As an initial matter, recent decisions in the ongoing license renewal proceeding for the Pilgrim Nuclear Power Station ("Pilgrim") held that ongoing monitoring for leakage of radioactive liquids is outside of the scope of license renewal:

> As we have said on numerous occasions, *monitoring is not proper subject matter for license extension contentions*. Thus, where Pilgrim Watch's original formulation of its contention focused upon the potential for surface and groundwater contamination from radioactivity contained by certain of the Applicant's buried pipes and tanks, that *subject is a matter managed by the Applicant's ongoing monitoring programs*, and is therefore *outside the scope of matters properly considered in license extension hearings*.[481]

The Board further clarified what is in the scope of a license renewal proceeding by stating:

> Nonetheless, imbedded in Pilgrim Watch's original contention was the concept that the application and the Applicant's AMPs appear to set out programs which enable the Applicant to determine whether those buried pipes and tanks containing radioactive fluids are leaking at such great rates that they would fail to satisfy their respective safety functions – and *that* inquiry is proper subject matter for a challenge to a license extension application.[482]

This holding by the Pilgrim Board raises a number of important issues that undercut WestCAN's Proposed Contention 37 and clearly demonstrate that Petitioner has not proffered an admissible contention with respect to leakage from buried components.

First, to the extent that WestCAN's contention alleges that the AMPs for underground piping do not include "adequate monitoring," as clearly stated by the Pilgrim Board, "monitoring is not proper subject matter for license extension contentions."[483] Moreover, such issues are outside the scope of license renewal, because they are managed by ongoing monitoring

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

[482] *Id.*

[483] *Id.*

programs.[484] Therefore, because this proposed contention is focused on monitoring of leakage from underground piping and on radioactive leakage into surface and groundwater, Proposed Contention 37 must fail as it does not meet the standard of an admissible contention set forth in 10 C.F.R. § 2.309(f)(1)(iii), which requires that a contention fall within the scope of the license renewal proceeding.

WestCAN also claims that the AMP is inadequate because it does not provide for adequate inspection, leak prevention, and monitoring with respect to underground pipes, tanks, and transfer canals, including those for IP1 to the extent the systems are used by Units 2 and 3.[485] In addition to being outside of the scope of license renewal, as discussed above, this allegation is deficient for a variety of reasons. First, WestCAN fails to address the Buried Piping and Tanks Inspection Program located in LRA Appendix B.1.6. This program is consistent with the program recommended by the NRC's GALL Report.[486] LRA Appendix B.1.6 even states that "[t]he Buried Piping and Tanks Inspection Program will be consistent with program attributes described in the GALL Report, Section XI.M34, Buried Piping and Tanks Inspection." WestCAN provides no arguments to dispute this, much less even acknowledge the information set forth in the LRA. Moreover, Program Element 2, Preventive Actions, of the section of the GALL Report on "Buried Piping and Tanks Inspection" expressly states:

> In accordance with industry practice, underground piping and tanks are coated during installation with a protective coating system, such as coal tar enamel with a fiberglass wrap and a kraft paper outer wrap, a polyolifin tape coating, or a fusion bonded epoxy coating to protect the piping from contacting the aggressive soil environment.[487]

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[484] *Id.*

[485] Petition at 250-261.

[486] GALL Report, Vol. 2, Rev. 1, at § XI.M34.

[487] *Id.*

The AMPs for IP2 and IP3 adhere to this requirement, which provides the protection required by the NRC guidance.

Further, WestCAN fails to acknowledge the existence of the many other programs for aging management of these components. For example, management of loss of material for internal surfaces of buried piping and tanks is managed by Water Chemistry Control-Primary and Secondary Program (LRA Appendix B.1.41), the Service Water Integrity Program (LRA Appendix B.1.34), the Periodic Surveillance and Preventive Maintenance Program (LRA Appendix B.1.29), or the One-Time Inspection Program (LRA Appendix B.1.27), as applicable, based on material-environment combinations. Again, Petitioner ignores the content of the LRA and fails to take specific issue with it.[488]

With respect to leakage attributable to Indian Point Unit 1, Section 1.2 of the LRA explains the treatment of Unit 1 systems and components for purposes of the instant LRA:

> Although the extension of the IP1 license is not a part of this license renewal application, IP1 systems and components interface with and in some cases support the operation of IP2 and IP3. Therefore, IP1 systems and components were considered in the scoping process (see Section 2.1.1). The aging effects of Unit 1 SSCs within the scope of license renewal for IP2 and IP3 will be adequately managed so that the intended functions will be maintained consistent with the current licensing basis throughout the period of extended operation.[489]

Thus, IP1 systems and components are relevant to this license renewal proceeding only to the extent they are within the scope of the AMR for IP2 and IP3 systems and components.

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[488] *See Oconee*, CLI-99-11, 49 NRC at 338 (noting that "Petitioners must articulate at the outset the specific issues [of the license application] that they wish to litigate as a prerequisite to gaining formal admission as parties" and providing that "it is the license application . . . that is at issue in our adjudications").

[489] LRA at 1-7.

WestCAN also suggests that leaks at the Indian Point units have been discovered by happenstance, and that they have gone undetected for an extended period of time.[490] WestCAN provides absolutely no reasoning for why this statement supports Proposed Contention 37. Moreover, the leaks WestCAN identifies in support of this proposed contention[491] have one thing in common—they have nothing in common relevant to Part 54. WestCAN itself recognizes as much, noting leaks attributable to a variety of non-age-related factors.[492]

In addition, WestCAN's posited "aging issues associated with leaking pipe and radioactive effluent"[493] suggest WestCAN's objective of contesting matters, under the rubric of Proposed Contention 37, goes well beyond aging management programs—health effects, structural integrity of the spent fuel pool, water chemistry, and the like. Such vaguely stated and unbounded issues simply do not comport with the level of specificity called for by 10 C.F.R. § 2.309(f).

Accordingly, Proposed Contention 37 addresses a matter subject to ongoing monitoring programs, beyond the scope of matters appropriately considered in the context of license renewal, and otherwise fails to satisfy 10 C.F.R. § 2.309(f). Thus this contention should be denied in its entirety.

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[490] Petition at 251.

[491] *Id.* at 257-58.

[492] *Id.* at 246.

[493] *Id.* at 253.

31. Proposed Contention 38

Contention 38: Microbial action potentially threatens all the stainless steel components, pipes, filters and valves at Indian Point (issue 99 of EIS).[494]

In Proposed Contention 38, WestCAN alleges that the Aging Management Program for microbial induced corrosion ("MIC") set forth in the LRA is inadequate, and that the statement regarding an absence of MIC impacts is a misrepresentation.[495] This proposed contention should be rejected, as explained below, because WestCAN's discussion of this matter is long on rhetoric, and short on substance.

Beginning with the purported inaccuracy of Entergy's representation about the impacts of MIC, WestCAN's assertion is based on third-hand statements made by some unidentified individual under unknown circumstances.[496] Rank hearsay of this sort cannot constitute support for admission of a contention, as it lacks the requisite basis and specificity called for by 10 C.F.R. § 2.309(f)(1). Moreover, beyond its vague statement of a contention, WestCAN fails to shoulder its burden to identify any shortcoming of the aging management programs in fact included in the LRA.[497] Under these circumstances, Proposed Contention 38 should be denied in its entirety.

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494 *Id.* at 262.

495 *Id.* at 262-64.

496 *Id.* at 263 (asserting that "eyewitness evidence" from "underwater divers" suggests that the traveling water screens contained pit marks and holes).

497 *See Oconee*, CLI-99-11, 49 NRC at 338 (noting that "Petitioners must articulate at the outset the specific issues [of the license application] that they wish to litigate as a prerequisite to gaining formal admission as parties" and providing that "it is the license application . . . that is at issue in our adjudications).

32. Proposed Contention 39

> Contention 39: Indian Point 1 leaks constitute a violation of SafeStor [sic] and since components of IP1 are used in the operation of Indian Point 2, the LRA's failure to address these leaks and the interfacing IP 1-IP2 systems renders the LRA inaccurate, incomplete, and invalid.[498]

WestCAN, again without regard for or recognition of the content of the LRA, implies that the LRA completely ignores Indian Point Unit 1, and its possible bearing on renewal of the Indian Point Units 2 and 3 operating licenses. That is simply not the case. Section 1.2 of the LRA expressly states the following:

> Although the extension of the IP1 license is not a part of this license renewal application, IP1 systems and components interface with and in some cases support the operation of IP2 and IP3. Therefore, IP1 systems and components were considered in the scoping process (see Section 2.1.1). The aging effects of Unit 1 SSCs within the scope of license renewal for IP2 and IP3 will be adequately managed so that the intended functions will be maintained consistent with the current licensing basis throughout the period of extended operation.[499]

IP1 components are included in the aging management reviews of IP2 components, as necessary, which, as discussed above, satisfies NRC requirements. Yet, WestCAN does not address the foregoing or provide other information identifying a particular dispute regarding material issues related to the LRA. Moreover, its baseless accusation that Entergy is engaged in "deliberate pollution,"[500] cannot stand unchallenged—the Applicant has taken appropriate measures to address spent fuel pool leaks to ensure that the public health and safety continues to be protected.

In light of the foregoing, it is clear that Proposed Contention 39 does not satisfy the requirements of 10 C.F.R. §§ 2.309(f), and should be denied.

