

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DUKE ENERGY CAROLINAS, LLC)	Docket Nos. 52-018 and 52-019
)	
(William States Lee III Nuclear Station,)	April 3, 2009
Units 1 and 2))	
)	

**DUKE ENERGY CAROLINAS, LLC'S ANSWER OPPOSING BLUE RIDGE
ENVIRONMENTAL DEFENSE LEAGUE NEW CONTENTION ELEVEN**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(h), Duke Energy Carolinas, LLC (“Duke”), hereby files this Answer in opposition to proposed New Contention Eleven, filed by the Blue Ridge Environmental Defense League (“BREDL”) on March 10, 2009.¹ Despite the long-standing U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) prohibition against attacks on current and proposed regulations,² New Contention Eleven challenges the adequacy of (1) the current Waste Confidence Rule set forth in 10 C.F.R. § 51.23; (2) the Commission’s proposal to update the Waste Confidence Rule; and (3) Table S-3 of 10 C.F.R. § 51.51 (which the Commission has *not* proposed to update). Specifically, BREDL asserts that the NRC has no basis for finding confidence that spent fuel can be safely stored and disposed of, or that there will

¹ New Contention Eleven (dated Mar. 9, 2009, but served on Mar. 10, 2009).

² See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345 (1999) (“It has long been agency policy that Licensing Boards ‘should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.’”) (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)).

be no radioactive releases from the high-level waste disposal repository.³ Thus, according to BREDL, the Commission’s proposal to update the Waste Confidence Rule is insufficient to satisfy the requirements of the Atomic Energy Act (“AEA”) or the National Environmental Policy Act (“NEPA”).⁴ BREDL, however, states that the issues raised in New Contention Eleven are “generic in nature” and does not seek to litigate them in this proceeding, but instead asks the Atomic Safety and Licensing Board (“Board”) to admit New Contention Eleven and hold it in abeyance pending NRC final action in the Waste Confidence rulemaking proceeding.⁵

As discussed below, BREDL erroneously filed New Contention Eleven with the Board instead of the Commission.⁶ Moreover, the record for the contested portion of this proceeding is closed and BREDL fails to demonstrate it should be reopened. BREDL also fails to satisfy the timeliness, standing, and contention admissibility requirements in 10 C.F.R. § 2.309. Finally, BREDL fails to establish that New Contention Eleven should be held in abeyance or referred to the Commission. Accordingly, for all these reasons, the Board should deny New Contention Eleven.

II. BACKGROUND

A. The Board Denied BREDL’s Original Petition to Intervene in Its Entirety and Rejected Its Earlier Waste Confidence Rule Challenges

In a letter dated December 12, 2007, Duke submitted an application to the NRC seeking approval of a combined license (“COL”) for William States Lee III Nuclear Station, Units 1

³ New Contention Eleven at 4-5.

⁴ *Id.* at 4.

⁵ *Id.* at 3.

⁶ Although Duke believes that BREDL improperly filed New Contention Eleven with the Board, Duke files this Answer with the Board in recognition that every tribunal has the inherent authority to determine, in the first instance, its own jurisdiction. *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-591, 11 NRC 741, 742 (1980).

and 2.⁷ The NRC accepted the COL application for docketing on February 25, 2008,⁸ and published a Hearing Notice in the *Federal Register* on April 28, 2008.⁹

On June 27, 2008, BREDL filed a Petition for Intervention and Request for Hearing (“June 27th Petition”), which contained eleven proposed contentions.¹⁰ Of note, Proposed Contention 10A claimed that Duke’s Environmental Report (“ER”) failed to discuss the environmental implications of the lack of options for permanent disposal of spent fuel.¹¹ Specifically, BREDL alleged that the NRC has not made a reliable assessment of whether spent fuel can be safely disposed of offsite or when such an offsite disposal facility will be available.¹² BREDL further alleged that significant radioactivity releases from Yucca Mountain will occur over time, and that the NRC’s Waste Confidence Decision, as amended, applies only to currently-operating plants.¹³ Proposed Contention 10B further stated that, even if the Waste Confidence Decision applies to this proceeding, it should be “reconsidered” in light of the alleged increased threat of terrorist attacks against U.S. facilities.¹⁴

In September 2008, the Board denied BREDL’s request for an evidentiary hearing because BREDL had failed to submit an admissible contention as required by 10 C.F.R.

⁷ See Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 6218 (Feb. 1, 2008).

⁸ See Acceptance for Docketing of an Application for Combined License for William States Lee III Units 1 and 2, 73 Fed. Reg. 11,156 (Feb. 29, 2008).

⁹ See Duke Energy; Notice of Hearing and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the William States Lee III Units 1 and 2, 73 Fed. Reg. 22,978 (April 28, 2008) (“Hearing Notice”).

¹⁰ Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (June 27, 2008).

