UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
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| In the Matter of | ) | |
| | ) | |
| DUKE ENERGY CAROLINAS, LLC, | ) | |
| | ) | Docket Nos. 52-018 and 52-019 |
| (William States Lee III Nuclear Station | ) | |
| Units 1 and 2) | ) | |

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# NRC STAFF ANSWER TO "PETITION FOR INTERVENTION AND REQUEST FOR HEARING BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE"

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July 22, 2008

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NRC STAFF ANSWER TO "PETITION FOR INTERVENTION AND REQUEST FOR HEARING BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE"

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC or Commission) hereby answers the Blue Ridge Environmental Defense League (BREDL) "Petition for Intervention and Request for Hearing" (Petition), filed in the William States Lee III Units 1 and 2 (Lee) combined license (COL) proceeding. For the reasons set forth below, the NRC staff does not oppose BREDL's standing, but opposes admitting BREDL as a party to this proceeding because none of BREDL's proposed contentions are admissible.

## BACKGROUND

By letter dated December 12, 2007 (but submitted on December 13, 2007), Duke Energy Carolinas, LLC (Duke or Applicant), submitted a COL application (Lee COL application) for two AP1000 advanced passive pressurized water reactors (PWRs) to be located in Cherokee County, South Carolina. The Federal Register notice of receipt and availability of the Lee COL application was published on February 1, 2008 (73 Fed. Reg. 6218), and the Lee COL application was accepted for docketing on February 25, 2008. The Federal Register notice of

docketing was published on February 29, 2008 (73 Fed. Reg. 11,156), and the Federal Register notice of hearing (Hearing Notice) was published on April 28, 2008 (73 Fed. Reg. 22,978).[1] The Hearing Notice included an "Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information [SUNSI] and Safeguards Information [SGI] for Contention Preparation" (SUNSI/SGI Access Order).

Two important parts of the Lee COL application that will be discussed extensively below are the Lee COL Final Safety Analysis Report (FSAR) and Environmental Report (ER). The Lee COL application also incorporates by reference 10 C.F.R. Part 52, Appendix D (which includes the AP1000 generic design control document (DCD) through Revision 15 (AP1000 R15)), as amended by AP1000 DCD, Revision 16 (AP1000 R16). AP1000 R16 remains subject to an ongoing NRC rulemaking under Docket No. 52-006. AP1000 R16 was accepted for docketing in that rulemaking proceeding and a notice to that effect was published in the Federal Register on January 28, 2008 (73 Fed. Reg. 4926).

DISCUSSION

In its Petition, BREDL asserts that it has standing based upon its representation of several of its members and proposes ten contentions. On pages 6-8 of the Petition, BREDL summarizes its ten proposed contentions as follows:

1. "The NRC cannot hold a fair hearing at this time because the application adopts by reference a design and operational practices that have not been certified by the NRC or accepted by the applicant."

2. "The applicant fails to analyze the 'carbon – footprint' of the construction and operation of the William States Lee nuclear reactors 1 & 2 in its environment report."

[1] On June 17, 2008, the Commission published a Federal Register notice (73 Fed. Reg. 34,348) correcting the name given for the COL applicant in the Hearing Notice. The COL applicant was identified as "Duke Energy" in the April 28, 2008, notice, rather than the correct "Duke Energy Carolinas, LLC."

3. "Duke's COLA does not identify the plans for meeting its water requirements with sufficient detail in order to determine if there will be adequate water during adverse weather conditions such as droughts."

4. "The applicant has not demonstrated that it is and [sic] financially qualified to engage in the activities authorized by the operating license in accordance with the regulations of 10 CFR § 50.57(a)(4)."

5. "The COLA does not provide reasonable assurance of adequate protection of public health and safety required by 10 CFR. § 50.57(a)(3). The FSAR insufficiently analyzes reactor units' capability to withstand a design-basis and safe shutdown earthquake because they fail to include more recent information regarding the type, frequency and severity of of [sic] potential earthquakes in violation of 10 CFR PART 100, APPENDIX A."

6. "Whether William States Lee III Will Improve the General Welfare, Increase the Standard of Living, or Strengthen Free Competition in Private Enterprise."

7. "The NRC Fails to Execute Constitutional Due Process and Equal Protection."

8. "The assumption that uranium fuel is a reliable source of energy is not supported in the combined operating license application submitted by Duke Energy to the U.S. Nuclear Regulatory Commission."

9. "Duke and NRC Fail to Include Adequate Protections from Aircraft Impacts at the WS Lee site."

10. "10A . . . Failure to Evaluate Whether and in What Time Frame Spent Fuel Generated by Bellefonte Units 3 and 4 [sic] Can Be Safely Disposed Of. . . . 10B . . . Even if the Waste Confidence Decision Applies to This Proceeding, It Should be Reconsidered."

As explained below, BREDL has established standing but has submitted no admissible contentions.[2]

[2] On page 5 of the Petition, BREDL complains about the terms of the SUNSI/SGI Access Order that was issued along with the Hearing Notice. *See* 73 Fed. Reg. at 22,978. Because BREDL does not seek any relief, the Staff will not address BREDL's complaints unless directed to do so by the Board.

I. Legal Standards:

A. Standing to Intervene

In accordance with the Commission's Rules of Practice:[3]

> [a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions that the person seeks to have litigated in the hearing.

10 C.F.R. § 2.309(a). The regulations further provide that the Licensing Board:

> will grant the [petition] if it determines that the [petitioner] has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].

*Id.*

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

> (i) The name, address and telephone number of the requestor or petitioner;
>
> (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act of 1954, as amended (Act)] to be made a party to the proceeding;
>
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
>
> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1).

As the Commission has observed:

> [a]t the heart of the standing inquiry is whether the petitioner has "alleged such a personal stake in the outcome of the controversy" as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.

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[3] *See* "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," 10 C.F.R. Part 2.

*Sequoyah Fuels Corp. and Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc*., 438 U.S. 59, 72 (1978), and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

> To demonstrate such a "personal stake," the Commission applies contemporaneous judicial concepts of standing. Accordingly, petitioner must (1) allege an "injury in fact" that is (2) "fairly traceable to the challenged action" and (3) is "likely" to be "redressed by a favorable decision."

*Sequoyah Fuels,* 40 NRC at 71-72 (quoting *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992) (citations and internal quotations omitted) and citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

In reactor license proceedings, licensing boards have typically applied a "proximity" presumption to persons "who reside in or frequent the area within a 50-mile radius" of the plant in question. *See, e.g.*, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148 (2001).[4] The Commission noted this practice with approval, stating that:

> We have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto[.] *See, e.g. Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979). . . . [T]hose cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment[.] *See, e.g., Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 8 [sic, 7] AEC 222, 226 (1974).

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[4] The *Turkey Point* decision summarizes the development of this doctrine. *See Turkey Point*, LBP-01-6, 53 NRC at 147-48.

*Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). The proximity presumption establishes standing without the need to establish the elements of injury, causation, or redressability. *Turkey Point*, LBP-01-6, 53 NRC at 150. The NRC staff submits that because a COL application is an application for a construction permit combined with an operating license (*see* 10 C.F.R. § 52.1(a)), the proximity presumption would appear, in general, to apply to such applications.

An organization may establish its standing to intervene based on organizational standing (showing that its own organizational interests could be adversely affected by the proceeding), or representational standing (based on the standing of its members). Where an organization seeks to establish "representational standing," it must show that at least one of its members may be affected by the proceeding, it must identify that member by name and address and it must show that the member “has authorized the organization to represent him or her and to request a hearing on his or her behalf.” *See, e.g.*, *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 195 (2006) (citing *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)). Further, for the organization to establish representational standing, the member seeking representation must qualify for standing in his or her own right, the interests that the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Palisades,* CLI-07-18, 65 NRC at 409; *Private Fuel Storage,* CLI-99-10, 49 NRC at 323 (citing *Hunt v. Wash. State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977)).

B. Legal Requirements for Contentions

1. General Requirements

The legal requirements governing the admissibility of contentions are well established and currently are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice (formerly § 2.714(b)).[5]

The standards in 10 C.F.R. § 2.309(f)(1) may be summarized as follows: 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 at the hearing; and (6) provide sufficient information to show that a genuine dispute with the applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.[6] *See* 10 C.F.R. § 2.309(f) (2008).

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[5] The Commission codified the requirements of former § 2.714, together with rules regarding contentions set forth in Commission cases, in § 2.309 in 2004. *See* "Changes to Adjudicatory Process" (Final Rule), 69 Fed. Reg. 2182 (Jan. 14, 2004), *as corrected*, 69 Fed. Reg. 25,997 (May 11, 2004). In the Statements of Consideration for the final rule, the Commission cited several Commission and Atomic Safety and Licensing Appeal Board decisions applying former § 2.714 in support of the codified provisions of § 2.309. *See* 69 Fed. Reg. at 2202. Accordingly, Commission and Appeal Board decisions on former § 2.714 retain their vitality, except to the extent the Commission changed the provisions of § 2.309 as compared to former § 2.714.

[6] Section 2.309(f) states the following requirements for contentions:

(f) Contentions.

(continued. . .)

Sound legal and policy considerations underlie the Commission's contention requirements. The purpose of the contention rule is to, "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202; *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is

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(. . .continued)

> (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
> (ii) Provide a brief explanation of the basis for the contention;
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.
> (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

10 C.F.R. § 2.309(f)(1)-(2).

appropriate for and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. 69 Fed. Reg. at 2221; *see also*, *Private Fuel Storage, L.L.C.,* CLI-99-10, 49 NRC at 325; *Ariz. Pub. Serv. Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice."[7] *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

Finally, it is well established that the purpose for the basis requirements is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom*, ALAB-216, 8 AEC at 20-21; *Ariz. Pub. Serv. Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991). The *Peach Bottom* decision requires that a contention be rejected if:

> (1) it constitutes an attack on applicable statutory requirements;

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[7] *See also Ariz. Public Service Co*. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991). These requirements are intended, *inter alia*, to ensure that a petitioner reviews the application and supporting documentation prior to filing contentions; that the contention is supported by at least some facts or expert opinion known to the petitioner at the time of filing; and that there exists a genuine dispute between the petitioner and the applicant before a contention is admitted for litigation -- so as to avoid the practice of filing contentions which lack any factual support and seeking to flesh them out later through discovery. *See, e.g., Shoreham*, 34 NRC at 167-68.

> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
>
> (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
>
> (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
>
> (5) it seeks to raise an issue which is not concrete or litigable.

*Peach Bottom, supra,* 8 AEC at 20-21.

These rules focus the hearing process on real disputes susceptible of resolution in an adjudication. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). For example, "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies." *Id.* Specifically, NRC regulations do not allow a contention to attack a regulation unless the proponent requests a waiver from the Commission. 10 C.F.R. § 2.335; *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 and n.15 (2007) (citing *Millstone*, CLI-01-24, 54 NRC at 364).

II. BREDL Has Established Representational Standing.

BREDL asserts representational standing to intervene in this proceeding by demonstrating an injury-in-fact to members who have authorized the organization to represent them in this proceeding. BREDL bases this claim on affidavits from five of its members who have authorized BREDL to represent them in this proceeding. Petition at 3-4. These individuals are: Diane Biggs, Mary B. Connolly, Stephen A. Laurence, Charles Moss, and Joseph Zdenek (collectively, BREDL Declarants). *Id*. BREDL states that these members reside within 50 miles of the proposed site and have standing due to their proximity to the site. *Id.*

In order to establish representational standing, an organization must demonstrate, among other things, that its members would otherwise have standing to participate in their own

right and that at least one of its members has authorized it to represent the member's interests. *See Palisades*, CLI-07-18, 65 NRC at 409. BREDL satisfies the representational standing requirement through each of the five individuals named in the Petition, who have provided virtually identical declarations, which are attached to the Petition (collectively, BREDL Declarations), in support of BREDL's standing. *See* BREDL Declarations. Each of the BREDL Declarants states that he or she is a member of BREDL and has authorized BREDL to represent him or her in this proceeding. *See id.* Further, the claims contained in all of the declarations are identical in substance – all individuals assert that their homes are within fifty miles of the site and that nuclear reactors in close proximity to their homes "could pose a grave risk to [their] health and safety." *Id*.

Because all of the BREDL Declarants have established standing to intervene in their own right and have authorized BREDL to represent their interests in the instant proceeding, BREDL has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409, and the NRC staff does not object to BREDL's representational standing to intervene.

III. BREDL Has Submitted No Admissible Contentions

A. Proposed Contention 1: The NRC cannot hold a fair hearing at this time because the application adopts by reference a design and operational practices that have not been certified by the NRC or accepted by the applicant. [Petition at 8.]

BASIS:

The WS Lee COLA relies upon Appendix D to 10 C.F.R. Part 52 and the AP1000 Design Control Document ("DCD") Revision 16. However, NRC staff has stated that the certification for the AP1000 revision 16 would not be completed until 2011. The NRC staff's Safety Evaluation report on Revision 16 is scheduled to be completed by March 2010 with the rule-making completed a year later. Modifications to the design or operational procedures for the AP1000 revision 16 would require changes in Duke application. [*Id.*]

BREDL first asserts that it is "fundamentally unfair for the NRC to require Petitioner and other interested parties to perform a review of the application when the application is not complete. *Id.* at 8-9. BREDL then states that "the most significant elements of the proposed reactors, i.e., the certified design and operational practices, are lacking in the Duke COL application." *Id.* at 9. BREDL then makes a variety of statements regarding Tier 1 and Tier 2 components of the DCD. *Id.* at 9-11. BREDL concludes by stating that "fairness requires that the proceeding be suspended." *Id.* at 11.

*Staff Response*: For the reasons stated below, this is not an admissible contention since it fails to comply with the 10 C.F.R. § 2.309 standards for contentions.[8] This contention simply asserts that a "fair hearing" cannot be held at this time due to the fact that the AP1000 certified design is currently undergoing revisions. Petition at 8. A contention that simply alleges that some general, non-specific matter ought to be considered does not provide the basis for an admissible contention. A contention is inadmissible if it fails to contain sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and does not include references to the specific portions of the application that the petitioner may dispute. *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 8 (2008). In the instant case, BREDL has not identified any dispute with the Lee COL Application. Rather, BREDL is simply stating its view that requiring petitioners to file contentions at this time is unfair.