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[498] Petition at 264.

[499] LRA at 1-7.

[500] Petition at 266.

33. Proposed Contention 40 (Mislabeled in Petition as a second Contention 36)

> Contention 40: The LRA submitted fails to include Final License Renewal Interim Staff Guidance. For example, LR-ISG 2006-03, "Staff Guidance for preparing Severe Accident Mitigation Alternatives."[501]

This proposed contention is identical to WestCAN's Proposed Contention 14. For reasons fully discussed by Entergy in its response to Proposed Contention 14 above, Entergy likewise opposes admission of this duplicate contention.

34. Proposed Contention 41

> Contention 41; Entergy's high level, long-term or permanent, nuclear waste dump on the bank of the Hudson River.[502]

WestCAN, in light of alleged uncertainties in the availability of a high-level waste repository as well as low-level waste storage needs, proffers a contention that sweeps up for consideration several disparate issues it contends must be decided. First, it asserts that the EIS for Indian Point License Renewal needs to address the costs and impacts of indefinite storage of nuclear waste.[503] Second, it asserts that an aging management plan for such waste is called for and that the site must be reviewed as a permanent high-level waste storage site. And, third, it asserts that the structural integrity of the spent fuel pools needs to be evaluated in light of identified leaks, and an aging management provided.[504] Thus, what starts out as an apparent environmental contention segues, without substantive explanation of its transition, to an issue of aging management.

This contention, to the extent it raises an environmental issue related to storage of both high-level and low-level radioactive waste, is, in effect, a challenge to 10 C.F.R. Part 51, in

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[501] *Id.* at 267.

[502] *Id.* at 268.

[503] *Id.*

[504] *Id.* at 268-280.

particular to the determinations codified in Table B-1, Appendix B to Subpart A, that these are Category 1 issues, not requiring consideration in individual license renewal proceedings. As the Licensing Board explained in the *Oconee* license renewal proceeding:

> The Commission's regulations provide that applicants for operating license renewals do not have to furnish environmental information regarding the onsite storage of spent fuel or high-level waste disposal, low-level waste storage and disposal, and mixed waste storage and disposal. *See* 10 C.F.R. §§ 51.53(c)(2), 51.53(c)(3)(i), and 51.95. *See also* the presumptions in 10 C.F.R. § 51.23 regarding high-level waste permanent storage; and *see* Table B-1 in Appendix B to Subpart A of Part 51, "Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants" (which includes specific findings on offsite radiological impacts of spent fuel and high-level waste disposal, low-level waste storage and disposal, mixed waste storage and disposal, and onsite spent fuel storage). Each of these areas of waste storage is barred as a subject for contentions because 10 C.F.R. § [2.335] provides that Commission rules and regulations are not subject to attack in NRC adjudicatory proceedings involving initial or renewal licensing.[505]

In affirming the Board's ruling on contention admissibility, the Commission stated that "Category 1 issues include the radiological impacts of spent fuel and high-level waste disposal, low-level waste storage and disposal, mixed waste storage and disposal, and onsite spent fuel."[506] The Commission added that "[a]n applicant's environmental report [for license renewal] therefore need not discuss any aspect of the storage of spent fuel for the facility within the scope of [these] generic determinations."[507]

The *Oconee* Licensing Board's reference to the Commission's "presumptions" regarding high-level waste permanent storage" is a reference to the Commission's "Waste Confidence Rule," codified at 10 C.F.R. § 51.23, which states:

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[505] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381, 391 (1998).

[506] *Oconee*, CLI-99-11, 49 NRC at 343.

[507] *Id.* at 343-44 (internal quotes and citations omitted).

> [I]f necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations.[508]

The Waste Confidence Rule likewise in not subject to challenge in an individual adjudication absent a waiver. Accordingly, Proposed Contention 41 must be rejected as an improper collateral attack on the Commission's Part 51 regulations, as they pertain to the Commission's generic Category 1 findings on the impacts of nuclear waste and spent fuel storage and the Commission's Waste Confidence Rule. WestCAN has failed to justify treating these matters otherwise in this proceeding and cannot challenge the Commission's generic findings here.

Apart from its impermissible challenge to generic NRC findings codified in 10 C.F.R. Part 51, Proposed Contention 41 fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1). As explained earlier, a petitioner must "provide a specific statement of the issue of law or fact to be raised or controverted."[509] 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]."[510] Namely, an "admissible contention must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[511] The contention rules "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.'"[512] Further, a petitioner must provide "a brief explanation of the basis

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[508] 10 C.F.R. § 51.23

[509] *Id.* § 2.309(f)(1)(i).

[510] *Oconee*, CLI-99-11, 49 NRC at 338.

[511] *Millstone,* CLI-01-24, 54 NRC at 359-60.

[512] *McGuire/Catawba*, CLI-03-17, 58 NRC at 424 (quoting *Oconee*, CLI-99-11, 49 NRC at 337-39).

for the contention."[513] This includes "some sort of minimal basis indicating the potential validity of the contention"[514] or "sufficient foundation" to "warrant further exploration."[515] The brief 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."[516] The Board, however, must determine the admissibility of the contention itself, not the admissibility of individual "bases."[517] This proposed contention fails to satisfy this requirement—WestCAN's references are to generic studies which WestCAN has failed to make specifically relevant to Indian Point, save by its unsupported assertions. Also in this regard, 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.[518] WestCAN has not done so here.

For all of the foregoing reasons, Proposed Contention 41 must be denied in its entirety.

35. Proposed Contention 42

> Contention 42 Dry Cask Storage (Issue 83) The Independent Spent Fuel Storage Installation (SFSI) [sic] being constructed at Indian Point for the purpose of holding the overflow of nuclear waste on site for decades, and probably more than a century, must be fully delineated and addressed in the aging management plan and, moreover, constitutes an independent licensing issue.[519]

In a variation of the theme noted in Proposed Contention 41, WestCAN first challenges the ER because of its failure to address spent fuel storage. Although noting here that this is

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[513] 10 C.F.R. § 2.309(f)(ii).

[514] Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170.

[515] *Seabrook*, ALAB-942, 32 NRC at 428 (footnote omitted).

[516] *Seabrook*, ALAB-899, 28 NRC at 97, *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991).

[517] *See NEF*, LBP-04-14, 60 NRC at 57 ("licensing boards generally are to litigate 'contentions' rather than 'bases'").

[518] *See* 10 C.F.R. § 2.309(f)(1)(v); *Yankee*, CLI-96-7, 43 NRC at 262.

[519] Petition at 280.

codified in Part 51 as a Category 1 issue, WestCAN, without any foundation, urges that it here be treated as a Category 2 issue.[520] None of the grounds it advances is sufficient. The contention is inadmissible for the reasons set forth above in response to Proposed Contention 41.

And like the preceding proposed contention, Proposed Contention 42 transitions to pose a different contention regarding the safety of the ISFSI to be constructed at Indian Point.[521] This matter is clearly beyond this scope of this license renewal proceeding, contrary to 10 C.F.R. § .309(f)(1)(iii), and should be rejected on that basis alone. WestCAN subsequently leaps to proposing consideration of an issue speculating on the need for additional spent fuel storage capacity in the future.[522]

Once again, WestCAN's proposed contention 42 is flawed in terms of the necessary specificity, devoid of factual support, and lacks any reference to the underlying LRA and ER. WestCAN'ss Proposed Contention 42 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(i), (v), and (vi), and should be denied.

36. Proposed Contention 43

> Contention 43 The closure of Barnwell will turn Indian Point into a low level radioactive waste storage facility, a reality the GEIS utterly fails to address, and a fact which warrants independent application with public comment and regulatory review.[523]

WestCAN, in Proposed Contention 43, contends that with the June 2008 closure of the Barnwell low-level waste storage facility, the Indian Point site will become a "low level radioactive waste storage facility," which is not addressed in the GEIS for license renewal, and

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[520] *Id.* at 280-282.

[521] *Id.* at 282-283.

[522] *Id.* at 283-286.

[523] *Id.* at 286.

for which a separate license is required.[524] As discussed before, conclusory statements cannot provide "sufficient" support for a contention.[525] 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.'"[526] But this is just what WestCAN has done in regard to Proposed Contention 43.

What might happen to low-level waste from Indian Point if Barnwell in fact closes its doors, or what actions Entergy might have to take in that eventuality are, essentially, speculative matters, going well beyond the scope of this license renewal proceeding. Accordingly, Proposed Contention 43 should be denied.

37. Proposed Contention 44

> Contention 44 The Decommissioning Trust Fund is inadequate and Entergy's plan to mix funding across Unit 2, 1 and 3 violates commitments not acknowledged in the application and 10 CFR rule 54.3.[527]

Citing 10 C.F.R. §§ 50.75 and 54.3, WestCAN contends that the costs for complete decommissioning and cleanup of the site must be adjusted to reflect significant changes in the contamination streams, including the large underground radioactive leaks.[528] Shifting to a different topic altogether, WestCAN also expresses concern about the "forced onsite storage of radioactive waste streams," as well as the prospect that "the Applicant and NRC will continue to use the Indian Point site as a radioactive waste dump for both LLRW and HLRW."[529] WestCAN asserts that "the storage of an additional 20 years of waste, either in the spent fuel pools or in dry

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[524] *Id.* at 286-90.