¹¹ *Id.* at 45.

¹² *Id.* at 45-46 (citing the Final Waste Confidence Decision, 49 Fed. Reg. 34,659 (August 31, 1984)).

¹³ *Id.* at 46-51.

¹⁴ *Id.* at 51.

§ 2.309(a).¹⁵ The Board examined the plain language and regulatory history of the Waste Confidence Rule and found that the Rule clearly applied to the proceeding.¹⁶ Accordingly, the Board rejected Proposed Contentions 10A and 10B as impermissible challenges to the Waste Confidence Rule.¹⁷

BREDL did not appeal and the Commission did not undertake *sua sponte* review of the Board's ruling. Thus, BREDL never became a party to this proceeding and the record for the contested portion of this proceeding is closed.

B. Background on the Waste Confidence Proceeding and the Proposed Waste Confidence Update

In 1990, the Commission issued a decision reaffirming and revising, in part, its 1984 Waste Confidence Decision that resulted as part of rulemaking proceedings to generically assess safety and environmental issues associated with the onsite storage of spent fuel until sufficient offsite disposal or storage becomes available.¹⁸ The Waste Confidence Decision resulted in the Commission finding, with reasonable assurance, that (1) safe disposal of spent fuel in a mined geologic repository is technically feasible; (2) at least one mined repository will be available by 2025 and sufficient repository capacity will be available within 30 years of the licensed life of any reactor; (3) spent fuel will be managed in a safe manner until sufficient repository capacity is available; (4) if necessary, spent fuel can be stored safely and without significant environmental

¹⁵ *Duke Energy Carolinas, LLC* (Combined License Application for Williams States Lee III Nuclear Station, Units 1 & 2), LBP-08-17, slip op. at 31 (Sept. 22, 2008). The Board referred to the Commission its ruling denying the admission of Proposed Contention 2, which alleged the need to provide an environmental assessment of the “carbon footprint” of the proposed facility. *Id.* at 13-14, 32. The Commission has not acted on that referral.

¹⁶ *Id.* at 29-30.

¹⁷ *Id.*

¹⁸ Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474, 38,474 (Sept. 18, 1990).

impacts for at least 30 years beyond licensed life of any reactor; and (5) safe independent onsite or offsite spent fuel storage will be made available if needed.¹⁹

These findings form the basis of the Commission's generic determination that there are no significant environmental impacts from temporary storage of spent fuel after cessation of reactor operations. This determination currently is codified in the NRC's Waste Confidence Rule in 10 C.F.R. § 51.23(a), which specifically states:

The Commission has made a generic determination that, if necessary, spent fuel generated in *any reactor* can be stored safely and *without significant environmental impacts* for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.²⁰

Based on this generic finding, 10 C.F.R. § 51.23(b) further states:

[N]o discussion of *any environmental impact* of spent fuel storage in reactor facility storage pools . . . for the period following the term of the reactor . . . combined license . . . is required in any environmental report, environmental impact statement, . . . or other analysis prepared in connection with the . . . issuance . . . of a combined license . . . under parts 52.²¹

BREDL's purported trigger for New Contention Eleven is its February 6, 2009 submission of comments on the Commission's October 9, 2008 proposals to update the Waste

¹⁹ *Id.* at 38,485-513.

²⁰ 10 C.F.R. § 51.23(a) (emphasis added).

²¹ *Id.* § 51.23(b) (emphasis added).

Confidence Decision and the Waste Confidence Rule.²² The Commission proposes to update Finding 2 of its Waste Confidence Decision to eliminate a specific date for the availability of a repository and to state that sufficient repository capacity would be available within 50-60 years beyond the licensed life of any reactor.²³ In addition, the Commission proposes to update Finding 4 to indicate that, if necessary, spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond licensed life of any reactor.²⁴

The Proposed Waste Confidence Update does not in any way call into question the adequacy of the existing Waste Confidence Decision or Waste Confidence Rule. In fact, the existing Waste Confidence Rule still provides a binding generic determination that spent fuel can be stored safely without significant environmental impacts for “at least 30 years beyond the licensed life for operation”²⁵ and the Proposed Update “strengthen[s] [the Commission’s] confidence in the safety and security of SNF storage” and “confirm[s] the Commission’s confidence that spent fuel storage is safe and secure over long periods of time.”²⁶ As a result, the Proposed Update states that “the Commission no longer finds it useful to include this [30-year] time limitation in its generic determination that SNF can be stored safely and without significant environmental impacts after the end of a reactor’s licensed operation.”²⁷

²² Waste Confidence Decision Update; Update and Proposed Revision of Waste Confidence Decision, 73 Fed. Reg. 59,551 (Oct. 9, 2008) (“Proposed Waste Confidence Decision Update”); Proposed Rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008) (“Proposed Waste Confidence Rule Update”). Collectively, these two proposed agency actions are referred to as “Proposed Waste Confidence Update” or “Proposed Update.”

