

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
)  
PPL BELL BEND, LLC ) Docket No. 52-039  
)  
)  
(Bell Bend Nuclear Power Plant) )

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NRC STAFF'S ANSWER TO "PETITION TO INTERVENE IN THE  
RADIOACTIVE BELL BEND NUCLEAR POWER PLANT COMBINED  
CONSTRUCTION AND LICENSE APPLICATION BY GENE STILP  
AND TAXPAYERS AND RATEPAYERS UNITED (TRU)

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June 12, 2009

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") hereby answers the "Petition to Intervene in the Radioactive Bell Bend Nuclear Power Plant Combined Construction and License Application by Gene Stilp and Taxpayers and Ratepayers United (TRU)" ("Stilp/TRU Petition"), dated May 18, 2009.<sup>1</sup> The NRC staff ("Staff") agrees that Taxpayers and Ratepayers United ("TRU") has presented information sufficient to establish standing in this proceeding, but, for the reasons set forth below, the Staff opposes Mr. Stilp's standing. In addition, the Staff submits that all the contentions proposed by Mr. Stilp and TRU (collectively, "Petitioners") are inadmissible and should be denied.

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<sup>1</sup> Through a memorandum dated May 22, 2009, the Secretary of the Nuclear Regulatory Commission ("Secretary") referred three petitions filed in this proceeding to the Honorable E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel. Two of these petitions bear the same title as the Stilp/TRU Petition, and Mr. Gene Stilp submitted both petitions on May 18, 2009. Although the Secretary identified these two petitions by different titles and indicated that Mr. Stilp filed one as a representative of TRU and filed the other *pro se* on his own behalf, the NRC staff compared these two documents using *Adobe Acrobat* and found them identical. Therefore, the NRC Staff is responding to both petitions as though they were one filing. The NRC Staff is also today responding to the third petition, which was filed by Eric Joseph Epstein, in a separate answer.

## BACKGROUND

On October 10, 2008, PPL Bell Bend, LLC (“Applicant”), pursuant to the Atomic Energy Act of 1954, as amended (“AEA”), and 10 C.F.R. Part 52, submitted an application for a combined license (“COL”) for a U.S. Evolutionary Power Reactor (“U.S. EPR”) (“Application”). The proposed facility would be located adjacent to the PPL Susquehanna Steam Electric Station in Luzerne County, Pennsylvania. Application, Part 3 at 1-1. The Application incorporates by reference the design certification application submitted on December 11, 2007, by AREVA NP (“AREVA”) for the U.S. EPR, including supplements 1 and 2, and the design control document (“DCD”) that is part of the design certification application. Application, Part 2 at 1-1. The Applicant calls the proposed plant the Bell Bend Nuclear Power Plant. *Id.*

On November 13, 2008, the Staff published in the *Federal Register* a “Notice of Receipt and Availability of Application for a Combined License” for the proposed facility. 73 Fed. Reg. 67,214 (Nov. 13, 2008). The Application was accepted for docketing on December 29, 2008. Acceptance for Docketing of an Application for Combined License for Bell Bend Nuclear Power Plant, 73 Fed. Reg. 79,519 (Dec. 29, 2008). On March 18, 2009, the NRC published a Notice of Hearing on the Application, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding. Combined License Application for the Bell Bend Nuclear Power Plant; Notice of Hearing, Opportunity To Petition for Leave To Intervene, and Associated Order, 74 Fed. Reg. 11,606 (Mar. 18, 2009) (“Notice of Hearing”). In response to the Notice of Hearing, Mr. Stilp and TRU timely submitted the Stilp/TRU Petition, through which they seek to intervene in this proceeding.

## DISCUSSION

In the Stilp/TRU Petition, Mr. Stilp asserts that he has standing to intervene individually, and that TRU has representational standing to intervene on behalf of its

members located within 50 miles of the proposed facility. Stilp/TRU Petition at 2-7.<sup>2</sup> The Petitioners propose five contentions, which relate to high level radioactive waste that would be generated by the facility if the Application were granted (*id.* at 7), low level radioactive waste that would be generated at the proposed facility (*id.* at 27), the environmental health and safety impacts resulting from terrorist attacks on the proposed facility (*id.* at 38), the Application's referencing of a design that is not certified (*id.* at 59), and decommissioning funding (*id.* at 66). The Staff addresses Petitioners' standing and each of these contentions *seriatim* below.