[525] *See American Centrifuge Plant*, CLI-06-10, 61 NRC at 472.

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

[527] Petition at 290.

[528] *Id.* at 291.

[529] *Id.* at 297.

cask storage, increases the risk to human health and safety far beyond the original Design Basis for this site . . . ."[530] WestCAN further accuses the NRC of "failing to provide the public with the protection standards that would be in place if a long term LLRW or HLRW storage facility were cited [sic] at the facility."[531]

In making these arguments, WestCAN provides no reference to relevant portions of the application (including the UFSAR or ER) or provides any expert support.[532] Moreover, Entergy opposes admission of Proposed Contention 44 because it raises issues that are beyond the narrow scope of this proceeding and immaterial to the Staff's license renewal findings. The contention also lacks adequate factual or expert support and fails to establish a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Finally, the contention improperly challenges the NRC's Part 54 and Part 51 regulations in contravention of 10 C.F.R. § 2.335.

As discussed above, financial matters such as an applicant's financial qualifications or decommissioning funding arrangements are outside the scope of license renewal. For that reason, the *Susquehanna* Licensing Board rejected arguments similar to those made by WestCAN here; *i.e.*, assertions that the applicant will be unable to meet its financial obligations associated with decommissioning of the facility.[533] Clearly, decommissioning after the plant has ceased to operate has nothing to do with the management of equipment aging or time-limited aging analyses during a renewed operating term.

In support of its contention, WestCAN cites 10 C.F.R. § 50.75, several recent decommissioning funding reports submitted by Entergy to the NRC, and a 2000 Commission

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[530] *Id.* at 297.

[531] *Id.* at 297.

[532] *Id.* at 290-303.

[533] *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-04, 65 NRC 281, 313-15 (2007).

license transfer adjudicatory decision.[534] In actuality, these references reinforce the conclusion that Proposed Contention 44 cannot be admitted because it raises issues that are adequately dealt with by regulatory processes on an ongoing basis today. The NRC's decommissioning funding regulations—not its license renewal regulations—are specifically designed to ensure that, when a plant ceases permanent operations, sufficient funds are available to decommission the facility in a manner that protects the public health and safety. The NRC regulations accomplish this by requiring (1) adequate financial responsibility early in plant life, (2) periodic adjustments, and (3) an evaluation of specific provisions close to the time of decommissioning.[535]

As reflected in 10 C.F.R. § 50.75(f)(1), the NRC requires every power reactor licensee to submit, at least biennially, a report on the status of decommissioning funding for each licensed power reactor owned in whole or in part by the licensee. Those status reports (to which WestCAN refers) provide information related to: updated NRC minimum decommissioning funding levels, the amount of funds accumulated to the end of the preceding calendar year, a schedule of annual amounts remaining to be collected (in the case of utilities making periodic contributions to their decommissioning funds), assumptions related to decommissioning cost escalation and fund earnings, contracts relied upon, changes since the previous report to methods of providing financial assurance of adequate decommissioning funding, and material changes to decommissioning trust agreements. Thus, WestCAN's reliance on Section 50.75 and Entergy's decommissioning funding status reports offer no support for its contention. In fact, those very requirements ensure that a licensee's decommissioning funds are continually monitored and adjusted (as necessary) during the initial and renewed operating terms to ensure that decommissioning funding remains adequate.

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[534] Petition at 291-93.

[535] 10 C.F.R. § 50.75.

WestCAN's claim that the Commission's 2000 decision (CLI-00-22) in the Indian Point/Fitzpatrick license transfer proceeding supports the admissibility of Proposed Contention 44 is erroneous.[536] WestCAN erroneously ascribes the following statement to the Commission: "[R]egarding decommissioning Stakeholders have the right to seek intervenor status in any application for license renewal or extension that Entergy Indian Point may file."[537] Based on this mischaracterization, WestCAN asserts that "the issue of whether there are adequate decommissioning funds is within [the] scope of the licensing renewal proceedings."[538]

Contrary to WestCAN's claim, the Commission, in CLI-00-22, did *not* hold that decommissioning funding issues are within the scope of a license renewal proceeding. In that proceeding, the Commission rejected certain arguments made by the Town of Cortlandt, New York in its intervention petition. In particular, the Town of Cortlandt had claimed that Entergy would be more likely to apply for license renewal than the Power Authority of the State of New York (PASNY) and "thereby delay Cortlandt's enjoyment of the full panoply of health-and-safety benefits associated with the expected decommissioning of all three units."[539] Cortlandt argued that any delay in decommissioning would "adversely affect Cortlandt's health and safety interests by subjecting Cortlandt and its citizens to the possibility of increased radiological exposure as a result of both the continued operation of the plant and the continued (and possibly expanded) onsite storage of spent fuel."[540] For these reasons, Cortlandt asserted that the NRC

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536 *Power Authority of the State of New York and Entergy Nuclear Indian Point 3 LLC and Entergy Nuclear Operations, Inc.* (James A. Fitzpatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No 3), CLI-00-22, 52 NRC 266 (2000).

537 Petition at 293.

538 *Id.*

539 *Id.* at 304.

540 *Id.*

Staff's assessment of financial ability should include an evaluation of the transferees' ability to decommission Indian Point 3—both for the current term and for the license renewal term.[541]

The Commission held that Cortlandt's concerns did not fall within the scope of the license transfer proceeding.[542] The Commission reasoned that (1) a license renewal application from Entergy was not pending and (2) Entergy was no more likely to seek renewal than PASNY. *Id.* at 304-05. While the Commission acknowledged Cortlandt's "right to seek intervenor status in any application for license renewal or license extension that Entergy Indian Point may file," it did not hold that issues related to decommissioning, decommissioning funding, or the impacts of spent fuel storage are subject to adjudication in a license renewal proceeding.[543]

In this proceeding, WestCAN makes analogous arguments regarding the NRC's alleged failure to consider the costs and impacts of "forced onsite storage of radioactive waste streams."[544] To the extent WestCAN's claims relate to the adequacy of decommissioning funding for IPEC, they are not litigable in this proceeding for the reasons set forth above. Insofar as WestCAN's arguments might be construed to relate to the Commission's generic consideration of the impacts of onsite waste storage in Part 51, they are likewise not litigable in this proceeding, as discussed above in response to Proposed Contention 41.

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[541] *Id.*

[542] *Id.*

[543] In fact, in the context of its *license transfer* holding, the Commission noted that Cortlandt had "provided no basis for [the Commission] to question Entergy Indian Point's ability or willingness to comply with the NRC's decommissioning requirements," and that Cortlandt's "challenge to the Applicants' use of the very decommissioning cost estimate methodology sanctioned by [NRC] rules amounts to an impermissible collateral attack on 10 C.F.R. § 50.75."

[544] Petition at 297.

In sum, the Board must deny admission of Proposed Contention 44 for failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v) and (vi)[545] and for improperly challenging generic determinations made by the NRC in 10 C.F.R. Part 54 and Part 51 regarding the scope of license renewal and the impacts of onsite waste storage.

38. Proposed Contention 45

Contention 45: Non-Compliance with NYS DEC Law – Closed Cycle Cooling "Best Technology Available" Surface Water Quality, Hydrology and Use (for all plants)[546]

WestCAN argues, in Proposed Contention 45, that Entergy, by omission, has misrepresented the impacts of its cooling system, contending that the State SPDES permits for Indian Point 2 and 3, pursuant to ECL § 17-0811, require that the facility be retrofitted with a closed-cycle cooling system, employing the best technology available.[547] WestCAN further asserts that until a closed-cycle cooling system is installed, the Indian Point 2 and 3 operating licenses cannot be renewed.[548] WestCAN's position with respect to this proposed contention is presented as a matter of law; beyond that, it presents no factual basis to support a contention that Entergy has somehow operated Indian Point 2 and 3 in violation of its currently valid SPDES permits.

Entergy opposes admission of this contention. There are a significant number of state and local permits, certificates and other forms of approval that Entergy, as all other utilities, must obtain in order to operate a power generating facility. Here, the Applicant initiated the process to obtain the necessary permits to support renewal of its operating licenses, including the discharge

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[545] It is notable that although implying that this contention is "Supported by Facts and/or Expert Opinion," Petition at 299, the Petition follows with no facts or identification of experts on whom WestCAN relies, but, in large part, only a recitation of unrelated regulations. *Id.* at 300-303.

[546] Petition at 303.

[547] *Id.* at 303-06.

[548] *Id.* at 306.

permit from the New York State Department of Environmental Conservation ("NYSDEC") which implements § 316 of the Clean Water Act. As part of that process, the NYSDEC staff has recommended that the Indian Point Units be retrofitted with a closed cycle cooling system. And, as also provided by the State's permitting process, Entergy has lawfully challenged the NYSDEC staff's recommendation. Until such time as the matter as been finally decided, however, Entergy is authorized to continue operating its facilities in accordance with the existing permits, which remain in effect until its application is finally determined. For that reason, Entergy's representation regarding compliance with its SPDES permits was and is, legally and factually, accurate.

