

April 3, 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)

NRC STAFF ANSWER TO "NEW CONTENTION ELEVEN"
FILED BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff (Staff) of the Nuclear Regulatory Commission (NRC or Commission) hereby answers the Blue Ridge Environmental Defense League (BREDL) "New Contention Eleven," filed on March 10, 2009,¹ in the William States Lee III Units 1 and 2 (Lee) combined license (COL) proceeding.² As explained below, Contention 11 should not be admitted because it attacks the current regulations and concerns generic

¹ Although the first page of the filing is dated March 9, 2009, the automated email the Staff received from the Office of the Secretary on March 10, 2009, stated that the filing "was submitted through the NRC's Electronic Information Exchange (EIE) system and arrived on 03/10/2009 00:28:32." Furthermore, the certificate of service attached to the filing states that New Contention Eleven was served on March 10, 2009.

² The regulations provide twenty-five days for answering "a request for a hearing, a petition to intervene *and/or proffered contentions*." 10 C.F.R. § 2.309(h)(1) (emphasis added). A reading of this language that gives effect to every word in the regulation suggests that § 2.309(h)(1) encompasses "proffered contentions" not submitted as part of the initial hearing request or intervention petition. See *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC __ (Feb. 4, 2009) (slip op. at 12 n.49) (providing, with respect to late-filed contentions on a specific issue discussed in the decision, twenty-five days for answers and seven days for replies, citing to § 2.309(h)(1),(2)). *But see Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), ASLBP No. 04-821-01-ESP (May 4, 2005) (slip op. at 2-3) (ADAMS No. ML051250033) (unpublished memorandum reading § 2.309(h) to cover only initial hearing requests and intervention petitions and concluding that the regulations provide no explicit deadline for answers to late-filed contentions).

issues that are the subject of an ongoing rulemaking. Furthermore, BREDL fails to meet the late-filing requirements of 10 C.F.R. § 2.309(c) and (f)(2).

BACKGROUND

By letter dated December 12, 2007, Duke Energy Carolinas, LLC (Duke or Applicant), submitted a COL application (Lee COL application) for two AP1000 advanced passive pressurized water reactors (PWRs) to be located in Cherokee County, South Carolina. The Federal Register notice of hearing (Hearing Notice) was published on April 28, 2008 (73 Fed. Reg. 22,978). BREDL filed its intervention petition (Petition) on June 27-28, 2008.

On September 22, 2008, an Atomic Safety and Licensing Board (“Board”) issued a Memorandum and Order, denying BREDL’s intervention petition. *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC __ (slip op.) (hereinafter “Lee Order”). The Board found that BREDL had demonstrated standing but had not submitted an admissible contention. Although the Board rejected all of BREDL’s contentions, the Board referred its ruling on Contention 2 to the Commission pursuant to 10 C.F.R. § 2.323(f). *Id.* (slip op. at 14). The Board referred its ruling on Contention 2, which concerned greenhouse gas emissions, because a licensing board in the Bellefonte COL proceeding had previously referred a nearly identical contention to the Commission. *Id.* (slip op. at 13-14). The Board also denied as moot the requests of the South Carolina Office of Regulatory Staff and the North Carolina Utilities Commission to participate as interested government entities, pursuant to 10 C.F.R. § 2.315(c). No other intervention petition or request to participate was submitted, and no appeal was taken from the *Lee Order*. The Commission has yet to act on the Board’s referral.

DISCUSSION

As explained below, Contention 11 is inadmissible as it does not satisfy the late-filed contention requirements of 10 C.F.R. § 2.309(c) and (f)(2). Further, even if Contention 11 had satisfied the requirements of 10 C.F.R. § 2.309(c) and (f)(2), the contention would still be

inadmissible because it attacks the current regulations and concerns issues that are the subject of an ongoing, general rulemaking. Contention 11, therefore, is outside the scope of this proceeding and does not present a genuine, material dispute with the Applicant based on the COL application. See 10 C.F.R. § 2.309(f)(1)(iii), (vi).³

I. Statement of Contention

BREDL Contention 11 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. [New Contention Eleven at 4].

