

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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 )  
PROGRESS ENERGY FLORIDA, INC. ) Docket Nos. 52-029 and 52-030  
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 )  
(Levy County Nuclear Site, Units 1 and 2) )

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NRC STAFF ANSWER TO "PETITION TO INTERVENE AND  
REQUEST FOR HEARING BY THE GREEN PARTY OF FLORIDA, THE ECOLOGY PARTY  
OF FLORIDA AND NUCLEAR INFORMATION AND RESOURCE SERVICE"

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March 3, 2009

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Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC or Commission) hereby answers the "Petition To Intervene And Request For Hearing By The Green Party Of Florida, The Ecology Party Of Florida And Nuclear Information And Resource Service" (Petition), filed in the Levy County Nuclear Site, Units 1 and 2 (Levy) combined license (COL) proceeding by the Green Party of Florida (GPF), the Ecology Party of Florida (EPF), and Nuclear Information and Resource Service (NIRS) (collectively "Joint Petitioners"). For the reasons set forth below, the Staff does not oppose the standing of Joint Petitioners. The Staff opposes the admissibility of all of Joint Petitioners' contentions. For these reasons, Joint Petitioners should not be admitted as a party to this proceeding.

BACKGROUND

By letter dated July 28, 2008, Progress Energy Florida, Inc. (Progress or Applicant), acting for itself submitted a COL application (Levy COL application or COLA) for two AP1000 advanced passive pressurized water reactors (PWRs) to be located in Levy County, Florida. The Federal Register notice of docketing was published on October 14, 2008 (73 Fed.

Reg. 60,726), and the Federal Register notice of hearing (Hearing Notice) was published on December 8, 2008 (73 Fed. Reg. 74,532). 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 Levy COL application that will be discussed extensively below are the Levy COL Final Safety Analysis Report (FSAR) and Environmental Report (ER). The Levy 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) “and Westinghouse Technical Report APP-GW-GLR-134, ‘AP1000 DCD Impacts to Support COLA Standardization,’ Revision 5, which was submitted on June 27, 2008.”<sup>1</sup> The AP1000 amendments remain 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). Revision 17 of the AP1000 design certification

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<sup>1</sup> Levy COL Application cover letter (ADAMS Accession No. ML082270194). *See also* Hearing Notice, 73 Fed. Reg. at 74,532. Technical Report APP-GW-GLR-134 (TR-134) (ADAMS Accession No. ML081850550) has the purpose of identifying impacts to the AP1000 R16. TR-134 describes these impacts as those:

which occurred or were discovered subsequent to the submittal of the DCD in support of the AP1000 design certification amendment, [and] may be in the form of: DCD discrepancies; responses to requests for additional information (RAIs) issued against prior technical reports, where those responses contain DCD changes; and correction of typographical errors and other minor corrections. This report addresses DCD Revision 16 impacts for Tier 1, Tier 2\*, and Tier 2. This document is provided to track the DCD impacts and thereby maintain consistency between the AP1000 Design Certification Amendment Application and the COL applications that reference the AP1000 Design Certification Rulemaking. The impacts included in this document will be incorporated into the AP1000 DCD in a forthcoming revision.

TR-134 at 1 (non-proprietary version). To some extent, TR-134 represents a bridge between Revisions 16 and 17 of the AP1000 design certification.

amendment, dated September 22, 2008, was published on the NRC public website on November 25, 2008.<sup>2</sup>

### DISCUSSION

In their Petition, GPF, EPF, and NIRS assert that they have standing based upon their representation of several of their members and propose several contentions. Petition at 9-10. As explained below, Staff does not oppose the standing of Joint Petitioners, but Joint Petitioners have failed to submit an admissible contention.

#### I. LEGAL STANDARDS:

##### A. STANDING TO INTERVENE

In accordance with the Commission's Rules of Practice:<sup>3</sup>

[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;

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<http://adamswebsearch2.nrc.gov/idmws/ViewDocByAccession.asp?AccessionNumber=ML083230868>.

<sup>3</sup> See "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," 10 C.F.R. Part 2.

(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.

*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*, 504 U.S. 505, 560-61 (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).<sup>4</sup> 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).

*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. 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 has been applied to COL Proceedings. See *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 67 NRC \_\_ (2008) (slip op. at 5); see *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-16, 67 NRC \_\_ (2008) (slip op. at 8).

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., *Entergy Nuclear Operations Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant) et al, CLI-08-19, 68 NRC \_\_, \_\_ (slip op. at 6-

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

7) (Aug. 22, 2008); *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

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)).<sup>5</sup>

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

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<sup>5</sup> 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.

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.<sup>6</sup> See 10 C.F.R. § 2.309(f).

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<sup>6</sup> Section 2.309(f) states the following requirements for contentions:

(f) Contentions.

(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).

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 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."<sup>7</sup> *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

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<sup>7</sup> *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.

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;
- (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. EACH OF THE JOINT PETITIONERS HAS ESTABLISHED REPRESENTATIONAL STANDING.

### A. GPF'S STANDING

GPF claims to have representational standing to intervene in this proceeding by a demonstrated injury-in-fact to eight of its members who have authorized it to represent them in

this matter.<sup>8</sup> Petition at 4 and GPF Exhibits 1-7, and 9. The eight individuals are Michael Canney, Shawna Doran, Gilman Marshall, Parry Donze<sup>9</sup>, Joyce Tentor, Pablo Lopez Garcia, Jessica Burris, and Gabriela Waschensky. Petition at 4.

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. GPF satisfies the representational standing requirement through eight of the individuals named in the Petition. The GPF declarants have provided similar affidavits, each asserting that he or she is a member of GPF, lives within fifty miles of the Levy site, and authorizes GPF to represent him or her in this proceeding. GPF Exhibits 1-7, and 9.

GPF must also show that the interests that the organization seeks to protect are germane to its own purpose, and that neither its claim, nor the requested relief requires an individual member to participate in the action. *Palisades*, CLI-07-18, 65 NRC at 409. GPF describes itself as "one of the largest networks of political parties and grassroots activists that openly endorse a safe, sustainable, non-nuclear energy policy." Petition at 4. This interest is germane to the interests of its members that GPF seeks to protect, where the GPF Declarants each stated that:

I am concerned that if the NRC grants Progress Energy Florida's COLA, the construction and operation of the proposed nuclear power plant could adversely affect my health and safety and the integrity of the environment where I live. I am particularly concerned about the risk of accidental releases of radioactive material to the environment, and the potential harm to groundwater supplies and local surface waters.

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<sup>8</sup> In the Petition, GPF lists nine individual members but fails to include the affidavit of one member, Jennifer Sullivan, amongst their exhibits. See Petition at 4.

<sup>9</sup> GPF member, Parry Donze, is also referred to as "Donze Parry", see Petition at 4, and "Gary Ponze," see Joint Petitioners' List of Exhibits.

GPF Exhibits 1-7, and 9. Because eight of the GPF declarants have established standing to intervene in their own right, and have authorized GPF, whose organizational interests are germane to those whom it would represent, to represent their interests in this proceeding GPF has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409. Therefore, the Staff does not object to GPF's representational standing to petition to intervene on behalf of its members.

The Staff notes that GPF's authorized representative, Michael Canney, has not yet filed a notice of appearance with the Commission. NRC regulations require that any authorized member or officer representing an organization in an adjudication shall file with the Commission a written notice of appearance. 10 C.F.R. § 2.314(b). Mr. Canney has, on behalf of GPF, authorized Mary Olson and Michael Mariotte of NIRS to submit electronic filings of behalf of GPF. See Exhibit PI-01.

B. EPF'S STANDING

EPF claims to have representational standing to intervene in this proceeding by a demonstrated injury-in-fact to four of its members who have authorized it to represent them in this matter. Petition at 6 and EPF Exhibits 1-4. The four individuals are David McSherry, December McSherry, Emily Casey, and Frank Caldwell. Petition at 6.

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. EPF satisfies the representational standing requirement through the four individuals named in the Petition. The EPF declarants have provided similar affidavits, each asserting that he or she is a member of EPF, lives within fifty miles of the Levy site, and authorizes EPF to represent him or her in this proceeding. EPF Exhibits 1-4.

EPF must also show that the interests that the organization seeks to protect are germane to its own purpose, and that neither its claim, nor the requested relief requires an individual member to participate in the action. *Palisades*, CLI-07-18, 65 NRC at 409. EPF describes itself as “a Florida political party which holds that environmental destruction is the most important issue facing America today.” Petition at 5. This interest is germane to the interests of its members that EPF seeks to protect, where the EPF Declarants each stated that:

I am concerned that if the NRC grants Progress Energy Florida’s COLA, the construction and operation of the proposed nuclear power plant could adversely affect my health and safety and the integrity of the environment where I live. I am particularly concerned about the risk of accidental releases of radioactive material to the environment, and the potential harm to groundwater supplies and local surface waters.

EPF Exhibits 1-4. Because the four EPF declarants have established standing to intervene in their own right, and have authorized EPF, whose organizational interests are germane to those whom it would represent, to represent their interests in this proceeding EPF has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409. Therefore, the Staff does not object to EPF’s representational standing to petition to intervene on behalf of its members.

C. NIRS STANDING

NIRS claims to have representational standing to intervene in this proceeding by a demonstrated injury-in-fact to eight of its members who have authorized it to represent them in this matter. Petition at 7 and NIRS Exhibits 1-8. The eight individuals are Emily Casey, Mandy Hancock, Rob Brinkman, Theodora Rusnak, Carol Gordon, Robert Tomashevsky, Connie Tomashevsky, and Frank Caldwell. Petition at 6.

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. NIRS satisfies the representational standing requirement through the eight individuals named in the Petition. The NIRS declarants have provided similar affidavits, each asserting that he or she is a member of NIRS, lives within fifty miles of the Levy site, and authorizes NIRS to represent him or her in this proceeding. NIRS Exhibits 1-8.

NIRS must also show that the interests that the organization seeks to protect are germane to its own purpose, and that neither its claim, nor the requested relief requires an individual member to participate in the action. *Palisades*, CLI-07-18, 65 NRC at 409. NIRS describes itself as “an information and networking center for people and organizations concerned about the safety, health and environmental risks posed by nuclear power generation.” Petition at 6. This interest is germane to the interests of its members that NIRS seeks to protect, where the NIRS declarants each stated that:

I am concerned that if the NRC grants Progress Energy Florida’s COLA, the construction and operation of the proposed nuclear power plant could adversely affect my health and safety and the integrity of the environment where I live. I am particularly concerned about the risk of accidental releases of radioactive material to the environment, and the potential harm to groundwater supplies and local surface waters.

NIRS Exhibits 1-8. Because the four NIRS declarants have established standing to intervene in their own right, and have authorized NIRS, whose organizational interests are germane to those whom it would represent, to represent their interests in this proceeding NIRS has satisfied the standards for representational standing set forth in *Palisades*, CLI-07-18, 65 NRC at 409. Therefore, the Staff does not object to NIRS’ representational standing to petition to intervene on behalf of its members.

### III. JOINT PETITIONERS’ PROPOSED CONTENTIONS

The Joint Petitioners submitted several proposed contentions, which are discussed below. As explained below, the NRC staff opposes admission of all of Joint Petitioners’

proposed contentions. The NRC Staff discusses the proposed contentions *seriatim* as they appear in Joint Petitioners' filing.

- A. CONTENTION 1 (AP1000 Deficiencies):  
[The] AP1000 is not certified and current revision is not adopted. Petition at 14.

The COLA is incomplete because at the moment many of the major safety components and procedures proposed for the Levy County reactors are only conditionally designed at best. In its COLA, PEF has adopted the AP1000 DCD Revision 16 which has not been certified by the NRC and with the filing of Revision 17 by Westinghouse, Revision 16 will no longer be reviewed by the NRC Staff. PEF is now required to resubmit its COLA as a plant-specific design or to adopt Revision 17 by reference and provide a timetable when its safety components will be certified. Either the plant-specific design or adoption of AP1000 Revision 17 would require changes in PEF's application, including the final design and key operational procedures. Regardless of whether the components are certified or not, the COLA cannot be reviewed without the full disclosure of all designs and operational procedures. Petition at 13.

Staff Response: A contention that simply alleges that some matter ought to be considered does not provide the basis for an admissible contention. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993). 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 a petitioner may dispute. See *Pacific Gas and Electric Co.* (Diablo Canyon ISFSI), CLI-08-01, 67 NRC 1, 8 (2008). If a contention alleges an omission, it must identify each omission and give supporting reasons for the Petitioners' belief that the application fails to contain information on a relevant matter required by law. 10 C.F.R. § 2.309(f)(1)(vi). Simply asserting that the application is inadequate or incomplete in some way, therefore, does not make an admissible contention. For the reasons explained below, this contention is inadmissible, either because it fails to meet the requirements of 10 C.F.R. § 2.309 or because it presents an impermissible attack on the regulations. See 10

C.F.R. § 2.335 (prohibiting challenges to the Commission's regulations in adjudicatory proceedings in the absence of waiver).

1. Petitioners' Challenge to the Commission's Licensing Process

With this contention, Joint Petitioners appear to be challenging the Commission's licensing process, stating that "it is impossible to conduct a meaningful technical and safety review of the COLA without knowing the final design of the reactors as they would be constructed by PEF." Petition at 15. Joint Petitioners also point out, as if it is an important defect, that design certification information may change during the AP1000 design certification amendment review, and that the COL application may change as a result. See Petition at 16. Joint Petitioners also complain that there is no timetable for resolution of the AP1000 amendment process, stating that they "have no confidence that several of the fundamental issues can be resolved." Petition at 18. Joint Petitioners' concerns do not provide adequate support for this contention's admissibility.

The regulations, Commission case law, and Commission policy clearly give COL applicants the right to reference a design certification application. 10 C.F.R. § 52.55(c); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant), CLI-08-15, 68 NRC \_\_\_ (July 23, 2008); "Conduct of New Reactor Licensing Proceedings; Final Policy Statement," 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (hereafter "New Reactor Licensing Policy Statement"). Joint Petitioners' challenge to the NRC's review of the Levy COL application prior to certification of the proposed AP1000 amendments, therefore, is an impermissible challenge to the regulations. See 10 C.F.R. § 2.335. Joint Petitioners' concerns outlined above appear to flow from the decision to allow COL applicants to reference design certification applications and, therefore, cannot support contention admissibility. As stated by the Board in *Summer* in refusing to admit a similar contention, the "contention is an attack on the design certification process and such matters are outside the scope of the proceeding." See *South Carolina*

*Electric & Gas and South Carolina Public Service Authority* (Virgil C. Summer Nuclear Station Units 2 & 3), LBP-09-02, slip op. at 8. These concerns also do not otherwise meet the admissibility requirements of § 2.309(f)(1).

Finally, Joint Petitioners may be under a misimpression because they state that Revision 16 of the AP1000 is no longer being reviewed by the NRC. See Petition at 14. Revision 17 is an update the Westinghouse's AP1000 amendment application,<sup>10</sup> and amendment information included in Revision 16 will be reviewed to the extent that it has not been changed in Revision 17. Revision 16, likewise, reflected proposed changes to Revision 15.<sup>11</sup>

2. Petitioners' Challenge to the AP1000 Recirculation Screen Design and Instrumentation and Controls

Joint Petitioners claim that the AP1000, Revision 16, design is deficient with respect to its recirculation screen design and so-called unresolved problems in the AP1000, Revision 16, instrumentation and controls (I&C). Petition at 15-16. Joint Petitioners cite only the docketing letter for the AP1000, Revision 16, to support their recirculation screen design assertion, stating that the issue "was discuss[ed]" in this letter. *Id.* The NRC's docketing letter, however, does not support contention admissibility. Joint Petitioners do not explain what specific facts or sources support an asserted inadequacy in Revision 16 other than the Staff's discussion of recirculation screen design in its letter. To demonstrate that a contention is admissible, a petitioner must do more than simply show that the NRC staff is looking into a particular issue in its review of an application; petitioners must themselves provide reasons or support to explain the significance

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<sup>10</sup> See Letter from Robert Sisk, Westinghouse, to NRC, "Update to Westinghouse's Application to Amend the AP1000 Design Certification Rule" (Sept. 22, 2008).