Moreover, it is clear that consideration of the substantive aspects WestCAN seeks to raise in the contention—retrofitting the facility for a closed cycle cooling system—is foreclosed by Section 511(c)(2)(B) of the Clean Water Act, 42 U.S.C. § 4321, which precludes the NRC from conditioning any license or permit on any limitation other than that established pursuant to the Clean Water Act. Until the matter pending in New York with respect to Entergy's discharge permit is resolved with finality, the NRC is constrained to assess the pending LRA on the basis of the currently-permitted system.

39. Proposed Contention 47

> Contention 47: The Environmental Report Fails to Consider the Higher than Average Cancer Rates and other Health Impacts in Four Counties Surrounding Indian Point.[549]

In Proposed Contention 47, WestCAN alleges that the LRA fails to address radiological health effects, in particular, cumulative health effects over a 60-year operating period, including

[549] *Id.* at 307.

health effects attributable to routine operation, accidents, and as a result of acts of sabotage.[550] Although given only passing mention in its Petition,[551] it is clear that WestCAN, in support of this proposed contention, relies largely, though without explicit attribution, on a study prepared by Joseph Mangano,[552] as well as on several other reports prepared by Greenpeace and UCS, the latter reflecting speculation about the effects of a core melt-down caused by a terrorist attack.

Entergy opposes admission of Proposed Contention 47. Without regard for the fact that this issue is addressed by a rule, WestCAN argues that the LRA "fails to address adequate [sic] the protection of public health and safety . . . . Additionally, . . . it fails to address adequate [sic] the protection of public health and safety from CUMULATIVE radioactive exposure for 60 years, during the current license and additional proposed 20 year new superseding license period."[553] The GEIS for license renewal evaluated, among other matters, the health effects of plant operation relevant to the license renewal program, and concluded, as a generic matter that the impacts on both the public and workers was small. For that reason, this issue was determined to be a Category 1 issue, not, as a general matter, requiring consideration in individual licenser renewal environmental reviews.[554]

Stripped of its rhetoric, this proposed contention, notwithstanding several references to Indian Point-related information, is a generalized challenge to the Commission's regulation which preludes consideration of this matter in individual license renewal actions, 10 C.F.R. § 51.53(c)(3)(i); *see also* Table B-1, Subpart A to Appendix B. And notably, it is substantively identical to the proposed contentions being proffered in this matter by both Hudson River Sloop

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[550] *Id.* at 307-23.

[551] *Id.* at 321-22.

[552] *See* Petition Exhibits TT and UU.

[553] Petition at 323.

[554] 10 C.F.R. § 51.53(c)(3)(i); *also* Tbl. B-1, Subpt. A to App. B.

Clearwater, Inc. and Connecticut Residents Opposed to Relicensing Indian Point ("CRORIP") (though the latter, for obvious reasons, makes reference to Connecticut, rather than New York counties).

Entergy opposes the admission of Proposed Contention 47 on the grounds that it (1) raises generic issues that challenge Commission regulations, contrary to 10 C.F.R. § 2.309(f)(1)(iii); (2) raises issues that are not unique to the period of extended operation and are therefore outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii); and (3) is based on speculation that does not raise a material issue of fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

Conspicuously absent from the Petition is any assertion or information showing that the Applicant has not, and is not, operating IPEC in accordance with the Commission's requirements with respect to radiological releases,[555] and, more importantly, that there is any basis for concluding that the pending application fails to satisfy NRC requirements for license renewal in 10 C.F.R. Part 54. To the contrary, it is evident from the Petition that (a) despite the inclusion of references to IPEC in their materials and the bald assertion that the information is new, the issue WestCAN wishes to raise is clearly a generic matter which challenges a Commission regulation with respect to health effects of low levels of radiation, and (b) the information is anything but new.

The issue WestCAN seeks to raise here is essentially the same as was proffered, and rejected, in the McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2, license renewal proceeding almost six years ago.[556] There, the Board rejected a

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[555] *See* 10 C.F.R. Part 20.

[556] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 85-87 (2002).

contention, again relying (in part) on a study by Mr. Mangano, similarly seeking to challenge the radiological impacts of plant operations.[557] Specifically, the Board found that the matter is appropriately identified as a Category 1 issue, not requiring site-specific consideration in individual license renewal environmental reviews, and that the petitioner there had failed to establish the existence of special circumstances regarding the specific matter of that proceeding that might warrant waiving the regulation, 10 C.F.R. § 51.53(c)(3) and App. B, Table B-1.[558] The Board's conclusion in the *McGuire* and *Catawba* proceeding is equally relevant in the instant proceeding:

> The issue is manifestly a generic one, as applicable to all nuclear plants as to any one of the plant units at issue in this proceeding. Therefore, even were we to consider the documents submitted in support of the contentions to constitute affidavits as required by section 2.758(b), we do not find a rule waiver to be appropriate in this proceeding. As the Commission has suggested, the Petitioners may wish to present their essentially generic concerns about radiological impacts through a petition for rulemaking under 10 C.F.R. § 2.802.[559]

Similarly, in the Millstone Nuclear Power Station, Units 2 and 3, license renewal proceeding, the Board rejected a substantively-similar contention, also supported in part by Mr. Mangano, because it was unrelated to matters material to license renewal under Part 54.[560] The contention there was initially rejected because it consisted of unsupported speculation, contrary to 10 C.F.R. § 2.309(f)(1), and, in any event, did not bear on any matter related to the detrimental effects of plant aging.[561] The Commission, in affirming the Licensing Board's

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[557] *Id.*

[558] *Id.*

[559] *Id.* at 86-87 (citations omitted).

[560] *Millstone*, LBP-04-15, 60 NRC at 90-91, *aff'd*, CLI-04-36, 60 NRC 631 (2004).

[561] *Millstone*, LBP-04-15, 60 NRC at 91-92.

decision denying the petitioner's motion for reconsideration and petition for leave to amend its petition, held

> Our license renewal inquiry is narrow. It focuses on "the potential impacts of an additional 20 years of nuclear power plant operation," not on everyday operational issues. Those issues are "effectively addressed and maintained by ongoing agency oversight, review, and enforcement." . . . .
>
> We are saying merely that a license renewal proceeding is not the proper forum for the NRC to consider operational issues. If CCAM has information supporting its claim that Millstone's operation has caused "human suffering on a vast scale," its remedy would not be a narrowly focused license renewal hearing, but a citizen's petition under 10 C.F.R. § 2.206.[562]

And finally, another Board, in the context of a license amendment proceeding, rejected a contention seeking to address the radiological impacts of operation at Millstone within regulatory limits, again supported by an affidavit submitted by Mr. Mangano, because it was an impermissible challenge to the Commission's regulations in 10 C.F.R. Parts 20 and 50.[563] There, as here,

> Mr. Mangano's affidavit does not make clear whether the increased effluent releases he alleges (and which he claims will cause adverse health effects) will be within regulatory limits or violate the Commission's regulations. If the former, Mr. Mangano's assertion represents an impermissible challenge to the Commission's regulations, 10 C.F.R. Part 20 and Part 50, that establish radiological dose limits. *See* 10 C.F.R. § 2.758.[564]

The Commission, on review stated:

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[562] *Millstone*, CLI-04-36, 60 NRC at 637-38 (citations omitted).

[563] *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273 (2001), *aff'd sub nom. Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001).

[564] *Millstone*, LBP-01-10, 53 NRC at 286-87 (citations omitted). The former 10 C.F.R. § 2.758 is now Section 2.335. Both the previous and current versions provide that no rule or regulation of the Commission may be attacked in any adjudicatory proceeding under the Commission's Rules of Practice, except through a valid waiver request.

> They [the petitioners] say they "are prepared to establish through expert testimony that any increase in routine radiological effluent to the air and water by the Millstone reactors will expose the public to greater risk of cancer, immunodeficiency diseases and other adverse health effects." *See* Appeal Brief at 4. But routine permissible releases occur virtually daily, and they do not remain at a constant level but go up and down routinely. All such releases are small and must remain within NRC-prescribed limits. Regulatory limits on effluent concentrations take into account the licensee's need to make frequent adjustments in releases, while still imposing absolute limits on both the rate of release and the dose to the nearest member of the public. The license amendments at issue here have no bearing on the Licensee's ability to make these frequent adjustments. If the Petitioners are objecting to all possible routine adjustments in effluent releases, then their claim amounts to an impermissible general attack on our regulations governing public doses at operating nuclear plants. *See* 10 C.F.R. § 2.758. Petitioners "may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies."[565]

Without attempting to fully catalogue here his various submissions and presentations to the NRC regarding health effects associated with nuclear power plants, Mr. Mangano has presented the essence of his thesis to the NRC in various forms, including in comments on environmental impact statements and Limited Appearance statements regarding the North Anna Early Site Permit proceeding (February 2005);[566] the Oyster Creek License Renewal proceeding (July 2006 and May 2007);[567] the Grand Gulf Early Site Permit proceeding (July 2005);[568] the Peach Bottom License Renewal proceeding (November 2001 and July 2002);[569] the Shearon

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[565] *Millstone*, CLI-01-24, 54 NRC at 364 (citing *Oconee,* 49 NRC at 334).

[566] *See* Pub. Mtg. Tr. Att. (Feb. 17, 2005), Radiation and Public Health Project, Death Rates in Central Virginia in the Vicinity of North Anna Nuclear Station (Jan. 19, 2005), *available at* ADAMS Accession No. ML050750309.