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[8] The Staff notes that Contention 1 is essentially identical to the first several pages of a motion to suspend the hearing notice filed by the North Carolina Waste Awareness and Reduction Network in the Progress Energy Carolinas, Inc (Shearon Harris Nuclear Site Units 2 & 3) proceeding. *See* "Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration by the North Carolina Waste Awareness and Reduction Network," June 25, 2008. That motion is currently pending before the Commission.

The contention, in essence, is an objection to the long-standing NRC requirements that a petitioner file proposed contentions based on the license application at the start of the Staff review, rather than after the Staff review is completed. *See* 10 C.F.R. §§ 2.104, 2.309. The contention further objects to NRC regulations that allow a COL applicant to reference a design for which a design certification application has been docketed but not yet granted. Quite simply, Duke Energy Carolinas filed its Lee COL application and referenced Appendix D to Part 52 (the AP1000 design certification rule) as well as the Westinghouse application for an amendment to Appendix D (Rev. 16). This is specifically allowed by 10 C.F.R. § 52.55(c). To the extent that BREDL wishes to challenge the Applicant's reliance on a pending amendment to a design certification, this is an impermissible attack on NRC regulations. See 10 C.F.R. § 2.335.

BREDL makes several statements regarding the interaction of Tier 1 and Tier 2 components in the AP1000 design. As recently re-affirmed by the 1st Circuit, the NRC may determine generic issues in rulemaking rather than through litigation in individual cases. *See Massachusetts v. U.S.*, 522 F.3d 115, 119 (1st Cir. 2008). The NRC certifies generic nuclear reactor designs through rulemaking. Thus, to the extent that a member of the public is concerned about any specific design certification, his opportunity to participate on these issues is to file comments on the proposed rule. Pursuant to the recently issued Commission policy statement on new reactor licensing, a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. *See* "Conduct of New Reactor Licensing Proceedings; Final Policy Statement," 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (hereinafter "New Reactor Licensing Policy Statement"). Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final design

certification rule, such a contention should be denied. *See Id.* A petitioner is foreclosed from filing contentions regarding a previously certified design in a COL proceeding. Thus, BREDL is foreclosed from filing contentions regarding the previously certified AP1000 design. *See* 10 C.F.R. Part 52, Appendix D, Section VI. (Issue Resolution). Beyond a vague reference to the Staff's January 18, 2008, docketing letter, *see* Petition at 9, BREDL has failed to identify any portion of the pending amendment to the AP1000 with which it takes issue. Similarly it has failed to identify a dispute with what is in the Westinghouse application for an amendment to the DCD, or put forth an adequate basis to support its concern. Thus, the provision of the Commission's policy statement which would allow contentions on the pending design amendment to be admitted and held in abeyance is not triggered since BREDL has not identified admissible contentions.

Because BREDL fails to demonstrate a genuine dispute with either the COL applicant or the DCD applicant on a material issue of law or fact, this contention does not comply with 10 C.F.R. § 2.309(f)(vi) and, thus, must be dismissed.

B. Proposed Contention 2: The applicant fails to analyze the "carbon – footprint" of the construction and operation of the William States Lee nuclear reactors 1 & 2 in its environment report. [Petition at 11.]

BASIS:

> Greenhouse gases rank among the top environmental concerns today. The release of greenhouse gases is part of any major construction operation – as the production of cement, steel, copper and other raw materials and components all contribute to what is generically called the "carbon-footprint" though more accurately, it would be referred to as the "Greenhouse Gas footprint." These emissions from many sources, in aggregate, are contributing to the destabilization of climate on planet Earth. The applicant fails to include an analysis of the emission of Greenhouse gases in the process of the production of raw materials and components, and the transportation of these materials and components and the construction processes required to build and operate the William States Lee nuclear power station.

> A second analysis of Greenhouse gas emissions, associated with each and every step in the uranium fuel chain is similarly lacking. The mining of uranium is accomplished using fossil fuels. The many transportation links in the 6 uranium processing steps (mining, milling, conversion, enrichment, re-conversion, fuel fabrication) prior to shipment to the Bellefonte [sic] site have not been analyzed for Greenhouse gas emissions and associated climate impacts. Today there are sometimes additional steps when down-blending and other feedstock sources are utilized in uranium fuel production. Each and every one of the 6 uranium processing steps requires power— and most are currently powered with fossil fuels. The back-end of the nuclear fuel chain also involves transportation and therefore combustion of fossil fuels in moving the so called low-level waste, and someday the high-level waste. Any plans for additional steps of storage or processing of these wastes will increase the associated transportation generated greenhouse gas emissions! In addition, the reprocessing of nuclear fuel generates large quantities of gaseous emissions, all of which need to be evaluated for whether they contribute to climate destabilization. [Petition at 12-13.]

The Petition goes on to outline various risks to its members from the asserted lack of analyses, pointing primarily to federal subsidies for new reactors and a possibly inadequate federal response to climate change. *Id.* at 13. The Petition then cites to a "recommended resource for conducting such an analysis" in a statement that focuses on how to analyze greenhouse gas emissions from the nuclear fuel cycle rather than on the significance of those emissions. *See id.* The Petition then asserts that the Applicant has not claimed that the Lee reactors or nuclear energy will contribute to a solution to climate change, but that other persons and groups have, and that it is important, therefore, "to include the 'carbon-footprint' of construction and operation and dealing with the wastes of the Lee reactors in the consideration of environmental impact." Petition at 14.

*Staff Response*: The NRC staff opposes admission of BREDL Contention 2. As explained below, BREDL fails to provide sufficient information to demonstrate a genuine factual dispute with the COL application and to provide a concise statement of the facts that support its

position. Accordingly, Contention 2 is not admissible because it fails to meet the requirements of § 2.309(f)(1)(v) and (vi).

1. BREDL Fails in Contention 2 to Provide a Concise Statement of the Facts That Support Its Position.

BREDL identifies no factual support or references for its generalized assertions concerning greenhouse gases "contributing to the destabilization of climate on planet Earth," or for its vague references to emissions from any of the steps in uranium fuel production. Petition at 12-13. BREDL also fails to explain what it means by "plans for additional steps of storage [sic] or processing of these wastes," or what "reprocessing of nuclear fuel" is referenced and why such activities should be anticipated. *See* Petition at 13. BREDL also completely fails to explain what emissions increases would be likely from either of these sources or what their environmental significance would be. *See id.* In fact, BREDL cites only a single source in all of Contention 2, and BREDL fails to explain how that report supports any of its assertions concerning the environmental significance of greenhouse gases that would be attributable to the proposed Lee facility.[9] Therefore, this contention fails to meet the requirements of § 2.309(f)(1)(v).

2. BREDL Fails in Contention 2 to Identify a Genuine Dispute With the COL Application on a Material Issue of Law or Fact.

As noted above, the contention is devoid of factual support for its assertions and conclusions concerning the significance of greenhouse gas emissions, whether from the uranium fuel cycle or otherwise. As such, the contention identifies no specific dispute with the

[9] The Petition states only that the findings in the cited report "include the determination that a key limiting variable in the nuclear fuel cycle impacts on Greenhouse Gas emissions is the relative ease with which uranium is obtained – the harder the rock, the deeper the deposits, the greater the Greenhouse gas emissions." Petition at 13. The Petition goes on to state, "[A] flat-line projection for Greenhouse Gas emissions from the nuclear fuel cycle is not likely to be an accurate representation." *Id.* The Petition completely fails to explain how this determination relates to, or supports, any of the broad statements it makes regarding the significance of the uranium fuel cycle greenhouse gas emissions.

Lee COL application other than to argue generally that the ER should contain such a discussion. Yet having failed to present a sufficiently specific or supported argument concerning the importance of greenhouse gases for environmental impacts analyses generally, BREDL has not articulated any support for an argument that such an analysis is appropriate or significant with respect to the Lee COL application or that any significant impacts have not been disclosed in the ER. Accordingly, this contention fails to meet the requirements of § 2.309(f)(1)(vi). *See System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005) (stating, in affirming a licensing board's rejection of a contention, "At NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the ER. Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances").

For the reasons stated above, Contention 2 fails to meet the requirements of § 2.309(f)(1)(v) and (vi), and, thus, is not admissible.

> C. Proposed Contention 3: Duke.s [sic] COLA does not identify the plans for meeting its water requirements with sufficient detail in order to determine if there will be adequate water during adverse weather conditions such as droughts. [Petition at 14.]
>
> BASIS:
>
> The availability of cooling water is a significant constraint to the safe shutdown of the proposed reactors and without a clear plan on how that water will be provided, the application is incomplete. The COLA does not satisfy the requirement for completeness of 10 C.F.R. § 2.101(a)(3). [*Id.*]

In the "Discussion" section, BREDL includes a great number of assertions that generally involve water in one way or another. The Discussion, as a whole, is disorganized, and many of the statements and assertions therein do not relate to adequate water for safe shutdown. These statements and assertions appear to fall under the following two categories: (1) Temperatures, water temperatures, and drought will increase in the future, and (2) the Lee COL application does not adequately account for the effects of these increases. As is discussed

below, it is possible to read Contention 3 as containing many bases in addition to the one quoted above. These possible additional bases will be outlined in the Staff Response.

*Staff Response*: As explained below, Contention 3 is not admissible because the contention does not meet the requirements of § 2.309(f). The issues presented therein are outside the scope of the proceeding and are not material to the findings the NRC must make to issue the license. Contention 3, therefore, does not show that there is a genuine dispute with the application on a material issue of law or fact. Also, every assertion in the contention has, as a necessary foundation, assumptions of future increases in temperatures, water temperatures, and drought that are entirely unsupported. Furthermore, many statements and assertions in the Contention 3 discussion do not provide logical support for the contention.

1. Contention 3 Has Fundamental Organization Problems.

The scope of BREDL's contention is not clear because much of the "Discussion" does not relate to the single basis provided by BREDL under the "Issue" heading. The Staff sees two possible ways of reading the contention. The first possible reading would treat the assertion about adequate water for safe shutdown that is specified under "Issue," Petition at 14, as the sole basis for the contention. Such a reading is consistent with BREDL's organization of the contention, and BREDL has the burden of clearly communicating its issues. Most of the "Discussion," however, would then become irrelevant to the contention's sole basis. Those parts of the discussion relevant to adequate water for safe shutdown would then be considered under BREDL's one basic claim, that the Lee COL application is incomplete in violation of § 2.101(a)(3) for failure to provide a sufficiently detailed plan for adequate water for safe shutdown.

The second possible reading would organize the disorganized collection of assertions in the Discussion section into separate bases that would be considered in addition to the one explicitly provided by BREDL. This reading would allow for more of the Discussion to be

considered, but there would still be a substantial portion of the Discussion outside the scope of BREDL's contention. That is because parts of the Discussion do not logically support the very generally stated contention. This second reading also would not be consistent with BREDL's own organization of its contention.

The Staff believes that the first reading is preferable under the general principle that "[i]t is a 'contention's proponent, not the licensing board,' that 'is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.'" *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998)). For the sake of completeness and to the extent possible, however, the Staff Response will collect the statements and assertions in the "Discussion" section together according to subject matter and treat them as additional bases offered in support of the contention. As will be shown below, Contention 3 is not admissible under either reading. Finally, whether the first or second reading is chosen, the Licensing Board should not try to articulate additional contentions for those parts of the Discussion that do not support the stated contention. Given that *USEC*, CLI-06-10, 63 NRC at 457, states that it is inappropriate for licensing boards to "infer unarticulated bases of contentions," *id.* at 457 (internal quotation omitted), the Staff believes it is also inappropriate to infer unarticulated contentions from bases.[10]

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[10] *USEC* provided the above quotation from the 1998 Policy Statement in support of this point. The rather apparent chain of logic is: 1. Petitioners, not licensing boards, have the duty to formulate contentions and provide bases. 2. Licensing boards, therefore, should not infer bases for contentions. This same chain of logic would apply to licensing boards inferring contentions for bases.

In the remaining parts of the Staff Response to Contention 3, the Staff will first make certain overall comments about Contention 3 that apply to the contention in its entirety, and then provide comments specific to each of the bases.

2. Overall Comments on Contention 3

a. The Only Regulatory Standard Cited Involves Issues Outside the Scope of This Proceeding.

No regulatory or statutory provision other than 10 C.F.R. § 2.101(a)(3) is cited in Contention 3. As shown below, to the extent that Contention 3 relies upon a claim that the Lee COL application is incomplete in violation of § 2.101(a)(3), it fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi). There are good reasons to think that all of Contention 3 was intended to relate to § 2.101(a)(3). First, § 2.101(a)(3) is the only regulatory or statutory provision cited in the contention and it is cited prominently under the "Issue" heading. Second, the Discussion, in its various parts, alleges that the Lee COL application is incomplete. Even if, however, the claims in Contention 3 are not considered to be based on § 2.101(a)(3), Contention 3 still fails to meet the contention admissibility requirements of § 2.309(f)(1)(i), (iv), and (vi), as shown below.

Any issue raised under § 2.101(a)(3) is outside the scope of the proceeding and not material to the findings the NRC must make to issue the COL license. BREDL's fundamental claim is that the Lee COL application is incomplete in violation of § 2.101(a)(3), but this regulatory section concerns the decision by the Director of the Office of New Reactors (NRO) to determine that the application is "complete and acceptable for docketing." The docketing determination preceded publication of the Hearing Notice,[11] and this proceeding concerns

[11] As stated above, the Hearing Notice was published on April 28, 2008, the application was docketed on February 25, 2008, and the docketing notice was published on February 29, 2008.

whether to issue a COL to Duke for the Lee site, not whether the prior docketing determination was proper. Similarly, the docketing determination is not material to the findings the NRC must make to issue the license. *See* 10 C.F.R. § 52.97(a).