<sup>11</sup> For a detailed listing of the changes Revision 16 makes to Revision 15, see "Westinghouse AP1000 Design Control Document Rev. 17 – Tier 1 – Change Roadmap" at xxvii-xxx, available at [http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU\\_ADAMS^PBNTAD01&ID=083250950](http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=083250950) (ADAMS Accession No. ML083230170); "Westinghouse AP1000 Design Control Document Rev. 17 – Tier 2 – Change Roadmap" at cxx-clxi, available at [http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU\\_ADAMS^PBNTAD01&ID=083250968](http://adamswebsearch2.nrc.gov/idmws/doccontent.dll?library=PU_ADAMS^PBNTAD01&ID=083250968) (ADAMS Accession No. ML083230194).

of the identified concern. *See Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 337 (1999) (“Petitioners seeking to litigate contentions must do more than attach a list of RAIs [NRC staff requests for additional information] and declare an application ‘incomplete.’ It is their job to review the application and to identify what deficiencies exist and to explain why the deficiencies raise material safety concerns.”) (emphasis added). In *Oconee*, the Commission also noted that NRC staff’s issuance of RAIs “does not alone establish inadequacies in the application,” and upheld the inadmissibility of a contention where “petitioners themselves provided no analysis, discussion, or information of their own on any of the issues raised in the RAIs[.]” *Id.* at 337. Docketing letters are like RAIs, in that they communicate with applicants on issues relevant to the NRC’s safety review, and *Oconee* is squarely on point. Joint Petitioners have failed to offer any specific facts or sources or make any independent argument in support of a dispute with the recirculation screen design. Joint Petitioners also do not explain their dispute with any specific portion of the design certification application and, therefore, do not demonstrate a genuine, material dispute with the application as required by 10 C.F.R. § 2.309(f)(1)(vi).

As for their I&C concerns, Joint Petitioners nowhere specifically describe what unresolved I&C problems they have in mind, point to any regulation that such problems might violate, describe what part of the application they dispute, or point to any alleged facts, expert support, or documentation that would support their position on the issue. Joint Petitioners, therefore, fail to meet the requirements in 10 C.F.R. § 2.309(f)(1)(i), (ii), (iv), (v), (vi) to specifically describe the factual and legal issues they raise; support their contention with a basis; demonstrate the materiality of their concerns; provide support for their contention; explain their dispute with specific portions of the application; or otherwise show a genuine, material dispute with the application. Joint Petitioners do not even cite to the I&C portion of the COL

application (chapter 7 of the FSAR) or the AP1000, Revision 16 DCD (Chapter 7 of Tier 2), much less meet the requirements for an admissible contention with respect to such information.

### 3. Petitioners' Challenge to the Structure of the DCD

Petitioners also appear to challenge the two-tier rule structure of design certifications.

They state:

Even the so-called "certified" components that have been *approved* depend on the interaction with non-certified components. These non-certified "Tier 2" components are not trivial, but run the gamut of containment, control room set up, seismic qualifications, fire areas, heat removal, human factors engineering design, plant personnel requirements, operator decision-making, alarms and piping. These non-certified components interact with Tier 1 components and each other to a significant degree. During the certification process, any or all of these may be modified by the Commission, and as a result, require the applicant to modify its application.

Petition at 16 (emphasis added). The implication appears to be that Tier 2 components are not approved.

In the design certifications that have been certified thus far, the NRC has adopted a two-tier structure for the DCD. The definitions for the two-tier rule structure are included in the appendix to Part 52 that certifies the design. Appendix D to Part 52 contains the DCD for the AP1000 Design. See 10 C.F.R. Part 52, Appendix D. Tier 1 means:

The portion of the design related information contained in the generic DCD that is approved and certified by this appendix (Tier 1 information). The design descriptions, interface requirements, and site parameters are derived from Tier 2 information. Tier 1 information includes;

1. Definitions and general provisions;
2. Design Descriptions;
3. Inspections, tests, analysis, and acceptance criteria (ITAAC);
4. Significant site parameters; and
5. Significant interface requirements.

See 10 C.F.R. Part 52, App. D, Section II.D.

Tier 2 means:

The portion of the design-related information contained in the generic DCD that is approved but not certified by this appendix (Tier 2 information). Compliance with Tier 2 is required, but generic changes to and plant-specific departures from Tier

2 are governed by Section VIII of this appendix. Compliance with Tier 2 provides a sufficient, but not the only acceptable, method for complying with Tier 1. Compliance methods differing from Tier 2 must satisfy the change process in Section VIII of this appendix. Regardless of these differences, an applicant or licensee must meet the requirement in Section III.B of this appendix to reference Tier 2 when referencing Tier 1. Tier 2 information includes:

1. Information required by §§ 52.47(a) and 52.47(c), with the exception of generic technical specifications and conceptual design information;
2. Supporting information on the inspections, tests, and analyses that will be performed to demonstrate that the acceptance criteria in the ITAAC have been met; and
3. Combined license (COL) action items (COL license information), which identify certain matters that must be addressed in the site-specific portion of the final safety analysis report (FSAR) by an applicant who references this appendix. These items constitute information requirements but are not the only acceptable set of information in the FSAR. An applicant may depart from or omit these items, provided that the departure or omission is identified and justified in the FSAR. After issuance of a construction permit or COL, these items are not requirements for the licensee unless such items are restated in the FSAR.
4. The investment protection short-term availability controls in Section 16.3 of the DCD.

10 C.F.R. Part 52, App. D, Section II.E. As defined above, both Tier 1 and Tier 2 information have been approved by the NRC in Appendix D.

Joint Petitioners are mistaken, therefore, to the extent they believe that Tier 2 information is unapproved. While it is true that Tier 1 components are certified and Tier 2 components are not certified, both Tiers are approved. See 10 C.F.R. Part 52, Appendix D, Sections II, D-E. Any “interaction” between Tier 1 and Tier 2 information that Joint Petitioners allege in no way compromises the approved and certified status of Tier 1 information. Also, since the two-tier structure is fundamental to the already certified AP1000 design, any attack on this structure is an impermissible attack on 10 C.F.R. Part 52, Appendix D. See 10 C.F.R. § 2.335.

Although Joint Petitioners mention certain portions of Tier 2 (“containment, control room set up, seismic qualifications, fire areas, heat removal, human factors engineering design, plant personnel requirements, operator decision-making, alarms and piping,” Petition at 16), they

appear to do so only to give examples of Tier 2 information and do not take issue with the adequacy of the DCD with respect to this information. To the extent they intended to assert challenges in these areas, however, Joint Petitioners clearly do not meet the § 2.309(f)(1) requirement to specify issues, provide a basis, demonstrate materiality, provide support for their positions, explain disputes with specific portions of the application, or demonstrate a genuine, material dispute with the application.

The final design of the reactor containment is discussed in two different portions of the DCD. See AP1000 Design Control Document; §§ 3.8.2, Steel Containment;<sup>12</sup> 6.2, Containment Systems.<sup>13</sup> The control room set up and operator decision-making procedures are discussed in Chapter 18 of the DCD. *Id.* at Chapter 18, Human Factors Engineering.<sup>14</sup> The seismic qualifications for various components of the AP1000 reactors are found in Chapter 3 of the DCD. *Id.* at §§ 3.9.3, ASME Code Classes 1, 2, and 3 Components, Component Supports, and Core Support Structures;<sup>15</sup> 3.10, Seismic and Dynamic Qualification of Seismic Category I Mechanical and Electrical Equipment;<sup>16</sup> Appendix 3D, Methodology for Qualifying AP1000 SAFETY-Related Electrical and Mechanical Equipment.<sup>17</sup> The establishment of fire protection

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<sup>12</sup> ADAMS Accession Nos. ML071580883 (Revision 16); ML083230305 (Revision 17).

<sup>13</sup> ADAMS Accession Nos. ML071580911 (Revision 16); ML083230332 (Revision 17).

<sup>14</sup> ADAMS Accession Nos. ML071580842-ML071580856 (Revision 16); ML083230262, ML083230264-ML083230277 (Revision 17).

<sup>15</sup> ADAMS Accession Nos. ML071580884 (Revision 16); ML083230306 (Revision 17).

<sup>16</sup> ADAMS Accession Nos. ML071580873 (Revision 16); ML083230297 (Revision 17).

<sup>17</sup> ADAMS Accession Nos. ML071580889 (Revision 16); ML083230311 (Revision 17).

areas is discussed in Chapter 9 of the DCD. *Id.* at § 9.5.1, Fire Protection System;<sup>18</sup> Appendix 9A, Fire Protection Analysis.<sup>19</sup>

“Heat removal” is very vague, but systems for safe shutdown are discussed in Chapter 6 of the DCD, and systems for design basis accidents are discussed in Chapter 15 of the DCD. *Id.* at § 6.3, Passive Core Cooling System;<sup>20</sup> Chapter 15, Accident Analyses.<sup>21</sup> *See also id.* at § 14.2.9, Preoperational Test Descriptions.<sup>22</sup> Human factors engineering is discussed in Chapter 18 of the DCD. *Id.* at Chapter 18, Human Factors Engineering.<sup>23</sup>

It is unclear what Joint Petitioners mean by “plant personnel requirements.” They have not provided sufficient detail to point the Staff to relevant application sections. Nevertheless, there are likely relevant discussions in Chapters 13 and 18 of the DCD. *Id.* at §§ 13.2, Training;<sup>24</sup> 18.6, Staffing.<sup>25</sup> It is also unclear what Joint Petitioners mean by “alarms.” They have not provided sufficient detail to point the Staff to specific application sections. However, there could be relevant discussions in Chapters 7, 9, 13, and 18 of the DCD. *Id.* at Chapter 7, Instrumentation Controls;<sup>26</sup> Chapter 9, Auxiliary Systems;<sup>27</sup> § 13.6, Security;<sup>28</sup> § 18.6, Staffing.<sup>29</sup>

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<sup>18</sup> ADAMS Accession Nos. ML071580935 (Revision 16); ML083230721 (Revision 17).

<sup>19</sup> ADAMS Accession Nos. ML071580937 (Revision 16); ML083230723 (Revision 17).

<sup>20</sup> ADAMS Accession Nos. ML071580912 (Revision 16); ML083230333 (Revision 17).

<sup>21</sup> ADAMS Accession Nos. ML071580821 (Revision 16); ML083230239 (Revision 17).

<sup>22</sup> ADAMS Accession Nos. ML071580817 (Revision 16); ML083230235 (Revision 17).

<sup>23</sup> ADAMS Accession Nos. ML071580842-ML071580856 (Revision 16); ML083230262, ML083230264-ML083230277 (Revision 17).

<sup>24</sup> ADAMS Accession Nos. ML071580815 (Revision 16); ML083230233 (Revision 17).

<sup>25</sup> ADAMS Accession Nos. ML071580852 (Revision 16); ML083230273 (Revision 17).

<sup>26</sup> ADAMS Accession Nos. ML071580918-ML071580924, ML071580926 (Revision 16); ML083230339-ML083230346 (Revision 17).

<sup>27</sup> ADAMS Accession Nos. ML071580931-ML071580937 (Revision 16); ML083230351-ML083230354, ML083230721-ML083230723 (Revision 17).

Again, it is unclear what Joint Petitioners mean by “piping.” They have not provided sufficient detail to point the Staff to specific application sections. In any event there is likely relevant discussion in various sections of the DCD. See *id.* at Chapter 3, Design of Structures, Components, Equipment and Systems;<sup>30</sup> Chapter 7, Instrumentation and Controls;<sup>31</sup> § 9.5.1, Fire Protection System.<sup>32</sup> Thus, Joint Petitioners do not challenge the adequacy of the DCD discussion of any of the above technical subjects.

4. Joint Petitioners’ Misplaced Disputes Based on AP1000 Revision 17

Joint Petitioners also attempt to base Contention 1 on information provided in the AP1000, Revision 17. On page 16 of their Petition, Joint Petitioners state that “[o]n its face, Revision 17 demonstrates that the DCD, and as a result, the COLA, is incomplete and that there remain a number of serious safety inadequacies in the AP1000 design that have not been satisfactorily addressed.” Joint Petitioners then list a number of “uncertified components” addressed in Revision 17, state that these components may be modified during the certification process, and that the applicant may, thereby, be required to amend its application. See Petition at 16-17.

Joint Petitioners’ articulation of their dispute is unclear, however, and can give rise to one of two interpretations. Both of these interpretations will be addressed by the Staff, but neither one supports contention admissibility. One possible interpretation is that Joint Petitioners believe that the mere existence of a Revision 17 proves that Revision 16 is

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<sup>28</sup> ADAMS Accession Nos. ML071580815 (Revision 16); ML083230233 (Revision 17).

<sup>29</sup> ADAMS Accession Nos. ML071580852 (Revision 16); ML083230273 (Revision 17).

<sup>30</sup> ADAMS Accession Nos. ML071580873-ML071580878, ML071580880-ML071580894 (Revision 16); ML083230297-ML083230317 (Revision 17).

<sup>31</sup> ADAMS Accession Nos. ML071580918-ML071580924, ML071580926 (Revision 16); ML083230339-ML083230346 (Revision 17).

<sup>32</sup> ADAMS Accession Nos. ML071580935 (Revision 16); ML083230721 (Revision 17).

somehow inadequate. This is clearly a fallacious argument. A DCD can be amended for any number of reasons, none of which cast doubt on the adequacy of information in prior revisions. Joint Petitioners clearly show no material, genuine, and supported dispute with the application on this score. See 10 C.F.R. § 2.309(f)(1).

A second possible interpretation, however, is that Joint Petitioners are attempting to dispute certain information in Revision 17 to the AP1000 DCD, specifically the list of Tier 2 components in Revision 17 to the AP1000. This appears similar to Joint Petitioners' challenge to the two-tier structure of the AP1000 DCD and cannot support contention admissibility, as described above. To the extent they intended to challenge the adequacy of any portion of Revision 17 to the AP1000, however, Joint Petitioners clearly do not meet the 10 C.F.R. § 2.309(f)(1) requirements to specify issues, provide a basis, demonstrate materiality, provide support for their positions, explain disputes with specific portions of the application, or demonstrate a genuine, material dispute with the application.

Any challenge to information contained in Revision 17 of the AP1000, but not yet incorporated into the Levy COL Application, faces a more fundamental threshold issue, however. In order to meet the requirements for issuing a COL, applicants must submit the information required by 10 C.F.R. §§ 52.77, 52.79, and 52.80. Some of this information may be incorporated from either an already certified design or a design certification application. 10 C.F.R. §§ 52.55(c), 52.73(a). If Joint Petitioners dispute any information found in the COL application, they can submit contentions based on those disputed issues, see 10 C.F.R. § 2.309(f)(2), and if Joint Petitioners submit otherwise admissible contentions disputing information in a referenced design certification application, the contention would be admitted, but held in abeyance pending resolution of the design certification rulemaking. See 73 Fed. Reg. at 20,972. Upon adoption of a final design certification rulemaking, such a contention should be denied. *Id.* A petitioner is foreclosed from filing contentions regarding a previously

certified design in a COL proceeding. See 10 C.F.R. § 2.335. Thus, Joint Petitioners are foreclosed from filing contentions regarding the previously certified AP1000 Revision 15 design. See 10 C.F.R. Part 52, App. D, Section VI.

If a referenced DCD is revised after submission of the COL application, then the COL applicant has a choice between incorporating these revisions in their entirety, or else requesting an exemption from some of the changes, or pursuing a custom design. See 73 Fed. Reg. at 20,972-73. A choice to incorporate some, or all, of the DCD revision would be made through an amendment to the COL application. Although this choice would need to be made at some point in the COL review process, there is no requirement that it be made immediately after a DCD revision is made, and Joint Petitioners point to no such requirement.

The Levy COL application has not been amended in response to Revision 17 of the referenced DCD; it still incorporates Revision 16. Contentions must be based on the application,<sup>33</sup> as it exists when the petition is filed, see 10 C.F.R. § 2.309(f)(2). Any admissible contentions in this COL proceeding, therefore, must be based on the COL application as it now exists, with the design information currently referenced. Contentions cannot be based on speculation about how the application might, or might not, be amended in the future. When and if, the COL application is later amended, late-filed contentions specifically taking issue with the amendment can then be submitted. These contentions can be admitted if they meet all relevant requirements, including the late-filing and admissibility requirements of 10 C.F.R. § 2.309.<sup>34</sup> Any challenge to Revision 17 of the AP1000, therefore, is currently outside the scope of this COL proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

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<sup>33</sup> “The adequacy of the applicant’s license application, not the NRC staff’s safety evaluation, is the safety issue in any licensing proceeding.” Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

<sup>34</sup> Among these requirements is the need to file contentions based on new information in a “timely fashion” after the new information became available. See 10 C.F.R.

5. Joint Petitioners' Challenges Regarding Accident Analyses

Joint Petitioners assert that it is impossible to conduct the probabilistic risk assessment (PRA) for the proposed Levy reactors without “a final design and operations procedures.” Petition at 16. In the context of a later discussion of the ER’s assessment of design basis accidents (DBAs), severe accidents, and severe accident mitigation alternatives (SAMAs), Joint Petitioners also assert that “[w]ithout having the current configuration, design and operating procedures in the application, the risk assessment and the SAMAs cannot be determined.” Petition at 18. None of these assertions support contention admissibility.