[567] *See* Letter from Joseph Mangano to NRC (July 14, 2006), *available at* ADAMS Accession No. ML 062050309; Ltd. Appearance Session Tr. 23-27 (May 31, 2007), *available at* ADAMS Accession No. ML071580352; Joseph Mangano, Radioactive Contamination and Cancer Near the Oyster Creek Nuclear Reactor (May 31, 2007), *available at* ADAMS Accession No. ML071650053.

[568] *See* Letter from Joseph Mangano to NRC (July 5, 2005), *available at* ADAMS Accession No. ML051960026.

[569] *See* Email from Joseph Mangano to NRC (Nov. 2,1 2001), *available at* ADAMS Accession No. ML020230268; Pub. Mtg. Tr. 79-90 (July 31, 2002), *available at* ADAMS Accession No. ML022390448.

Harris License Renewal proceeding (July 2007);[570] the Turkey Point License Renewal proceeding (July 2001);[571] and the Diablo Canyon independent spent fuel storage installation proceeding (July 2007).[572] Presenting fundamentally the same hypothesis[573] in numerous proceedings over many years makes it abundantly clear that the issue WestCAN seeks to raise in this proceeding is generic and has no unique tie to either license renewal or to IPEC.[574] WestCAN, moreover, has not requested a waiver pursuant to 10 C.F.R. § 2.335(b), has not submitted a supporting affidavit that "must" accompany the waiver request, nor has it addressed the required four-part *Millstone* test for Section 2.335 petitions. Nor has it pursued this through a petition for rulemaking in accordance with 10 C.F.R. § 2.802.

As noted above, the issue WestCAN seeks to raise is generic in nature and there is nothing unique to this renewal proceeding that warrants waiver of the categorization of this issue as Category 1 in the GEIS. The fundamental hypothesis advanced by WestCAN (as supported by Mr. Mangano and his underlying data) have been offered in connection with a wide variety of licensing actions throughout the country. Here, WestCAN conveniently reference IPEC, in contrast to the references to other facilities in Mr. Mangano's other presentations, but the bottom line remains the same: radiation releases from nuclear power plants operating in conformance

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570 *See* Joseph Mangano, Patterns of Radioactive Emissions and Health Trends Near the Shearon Harris Nuclear Reactor (July 17, 2007), *available at* ADAMS Accession No. ML072120423; Ltd. Appearance Session Tr. 5-9 (July 17, 2007), *available at* ADAMS Accession No. ML072040023.

571 *See* Pub. Mtg. Tr. 93-94 (July 17, 2001), *available at* ADAMS Accession No. ML012270223; NUREG-1437 Supp. 5, Generic Environmental Impact Statement, App. A, A-291-A-307 (Jan. 2002), Comment of the Radiation and Public Health Project (July 17, 2001), *available at* ADAMS Accession No. ML020280226.

572 *See* Email from Joseph Mangano to NRC (July 2, 2007), *available at* ADAMS Accession No. ML071870039.

573 The Radiation and Public Health Project website includes a list of some 50 articles, letters to editors and other presentations related to a number of reactor facilities – existing and proposed – nationwide, regarding which Mr. Mangano has presented his position (in more summary form) with respect to radiation, nuclear power plants, the tooth fair project and the incidence of cancer. *See* http://www.radiation.org/press/index.html. Regardless of where the facility is located (or proposed), Mr. Mangano's theme with respect to the foregoing is fundamentally the same.

574 *Turkey Point*, LBP-01-6, 53 NRC at 159, *aff'd*, CLI-01-17, 54 NRC 3.

with NRC regulations can purportedly be correlated with the incidence of cancer. Thus, similar to the emergency planning issue in *Millstone*,[575] it is plain that this issue, to the extent it may have any validity, is not unique here, and must be rejected as a matter of law.

Moreover, other than unsupported speculation regarding releases in the future and, superficial citations to Entergy's ER, there is nothing put forward by WestCAN to make this issue relevant to operation of IPEC during a renewed period of plant operation. Notably, Entergy's most recent reports—the 2006 Annual Radioactive Effluent Release Report and Annual Radiological Environmental Operating Report for 2006, submitted to the NRC in April 2007 and May 2007, respectively—show no instance where NRC requirements were exceeded during the operating period, for Indian Point Units 1, 2 and 3. The Annual Radiological Environmental Operating Report for 2006 concludes: "the levels of radionuclides in the environment surrounding Indian Point were within the historical ranges, i.e., previous levels resulting from natural and anthropogenic sources for the detected radionuclides. Further, Indian Point operations in 2006 did not result exposure [sic] to the public greater than environmental background levels."[576] "Plant related radionuclides were detected in 2006; however, residual radioactivity from atmospheric weapons tests and naturally occurring radioactivity were the predominant sources of radioactivity in the samples collected. Analysis of the 2006 REMP [Radiological Environmental Monitoring Program] sample results supports the premise that radiological effluents were well below regulatory limits."[577] Nothing provided by WestCAN is to the contrary. As the Commission stated in *Millstone*:

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[575] *Millstone*, CLI-05-24, 62 NRC at 561.

[576] Annual Radiological Environmental Operating Report for 2006 at 1-2 (Executive Summary).

[577] *Id.* at 2-2 (Introduction).

> *Issues that have relevance during the term of operation under the existing operating license as well as license renewal would not be admissible* under the new provision of § 2.758 [now § 2.335] because there is *no unique relevance of the issue to the renewal term.*[578]

Proposed Contention 47, while including some IPEC-specific information, in the end is based on the same dated information Mr. Mangano provided in support of other unsuccessful attempts to have a like contention admitted in other proceedings (including license renewal proceedings) in other areas of the country, now, though, even more dated.[579] It includes an amalgam of disassociated "facts" drawn, in some cases, from assessments of the effects of atomic bombs and weapons-testing conducted many decades ago and assessments of beyond design basis accidents/severe accidents including terrorist attacks.[580] This assortment of unrelated factoids is then strung together with data annually reported by Entergy, to show the occurrence of releases of various routine radionuclides over time; releases which, not surprisingly, are subject to fluctuation.[581] Without any further support, or qualification to offer the opinion, Mr. Mangano then suggests that "Indian Point is more vulnerable to a meltdown from mechanical failure than most reactors because of its age . . . . The reactors are also vulnerable to a meltdown due to its parts corroding as the plant ages and as the reactors operate much more of the time in recent years. . . ."[582]

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[578] *Millstone*, CLI-05-24, 62 NRC at 561 (quoting Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. at 64,961-62 (emphasis in original)).

[579] *Supra* at 51-55.

[580] *See* Mangano Declaration, Att. A, §§ II.A-B, III.C, IV-V.

[581] Mr. Mangano does not suggest, however, that these releases exceeded regulatory limits. Mangano Declaration, Att. A at 9.

[582] *See* Mangano Declaration, Att. A at 7.

Such gross speculation has been and should be summarily rejected.[583] The underlying analyses and hypotheses with respect to health effects previously have been rejected by the NRC,[584] and discredited by the State of New Jersey, Commission on Radiation Protection, Department of Environmental Protection.[585] The latter, set out in a 44-page report (which includes two earlier assessments of the Tooth Fairy Project and of the analyses and data employed) goes on at some length to examine significant and material flaws in the study, and refute its findings. In light of the foregoing, Mr. Mangano's Report cannot provide a sufficient basis for WestCAN's Petition.

In sum, WestCAN's Proposed Contention 47 is inadmissible because it proposes consideration of an issue which is beyond the scope of this proceeding, and presents a generic issue decided by rule not to warrant specific evaluation in the context of an individual license renewal proceeding.[586] As a result, it must be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(iii). But even beyond being a challenge to the regulation, the proposed contention also fails because it lacks the requisite specificity with respect to the subject-matter of this proceeding—impacts attributable to the operation of IPEC in the period of renewal.[587] Stripped to its essence, the contention is nothing more than an obvious challenge to the Commission's permissible doses in

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583 *See McGuire*, LBP-02-4, 55 NRC at 85-87; *Millstone*, LBP-04-15, 60 NRC at 90-91; *Millstone*, CLI-04-36, 60 NRC at 637-38; *Millstone*, LBP-01-10, 53 NRC at 273; *Millstone*, CLI-01-24, 54 NRC at 349.

584 *See* Letter from Christopher L. Grimes, Program Dir. , License Renewal and Environmental Impacts, Division of Regulatory Improvements Programs, Office of Nuclear Reactor Regulation, NRC, to Dr. Jerry Brown, Radiation and Public Health Project (Jan. 15, 2002) (regarding comments provided by the Radiation and Public Health Project in connection with the Turkey Point license renewal), *available at* ADAMS Accession No. ML020150511.

585 See Letter from Dr. Julie Timins, Chair, Comm. on Radiation Protection, to N. J. Gov. Jon Corzine, (Jan. 18, 2006) (regarding state funding of the Radiation and Public Health Project for further analysis of strontium-90 in baby teeth of children living near the Oyster Creek Nuclear Generating Station in New Jersey), *available at* ADAMS Accession No. ML060410476.

586 *See* 10 C.F.R. Part 51, Tbl. B-1.

587 *See Millstone*, CLI-05-24, 62 NRC at 561.