²³ Proposed Waste Confidence Decision Update, 73 Fed. Reg. at 59,551.

²⁴ *Id.*

²⁵ 10 C.F.R. § 51.23(a).

²⁶ Proposed Waste Confidence Rule Update, 73 Fed. Reg. at 59,548-549.

²⁷ *Id.* at 59,549.

C. **BREDL's New Contention Eleven**

On March 10, 2009, BREDL submitted New Contention Eleven, which reads as follows:

Neither the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act. Therefore they fail to provide adequate support for the Applicant's Environmental Report or for an Environmental Impact Statement in this particular licensing case. The deficiencies in the Waste Confidence Rule also fatally undermine the adequacy of the NRC's findings in Table S-3 of 10 C.F.R. § 51.51 to satisfy NEPA. Unless and until the NRC remedies the deficiencies in the Waste Confidence Rule, Table S-3, and the Proposed Spent Fuel Storage Rule, the NRC has no lawful basis to issue a license for the proposed William States Lee III nuclear power plant.²⁸

Thus, in addition to challenging the Proposed Waste Confidence Update, BREDL also challenges Table S-3 of 10 C.F.R. § 51.51, which, among other things, summarizes and codifies the NRC's assessment of and determinations for evaluating the environmental effects of high-level waste related to the uranium fuel cycle.²⁹ In support of New Contention Eleven, BREDL includes comments that were submitted by it and several other organizations on February 6, 2009 in response to the Commission's October 9, 2008 Proposed Waste Confidence Update.³⁰

III. **LEGAL STANDARDS**

A. **Licensing Board Jurisdiction Over Adjudicatory Proceedings**

A licensing board has jurisdiction only over those matters that the Commission commits to it in the hearing notice and referral order that identifies the subject matters of the hearing.³¹ Once a licensing board denies a petition to intervene and the period in which the Commission

²⁸ New Contention Eleven at 4.

²⁹ *Id.* at 4.

³⁰ *Id.*

³¹ *Fla. Power & Light Co. (Turkey Point, Units 3 & 4)*, LBP-01-6, 53 NRC 138, 151 (citing *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-825, 22 NRC 785, 790 (1985)).

could exercise its right to review the record expires, jurisdiction passes back to the Commission, including jurisdiction over any new petitions, contentions, or motions.³²

B. Requirements to Reopen the Record

As noted above, the Board denied the only petition to intervene filed in this proceeding and, therefore, BREDL is not a party to this proceeding. In fact, there is no active contested proceeding. Under very similar circumstances—where a Board already denied a petition to intervene—the Commission recently held that a petitioner seeking to file a new petition or seeking to submit new or amended contentions must address the standards for motions to reopen.³³ The requirements for a motion to reopen in 10 C.F.R. § 2.326(a) are threefold:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and

³² See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35 (2006) (finding a motion improperly filed with the licensing board because “the Board has already dismissed the case and no longer has jurisdiction over the matter”); *Metropolitan Edison Co.* (Three Mile Island Station, Unit No. 1), ALAB-699, 16 NRC 1324, 1326-27 (1982) (holding that a licensing board retains jurisdiction over a matter “at least until the issuance of its initial decision, but no later than either the filing of exceptions or the expiration of the period during which the Commission or an appeal board can exercise its right to review the record”); *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), Docket Nos. 52-027-COL & 52-028-COL, Order (Regarding Mr. Wojcicki’s February 27, 2009 Filing; Notice of Termination of Proceeding), at 1 (Mar. 3, 2009) (unpublished order) (holding that order denying petitions to intervene “had the substantive effect of terminating the . . . proceeding before the Board”).

³³ *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, slip op. at 6 (Mar. 5, 2009) (holding that, when the Board has “already denied the intervention petition, a motion to file new or amended contentions must address the motion to reopen standards”) (citation and internal quotations omitted). See also *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 37 (2006) (applying reopening factors to new contentions filed after petition to intervene had been denied); *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-1, 35 NRC 1, 3, 7 (1992) (applying reopening factors to new contentions filed after adjudicatory proceedings dismissed pursuant to settlement).

- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.³⁴

In codifying this standard, the Commission emphasized “the heavy burden involved” and characterized these requirements as “high” and “stringent.”³⁵ As part of this burden, the request to reopen must be accompanied by an affidavit that separately and specifically supports each of the applicable criteria in Section 2.326(a).³⁶

C. Standards for Non-timely Filings

In addition to the requirements for reopening, NRC regulations also provide that a petitioner may submit a new contention only upon a favorable balancing of the eight factors in 10 C.F.R. § 2.309(c)(1).³⁷ Those factors are (1) good cause, if any, for the failure to file on time; (2) the nature of the petitioner’s right to be made a party; (3) the nature and extent of the petitioner’s interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the petitioner’s interest; (5) the availability of other means whereby the petitioner’s interest will be protected; (6) the extent to which the petitioner’s interests will be represented by existing parties; (7) the extent to which the petitioner’s participation will broaden

³⁴ 10 C.F.R. § 2.326(a). Although the Commission once held that only a “party” may move to reopen a closed record, in a subsequent decision the Commission indicated that a non-party may seek late intervention by addressing both the standards for late intervention in 10 C.F.R. § 2.309(c) and the standard for reopening the record in 10 C.F.R. § 2.326(a). *See Millstone*, CLI-09-5, slip op. at 11.

³⁵ Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

³⁶ 10 C.F.R. § 2.326(b).

³⁷ 10 C.F.R. § 2.326(d) (“A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).”). *See also* Hearing Notice, 73 Fed. Reg. at 22,979 (“Non-timely requests and/or petitions and contentions will not be entertained absent a determination . . . that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 C.F.R. § 2.309(c)(1)(i)-(viii).”).

the issues or delay the proceeding; and (8) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.³⁸

The burden is on the petitioner to demonstrate “that a balancing of these factors weighs in favor of granting the petition.”³⁹ The first factor identified in that regulation, whether “good cause” exists for the failure to file on time, is entitled to the most weight.⁴⁰ If good cause is lacking, then a “compelling showing” must be made as to the remaining factors to outweigh the lack of good cause.⁴¹

D. Substantive Requirements for a Petition to Intervene

Apart from the late-filing criteria in 10 C.F.R. § 2.309(c)(1), a late-filed petition to intervene must also meet the substantive requirements for all petitions to intervene. Thus, a petitioner must demonstrate standing and submit at least one admissible contention to be admitted as a party to this proceeding.⁴²

With respect to standing, NRC regulations require that a petitioner provide certain basic information to support its claim of standing.⁴³ This required information includes: (1) the nature of the petitioner's right under the Atomic Energy Act of 1954 (“AEA”), as amended, to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued

³⁸ 10 C.F.R. § 2.309(c)(1)(i)-(viii).

³⁹ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1367 (1984).

⁴⁰ *See State of N.J.* (Dep't of Law & Pub. Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993).

⁴¹ *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

⁴² 10 C.F.R. § 2.309(a).

⁴³ *See id.* § 2.309(d)(1).

in the proceeding on its interest.⁴⁴ 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).⁴⁵

Duke’s Answer to BREDL’s original Petition contains an extensive discussion of the NRC’s contention admissibility standards and we do not repeat those standards here.⁴⁶ In brief, however, the Commission’s contention admissibility rule at 10 C.F.R. § 2.309(f)(1) is “strict by design,”⁴⁷ and failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a proposed new contention.⁴⁸ Additionally, a petitioner may not use an adjudicatory proceeding to attack generic rules or regulations.⁴⁹ Thus, “a licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process,”⁵⁰ and a contention that attacks an NRC rule or regulation must be rejected.⁵¹ Similarly, licensing boards “should not accept in individual

⁴⁴ See *id.* § 2.309(d)(1)(ii)-(iv).

⁴⁵ See, e.g., *Calvert Cliffs Nuclear Project LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-4, slip op. at 6-7 (Mar. 24, 2009).

⁴⁶ See Duke Energy Carolinas, LLC’s Answer Opposing Petition for Intervention and Request for Hearing by Blue Ridge Environmental Defense League at 3-12 (July 22, 2008).

⁴⁷ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *recons. denied*, CLI-02-1, 55 NRC 1 (2002).

⁴⁸ See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁴⁹ 10 C.F.R. § 2.335; *Duke Energy Corp.* (Oconee Nuclear Stations, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 334 (1999).

⁵⁰ *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Unit 2 & 3), ALAB-216, 8 AEC 13, 20, *aff’d in part on other grounds*, CLI-74-32, 8 AEC 217 (1974) (footnote omitted); see also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 65 NRC 41, 57-58 (2007) (citing *Peach Bottom*, ALAB-216, 8 AEC at 20).

⁵¹ See, e.g., *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.”⁵²

IV. NEW CONTENTION ELEVEN IS NOT PROPERLY BEFORE THE BOARD AND DOES NOT MEET THE NRC’S REOPENING, NON-TIMELY FILING, STANDING, OR CONTENTION ADMISSIBILITY REQUIREMENTS

As demonstrated below, New Contention Eleven should be rejected because it is improperly filed with the Board and BREDL has not demonstrated that the record for this proceeding should be reopened. Furthermore, New Contention Eleven should be rejected because it fails to satisfy the fundamental timeliness, standing, and contention admissibility requirements in 10 C.F.R. § 2.309. Finally, BREDL has failed to demonstrate that New Contention Eleven should be held in abeyance or referred to the Commission.