The Staff first notes that all of the analyses are in fact found in the relevant design certification and COL application documents. The PRA is found in chapter 19 of the Levy FSAR, and in Tier 2, Chapter 19 of the certified AP1000 Rev. 15, as well as in Revisions 16 of the AP1000 design. Likewise, Chapter 7 of the Levy Environmental Report (ER) addresses DBAs, severe accidents, and SAMA. See Levy ER, Section 7.1 (DBAs), Section 7.2 (Severe Accidents) and Section 7.3 (SAMAs). Moreover, the NRC environmental assessment (EA) for the AP1000 Rev. 15, contains an analysis of Severe Accident Mitigating Design Alternatives (SAMDA), which form a part of the SAMA analysis. See AP1000 Rev. 15, EA (ADAMS Accession No. ML053630176). The Westinghouse SAMDA analysis for the AP1000 Revisions 16, can be found in Tier 2, Appendix 1B, of the respective DCDs. Joint Petitioners neither cite to these analyses, nor explain how any portion of these analyses are incorrect or incomplete,

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§ 2.309(f)(2)(iii). The clock for late-filed contentions specifically disputing information contained in the amendment to the application would be triggered with the filing of the amendment, because the application simply did not contain this information before the amendment. A different situation presents itself with respect to new information, regardless of its source, that allegedly calls into question the adequacy of the *existing* application. An example might be the conclusions of a technical report, whether or not the report is connected to the licensing action. Since contentions can always be filed with respect to the existing application, the clock for late filing in this latter situation would run from the availability of the new information—in this case, the technical report.

contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(vi).<sup>35</sup> Joint Petitioners also do not provide any alleged facts or expert opinion, and no references to documentation, that would support their assertions that various accident analyses are “impossible” to perform, thereby failing to meet § 2.309(f)(1)(v).

Fundamentally, it appears that Joint Petitioners’ grievance is not with the Levy COL application, but with the Commission’s licensing process. Joint Petitioners nowhere particularize their dispute with the Application’s accident analyses. Neither do Joint Petitioners allege that such analyses, though possible to perform, have not been performed in this case. Joint Petitioners instead argue that these accident analyses are impossible to perform, see Petition at 15, 16, which implicitly attacks the Commission’s decision to allow COL applicants to reference design certification applications. See 10 C.F.R. § 52.55(c). Contentions attacking the Commission’s licensing process cannot be admitted in NRC proceedings. 10 C.F.R. § 2.335; see also discussion at III.A.1, *supra*.

For the above reasons, Contention 1 is not admissible.

- B. CONTENTION 2 (Part 50 Should Apply):  
PEF Should Withdraw the COLA Until the AP 1000 Certification is actually complete, or Apply under Part 50. Petition at 19.

Staff Response: 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

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<sup>35</sup> To the extent that Joint Petitioners believe that any specific deficiencies in the AP1000 DCD or Levy COL application relate to deficiencies in the accident analyses, Joint Petitioners fail to explain this relationship, or provide any support for their concerns.

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. See 10 C.F.R. § 2.309(f). Joint Petitioners have failed to meet any of the contention admissibility requirements of § 2.309(f). Joint Petitioners have simply copied portions of two NRC regulations. For this reason, Contention 2 is not admissible.

- C. PROPOSED CONTENTION 3:  
The Applicant does not meet the Financial Qualification Requirements of 10 C.F.R. § 50.33. Petition at 20.

Staff Response: Proposed contention 3 is inadmissible in that it fails to establish a genuine dispute with the applicant on a material issue of fact or law, in contravention of the requirements of 10 C.F.R. § 2.309(f)(vi), and fails to raise an issue within the scope of the proceeding, in contravention of 10 C.F.R. § 2.309(f)(ii).

1. Petitioners fail to establish a genuine dispute with the applicant.

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). The petitioners have not alleged that the NRC will not be able to make a finding regarding funding of construction costs. To the extent that Petitioners did in fact intend to challenge the applicant’s ability to fund construction costs, the Petitioners have failed to identify a genuine dispute with the applicant. In order to demonstrate a factual dispute a Petitioner must make “minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.” 54 Fed. Reg. 33,168, 33,170 (August 11, 1989). In the instant case Petitioners have failed to make even that minimal showing. They simply make a variety of statements that building the plants will be very expensive. A contention is inadmissible where 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 Petitioners dispute. See *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 8 (2008). The Petitioners note that the cost estimates were not publicly available in the application. Petitioners had the option to seek access to the proprietary cost information through the SUNSI access procedures but they did not avail themselves of this opportunity. Since the Petitioners have failed to demonstrate any genuine dispute with the applicant, the contention is inadmissible. See 10 C.F.R. § 2.309(f)(1)(vi).

2. Petitioners fail to demonstrate that the issue raised is within the scope of the proceeding.

The fundamental purpose of NRC financial qualifications requirements is to ensure public health and safety, See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center) CLI-97-15, 46 N.R.C. 294, 303 (1997), not to ensure the financial viability of a project. In order to support its contention, Petitioners make statements such as:

General construction cost estimates of new nuclear plants have spiraled out of control to gargantuan proportions since the time that Levy Units 1 and 2 were first announced, and they remain highly volatile. Petition at 21.

Company officials have acknowledged publically that total costs could exceed \$20 billion. Petition at 23.

The NRC holds independent authority and responsibility to ascertain whether PEI/PEF can acquire adequate funds to complete this project. Petition at 26.

It goes without saying that nothing in Florida law can obstruct the NRC's statutory obligation to ensure the fiscal responsibility of this project. Petition at 27.

PEF fails to properly evaluate the risk of choosing a single technology, instead choosing two extremely large, risky construction projects. A more reasonable approach would be to seek a modular approach made up of a greater variety of resource options allowing a greater opportunity to change course during implementation of the plan, in the event that risks, known to be potential and those that are not now foreseeable, develop into real difficulties during implementation, and in the event that other superior opportunities become realistic. Petition at 30.

Petitioners appear to be arguing that building Levy Units 1 and 2 is not a wise financial choice for Progress Energy. The NRC financial qualifications review for an electric utility such as Progress Energy is limited to whether or not the applicant can demonstrate that it “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). Whether or not Progress Energy is making a wise financial choice in applying for a COL at the Levy site is outside the purview of the NRC, and thus is outside the scope of the proceeding.

Since Petitioners have failed to demonstrate a genuine dispute with the applicant, in contravention of 10 C.F.R. § 2.309(f)(vi), and have failed to demonstrate that the contention they raise is within the scope of the proceeding, in contravention of 10 C.F.R. § 2.309(f)(1)(ii), this contention should be denied.

- D. PROPOSED CONTENTION 4.A:  
Direct, indirect and cumulative environmental impacts- the LNP Units 1 and 2 COL Application Part 3, Environmental Report (ER) fails to address adverse direct, indirect, and cumulative environmental impacts of the proposed LNP facility. Petition at 32.

Staff Response: Contention 4.A is inadmissible in that it fails to specifically identify the portions of the application with which it disputes, and the supporting reasons for each dispute, in accordance with 10 C.F.R. § 2.309(f)(1)(vi). Thus, the Joint Petitioners have failed to give an adequate basis for their contention. The basis requirement exists in part to assure that there has been sufficient foundation assigned for the contentions to warrant further exploration. See *GPU Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-86-10, 23 NRC 283, 285 (1986).

In the instant case, Joint Petitioners have simply stated their belief that a table in the LNP ER which summarizes the environmental impacts of construction erroneously characterizes the impacts as “SMALL” or “SMALL-MODERATE,” and the Joint Petitioners do not believe these tables have adequately characterized the impacts. See Petition at 34-35.

However, Joint Petitioners have failed to provide any facts or expert opinion to dispute any specific impact in the table. Simply stating a familiarity with the region does not provide any facts to demonstrate that there is a foundation for the contention sufficient to warrant further exploration in an adjudicatory hearing. See *Three Mile Island*, LBP-86-10, 23 NRC at 285. Thus, contention 4.A is inadmissible.

- E. PROPOSED CONTENTION 4.B:  
Constructing in flood plains – The LNP ER failed to address adverse, direct, indirect and cumulative environmental impacts of constructing the proposed LNP facility within flood plains and on wetlands, special aquatic sites and waters. Petition at 35-36.

Staff Response: Contention 4.B is inadmissible since Petitioners have failed to demonstrate a genuine dispute with the applicant on a material dispute of fact or law. Petitioners fail to cite, as required by 10 C.F.R. § 2.309(f)(1)(vi) the specific portions of the application with which they disagree. Petitioners do allege that the ER failed to identify the source of the aggregate fill required for the LNP project. Petition at 36. To the extent Petitioners intend a contention of omission regarding the source of the fill, they must identify why the allegedly missing information is required to be submitted by law. See 10 CFR § 2.309(f)(1)(vi).

In the instant case, Petitioners have not demonstrated why the applicant must provide analysis regarding the source of the fill. Given that “NEPA requires that information in the environmental impact statement be sufficiently accurate to inform both the acting agency and the public,” it is unclear why additional analysis is needed regarding the specific source of the fill. See, e.g., *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf Site), CLI-05-04, 61 NRC 10, 27 (2005). NEPA does not require analysis of impacts that would be too attenuated from the proposed action. See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-775 (1983); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002). Since Petitioners fail to

demonstrate a material dispute with the applicant, this contention is not admissible. 10 C.F.R. § 2.309(f)(1)(vi).

- F. PROPOSED CONTENTION 4.C:  
Construction materials- the ER failed to address adverse direct, indirect, and cumulative impacts on flood plains, wetlands, special aquatic sites and waters from additional mining for the production of raw materials, such as aggregate for concrete, to construct the proposed LNP facility  
Petition at 38.

Staff Response: Contention 4.C is inadmissible since Petitioners have failed to demonstrate a genuine dispute with the applicant on a material dispute of fact or law. Petitioners fail to cite, as required by 10 CFR § 2.309(f)(1)(vi) the specific portions of the application with which they disagree. Petitioners do allege that the ER failed to identify the source of the mined raw materials to create concrete for the LNP project. Petition at 36. To the extent Petitioners intend a contention of omission regarding the source of the mined raw materials, they must identify why the allegedly missing information is required to be submitted by law. See 10 CFR § 2.309(f)(1)(vi).

In the instant case, Petitioners have not demonstrated why the applicant must provide analysis regarding the source of the mined raw materials. Given that “NEPA requires that information in the environmental impact statement be sufficiently accurate to inform both the acting agency and the public,” it is unclear why additional analysis is needed regarding the source of the mined raw materials. See, e.g., *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf Site), CLI-05-04, 61 NRC 10, 27 (2005). Also, it is unnecessary to analyze anything further, as the impacts would be too attenuated from the proposed action. See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-775 (1983); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002). Since Petitioners fail to demonstrate a material dispute with the applicant, this contention is not admissible. 10 C.F.R. § 2.309(f)(1)(vi).

G. Proposed Contention 4.D:

The ER failed to address adverse direct, indirect and cumulative environmental impacts on flood plains, wetlands, special aquatic sites and water of on-site mining (excavation) and dewatering to construct and operate the proposed LNP and all associated components. Petition at 40.

Staff Response: Proposed Contention 4.D is inadmissible because it fails to demonstrate a genuine dispute with the applicant and it fails to provide facts or expert opinion pursuant to 10 C.F.R. § 2.309(f)(1)(v) & (vi).

Petitioners fail to provide adequate facts or expert opinion to support their assertion that the proposed LNP project would result in “LARGE” rather than “SMALL” impacts to wetlands, flood plains, special aquatic sites and other waters throughout and beyond the site and vicinity of the proposed LNP project. See Petition at 43. A contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” See *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 67 NRC \_\_\_ (Sept. 22, 2008) (slip op. at 9) (*quoting* Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)). Petitioners do attach a declaration from Dr. Bacchus, but he simply asserts that the LNP project would cause “LARGE” impacts, with no reasons to back up his assertions. Even the opinion of a qualified and properly identified expert will not support a contention if the opinion lacks a reasoned basis or explanation. *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006). Similarly Petitioners attach an article by Dr. Bacchus titled “*Nonmechanical Dewatering of the Regional Floridan Aquifer System*, GEOLOGICAL SOC’Y of AM. (2006). Simply attaching materials or documents, without explaining their significance, is insufficient. See *id.* Since Petitioners have failed to provide any facts or expert support for contention 4.D, it is inadmissible.

Moreover, the portion of the contention regarding evaporative loss is inadmissible for failure to take issue with a specific portion of the application as required by 10 C.F.R. §

2.309(f)(1)(vi). Joint Petitioners assert that “[i]f the 30,427 gallons per minute of evaporative loss (identified in the LNP report) is multiplied by 60 minutes per hour and 24 hours per day, the total daily evaporative loss from the cooling towers is 43,814,880 gallons per day (gdp) or 43.8 MGD.” Petition at 43. The petition continues on to claim that this is an “astronomical” amount of evaporative loss that “will include salt drift, which will be contaminating the surrounding wetlands, flood plains, special aquatic sites.” *Id.* As a result, Joint Petitioners claim it will be impossible to “mitigate those LARGE impacts.” Petition at 43.

Joint Petitioners however may be confused in their assessment of evaporative loss and the resulting salt drift. Evaporation and drift are two entirely separate issues. The 43 million gallons of evaporative loss is comprised of water vapor, essentially distilled water, which leaves the cooling towers. This water vapor contains no salt. The salt drift is water leaving the cooling tower not as a vapor, but as fine droplets of salt water. Salt drift is thus an unavoidable consequence of operating a cooling tower. This drift is estimated to amount to 5.32 gallons per minute of the total evaporative loss. Cooling towers include features specifically designed to minimize drift. See LEVY COL ER subsection 5.3.3.1.3; see *also* ER Table 3.3-2. The salt drift therefore is not the 43 million gallon per day (30, 427 gallons per minute) figure that Joint Petitioners claim. Petition at 43. LEVY COL ER subsection 5.3.3.2.1 states:

The analysis resulted in a maximum predicted off-site deposition rate (during normal plant operation) of 6.81 kilogram per hectare per month (kg/ha/mo) (6.13 pounds per acre per month [lb/ac/mo]) of total solids at a location due west of the cooling towers at the nearest property boundary. Even assuming that all of the solids contained in the cooling tower drift are salts, this rate is below the threshold limit of 10 kg/ha/mo (9 lb/ac/mo) as provided in NUREG-1555, which is a threshold above which an adverse impact on vegetation could occur. The maximum predicted on-site deposition (during normal plant operation) is 10.75 kg/ha/mo (9.68 lbs/ac/mo).

Joint Petitioners’ statement that the 43 million gallons of “astronomical evaporative loss” will contain salt drift, is not based on any data or statements made in the application. Also by

claiming that it is impossible to mitigate “LARGE” impacts from the salt drift and that the Levy ER does not provide this information, Joint Petitioners take issue with findings that are not in the application. “A petitioner’s imprecise reading of a reference document cannot serve to generate an issue suitable for litigation.” *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia) LBP-95-6, 41 NRC 281, 300 (1995). Therefore, Proposed Contention 4.D regarding evaporative loss is inadmissible as Joint Petitioners fail to provide sufficient information to show that a genuine dispute exists with the application pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

- H. Proposed Contention 4.E:  
Wetlands connected to the Floridan aquifer system - The ER failed to address adverse direct, indirect, and cumulative environmental impacts of constructing the proposed LNP facility within wetlands that are connected to the underlying Floridan aquifer system via relict sinkholes. Petition at 44.

Staff Response: Proposed Contention 4.E is inadmissible as it does not cite to sources or expert opinions which support the Joint Petitioners’ position, nor does it provide sufficient information to show that a genuine dispute exists with the application pursuant to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Joint Petitioners argue that the construction from the proposed LNP project will harm wetlands “and those associated with other natural waters on the site and within the vicinity and region.” Petition at 44. As a result, this will cause “adverse direct, indirect and cumulative impacts to pond-cypress wetlands” and to wetlands beyond the site. Petition at 45. However, Joint Petitioners do not point to specific portions of the ER nor do they provide any expert support to bolster their argument.

Further, the applicant states it intends to abide by Florida’s Regional Off-Site Mitigation Area Plan (ROMA) to mitigate damage to wetlands. According to ER subsection 4.2.1.5:

Approximately 39 percent of the site is covered by existing wetlands. Clearing vegetation around the LNP site and within the associated corridors will affect

wetlands on the site...However, the actual LNP footprint will only be a small percentage of the total site. Permanent and affected wetlands will be mitigated through Florida's Regional Off-Site Mitigation Area (ROMA) Plan.