In proposed Contention 11, BREDL asserts that the Lee COL application is inadequate due to the NRC's proposed Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008) (hereinafter "Proposed Waste Confidence Decision Update"), and the proposed rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of

³ Additionally, it is not clear to the Staff that the Board possesses jurisdiction over Contention 11. In a recent license amendment proceeding, the Commission stated, "Generally, once there has been an appeal or petition to review a Board order ruling on intervention petitions (or, where a hearing is granted, following a partial or final initial decision), jurisdiction passes to the Commission, including jurisdiction to consider any motion to reopen." *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC __ (March 5, 2009) (slip op. at 7) (but concluding that the licensing board obtained jurisdiction through a referral from the Secretary of the Commission). See also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35 (2006) (concluding in a license renewal proceeding that the licensing board did not have jurisdiction over a motion to reopen filed after the denial of intervention because the licensing board had "already dismissed the case").

The instant situation could arguably be considered analogous in relevant respects to the situations described above because, with the *Lee Order*, the Board disposed of the intervention petition and all other requests to participate in this proceeding. Furthermore, no appeal was taken from the *Lee Order*, and the only pending issue was a ruling that the Board referred to the Commission under 10 C.F.R. § 2.323(f). The referred ruling rejected a contention on greenhouse gas emissions, not spent fuel storage, and that issue is before the Commission, not this Board.

Reactor Operation, 73 Fed. Reg. 59,547 (Oct, 9, 2008) (hereinafter “Proposed Temporary Storage Rule”). BREDL’s Contention 11 “seeks to enforce, in this specific proceeding, the NRC’s commitment that ‘it would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.’ . . . The contention also seeks to enforce the requirement of the National Environmental Policy Act (‘NEPA’) that generic determinations under NEPA must be applied to individual licensing decisions and must be adequate to justify those individual decisions.” New Contention Eleven at 2 (internal citations omitted). BREDL takes issue with the proposed decision and the proposed rule, but also contends that the NRC must finalize determinations on the Waste Confidence Decision and the Temporary Storage Rule before the NRC issues a COL to Lee. *Id.* at 3. BREDL admits that it does not seek to litigate the relevant issues in this licensing proceeding, but requests that “the contention [] 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.” *Id.* at 3.

II. Contention 11 is Inadmissible

A. Legal Standards for Admission of Late-Filed Contentions

Under Commission regulations, a late-filed contention may be admitted only upon the presiding officer’s determination, *inter alia*, that the contention should be admitted after balancing the eight factors listed in 10 C.F.R. § 2.309(c), all of which must be addressed in the petitioner’s filing.⁴ Petitioners seeking the admission of a late-filed contention bear the burden

⁴ Section § 2.309(c) requires a balancing of the following factors for late-filed contentions:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the 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;

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of showing that a balancing of these factors weighs in favor of admittance. See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). The Commission has defined “good cause” in its adjudicatory decisions as a showing that the petitioner (1) could not have met the filing deadline and (2) “filed as soon as possible thereafter.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564-65 (2005). Where no showing of good cause for lateness is tendered, a petitioner’s demonstration on the other factors must be particularly strong. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992). The fifth and sixth factors, the availability of other means to protect the petitioner’s interest, and the ability of other parties to represent the petitioner’s interest, are less important than the other factors, and are therefore entitled to less weight. See *id.* at 74.

The Commission’s regulations additionally provide that “contentions may be amended or new contentions filed after the initial filing” only if 1) the new or amended contention is based on information that was not previously available, 2) the petitioner shows that this information is

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- (iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest;
- (v) The availability of other means whereby the requestor’s/petitioner’s interest will be protected;
- (vi) The extent to which the requestor’s/petitioner’s interests will be represented by existing parties;
- (vii) The extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor’s/petitioner’s participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c).