A. New Contention Eleven Should Be Dismissed As Improperly Filed With the Board

As discussed above, in September 2008, the Board issued a decision denying BREDL’s June 27th Petition.⁵³ BREDL did not appeal or otherwise seek review of the Board’s ruling. Nor did the Commission act on its own authority to review this aspect of the Board’s decision.⁵⁴ Thus, in November 2008, after expiration of the period in which the Commission could exercise its right to review the record, the contested portion of this proceeding ended and the Board’s jurisdiction over this proceeding lapsed.⁵⁵ Accordingly, Duke respectfully submits that the

⁵² *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Douglas Point*, ALAB-218, 8 AEC at 85).

⁵³ LBP-08-17, slip op. at 31.

⁵⁴ See 10 C.F.R. § 2.341(a)(2).

⁵⁵ See *Millstone*, CLI-06-4, 63 NRC at 35 (finding a motion improperly filed with the licensing board because “the Board has already dismissed the case and no longer has jurisdiction over the matter”).

Board no longer has jurisdiction over this proceeding and, therefore, the Board should dismiss New Contention Eleven as improperly filed with the Board.⁵⁶

B. New Contention Eleven Does Not Meet the Standards to Reopen the Record Under 10 C.F.R. § 2.326

Even if the Board were to consider BREDL's filing, New Contention Eleven should be denied for failing to even address—much less meet—the requirements set forth in 10 C.F.R. § 2.326 to reopen a closed record. As discussed above, in the recent *Millstone* power uprate proceeding, the Commission explained that, if the Board has “already denied [an] intervention petition, a motion to file new or amended contentions must address the motion to reopen standards.”⁵⁷ BREDL has not addressed any of the factors in 10 C.F.R. § 2.326(a) and has not included an affidavit addressing why the three reopening criteria have been met.

For these reasons alone, the Board should reject New Contention Eleven. Furthermore, as discussed briefly below, even if BREDL had attempted to address the reopening standards, it plainly does not meet them.

1. New Contention Eleven Is Untimely

First, New Contention Eleven is not timely. New Contention Eleven challenges the Proposed Waste Confidence Update, which was published in the *Federal Register* on October 9, 2008—almost six months ago.⁵⁸ Thus, to be considered timely, New Contention Eleven should have been filed promptly after publication of the Proposed Update in November 2008—not in

⁵⁶ See *Millstone*, CLI-09-5, slip op. at 7 (noting that, absent a new referral to the Board, the Commission would have retained jurisdiction over new or amended contentions filed after the Board had already denied a petition to intervene).

⁵⁷ *Millstone*, CLI-09-5, slip op. at 6 (citation and internal quotations omitted). See also *Millstone*, CLI-06-4, 63 NRC at 37 (applying reopening factors to new contentions filed after petition to intervene had been denied); *Comanche Peak*, CLI-92-1, 35 NRC at 3, 7.

⁵⁸ Proposed Waste Confidence Decision Update, 73 Fed. Reg. at 59,551; Proposed Waste Confidence Rule Update, 73 Fed. Reg. at 59,547.

March 2009.⁵⁹ Instead, BREDL waited five months before filing its new contention. BREDL’s attempt to point to its more recent submission of comments on the Proposed Update is unavailing. The Commission has emphasized that “a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it.”⁶⁰ All of the *information* needed to file the instant contention was available in October 2008 when the Commission issued the Proposed Waste Confidence Update. Therefore, New Contention Eleven is untimely.

2. BREDL Fails to Show the Existence of a Significant Environmental Issue

Second, BREDL does not present any new information that even remotely suggests the existence of a significant safety or environmental issue in this proceeding. To raise a significant environmental issue, “new information must paint a ‘*seriously*’ different picture of the environmental landscape.”⁶¹ Nothing in the Proposed Waste Confidence Update cited by BREDL identifies any significant safety or environmental issue necessitating reopening the record. In fact, the Proposed Waste Confidence Update provides just the opposite in that it “strengthen[s] [the Commission’s] confidence in the safety and security of SNF storage” and “confirm[s] the Commission’s confidence that spent fuel storage is safe and secure over long periods of time.”⁶² Accordingly, New Contention Eleven fails to raise a significant safety or environmental issue.

⁵⁹ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-90-6, 31 NRC 483, 487 (1990) (finding a motion to reopen untimely because intervenors did not act “promptly after receipt of the information needed to frame . . . contentions,” but instead waited ten months before acting).

⁶⁰ *Millstone*, CLI-09-5, slip op. at 15 (emphasis in original).

⁶¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006) (citation omitted).

⁶² Proposed Waste Confidence Rule Update, 73 Fed. Reg. at 59,548-549.