I. LEGAL STANDARDS

A. Standing to Intervene

In accordance with the Commission's Rules of Practice:

[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 which 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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<sup>2</sup> The Stilp/TRU Petition is unnumbered. An electronic version of the Petition filed in this proceeding in PDF format, however, may be viewed using the *Adobe Acrobat* program, which assigns a number to each page of the Petition (displayed in the status bar at the top of the page). The Staff herein refers to the pages of the Petition by these page numbers.

(ii) The nature of the requestor's/petitioner's right under the [AEA] 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 Env'tl. Study Group, Inc.*, 438 U.S. 59, 72 (1978), and quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In order to demonstrate the requisite “personal stake,” the 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*, CLI-94-12, 40 NRC at 71-72 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotations omitted).

In reactor licensing proceedings, licensing boards have acknowledged that “Commission case law has established a ‘proximity presumption,’ whereby an individual may satisfy . . . standing requirements by demonstrating that his or her residence or activities are within . . . a 50-mile radius of such a plant.” *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs, Unit 3), LBP-09-04, 69 NRC \_\_ (Mar. 24, 2009) (slip op. at 5) (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 65 NRC 41, 52 (2007)) (“*Calvert Cliffs*”). The Commission has concluded that individuals residing within the 50-mile radius “face a realistic threat of harm if a

release of radioactive material were to occur from the facility,” and need not make individual showings of injury, causation, and redressability. *Id.* at 12-13 (citing *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (“*St. Lucie*”)); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150 (2001)). Licensing boards have consistently applied the proximity presumption in reactor licensing proceedings, granting standing to individuals residing within the 50-mile radius. *See, e.g., Virginia Elec. & Power Co., d/b/a/ Dominion Virginia Power and Old Dominion Elec. Coop.* (North Anna Power Station Power Station, Unit 3), LBP-08-15, 68 NRC 294, 304 (2008).

An organization may establish its standing to intervene on a theory of representational standing, based upon the standing of its members. An organization that seeks to establish representational standing must show that at least one of its members may be affected by the proceeding, must identify that member, and must show that the member “has authorized the organization to represent him or her and to request a hearing on his or her behalf.” *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007) (internal citations omitted) (“*Palisades*”). 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 may 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 are currently set forth in 10 C.F.R. § 2.309(f) of the Commission’s Rules



of Practice (formerly 10 C.F.R. § 2.714(b)).<sup>3</sup> In order to be admissible under 10 C.F.R. § 2.309(f)(1), a proposed 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 information sufficient to show that a genuine dispute with the applicant exists in 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 of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.

See 10 C.F.R. § 2.309(f).<sup>4</sup>

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<sup>3</sup> In 2004, the Commission codified the requirements of former § 2.714, together with rules regarding contentions set forth in Commission cases, in 10 C.F.R. § 2.309. 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 Atomic Licensing 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.

<sup>4</sup> Section 2.309(f)(1)(1)-(iv) are identical to the criteria in (1) through (4) above. Criteria (5) and (6) above, however, summarize the rule language, but are not identical to it. Section 2.309(f)(1)(v) and (vi), and 2.309(f)(2) read as follows:

(Continued...)

Sound legal and policy considerations underlie the Commission's contention requirements. The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202. 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." *Id.* 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. "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek

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(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.

(vii) [Standards for hearings under 10 C.F.R. § 52.103]

(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) - (f)(2).

Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal citation omitted).

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

These rules focus the hearing process on real disputes susceptible to resolution in an adjudicatory proceeding. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) ("*Oconee*"). 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. See 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. STANDING.

A. MR. STILP'S STANDING

Mr. Stilp states in the Stilp/TRU Petition, and in a declaration that he submitted in support of one of the contentions in the Petition, that he owns a house and property less than 20 miles from the proposed Bell Bend Nuclear Power Plant, and his business activities frequently require him to travel within a 50-mile radius of this proposed plant. Stilp/TRU Petition at 2-3; "Declaration of Gene Stilp in Support of Petitioners' Contention Regarding Environmental Policy of Low Level Radioactive Waste Storage in Pennsylvania," ¶1 (May 18, 2009) ("Stilp Declaration"). Mr. Stilp does not claim to reside at this property, nor does he identify his residence. *Id.* Mr. Stilp does not describe the nature of his contacts with this property (how often he visits it, the length of time he spends there per visit), nor does he describe the property or the nature of his interest in it. *Id.* Nor does Mr. Stilp describe the nature of the property and how it could be affected by the proposed action. *Id.* Nor does he describe the locations within a 50-mile radius of the proposed facility that he visits for his business interests, or the frequency and length of such visits. *Id.* The rest of Mr. Stilp's declaration addresses his knowledge and experience regarding low-level radioactive waste, and provides no further information regarding the nature of his interest and how it could be affected by the proposed action. *Id.* ¶¶2-5.