materially different from what was previously available, and 3) the petitioner shows that the contention was filed in a “timely fashion based on the availability of the subsequent information.” 10 C.F.R. § 2.309(f)(2)(i)-(iii). A comparison of the Commission’s description of “good cause” with the § 2.309(f)(2)(i)-(iii) factors shows that these factors essentially outline the application of “good cause” to contentions based on previously unavailable information. The § 2.309(c) and § 2.309(f)(2)(i)-(iii) factors, and the other late-filing language in § 2.309(f)(2), are the result of a rulemaking in 2004. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004) (hereinafter “2004 Part 2 Rule”). Although the § 2.309(f)(2)(i)-(iii) factors were new to the 2004 rule, the § 2.309(c) factors and much of the rest of the § 2.309(f)(2) language largely incorporate the NRC’s long-standing late-filed contention requirements. Compare 10 C.F.R. § 2.309(c) and (f)(2) with 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004). Lastly, a petitioner must also show that the late-filed contention meets the substantive contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). See *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993).⁵ Failure

⁵ 10 C.F.R. § 2.309(f)(1) requires a proposed contention to:

- (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) In a proceeding other than one under 10 CFR 52.103, 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

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to comply with any of the contention requirements may be grounds for dismissing a contention. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

The Staff believes that petitioners submitting a late-filed contention after the initial filing need to address the § 2.309(c)(1) factors, as well as the § 2.309(f)(2)(i)-(iii) factors. By its terms, § 2.309(c)(1) applies to “[n]ontimely requests and/or petitions *and contentions*.” § 2.309(c)(1) (emphasis added). Furthermore, the balancing factors for “[n]ontimely filings” in § 2.309(c) largely derive from the balancing factors for “[n]ontimely filings” under the former 10 C.F.R. § 2.714(a), which, prior to the 2004 Part 2 Rule, governed the admission of late-filed contentions. See 10 C.F.R. § 2.714(a)(1), (a)(3), (b)(1) (2004); *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 154, *reconsid'n denied*, CLI-93-12, 37 NRC 355, *clarified*, CLI-93-19, 38 NRC 81 (1993) (stating that the § 2.714(a) factors must be applied to new and amended environmental contentions). See also *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-47 (1983) (concluding that the § 2.714(a)(1) balancing factors apply even to late-filed contentions based on previously unavailable information). Also, in the statements of consideration for the 2004 Part 2 Rule, the Commission specifically stated that new or amended contentions based on information in the Staff's Safety Evaluation Report would be evaluated under § 2.309(c) to determine “the possible effect that the admission of amended or new contentions may have on the course of the proceeding.” 2004 Part 2 Rule, 69 Fed. Reg. at 2202. This language clearly encompasses late contentions after the initial filing. Finally, the Commission recently reiterated

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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.
10 C.F.R. § 2.309(f)(1)(i)-(vi).

that “[n]ew bases for a contention cannot be introduced in a reply brief, *or any other time after the date the original contentions are due*, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).” *Amergen Energy Co.* (License Renewal for Oyster Creek Nuclear Generating Station) CLI-09-07, 69 NRC __ (Apr. 1, 2009) (slip op. at 32) (emphasis added) (quoting *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)).

Some licensing boards have taken an opposing view, concluding that the § 2.309(c)(1) factors need not be applied if the § 2.309(f)(2)(i)-(iii) factors are met. See e.g., *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813 (2005); *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 396 n.3 (2006) (agreeing with *Vermont Yankee*, LBP-05-32). The *Vermont Yankee* licensing board based its view, primarily, on a comparison of “timely fashion” in § 2.309(f)(2)(iii) with “nontimely” in § 2.309(c) and concluded that it would be contradictory to apply the § 2.309(c) factors for nontimely filings to a contention that was filed in a timely fashion based on previously unavailable information. *Vermont Yankee*, LBP-05-32, 62 NRC at 821. Read in context, however, and consistent with the authorities identified in the previous paragraph, the Staff believes that “timely fashion” in § 2.309(f)(2)(iii) refers to timeliness with respect to “the availability of the subsequent information,” while § 2.309(c) applies to filings that are “nontimely” with respect to the deadlines for initial filings.⁶ In any event, BREDL should