Furthermore, licensing boards do not have jurisdiction over the NRO Director's docketing determinations. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 570 (2005) (stating, "As we have stated repeatedly over the last quarter-century, boards lack the authority to supervise the NRC Staff in the performance of its regulatory duties"); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 385 n.69 (2007) (stating, with regard to an applicant's amendment to its license renewal application, that the licensing board "lack[ed] authority to prohibit the NRC Staff from docketing the amendment"). Contention 3, therefore, is inadmissible under § 2.309(f)(1)(iii) because docketing issues are outside the scope of the proceeding and is inadmissible under § 2.309(f)(1)(iv) and (vi) because docketing issues are not material to the proceeding.

If some of the claims made in Contention 3 are deemed not to relate to § 2.101(a)(3), then for those claims BREDL has not satisfied the requirements of § 2.309(f)(1)(i) to state the specific issues of law or fact that are raised or controverted. Because the claims in Contention 3, however they are understood, necessarily involve mixed questions of fact and law, specifying the applicable regulatory or statutory standard is necessary to meet § 2.309(f)(1)(i). Otherwise, claims that analyses or discussions are incomplete or insufficient have no meaning in a way material to this proceeding. It would not even be clear whether BREDL's concerns are within the regulatory jurisdiction of the NRC. For this reason, specifying the issues of law being controverted is also necessary to make the demonstration of materiality in § 2.309(f)(1)(iv), (vi). *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 8 (2008) (stating that "[t]his strict contention pleading rule is

designed to focus the hearing process on genuine disputes susceptible of resolution, puts the other parties on notice of the specific grievances at issue, and restricts participation to 'those able to proffer at least some minimal factual and legal foundation in support of their contentions'") (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)).

b. All of the Assertions Contained in Contention 3 Rely Upon Non-specific, Unsupported Assumptions Regarding Temperature, Water Temperatures and Drought.

As described in the summary of Contention 3, the points made in the Discussion portion of Contention 3 appear to fall under the following two categories: (1) Temperatures, water temperatures, and drought will increase in the future, and (2) the Lee COL application does not adequately account for the effects of these increases. In fact, every claim made about the inadequacy of the Lee COL application in Contention 3, however general, fundamentally relies upon an assumed increase in temperatures and/or drought. Generally, BREDL does not dispute any of the methodologies used by the applicant in its analyses, but, rather, complains that the applicant did not use BREDL's non-specific, unsupported speculations as a basis for analysis. These assumed increases in temperature and drought, however, are not stated specifically or supported by documentation or expert opinion. Because the entirety of Contention 3 relies upon these non-specific, unsupported assertions, the contention, as a whole, fails to meet the requirements of § 2.309(f)(1)(v), (vi), as shown below.

Section 2.309(f)(1)(v) requires petitioners to:

> Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.

When BREDL claims that temperatures and drought will increase in the future, it provides a statement of alleged fact, but BREDL fails to support its claim. Its assertions are entirely unsupported in nature. No documentation or expert opinion is provided for them. Contention 3, therefore, fails to meet § 2.309(f)(1)(v).

BREDL not only fails to support its temperature and drought claim, it fails to state its claim with enough specificity to demonstrate that it is material to this proceeding. A demonstration of the significance of a dispute is required for the materiality of either a safety or environmental contention. *See Nuclear Management Co*. (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 748-49 (2005) (stating that "'[m]ateriality' requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding. This means that there must be some significant link between the claimed deficiency and either the health and safety of the public, or the environment"); *System Energy Resources,* CLI-05-4, 61 NRC at 13 (stating, in affirming a licensing board's rejection of a contention, "At NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the ER. Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances"). *See also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 259 (1996) (stating, "[I]t should be evident that not all actual or alleged errors in a decommissioning plan are of equal significance; to be significant enough to be 'material,' within the meaning of the contention rule, there needs to be some indication that an alleged flaw in a plan will result in a shortfall of the funds actually needed for decommissioning.") By failing to specify the extent of its asserted increases in temperature and drought, BREDL fails to show that there is a genuine dispute with the application on a material issue of law or fact. For this reason, therefore, Contention 3 is inadmissible for failing to meet § 2.309(f)(1)(vi).

Contention 3 does not constitute an admissible contention.

3. Comments Specific to the Bases of Contention 3

As stated above, BREDL only explicitly offers one basis for Contention 3 (labeled below as "Basis 1"), but for the sake of completeness, elements of the "Discussion" will be grouped together by subject matter as if these constituted additional bases. The Contention 3 bases and the Staff analysis of these bases are as follows:[12]

BASIS 1:

> The availability of cooling water is a significant constraint to the safe shutdown of the proposed reactors and without a clear plan on how that water will be provided, the application is incomplete. The COLA does not satisfy the requirement for completeness of 10 C.F.R. § 2.101(a)(3). [Petition at 14.]

*Staff Analysis:* Basis 1 does not provide support for an admissible contention. As described above, a contention based on § 2.101(a)(3) cannot be admissible. Furthermore, the contention relies upon non-specific, unsupported assumptions regarding temperature and drought. BREDL does not reference the COL application, much less explain how that discussion is insufficient. FSAR section 2.4.11.1, "Low Flow in Rivers and Streams," states the following:

> However, there are no safety-related facilities that could be affected by low-flow or drought conditions, since the passive cooling system does not rely on the Broad River as a source of water. If necessary, the on-site reservoirs can be used to supplement natural flow to support continued operations for additional periods of time. Non-safety related water supply during drought is addressed in Subsection 2.4.11.5.

[12] The Staff notes that many of the citations to the application provided in the Discussion section do not specify whether the ER or FSAR is intended. The Staff believes that the context generally allows it to understand which was intended, however, and may simply identify which document is being cited to without further elaboration.

FSAR at 2.4-48 to -49. BREDL does not dispute this statement, so it has not demonstrated a genuine dispute with the application on a material issue of law or fact, thereby failing to meet § 2.309(f)(1)(vi).

Basis 1 does not constitute an admissible basis for Contention 3.

*BASIS 2*:

> The applicant fails to fully analyze the following potential impacts of elevated water temperatures in the Broad River and its water shed: . . . a) The impact of reactor thermal discharge (warmed water) on water that is already elevated in temperature – looking at both additive and synergistic impacts on the local and down-river ecosystem . . . e) The impact on other facilities – the need to provide cool water to the two William States Lee reactors could impact operations at other facilities up-stream from the facility, as well as the issue of whether heat generated at the Lee site would impact operations at facilities down-stream . . . f) The impact of pollution in water at warmer temps on the ecology of the site and also down-stream –most chemical reactions are facilitated by elevated temperatures; a full analysis of the impact of reactor heat in hotter water on the other pollutants in the water from any source must be considered, including implications for the food chain. . . . j) The the [sic] potential for extended drought locally, and in the region to exacerbate all of the issues identified above. [Petition at 15-16.]
>
> 5.2.3.1 Thermal Impacts – the description of the system does not include a consideration of the projected increase in overall temperatures anticipated during the decades of operation. Synergistic interactions of thermal impacts and other factors are also not included. [Petition at 19.]

*Staff Analysis:* Licensing Boards have described § 2.309(f)(1)(ii) as requiring the brief explanation of bases to "'indicat[e] the potential validity of the contention,'" *see Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 147 (2006) (quoting "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process," Final Rule 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)), and to provide the "logical underpinnings of a contention," *Vermont Yankee*, 64 NRC at 147. Because the

above assertions are not related to adequate water for plant use, they do not provide logical support for the contention and, therefore, do not meet the § 2.309(f)(1)(ii) basis requirement.

The Basis 2 assertions also do not refer to any specific regulatory or statutory standard other than § 2.101(a)(3) (which constitutes an impermissible challenge as explained above), thus the nature of any dispute, other than an impermissible one, has not been specified. Even if the concerns can be considered environmental, BREDL has not identified which environmental statute or regulation is at issue. There has been, therefore, no demonstration that the issues involved are material to the findings the NRC must make to issue the COL. *See* § 2.309(f)(1)(iv).

As a whole, the Basis 2 assertions are conclusory in nature and lack documentation or expert support, thereby failing to meet § 2.309(f)(1)(v). These assertions also do not explain the extent of BREDL's feared impacts, much less explain how any of the feared impacts are significantly different from the description of impacts in the ER to demonstrate that there is a genuine dispute with the application on a *material* issue of law or fact. *See* § 2.309(f)(1)(vi). The application is only mentioned in passing, and BREDL does not explain how the conclusion in ER Section 5.2.3.1, "Thermal Impacts," that the environmental effects of thermal effluents will be small, is in error. BREDL also does not take issue with the model used to perform the thermal effluent analysis, or explain how the model's reliance upon data from the years 1996 to 2006 will be significantly different from future expected data. *See* ER at 5.2-10. BREDL also does not cite to the ER discussion of chemical effluents in ER Section 3.6, "Nonradioactive Waste Systems," show how any information in that section is deficient, or otherwise show that there is a genuine dispute on a material issue of law or fact on water chemistry issues.

Basis 2 does not constitute an admissible basis for Contention 3.

*BASIS 3:*

> The applicant fails to fully analyze the following potential impacts of elevated water temperatures in the Broad River and its water shed: . . . b) The impact of warmed water on condenser cooling – nuclear power reactors around the world in increasing numbers, including TVA's Brown's Ferry nuclear reactor in 2007, have gone to low-power or off-line due to elevated cooling water temperatures and the loss of efficiency in power production due to loss of effective condensation of steam used to generate power. . . . j) The the potential for extended drought locally, and in the region to exacerbate all of the issues identified above. [Petition at 15-16.]

*Staff Analysis*: The Basis 3 assertions do not refer to any specific regulatory or statutory standard other than § 2.101(a)(3) (which constitutes an impermissible challenge as explained above), so the nature of any dispute, other than an impermissible one, has not been specified. There has been, therefore, no demonstration that the issue involved is material to the findings the NRC must make to issue the COL. *See* § 2.309(f)(1)(iv). This assertion is not specific enough to serve as an alleged fact in support of BREDL's position, and the assertion is also conclusory in nature and lacks documentation or expert support, thereby failing to meet § 2.309(f)(1)(v).

This condenser cooling assertion also does not explain the nature or extent of BREDL's feared effects, much less explain how any of the feared effects are significantly different from the descriptions in the ER or FSAR to demonstrate that there is a genuine dispute with the application on a *material* issue of law or fact. *See* § 2.309(f)(1)(vi). BREDL cites to the experience of other plants without explaining how the climate conditions and plant designs from those examples relate to an AP1000 at the Lee site such that there will be a significant loss of efficiency. BREDL also does not explain how the environmental effects described are incorrect in a significant and material way. Finally, to the extent BREDL has some unspecified safety concern with the condenser cooling, it does not take issue, for example, with statements such as one found in Lee FSAR Section 10.4.5.1.1., "Safety Design Basis," which states, "The

circulating water system (CWS) serves no safety-related function and therefore has no nuclear safety design basis." FSAR at 10.4-2.

Basis 3 does not constitute an admissible basis for Contention 3.

*BASIS 4*:

> The applicant fails to fully analyze the following potential impacts of elevated water temperatures in the Broad River and its water shed: . . . c) [t]he evaluation of increasingly warmed water on tech specs for reactor cooling. . . . j) The the [sic] potential for extended drought locally, and in the region to exacerbate all of the issues identified above. [Petition at 15-16.]

*Staff Analysis*: The above assertion does not specify the technical specification in question or any safety concern that BREDL may have. BREDL might have intended Basis 4 to relate to adequate water for safe shutdown, but the § 2.309(f)(1)(ii) basis requirement is not met because the assertion makes no sense: Warmed water has no effect on the technical specifications. If a technical specification is not met, then a required action is taken, which could include shutting down the plant. Furthermore, technical specifications can be modified by license amendment, if necessary.

Basis 4 also does not refer to any specific regulatory or statutory standard other than § 2.101(a)(3) (which constitutes an impermissible challenge as explained above); thus the nature of any dispute other than an impermissible one has not been specified. There has been, therefore, no demonstration that the issue involved is material to the findings the NRC must make to issue the COL. *See* § 2.309(f)(1)(iv). This assertion is not specific enough to serve as an alleged fact in support of BREDL's position, and the assertion is also conclusory in nature and lacks documentation or expert support, thereby failing to meet § 2.309(f)(1)(v).

Moreover, the assertion in Basis 4 does not explain the nature of BREDL's concern, much less its extent. This fact, in combination with BREDL's failure to cite a specific portion of the application, demonstrates that there is not a genuine dispute with the application on a

material issue of law or fact. *See* § 2.309(f)(1)(vi). To the extent that Basis 4 is related to Basis 1, BREDL fails to demonstrate a genuine dispute with FSAR section 2.4.11.1, "Low Flow in Rivers and Streams," as discussed in the Staff Analysis of Basis 1.

Basis 4 does not constitute an admissible basis for Contention 3.

*BASIS 5*:

> The applicant fails to fully analyze the following potential impacts of elevated water temperatures in the Broad River and its water shed: . . . d) The evaluation of the impact of warmer ambient water temperatures on total withdrawal, consumption and evaporation. . . . j) The the [sic] potential for extended drought locally, and in the region to exacerbate all of the issues identified above. [Petition at 15-16.]
>
> The applicant offers one brief report on a longitudinal analysis of flow-rates in the Broad River, supporting our contention that there are real issues to be examined here. Section 5.2.2.1 states:
>
> > Additional evaluation indicated that had a hypothetical Lee Nuclear Station operated during the 81-year period of record, operations would have been curtailed only once. During the 1998-2002 drought, operations would have been curtailed for 42 days during June-September 2002, which was the worst year of the drought. Part of this outage would have coincided with the summer peak power demand.
>
> This statement confirms that even based on historical data, rather than the projected trends for increasing temperatures and more prolonged periods of drought, there are some very serious questions that need to be answered. The applicant fails to fully address the host of issues associated with the problem of rising temperatures. This renders the COLA incomplete and opens the possibility that the conclusions are incorrect. [Petition at 16-17.]
>
> Chapter 5.2.2.1 Makeup Water and Consumptive Use –
> The mean annual flow of the Broad river based on historical is cited for the consumption of 2% of the Broad River. No analysis is included on the impact of higher ambient water temperature due to increased temperatures in the region on either water withdrawal or consumption. It is important that projections be made in a "snap-shot" manner focused on the outcomes of a hot spell in conjunction with a drought, rather than only aggregate (annual means, etc). Such an analysis may show a significantly greater water consumption in these periods, and may not support the statement made in this section: "There is sufficient water in the

onsite ponds for the station to operate at full power for approximately four weeks during low flow conditions."