In its decision in *St. Lucie*, the Commission indicated that it had held, in operating license and construction permit proceedings, that living within a specific distance of the plant was "enough to confer standing on an individual[.]" *St. Lucie*, CLI-89-21, 30 NRC at 329. Mr. Stilp, however, has not identified where he lives. See Stilp Declaration.

Accordingly, he has not established standing due to proximity under the test recited in the *St. Lucie* decision.<sup>5</sup> Also, since he has not drawn a connection between his property and the proposed action and has not specified any details about his “business interests” or how frequently and for what duration they take him near the proposed plant site, he has not met the traditional test for standing. That is, he has not alleged an “injury in fact” that is “fairly traceable to the challenged action” and is “likely” to be “redressed by a favorable decision” under *Sequoyah Fuels*. *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72. Accordingly, the Staff objects to Mr. Stilp’s standing to participate in this proceeding. See *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_\_ (Mar. 24, 2009) (slip op. at 6) (citing *Shearon Harris*, LBP-07-11, 65 NRC 41, 52 (2007)).

B. TAXPAYERS AND RATEPAYERS UNITED’S STANDING

TRU, which is a Pennsylvania corporation with members in 29 counties within Eastern Pennsylvania, claims to have representational standing to intervene in this proceeding based on a demonstrated injury-in-fact to one of its members, Adam Helfrich. Stilp/TRU Petition at 4 - 7; “Declaration of Adam Helfrich in Support of Taxpayers and Ratepayers United Association’s Petition to Intervene in Bell Bend Licensing Proceeding,” (May 15, 2009) (“Helfrich Declaration”). Mr. Helfrich states that he is a member of TRU, lives within 17 miles of the proposed Bell Bend Nuclear Power Plant, and is concerned that the construction and operation of the proposed plant could adversely affect his health and safety. See Helfrich Declaration.

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<sup>5</sup> One Licensing Board ruled that an individual’s claim of ownership of improved farmland 10 to 15 miles from the facility site and occasional visits to this farm was insufficient to establish an interest that could be affected, and that the individual did not have standing to intervene. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336-68 (1979) (“WPPSS”). While Mr. Stilp claims to have an interest in a house that is located less than 20 miles from the proposed facility, unlike the petitioner in *WPPSS*, he does not indicate the nature of his interest. Stilp Declaration ¶1. Mr. Stilp’s circumstances would appear similar to those of the petitioner in the *WPPSS* proceeding.

Based on his residence within a 50-mile radius of the proposed facility, and in accordance with the decision in *St. Lucie*, Mr. Helfrich need not make individual showings of injury, causation, and redressability. See *St. Lucie*, CLI-89-21, 30 NRC at 329. Under the standard recited in *Calvert Cliffs*, Mr. Helfrich would otherwise have standing to participate in this proceeding in his own right, and, accordingly, TRU may establish representational standing through him. See *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_\_ (Mar. 24, 2009) (slip op. at 6). In addition, Mr. Helfrich has authorized TRU to represent him in this proceeding. See Helfrich Declaration.

Nonetheless, TRU must also show that the interests that the organization seeks to protect in this proceeding are germane to its own stated 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. TRU describes itself as “a Pennsylvania corporation with members in the PPL service territory which comprises twenty-nine counties in eastern Pennsylvania.” Stilp/TRU Petition at 4. TRU states that its purpose is “fighting the 40% rate increase scheduled for all PPL customers on December 31, 2009[,]” and that it “has an ongoing interest in costs associated with taxpayer and ratepayer economics, safety, nuclear power, energy efficiency, radioactive nuclear waste, alternative energy, and the risks posed by radioactive nuclear plants and radioactive nuclear waste dumps in all of Pennsylvania, including the Bell Bend radioactive nuclear plant site.” Stilp/TRU Petition at 4-6.