⁶ The *Vermont Yankee* licensing board also believed that it would be “neither logical nor sensible” to apply eleven “hurdles” (the eight § 2.309(c) factors plus the three § 2.309(f)(2) factors) to late contentions submitted after the initial filing that were based on new information, while applying only eight hurdles to a new intervention petition with a contention based on old information that was tardily submitted through inadvertence. See *Vermont Yankee*, LBP-05-32, 62 NRC at 821 n.21. The Staff, however, does not believe that such an arithmetic comparison is illuminating where the eight § 2.309(c) factors are balancing factors rather than independent hurdles, the eight balancing factors are not all given equal weight, and the three § 2.309(f)(2) factors are clearly related to the single “good cause” factor in § 2.309(c)(1)(i). For example, an otherwise admissible late-filed contention promptly submitted with good cause based on previously unavailable information would meet the § 2.309(f)(2) test as well as satisfy the (continued. . .)

have addressed the § 2.309(c) factors under either the Staff interpretation or the *Vermont Yankee* interpretation because, as explained below, BREDL does not meet the § 2.309(f)(2)(i)-(iii) test.

B. Contention 11 Does Not Satisfy the Criteria for Late-Filing.

Contention 11 is based primarily on information contained in comments submitted February 6, 2009, on the Proposed Waste Confidence Decision Update and the Proposed Temporary Storage Rule. As explained below, Contention 11 is inadmissible to the extent that it relies on the information contained in the February 6, 2009, comments because BREDL fails to demonstrate that the late-filing factors in 10 C.F.R. § 2.309(c) and (f)(2)(i)-(iii), are satisfied.⁷

Under 10 C.F.R. § 2.309(c), a requester or petitioner is required to “address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.” In support of its late-filed contention, BREDL recites each of the § 2.309(f)(2)(i)-(iii) criteria, and corresponding reasons that these criteria supposedly run in BREDL’s favor. BREDL, however, does not address § 2.309(c)(1). Accordingly, Contention 11 does not comply with the Commission’s late-filed contention rules.

BREDL has not demonstrated that it has good cause under § 2.309(c)(1)(i). While BREDL asserts that Contention 11 is based on information which was not previously available,

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“good cause” factor in § 2.309(c)(1)(i). This alone might prove determinative since good cause is the most important factor in the § 2.309(c)(1) balancing.

⁷ Contention 11 also contains a paragraph discussing a portion of President Obama’s *proposed* budget of February 26, 2009, that is related to the high-level waste repository application that has been filed with the NRC. See New Contention Eleven at 9 and Exhibit B. Although this budget proposal is of recent vintage, this information constitutes but a minor portion of the Contention 11 discussion. Also, BREDL does not explain how this information, on its own, satisfies the standards in § 2.309(f)(1)(i)-(vi), nor does BREDL mention the budget proposal in its discussion of the § 2.309(f)(2)(i)-(iii) late-filing factors. In addition, as explained in Section II.C., below, Contention 11 is inadmissible because it attacks current regulations and concerns issues that are the subject of an ongoing, general rulemaking.

the contention is primarily based on comments that BREDL submitted on February 6, 2009, regarding the NRC's Proposed Waste Confidence Decision Update and Proposed Temporary Storage Rule, which were published on October 9, 2008. See New Contention Eleven at 1. BREDL admits that it is "placing *the exact same concerns*" before the Board that it has placed before the Commission with its comments. *Id.* at 3 (emphasis added).

BREDL claims that its own February 6, 2009 comments constitute new information for the purposes of the proposed contention because:

[T]he information on which the contention is based, i.e., the legal and technical analyses of the Proposed Confidence Decision and the Proposed Temporary Storage Rule, were not available to the Blue Ridge Environmental Defense League until February 6, 2009, when the Comments were finalized, presented to Blue Ridge Environmental Defense League for concurrence, and submitted to the NRC.