Duke reports the following; however,we suggest that this is merely the "tip of the iceberg" in terms of what the next four to eight decades are likely to hold:

> Duke Energy first calculated a long-term 7Q10 flow for the Broad River. Details of the 7Q10 calculation and the following evaluation are presented in Subsection 5.3.1.1.3. The 7Q10 calculated for the Broad River at Gaffney is 479 cfs. This value is within the FERC minimum flow requirement for the Ninety-Nine Islands Hydroelectric Station (July through November) of 483 cfs. Using this minimum flow requirement of 483 cfs and the projected Lee Nuclear Station cooling water consumptive water use of 55 cfs, Duke Energy defined the sum of the FERC requirement and consumptive water use (538 cfs) as a trigger to define the minimum flow in the Broad River that would support current water use and quality for downstream users. Duke Energy plans to use the Make-Up Pond B to supplement river flows during low-flow conditions. A study was conducted to estimate how often this would occur and recurrence intervals were calculated based on the FERC required minimum continuous flow of 483 cfs established for Ninety-Nine Islands Hydro.
>
> The results of the study indicate that Lee Nuclear Station may have to partially align to the Make-Up Pond B for a 7-day period every 1.5 years. Lee Nuclear Station may have to partially align to the Make-Up Pond B for one month every 6.4 years. Lee Nuclear Station may have to completely align to the Make-Up Pond B for one month every 10.3 years. Lee Nuclear Station may have to partially align to the Make-Up Pond B for 90 consecutive days every 12.2 years. This indicates that for the combination of projected operations and historical lowflow conditions, the capacity of the Broad River and Make-Up Pond B might be exceeded once every 12.2 years. Station operations would potentially have to be curtailed at this frequency.
>
> Additional evaluation indicated that had a hypothetical Lee Nuclear Station operated during the 81-year period of record, operations would have been curtailed only once. During the 1998-2002 drought, operations would have been curtailed for 42 days during June-September 2002, which was the worst year of the drought. Part of this outage would have coincided with the summer peak power demand.

The lack of further analysis to address all points of concern, and the insufficiency of remedies offered result in an application that has failed to sufficiently address the scope of likely impacts to the

> human environment and could result in harm to our members directly through loss of power and increased potential for accidents, as well as loss of water resource. [Petition at 17-19.]

*Staff Analysis:* As the Basis 5 assertions do not refer to any specific regulatory or statutory standard other than § 2.101(a)(3) (which constitutes an impermissible challenge as explained above), the nature of any dispute, other than an impermissible one, has not been specified. There has been, therefore, no demonstration that the issue involved is material to the findings the NRC must make to issue the COL. *See* § 2.309(f)(1)(iv). As a whole, these assertions are conclusory in nature and lack documentation or expert support, thereby failing to meet § 2.309(f)(1)(v).

The Basis 5 assertions do not explain the extent of BREDL's feared impacts, much less explain how any of the feared impacts are significantly different from the description of impacts in the ER to demonstrate that there is a genuine dispute with the application on a *material* issue of law or fact. *See* § 2.309(f)(1)(vi). The application is discussed, but BREDL makes the unjustified leap of assuming that, since there could have been 42 days of curtailed operations during a hypothetical 81 years of operation, then BREDL's non-specific, unsupported speculations regarding future droughts, taken as fact, necessarily imply some nonspecific, speculative increase in the curtailment of future operations that is significantly at odds with the application. None of this is explained, only assumed. Speculation is piled upon speculation, without any documentation or expert support. BREDL also calls for a "snap-shot" method of calculating flow rates without providing any expert opinion or documentary support for why that method is proper or likely to be accurate.

Basis 5 does not constitute an admissible basis for Contention 3.

*BASIS 6*:

> 7.2 Severe Accidents: Fails to mention the potential for increased risks associated with loss of off-site power that could result from the failure of the reactors to operate in peak heat periods. . . . 19

> Probabilistic Risk Assessment: Fails to address the potential for increased risks associated with loss of off-site power that could result from the failure of the reactors to operate in peak heat periods. Loss of off-site power is the root cause of station blackout. Station blackout is associated with 50% of the risk of a major reactor accident (NUREG-1150, 1990). [Petition at 19.[13]]

*Staff Analysis:* The Basis 6 assertions do not refer to any specific regulatory or statutory standard other than § 2.101(a)(3) (which constitutes an impermissible challenge as explained above), so the nature of any material dispute other than an impermissible one has not been specified. The assertion that shutdown will cause loss of offsite power (LOOP) is not supported or explained, and BREDL does not attempt to estimate the increased risk of LOOP or show that such an increase would be significant. There has been, therefore, no demonstration that the issue involved is material to the findings the NRC must make to issue the COL. *See* § 2.309(f)(1)(iv). As a whole, the above assertions are conclusory in nature and lack documentation or expert support, thereby failing to meet § 2.309(f)(1)(v). These LOOP assertions are based on non-specific, unsupported assertions of increased shutdown frequency, which are, themselves, based on non-specific, unsupported assertions regarding increased temperatures and drought.

Most significantly, BREDL is apparently unaware that the AP1000 is designed so as not to rely upon offsite power in the way other designs do. See "AP1000 Design Certification," Final rule, 71 Fed. Reg. 4464, 4471 (Jan. 27, 2006) (granting a partial exemption from the 10 C.F.R. part 50, Appendix A, GDC 17 requirement for a second offsite power supply circuit because of the combination of design features and onsite power sources). BREDL takes no issue with the statement in the Lee COL FSAR that "[o]ffsite power is not required to meet any safety function." FSAR 8.2-3. Such a statement is also found in the certified AP1000 DCD, Tier 2 at

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[13] Although not specified, the Staff believes that these are references to FSAR sections.

8.2-1, (as well as in Revision 16, Tier 2 at 8.2-1). As for the probabilistic risk assessment, the 1990 NUREG-1150, "Severe Accident Risks: An Assessment for Five U.S. Nuclear Power Plants," cited by BREDL, was published before the AP1000 was designed and does not apply to that design. Rather, it applies to five plants that were in operation at the time of the assessment. *See* NUREG-1150 at 1-3. BREDL offers no reason why it would apply to the AP1000, and BREDL is apparently unaware of the following statement in the AP1000 DCD:

> Typical current PRA dominant initiating events are significantly less important for the AP1000. For example, the reactor coolant pump (RCP) seal loss-of-coolant accident (LOCA) event has been eliminated as a core damage initiator since AP1000 uses canned motor reactor coolant pumps which do not have seals. *Another example is the loss of offsite power (LOOP) event. The station blackout and loss of offsite power event is a minor contributor to AP1000 since the passive safety-related systems do not require the support of ac power*.

AP1000 Rev 15, Tier 2 at 19.59-2 (emphasis added). *See also* AP1000 Rev 16, Tier 2 at 19.59-2. The following statement from the AP1000 Rev 15 is also relevant:

> Loss of Offsite Power. The loss of offsite power core damage frequency contribution at power is insignificant (less than 1 percent). AP1000 passive systems require only dc power provided by the long-term batteries for actuation to provide cooling. In addition, the passive residual heat removal heat exchanger is backed up by bleed and feed cooling using the automatic depressurization system and core makeup tanks or in-containment refueling water storage tank gravity injection, which also require only dc power provided by long-term batteries. With onsite power available, startup feedwater provides an additional means of decay heat removal.

AP1000 Rev 15, Tier 2 at 19.59-13. *See also* AP1000 Rev 16, Tier 2 at 19.59-13.

It appears that BREDL's dispute is with the conclusions and analyses in the certified AP1000 design; thus Contention 3, in this respect, would be barred as a collateral attack on

NRC regulations.[14] Also, BREDL has not even attempted to satisfy the stringent 10 C.F.R. § 2.335 requirements for a collateral attack on NRC rules.[15] BREDL, therefore, has not shown a genuine dispute with the Lee COL application on a material issue of law or fact.

Basis 6 does not constitute an admissible basis for Contention 3.

*BASIS 7*:

> The applicant fails to fully analyze the following potential impacts of elevated water temperatures in the Broad River and its water shed: . . . g) The impact of reactors going off-line on overall power and reliability," (this assertion focuses on effects on customers). . . h) The impact of reactors going off-line during heat wave on customers – specifically, the loss of power . . . i) [t]he impact of reactors going off-line on regional grid stability. . . . j) The the [sic] potential for extended drought locally, and in the region to exacerbate all of the issues identified above. [Petition at 15-16.]

*Staff Analysis:* The Basis 7 assertions do not refer to any specific regulatory or statutory standard other than § 2.101(a)(3) (which constitutes an impermissible challenge as explained above), so the nature of any dispute other than an impermissible one has not been specified. Even if the concerns can be considered environmental, generally, BREDL has not identified which environmental statute or regulation is at issue, or whether the issue is within the jurisdiction of the NRC. There has been, therefore, no demonstration that the issues involved are material to the findings the NRC must make to issue the COL. *See* § 2.309(f)(1)(iv).

As a whole, the power reliability and grid stability assertions above are conclusory in nature and lack documentation or expert support, thereby failing to meet § 2.309(f)(1)(v). These

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[14] 10 C.F.R. § 2.335. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) (stating, "[A] petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies").

[15] To attack a Commission rule, § 2.335, among other things, requires a *prima facie* showing that applying the rule would not serve the purposes of the rule and requires that the *prima facie* showing be based on "special circumstances with respect to the subject matter of the particular proceeding" as outlined in a supporting affidavit. Section 2.335 applies to challenges to design certification rules in COL proceedings. *See* 10 C.F.R. §§ 52.83(a) and 52.63(a)(5).

assertions are based on non-specific, unsupported assertions of increased shutdown frequency, which are, themselves, based on non-specific, unsupported assertions regarding increased drought.

The Basis 7 assertions also do not explain the extent of BREDL's feared impact, much less explain how any of the feared impacts are significantly different from discussions in the ER and FSAR to demonstrate that there is a genuine dispute with the application on a *material* issue of law or fact. *See* § 2.309(f)(1)(vi). BREDL does not even cite the application, much less explain why any part of it is inaccurate to a significant degree. BREDL also does not point to any dispute with the Lee COL FSAR's discussion of grid stability in FSAR Section 8.2.2.

Basis 7 does not constitute an admissible basis for Contention 3.

Because of the many defects described above, Contention 3 fails to meet the admissibility requirements of § 2.309(f)(1) and should not be admitted.

D. Proposed Contention 4: The applicant has not demonstrated that it is and [sic] financially qualified to engage in the activities authorized by the operating license in accordance with the regulations of 10 CFR §50.57(a)(4). [Petition at 20.]

BASIS:

The Petitioners allege that the NRC must find that the "owner-operator is financially sound" prior to granting an operating license, that the US is "very probably" in a recession which will decrease demand for energy and that the US dollars [sic] is devaluing which could lead to a financial crisis for Duke. [Petition at 20-21.]

*Staff Response*: BREDL has failed in this contention to satisfy the requirements of 2.309(f) in that it fails to demonstrate that the issue raised in the contention is within the scope of the proceeding, show that a genuine dispute exists within the applicant on a material issue of law or fact, or provide an adequate basis for their contention. 2.309(f)(iii), (iv), and (v).

1. BREDL Has Not Shown That the Issue Sought to be Raised is Within the Scope of the Proceeding.

It is very unclear what matters of fact or law BREDL wishes to litigate with this contention. BREDL focuses on 10 C.F.R. § 50.57(a)(4) and alleges that the applicant has not demonstrated it is financially qualified to engage in the activities authorized by the operating license. Petition at 20. However, the Applicant has not applied for an operating license; it has applied for a combined license, which includes authorization for construction, as well as operation. The regulations regarding financial qualifications for a COL are found in 10 C.F.R. § 50.33(f). 10 C.F.R. § 50.57(a)(4) specifically states that no financial qualifications finding is necessary for an electric utility applicant for an operating license. See 50.57(a)(4). 10 C.F.R. §50.33(f)(2) contains a similar exclusion for the need for financial qualifications for an electric utility applicant for operations. The applicant asserts that it is an electric utility. Application, Rev. 0, Part 1 at 1.0-8. BREDL has not challenged the categorization of Duke as an electric utility. To the extent BREDL wishes to challenge the exclusion of electric utilities from the need for a finding of financial qualifications for an operating license it is an impermissible attack on the Commission's regulations. *See* 10 C.F.R. § 2.335; *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 161 (2000). Since it is an attack on the Commission's regulations, it is outside the scope of the proceeding.

2. BREDL Failed to Demonstrate a Genuine Dispute With the Applicant on a Material Issue of Law or Fact.

The only financial finding the NRC must make for an electric utility is that "the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs." 10 C.F.R. § 50.33(f)(1). BREDL has not alleged that the Staff will not be able to make a finding regarding funding of construction costs. To the extent that BREDL did in fact intend to challenge the applicant's ability to fund

construction costs, BREDL has failed to identify a genuine dispute with the COL application. In order to demonstrate a factual dispute a petitioner must make a "minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). In the instant case BREDL has failed even to make that minimal showing. BREDL makes several statements regarding the economy. The Petition suggests that it "is very probably [sic] that the US has stepped into a recession since the subprime mortgage crisis in 2006. The decrease in economy growth would decrease demand for energy significantly." Petition at 21. It notes that "Duke anticipates capital expenditure of $23 billion on future expansion from 2008 to 2012." *Id.* BREDL further asserts that "the US dollar is experiencing devaluation which may last for a long time." A contention is inadmissible if it fails to contain sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact and does not include references to the specific portions of the application the petitioner disputes. *See* Diablo Canyon, CLI-08-01, 67 NRC at 8. Since BREDL has failed to demonstrate any genuine dispute with the applicant, or reference the Application at all, the contention is inadmissible. *See* 10 C.F.R. 2.309(f)(1)(vi).