10 C.F.R. Part 20, which simply cannot be contested in an individual license renewal proceeding such as this.[588] Moreover, in light of the generic nature of the underlying information and the serious questions regarding its overall reliability, discussed above, the information presented by WestCAN is not "new and significant information" of the type which need be addressed in a license renewal environmental report, notwithstanding that the matter is otherwise a Category 1 matter.[589]

40. Proposed Contention 48

In an unfocused discussion broadly addressing a litany of topics it characterizes as Environmental Justice – Corporate Welfare, WestCAN does not set forth any contention at all, but rather only a discourse critical of Entergy.[590] In so doing, it suggests that "the NRC would be warranted in requiring the Applicant to pay for the legal expenses of the community Stakeholders, and require a comprehensive study of the actual costs to taxpayers for the operation of Indian Point for certain enumerated matters.[591]

Entergy opposes admission of this contention because it utterly fails to comply with key requirements of the Commission's regulations regarding contentions—that it provide a "specific statement of the issue of law or fact to be raised or controverted," that it demonstrate that the issue raised in the contention is within the scope of the proceeding, that it demonstrate the materiality of the proposed contention in the context of the findings that must be made in connection with the action before the Board, and provide a concise statement of the facts or

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588 10 C.F.R. § 2.335(a); *see also, e.g.*, *Turkey Point*, CLI-01-17, 54 NRC at 3.

589 *See* 10 C.F.R. § 51.53(c)(3)(iv).

590 Petition at 323-29.

591 *Id.* at 326-28.

expert opinions that support the petitioner's position on the issue and on which the petitioner intends to rely at hearing.[592]

What is clear, though, is that the matter WestCAN seeks to raise here is not one that falls within the NRC's accepted understanding of Environmental Justice ("EJ"). There are two prerequisites to support the admission of a contention alleging deficiencies in an applicant's EJ analysis: first, "support must be presented regarding the alleged existence of adverse impacts or harm on the physical or human environment"; and second "a supported case must be made that these purported adverse impacts could disproportionately affect poor or minority communities in the vicinity of the facility at issue."[593] Thus, a petitioner must "identify [a] *significant and disproportionate* environmental impact on the minority or low-income population relative to the general population . . . ."[594]

It is readily apparent that WestCAN's proposed contention is far wide of the mark in terms of alleging matters appropriately embraced by the foregoing principles, and yet wider of the mark in setting forth a contention that satisfies the requirements of 10 C.F.R. § 2.309(f)(1). For these reasons, Proposed Contention 48 should be denied in its entirety.

41. Proposed Contention 49

> Contention 49: Applicant's LRA fails to consider the effects of global warming and Applicant has failed to present a plan for how it will either analyze or manage such effects during an additional 20 years of operation.[595]

This proposed contention is, yet again, a largely unguided discourse on broad socio-environmental issues with very little identified in terms of specific matters of direct relevance to

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[592] 10 C.F.R. § 2.309(f)(1)(i), (iii), (iv) and (v).

[593] *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 262 (2007) (citing 69 Fed. Reg. 52,047).

[594] *Sys. Energy Res., Inc.* (Grand Gulf Early Site Permit), LBP-04-19, 60 NRC 277, 294 (2004); *see also La. Energy Servs., LP* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 106 (1998).

[595] Petition at 329.

renewal of the Indian Point operating licenses. Under the rubric of "global warming," WestCAN references a number of studies addressing: climate change in the Northeast United States; flooding in the borough of Queens, New York, as well as in the Pacific Northwest; temperature trends in the Hudson River; and wildfires in the Western and Southwestern United States, Australia, Russia and Alaska.[596] It then posits that these type of phenomena can affect water levels in the Hudson River upon which Entergy depends for cooling, affect off-site power and on-site power, impair the plant's intake structures and piping by storm debris, corrode piping and other plant components and systems, as well as adversely impact the integrity of the foundations upon which structures are built. These climatological events and purported impacts, WestCAN alleges, must be accounted for by Entergy in an aging management plan.[597]

Proposed Contention 49 must be denied for several reasons. First, although WestCAN attempts to identify a number of possible effects which might arguably bear on license renewal, it fails to do so with the necessary specificity and basis to satisfy 10 C.F.R. § 2.309(f)(1). Second, it cannot be determined whether WestCAN's Proposed Contention 49 is intended to raise an environmental issue or a safety issue—its narrative meanders through both, without settling on either. But equally critical, WestCAN fails to relate the broad "global warming" matters it wishes to raise to the LRA itself. Said otherwise, WestCAN fails to "include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's

[596] Petition at 329-38.

[597] *Id.*

belief."[598] The LRA, as required by 10 C.F.R. § 54.21, has in fact addressed many of the underlying issues that WestCAN puts forward in regard to ensuring integrity and functionality of the plant's structures, systems and components, and, overall, the ability to provide reasonable assurance of public health and safety. WestCAN, in turn, has failed to sustain its burden to show, with the requisite basis and specificity, in what way the LRA is not sufficient. For the foregoing reasons, Proposed Contention 49 should be denied in its entirety.

42. Proposed Contention 50

> Contention 50: Replacement Options: Stakeholders contend that the energy produced by Indian Point can be replaced without disruptions as the plants reach the expiation dates of their original licenses.[599]

In Proposed Contention 50, WestCAN challenges the sufficiency of the ER with respect to its analysis of alternatives, and suggests that the energy produced by Indian Point Units 2 and 3 can be replaced before expiration of the current operating licenses without disruption.[600] Citing a report prepared for Westchester County by Levitan Associates in June 2006, WestCAN asserts that through a "portfolio of approaches, including investments in energy efficiency, transmission and new generation," [t]here are no insurmountable technical barriers to the replacement of Indian Point's capacity."[601] In support of it hypothesis, WestCAN postulates the possibility of a variety of state and local legislative actions to mandate energy efficiency and demand-side conservation measures.[602]

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598 10 C.F.R. § 2.309(f)(1)(vi).

599 Petition at 338.

600 Petition at 338-39.

601 Petition at 339, citing Levitan Associates, *Alternatives to the Indian Point Energy Center for Meeting New York Electric Power Needs.*

602 Insofar as WestCAN proposes to incorporate by reference New York State's proposed contention on this issue, Petition at 342, WestCAN has not, in the Applicant's view, established that it should be admitted as a party, and therefore, is unable to co-sponsor or adopt a contention put forward by another petitioner. *See supra* at 35-36.

While WestCAN presents a wide-ranging primer on the foregoing, as well as on alternatives such as solar, wind, geothermal,[603] nothing it puts forward is beyond the realm of speculation, especially in the relevant timeframe, that is, by 2013 and 2015, when the Indian Point 2 and 3 operating licenses expire. While the Commission is obliged to address, in its environmental reviews, reasonable alternatives to the action proposed, the starting point for judging the adequacy of the agency's review is whether the alternatives assessed are reasonable.[604] The proposals presented by WestCAN are not reasonable; they are subject to the serendipitous confluence of external social and political vagaries which render them remote and speculative, at least in the context of license renewal.[605]

WestCAN further alleges that the Applicant fails to provide an evaluation of energy conservation as an alternative to license renewal.[606] It further claims that energy conservation is a viable alternative, and that leaving IP2 and IP3 as options inhibits the implementation of environmentally-preferable energy conservation, which is the equivalent of generating energy and meeting energy needs.[607]

Entergy opposes the admission of Proposed Contention 50 on the grounds that it: (1) fails to provide a concise statement of alleged facts or expert opinions, as required by 10 C.F.R. § 2.309(f)(1)(v), and (2) fails to establish a genuine dispute with the Applicant on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

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603 Petition at 346-49.

604 *Monticello*, LBP-05-31, 62 NRC at 753 (citing *Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defense Council*, 435 U.S. 519, 551 (1978)) (noting that there is no requirement for an applicant to look at every conceivable alternative to its proposed action).

605 *Id. (citing Natural Resources Defense Council Inc. Morton,* 458 F.2d 827, 834, 837 (D.C. Cir 1972) (noting that NEPA requires only consideration of reasonable alternatives, (*i.e.*, those that are feasible and nonspeculative)).

606 Petition at 340-45.

607 Petition at 339.

NEPA and NRC regulations at 10 C.F.R. Part 51 require the Staff to consider the potential environmental effects of any proposed "major federal action significantly affecting the quality of the human environment."[608] In this instance, the purpose and need of the "major federal action" which falls under the umbrella of NEPA is the determination by the NRC to "provide an option that allows for power generation capability beyond the term of a current nuclear power plant operating license . . . ."[609]

An applicant for a renewed license is required to prepare an ER which, among other things, must discuss the environmental impacts of the proposed action and compare those impacts to alternatives to the proposed action.[610] The discussion of alternatives

> must be sufficiently complete to aid the Commission in developing and exploring, pursuant to [NEPA §] 102(2)(E) 'appropriate alternatives to recommended courses of action in any proposal which involved unresolved conflicts concerning alternative uses of available resources.[611]

As the Licensing Board in the *Monticello* license renewal proceeding held, however, "there is no requirement for an applicant to look at every conceivable alternative to its proposed

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608 *See* 42 U.S.C. §§ 4321 *et. seq.*; 10 C.F.R. Part 51. NEPA requires that "all agencies of the Federal Government shall . . . include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(2)(C).

609 GEIS at xxxiv.

610 10 C.F.R. §§ 51.45, 51353(c); *see also Monticelo*, LBP-05-31, 62 NRC at 752-53, *aff'd*, CLI-06-06, 63 NRC 161 (2006).