The interests in safety and the risk of nuclear plants and waste, *inter alia*, are germane to Mr. Helfrich’s interests, who stated that:

I am concerned that if the NRC grants a license for the proposed plant, 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, including releases of radioactive material during storage of radioactive waste on the site.

Helfrich Declaration. Because Mr. Helfrich, who established standing to intervene in his own right, authorized TRU to represent his interests in this proceeding, and TRU's organizational interests are germane to Mr. Helfrich's interests, TRU has met the standard for representational standing set forth in *Palisades*. See *Palisades*, CLI-07-18, 65 NRC at 409.

### III. CONTENTIONS

#### A. PROPOSED CONTENTION 1:

##### High Level Radioactive Waste Generated by PPL at Bell Bend

The contention is that the PPL Construction and Licensing Application for a new radioactive nuclear plant cannot be granted because there is no reasonable or technical confidence or belief that the high level radioactive waste from the Bell Bend's radioactive nuclear power plant will be disposed of, or can be disposed of in a safe way, and that PPL has not addressed this issue in its Application, and that PPL's Bell Bend high level radioactive nuclear waste disposal problem has unique, special and site specific, safety, health and environmental issues that allow the ASLB to consider this contention at this time as specific and non-generic or allows the ASLB to delay their deliberations on this contention until the rulemaking on the Rule for the Proposed Temporary Spent Fuel Storage proposal and the Waste Confidence Decision that is proposed are ruled on because any license granted to PPL must be in compliance with the National Environmental Policy Act.

Stilp/TRU Petition at 7-8.

Petitioners provide a history of the nation's high level waste program (*id.* at 11-17) and conclude that the proposed Yucca Mountain repository "is dead" and, therefore, the State of Pennsylvania will have "de facto 'permanent' high level radioactive waste storage areas next to the five nuclear plants in the state." *Id.* at 8-9. Petitioners claim that the NRC no longer has a basis for its Waste Confidence Rule and that Table S-3 must be reevaluated. See *id.* at 18. Petitioners argue that this contention should be

admitted in accordance with 10 C.F.R. § 2.335(b) because “‘unique’ and ‘special circumstance[s]’” exist. *Id.* In the alternative, Petitioners argue that if the Board determines Proposed Contention 1 is inadmissible, it should hold this contention in abeyance or refer it to the Commission for its consideration. *See id.* at 25.

Staff Response: The Staff opposes admission of Proposed Contention 1 for three reasons, which are more fully discussed below. First, Proposed Contention 1 impermissibly challenges the Commission’s regulations and Petitioners have failed to show that special circumstances exist. *See* 10 C.F.R. §§ 2.335(a), (b). Second, Proposed Contention 1 inappropriately seeks to address issues that are the subject of an ongoing rulemaking. *See Oconee*, CLI-99-11, 49 NRC at 345. Finally, Petitioners fail to meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(iii), (v) and (vi). Accordingly, Proposed Contention 1 should be denied.

1. Proposed Contention 1 constitutes an impermissible attack on Commission rules.

Contrary to the requirements of § 2.335, Proposed Contention 1 impermissibly attacks the Commission’s regulations. *See Oconee*, CLI-99-11, 49 NRC at 334 (“a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies.”). A Commission regulation may be challenged in adjudication only if a waiver is explicitly granted or an exception is made in a particular proceeding. 10 C.F.R. § 2.335(a), (b).

Here, Petitioners assert that there is “no reasonable or technical confidence or belief that high level radioactive waste” from the proposed plant will be or can be disposed of in a safe way. *Stilp/TRU Petition* at 7. Petitioners claim that the Waste



Confidence Rule does not satisfy the requirements of NEPA and the AEA. *Id.* at 17.<sup>6</sup> Petitioners further claim that the NRC must reevaluate “Table S-3 because it can no longer have confidence in the complete safe disposal of high level radioactive nuclear waste at a permanent site.” *Id.* at 18 (citing Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,491 (Sept. 18, 1990)). Petitioners repeatedly emphasize their issue with long term or permanent storage of spent fuel and the underlying reason for their concern, which is the absence of a permanent disposal facility for high-level waste. *See, e.g., id.* at 7, 8, 12, 13, 14, 16, 17, 19.