3. BREDL Has Failed to Provide an Adequate Basis for Its contention.

A petitioner is required to present a basis for its contention with reasonable specificity. *See* 10 C.F.R. §2.309(f)(v) and (vi); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-04, 59 NRC 129, 157 (2004). A basis for a contention is set forth with reasonable specificity if the applicants are sufficiently put on notice so that they will know, at least generally, what they will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 427-28 (1990). In the instant case BREDL has provided only broad statements about the economy in general in support of its contention. There is no specific basis to put either Duke or the Staff on notice as

to what it is they will need to support or oppose. Thus, BREDL has failed to provide an adequate basis for its contention and it is inadmissible.

Conclusion

Because BREDL has failed to identify an issue within the scope of the proceeding, identify any actual dispute with the applicant on a material issue of law or fact, or provide a basis for its contention, this contention must be denied.

E. Proposed Contention 5: The COLA does not provide reasonable assurance of adequate protection of public health and safety required by 10 CFR § 50.57(a)(3). The FSAR insufficiently analyzes reactor units' capability to withstand a design-basis and safe shutdown earthquake because they fail to include more recent information regarding the type, frequency and severity of [sic] potential earthquakes in violation of 10 CFR PART 100, APPENDIX A. [Petition at 22.]

Contention 5 appears to provide two purported bases in support of the contention. First, the Petition states that the Lee ER wrongly "seems to suggest" that there are no active faults, *see id.* at 27, presumably in some unspecified area near the Lee site. Second, the Petition implies that a reactor at the Lee site should be designed to withstand another 1886 Charleston Earthquake and suggests that the information provided in the Lee COL application is somehow contrary to this imperative.

In support of its contention, the Petition provides a discussion of facts, summarized as follows:

(1) Twenty earthquakes of intensity V or greater on the Modified Mercalli scale are said to have been centered in the state according to National Earthquake Information Center reports. *See* Petition at 22. No citations to these reports are provided, however.

(2) The 1886 Charleston earthquake is said to have had an intensity of X. *See* Petition at 22. Further description of the 1886 quake is given in text and in a map. *See* Petition at 23-24. Documentation and citations are provided for these claims.

(3) Various earthquakes are said to have taken place in South Carolina between 1754 and 1996, with several instances highlighted. *See* Petition at 24.[16] The magnitudes or intensities of these particular instances are not provided, with the exception of a 1903 quake in the "Savannah River area" with an intensity of VI and a 1971 earthquake "centered near Orangeburg," which is said to have had a 3.4 magnitude on the Richter scale. *See id.* The Petition also claims that "low level seimicity" was present in the Charleston-Summerville area both in the past and present. *See id.* No references are provided for these claims.

(4) Three maps of South Carolina and the surrounding area are provided, two of which identify earthquake occurrences for the years 1977 to 2006 and the third of which is a Seismic Hazard map. *See id.* at 25-27. References are provided for these maps.

*Staff Response*: BREDL's Contention 5 does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) and should not be admitted. As explained below, Contention 5 does not satisfy the requirements in § 2.309(f)(1)(i), (ii), (iv), and (vi). Also, many of the factual assertions contained in the contention do not contain references to specific documents and sources as required by § 2.309(f)(1)(v).

The Staff begins by noting that many of the claims made in Contention 5 are, as described above, devoid of "references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue," in violation of § 2.309(f)(1)(v), and cannot be used in support of Contention 5.

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[16] Although the topic sentence of the paragraph refers to earthquakes located in South Carolina, several of the earthquakes described on page 24 of the Petition give only the year of the quake, without giving the location. Other earthquakes are described as impacting areas of South Carolina without specifying the epicenter of the earthquake.

The Staff next notes that BREDL is under a misimpression regarding which geologic and seismic siting criteria apply to the Lee COL application. According to the introductory text of 10 C.F.R. § 100.23, section 100.23 "sets forth the principal geologic and seismic considerations that guide the Commission in its evaluation of the suitability of a proposed site and adequacy of the design bases established in consideration of the geologic and seismic characteristics of the proposed site." As further explained in § 100.23(a), the requirements in § 100.23(c)-(d) apply to COL applicants, Early Site Permit (ESP) applicants, Operating License (OL) applicants, and Construction Permit (CP) applicants on or after January 10, 1997, which includes the Lee COL application. Appendix A, on the other hand, applies to OL applicants or holders "whose construction permit was issued prior to January 10, 1997," *id.*, which includes the current fleet. *See also* "Reactor Site Criteria Including Seismic and Earthquake Engineering Criteria for Nuclear Power Plants," Final Rule, 61 Fed. Reg. 65,157, 65,158 (Dec. 11, 1996) (hereafter "Reactor Siting Rule").[17]

Part 100, Appendix A, and § 100.23 follow significantly different approaches. Part 100, Appendix A, contains a great deal of detail and follows a deterministic approach, in which:

> an applicant develops a single set of earthquake sources, develops for each source a postulated earthquake to be used as the source of ground motion that can affect the site, locates the postulated earthquake according to prescribed rules, and then calculates ground motions at the site.

[17] The Staff also notes that the concluding sentences of the Contention 5 Discussion cite to 10 C.F.R. § 100.20 and the Environmental Standard Review Plan (E-SRP) in a call for the NRC to "independently determine what is the true nature of the hazard and what would be required." Petition at 28. The E-SRP, however, is not a regulation, and although § 100.20, which generally identifies the various reactor siting factors to be considered, is applicable to the Lee COL application, § 100.20(c)(1) correctly points to § 100.23 for the geologic and seismic siting factors. BREDL, however, wrongly cites to Part 100, Appendix A.

*See* Reactor Siting Rule, 61 Fed. Reg. at 65,164. Section 100.23, however, contains considerably less detail and allows for a probabilistic approach. *Id*. Regulatory Guide [RG] 1.208, "A Performance-Based Approach to Define the Site-Specific Earthquake Ground Motion," (Mar. 2007), provides guidance on complying with the requirements of § 100.23 and was utilized in the Lee COL application, *see generally* FSAR Section 2.5.

Contention 5, therefore, fails the first requirement of an admissible contention, which is to "[p]rovide a specific statement of the issue of law or fact to be raised or controverted," § 2.309(f)(1)(i). Contention 5 fails to correctly specify the particular regulatory requirement that would supposedly be contravened by issuing the COL.[18] Contention 5's claim that the application contains insufficient analysis might be considered a statement of fact at issue, except that "insufficiency" only gains specific meaning by reference to a statutory or regulatory standard, as is generally the case with a mixed question of fact and law. Contention 5 also, therefore, fails to "[d]emonstrate 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," *see* § 2.309(f)(1)(iv), because the NRC will not be making findings in this COL proceeding based on Part 100, Appendix A. Also, as discussed in more detail below, Contention 5, although purportedly a dispute with the FSAR, never cites to any part of it. It cannot even be ascertained whether BREDL read the extensive seismic discussion in FSAR Section 2.5. Contention 5, therefore, does not demonstrate that a genuine dispute exists with the applicant, thereby failing to meet § 2.309(f)(1)(vi).

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[18] The Staff also notes that the contention wrongly cites to § 50.57(a)(3), which concerns a finding required to issue an OL, rather than to § 52.97(a)(1), which applies to COLs. The substance of § 50.57(a)(3) is reflected in § 52.97(a)(1)(iii) and (iv), but this error highlights how far off the regulatory mark Contention 5 is.

Contention 5 also fails to satisfy other requirements of § 2.309(f)(1). The Staff will show this through an individual examination of each of the purported bases.

1. Basis 1 Does Not Support the Admissibility of Contention 5.

The first purported basis offered in support of the contention is that the following quotation from the Lee COL ER wrongly "seems to suggest" that there are no active faults, *see* Petition at 27, presumably in some unspecified area near the Lee site:

> "Based on recent and past subsurface investigations at the Lee Nuclear Site, no active faults exist in the general location of the site. According to published documents from the USGS, several inactive faults are within the vicinity of the site, with the closest being approximately 2 mi. westsouthwest of the Lee Nuclear Site (Reference 2)." [Reference 2= Duke Power Company (DPC), Cherokee Nuclear Station - Environmental Report, Amendment No. 4, revised 1975] [COLA ER 2.6.2 REGIONAL AND LOCAL GEOLOGY, page 2.6-2]

Petition at 27.[19] To the extent this claim is offered in support of the contention, it fails to satisfy the basis requirement of § 2.309(f)(1)(ii). A brief explanation is provided, but it does not serve as a supporting reason for the contention (which itself is fatally flawed because it is not focused on the applicable regulatory requirements).

Licensing Boards have described § 2.309(f)(1)(ii) as requiring the brief explanation of bases to "'indicat[e] the potential validity of the contention,'" *see* Vermont Yankee, 64 NRC at 147 (quoting "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process," Final Rule 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)), and to provide the "logical underpinnings of a contention," *Vermont Yankee*, 64 NRC at 147. In light of this, the Staff notes that although the text of the contention focuses on supposedly insufficient analysis in

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[19] The Staff notes that a statement with nearly identical wording and identical substance is found in ER Section 2.3.1.5.2 at 2.3-15. The reference provided there, however, is to a more recent document: "Horton, J.W. Jr., and Dicken, C., 'Preliminary Digital Geologic Map of the Appalachian Piedmont and Blue Ridge – South Carolina Segment,' U.S. Geological Survey Open-File Report 01-298, revised 2004, Website, http://pubs.usgs.gov/of/2001/of01-298/, accessed April 1, 2007." Lee ER at 2.3-37 (Reference 14).

the Lee FSAR, the only citation to the application provided by BREDL is to the ER. Contention 5 entirely fails to account for the extensive discussion of seismic issues (including faulting) provided in Section 2.5 of the Lee FSAR, including the extensive faulting discussions in Section 2.5.1, "Basic Geologic and Seismic Information," and Section 2.5.3, "Surface Faulting." The Staff also notes that the introductory text in ER Section 2.6 describes Section 2.6 as "a brief summary of the physiographic setting and the regional and local geology of the Lee Nuclear Site," while referring to FSAR Section 2.5 for "[a] detailed description of regional and site geology." *See* Lee ER at 2.6-1. A contention based on a claimed deficiency in the FSAR cannot find its "logical underpinnings" in a supposed deficiency in the ER.

In light of the principle that "it is the admissibility of the contention, not the basis, that must be determined," *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 557 (2004) (citing to § 2.309(a)), the above discussion, focused on the relationship between the contention presented by BREDL and BREDL's dispute with the ER's description of faults near the site, should be conclusive on the first purported basis. There is no indication that the dispute with the ER is intended as a separate contention. It is also inappropriate for licensing boards to infer a contention from bases. The Commission has said that it is inappropriate for licensing boards to "infer unarticulated bases of contentions," *USEC, Inc.*, CLI-06-10, 63 NRC at 457 (internal quotation omitted), stating that "[i]t is a 'contention's proponent, not the licensing board,' that 'is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.'" *Id.* (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22). Similarly, because it is the petitioner's duty to formulate the contention, it would be inappropriate to infer from the bases a contention different from the one stated by BREDL.

Even if one were to look at the supposed deficiency in the ER separately, however, an admissible contention could not be found. Contention 5 does not even cite to NEPA (or any other environmental statute), much less explain how the supposed deficiency in the description of faults is significant and material to the description of environmental impacts in the ER. Such an explanation is required for a NEPA contention to be admissible: "At NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the ER. Our boards do not sit to 'flyspeck' environmental documents or to add details or nuances." *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005) (affirming a licensing board's rejection of a contention). *See also Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (stating that "there may, of course, be mistakes in the DEIS, but in an NRC adjudication, it is Intervenors' burden to show their significance and materiality"), *aff'd sub nom. Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006). Because BREDL does not attempt to provide such a discussion, its dispute with the ER cannot meet the materiality and genuine dispute requirements of § 2.309(f)(1)(iv), (vi).

Also, BREDL does not even explain how the earthquake information it provides in Contention 5 calls the ER statement on active faults into question. The quoted portion of the ER states that there are no active faults in the "general location" or "vicinity" of the site. Although "general location" is not defined in the ER, "Lee Nuclear Site vicinity" is defined as "[t]he area within approximately the 6-mi. band around the site boundary." ER at 2.0-1. This definition was "provided as additional information related to the content of the Chapter 2 sections." *Id.*[20] A map of the site "vicinity," as defined in the ER, can be found in ER Figure 1.1-

[20] The Staff notes that FSAR 2.5 uses the RG 1.208 definition of "vicinity," which means the area within a (continued. . .)

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http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=073620108.

Even accepting the definition BREDL provides for "active fault," that a fault is active if it has moved in the last 10,000 years,[21] the laundry list of claimed earthquake occurrences provided in the contention appear to be a good deal farther away from the Lee site than six miles. BREDL certainly does not provide any distances. Also, other than the 1886 Charleston Earthquake, the textual description of claimed earthquake occurrences on page 24 of the Petition gives no references to support the claims, often gives no location for the earthquakes, and only twice provides a magnitude or intensity for the earthquake. The locations given on page 24 are a substantial distance away from the Lee site.[22] BREDL also does not explain how

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(. . .continued)

25 mile radius of the site, *see* FSAR at 2.5-1, but respecting the use of this term, the FSAR states: "These terms are used in Subsection 2.5.1 through 2.5.5 to describe these specific areas of investigation. These terms are not applicable to other sections of this COL application." *Id.*

[21] Although a reference is not provided for this definition, this definition can be found, word for word, in the definition of "active fault" given on the United States Geologic Service (USGC) website at http://earthquake.usgs.gov/learning/glossary.php?term=active%20fault. The Staff accepts this as an acceptable definition of "active fault."