The application continues to discuss impact on wetlands in ER subsection 4.2.2.2. "Wetlands may be affected if groundwater is pumped from the site. Pumping may cause groundwater levels to decrease, lowering wetland levels. Any affected wetlands will be mitigated under Florida's ROMA Plan." See Levy ER subsection 4.2.2.2. The ER also states that Water use impacts on wetlands from LNP construction will be SMALL." See *id.*

In addition, ER subsection 2.4.1 describes in considerable detail wetlands found at the proposed site. However, Joint Petitioners do not reference Levy ER subsections 4.2.1.5, 4.2.2.2 or 2.4.1 in the proposed contention. Nor do Joint Petitioners take issue with the information pertaining to wetlands in these ER subsections, or information in any other portions of the ER. Therefore, as Joint Petitioners do not dispute a specific part of the application, Proposed Contention 4.E is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

On page 45 of the Petition, Joint Petitioners do reference Exhibit E, a paper written by Joint Petitioners' expert Sidney T. Bacchus entitled, *Nonmechanical Dewatering of the Regional Floridan Aquifer System*, GEOLOGICAL SOC'Y of AM. (2006). Nonetheless, this paper does not reference the LNP project or the applicant's ER. Nor does the paper support Joint Petitioners' position that cumulative impacts from the proposed LNP project will cause harm to the wetlands. While Joint Petitioners are not required to prove facts at this point in this proceeding, they must provide sources and expert opinions in support of their contentions. See 10 C.F.R. § 2.309(f)(1)(v) and (vi). Further, those sources must actually stand for the proposition for which they are cited. See *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, LBP-96-2, 43 NRC 61, 90 (1996). Proposed Contention 4.E thus does not cite to any sources or expert opinion that support Joint Petitioners' claim. Thus, as Proposed Contention 4.E does not raise a

genuine dispute with the application, it should be denied in accordance with 10 C.F.R. § 2.309(f)(1)(v) and (vi).

- I. PROPOSED CONTENTION 4.F:  
Outstanding Florida Waters- The ER failed to address adverse direct, indirect and cumulative impacts of constructing and operating the proposed LNP project on “Outstanding Florida Waters” (OFW). Petition at 45.

Staff Response: Proposed Contention 4.F is inadmissible in that it does not demonstrate a genuine dispute with the applicant on a material issue of law or fact and it does not provide facts or expert opinion to support the contention. 10 C.F.R. § 2.309(f)(1).

1. Petitioners fail to demonstrate a genuine dispute with the applicant on a material issue of law or fact.

10 C.F.R. § 2.309(f)(vi) requires a Petitioner to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Petitioners are required to provide references to the specific portions of the application that the Petitioner disputes along with the supporting reasons for each dispute. In the instant case, while Petitioners allege that the ER fails to address the effects of dewatering, they do not reference or dispute the various sections of the ER that describe dewatering impacts. ER Section 4.2.1 describes the impacts that may result from temporary dewatering during construction and impacts on wetlands. See ER Section 4.2.1 (ADAMS Accession No. ML082260948). Impacts to freshwater streams are described in ER Section 4.2.2.1. See ADAMS Accession No. ML082260948. Impacts from construction activities to lakes and impoundments, to the Cross Florida Barge Canal, to groundwater, and to wetlands are described in ER Sections 4.2.1.2-4.2.1.5. See *Id.* Since Petitioners fail to reference specific portions of the application which discusses their concerns, they have not demonstrated a genuine dispute with the applicant, and hence this contention is inadmissible.

2. Petitioners fail to support their contention with facts or expert opinion.

10 C.F.R. § 2.309(f)(1)(v) requires a Petitioner to provide a concise statement of the alleged facts or expert opinion which support the Petitioners position on the issue and which the petitioner intends to rely at hearing. In the instant case, Petitioners do not point to any facts or expert opinion to support their assertion that the LNP project would result in “LARGE” and irreversible impacts, rather than the “SMALL” impacts reported in the LNP ER. See Petition at 46. Petitioners do attach a declaration of Dr. Sydney T. Bacchus, however for this contention Dr. Bacchus simply states that in his professional opinion he believes all of the impacts should have been recorded as “LARGE.” See Bacchus Declaration at 16. While a Petitioner is not required to prove a contention in its admission, it must allege at least some credible foundation for the contention. *Connecticut Yankee Atomic Power Co. (Haddam Neck Plant)*, LBP-01-21, 54 NRC 33, 47-48 (2001). Simply attaching an expert declaration stating that he believes the impacts are large does not satisfy this threshold test. Since Petitioners have failed to support contention 4.F with facts or expert opinion, this contention is not admissible.

Petitioners have not established a genuine dispute with the applicant, nor have they supported their contention with facts or expert opinion, thus this contention is inadmissible. 10 C.F.R. § 2.309(f)(1).

- J. PROPOSED CONTENTION 4.G:  
Alteration of nutrient concentrations – The LNP ER failed to address adverse direct, indirect, and cumulative environmental impacts on constructing and operating the proposed LNP project on nutrient concentrations in wetlands, flood plains, special aquatic sites and other waters resulting from dewatering. Petition at 46-47.

Staff Response: Contention 4.G is inadmissible since it fails to demonstrate a genuine dispute with the Applicant on a material issue of law or fact and it fails to support the contention with facts or expert opinion. 10 C.F.R. § 2.309(f)(1).

A petitioner is required to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must include

references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute. See 10 C.F.R. § 2.309(f)(1)(vi). Petitioners believe that the change in nutrient concentrations as a result of dewatering should have been addressed in the ER. See Petition at 47. Petitioners do not cite to, or disagree with, the dewatering analysis contained in the ER in Section 4.2.1. See ADAMS Accession No. ML082260948. Similarly Petitioners do not cite to, or disagree with, the discussion of mitigation and management methods to ensure water quality during construction and operation found in ER Section's 4.2 and ER Section 5.2. See ADAMS Accession No. ML082260948 and ML082260949. Petitioners do not give any support for their assertion that a change in nutrient concentrations should have been specifically discussed. The purpose of NEPA is to inform the decisionmaker and inform the public about the environmental impacts of a proposal. Petitioners fail to demonstrate how an omission of nutrient concentrations in the ER is a material dispute for the licensing action, such that a NEPA document would not be sufficient without this information. See, e.g., *Grand Gulf ESP*, CLI-05-04, 64 NRC at 29 (In finding the contention to be inadmissible, the Commission stated that “[h]owever, even if petitioners' method were shown to be the better method, it would not be sufficient to create a litigable, material issue here . . . While petitioners might prefer different language or emphasis, ‘editing’ NEPA documents is not a function of our hearing process. ‘Our busy boards do not sit to parse and fine-tune EISs.’” *Id.* (internal citations omitted)).

Moreover, this contention is inadmissible since Petitioners fail to support their contention with facts or expert opinion, contrary to 10 C.F.R. § 2.309(f)(1)(v). Petitioners simply state that the nutrient concentrations will increase, and this increase will violate Florida's Administrative code. See Petition at 47. Petitioners do not cite any sources or opinion for this bare assertion. While a Petitioner is not required to prove its contention, it must allege at least some credible foundation for its contention. See *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant),

LBP-01-21, 54 NRC 33, 47-48 (2001). In the instant case, Petitioners have failed to provide any facts or expert opinion to create a foundation for this contention, and thus it is inadmissible.

- K. PROPOSED CONTENTION 4.H:  
Destructive Wildfires as a new source of nutrients- The LNP ER failed to address adverse direct, indirect, and cumulative environmental impacts of constructing and operating the proposed LNP project on destructive wildfires in wetlands, flood plains, special aquatic sites and other waters and destructive wildfires as a new source of nutrients to those wetlands, flood plains, special aquatic sites and other waters. Petition at 48.

Staff Response: This contention is inadmissible for failure to demonstrate a genuine dispute with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). Petitioners are required to provide references to the specific portions of the application that the Petitioner disputes along with the supporting reasons for each dispute. See *id.* In the instant case, Joint Petitioners' contention rests on the premise that there will be dewatering of the magnitude to create the type of impacts Petitioners allege. However, as discussed in the response to Contention 4.D, Joint Petitioners have failed to reference or dispute the various sections of the ER that describe dewatering impacts. ER Section 4.2.1 describes the impacts that may result from temporary dewatering during construction and impacts on wetlands. See ER Section 4.2.1 (ADAMS Accession No. ML082260948). Impacts to freshwater streams are described in ER Section 4.2.2.1. See ADAMS Accession No. ML082260948. Impacts from construction activities to lakes and impoundments, to the Cross Florida Barge Canal, to groundwater, and to wetlands are described in ER Sections 4.2.1.2-4.2.1.5. See *id.* Since the scale of dewatering is essential to the contention, Petitioners failure to reference or dispute the specific portions of the application which discusses the dewatering renders contention 4.H inadmissible.

L. PROPOSED CONTENTION 4.I:

Salt drift from cooling towers as a water quality contaminant- the LNP ER failed to address adverse direct, indirect and cumulative environmental impacts of constructing and operating the proposed LNP project with cooling towers that would use coastal waters, at an inland location in and surrounded by freshwater wetlands, flood plains, special aquatic sites and other waters that would be adversely affected by dewatering from the construction and operation of the LNP project if it is licensed. Petition at 49.

Staff Response: This contention is inadmissible for failure to demonstrate a genuine dispute with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). Contention 4.I is based on the assertion that the saltwater evaporative loss would be 43.8 MGD. Petition at 51. However, as discussed in response to Contention 4.D, it appears that Petitioners may be confused in their assessment of evaporative loss and the resulting salt drift. Evaporation and drift are two entirely separate issues. The 43 million gallons of evaporative loss is comprised of water vapor, essentially distilled water, which leaves the cooling towers. This water vapor contains no salt. The salt drift is water leaving the cooling tower not as a vapor, but as fine droplets of salt water. Salt drift is thus an unavoidable consequence of operating a cooling tower. This salt drift is estimated to amount to 5.32 gallons per minute. Cooling towers include features specifically designed to minimize drift. See LEVY COL ER subsection 5.3.3.1.3; see also ER Table 3.3-2. The salt drift therefore is not the 43 million gallon per day (30, 427 gallons per minute) figure that Joint Petitioners claim. Petition at 43. LEVY COL ER subsection 5.3.3.2.1 states:

The analysis resulted in a maximum predicted off-site deposition rate (during normal plant operation) of 6.81 kilogram per hectare per month (kg/ha/mo) (6.13 pounds per acre per month [lb/ac/mo]) of total solids at a location due west of the cooling towers at the nearest property boundary. Even assuming that all of the solids contained in the cooling tower drift are salts, this rate is below the threshold limit of 10 kg/ha/mo (9 lb/ac/mo) as provided in NUREG-1555, which is a threshold above which an adverse impact on vegetation could occur. The maximum predicted on-site deposition (during normal plant operation) is 10.75 kg/ha/mo (9.68 lbs/ac/mo).

Joint Petitioners' statement that the 43 million gallons of "astronomical evaporative loss" will contain salt drift, is not based on any data or statements made in the application. "A petitioner's imprecise reading of a reference document cannot serve to generate an issue suitable for litigation." *Georgia Inst. of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.) LBP-95-6, 41 NRC 281, 300 (1995). Since proposed contention 4I is premised on the evaporative loss of 43.8 MGD releasing saltwater, and Joint Petitioners have failed to support that premise, the entire contention is inadmissible for failure to provide sufficient information to show that a genuine dispute exists with the application pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

M. PROPOSED CONTENTION 4.J:

Prematurely killing trees by discharging cooling-tower salt drift, dewatering, cutting, herbicide application and other means releases stored carbon – the LNP ER failed to address adverse direct, indirect and cumulative environmental impacts to the nation's air resources resulting from the premature death of countless inland trees throughout the site, vicinity and region of the proposed LNP project due to: a) dewatering of the site, vicinity and region of the proposed LNP project; b) destructive wildfires from dewatering of the site, vicinity and region of the proposed LNP project; c) cooling-tower salt-drift contaminants discharged in freshwater wetlands, flood plains, special aquatic sites and other waters, including aquatic and terrestrial ecosystems; d) filling and other construction within the flood zone of the proposed LNP project, and e) cutting herbicide application and other means of prematurely killing trees in the transmission/ utility corridors and other LNP areas in conjunction with the proposed construction and operation of the proposed LNP project. Petition at 52-53.

Staff Response: Proposed contention 4.J is inadmissible for failure to provide expert facts or opinions, and failure to raise a genuine dispute with the applicant. See 10 C.F.R. 2.309(f)(1)(v)-(vi).

Petitioners make a series of assertions that trees will be killed as a result of various activities related to the construction and operation of the proposed LNP project. Petitioners largely fail to support their statements with facts or expert opinion, in contravention of 10 C.F.R. § 2.309(f)(1)(v). The only supported statement is the reference to the ER that the transmission corridors will be cut and removed for trees with a mature growth greater than 12 feet. See

Petition at 55. Petitioners then cite to Bacchus Exhibit G as support for their statement that “the premature death of those trees will release stored carbon, comparable to releasing the ‘yearly emissions from about 225,000 cars’ if the forests referenced in Bacchus Exhibit G were prematurely killed.” Petition at 55. However, a document put forth by an intervenor as supporting the basis for a contention is subject to scrutiny, both for what it does and does not show. *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, LBP-96-2, 43 NRC 61, 90 (1996). In the instant case, the document in question is a news article about a journal article regarding the carbon storage capacity of forests in the Upper Great Lakes region. See Petition Bacchus Exhibit G. The article says nothing that would support Petitioners assertions regarding either the magnitude of the loss of trees due to the LNP project, or the corresponding impacts from this loss of trees. Similarly, the article says nothing to indicate that an analysis of forests in the Upper Great Lakes region would apply to a project in Florida. Since the referenced sources do not support Petitioners assertions, Petitioners have failed to support contention 4.J with facts or expert opinions and it is thus inadmissible.

Contention 4.J is further inadmissible because it fails to demonstrate a genuine dispute with the applicant on a material of fact or law in contravention of 10 C.F.R. 2.309(f)(1)(vi). Petitioners are required to demonstrate such a dispute through specific references to the portions of the application with which they disagree. In Contention 4.J Petitioners reference the application twice. Petitioners note the intended clearing of the transmission lines through referencing page 4-12 of the ER. However, Petitioners do not dispute the description in the ER of the clearing of the transmission lines. Therefore, there is no dispute with the applicant on a material issue of fact or law such that this would be an admissible contention. Petitioners then reference the LNP ER’s statement that “nuclear generation is one generating technology that produces no greenhouse gas emissions.” Petition at 55. While Petitioners do state their disagreement with this statement, they fail to adequately support the statement, as discussed

above. Thus, Petitioners have failed to demonstrate a genuine dispute with the applicant on a material issue of fact or law and contention 4.J is inadmissible.

- N. PROPOSED CONTENTION 4.K:  
Additional air quality degradation from destructive wildfires – the LNP ER failed to address adverse direct, indirect and cumulative environmental impacts of constructing and operating the proposed LNP project on the release of particulate matter (PM) from destructive wildfires in wetlands, flood plains, special aquatic sites and other waters. Petition at 56.

Staff Response: This contention is virtually identical to contention 4H, except for that rather than referring to “nutrients” being released into the water as a result of wildfires; it discusses “airborne particulate matter” being released. See Petition at 46 & 56. For the same reasons discussed in response to Contention 4.H, this contention is inadmissible.

- O. PROPOSED CONTENTION 4.L:  
Irreparable harm to public lands and waters and private property not owned by PEF – the LNP ER failed to address the adverse direct, indirect and cumulative environmental impacts, as described above, on public preserves, parks, forests, wildlife management areas, state sovereign lands, waters of the state and US and private property not owned by PEF from constructing and operating the proposed LNP project. Petition at 58.

Staff Response: This contention is inadmissible for failure to adequately support the contention with facts or expert opinion, in contravention of 10 CFR § 2.309(f)(1)(v). Petitioners simply state that based on their previous contentions, the summary of impacts in the ER is wrong. Petitioners’ previously described, inadmissible contentions do not provide a basis for admission of a contention. A contention is inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” See *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 67 NRC \_\_ (Sept. 22, 2008) (slip op. at 9) (*quoting* *Fansteel, Inc. (Muskogee, Oklahoma Site)*, CLI-03-13, 58 NRC 195, 203 (2003)). Here, Petitioners have provided only the bare statement that the impacts are large, rather than small, with no facts to support their assertion. Hence Contention 4.L is inadmissible.