3. BREDL Fails to Demonstrate a Materially Different Result Is Likely

Third, BREDL fails to demonstrate that anything in the Proposed Waste Confidence Update would lead to a materially different result regarding the issuance of Duke's COL, or the Board's prior rejection of Proposed Contentions 10A and 10B. To the contrary, BREDL admits that New Contention Eleven constitutes a challenge to the Waste Confidence Rule and raises issues relating to an ongoing rulemaking, and thus should not be admitted for adjudication in individual proceedings.⁶³ Duke agrees that the issues BREDL seeks to raise cannot be litigated in this proceeding. Therefore, a materially different result is not possible.

C. New Contention Eleven Does Not Satisfy the Requirement for Non-timely Filings Under 10 C.F.R. § 2.309(c)(1)

In addition to meeting the standards to reopen the record, BREDL also must meet the requirements for non-timely filings in 10 C.F.R. § 2.309(c)(1).⁶⁴ As discussed below, BREDL has not demonstrated the necessary "good cause" under 10 C.F.R. § 2.309(c)(1)(i).⁶⁵ Nor has BREDL made a "compelling showing" as to the remaining factors to outweigh the lack of good cause.⁶⁶ Accordingly, the balance of the factors under 10 C.F.R. § 2.309(c)(1) requires rejection of New Contention Eleven.

1. Factor (i): BREDL Has Not Shown Good Cause for Failing to File on Time

In certain instances, the availability of new information may provide "good cause" under factor (i). The Commission has held:

⁶³ New Contention Eleven at 3.

⁶⁴ 10 C.F.R. § 2.326(d).

⁶⁵ Although BREDL has not specifically addressed the factors in 10 C.F.R. § 2.309(c)(1), BREDL addresses the factors in 10 C.F.R. § 2.309(f)(2)(i)-(iii), which essentially codify the test for meeting the "good cause" factor in Section 2.309(c)(1)(i). For the same reasons that BREDL has not demonstrated good cause, it also has not satisfied the factors in Section 2.309(f)(2)(i)-(iii).

⁶⁶ See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

[T]he test is when the information became available and when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.⁶⁷

As noted above, such circumstances are not present here. New Contention Eleven was not submitted “promptly” after BREDL became (or should have become) aware of the purported new information. Generally, a new contention is submitted promptly if filed within 30 days of the *availability* of the new information.⁶⁸ New Contention Eleven challenges the Commission’s Proposed Waste Confidence Update, which was published in the *Federal Register* on October 9, 2008.⁶⁹ Thus, to be considered timely, New Contention Eleven should have been filed in November 2008—not in March 2009.

BREDL erroneously claims that the trigger date for filing New Contention Eleven should be February 6, 2009; the date on which it filed comments on the ongoing rulemaking.⁷⁰ BREDL is in error. The appropriate trigger is when the underlying *information* became available to the public, not when BREDL decided to act on that information.⁷¹ In essence, BREDL is arguing that the timeframe for filing its new contention started when it finished analyzing the new information published in October 2008. If such an interpretation of the late filing standard were

⁶⁷ See *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 70 (1992).

⁶⁸ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 231 (2000).

⁶⁹ Proposed Waste Confidence Decision Update, 73 Fed. Reg. at 59,551; Proposed Waste Confidence Rule Update, 73 Fed. Reg. at 59,547.

⁷⁰ New Contention Eleven at 1, 10.

⁷¹ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 309 n.2 (2000) (indicating that the appropriate trigger date for a late-filed contention challenging an issue raised by rulemaking is the date the proposed rule is issued). Additionally, as the Commission has ruled, a late-filed contention “is not an occasion to raise additional arguments that could have been raised previously.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 385-86 (2002).

permitted, then this requirement would become meaningless as a petitioner could indefinitely toll the time for filing a new contention while it “assessed” the new information.

Furthermore, even assuming BREDL’s February 6, 2009 filing could be an appropriate trigger date—which it is not—BREDL has not demonstrated that any of the information in its comments on the Proposed Waste Confidence Update constitutes “new information.” BREDL attempts in vain to satisfy this requirement by arguing that the information in New Contention Eleven has not “previously been integrated into a single document.”⁷² This is irrelevant. Commission precedent does not permit a late-filed contention that merely integrates information that was previously available.⁷³

In summary, BREDL has not shown that it acted promptly upon learning of the Proposed Waste Confidence Update issued in October 2008. Nor has BREDL shown that any information that provides the basis for its proposed contention is new information not already in the public domain. Accordingly, BREDL has failed to show that there was good cause for its failure to file on time.