[22] The textual discussion identifies earthquakes occurring in the following locations: Middleton Place (identified as roughly the center of the 1886 Charleston earthquake), "the Savannah River area" (1903 quake), "west of Columbia" (1945 quake) and "near Orangeburg" (1971 quake). Petition at 24. Using Google Maps, the Staff has determined that Columbia is about 70 miles away from the plant site, Orangeburg is over 100 miles away, and Middleton Place is over 150 miles away (assuming that "Middleton Place" refers to Middleton Place Plantation, which is consistent with the Petition because it is northeast of Charleston and between Charleston and Jedburg, *see* Petition at 24). The "Savannah River area" is too general a location because the Savannah River forms most of the long border between Georgia and South Carolina. The Staff notes, however, that all parts of the Savannah River are a substantial distance away from the Lee site. Also, a 1907 earthquake is said to have affected "Charleston, Augusta, and Savannah" but no epicenter is identified. The Staff notes that the triangle formed by these three cities covers a large area, and the closest city to the site, Augusta, GA, is more than 100 miles away.

the earthquake maps provided on pages 25 and 26 of the Petition invalidates the ER discussion of faults. No distances are provided, the maps have no scale, and no magnitudes or intensities are provided.[23] BREDL also does not attempt to relate the earthquake occurrences listed in Contention 5 to any particular fault that might invalidate the ER discussion. Clearly, if viewed as a separate matter, Contention 5's claims regarding the ER do not constitute an admissible contention.

2. Basis 2 Does Not Support the Admissibility of Contention 5.

The second purported basis given in support of the contention is that the need to design nuclear reactors in upstate South Carolina to withstand another 1886 Charleston Earthquake is somehow inconsistent with the Lee application. The Staff first notes that no reference to the application is explicitly provided for this second purported basis, although perhaps BREDL was basing its position on the citation to ER Section 2.6 on page 27 of the Petition. Either way, a basis for a dispute with the FSAR is not shown. Second, although this part of the contention is based on a somewhat ambiguous statement by unidentified experts, the Staff agrees that a reactor built at the Lee site should be able to withstand another 1886 Charleston Earthquake.

The Lee COL FSAR, however, does indeed account for the 1886 Charleston Earthquake. The 1886 Charleston Earthquake is discussed in several parts of FSAR Section 2.5. For example, FSAR Section 2.5.1.1.3.2.1, "Charleston Tectonic Features," states that the 1886 Charleston Earthquake is the "largest historical earthquake in the eastern United States." FSAR at 2.5-33. FSAR Section 2.5.1.2.7, "Site Area Seismicity and

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[23] This discussion does not consider the seismic hazard map of South Carolina presented on page 27 of the Petition because BREDL fails to explain how this map is relevant to an active faults claim. BREDL also fails to explain how the unsupported claim regarding low-level seismicity in the "Charleston-Summerville" area relates to the active faults claim.

Paleoseismology," recognizes that the intensity of the 1886 Charleston Earthquake at the Lee site was a VI on the Modified Mercalli Scale. FSAR at 2.5-62. Perhaps most pertinent to BREDL's claim, however, the 1886 Charleston Earthquake is one of the distant controlling earthquakes for the Lee site. *See* FSAR at 2.5-122.[24] The controlling earthquakes are developed from the disaggregation of the probabilistic seismic hazard analysis for the site, which provides insight in to the seismic sources that most impact the hazard at the particular site. *See* RG 1.208 at 16. In particular, the controlling earthquakes demonstrate the largest contributors to the overall seismic hazard for a site and are generally a combination of larger and more distant earthquake together with smaller and more local earthquakes. The Lee COL FSAR, therefore, accounts for the 1886 Charleston Earthquake, and BREDL fails to show a genuine dispute with the application on a material issue of law or fact.

Finally, to the extent BREDL may be suggesting that the Lee COL application generally fails to account for earthquake information, BREDL fails to explain how the lengthy discussion and analysis of relevant seismic features in FSAR Section 2.5 is deficient. FSAR Section 2.5.2.1, "Seismicity," for example, describes how certain seismic analyses were based upon an updated catalog of historical seismicity in the Central and Eastern United States through the year 2005, and explains how various sources were used to update the catalog. *See*

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[24] As this part of the FSAR discussion states:

> The deaggregation plots in Figures 2.5.2-231, 232, 233, 234, 235, and 236 indicate that the Charleston and New Madrid seismic sources contribute to seismic hazard at the Lee site. For $10^{-4}$ annual frequency of exceedence, these sources are the largest contributor to seismic hazard for both 1 and 2.5 Hz (Figure 2.5.2-231) and 5 and 10 Hz (Figure 2.5.2-232). For annual frequencies of 10-5 and 10-6, the contribution is smaller, particularly for 5 and 10 Hz (Figures 2.5.2- 234 and 2.5.2-236). The local sources representing seismicity in central South Carolina dominate for these annual frequencies and for 5 and 10 Hz.

*Id.*

FSAR at 2.5-83 to -85. A visual illustration of the earthquake occurrences contained in the EPRI catalog, including earthquake locations and magnitudes, can be found in FSAR Figure 2.5.2-201 "Updated Seismicity for Site Project Region," at http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=073620490. BREDL fails to explain how this information is false or deficient and does not bother to compare this information with the information it provided in Contention 5. Contention 5 in no way "provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," *see* § 2.309(f)(1)(vi).

For the reasons above, Contention 5 should not be admitted.

F. Proposed Contention 6: Whether William States Lee III Will Improve the General Welfare, Increase the Standard of Living, or Strengthen Free Competition in Private Enterprise. [Petition at 28.]

BASIS:

> After years of rulemakings, NUREGs and lessons learned, Congress's declared policy is unaltered: "[T]he development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." See 42 U.S.C. 2011. […]
>
> [T]he Commission itself is critically flawed as a regulatory body. The public's perception is that the agency lacks true independence; that the NRC staffs' [sic] review of license applications and other nuclear industry documents is incomplete and perfunctory; that the procedural process lacks the essential element of justice and impartiality. [Petition at 29.]

BREDL alleges concerns about NRC enforcement practices, about the general significance of "human error" for reactor operations, about the independence of the NRC's review of applications, and about the NRC's adjudicatory process.

BREDL first criticizes the adequacy of NRC enforcement practices. BREDL references reports from the U.S. General Accounting Office and NRC's Office of the Inspector General that discuss, respectively, the NRC's handling of safety issues at the Davis-Besse nuclear plant and

the agency's enforcement of fire barrier regulations. *Id.* at 29-30. BREDL characterizes these as "matters requiring agency-wide correction," but argues that, with respect to South Carolina, "inadequate Commission oversight may lead to safety lapses resulting in accidents and negative economic impacts." *Id.* at 30. BREDL states it is "aware of no agency-wide action which would properly oversee Duke's operation" *Id.* at 31.

BREDL next makes claims concerning the potential for human error at nuclear facilities. BREDL states that "all reactors have human operators and are therefore susceptible to error." *Id.* at 32. BREDL quotes from a 2001 NRC analysis of the extent to which human error contributes to operating risks and claims that "the extent of the human error problem is difficult if not impossible to quantify." *Id.* at 31. BREDL states that "the new AP-1000 reactor design and its associated DCD and training regimes have not been tested in the real world" and that "the NRC is obligated to demonstrate how it will prevent human frailty from turning a mishap at the proposed facility into a catastrophe." *Id.* at 32.

Third, BREDL claimS that the federal risk insurance provisions in the Energy Policy Act of 2005 undercut NRC's "independence as a regulatory agency[.]" *Id.* at 32. BREDL claims that because the Act creates an insurance program that may compensate qualifying license applicants for certain delays attributable to the Commission, the NRC's review will be pressured by financial considerations. *Id.* at 33.

Finally, BREDL criticizes the NRC's adjudicatory process as "opaque" and "stilted," making the general claim that the process "too often lacks the element of impartiality." *Id.* at 34. BREDL quotes as "instructive" an excerpt from the transcript of an oral argument before an Atomic Safety and Licensing Board in January 2008. *Id.* at 34-35. BREDL concludes the discussion of this contention by questioning whether the NRC will "adhere to its own Principles of Good Regulation" with respect to its regulatory independence. *Id.* at 36.

*Staff Response*: For the reasons stated below, none of the bases BREDL raises is sufficient to make the contention admissible.

Proposed Contention 6 purports to rely on a Congressional statement of policy in the Atomic Energy Act, quoting its text as the title of the contention. However, BREDL fails to explain why this general statutory policy statement is a basis for a justiciable claim in an NRC proceeding. In any event, as discussed further below, BREDL does not explain how any of the other issues discussed in its proposed bases for the contention either concern or are contrary to the broad objectives identified in the policy statement, nor does it discuss how any dispute with the Application relates to those objectives. Instead BREDL criticizes various general aspects of NRC policy. Consequently, BREDL does not demonstrate how the contention is within the scope of the proceeding, that it is material to the findings that NRC must make in regard to the Lee COL application, how BREDL's alleged facts support its position, or that a genuine dispute exists with the Lee COL application on a material issue of law or fact. Accordingly, Proposed Contention 6 fails to meet the requirements of § 2.309(f)(1)(iii), (iv), (v) and (vi).

1. BREDL Fails to Demonstrate That the Proposed Contention 6 Attacks on the Commission's Enforcement Practices are Within the Scope of This Proceeding.

BREDL's broad challenges to the NRC's enforcement practices are an insufficient basis for an admissible contention. BREDL criticizes the adequacy of recent Commission enforcement practices, but a petitioner may not demand a hearing to express generalized grievances about NRC policies. *See Oconee*, CLI-99-11, 49 NRC at 334; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004) (noting that requiring contentions "to be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself."). Likewise, general attacks on the NRC's competence or regulations are not admissible issues in a specific licensing proceeding. *See*

*Vermont Yankee Nuclear Power Corp., et al.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC at 165-66; *see also Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 690 (1980) (general criticisms of NRC's methods of ensuring compliance with NRC regulations, without raising issues specifically relevant to the application, are not permissible subjects of contentions in a specific licensing proceeding).

BREDL's failure to identify a dispute specific to this proceeding is apparent from its characterization of the enforcement issues it identifies as "matters requiring agency-wide correction." Petition at 13. BREDL does not explain how discussions of the Davis-Besse nuclear facility, of NRC enforcement of fire barrier regulations, or of reactor shut-downs at TVA facilities represent concerns relevant to the Lee COL application, other than to argue generally that "inadequate Commission oversight causes both safety and economic problems" that would thereby have "implications for South Carolina." *Id.* at 30. These broad policy concerns are directed at NRC's general regulatory process and implementation rather than the Lee COL application, and thus BREDL fails to demonstrate that this basis is within the scope of the Lee COL proceeding. *See Vermont Yankee*, CLI-00-20, 52 NRC at 165-66.

Accordingly, because this basis for the contention attacks general NRC practices and does not identify any specific dispute with the Application, this proposed basis fails to meet the requirements of § 2.309(f)(1)(iii) and (vi).

2. BREDL's References to "Human Error" Raise Only Generalized Concerns and Do Not Identify Any Dispute With the Application.

BREDL's references to "human error" and "human frailty" raise only generalized concerns and do not identify any specific dispute with the Lee COL application. BREDL fails to explain how their broadly stated concern with "human factors" reflects any specific inadequacy in, or dispute with, the Lee COL application; indeed, BREDL does not even discuss the Lee

COL application's treatment of human factors (*see, e.g.*, Final Safety Analysis Report (FSAR), ch. 18). Consequently, this basis fails to meet the requirements of § 2.309(f)(1)(vi).

Likewise, BREDL identifies no specific concern either with the AP1000 reactor design or with any training programs related to it except to claim that they "have not been tested in the real world." Petition at 32. BREDL provides no facts or sources to support any safety concern specific to the AP1000 design or the Lee application. Accordingly, this basis also fails to meet the requirements of § 2.309(f)(1)(v).

3. BREDL Misconstrues the Energy Policy Act and Fails to Demonstrate that Proposed Contention 6's Challenges to That Statute are Within the Scope of the Proceeding.

The Petition's discussion of federal risk insurance alleges that provisions of the Energy Policy Act of 2005 (Pub. L. No. 109-58, 119 Stat. 594 [2005]) (EPAct 2005) have affected the NRC's regulatory independence. Petition at 32-33. A contention must be rejected as outside the scope of a licensing proceeding if it constitutes an attack on applicable statutory requirements. *See Pub. Serv. Co. of N. H.* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982), *citing* Peach Bottom, ALAB-216, 8 AEC at 20-21. To the extent the contention attacks the policy goals of the Energy Policy Act, such a challenge could not be redressed in this adjudication and thus BREDL has failed to demonstrate that the issue is within the scope of this proceeding.

In any event, BREDL is mistaken in its description of the statute in question. BREDL claims that delays covered by the risk insurance program would result in "out-of-pocket costs to the Commission." *Id.* at 33. However, the risk insurance program is administered by the U.S. Department of Energy; the portion of the statute that the Petition cites refers to payments by the Secretary of Energy, not by the Commission. *See* 42 U.S.C.A. §§ 15801, 16014 (2008) (Sections 2 and 638 of EPAct 2005); 10 C.F.R. § 950.3 (2008). Finally, the risk insurance contract does not start until after issuance of a combined license, so the conduct of this

proceeding does not relate to risk insurance coverage. See 10 C.F.R. § 950.12(a)(2) (making COL issuance a condition precedent to entering into a Standby Support Contract). BREDL's misinterpretation of the statute vitiates its claims regarding any effect on NRC's regulatory independence. Accordingly, this basis fails to demonstrate any concern that is material to the findings the NRC must make. Moreover, this basis attacks the NRC's regulatory process and does not identify any dispute with the Application. This basis therefore fails to meet the requirements of § 2.309(f)(1)(iv) and (vi).

4. BREDL Fails to Demonstrate That Proposed Contention 6's Attacks on the Commission's Adjudicatory Process are Within the Scope of the Proceeding.