- P. PROPOSED CONTENTION 4.M:  
Jeopardized survival and recovery of federally listed species- The LNP ER failed to address the adverse direct, indirect, and cumulative environmental impacts, as described above, on the survival and recovery of federally listed species. Petition at 61.

Staff Response: This contention is inadmissible for failure to provide facts or expert opinions in support of the contention, and failure to demonstrate a genuine dispute with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(v) & (vi).

Petitioners fail to provide any facts or expert opinion to support their assertion that the proposed LNP project would destroy the habitat of the Wood storks, red cockaded woodpeckers or the green turtles. See Petition at 62-63. A contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” See *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 67 NRC \_\_\_ (Sept. 22, 2008) (slip op. at 9) (*quoting* Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)). Petitioners do attach a declaration from Dr. Bacchus, but he simply asserts that the LNP project would destroy habitat, with no reasons to back up his assertions. Even the opinion of a qualified and properly identified expert will not support a contention if the opinion lacks a reasoned basis or explanation. See *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006). Similarly Petitioners attach an article by Dr. Bacchus titled “Nonmechanical Dewatering of the Regional Floridan Aquifer System” published in 2006. Simply attaching materials or documents, without explaining their significance, is insufficient. See *Id.* Since Petitioners have failed to provide any facts or expert support for contention 4.M, it is inadmissible.

Moreover, Petitioners have failed to demonstrate a genuine dispute with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). Petitioners are required to provide references to specific portions of the application which they dispute and the supporting

reasons for each dispute. See *Id.* The LNP ER provides a discussion of the impacts of the LNP project in federally listed species in ER Section 4.3.1; 4.3.2; 5.3.1; 5.3.2 and 5.6.1. See ADAMS Accession Nos. ML082260948 and ML082260949. Petitioners fail to dispute the analysis in these sections. Thus, Contention 4.M is inadmissible.

- Q. PROPOSED CONTENTION 4.N:  
Irreversible and irretrievable commitments of resources and inability to mitigate adverse environmental impacts – the LNP ER’s failure to address the adverse direct, indirect and cumulative environmental impacts, as described above, would result in the irreversible and irretrievable commitments of resources and inability to mitigate adverse environmental impacts if the proposed LNP project is constructed and operated as proposed. Petition at 64.

Staff Response: Contention 4.N is inadmissible for failure to provide any facts or expert opinion, and failure to demonstrate a genuine dispute with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(v) & (vi). It is unclear to the Staff if Petitioners intend for Contention 4.N to be a ‘stand-alone’ contention, or if it is simply a summary of what was stated in Contention’s 4.A-4.M. To the extent it is intended to be a stand-alone contention, it has only bare assertions and speculation and is thus, inadmissible. See *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 67 NRC \_\_ (Sept. 22, 2008) (slip op. at 9). Petitioners are required to cite to specific portions of the application which they dispute. See 10 C.F.R. § 2.309(f)(1)(vi). Petitioners have not cited to any portion of the ER with which they take issue, they have simply asserted that the impacts of the project cannot be mitigated. Thus, Contention 4.N is inadmissible.

- R. PROPOSED CONTENTION 4.O:  
Alternatives without adverse environmental impacts of proposed LNP – The LNP ER failed to address alternatives to the proposed LNP that are readily available and that would avoid the adverse direct, indirect, and cumulative environmental impacts described above. Petition at 65.

In Contention 4.O, Joint Petitioners assert that “[t]he LNP ER failed to address alternatives to the proposed LNP that are readily available and that would avoid the adverse

direct, indirect and cumulative environmental impacts described above.” Petition at 65. Joint Petitioners provide two bases for this contention. First, Joint Petitioners claim that, although the solar power alternative was discussed in the ER, it was “summarily dismissed as, ‘too large to construct at the LNP site.’” Second, Joint Petitioners claim that the ER failed to address the “decoupling” alternative. *Id.*

In support of their first asserted basis, Joint Petitioners cite the paragraph in the Levy ER that discusses the “substantial impacts on wildlife habitat, land use, and aesthetics” resulting from construction of solar facilities.<sup>36</sup> Petition at 65 (citing ER at 9-13). This paragraph estimates the required footprint for photovoltaic (PV) and solar thermal systems based on solar facility land use requirements stated in the GEIS<sup>37</sup> and concludes that both types of systems “are much too large to construct at the LNP site.” ER at 9-13. Joint Petitioners contend that, in concluding that solar systems would be too large, the Applicant failed to consider the option of constructing “solar collectors on existing residential or commercial rooftops for power generation rather than constructing the solar collectors on land in a natural state, farmlands, or other land use.”<sup>38</sup> Petition at 66. Joint Petitioners provide two exhibits, Exhibit I-1 and I-2, which describe

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<sup>36</sup> The Staff notes that Joint Petitioners focus on one paragraph of a four-page discussion of solar energy alternatives in the ER and mistakenly assert that the Applicant’s sole basis for dismissing solar energy is the large land area requirement. In fact, the Applicant’s conclusion that solar alternatives are non-competitive is based on both the “lack of information regarding large-scale systems able to produce the proposed 2200-MWe baseload capacity and the large land area footprint needed for construction.” *Id.* at 9-16. The ER specifically notes that “grid-connected PV systems” would cost substantially more than nuclear power, ER at 9-15, and that PV cell technologies could not meet the LNP baseload capacity, *id.* at 9-16.

<sup>37</sup> Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437 (May 1996).

<sup>38</sup> As part of their discussion of failure to address the solar alternative, Joint Petitioners state that the “subsurface ‘footprint’ of the proposed LNP (e.g., hydroperiod impacts) would exceed the site and vicinity of the proposed LNP and simply would ‘take’ surrounding public and private lands and waters, without compensation . . .” Petition at 65. This statement does not appear to relate to the contention or the stated bases, and is an unsupported, conclusory assertion. Therefore, the Staff will not address it further.

rooftop solar projects in Florida and California.<sup>39</sup> According to the Joint Petitioners, rooftop systems “would have a far smaller physical and environmental impact ‘footprint’ . . . than the proposed LNP, would require no water and would result in none of the adverse environmental impacts of the proposed LNP . . .” Petition at 66. The Joint Petitioners also claim that the impacts to wildlife habitat, land use, and aesthetics of the proposed LNP “far exceed those of the roof-top solar collectors alternative.” *Id.*

In support of their second asserted basis, failure to address the decoupling alternative, Joint Petitioners provide Exhibit J, a transcript of an interview with Dr. Joe Romm, in which decoupling is discussed.<sup>40</sup> Joint Petitioners claim that decoupling “would have a far smaller ‘footprint’ . . . than constructing and operating the proposed LNP project,” and “would have none of the adverse environmental impacts.” Petition at 67.

Staff Response: As discussed below, this contention is inadmissible because it is not material to a decision NRC must make, it is not adequately supported by fact or expert opinion, and it fails to raise a genuine dispute with the applicant on a material issue of fact or law.

1. The contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iv) because it is not material to a decision NRC must make.

In NRC licensing actions, the NRC, consistent with NEPA, “may accord substantial weight to the preferences of the applicant and/or sponsor in the citing and design of the project.” *City of Grapevine v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994). Here, the Applicant’s stated purpose is to add 2200 MW of baseload power generation capacity. See, e.g., ER at 9-5. Under NEPA, “agencies need only consider those alternatives that can achieve the purposes of the proposed action.” *USEC, Inc. (American Centrifuge Plant)*,

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<sup>39</sup> Sandia National Laboratories, “Highlights of Sandia’s Photovoltaics Program,” Vol. 2, October, 2000 (Exhibit I-1); Press Release, “Southern California Edison Completes First of its Major Commercial Rooftop Solar Installations,” Dec. 1, 2008 (Exhibit I-2).

<sup>40</sup> Interview Transcript, “Stimulating Smarter Utilities,” January 30, 2009 (available at <http://www.loe.org>).

CLI-06-10, 63 NRC 451, 469 (2006) (citing *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001)). Further, under Commission precedent, an alternative energy source is not a reasonable alternative, and therefore need not be considered under NEPA, unless it can generate an amount of electric power comparable to that of the proposed nuclear power plant.<sup>41</sup> See *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 807, 809-10 (2005); see also *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991).

In this case, Joint Petitioners have not demonstrated that either of the asserted omissions are reasonable alternatives that must be considered under NEPA. Nothing in Exhibits I-1 or I-2 support the proposition that the rooftop solar installations advocated by Joint Petitioners could provide 2200 MW of baseload electric capacity. Indeed, Exhibit I-1 states that “the state [Florida] will see 3.8 MW of grid-tied systems on line by 2007.” Exh. I-1 at 8. Similarly, Exhibit I-2 states that proposed rooftop projects in California “could eventually” provide 250 MW of peak generating capacity. Exh. I-2 at 1. Thus, according to Joint Petitioners’ own exhibits, rooftop solar systems cannot provide a comparable baseload capacity to the proposed LNP. Consequently, rooftop solar systems are not a reasonable alternative that must be considered in the NRC EIS, or, by extension, in the applicant’s ER.

Joint Petitioners assertion that the ER failed to address the decoupling alternative is similarly flawed. Joint Petitioners do not explain this alternative, but state that it is “described by Dr. Joe Romm, senior fellow with the Center for American Progress, in Bacchus Exhibit J.” Petition at 66-67. According to Dr. Romm’s explanation in Exhibit J, decoupling is simply a mechanism for encouraging energy efficiency and conservation in lieu of adding generating

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<sup>41</sup> The legal background related to reasonable alternatives under NEPA is discussed more fully in the Staff’s Response to Contentions 9-11. See *infra* pages 69 to 86.

capacity.<sup>42</sup> Therefore, the essence of this part of the contention is that the ER fails to consider energy efficiency and conservation as alternatives. In fact, section 9.2.1 of the ER does discuss such programs as alternatives; therefore, Joint Petitioners' assertion of omission is incorrect. Furthermore, as the Commission stated in the Clinton ESP proceeding, "energy conservation or efficiency – or, as it is sometimes called, 'demand side management' – is not a reasonable alternative" to the goal of creating baseload power capacity. *Clinton*, CLI-05-29, 62 NRC at 806 (2005). Therefore, because energy conservation or efficiency is not a reasonable alternative, it is not material to a decision the NRC must make.<sup>43</sup>

In addition, although Exhibit J suggests that decoupling has been adopted in a few states, including California and Maryland, there is no indication that such an approach has been adopted in Florida, or that it is even being considered by the appropriate state regulatory agencies. Therefore, Joint Petitioners have not demonstrated that decoupling is anything more than a remote and speculative alternative. Such alternatives need not be considered in the agency's NEPA analysis. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972).

2. The contention is inadmissible because it fails to satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Joint Petitioners have also failed to satisfy 10 C.F.R. § 2.309(f)(1)(v), which requires "a concise statement of the alleged facts or expert opinion" which support their position, along with

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<sup>42</sup> In Exhibit J, Dr. Romm states that decoupling involves "[rewriting] utility regulations to decouple utility profits from the sale of electricity." Exhibit J at 1. This will encourage utilities to "raise rates a very small amount" and use that money to promote energy efficiency, thereby "replac[ing] new power generation with saved electricity." *Id.* In terms of providing electric power, therefore, the decoupling alternative is equivalent to using energy conservation and efficiency as an alternative to building a nuclear (or other) power plant.

<sup>43</sup> Recently, the Board in the Virgil C. Summer COL proceeding concluded that a contention asserting that the Applicant ignored demand-side management (DSM) raised issues that are "not material to the determination the NRC must make" because "a DSM program is not a substitute for the addition of base-load power, which is the accepted project purpose . . ." *South Carolina Electric & Gas Co. and South Carolina Public Service Authority* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-02, 69 NRC \_\_ (Feb. 18, 2009) (slip op. at 23).

“references to the specific sources and documents” on which they intend to rely to support the contention. With respect to the applicant’s alleged failure to consider rooftop solar installations, the Joint Petitioners provided Exhibits I-1 and I-2, but did not explain how these exhibits support their contention. Simply attaching or referring to articles or other documents, without explanation of their significance, is not adequate support for a contention. *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472, 478 (2006); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253-54 (2007) (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003)). Moreover, Exhibits I-1 and I-2 merely describe projects and potential benefits in general, and do not specifically address this licensing proceeding or support Joint Petitioners’ assertions. Also, as discussed above, these exhibits do not support a claim that rooftop systems are a reasonable alternative to the LNP that should be considered under NEPA.

Likewise, Exhibit J fails to provide support for this contention because it simply provides Dr. Romm’s general perspective on decoupling. Nothing in Exhibit J relates specifically to this licensing proceeding, the Levy ER, or Joint Petitioners’ assertions that decoupling would have a “far ‘smaller’ footprint” and “none of the adverse environmental impacts.” Petition at 67.

Moreover, Joint Petitioners have not identified Dr. Romm as an expert on decoupling or on energy in general, nor have they provided any indication that he is qualified to give an opinion on these topics. Therefore, Dr. Romm’s views cannot be considered expert opinion. Similarly, Dr. Bacchus’s education, experience, and publications indicate that his areas of expertise are biology and hydroecology, not solar energy or decoupling. See Bacchus Decl. at 1-2. In summary, Joint Petitioners have provided no documentary support or expert opinion in support of this contention. Other than the exhibits and Dr. Bacchus’ Declaration, the Joint Petitioners provide only bare, conclusory assertions in support of this contention. Therefore,

Joint Petitioners have not met the Commission's admissibility requirements and the contention should be rejected.

Finally, Joint Petitioners' contention fails to raise a genuine dispute of material fact or law with the Applicant. 10 C.F.R. § 2.309(f)(1)(vi). As discussed above, neither of Joint Petitioners' asserted omissions are reasonable alternatives under NEPA; therefore, neither must be considered in the Applicant's ER. Since the issues raised are not material to the decision the NRC must make, they do not raise a genuine dispute of material fact or law, as required by 10 C.F.R. § 2.309(f)(1)(vi).

- S. PROPOSED CONTENTION 4.N-2:  
Proposed LNP is inconsistent with 40 CFR § 230 – The LNP ER failed to address the inconsistencies of the proposed LNP project with 40 CFR § 230. Petition at 67.

In Contention 4.N-2,<sup>44</sup> Joint Petitioners allege that the proposed LNP project is inconsistent with 40 C.F.R. § 230 and the ER fails to address these inconsistencies. Petition at 67. The Joint Petitioners' stated basis for this contention is that "[t]he proposed LNP project is inconsistent with 40 C.F.R. § 230 regarding at least" nine listed categories.<sup>45</sup> *Id.* As support for this contention, Joint Petitioners first provide a two-sentence excerpt from 40 C.F.R. § 230.41(b), followed by a number of statements related to the nine categories identified in the basis. Each of these statements references 40 C.F.R. § 230.10 and makes general assertions about "wetlands, flood plains, special aquatic sites, and other waters" (hereinafter collectively

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<sup>44</sup> Because this is the second contention in the petition that is denoted "Contention 4.N," the Staff will refer to this contention as 4.N-2 to avoid confusion with the first Contention 4.N, found on pp. 64-65 of the petition.

<sup>45</sup> The categories are (1) productive and valuable public resources, (2) food chain production and general habitat and nesting sites for aquatic or land species, (3) study of the aquatic environment, sanctuaries, and refuges, (4) natural drainage characteristics, salinity distribution, and other environmental characteristics, (5) natural storage areas for storm and flood waters, (6) natural groundwater discharge and recharge and water purification, (7) uniqueness, (8) failure to consider relevant information, (9) injury to property, invasion of other rights and superseding the rights and interests of the public. Petition at 67.

referred to as “wetlands”) that would be destroyed or altered by the proposed LNP project.<sup>46</sup>

See Petition at 68-71.

In addition, Joint Petitioners claim several omissions from the ER. These omissions include “failure to acknowledge that construction and operation of the proposed LNP would be inconsistent with 40 C.F.R. § 230,” failure to identify the affected wetlands as “unique” and “intimately linked with the Floridian aquifer system,” failure to analyze the cumulative impacts of the proposed LNP project “as described in 40 C.F.R. § 230.10,” failure to address relevant information regarding the numerous adverse cumulative impacts that would occur in the vicinity and region” with regard to certain “[c]ategories in 40 C.F.R. § 230.10,”<sup>47</sup> and failure to address the section 404(b)(1) guidelines. *Id.* at 68, 70-71.