611 *Monticello*, LBP-05-31, 62 NRC at 753 (citing 10 C.F.R. 51.45(b)(3)).

action."[612] Rather, "NEPA requires only consideration of reasonable alternatives, (i.e., those that are feasible and nonspeculative)."[613] This notion is reflected in the GEIS:

> While many methods are available for generating electricity, a huge number of combinations or mixes can be assimilated to meet a defined generating requirement, such expansive consideration would be too unwieldy to perform given the purposes of the analysis. Therefore, NRC has determined that a reasonable set of alternatives should be limited to analysis of single, discrete electric generation sources and *only electric generation sources that are technically feasible and commercially viable.*[614]

The inquiry regarding alternatives is a focused one, although an applicant may not define the project so narrowly as to eliminate the NRC's consideration of the full range of "reasonable alternatives" in the EIS.[615] Rather, as the Commission has held, the NRC "need only discuss those alternatives that are reasonable and 'will bring about the ends' of the proposed action."[616] To that end, where, as is the case here, a federal agency is not the sponsor of the project, the Federal Government's consideration of alternatives should "accord substantial weight to the preferences of the applicant and or/sponsor."[617]

As Entergy has indicated in its ER, the scope or goal of the proposed action (license renewal) is the renewal of the operating licenses that allow production of approximately 2,158

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612 *Id.* (citing *Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defense Council,* 435 U.S. 519, 551 (1978)).

613 *Id.* (citing *Natural Resources Defense Council Inc. Morton,* 458 F.2d 827, 834 837 (D.C. Cir 1972) and *City of Carmel-by-the-Sea v. Dept. of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 65 (1991)).

614 GEIS § 8.1 (emphasis added).

615 *Monticello*, LBP-05-31, 62 NRC at 753 (citing *Simmons v. U.S. Army Corps of Eng'rs,* 120 F. 3d 664, 666 (7th Cir. 1997)).

616 *Hydro Resources*, CLI-01-4, 53 NRC at 55 (quoting *Citizens Against Burlington v. Busey,* 938 F.2d 190, 195 (1991 D.C. Cir.) *cert. denied*, 502 U.S. 994 (1991)); *see also Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 156-58 (2005), *aff'd* CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Env't'l Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006).

617 *Monticello,* LBP-05-31, 62 NRC at 753 n.83 (quoting *Citizens Against Burlington v. Busey,* 938 F.2d at 195).

MWe of base-load power.[618] The ER further states that "[a]lternatives that do not meet this goal are not considered in detail,"[619] which is consistent with the Licensing Board's ruling in the *Monticello* case and with controlling Commission precedent.[620] In the *Monticello* license renewal proceeding, the Applicant's stated goal was the same as is stated here—the production of baseload power.[621] In that case, the Board determined that the Applicant need not address every conceivable alternative energy option, nor must the Applicant consider those options which are infeasible, speculative and incapable of fulfilling the goal of the proposed project. Thus, because the goal of the proposed project in *Monticello* was to provide baseload power, the ER did not need to address generating options, such as wind and biomass, that could not produce baseload power, and did not need to address demand side management.[622]

The Commission, and the U.S. Court of Appeals for the Seventh Circuit, upheld a similar Licensing Board ruling on a similar contention in the *Clinton* ESP proceeding.[623] Specifically, the Commission's ruling in *Clinton* upheld the Board's exclusion of non-baseload generating options, in part because,

> Intervenors' various claims fail to come to grips with fundamental points that can't be disputed: solar and wind power, by definition, are not always available . . . .[624]

Clinton also involved a claim that the applicant should undertake an analysis of energy efficiency and conservation options. The *Clinton* applicant, like Entergy, was a merchant

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618 ER at 8-1.

619 *Id.*

620 *Monticello,* LBP-05-31, 62 NRC at 753; *Clinton*, CLI-05-29, 62 NRC at 810-811.

621 *Monticello,* LBP-05-31, 62 NRC at 753.

622 *Id.* at 752-53.

623 *Env't'l Law & Policy Center v. NRC*, 470 F.3d at 84 (upholding "the Board's adoption of baseload energy generation as the purpose behind the ESP").

624 CLI-05-29, 62 NRC at 810-11.

generator, whose "sole business is that of generation of electricity and the sale of energy and capacity at wholesale."[625] The Commission upheld the Board's denial of this contention, in part because "neither the NRC nor Exelon has the mission (or power) to implement a general societal interest in energy efficiency."[626] Thus, the scope of the "hard look" required by NEPA is limited by a "rule of reason," which does not demand that a merchant generator, like Entergy, undertake an analysis of energy efficiency and conservation, as an alternative to its goal of generating baseload power.[627]

First, WestCAN takes issue with the Applicant's goal of the proposed action—"the production of approximately 2,158 MWe of base-load generation."[628] The Petitioner claims that "this . . . unreasonably limits the alternatives that can and should be considered to the continued operation of either IP2 or IP3."[629] As discussed above, the applicant may not define the project so narrowly as to eliminate the NRC's consideration of the full range of "reasonable alternatives" in the EIS.[630] However, where, as is the case here, a federal agency is not the sponsor of the project, the Federal Government's consideration of alternatives should "accord substantial weight to the preferences of the applicant and or/sponsor."[631] In addition, as the Commission has

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625 *Id.* at 807.

626 *Id.* at 806.

627 *See id.* at 807.

628 ER at 8-1.

629 Petition at 106.

630 *Monticello.*, LBP-05-31, 62 NRC at 753 (citing *Simmons v. U.S. Army Corps of Eng'rs,* 120 F. 3d 664, 666 (7th Cir. 1997)).

631 *Monticello,* LBP-05-31, 62 NRC at 753 n.83 (quoting *Citizens Against Burlington v. Busey,* 938 F.2d at 195).

held, the NRC "need only discuss those alternatives that are reasonable and 'will bring about the ends' of the proposed action."[632]

In its ER, the Applicant notes that the "concept of energy conservation as a resource does not meet the primary NRC criterion 'that a reasonable should be limited to analysis of a single, discrete electric generation sources and only electric generation sources that are technically feasible and commercially viable.'"[633] In addition, the ER states that, "[c]onservation is neither single, nor discrete, nor is it a source of generation."[634] Nevertheless, the ER does provide a brief analysis of utility-sponsored conservation, finding that "the potential to displace the entire generation at the site solely with conservation is not realistic."[635]

The Applicant's approach is reasonable and appropriate "because the generation of approximately 2,158 MWe of electricity as a *base-load supply* using energy conservation is not technologically feasible."[636] This approach is consistent with the GEIS, as discussed above, and is consistent with the *Monticello* ruling.[637] Again, the Applicant need only consider reasonable alternatives which are capable of fulfilling the proposed action—to provide an option that allows for 2,158 MWE of baseload power generation capability. Thus, WestCAN fails to raise a genuine issue of law or fact in dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

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632 *Hydro Resources*, CLI-01-4, 53 NRC at 55 (quoting *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 *cert. denied*, 502 U.S. 994; *see also Clinton*, LBP-05-19, 62 NRC at 156-58, *aff'd* CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Envt'l. Law & Policy Center v. NRC*, 470 F.3d 676.

633 ER at 8-55 citing GEIS § 8.1.

634 *Id.* citing GEIS, Supplement 3, Generic Environmental Impact Statement for License Renewal of Nuclear Plants – Arkansas Nuclear One, Unit 1 at Section 8.2.4.12.

635 ER at 8-56.

636 *Id.* at 8-50.

637 *See* GEIS, Vol. 1 at 8-1; *see also Monticello*, LBP-05-31, 62 NRC at 753.

The remainder of the contention consists of a meandering discussion of energy conservation initiatives [638] that contain bare assertions and speculation. Failure to provide facts or expert opinions, however, does not satisfy 10 C.F.R. § 2.309(f)(1)(v). In addition, as discussed above, the Applicant need not consider every conceivable alternative energy option, such as energy conservation.[639] Accordingly, WestCAN's argument is insufficient to support the admissibility of the contention.[640]

WestCAN proposes the need for consideration of wind power, solar, geothermal, hydropower and energy conservation with only the most cursory analysis of their feasibility and costs and benefits."[641] While the ER addresses each of the these alternative energy sources, the Applicant acknowledges that "these sources have been eliminated as a reasonable alternative to the proposed action because the generation of approximately 2,158 MWe of electricity as a *base-load supply* using these technologies is not technologically feasible."[642] This approach is consistent with the GEIS, as discussed above, and is consistent with the *Monticello* case.[643]

The Applicant need only consider reasonable alternatives which are capable of fulfilling the proposed action—to provide an option that allows for 2,158 MWE of baseload power generation capability.[644] Solar and wind power, as explained above, are not always available,

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638 *See* Petition at 110-120.

639 *See Monticello*, LBP-05-31, 62 NRC at 753. The Applicant notes, however, that the ER *does* contain a discussion of utility-sponsored conservation. *See* ER at 8-55, 56.

640 *See* 10 C.F.R. § 2.309(f)(1)(v); *see also Monticello*, LBP-05-31, 62 NRC at 752.

641 Petition at 121.

642 ER at 8-50.

643 *See* GEIS, Vol. 1 at 8-1; *see also Monticello*, LBP-05-31, 62 NRC at 753.