BREDL's criticism of the Commission's adjudicatory process constitutes only a generalized attack on the agency's policies and regulations and is outside the scope of this proceeding. A contention must be rejected where it challenges the basic structure of the Commission's regulatory process or seeks to raise an issue which is not concrete or litigable. *See Seabrook*, LBP-82-76, 16 NRC at 1035 (citing *Peach Bottom*, ALAB-216, 8 AEC at 20-21). BREDL does not explain how the cited transcript, involving a past argument before an Atomic Safety and Licensing Board, relates to the current proceeding. Petition at 17-18. BREDL expresses general dissatisfaction with, or suspicion of, the NRC's adjudicatory process, as well as skepticism concerning its "Principles of Good Regulation," but it fails to identify any concern specific to the Lee COL proceeding or any dispute with the Lee COL application. Accordingly, this basis fails to meet the requirements of § 2.309(f)(1)(iii) and (vi).

For the reasons stated above, Proposed Contention 6 fails to meet the requirements of § 2.309(f) and is not admissible.

G. Proposed Contention 7: The NRC Fails to Execute Constitutional Due Process and Equal Protection. [Petition at 36.]

BASIS:

> The Fifth Amendment to the US Constitution states, 'No person shall…be deprived of life, liberty, or property, without due process of law.' The Fourteenth Amendment adds that the States may not, 'deny to any person within its jurisdiction the equal protection of the laws.' In addition to the Atomic Energy Act, the National Environmental Policy Act and other statutes the Nuclear Regulatory Commission must certainly abide by the highest law in the land. However, the agency has violated these rights by applying inequitable standards of protection by treating different people differently and depriving them of Constitutional guarantees. [*Id*. at 36-37]

BREDL's equal protection argument is that, "Radioactive exposure standards do not protect all members of the public fairly." *Id*. at 37. BREDL bases its argument on the assertion "that children have a significantly higher risk of developing cancer from radiation than adults do and women have a higher risk of radiation-induced cancer than men do." *Id*. The latter portion of Contention 7 concerns due process, the Price-Anderson Act (Section 170 of the Atomic Energy Act, 42 U.S.C. § 2210), and the decision of the U.S. Supreme Court in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978). Petition at 38-39, but it is not entirely clear why BREDL raised these particular due process issues. The Staff Response, however, will treat this part of Contention 7 as a due process challenge attacking both the Price-Anderson Act and the Supreme Court decision.

*Staff Response*: The Staff opposes the equal protection portion of Contention 7 for two reasons. First, it is an impermissible attack on the Commission's regulations in 10 C.F.R. Part 20. Second, it does not satisfy the requirements of § 2.309(f) because it does not identify a dispute with the Application and does not demonstrate that the proposed contention is within the scope of this proceeding or is material to the findings the Commission must make in this proceeding. The Staff opposes the due process portion of Contention 7 because it is outside

the scope of this proceeding and does not show that a genuine dispute exists with the application on a material issue of fact or law.

1. BREDL Contention 7 Impermissibly Attacks the Commission's Regulations.

It is well settled that a petitioner in an individual adjudication cannot challenge generic decisions that the Commission has made in rulemaking. 10 C.F.R. § 2.335; *Vermont Yankee*, CLI-00-20, 52 NRC at 166. BREDL uses the form of a contention but in actuality is attacking Commission regulations and policies. Specifically, BREDL complains that the radiation protection requirements of 10 C.F.R. Part 20 do not provide "equal protection" to children as compared to adults, and women as compared to men. BREDL, however, may not attack the Commission's regulations by raising a contention in a proceeding on an application unless the stringent requirements of 10 C.F.R. § 2.335 are met.[25]

2. The Equal Protection Portion of Contention 7 Fails to Satisfy the Requirements of 10 C.F.R. § 2.309(f).

Contention 7 does not identify any dispute with the Lee COL application, and therefore, does not satisfy § 2.309(f)(1)(vi). The Petition states that NRC regulations "will not prevent these elevated levels of exposure" but does not explain to what "elevated levels" in the COL application (or even in the Petition) this statement refers. *See* Petition at 37. Similarly, BREDL makes no attempt to demonstrate that its quarrel with the NRC radiation protection standards in Part 20 is somehow within the scope of this proceeding or material to the findings the NRC must make to issue the COL. Contention 7, therefore, fails to meet the requirements of § 2.309(f)(1)(iii) and (iv).

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[25] To attack a Commission rule, § 2.335, among other things, requires a *prima facie* showing that applying the rule would not serve the purposes of the rule and requires that the *prima facie* showing be based on "special circumstances with respect to the subject matter of the particular proceeding" as outlined in a supporting affidavit.

3. The Due Process Portion of Contention 7 Fails to Meet § 2.309(f).

As described above, the "due process" portion of this contention could be read as attacking the Price-Anderson Act and a Supreme Court decision dating from 1978. The Petition is devoid of any information to show how this portion of the contention raises any dispute with the Lee COL application, how it could be within the scope of this proceeding or how it might somehow be material to any finding the Commission must make in this proceeding. Accordingly, the "due process" portion of Contention 7 fails to provide sufficient information to show that a genuine dispute exists with the application on a material issue of fact or law, as required by § 2.309(f)(1)(vi), and also fails to meet the standards of §§ 2.309(f)(1)(iii) and (iv).

For the reasons stated above, Contention 7 fails to meet the requirements of § 2.309(f) and is not admissible.

H. Proposed Contention 8: The assumption and assertion that uranium fuel is a reliable source of energy is not supported in the combined operating license application submitted by Duke Energy to the U.S. Nuclear Regulatory Commission. [Petition at 39.]

BASIS:

The applicant fails to fully and credibly discuss the matter of reliability of uranium fuel supply in the COL when asserting that building new nuclear power reactors is a means of achieving a reliable and cost-effective supply of electricity. The related cost ratio of the power from a power plant that has no fuel is effectively infinite.

Worldwide uranium consumption (about 67,000 tonnes per year) [(World Nuclear Association backgrounder on Uranium Supply posted at: http://www.world-Nuclear.org/info/inf75.html?terms= uranium+supply)] has exceeded worldwide uranium production for some time. Only about 60% of consumption is currently supplied by annual production; [(*id.,* the production of uranium from mines [is] 40,251 tonnes for 2004; 41,702 tonnes for 2005 and 39,429 tonnes for 2006. This leaves a shortfall of uranium to fuel the existing reactors of about 26,000 tonnes. This shortage is being made up by consuming former stockpiles, reprocessing of nuclear weapons uranium, longer reactor cycles and more efficient enrichment processes. The former stockpiles and weapons reprocessing are short term stopgaps and are failing fast.] further,

> actual production of uranium has been effectively level for the last twenty years, as can be seen in the graph below from the World Nuclear Association. While there are various short-term supplies of uranium such as down-blending from nuclear weapons inventories, none of these are projected to last indefinitely. It is incumbent upon the applicant to address these issues and to support the statements cited below which imply that uranium availability will be sufficient to service the existing worldwide fleet of nuclear power reactors over the current periods of license, and in addition, the proposed William States Lee 1 & 2.
>
> If there is a plan to address the failure of uranium supply during the license period for William States Lee with a substitution of plutonium fuel (MOX or mixed-oxide), this information is also missing from the COL application as filed by the applicant. This is not an undue possibility since Duke Energy is currently supporting a partnership with Shaw Areva MOX services and holds a contract with the US Department of Energy to use its McGuire and Catawba nuclear power stations as "mission reactors" in the Department's surplus plutonium disposition program that, as current [sic] configured would produce plutonium fuel to be used in commercial nuclear reactors. [*Id.* at 39-41. (footnotes incorporated into text or omitted; graph omitted)].

BREDL then refers to statements in the ER and technical specification bases with which it disagrees, and it states that there are "numerous other examples of these assertions and assumptions throughout the COL." *Id.* at 41-42. BREDL concludes that "[n]owhere in the COL [application] does the applicant support these assertions." *Id.* at 42.

*Staff Response*: BREDL has provided specific references to statements in the ER with which it disagrees.[26] The NRC staff nonetheless opposes Proposed Contention 8 because BREDL fails to demonstrate a genuine dispute with the Applicant on a material issue of law or fact, contrary to the requirements of § 2.309(f)(1)(vi).

A document put forth by a petitioner as the basis for a contention is subject to scrutiny both for what it does and does not show. *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power

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[26] BREDL's asserted dispute with the technical specification bases is vague and is not a specific statement of an issue of law or fact to be controverted. Accordingly, this asserted dispute fails to satisfy the requirements of § 2.309(f)(i).

Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd on other grounds,* CLI-96-7, 43 NRC 235, 269 n.39 (subject of Board holding not raised for review). With respect to Proposed Contention 8, BREDL cites a website for the proposition that more uranium is being consumed than produced and concludes that stopgaps to make up the difference are failing fast. Petition at 40, n.15. That very website also states the following:

> Without . . . estimates of uranium resource replenishment through exploration cycles, long-term supply-demand analyses will tend to have a built-in pessimistic bias (i.e. towards scarcity and higher prices), that will not reflect reality. Not only will these forecasts tend to overestimate the price required to meet long-term demand, but the opponents of nuclear power use them to bolster arguments that nuclear power is unsustainable even in the short term.

World Nuclear Association, "Supply of Uranium" (Mar. 2007). http://www.world-nuclear.org/info/inf75.html?terms=Uranium+supply. (Accessed on July 11, 2008). BREDL has done precisely what the article it cites predicts: it has used an analysis that does not "reflect reality" to argue that nuclear power is unsustainable in the short term. Accordingly, BREDL has failed to provide expert opinion, documents or other sources to support its position on Proposed Contention 8 and fails to satisfy § 2.309(f)(1)(v).

In addition, BREDL makes the claim that, "If there is a plan to address the failure of uranium supply during the license period for William States Lee with a substitution of plutonium fuel (MOX or mixed-oxide), this information is missing from the [Application]." Petition at 41. BREDL's sole basis for this claim is that "it is not an undue possibility since Duke Energy is currently supporting a partnership with Shaw Areva MOX services and holds a contract with the US Department of Energy to use its McGuire and Catawba nuclear power stations as 'mission reactors' in the Department's surplus plutonium disposition program that, as currently configured would produce plutonium fuel to be used in commercial nuclear reactors." Petition at 41. This claim represents pure speculation and, as such, does not constitute a basis for a

contention. *See* Yankee, CLI-96-7, 43 NRC at 267. Indeed, the Commission has previously held in the context of dismissing a contention regarding MOX fuel in Duke Energy's license renewal of the McGuire and Catawba units, that "[c]ontentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. An NRC proceeding considers the application presented to the Agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding." *See Duke Energy Corp*, (McGuire Nuclear Station, Units 1 & 2 and Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 294 (2002). Accordingly, BREDL's claim that the COL application somehow improperly omits information regarding mixed-oxide fuel lacks the basis required by § 2.309(f)(1)(ii).

In view of the above, BREDL has not provided sufficient information to show that a genuine dispute exists with the Lee COL application on a material issue of law or fact and has not met the requirements of § 2.309(f)(1)(vi) with respect to Proposed Contention 8.

I. Proposed Contention 9: Duke and NRC fail to include adequate protections from aircraft impacts at the WS Lee site. [Petition at 43.]

After the statement of Contention 9, BREDL further states that "NRC should require that all new reactors built in the U.S. be designed to withstand an airliner impact," *Id.*, and cites to a statement calling for including in the Design Basis Threat (DBT) intentional aircraft crashes into nuclear power plants. The "Discussion" portion of Contention 9 focuses on two primary topics. The first topic generically covers the consequences of an aircraft impact and is based on quotations from NUREG/CR-2859, published in 1982. *Id.* at 43-44. The second topic covers BREDL's disagreement with positions taken in "Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs," Proposed Rule, 72 Fed. Reg. 56,287 (Oct. 3, 2007) (hereinafter "Aircraft Impacts Rule"). *See* Petition at 44-45.

*Staff Response:* The petitioner's fundamental complaint appears to be that a proposed rule published by the Commission would not apply certain aircraft impacts requirements to the AP1000 design or the Lee COL application. *See* Aircraft Impacts Rule, Proposed Rule, 72 Fed. Reg. at 56,287. This contention is not admissible for the following reasons: The contention regards issues that are the subject of an ongoing rulemaking, is an attack on the current regulatory requirements, and does not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

1. Contention 9 is Inadmissible Because It Regards an Ongoing, General Rulemaking.

The Commission has stated that "[i]t has long been agency policy that Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'" Oconee, CLI-99-11, 49 NRC at 345 (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)). In *Oconee*, the Commission also stated that "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies." *Id.* at 334. BREDL is concerned about issues subject to an ongoing, general rulemaking proceeding, as BREDL, itself, recognizes, and BREDL expresses generic objections to the proposed policies in a proposed rule. *See* Petition at 44 (citing the proposed Aircraft Impacts Rule).

A final Aircraft Impacts Rule has not been issued, but under the proposed rule, certain license and design applicants would be required to:

> perform an aircraft impact assessment of the effects on the designed facility of the impact of a large, commercial aircraft. Based on the insights derived from that assessment, the application would have to include a description and evaluation of the design features, functional capabilities, and strategies to avoid or mitigate the effects of an aircraft impact, addressing core cooling capability, containment integrity and spent fuel pool integrity. The applicant would be required to describe how such

> design and other features avoid or mitigate, to the extent practicable, the aircraft impact effects with reduced reliance on operator actions.

Aircraft Impacts Rule, Proposed Rule, 72 Fed. Reg. at 56,288. These requirements would be contained in a new § 52.500 and would be imposed on certain design certification applicants through the application content requirements of § 52.47 and imposed on certain COL applicants through the application content requirements of § 52.79. *See* Aircraft Impacts Rule, Proposed Rule, 72 Fed. Reg. at 56,296-97.