Staff Response: This contention is inadmissible for several reasons. First, the issue raised is outside the scope of the proceeding because the NRC has no jurisdiction over the issuance of permits under 40 C.F.R. § 230. Pursuant to § 404(b)(1) of the Federal Water Pollution Control Act (“FWPCA” or “Clean Water Act”), 33 U.S.C. § 1344 (2006), the U.S. Army Corps of Engineers (“USACE”) has sole authority to grant such permits. 33 U.S.C. § 1344(a), (d); *see also* 40 C.F.R. § 230.2(a). Further, the procedural requirements of the National Environmental Policy Act (“NEPA”) do not expand NRC’s substantive jurisdiction. *Robertson v. Methow Valley Citizen’s Council*, 490 U.S. 332, 350-353 (1989). Therefore, a contention

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<sup>46</sup> These statements are mirrored, virtually word for word, in section J of the declaration of Dr. Sydney T. Bacchus. See “Expert Declaration by Dr. Sydney T. Bacchus in Support of Petitioners’ Standing to Intervene in this Proceeding” at 21-22 (¶¶ 77-86) (Feb. 6, 2009) (“Bacchus Declaration”). The Bacchus Declaration contains no additional support for this particular contention beyond the statements provided in the petition itself, other than to indicate that those statements constitute Dr. Bacchus’ professional opinion.

<sup>47</sup> According to Joint Petitioners, the categories in 40 C.F.R. § 230.10 for which relevant information should have been considered include “fish and wildlife; water quality; historic, cultural, scenic and recreational values; property ownership; activities affecting coastal zones; activities that may affect marine sanctuaries; compliance with other federal, state or local requirements; floodplain management; water supply and conservation; energy conservation; environmental benefits; and economics.” Petition at 71. The Staff could not locate this list of categories anywhere in 40 C.F.R. § 230.

alleging inconsistencies with the USACE permitting process under 40 C.F.R. § 230 is not within the scope of this proceeding. *Cf. Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 93 (2004), *aff'd* CLI-04-36, 60 NRC 631 (2004) (finding that a contention regarding a state's FWPCA permitting process was outside the scope of NRC license renewal proceeding); *see also Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 58 (1974) (“[NRC] licensing is in no way dependent upon the existence of a [FWPCA] permit.”).

Second, and in a similar vein, the issue raised in the contention is not material to the findings that the NRC must make to support this licensing action. See 10 C.F.R. § 2.309(f)(1)(iv). In order for an issue to be material, “the subject matter of the contention must impact the grant or denial of a pending license application.” *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 24 (2007). Joint Petitioners fail to explain how the alleged inconsistencies with 40 C.F.R. § 230 have any bearing on this NRC licensing proceeding. As discussed above, the USACE, not the NRC, is responsible for evaluating the proposed LNP project under 40 C.F.R. § 230 and for granting the required permit. Neither the AEA nor NRC regulations require the NRC to find that an applicant's ER is consistent with, or satisfies, the guidelines set forth in 40 C.F.R. § 230 in order to grant a COL. See 42 U.S.C. §§ 2133(a), 2235(b); 10 C.F.R. § 52.97(a)(1). Similarly, the NRC regulations implementing NEPA (10 C.F.R. Part 51) do not require NRC to evaluate environmental impacts within the specific context of 40 C.F.R. § 230, nor do they contain any requirement that applicants address the guidelines in 40 C.F.R. § 230. See 10 C.F.R. §§ 51.45; 51.50(c). Therefore, any inconsistencies or omissions that the Joint Petitioners allege with respect to 40 C.F.R. § 230 are not material to the findings that the NRC must make in this proceeding.

Third, the contention must be rejected because it is not adequately supported by “a concise statement of fact or expert opinion.” 10 C.F.R. § 2.309(f)(1)(v); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Joint Petitioners’ statements in support of this contention amount to no more than general, conclusory assertions, and the Bacchus Declaration merely restates these assertions as Dr. Bacchus’ professional opinion. Conclusory assertions, even when provided by an expert, do not amount to sufficient support for a contention. *Southern Nuclear* (Early Site Permit for *Vogtle*), LBP-07-03, 65 NRC 237, 253 (2007); *see also USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (internal citations omitted) (“an expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate . . .”). Therefore, because the Joint Petitioners have not provided the necessary factual or expert support, the contention is inadmissible.

Finally, the Joint Petitioners have failed to raise a genuine dispute with the applicant on a material issue of fact or law, as required by 10 C.F.R. § 2.309(f)(1)(vi). As discussed above, issues related to 40 C.F.R. § 230 are not material to NRC’s determination in this proceeding. However, even if a material issue could be identified, Joint Petitioners have failed to challenge specific portions of the application and have failed to provide supporting reasons for their belief that a dispute exists or, in the case of omissions, for their belief that required information is not included. 10 C.F.R. § 2.309(f)(1)(vi). Therefore, Joint Petitioners have not provided sufficient information to show that a genuine dispute exists with the applicant and the contention is inadmissible.

- T. PROPOSED CONTENTION 5:  
Proximity of Proposed Site to Crystal River Nuclear Power Station Not Assessed in SAMA Analysis. Petition at 72.

Staff Response: This contention is inadmissible in that it raises an issue outside the scope of the proceeding and it fails to provide any reason for why the alleged omission is required.

1. An accident at CREC is outside the scope of the proceeding.

The proposed federal action is the granting of a COL at the Levy site. A severe accident at CREC is outside the scope of the proposed federal action. The granting of a COL to Progress Energy for the Levy site could not cause a severe accident at CREC. Thus, the federal action would not be the proximate cause of a severe accident at CREC and the consideration of a severe accident at CREC in the SAMA analysis is not an admissible contention. *See, e.g., Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 132-33 (2007) (holding that the environmental effects of terrorism need not be considered in NRC licensing proceedings since the “claimed impact is too attenuated to find the proposed federal action to be the ‘proximate cause’ of that impact.”)

2. Joint Petitioners fail to demonstrate why a discussion of an accident at CREC is required.

This contention is inadmissible since, contrary to requirements of 10 C.F.R. § 2.309, the contention identifies an alleged omission, the consideration of a severe accident at CREC, and fails to identify why such a severe accident would need to be included in the SAMA analysis for the Levy COL. The Petition simply states that “an accident at the nuclear unit at CREC could disrupt normal operations at Levy County units 1 and 2 and should be analyzed in the SAMA analysis fir this COL.” Petition at 72. A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide a basis for an admissible contention. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating

Station), LBP-93-23, 38 NRC 200, 246 (1993). Since Joint Petitioners have failed to demonstrate why an accident at CREC is required to be analyzed as part of the Levy COL SAMA analysis, this contention is inadmissible.

S. PROPOSED CONTENTION 6.A:

The application is deficient in its discussion of high-level radioactive waste that would be generated by Levy County units 1 and 2. Failure to evaluate whether and in what time frame spent fuel generated by Levy County Units 1 and 2 can be safely disposed of. Petition at 73.

Staff Response: The Staff opposes admission of Proposed Contention 6.A, as it is an impermissible attack on the Commission's regulations. See 10 C.F.R. § 2.335; *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station) and *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 and n.15 (2007); *Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001); see also *Dominion Nuclear North Anna, LLC* (Early Site Permit [ESP] for the North Anna 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); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 67 NRC \_\_\_ (2008) (slip op. at 39) (holding that many other licensing boards have considered identical contentions and squarely rejected them). 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 which states:

[T]he commission believes there is reasonable assurance that at least one mined geological 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 (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 55 Fed. Reg. at 38,501-04.). Accordingly, Proposed Contention 6-A impermissibly attacks the Commission’s regulations and is inadmissible.<sup>48</sup> See *North Anna ESP Site*, LBP-04-18, 60 NRC at 269.

U. PROPOSED CONTENTION 6.B:

Comment from the Co-Petitioners on the Waste Confidence Decision as it Applies to This Proceeding; Request for Reconsideration. Petition at 83

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 83.

Staff Response: The Staff opposes admission of Proposed Contention 6.B, as it is an impermissible attack on the Commission’s regulations and it is outside the scope of this proceeding. 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 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); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 67 NRC \_\_\_ (2008) (slip

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<sup>48</sup> In support of this contention, Joint Petitioners also note the current rulemaking regarding a revision to the Waste Confidence Decision. See Petition at 76. The Commission has stated that contentions which are the subject of current rulemaking are inadmissible in individual proceedings. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)

op. at 39) (holding that many other licensing boards have considered identical contentions and squarely rejected them). 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 Section 51.23(b), this aspect of Proposed Contention 6.B is not within the scope of this proceeding; thus the Joint Petitioners fails to satisfy the contention requirements of 10 C.F.R. § 2.309(f)(1)(iii).

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.*

The Joint Petitioners have 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 granted. See Petition at 44-47. The Joint Petitioners have failed to establish that application of the Waste Confidence Rule in this particular proceeding would not serve the purpose for which the

rule was adopted. 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. This is precisely the function it serves applied to the present proceeding.

In view of the foregoing, Proposed Contention 6.B and its supporting bases raise an issue that is not within the scope of this proceeding, and it impermissibly seeks to challenge a Commission regulation. 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 the Joint Petitioners have not made, this matter must be addressed through Commission rulemaking, and be found inadmissible here. See *North Anna ESP Site*, LBP-04-18, 60 NRC at 269-270.

V. PROPOSED CONTENTION 7:

[The] Application to build and operate Levy County Nuclear Station Units 1 & 2 violates the National Environmental Policy Act by failing to address the environmental impacts of the waste that it will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment. PEF’s The Environmental Report does not address the environmental, environmental justice, health, safety, security, or economic consequences that will result from lack of permanent disposal for the radioactive waste generated. Petition at 87.

Staff Response: The Staff opposes the admission of this contention because Joint Petitioners raise an impermissible attack on a Commission regulation. 10 C.F.R. § 2.335. This contention is also inadmissible because it does not include references to specific portions of the application, including the ER, which are relevant to the information that the Joint Petitioners believe that the application omitted. The contention fails to identify how the alleged omission is a relevant matter required by law. 10 C.F.R. § 2.309(f)(1)(vi). This contention is also inadmissible because it does not provide a concise statement of the alleged facts or expert opinions which support the Joint Petitioners’ 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 Petitioner intends to rely to support its position on the issue. 10 C.F.R. § 2.309(f)(1)(v). The contention is inadmissible because it does not demonstrate that an issue raised herein is material to the findings that the NRC must make to support the action that is involved in the proceeding. 10 C.F.R. § 2.309(f)(1)(iv).

The Joint Petitioners concede that Contention 7 raises a challenge to a Commission rule by challenging Table S-3 of 10 C.F.R. § 51.51. Petition at 87, n. 30. Moreover, the Petition does not meet the criteria for properly challenging a rule under the provisions of 10 C.F.R. § 2.335. In summary, section 2.335 requires:

- (1) A party to an adjudicatory proceeding may petition for a rule waiver or exception;
- (2) That special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule would not serve the purposes for which it was adopted;
- (3) The petition is accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which the rule was adopted; and
- (4) The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.

Joint Petitioners have not shown that special circumstances exist with this application in this proceeding, or that Table S-3 would not serve the purposes for which it was adopted. The Petition only mentions "new and significant information" but does not identify what the new and significant information is, or how it creates special circumstances that exist in this proceeding but not in other proceedings. Petition at 87 n. 30. Joint Petitioners includes the affidavit of Diane D'Arrigo. The affidavit contains a discussion of low level waste along with Ms. D'Arrigo's unsupported assumption that no storage facility will be available for low level waste even in a long term period. However, the only reference to the Commission's rules in the affidavit is a reference to 10 C.F.R. Part 61. D'Arrigo Affidavit at 3. As such the affidavit is insufficient to support a petition under 10 C.F.R. § 2.335 for waiver of or exception to a rule since it neither

asks for a waiver nor identifies a rule to waive. The Commission recently ruled that a virtually identical contention in the *Bellefonte* proceeding constituted a collateral attack upon Table S-3. See Tennessee Valley Authority, (Bellefonte Nuclear Power Plant), CLI-09-03, slip op. at 9.

The Petition claims that “the applicant provides no detail regarding the ongoing onsite management and potential impact from permanent or very long term- storage of all the B, C and >C radioactive waste from operations on the site of generation.” Petition at 89. In support of this claim of omission, Joint Petitioners cite only Sections 3.1.1.5 (radwaste building) and 3.5.3 (solid waste management system) of the ER. A petitioner is required to read and cite the pertinent portions of the FSAR and the ER. Joint Petitioners do not indicate that it reviewed any other portions of the ER. Even when read with the affidavit of Ms. D’Arrigo, the affidavit does not cite any additional sections of the ER. Specifically, Joint Petitioners do not cite or reference the discussion in the ER in Sections 3.5.4.3 (solid waste storage system), 5.4 (radiological impacts of normal operations), 5.4.1.3 (direct radiation from the LNP), and 5.7.1.10 (radioactive wastes). NRC’s pleading standards require a petitioner to read the pertinent portions of the licensing request and supporting documents, including the FSAR and ER, state the applicant’s position and the petitioner’s opposing view, and explain why it has a disagreement with the applicant. Final Rule, 54 Fed. Reg. at 33,170 (Aug. 11, 1989); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 1 and 2) CLI-01-24, 54 NRC 349, 358 (2001). Because the contention claims that the ER omits a discussion of the impacts from the long term storage of low-level radioactive waste (LLRW), but does not reference the pertinent portions of the ER that discuss LLRW, Joint Petitioners do not demonstrate that there is an omission in the ER given its discussion of the quantity of LLRW, rate of waste generation, quality of LLRW, storage capacity of the proposed facility, design of the storage, or analysis of radiation dose. Thus, the contention does not meet the requirements of 10 C.F.R. 2.309(f)(1)(vi), and is therefore inadmissible.

Further this contention does not provide a concise statement of the alleged facts or expert opinions which support the 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 Petitioner intends to rely to support its position on the issue. 10 C.F.R. 2.309(f)(1)(v). The contention assumes that no offsite disposal facility will ever be available or will not be available for a long period of time. "No explanation is offered for how the applicant will meet this plan [for offsite disposal] in the absence of a licensed disposal site. Applicants apparently assume that they will be able to send its Class B, C, and Greater-Than-Class-C radioactive waste offsite." Petition at 89. The Petition further states, "[t]hus it is reasonable to expect that all Class B, C, and Greater-than-C radioactive waste from the proposed Calvert Cliffs Unit 3 nuclear reactor will remain onsite indefinitely." *Id.* at 90. Joint Petitioners do not offer a reference, source, or expert opinion to support this assumption underlying its contention. A "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;" rather, "a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention." *Private Fuel Storage, L.L.C.*, LBP-98-7, 47 NRC at 180 (1998) (*citing Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305 (1995) (A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention.")) Although a "Declaration of Diane D'Arrigo" was filed by Joint Petitioners, it provides no more support for the assumption than the Petition, and is not referenced in the Petition in support of this contention. Joint Petitioners must provide support for the assertions it makes upon which its claim of omission relies. Without the proper support, this contention is not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(v).

The Petition provides one additional issue in support of this contention where it states,

“The Environmental Report should also evaluate the impacts of licensing the site itself under 10 CFR Part 61.” Petition at 91. The Commission recently held that “Part 61 is inapplicable [in COL proceedings] because it applies only to land disposal facilities that *receive* waste from others, not to onsite facilities . . . where the license intends to *store* its own low-level radioactive waste.” *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 68 NRC \_\_ (2009) (slip op. at 5-6) (emphasis in original). Thus, the contention is not admissible based upon this issue pursuant to 10 C.F.R. § 2.309(f)(1)(iv).

W. PROPOSED CONTENTION 8:

A substantial omission in Progress Energy Florida’s (PEF) COL application to build and operate Levy County Nuclear Station Units 1 & 2 is the failure to address the absence of access to a licensed disposal facilities or capability to isolate the radioactive waste from the environment. PEF’s FSAR does not address an alternative plan or the safety, radiological and health, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated. Petition at 93-94.

Staff Response: Proposed Contention 8 is inadmissible since it fails to demonstrate a genuine dispute with the applicant on a material issue of fact or law. See 10 C.F.R. § 2.309(f)(vi). Petitioners assert that “the Process Control Program . . . does not explain how the application will comply with the need for permanent disposal of long-lasting radioactive waste in the absence of licensed disposal facilities for Classes B, C and Greater-Than-C waste.” Petition at 97. Although the Contention challenges the sufficiency of the COLA with respect to disposal of LLRW, Petitioners have failed to provide any references to regulatory requirements showing that the Applicant is required to address disposal of LLRW in its COLA beyond providing a mechanism for processing and packaging waste in preparation for disposal as required by 10 C.F.R. § 2.309(f)(vi) (“if the petitioner believes the application fails to contain information on a relevant matter as required by law, [the petitioner must identify each] failure and the supporting reasons for the petitioner’s belief.”).