644 *See* ER at 1-1; 7-4.

and therefore cannot supply baseload power. Similarly, the other alternatives simply cannot, with current technology, provide the necessary amount of baseload power.[645]

Notably, WestCAN fails to raise any NEPA, Commission, or Board case law in support of Proposed Contention 50. Moreover, other than the bare assertions regarding the purported inadequacy of the ER, WestCAN fails to identify any *specific* deficiencies in Entergy's discussion of alternatives. While WestCAN discusses various alternative energy sources such as wind, solar, and geothermal, WestCAN alleges no inadequacies with regard to Entergy's analysis in its ER. Therefore, WestCAN fails to demonstrate a genuine dispute with the Applicant on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

Accordingly, Proposed Contention 50 should be denied in its entirety.

43. Proposed Contention 50 (the second so numbered; herein, numbered "Contention 50-1")

Contention 50: Failure to Address Environmental Impacts of Intentional Attacks & Airborne Threats.[646]

WestCAN seeks admission of a contention challenging the adequacy of the Applicant's LRA because it fails to address the environmental impacts of a terrorist attack.[647] Reciting the history and legacy of the events of September 11, 2001, and its aftermath, WestCAN presents a discussion that wanders through statements challenging the adequacy of the NRC's Design Basis Threat, found in 10 C.F.R. § 73.1, the sufficiency of force-on-force exercises, the level of the terrorist threat, purported deficiencies in Entergy's off-site alert notification/siren system, and

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645 *See id.* at 7-5.

646 Petition at 354.

647 *Id.* at 354-369.

vulnerabilities to air and water-borne attack, concluding that NEPA is violated if the threat of terrorism is not considered.[648]

Entergy opposes the admission of Proposed Contention 50-1 on the grounds that it: (1) raises issues that are not within the scope of this proceeding, in direct contravention of controlling legal precedent, and 10 C.F.R. § 2.309(f)(1)(iii); and (2) fails to establish a genuine dispute with the Applicant on a material issue of law or fact in that it raises issues that are not material to the Staff's license renewal findings, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

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, including the spent fuel pool.[649] In *Oyster Creek*, the Commission 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 study under NEPA. The claimed impact is too attenuated to find the proposed federal action to be the proximate cause of that impact.[650]

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[648] *Id.*

[649] *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; *Monticello*, LBP-05-31, 62 NRC at 756; *Oyster Creek*, CLI-07- 08, 65 NRC at 129.

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

The Commission also expressly rejected the assertion that the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace* 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.[651] In *Oyster* Creek, the Commission stated that:

> The terrorism risk at Oyster Creek remains the same during the renewal period as it was the day before when the plant still operated under its original license. . . . 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."[652]

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."[653] Such an obligation, the Commission observed, "would defeat any possibility of a conflict between the Circuits on important issues. As such, in *Oyster Creek* the Commission held that the Board had properly applied our settled precedents on the NEPA-terrorism issue.[654] The Commission's *Oyster Creek* decision thus requires that this Board reject Proposed Contention 50-1. Where a matter has been considered by the Commission, it may not be reconsidered by a Board. Commission precedent must be followed.[655]

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[651] *Id.* at 129.

[652] *Id.* at 130 n.25.

[653] For that same reason, the environmental impacts of terrorism were addressed in connection with the licensing of the Pa'ina irradiator in Hawaii, another facility located in the 9th Circuit, as noted in the Petition at 357-358.

[654] *Id.* at 131-34.

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

Proposed Contention 50-1 also 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.[656]

In the GEIS, the Commission discussed sabotage as the potential initiator of a severe accident. The Commission determined generically that severe accident risk is of small significance for all nuclear power plants. Thus, no separate NEPA analysis is required to evaluate the potential environmental impacts of a terrorist attack, because the GEIS analysis of severe accident consequences bounds the potential consequences that might result from a large scale radiological release, irrespective of the initiating cause.[657] By contending that Entergy and the NRC must address the environmental impacts of a successful terrorist attack on the Indian Point facility, WestCAN improperly challenges the GEIS and Part 51 regulations. As noted above, the rulemaking process, not this adjudicatory proceeding, is the proper forum for seeking to modify generic determinations made by the Commission.[658]

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[656] GEIS, Vol. 1. at 5-17 to 5-18.

[657] *Oyster Creek*, CLI-07-08, 65 NRC at 131.

[658] 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

For the foregoing reasons, the Board must deny Proposed Contention 50-1 in its entirety.

44. Proposed Contention 51

Contention 51: Withholding of Access Proprietary [sic] Documents Impedes Stakeholders Adequate Review of Entergy Application for License Renewal of IP2 LLC and IP3 LLC.[659]

WestCAN offers the following principal arguments as bases for this proposed contention: (1) extensive redactions of proprietary information from the license renewal application made it impossible for Stakeholders to adequately review the application and related documents and develop contentions; (2) Entergy and/or the NRC have violated WestCAN's constitutional rights under the First Amendment and 42 U.S.C. 1983; (3) Entergy has wrongfully withheld information as proprietary; and (4) the NRC designed the license renewal process to curtail any meaningful public involvement.[660] As relief, WestCAN requests that the "time clock" for submitting hearing requests and petitions to intervene "should not begin until stakeholders have access to a full and complete set of un-redacted versions of the [license renewal application] and its underlying documents," including all versions of the FSAR, UFSAR, as well as the entire CLB.[661]

Entergy opposes admission of proposed Contention 51 on the grounds that (1) it lacks foundation, (2) is beyond the scope of this proceeding, (3) fails to raise a genuine dispute with

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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." *Id.* (emphasis added). Petitioner has not availed themselves of this procedure in Proposed Contention 27. Regardless, even if Petitioner had sought such a waiver, it has failed to meet its 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, including any spent fuel pool. The Commission has stated unambiguously that "[w]aiver of a Commission rule is simply not appropriate for a generic issue." *Conn. Yankee Atomic Power Co.*, (Haddam Neck) CLI-03-7, 58 NRC at 8 (citing *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980)).

659 Petition at 369.

660 Petition at 369-382.

661 As discussed above, the Commission has specifically addressed this issue and has determined that a license renewal applicant is not required to compile the CLB. See Section IV.B.1.

regard to any material issue of law or fact, and (4) impermissibly challenges NRC regulations as prescribed by 10 C.F.R. § 2.335(a). First and foremost, the proposed contention lacks any basis in fact or law. WestCAN's statement that Entergy has wrongfully withheld information "under the guise" that it is proprietary is simply incorrect. The LRA and associated supporting documents submitted by Entergy do not contain the extensive redactions of which WestCAN complains. While WestCAN points to massive redactions, it fails to identify, with any specificity, affected portions of the documents in question. Contrary to its claims, only very limited information has been redacted from the application and related documents.

Even if WestCAN's claims regarding access to non-public information are true, it was not without redress. Specifically, the Commission's August 1, 2007, Notice of Opportunity for Hearing explicitly directed prospective petitioners to proceed as follows:

> To the extent that the application contains attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or *proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel to discuss the need for a protective order.*[662]

WestCAN never contacted counsel for Entergy to discuss any potential need for a protective order or other appropriate legal device (*e.g.*, confidentiality/nondisclosure agreement). Indeed, had WestCAN done so, it may have discovered that the information it purportedly sought is, in fact, publicly available or could have been obtained through an appropriate agreement with Entergy and/or the NRC Staff. Accordingly, WestCAN cannot now claim that is has been unfairly denied access to information in the LRA and related documents.[663] Such an assertion is

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[662] 72 Fed. Reg. at 42, 134.

[663] WestCAN's suggestion that its due process rights, whether Constitutionally or statutorily conferred, have been infringed is simply incredible. The Commission has provided members of the public, including WestCAN, with ample means to participate in the hearing process and to obtain any necessary information to support that participation. It is WestCAN who has not fully availed itself of the procedural options available to it.

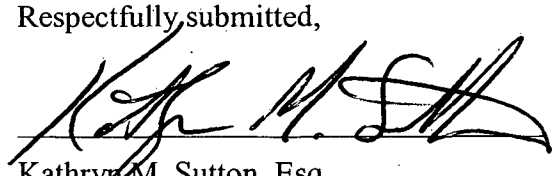
inexcusable given the generous 130-day period during which the NRC permitted WestCAN to prepare proposed contentions.

Lack of foundation aside, insofar as proposed Contention 51 raises a purely procedural concern (acquiring access to non-public information), it bears no relation to management of the effects of aging or review of time-limited aging analyses. Nor would its adjudication have any bearing on the substantive outcome of this license proceeding. WestCAN's unfounded allegations that Entergy, the nuclear power industry, or the NRC are untrustworthy and have sought to curtail public participation in the license renewal process are similarly outside the scope this proceeding. Finally, this Board lacks the authority to grant the relief sought by WestCAN; *i.e.*, indefinite postponement of the time for filing petitions to intervene.

V. CONCLUSION

Although WestCAN has standing to intervene in this proceeding, it has failed to proffer an admissible contention pursuant to 10 C.F.R. § 2.309(f)(1), for the many reasons set forth above. Therefore, its Petition should be denied in its entirety.

Respectfully submitted,



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this 22nd day of January 2008

1-WA/2886729

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 WestCAN, et al. Petition for Leave to Intervene and Request for Hearing" 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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