These assertions attack the Commission’s Waste Confidence Rule and Table S-3. The Waste Confidence Rule states that the Commission has determined that there is reasonable assurance that a geologic repository will be available by 2025 and that sufficient repository capacity will be available within 30 years to dispose of high level waste and spent fuel generated by any reactor up to that time. 10 C.F.R. § 51.23(a). Furthermore, the Commission has also determined that, “if necessary, spent fuel generated in any reactor can be stored *safely and without significant environmental impacts for at least 30 years*” in an onsite spent fuel pool or an on-site or off-site independent spent fuel storage installation (ISFSI). *Id.* (emphasis added). Based on the Commission’s generic findings, the regulations expressly state that no discussion of environmental impacts of spent fuel storage for the specified period is required in an Environmental Report (“ER”) or an Environmental Impact Statement (“EIS”) prepared in connection with the requested action. 10 C.F.R. § 51.23(b). As previous Boards have

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<sup>6</sup> The Waste Confidence Decision contains the Commission’s generic findings regarding the availability of a geologic repository for high level waste disposal and the environmental impacts and safety of storing spent fuel onsite beyond the licensed operating life of a reactor. Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990) (codified in the Waste Confidence Rule, 10 C.F.R. § 51.23(a)).

stated, the Waste Confidence Rule is applicable to new reactor proceedings and “contentions challenging this rule or seeking its reconsideration” should not be admitted. *See, e.g., Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), LBP-08-21, 68 NRC \_\_\_ (Oct. 30, 2008) (slip op. at 39); *Bellefonte*, LBP-08-16, 68 NRC at 416.

Petitioners also challenge Table S-3, asserting it must be reevaluated because the NRC cannot have confidence in the safe disposal of high level waste. Stilp/TRU Petition at 18. Petitioners allege “that the generic high level radioactive waste issue has safety significance for the Bell Bend reactor . . . and that the way Bell Bend ER deals with the matter of high level radioactive nuclear waste . . . is inadequate.” *Id.* at 24. To support their position, Petitioners cite *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87 (1983), which states that an agency must consider all “environmental effects in a manner that will ensure that the overall process . . . brings those effects to bear on the decisions to take particular actions that significantly effect the environment.” Stilp/TRU Petition at 14-15 (quoting 42 U.S. at 96). However, this decision also states that:

[a]s *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decision-making structure. Here, *the agency has chosen to evaluate generically the environmental impact of the fuel cycle* and inform individual licensing boards, through the *Table S-3 rule*, of its evaluation. *The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA.*

*Baltimore Gas & Elec. Co.*, 42 U.S. at 100-101 (emphasis added). The Commission’s regulations require that an environmental report prepared in support of a COL application for a light-water-cooled power reactor “take Table S-3 . . . as the basis for evaluating the contribution of . . . and management of . . . high-level wastes related to uranium fuel cycle activities to the environmental costs of licensing the nuclear power

reactor.” 10 C.F.R. § 51.51(a). Petitioners have not disputed the Applicant’s analysis of environmental effects based on Table S-3. Rather, Petitioners challenge the NRC’s generic determinations in Table S-3 and generally state that the ER is inadequate. See, e.g., Stilp/TRU Petition at 18, 19.<sup>7</sup> Petitioners have, however, failed to establish the requirements for a waiver as required by § 2.335(a).

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.” 10 C.F.R. § 2.335(b). In order to challenge a Commission regulation, a petitioner must submit a supporting affidavit setting forth “with particularity” the special circumstances that justify the waiver or exception requested. 10 C.F.R. § 2.335(b).<sup>8</sup> Commission decisions have defined the scope and application of 10 C.F.R. § 2.335(b), stating that a waiver may be granted only where:

(i) the rule's strict application “would not serve the purposes for which [it] was adopted”; (ii) the movant has alleged “special circumstances” that were “not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived”; (iii) those circumstances are “unique” to the facility rather than “common to a large class of facilities”; and (iv) a waiver of the regulation is necessary to reach a “significant safety problem.” The use of “and” in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four* factors must be met.

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<sup>7</sup> The Applicant included the evaluation of Table S-3 in ER Table 5.7-1. Petitioners do not reference or dispute the Applicant’s analysis in this table, and, therefore, fail to raise a genuine dispute with the Application. See 10 C.F.R. § 2.309(f)(1)(vi).