2. Factors (ii), (iii), and (iv): BREDL Has Failed to Show that Its Interests Will Be Affected

Factors (ii), (iii), and (iv) of 10 C.F.R. § 2.309(c)(1) are essentially the same factors used to determine standing 10 C.F.R. § 2.309(d)(ii)-(iv). Here, BREDL has failed to proffer *any* facts, through a declaration or other means, to demonstrate that it has standing in this proceeding. Although BREDL may have intended to rely on the Board’s September 2008 determination that it had standing to intervene at that earlier stage in the proceeding, New Contention Eleven fails

⁷² New Contention Eleven at 10.

⁷³ See *Millstone*, CLI-09-5, slip op. at 15 (holding that “a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it”) (emphasis in original); *Comanche Peak*, CLI-92-12, 36 NRC at 70 (holding that “the information itself must be new information, not information already in the public domain”).

to provide any information suggesting that its earlier filings, including its previously submitted declarations, remain accurate.⁷⁴

The Commission explained that, a petitioner may rely on prior determinations of standing if the petitioner: (1) specifically identifies its prior standing determinations, and (2) shows that its prior standing determinations correctly reflect the current status of its standing.⁷⁵ But BREDL fails to demonstrate that the declarations filed in support of its June 27th Petition reflect the status of its current membership or the basis for its current claim of standing. More specifically, there is no intimation anywhere in New Contention Eleven that the individuals who submitted the declarations upon which BREDL based its standing still authorize BREDL to represent their interest, that they still live in proximity to the proposed facilities, or even that they remain members of the organization. Without such an affirmative statement, BREDL cannot rely on its prior demonstration of standing.⁷⁶ Accordingly, BREDL has failed to demonstrate that the factors (ii), (iii), and (iv) provide any support for further consideration of New Contention Eleven.

3. BREDL Has Not Made a Compelling Showing on the Remaining Factors

BREDL itself recognizes that New Contention Eleven raises “*the exact same concerns*” it has raised in the ongoing Waste Confidence rulemaking.⁷⁷ Moreover, BREDL acknowledges that it has already taken steps—through submission of comments—to protect its interest in the

⁷⁴ See LBP-08-17, slip op. at 6.

⁷⁵ *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993).

⁷⁶ *Id.*

⁷⁷ New Contention Eleven at 3 (emphasis added).

outcome of that proceeding. Accordingly, the ongoing Waste Confidence rulemaking provides BREDL with adequate means to protect its interests.⁷⁸

In addition, BREDL wishes to raise an issue that is not within the current scope of this proceeding. Broadening the scope of this proceeding to encompass the proposed changes to 10 C.F.R. § 51.23, as well as BREDL's suggested changes to Table S-3, could significantly delay this proceeding pending NRC action on the Proposed Waste Confidence Update.

Further, BREDL provides no indication that its participation would contribute to the development of a sound record. To the contrary, BREDL states that it does not wish to litigate this issue in this proceeding.⁷⁹ The Commission has already undertaken consideration of the issues BREDL seeks to raise in a rulemaking proceeding, so simply admitting these same issues in this proceeding—and holding them in abeyance—will not in any way contribute to the development of a sound record.

D. New Contention Eleven Does Not Meet the Substantive Admissibility Requirements for a Petition to Intervene

In addition to the timeliness requirements, BREDL must also demonstrate standing and submit at least one admissible contention to be admitted as a party to this proceeding.⁸⁰ As discussed above in Section IV.C.2, BREDL fails to establish its standing to participate in this proceeding, contrary to 10 C.F.R. § 2.309(d). As discussed below, BREDL also fails to satisfy the substantive admissibility requirements of 10 C.F.R. § 2.309(f)(1).

The Board's rationale for rejecting Proposed Contentions 10A and 10B remains valid, and applies equally to New Contention Eleven. In short, New Contention Eleven is inadmissible

⁷⁸ See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565-66 (2005) (finding that opportunity to petition for rulemaking and opportunity to comment on pending petition for rulemaking provides a means for petitioner to protect its interests).

⁷⁹ See New Contention Eleven at 3.

⁸⁰ 10 C.F.R. § 2.309(a).

because it consists entirely of impermissible attacks on the existing Waste Confidence Rule, Table S-3, and the ongoing rulemaking updating the Waste Confidence Rule.⁸¹

As the Board previously indicated in this proceeding, NRC regulations bar contentions that “seek to litigate a generic determination that the Commission has established by rulemaking, or that raise a matter that is or is about to become the subject of rulemaking.”⁸² BREDL has not sought a waiver to challenge the Waste Confidence Rule or Table S-3, but instead attempts to point to the ongoing rulemaking to amend Section 51.23 as a basis to admit New Contention Eleven.⁸³ Accordingly, New Contention Eleven is inadmissible for this additional reason.

E. The Board Should Not Hold New Contention Eleven in Abeyance

Despite the many obvious contention admissibility deficiencies, BREDL suggests that “the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding.”⁸⁴ The only argument that BREDL provides for holding New Contention Eleven in abeyance is that if it is dismissed from this proceeding prior to completion

⁸¹ New Contention Eleven at 1-10, Exhibit A.