New Contention Eleven at 9. This position is inconsistent with Commission precedent on new information. In a recent case, the Commission, in denying an appeal from the denial of a late-filed contention, stated the following:

[The Petitioner] did not justify its untimely attempt to raise these new issues. To show good cause, 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. . . . [The Petitioner has] failed to demonstrate good cause, as the information it relied upon was available earlier, and is not new information merely because [the Petitioner] was not aware of it earlier.

Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC ___ (Mar. 5, 2009) (slip op. at 15) (emphasis added). Also, the good cause factor would have no practical force if a petitioner could cite its own documents as new information.

Here, the Contention by its own terms is based upon the NRC's October 9, 2008, Proposed Waste Confidence Decision Update and Proposed Temporary Storage Rule. None of the information contained in BREDL's February 6, 2009, comments is alleged to be based upon information that was not previously publicly available. Instead, BREDL claims that the contention is based upon analyses performed for BREDL that were not available prior to the day

BREDL filed its comments. However, BREDL does not claim that these analyses are themselves based upon information that was not previously publicly available, or explain how they otherwise constitute new information. Therefore, BREDL has not shown good cause for its late filing. Thus, the most important of the late-filed contention factors in the § 2.309(c) balancing weighs against consideration of the contention. As discussed below, for similar reasons, BREDL also fails to satisfy the late-filing requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii).

Two of the other balancing factors also weigh against contention admissibility. Concerning § 2.309(c)(1)(vii), admission of Contention 11 could cause a substantial delay and would broaden the issues in this proceeding, since the Board previously rejected all contentions, and the only pending issue is a ruling on BREDL Contention 2 (which concerns greenhouse gases) that was referred to the Commission. As for § 2.309(c)(1)(viii), BREDL's participation would not assist in developing a sound record because (1) the waste confidence aspect of the contention is the subject of an ongoing rulemaking where BREDL has already filed comments with the Commission, and (2) any generic attack on Table S-3 is appropriately pursued through a rulemaking petition. The record is not developed further by litigating these generic issues in this adjudication.

BREDL has not shown good cause for its late-filed contention and BREDL has other, more appropriate, avenues for advancing its generic concerns. This contention will also not assist in developing a sound record, although it will broaden the issues and could delay the proceeding. Although BREDL has established standing and there are no other parties available to represent its interests in this adjudicatory proceeding, Contention 11 should be rejected based on the 10 C.F.R. § 2.309(c)(1) balancing, especially since BREDL did not even address the § 2.309(c) factors.

The proposed contention is also inadmissible because it does not satisfy 10 C.F.R. § 2.309(f)(2)(i)-(iii). As discussed above, BREDL does not demonstrate that the information on which its February 6, 2009, comments are based is information that only recently

became available and that is materially different from information that was previously available. See 10 C.F.R. § 2.309(f)(2)(i), (ii). Furthermore, BREDL fails to demonstrate that Contention 11 was filed in a timely fashion based on the availability of new information. See § 2.309(f)(1)(iii). To the extent that BREDL's contention is based on the Proposed Waste Confidence Decision Update and Proposed Temporary Storage Rule, these documents were published five months before Contention 11 was submitted, well past the time in which a contention could be considered as filed in a timely fashion. Therefore, the proposed contention does not satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i), (ii) or (iii), and is inadmissible.

C. Contention 11 is Inadmissible Because it Concerns an Ongoing, General Rulemaking and Because It Attacks the Current Regulations.

"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.'" *Oconee*, CLI-99-11, 49 NRC at 345 (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)). In *Oconee*, the Commission also stated that "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies." *Id.* at 334. See also 10 C.F.R. § 2.335. Here, BREDL's arguments constitute an attack on the current regulations in 10 C.F.R. § 51.23 (waste confidence regulation) and 10 C.F.R. § 51.51 (Table S-3). BREDL's arguments also concern generic issues which are the subject of an ongoing rulemaking proceeding. BREDL acknowledges this in its pleading and further admits that it does not wish to litigate Contention 11 in this licensing proceeding. New Contention Eleven at 3-4. Therefore, the proper venue for BREDL's concerns with the Commission's Proposed Waste Confidence Decision Update and Proposed Temporary Storage Rule is not this licensing proceeding, but the process for submitting comments on the proposed decision and the proposed rule. See 10 C.F.R. § 2.335. See also *Oconee*, CLI-99-11, 49 NRC at 334, 345. BREDL, in fact, says that it has submitted

comments on both the Proposed Waste Confidence Decision Update and Proposed Temporary Storage Rule. See New Contention Eleven at 1. Also, to the extent that BREDL wishes to attack Table S-3 in 10 C.F.R. § 51.51, the appropriate forum is the petition for rulemaking process outlined in 10 C.F.R. § 2.802.