The Petitioners have also failed to demonstrate that the Applicant is required to obtain, or demonstrate the ability to obtain, access to an offsite disposal facility prior to being granted a license to construct or operate a nuclear generating facility. With respect to disposal of LLRW, the requirements for the contents of COLAs do not state that a COLA applicant must describe how it plans to dispose of LLRW. See 10 C.F.R. §§ 52.79, 52.80. NRC regulations do not require an Applicant to ensure adequate offsite disposal for any generated LLRW prior to being granted a construction or operating license. In the absence of a regulatory requirement that this information be included within the COLA, it cannot be said that such information has been omitted or that the FSAR is incomplete without it. This mistaken presumption cannot form part of an acceptable basis for proposed Contention 8 in accordance with 10 C.F.R. § 2.309(f)(1)(vi).

The Commission recently reversed the admission of a very similar contention in the *Bellefonte* proceeding holding that “although the *Bellefonte* Board was free to view Intervenors’ support for Contention FSAR-D in the light most favorable to Intervenors, the Board was not free to ignore the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). See *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 68 NRC \_\_\_ (Feb. 18, 2009) (slip op. at 6). Similarly, the Petitioners in the instant case have failed to meet the contention requirements of 10 C.F.R. § 2.309(f)(1) and the contention is not admissible.

X. PROPOSED CONTENTIONS 9 TO 11 – ALTERNATIVES TO NUCLEAR POWER GENERATION

Contentions 9 through 11 all involve challenges to the ER’s analysis of alternatives to nuclear power generation. These alternatives include energy conservation and renewable energy resources. Because these challenges all involve similar legal and factual issues, the NRC Staff will first provide a background discussion that sets forth the relevant regulatory framework and briefly summarizes the Levy ER’s discussion of need for power and alternatives to nuclear generation. Also, the Staff will, before individually addressing each contention,

address the issue of whether there is any expert support provided for contentions 9 through 11. As explained below, contentions 9, 10, and 11 do not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1). Joint Petitioners' challenges to the application are similar in many relevant respects to challenges made in the Virgil C. Summer, Units 2 and 3 (V.C. Summer) COL proceeding, and should be rejected for many of the same reasons given by the V.C. Summer Licensing Board. See *South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), LBP-09-2, 68 NRC \_\_ (Feb. 18, 2009) (slip op. at 18-28).

1. Legal and Factual Background.

a. *NEPA analysis of alternatives to nuclear power generation.*

According to the Council on Environmental Quality (CEQ), the analysis of alternatives is the heart of the EIS. 40 C.F.R. § 1502.14(a).<sup>49</sup> NRC regulations also require that the discussion of alternatives in the ER be sufficiently complete to aid the NRC in meeting the mandate of NEPA § 102(2)(e), 42 U.S.C. § 4332(2)(E), to explore "appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 10 C.F.R. § 51.45(b)(3) (quoting NEPA § 102(2)(e)) (emphasis added). As § 51.45(b)(3) makes clear, NRC environmental reviews are focused on *appropriate* alternatives rather than every alternative. See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978) (stating that "[t]o make an impact statement something more than an exercise in frivolous boiler-plate the concept of alternatives must be bounded by some notion of feasibility"); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 479 (2003) (stating,

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<sup>49</sup> Although CEQ regulations are not binding on the Commission, both the NRC and the U.S. Supreme Court accord them "substantial deference." See *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 334, 355-56 (1989)).

“[A]n agency’s consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative”) (quoting *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1181 (9th Cir. 1990), *reh’g and reh’g en banc denied*, 940 F.2d 435 (1991)) (alteration in original). Furthermore, CEQ regulations provide that, while an EIS must “[r]igorously explore and objectively evaluate” alternatives that are “reasonable,” the EIS need only “briefly discuss” the reasons why an alternative was rejected from more detailed study. 40 C.F.R. § 1502.14(a). See also *North Anna ESP*, CLI-07-27, 66 NRC at 222 n.21.

Although an alternative might not be considered reasonable for a variety of reasons, an alternative’s failure to meet the purpose and need of the project is a compelling reason to reject it. Consistent with NEPA, the NRC defers to an applicant’s stated objectives: “[A]n agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate the alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process.” *Exelon Generation Co. (Early Site Permit for Clinton ESP Site)*, CLI-05-29, 62 NRC 801, 806 (2005), *aff’d Environmental Law and Policy Center v. U.S. Nuclear Regulatory Comm’n*, 470 F.3d 676 (7th Cir. 2006) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991)); see also *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho NM 87174), CLI-01-4, 53 NRC 31, 55-56 (2001) (stating, “[T]he agency should take into account the needs and goals of the parties involved in the application”) (quoting *Citizens Against Burlington*, 938 F.2d at 196). Furthermore, “[w]hen the purpose is to accomplish one thing’ . . . ‘it makes no sense to consider the alternative ways by which another thing might be achieved.’” *Clinton ESP*, CLI-05-29, 62 NRC at 806 (quoting *Citizens Against Burlington*, 938 F.2d at 195).

*Clinton ESP* is particularly instructive because the Commission encountered a contention asserting that the EIS inappropriately rejected the energy conservation alternative. Basing its decision on the principles outlined in the preceding paragraph, both the Commission

and Licensing Board rejected this challenge. See *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), LBP-05-19, 62 NRC 134 (2005); *Clinton ESP*, CLI-05-29, 62 NRC 801. The Commission agreed with the Licensing Board that the NRC did not have the “mission (or power) to implement a general societal interest in “energy efficiency.” *Clinton ESP*, CLI-05-29, 62 NRC at 806. The Commission further agreed that the energy conservation alternative did not need to be further analyzed since it failed to meet the applicant’s goal of generating electricity, *id.*, noting that the applicant was in the sole business of generating electricity and selling energy and capacity at wholesale. *Id.* at 807.

The Commission in *Clinton ESP* also examined the licensing board’s rejection of a challenge to the EIS examination of wind and solar power as alternatives. *Id.* at 809-10. In discussing this challenge, the Commission focused on the *type and amount* of electrical energy that the applicant sought to produce. The Commission had previously noted that the licensing board’s decision rested, in part, upon the fact that “[i]n order to satisfy the purpose of the project, and thus to constitute a reasonable alternative, the combined facility must be able to generate power in the amount of 2180 MW at all times.” *Id.* at 809. With this in mind, the Commission stated that “[b]ecause a solely wind- or solar-powered facility could not satisfy the project’s purpose, there was no need to compare the impact of such facilities to the impact of the proposed nuclear plant.” *Id.* at 810.

Under controlling Commission precedent, therefore, a proposed alternative to a project whose purpose and need is the generation of a large amount of baseload electric power is not a reasonable alternative unless it also generates baseload electric power in the amount needed by the applicant. If an alternative is not reasonable, it need not be rigorously explored in the ER or EIS and is not, therefore, material to the NRC’s licensing decision.<sup>50</sup>

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<sup>50</sup> With respect to the materiality of environmental contentions, the Commission has stated:

b. *Levy ER Analysis of Alternatives to Nuclear Power*

Chapters 8 and 9 of the Levy ER are most relevant to the consideration of contentions 9 through 11. Levy ER Chapter 8 discusses the “Need for Power” and provides support for the applicant’s conclusion that there is a “need for power in [the Applicant’s] Region of Interest (ROI) requiring the addition of two large baseload electric generating plants in the 2016 – 2017 timeframe.” Levy ER at 8-1. The Need for Power analysis discusses power demand and power supply in the ROI, including existing and planned capacity, in Sections 8.2 and 8.3 of the ER.

The Applicant’s Integrated Resource Planning (IRP) process is also described in Chapter 8, along with the State of Florida’s regulatory oversight functions, which include regulating the Applicant’s “rates, electric service and grid reliability, and the planning and implementation of generating and non-generating resources to meet native load needs.” Levy ER at 8-1. According to the Levy ER, the Florida Public Service Commission (Florida PSC) unanimously voted to approve the need for the plant, and a final order was expected in July 2008. *Id.* at 8-5. The Staff has accessed the Florida PSC online docket and discovered an order of the Florida PSC approving the Applicant’s need for the proposed reactors.<sup>51</sup> The PSC Order discusses a multitude of issues, including the need for electric system reliability and integrity and the need for baseload capacity. The need for the proposed plant was found in both of these respects. See PSC Order, pp. 3 to 6 and 7 to 9. The PSC Order also examined energy conservation, concluding that “[t]here are no renewable energy sources and

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At NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the ER. Our boards do not sit to “flyspeak” 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).

<sup>51</sup> “Final Order Granting Petition for Determination of Need for Proposed Nuclear Power Plants,” Order No. PSC-08-0518-FOF-EI, Docket No. 080148-EI (Aug. 12, 2008) (hereinafter “PSC Order”) (available at <http://www.psc.state.fl.us/dockets/orders/>).

technologies or conservation measures taken by or reasonably available to PEF which might mitigate the need for Levy Units 1 and 2.” *Id.* at 16.

Chapter 9 of the ER contains the Applicant’s alternatives analysis. Alternatives to new generating capacity (including energy conservation) are examined in ER Section 9.2.1, while an array of alternatives requiring new generating capacity (including renewable resources such as wind and solar power) are discussed in ER Section 9.2.2. The environmental effects of reasonable alternatives are then compared with the environmental effects of the proposed plants in ER Section 9.2.3, which looks at the coal and gas alternatives and also combinations of alternatives, particularly the combination of renewable resources with fossil fuel resources.

2. No Expert Support is Provided for Contentions 9 to 11.

Joint Petitioners provide no expert support for contentions 9 through 11. Contentions 9 through 11 never identify an expert or claim that any statement or opinion made in the contention is supported by expert opinion. Certain documents cited by Joint Petitioners, however, do contain the name “Quillen” in the exhibit label. See Petition (p. 98 of contention 9 discussion; p. 99 of contention 10 discussion; p. 101 of contention 11 discussion). Joint Petitioners also filed a declaration of one Carter M. Quillen (Quillen Declaration) with their petition, and Mr. Quillen, who claims to be an expert, does offer a few assertions related to energy conservation and renewable resources. Mr. Quillen’s declaration, however, does not discuss the exhibits whose labels bear his name, see Quillen Declaration, and Mr. Quillen did not author either of the Quillen exhibits. See Joint Petitioners Ex. Quillen-01 and Quillen-02. Also, although contention 9, which regards solar thermal water heaters, cites to Exhibit Quillen-01, none of the opinions in the Quillen declaration speak to solar thermal water heaters. Given this, the Quillen Declaration should not be considered at all to support this contention, since Petitioners bear the burden of framing and supporting their contentions. 10 C.F.R. § 2.309(f)(1).

Even if the Quillen Declaration is further considered in the admissibility determinations for contentions 9 through 11, the declaration does not provide *expert* support for these contentions. First, Joint Petitioners do not show that Mr. Quillen possess expertise relevant to the admissibility of contentions 9 through 11. That Joint Petitioners bear the burden of demonstrating Mr. Quillen's expertise can be gleaned from a close examination of the text of § 2.309(f)(1) and relevant case law. First, § 2.309(f)(1) makes explicit that petitioners bear the burden of demonstrating contention admissibility. Second, § 2.309(f)(1)(v) requires a statement of supporting "expert opinions," not just a statement of supporting "opinions." To grant that any opinion labeled "expert" can be used to satisfy § 2.309(f)(1)(v), whether or not that label has any foundation in reality, would eviscerate the § 2.309(f)(1)(v) requirement.

Third, Atomic Safety and Licensing Boards (Licensing Boards) have considered the qualifications of proffered experts in making contention admissibility determinations. The Licensing Board in *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 90 (2004), *aff'd*, CLI-04-36, 60 NRC 631 (2004), found that a contention asserting, among other things, various harms to human health from "routine and unplanned releases of radionuclides and toxic chemicals into the air, soil and water," failed to satisfy § 2.309(f)(1)(v). In doing so, the Licensing Board discounted opinion affidavits from an investigative journalist and author of *Millstone and Me*, "[n]otwithstanding [his] studies into the relationship between low-level radiation and human health," because "neither he nor CCAM [] provided sufficient information to establish any expertise on his part in this area." *Id.* at 91 & n.39. Similarly, with respect to a security plan contention in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360 (1998), *reconsideration granted on another issue*, LBP-98-17, 48 NRC 69, the Licensing Board discounted the affidavit of intervenor's proffered expert because the intervenor (the State of Utah) "failed to establish he has the requisite knowledge, skill, training, education, or experience

to be considered an expert on physical security matters.” *Id.* at 367. The Licensing Board found the proffered expert’s qualifications lacking even though he was the Director of Utah’s State Division of Radiation Control, was the Governor’s designee for receiving the applicant’s physical security plan, possessed “education, training, and experience in environmental health and hazardous substance,” and had received “NRC health physics training.” *Id.* at 367-68.

Mr. Quillen’s declaration falls squarely within the factual scenarios outlined in the preceding paragraph. Mr. Quillen may, for instance, possess engineering expertise in solar collector testing, see Quillen Declaration at 1, but contentions 9 through 11 involve utility resource planning issues, such as whether energy conservation or various renewable resources constitute reasonable alternatives to the proposed reactors in light of the need for a large amount of baseload electric power. The Quillen Declaration simply does not demonstrate Mr. Quillen’s expertise in these areas.

Additional problems with the Quillen Declaration include the fact that Mr. Quillen’s opinions are not focused on the application, as is required for contentions by 10 C.F.R. § 2.309(f)(1)-(2). The Quillen Declaration never discusses or takes issue with the Levy ER’s discussion of alternatives, and the Petition never integrates Mr. Quillen’s opinions with the contentions’ arguments. Finally, the Quillen Declaration only provides Mr. Quillen’s mere conclusion that alternative energy, energy conservation, and distributed generation were not properly considered. See Quillen Declaration at 2. Such conclusory assertions are clearly inadequate to support contention admissibility: “[A]n expert opinion that merely states a conclusion (e.g., the application is “deficient,” “inadequate,” or “wrong”) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion . . .” *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (discussing expert support in the context of contention admissibility) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent

Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998)). For the above reasons, the Quillen Declaration does not provide support for contentions claiming that solar thermal domestic water heaters, energy conservation, and distributed generation are reasonable alternatives to the proposed reactors.

- Y. CONTENTION 9:  
PEF environment report omits consideration of major renewable energy option: solar thermal hot water. Petition at 97.

With Proposed Contention 9, Joint Petitioners contend that ER Section 9.2.2.3 omits discussion of solar thermal domestic water heaters. Petition at 97. The Petition claims that solar thermal water heaters have the potential to displace baseload power because of the thermal storage aspect of the technology. *Id.* The Petition also states the following:

This contention incorporates by reference the information on Energy Efficiency provided in contention 10 since solar thermal water heating is a major source of reduction in power consumption, averaging 20% of an all electric home's energy use, and therefore could significantly reduce need for power production.

*Id.* at 97-98. Joint Petitioners then offer additional assertions in support of contention 9, including a claim that solar thermal water heaters led to an 8.3% savings in energy consumption when used in a pilot program receiving financial assistance and technical support from other entities. *Id.* at 98.

Staff Response: Proposed Contention 9 fails to provide sufficient information to demonstrate a genuine, material dispute on a legal or factual issue, as required by 10 C.F.R. § 2.309(f)(1)(vi). As an initial matter, the Staff observes that, although Joint Petitioners characterize their contention as one of omission, both solar power and thermal energy storage are discussed in the Levy ER. Solar power alternatives are examined in Levy ER Section 9.2.2.4 (not Section 9.2.2.3) and are rejected “based on the lack of information regarding large-scale systems able to produce the proposed 2200-MWe baseload capacity and the large land area footprint needed for construction.” Levy ER at 9-16. Section 9.2.2.4 examines the merits and demerits of solar power in light of the project’s purpose and need,

specifically noting that solar is an intermittent, rather than baseload, energy source. *Id.* at 9-13. The Levy ER also discusses the concept of thermal energy storage as part of its discussion of electrical generation from concentrating solar power systems. *Id.* at 9-14. The Applicant's plan for offering to install solar-thermal water heaters for their customers is described in Chapter 8 of the ER. *Id.* at 8-76. The Staff also notes that the solar thermal water heater alternative was considered by the Florida PSC as an alternative to the proposed reactors and rejected. PSC Order at 17-18.<sup>52</sup>

Nothing in Proposed Contention 9 suggests that the particular alternative of solar thermal domestic water heaters is a reasonable alternative that needs to be further examined in the ER. First, the Joint Petitioners' proposed alternative, as the Staff understands it, does not involve the generation of electrical power. With respect to the sources cited in contention 9, the only one discussed in any level of detail is a U.S. Department of Energy (DOE) brochure (DOE brochure) which discusses the use of solar thermal domestic water heaters in a pilot project in Lakeland, FL. See Petition at 98. Further examination of this brochure is proper because 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 Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235, 269 n.39 (subject of Board holding not raised for review). The DOE brochure only discusses the use of solar power to directly heat the water used by residential customers, not

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<sup>52</sup> In addition, the Staff notes that even contentions of omission must contain a petitioner's reasons for believing that the application "fails to contain information *on a relevant matter as required by law.*" 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added). Simply claiming that an alternative must be examined does not make it so, and proposed contention 9 does not point to any applicable regulation. As explained above, only a reasonable range of alternatives need be examined in an ER. See *Private Fuel Storage*, LBP-03-30, 58 NRC at 479; *Vermont Yankee*, 435 U.S. at 551. As explained below, Joint Petitioners do not demonstrate a genuine, material dispute concerning whether solar thermal domestic water heaters constitute a reasonable alternative that must be further examined in the ER.

the potential generation of baseload electric power to serve the various electricity needs of different types of customers. This alone should result in the rejection of contention 9.