<sup>8</sup> Section 2.335 was formerly § 2.758. Because no changes were made to the regulatory language with the number revisions in 2004, case law interpreting § 2.758 is applicable to § 2.335. See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2224 (Jan. 14, 2004).

*Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-560 (2005) (internal citations omitted).

It is not enough merely to allege the existence of special circumstances in a proceeding; a petitioner must make a *prima facie* showing that application of the rule or regulation as written “would not serve the purposes for which the rule was adopted.” 10 C.F.R. § 2.335(b); see *Carolina Power & Light Co.* (Shearon Harris Nuclear Plant), ALAB-837, 23 NRC 525, 546 (1986). Such waivers or exceptions are only granted in “*unusual and compelling circumstances.*” *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972) (emphasis added).

Petitioners assert that unique and special circumstances exist in regard to the application of 10 C.F.R. § 51.23 and Table S-3 with respect to the Application, and argue that their attack on the Commission’s regulations is therefore permissible. Stilp/TRU Petition at 18-19 (citing 10 C.F.R. § 2.335(b)). Petitioners set forth three reasons to support their claim that a waiver is appropriate in regard to their attack on § 51.23 and one reason in regard to Table S-3. With respect to § 51.23, Petitioners first assert special circumstances in that the proposed location of the Bell Bend facility is adjacent to an existing nuclear power unit. *Id.* at 9-10, 20. Second, Petitioners assert that local water, air, and soil conditions near the proposed facility constitute the requisite special circumstances. *Id.* at 21. Third, Petitioners assert that the “defunding of Yucca Mountain” is a special circumstance. *Id.* at 8-9, 17-19. With respect to Table S-3, Petitioners assert that the “fuel burn up factor that affects the waste content” is a special circumstance. *Id.* at 22-23. Petitioners have not submitted an affidavit with respect to any of these asserted special circumstances to justify their request, which is required by 10 C.F.R. § 2.335(b). This failure alone is reason enough to conclude that Petitioners have not established the special circumstances required to justify the waiver they

request. Nonetheless, the Staff discusses each of Petitioners' asserted special circumstances below.

First, Petitioners claim that Bell Bend is unlike the four other reactors in Pennsylvania and is a "special area or case" because the proposed location of Bell Bend is next to an existing plant. Stilp/TRU Petition at 9-10, 20. This assertion, however, does not present a unique situation, does not demonstrate that a rule waiver is necessary to reach a significant safety finding and does not show that the rule's application would not serve the purpose for which it was adopted. *See Millstone*, CLI-05-24, 62 NRC at 559-60. The proposed location for Bell Bend next to an existing plant does not create a unique situation. A number of the current COL applications including those for the proposed Callaway, Calvert Cliffs, Comanche Peak, Fermi, Shearon Harris, South Texas, Virgil C. Summer, and Vogtle facilities propose new units next to existing units.<sup>9</sup> In addition, Petitioners do not provide any information to show that a rule waiver is necessary to address a significant safety problem because Bell Bend will be built next to an existing plant.<sup>10</sup> Finally, Petitioners fail to show that the

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<sup>9</sup> *See, e.g.*, Callaway Plant Unit 2 Combined License Application, Rev. 1, Part 3: Environmental Report, Section 1.1 (Rev. 1) (Feb. 2009) (ADAMS Accession No. ML090710383); Calvert Cliffs Nuclear Power Plant Unit 3 Combined License Application, Part 3: Environmental Report, Rev. 4, Section 1.1 (Mar. 2009) (ADAMS Accession No. ML090860302); Comanche Peak Nuclear Power Plant, Units 3 & 4 COL Application, Part 3 – Environmental Report, Section 1.1 (Sept. 2008) (ADAMS Accession No. ML082680343); Fermi 3 Combined License Application, Part 3: Environmental Report, Section 1.1 (Sept. 2008) (ADAMS Accession No. ML082730645); Shearon Harris Nuclear Power Plant Units 2 and 3 COL Application Part 3, Environmental Report, Section 1.0 (Feb. 2008) (ADAMS Accession No. ML080600904); South Texas Project Units 3 and 4 Combined License Application, Part 3 – Environmental Report, Rev. 2, Section 1.1 (Sept. 2008) (ADAMS Accession No. ML082831274); Virgil C. Summer Nuclear Power Station Units 2 & 3 COLA, Part 3 Environmental Report, Rev. 1, Section 1.1.2.2 (Feb. 2009) (ADAMS Accession No. ML090510239); Southern Nuclear VEGP Units 3 & 4 COLA (Environmental Report), Rev. 0, Section 1.1 (Mar. 2008) (ADAMS Accession No. ML081050181).