In the *Lee Order*, this Board rejected a similar contention attacking the adequacy of the waste confidence regulation. See *Lee Order*, 68 NRC ___ (slip op. at 30) (describing Contention 10B as “a paradigm of an inadmissible contention” because it attacked a current regulation). The Board stated, “At least six other licensing boards have considered BREDL’s position, and have rejected it. We agree with them.” *Id.* (internal footnote omitted). The *Lee Order* also reflects BREDL’s stated intention “to participate in the pending Nuclear Regulatory Commission rulemaking on waste confidence.” *Id.* (quoting BREDL Reply at 20).

BREDL Contention 11 offers nothing new to suggest that the reasoning given in the *Lee Order* should not also apply here. Under § 2.335, an NRC regulation may not be attacked in an adjudicatory proceeding unless the petitioner meets the following standards for a waiver of, or exception to, the regulation:

The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.

§ 2.335(b). In explaining these standards in *Millstone*, the Commission held, among other things, that a waiver or exception could only be appropriate if the alleged special circumstances were “‘unique’ to the 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), *reconsid’n denied*, CLI-89-3, 29 NRC 234 &

CLI-89-7, 29 NRC 395 (1989)) (internal footnote omitted). See also *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 69 NRC __ (2009) (slip op. at 9 n.38) (concerning an attack on Table S-3). Here, BREDL does not address the § 2.335 standards, and the issues raised by BREDL are not unique to the Lee COL application but, instead, represent a generic attack on the current regulations. Contention 11, therefore, must be rejected because it is outside the scope of this licensing proceeding and does not present a genuine, material dispute with the Applicant based on the COL application.

10 C.F.R. § 2.309(f)(1)(iii), (vi).

Further, BREDL states that, although it does not seek to litigate Contention 11 in this proceeding, it requests that “the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal.” New Contention Eleven at 3. The Commission, however, has held that a deficient contention cannot be either conditionally admitted or conditionally denied; it must, instead, be rejected “outright.” *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC __ (Feb. 4, 2009) (slip op. at 8). BREDL Contention 11, therefore, should simply be denied.

Finally, BREDL requests that the Commission finalize the Proposed Waste Confidence Decision Update and Proposed Temporary Storage Rule before any decision to license Lee. New Contention Eleven at 3. BREDL claims that this is required by NEPA because environmental concerns must be considered before undertaking the Federal action. *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). BREDL provides no reason to believe that a licensing decision in this proceeding would necessarily come prior to the conclusion of a rulemaking proceeding and does not explain how its argument supports contention admissibility. More fundamentally, however, BREDL’s position fails to recognize that

licenses can be issued based on the conclusions in the current waste confidence regulation in 10 C.F.R. § 51.23 until the ongoing rulemaking process is completed.⁸

CONCLUSION

Contention 11 is inadmissible because it attacks the current regulations and concerns generic issues that are the subject of an ongoing rulemaking. Furthermore, BREDL fails to satisfy the requirements in 10 C.F.R. § 2.309(c) and (f)(2) for late-filed contentions. For these reasons, Contention 11 should not be admitted.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
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⁸ Also, contrary to BREDL's claim on page five of New Contention Eleven, the Proposed Waste Confidence Decision Update does not repudiate the assumption that it is possible to safely dispose of spent nuclear fuel in a repository.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO 'NEW CONTENTION ELEVEN' FILED BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE" has been served upon the following persons by Electronic Information Exchange this 3rd day of April 2009:

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