Under the proposed rule, a COL application referencing a certified design (such as the Lee COL application) would not be required to take the above actions. *See id.* at 56,296. Also, previously certified designs, such as the AP1000, would be exempt from the proposed rule's requirements. *Id.* at 56,290 and n.2. The applicability of the proposed rule's requirements is being resolved through the rulemaking process, and BREDL had an opportunity to participate in that process by commenting on the proposed rule. Fundamentally, BREDL is trying to adjudicate a rulemaking proceeding and this is outside the scope of the Hearing Notice. That is because an adjudicatory proceeding is not the proper forum for BREDL's "generalized grievances" about the Commission's proposed policies.

The Commission has issued a recent policy statement, however, that could possibly be read to suggest that the proposed contention should be held in abeyance (if acceptable under § 2.309(f)(1)), rather than rejected under *Oconee*. *See* "Conduct of New Reactor Licensing Proceedings; Final Policy Statement," 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (hereinafter "New Reactor Licensing Policy Statement"). In this policy statement, the Commission decided that contentions falling within the scope of a docketed, but not completed, design certification rulemaking would be held in abeyance pending resolution of the rulemaking if the contentions were "otherwise admissible." *Id.* If the Commission later issued a final design certification rule that addressed the admitted contention, the contention would be denied. *Id.* Notably, the New

Reactor Licensing Policy Statement cited *Oconee* in support of the above approach. *See id.* A close examination of relevant case law, however, shows that the rationale supporting the above approach does not apply to Contention 9.

In *Oconee*, the Commission upheld a board ruling denying a contention that was based, in part, on a failure to comply with former 10 C.F.R. § 51.53(c)(3)(ii)(M), which required, in pertinent part, that the environmental impacts of high-level waste transportation be reviewed. *See* § 51.53(c)(3)(ii)(M) (1999). The Commission agreed with the licensing board that "the transportation of spent fuel rods to an offsite repository is not an appropriate subject for a contention because it is the subject of a pending rulemaking." *Oconee*, 49 NRC at 345. In *Oconee*, the ongoing rulemaking was an action to "categorize the impacts of transporting high-level waste as a generically addressed Category 1 issue," *id.*, which would have taken the issue outside the realm of the license renewal proceeding, *see* § 51.53(c)(3)(i) (1999). Moreover, in a 1998 Staff Requirements Memorandum, the Commission had stated that license renewal applicants need not address the transportation issues "unless waiting for the rulemaking to be final would delay the license renewal proceeding." *Oconee*, 49 NRC at 345. In *Oconee*, the rulemaking was scheduled to become final well before the scheduled conclusion of the licensing proceeding. *Id.*

In *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 474-75 (2001), the Commission explained the application of the *Oconee* principles, and although the particular facts in that case are not particularly relevant to the instant case, the decision makes clear that two important issues are (1) whether an applicable generic rule is already in place and (2) the timing issue discussed in *Oconee*. *See id.* With regard to the timing issue, it bears noting that the New Reactor Licensing Policy Statement explicitly recognizes that a license cannot be issued for a COL application referencing a design

certification application until the rule becomes final, and that delays to the rule may delay license issuance. *See* 73 Fed. Reg. at 20,972-73.

Applying the above principles to the instant case, it becomes clear that Contention 9 should be rejected. In the instant case, unlike the cases in *Oconee* and *PFS*, and the cases in which COL applications reference design certification applications, the current regulations do not require the applicant to take the actions that would be required if the proposed rule were to become final. Also, because there is no current applicable rule on point, the conclusion of this proceeding cannot be delayed by a delay in issuing the Aircraft Impacts Rule. Finally, even if the course outlined in the New Reactor Licensing Policy Statement were applied to Contention 9, Contention 9 would have to be denied, rather than held in abeyance, because the contention is not otherwise admissible, as explained below.

2. Contention 9 is Inadmissible Because it Constitutes an Attack on the Regulations.

Aside from the fact that the issues raised in Contention 9 are the subject of an ongoing rulemaking proceeding, Contention 9 is also an attack on the current regulations. One of the premises underlying the Aircraft Impacts Rule is that license and design applicants are not currently required by regulation to take the actions that would be required if the proposed rule were to become final, and the Commission stated in the proposed rule that the proposed requirements were not "necessary for adequate protection," 72 Fed. Reg. at 56,288. Also, BREDL has not pointed to any current requirement that would require such actions from the applicant.

Contentions should be rejected that "present[] an impermissible challenge to the Commission's regulations by seeking to impose requirements in addition to those set forth in the regulations." Turkey Point, LBP-01-6, 53 NRC at 159. BREDL's Contention 9, therefore, must be rejected as an attack on the Part 52 reactor licensing requirements, generally, and on the

§ 52.79 information requirements for COL applicants, specifically. Although BREDL never identified any supposed deficiencies in the Lee COL application or the referenced design information, to the extent that BREDL's contention is also an attack on the AP1000 design as certified in Part 52, Appendix D, the contention would be barred as an attack on that regulation as well. It is possible to attack Commission regulations, but only if the stringent requirements of 10 C.F.R. § 2.335 are satisfied.[27] BREDL, however, does not even cite to § 2.335, let alone show that these requirements are met.

3. Contention 9 Does Not Meet the Admissibility Requirements of 10 C.F.R. § 2.309(f)(1).

Because, as discussed above, the current regulations do not require the applicant to take the actions described in the proposed Aircraft Impacts Rule, Contention 9 does not meet the requirement of 10 C.F.R. § 2.309(f)(1)(iv) to "[d]emonstrate 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." Furthermore, BREDL does not "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," § 2.309(f)(1)(vi), because the issues are not material to issuing the COL and the dispute is more with the Commission's proposed rule than with the application.[28] Also, BREDL does not point to any specific part of the application or to any specific current requirement, much less explain how

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[27] To attack a Commission rule, § 2.335, among other things, requires a *prima facie* showing that applying the rule would not serve the purposes of the rule and requires that the *prima facie* showing be based on "special circumstances with respect to the subject matter of the particular proceeding" as outlined in a supporting affidavit. Section 2.335 applies to challenges to design certification rules in COL proceedings. *See* 10 C.F.R. §§ 52.83(a) and 52.63(a)(5).

[28] BREDL's complaints are primarily directed at the Commission. *See* Petition at 44. The Staff notes that these complaints appear to assume that a final decision has been reached on the rulemaking matters at issue, but the Aircraft Impacts Rule has not been issued in final form and, as with any proposed rule, changes might occur.

specific portions of the application would not meet current requirements. BREDL focuses its concerns on the Aircraft Impacts Rule. Finally, the generic nature of BREDL's concern is highlighted by the fact that the documentation it cites in support of Contention 9 is not specific either to the Lee COL application or the AP1000.

For all of the above reasons, Contention 9 should not be admitted.

J. Proposed Contention 10: Failure to Evaluate Whether and in What Time Frame Spent Fuel Generated by Bellefonte Units 3 and 4 [Sic] Can Be Safely Disposed Of. [Petition at 45.]

> BASIS:
>
> The ER for the proposed new reactors does not contain any discussion of the environmental implications of the lack of options for permanent disposal of the irradiated fuel to be generated by North Anna [sic] site. Therefore, it is fatally deficient. [Petition at 45.]
>
> The Environmental Report for COLA is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated (i.e., "spent") fuel that will be generated by the proposed reactors if built and operated. . . .
>
> Even if the Waste Confidence Decision applies to this proceeding, it should be reconsidered, in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, *i.e*., the increased threat of terrorist attacks against U.S. facilities. [Petition at 51.]

BREDL indicates that the proposed contention is directed towards the environmental impacts of the proposed new reactors. *Id*. BREDL argues that the Waste Confidence decision applies only to plants which are currently operating, not new plants. *Id.* at 46. BREDL further asserts that the Commission has given no indication that it has confidence that repository space will be available for high level radioactive waste from new reactors licensed after December 1999. *Id.* at 47. BREDL also claims that the Commission no longer has confidence in the likelihood that more than one repository will be licensed. *Id.* at 47. BREDL argues further that the capacity of the proposed repository at Yucca Mountain, Nevada (63,000 metric tons of high-level waste and irradiated nuclear fuel) is too small to accommodate even the waste generated

by currently operating reactors and cannot accommodate the waste that would be generated at new reactors. *Id*. at 48-49. BREDL states that spent fuel may sit at the proposed reactor site for an indefinite period of time. *Id.* at 51. Finally, BREDL restates Proposed Contention 10 as follows: "The environmental impacts of . . . indefinite [spent fuel] storage must be evaluated before a Combined Operating License can be granted." *Id*. at 51.

*Staff Response*: The NRC staff opposes admission of Proposed Contention 10 as an impermissible attack on the Commission's regulations. *See* 10 C.F.R. § 2.335; *Vermont Yankee* and *Pilgrim*, CLI-07-3, 65 NRC at 17-18 and n.15; *Millstone*, CLI-01-24, 54 NRC at 364; *see also Dominion Nuclear North Anna, LLC* (Early Site Permit [ESP] for the North Anna ESP site), LBP-04-18, 60 NRC 253, 268-70 (2004) (holding inadmissible an essentially identical set of contentions in the North Anna ESP proceeding, as impermissibly challenging the NRC's regulations). As explained by the Board in the North Anna ESP proceeding, "[t]he matters the Petitioners seek to raise have been generically addressed by the Commission through the Waste Confidence Rule, the plain language of which states:

> [T]he Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of *any* reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Furthermore, when the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors." *North Anna ESP Site*, LBP-04-18, 60 NRC at 269 (also citing 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990) ("The availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of [the current fleet of] reactors' [operating

licenses]. The same would be true of the spent fuel discharged from any new generation of reactor designs."); *see also id.* at 38,501-04.).[29] Accordingly, Proposed Contention 10 impermissibly attacks the Commission's regulations and is inadmissible. *See North Anna ESP Site*, LBP-04-18, 60 NRC at 269.

Furthermore, with respect to BREDL's request for reconsideration of the Waste Confidence Rule, that request also is not within the scope of this proceeding and is an impermissible attack on the Commission's regulations. *See* 10 C.F.R. § 2.335; *Vermont Yankee* and *Pilgrim*, CLI-07-3, 65 NRC at 17-18 and n.15; *Millstone*, CLI-01-24, 54 NRC at 364; *North Anna ESP Site*, LBP-04-18, 60 NRC at 269. The Commission's rules provide as follows:

> [W]ithin the scope of the generic determination in [§ 51.23(a)], no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the . . . reactor combined license . . . for which application is made, is required in any environmental report [or] environmental impact statement. . . prepared in connection with the issuance . . . of a combined license for a nuclear power reactor under [part 52].

10 C.F.R. § 51.23(b). Since no discussion of this matter is required in this proceeding pursuant to § 51.23(b), this aspect of Contention 10 is not within the scope of this proceeding, and BREDL fails to satisfy the contention standards of § 2.309(f)(1)(iii).

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[29] Although the Petitioners cite *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979), to support their argument that the ER is "fatally deficient" for failing to address ultimate disposal of spent reactor fuel, Petition at 45, the reference is inapposite. In *Minnesota v. NRC*, the Court of Appeals for the D.C. Circuit remanded to the Commission the issue of ultimate disposal of spent fuel in a case involving two license amendments. *Minnesota,* 602 F.2d at 419. The D.C. Circuit, however, did not reverse the agency's determination that the amendments should be issued. *Id.* at 418. Rather, the court held that the petitioners were not entitled to an adjudicatory proceeding on issues related to the disposal of spent fuel and that the NRC "could properly consider the complex issue of nuclear waste disposal in a 'generic' proceeding such as a rulemaking, and then apply its determinations in subsequent adjudicatory proceedings." *Id.* at 416. Since the NRC has engaged in the rulemaking envisioned by the D.C. Circuit in the *Minnesota* decision, the reference to the case by the Petitioners is misplaced. In fact, the case envisions that the NRC would apply 10 C.F.R. § 51.23(a) in future proceedings such as the instant adjudicatory proceeding.

The Commission has provided litigants in an adjudicatory proceeding subject to 10 C.F.R. Part 2 the opportunity to request that a Commission rule or regulation "be waived or an exception made for the particular proceeding." 10 C.F.R. § 2.335(b). The Commission has specified that "[t]he sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted." *Id.* The Commission requires that any request for such waiver or exception "be accompanied by an affidavit that identifies . . . the subject matter of the proceeding as to which application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted." *Id.* Additionally, "[t]he affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested." *Id.*

BREDL has failed to establish that it meets any of the requirements imposed by the Commission on litigants wishing that a rule be waived or an exception be granted. *See* Petition at 51-54. BREDL has failed to establish that application of the Waste Confidence Rule in this particular proceeding would not serve the purpose for which the rule was adopted. To the contrary, 10 C.F.R. § 51.23 reflects, on its face, that the rule was designed to dispense with the need for NRC adjudications to address the impacts associated with the ultimate disposal of spent fuel and high-level waste.

In view of the foregoing, the contention and its supporting bases raise a matter that is not within the scope of the proceeding and impermissibly seek to challenge a Commission regulatory requirement. *See* 10 C.F.R. §§ 2.309(f)(1)(iii), 2.335; *Vermont Yankee* and *Pilgrim*, CLI-07-3, 65 NRC at 17-18 and n.15; *Millstone*, CLI-01-24, 54 NRC at 364. Absent a showing of "special circumstances" under 10 C.F.R. § 2.335(b), which BREDL has not made, this matter must be addressed through Commission rulemaking. *See North Anna ESP Site*, LBP-04-18, 60 NRC at 269-270

## CONCLUSION

In view of the foregoing, BREDL's Petition should be denied. Although BREDL establishes representational standing, it has submitted no admissible contentions.

Respectfully submitted,

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Dated at Rockville, Maryland
this 22nd day of July 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| DUKE ENERGY CAROLINAS, LLC, | ) | |
| | ) | Docket Nos. 52-018 and 52-019 |
| (William States Lee III Nuclear Station Units 1 and 2) | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO 'PETITION FOR INTERVENTION AND REQUEST FOR HEARING BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE,'" has been served upon the following persons by Electronic Information Exchange this 22nd day of July, 2008:

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