Second, Joint Petitioners offer no assertion, properly supported in accordance with 10 C.F.R. § 2.309(f)(1)(v), that would suggest that their proposed alternative could generate energy on a scale equivalent to the proposed reactors. Joint Petitioners assert that the participants in the Lakeland pilot project “were able to replace 8.3% of their energy consumption by installing thermal solar water heaters on their homes,” Petition at 97, but the Staff cannot find this figure in the DOE brochure. The brochure does provide a utility estimate of average energy savings in kWh per household on page 4, but Joint Petitioners do not cite to this figure. In any event, Proposed Contention 9 nowhere relates these energy savings to the Applicant’s power needs or explains how these average energy savings could be realized on a scale equivalent to the energy provided by the proposed reactors. In this regard, the Staff notes that the Lakeland pilot project involved only 60 households, DOE brochure at 1, and that the pilot project was initially focused on a development specifically chosen for its advantageous qualities. *Id.* at 2. In addition, the financial and technical contributions from other entities were deemed to be “pivotal” to the initial progress of the project. *Id.* at 1. However, the Petitioners offer no evidence suggesting that this same assistance would be available for a large scale project in the ROI. Finally, at the time the brochure had been authored, the project was “very close to,” but had not yet reached, economic sustainability. *Id.* at 2.

The other arguments offered by Joint Petitioners are similarly unavailing. Petitioners assert that “solar thermal water heating is a major source of reduction in power consumption, averaging 20% of an all electric home's energy use, and therefore could significantly reduce need for power production.” Petition at 97-98. Because no support is offered for this assertion, however, it cannot be considered in support of contention admissibility.

10 C.F.R. § 2.309(f)(1)(v). Moreover, this 20 percent average, which only applies to all-electric

homes, is similar to the energy savings figure cited in the previous paragraph, and likewise fails to create a genuine dispute on a material issue of law or fact.

Joint Petitioners also incorporate by reference the information in contention 10, but neglect to explain how a proposed contention relating to energy efficiency makes their solar thermal water heater contention any more admissible. Petitioners, not licensing boards or other parties, bear the burden of stating, explaining, and supporting their contentions.

10 C.F.R. § 2.309(f)(1). Joint Petitioners also do not explain how their contention is supported by certain unidentified “numerous studies” or a report (Joint Petitioners Exhibit Quillen-01) from the American Council for an Energy-Efficient Economy (ACEEE) entitled “Potential for Energy Efficiency and Renewable Energy to Meet Florida’s Growing Energy Demands” (ACEEE Report). Commission precedent speaks to this issue:

Commission practice is clear that a petitioner may not simply incorporate massive documents by reference as the basis for or a statement of his contentions. Such a wholesale incorporation by reference does not serve the purposes of a pleading. The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point.

*Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989) (internal citations omitted).<sup>53</sup>

As discussed above, an alternative failing to meet the purpose and need of the project is not a reasonable alternative and does not need to be further discussed in the ER or EIS. See *Clinton ESP*, CLI-05-29, 62 NRC at 801. Joint Petitioners simply do not provide sufficient information to suggest that solar thermal domestic water heaters constitute a reasonable alternative to reactors producing a large amount of baseload *electric* power. Proposed

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<sup>53</sup> The Staff also notes that Joint Petitioners conclude proposed contention 9 with a reference to ratepayer interests and radiological concerns, but neither reference is supported or is related to proposed contention 9.

Contention 9, therefore, must be rejected because it does not establish a genuine, material dispute with the application. 10 C.F.R. § 2.309(f)(1)(vi).

Z. CONTENTION 10:

PEF has grossly underestimated the potential for conservation and efficiency in its environment report. Petition at 98.

Joint Petitioners contend that Levy ER Section 9.2.1.1 contains an “omission” and take issue with the discussion of energy conservation contained in that section. Petition at 98-99. The petitioners claim that their position is supported by the ACEEE Report and “numerous other publications.” *Id.* at 99. Several additional arguments are then provided in support of contention admissibility, including an argument based on the “costs and risks” of transmission lines and an argument based on the environmental benefits of conservation. *Id.*

Staff Response: Proposed Contention 10 fails to provide sufficient information to demonstrate a genuine, material dispute on a legal or factual issue, as required by 10 C.F.R. § 2.309(f)(1)(vi). The Staff begins by noting that, although Joint Petitioners characterize their contention as one of omission, Levy ER Section 9.2.1.1 discusses energy conservation as an alternative to the proposed action and points to ER Section 8.2.2.2 for further discussion of conservation measures. These sections of the ER provide a detailed description of the Applicant’s various conservation measures and their effectiveness. The Applicant’s alternatives analysis, however, states that “[a]lthough [demand-side management] has shown great potential in reducing peak-load usage, it does not satisfy the baseload need that will be satisfied by the [proposed reactors].” Levy ER at 9-4.

Proposed Contention 10 fails to effectively rebut the ER’s rejection of energy conservation as a reasonable alternative. The contention does cite to the application in ER Section 9.2.1.1, but only to broadly disparage the Applicant’s energy conservation programs without further explanation. See Petition at 99. As NRC regulations make clear, environmental contentions must focus on the applicant’s ER, specifically reference the disputed portions of the

ER, and provide supporting reasons for each dispute. 10 C.F.R. § 2.309(f)(1)(vi) and (f)(2).

Joint Petitioners, moreover, must provide sufficient information, based on either documentary or expert support, to demonstrate a genuine dispute with the applicant that is material to the findings that the NRC must make to issue the license. 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

Demonstrating a genuine, material dispute based on the application requires a properly focused discussion that substantively engages the application on the relevant factors. Proposed Contention 10, however, fails to effectively grapple with the ER's alternatives analysis. The Petition nowhere specifically describes how the conservation programs described in the ER are deficient, much less provide documentary or expert support that would suggest any specific and substantial deficiencies. Joint Petitioners' attack on the ER's consideration of energy conservation alternatives consists of unsupported, "bare assertions," which can never support contention admissibility. See *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003).

Joint Petitioners cite to the ACEEE Report in support of their contention, but the portion cited refers to energy savings in 2023, not the 2016-2017 timeframe in which the proposed reactors are scheduled to come online to meet baseload electric power needs.

Levy ER at 8-1.<sup>54</sup> Furthermore, the figure cited from the ACEEE Report refers to savings from using renewable resources in addition to energy conservation. See Petition at 99. It is the admissibility of contentions, not bases, that must be determined in NRC proceedings, see *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 557 (2004) (citing to § 2.309(a)), and the Petitioners citation to the ACEEE Report is not squarely focused either on the proposed action or their own contention.

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<sup>54</sup> Joint Petitioners also claim that their position is supported by "numerous other publications," but fail to identify these. Petition at 99. As discussed in the Staff's response to contention 9, such vague references fail to support contention admissibility. See *Seabrook*, CLI-89-3, 29 NRC at 240-41.

Even if Joint Petitioners had provided an energy savings figure for the 2016-2017 timeframe that aligned with the contention's focus on conservation, they nowhere tie the ACEEE Report's cited projection, which is based on the state of Florida as a whole, Petition at 99, to the Applicant's specific situation. Joint Petitioners nowhere explain how the cited figure demonstrates that the need for baseload electric power would be met through conservation.

Fundamentally, Proposed Contention 10 ignores the project purpose and fails to explain how energy conservation is a reasonable alternative in light of the need for a large amount of baseload electric power. An alternative failing to meet the purpose and need of the project does not need to be further examined in the ER or EIS. See *Clinton ESP*, CLI-05-29, 62 NRC at 801; 40 C.F.R. § 1502.14(a). In the recent *V.C. Sumner* decision, a Licensing Board rejected a similar energy conservation contention because of a failure to meet the project's purpose of generating baseload electric power. See *V.C. Sumner*, LBP-09-2, 68 NRC at \_\_\_, (slip op. at 22-24). The Staff believes that the reasoning in *V.C. Sumner* applies here, as well.

The remaining arguments from Joint Petitioners also do not establish contention admissibility. Joint Petitioners' assertions about the "costs and risks" of transmission lines do not provide specific, supported assertions that suggest any significant issues, see Petition at 99, and the Staff fails to see the relevance of these arguments to establishing energy conservation as a reasonable alternative to large-scale baseload electric generation. The requirements of 10 C.F.R. § 2.309(f)(1)(v)-(vi), therefore, are not met. Joint Petitioners also mistakenly claim that the environmental effects of energy conservation need to be compared to the proposed project, see *id.*, but such comparisons need only be performed for reasonable alternatives. See *Clinton ESP*, CLI-05-29, 62 NRC at 810; 40 C.F.R. § 1502.14(a).<sup>55</sup>

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<sup>55</sup> The Staff also notes that Joint Petitioners conclude proposed contention 10 with a reference to ratepayer interests and radiological concerns, but neither reference is supported or is related to proposed contention 10.

Petitioners shoulder the burden of demonstrating contention admissibility, which includes demonstrating a genuine, material dispute that is specifically focused on the application and based on sufficient factual support. See 10 C.F.R. § 2.309(f)(1)(vi). This, the Petitioners have failed to do. Contention 10 should not be admitted.

AA. CONTENTION 11:

The basis for PEF's analysis of renewable energy options is inherently flawed since all options assessed are assumed to be centralized power production sites; PEF fails to assess distributed generation using renewable energy technologies. Petition at 100.

Proposed Contention 11 claims that fuel-free power sources, such as wind power, solar power, and hydropower, have the potential to be placed close to the point of power consumption. Petition at 100. Joint Petitioners argue that such distributed generation brings certain efficiencies that must be examined in the Levy ER. *Id.* at 100-101. The petitioners also claim that the environmental benefits from such distributed renewable resources must be compared with the environmental effects of the proposed action. *Id.*

Staff Response: For many of the reasons cited in the Staff responses to Proposed Contentions 9 and 10, Proposed Contention 11 fails to meet the NRC's contention admissibility requirements. The three generation alternatives initially mentioned by Joint Petitioners (solar power, wind power, and hydropower) are all discussed in the Levy ER. Solar power is discussed in ER Section 9.2.2.4, wind power is discussed in ER Section 9.2.2.1, and hydropower is discussed in ER Section 9.2.2.3. None of these alternatives was considered by the Applicant to be a reasonable alternative to the proposed reactors. Joint Petitioners do not even reference, much less identify a dispute with, the analysis contained in these sections of the Levy ER. Proposed Contention 11's distributed generation arguments are beside the point. Distributed intermittent wind power is still intermittent, not baseload. See Levy ER at 9-12 (rejecting wind power, in part, for a failure to provide baseload power). Distributed hydropower, even were it more efficient than centralized hydropower, cannot be a reasonable alternative to

large scale energy generation if there is little capacity for it in the ROI. See Levy ER at 9-13 (discussing the lack of feasible sites because of Florida's flat terrain). Environmental contentions must focus on the applicant's ER, specifically reference the disputed portions of the ER, and provide supporting reasons for each dispute. 10 C.F.R. § 2.309(f)(1)(vi) and (f)(2). Proposed Contention 11 fails to do this and must be rejected for this reason.

Additionally, no documentary material or expert support is provided for any assertions regarding wind power and hydropower, so, in this regard, Proposed Contention 11 fails to meet the requirements of § 2.309(f)(1)(v). Joint Petitioners also do not explain how wind power or hydropower could meet the purpose and need of the project, to generate large amounts of baseload electric power. Taken as a whole, the wind power and hydropower discussions clearly fail to demonstrate a genuine, material dispute with the Applicant over whether wind power and hydropower are reasonable alternatives to the proposed facility. See 10 C.F.R. § 2.309(f)(1)(vi).

Joint Petitioners do further develop their solar power argument, in the form of a newspaper article labeled Exhibit Quillen-02, but still fail to demonstrate contention admissibility. Solar power alternatives are examined in Levy ER Section 9.2.2.4 and are rejected "based on the lack of information regarding large-scale systems able to produce the proposed 2200-MWe baseload capacity and the large land area footprint needed for construction." Levy ER at 9-16. Exhibit Quillen-02, which primarily discusses the experience of a General Motors warehouse in California, does not claim that distributed solar power is a substitute for baseload power, or that distributed solar can be used to produce power at the level produced by the proposed reactors in the ROI. Joint Petitioners' argument, therefore, fails to demonstrate a genuine, material dispute with the Applicant's alternatives analysis. See 10 C.F.R. § 2.309(f)(1)(vi).

Joint Petitioners make the same transmission line argument made in contention 10, Petition at 100, and the argument must be rejected here for the same reasons: The argument lacks support, is not specific enough to suggest a significant issue of any kind, does not focus

on the Application's alternatives analysis, and does not demonstrate a genuine, material dispute over whether a rejected alternative is a reasonable one that must further be considered in the ER. See 10 C.F.R. § 2.309(f)(1)(v)-(vi). Joint Petitioners also repeat another argument from Contention 10 when they claim that the environmental effects of Joint Petitioners' proposed alternative must be compared with the environmental effects of the proposed action.

Petition at 100-101. This argument fails here, as well, because only reasonable alternatives need to be further examined in the ER. See *Clinton ESP*, CLI-05-29, 62 NRC at 810; 40 C.F.R. § 1502.14(a).

The petitioners' fuel diversification and energy independence argument also lacks merit because it does not dispute the Applicant's alternatives analysis to demonstrate a genuine, material dispute over whether the rejected renewable alternatives are, in fact, reasonable alternatives to the proposed action. 10 C.F.R. § 2.309(f)(1)(vi). The citations to Mr. Freeman and Mr. Makjani, Petition at 102 nn.33-34, also do not help the petitioners because these are used to support conclusory statements that do not dispute the Applicant's alternatives analysis. Petitioners do not explain how the cited sources show a genuine, material dispute with the Applicant. See 10 C.F.R. § 2.309(f)(1)(v)-(vi); *Fansteel*, CLI-03-13, 58 NRC at 203 (2003) (stating that bare assertions do not support contention admissibility); and *Seabrook*, CLI-89-3, 29 NRC at 240-41 (stating that a petitioner "may not simply incorporate massive documents by reference as the basis for or a statement of his contentions").

For the above reasons, Proposed Contention 11 is not admissible.

CONCLUSION

In view of the foregoing, Joint Petitioners have demonstrated representational standing to intervene in this proceeding. The current Petition, however, should be denied because, pursuant to the requirements of 10 C.F.R. § 2.309(f)(1), Joint Petitioners have not submitted an admissible contention.

Respectfully Submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 3rd day of March, 2009

March 3, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
PROGRESS ENERGY FLORIDA, INC. ) Docket Nos. 52-029 and 52-030  
 )  
(Levy County Nuclear Site, Units 1 and 2) )

NOTICE OF APPEARANCE FOR SARA B. KIRKWOOD<sup>56</sup>

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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<sup>56</sup> I have recently changed my name from **Sara E. Brock** to **Sara B. Kirkwood**. I am in the process of changing my name with the Virginia State Bar.

March 3, 2009

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Respectfully submitted,

**Executed in Accord with 10 CFR § 2.304(d)**

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March 3, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO "PETITION TO INTERVENE AND REQUEST FOR HEARING BY THE GREEN PARTY OF FLORIDA, THE ECOLOGY PARTY OF FLORIDA AND NUCLEAR INFORMATION AND RESOURCE SERVICE," NOTICE OF APPEARANCE OF SARA B. KIRKWOOD, NOTICE OF APPEARANCE OF MICHAEL A. SPENCER, and NOTICE OF APPEARANCE OF LAURA R. GOLDIN have been served on the following persons by Electronic Information Exchange on this 3rd day of March, 2009:

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