⁸² LBP-08-17, slip op. at 8. *See also* 10 C.F.R. § 2.335(a) (“no rule or regulation of the Commission . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding”).

⁸³ Even if BREDL had requested a waiver, it would not qualify for one. The Commission has stated that “[w]aiver of a Commission rule is simply not appropriate for a generic issue.” *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 8 (2003) (citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 NRC 674, 675 (1980)). Similarly, the Commission has stated that a waiver may only be granted under circumstances that are “unique” to a facility rather than “common to a large class of facilities.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005) (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988)). As BREDL has admitted, nothing raised in New Contention Eleven is unique to Duke’s COL application and this contention is entirely generic. *See* New Contention Eleven at 3. In fact, BREDL has filed identical contentions in the Bellefonte and North Anna COL proceedings.

⁸⁴ New Contention Eleven at 3.

of the rulemaking, then it “will be required to appeal the substantive issues raised by [its] contention before the issues are ripe.”⁸⁵

As an initial matter, this argument is based upon a faulty premise. If the Board rejects this contention, then BREDL would have the option of appealing the Board’s admissibility decision.⁸⁶ On the other hand, if BREDL wishes to appeal the final update to the Waste Confidence Rule, then it must do so in federal court at the appropriate time in the rulemaking process.⁸⁷ BREDL cannot, however, appeal an update to the Waste Confidence Rule in this proceeding.

Furthermore, NRC regulations and precedent do not support holding New Contention Eleven in abeyance. When a proposed contention attacks a Commission rule or raises an issue within the scope of a rulemaking proceeding, the appropriate response is to reject the contention as contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a), not to hold it in abeyance. Nothing in these regulations authorizes holding such a contention in abeyance pending completion of a rulemaking.⁸⁸ Additionally, holding New Contention Eleven in abeyance pending issuance of a final rule could act as a *de facto* suspension of this proceeding if the rulemaking is not completed by the end of the proceeding.⁸⁹ No legal or regulatory basis for such drastic action exists.

⁸⁵ *Id.* at 3 n.1.

⁸⁶ *See* 10 C.F.R. § 2.311(c).

⁸⁷ *See* 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1).

⁸⁸ Recently, the Commission declined to grant a request to hold a contention in abeyance because the contention was otherwise inadmissible. *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC ___, slip op. at 9-13 (Feb. 4, 2009); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 466-67 (1982) (explaining that a licensing board is not authorized to conditionally admit contentions that do not meet the admissibility criteria).

⁸⁹ The Commission has characterized such suspensions of proceedings as a “drastic course of action” that is only warranted for “immediate threats to public health and safety.” *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000).

The only circumstance under which the Commission has authorized a Board to hold a contention in abeyance is when an otherwise admissible contention raises issues encompassed by a pending design certification rulemaking that is referenced in the COL application.⁹⁰ Those circumstances are not present with New Contention Eleven.

In summary, BREDL simply has not provided any legal basis for admitting New Contention Eleven and then holding it in abeyance and BREDL's request should be denied.

F. The Board Should Not Refer New Contention Eleven to the Commission

Finally, BREDL argues that “[i]f the ASLB does not determine that it has the authority to admit the contention because it presents a challenge to a generic rule, we request the ASLB to refer the contention to the Commission.”⁹¹ BREDL has not addressed—much less satisfied—the requirements for referral of an issue to the Commission.

In general, the regulations state that the Commission will review a referred ruling only if it “raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.”⁹² These circumstances are not present here. The issues raised by New Contention Eleven are not novel, are conclusively resolved by the existing Waste Confidence Rule and Table S-3, and therefore referral will not materially advance the orderly disposition of this proceeding.

V. CONCLUSION

For the foregoing reasons, New Contention Eleven is improperly filed with the Board; attempts to re-litigate a previously-rejected contention without demonstrating that the record for the contested portion of this proceeding should be reopened; and fails to satisfy the timeliness,

⁹⁰ Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

⁹¹ New Contention Eleven at 3-4.

⁹² 10 C.F.R. § 2.341(f)(1).

standing, and contention admissibility requirements in 10 C.F.R. § 2.309. Furthermore, BREDL fails to establish that New Contention Eleven should be held in abeyance or referred to the Commission. Accordingly, New Contention Eleven should be rejected.

Respectfully submitted,

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Dated in Washington, D.C.
this 3rd day of April 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
DUKE ENERGY CAROLINAS, LLC)	Docket Nos. 52-018 and 52-019
(William States Lee III Nuclear Station, Units 1 and 2))	April 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2009 a copy of “Duke Energy Carolinas, LLC’s Answer Opposing Blue Ridge Environmental Defense League New Contention Eleven” was served on the following persons by the Electronic Information Exchange:

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