<sup>10</sup> *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 239 (1998), *reconsid. on other grounds*, LBP-98-10, 7 NRC 288 (1998), *reconsid. aff'd*, CLI-98-13, 48 NRC 26 (1998) (stating a waiver petition must show "that the circumstances involved are 'unusual and compelling' such that it is evident from the petition and other allowed (Continued...)

location of the proposed plant next to existing plants creates a special circumstance, such that the Commission's rule would not serve the purpose for which it was adopted, *i.e.*, to avoid case-by-case determinations regarding generic findings in the Waste Confidence Rule. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 241 (1998) *reconsid. granted on other grounds*, LBP-98-10, 47 NRC 288, *aff'd* CLI-98-10, 48 NRC 26 (citing Waste Confidence Decision, 49 Fed. Reg. 34,658, 34,666 (Aug. 31, 1984)). Thus, Petitioners' assertions regarding the proposed plant's proximity to existing units, without more, fail to establish the requisite special circumstances for a waiver.

With respect to Petitioners' second claim that the proposed plant is unique and special due to its "geographic location which includes the water, air, soil conditions, geologic conditions that are special to that specific location," Petitioners state that Bell Bend is unique because it will be located on the Susquehanna River. Stilp/TRU Petition at 21. In this regard, Petitioners argue that the "hundreds of thousands of people who utilize the Susquehanna River for drinking water downstream constitute a unique environmental consideration for this site." *Id.* As Petitioners note, however, the proposed unit is not the only plant on the Susquehanna River; Three Mile Island, Peach Bottom, and Susquehanna Units 1 and 2 are also located on the Susquehanna River. *Id.* at 21-22.<sup>11</sup> Petitioners claim that the cumulative effect of nuclear effluents from the

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papers that a waiver is necessary to address the merits of a 'significant safety problem' relative to the rule at issue.") (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989)).

<sup>11</sup> Petitioners appear to assert that the Susquehanna facility is unique compared to the five other facilities in Pennsylvania, since the proposed Bell Bend facility would be located adjacent to the Susquehanna site. Stilp/TRU Petition at 9-10. This proceeding, however, is (Continued...)

proposed facility into the Susquehanna River and Chesapeake Bay must be considered with other sources of such effluents. *Id.* Petitioners, however, do not attempt to relate this claim to the provisions of § 51.23 (or Table S-3). Accordingly, Petitioners' argument regarding local conditions fails to demonstrate how the underlying purpose of these rules would not be served by their application in this proceeding, as required by § 2.335(b).<sup>12</sup>

Third, Petitioners assert that the special and unique situation "officially came into existence with the complete defunding of Yucca Mountain" (Stilp/TRU Petition at 17), which Petitioners claim "implements the administration's decision to terminate the Yucca Mountain Program . . . ." *Id.* at 9 (quoting *FY 2010 Energy Budget Shuts Yucca Mountain Nuclear Dump*, THE ENVIRONMENT NEWS SERVICE, May 8, 2009, <http://www.ens-newswire.com/ens/may2009/2009-05-08-092.asp>). Petitioners argue that the elimination of Yucca Mountain will create a "de facto" permanent" storage area on the Bell Bend site and that the site specific environmental impacts from this storage have not been assessed. *Id.* at 9, 17, 18-19 (emphasis added). On this basis,

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about the Bell Bend application, and not the Susquehanna facility. The special circumstances required for a waiver of § 2.335 must apply with respect to the proposed Bell Bend facility.

<sup>12</sup> Petitioners do not identify any deficiency or omission in the Application with respect to radioactive effluents. It is not clear precisely what issue Petitioners seek to litigate (other than the generic requirements of these rules) in connection with the proposed facility. In any event, the Petitioner does not reference and dispute the Applicant's analysis of such effects in ER Section 5.4 and ER Table 5.4-24.

Similarly, Petitioners assert that a special circumstance exists because the proposed facility will be located near a "low level dump" because the proposed plant will not have access to an offsite low level waste disposal due to the recent closure of the Barnwell facility. Stilp/TRU Petition at 22. Petitioners make no attempt to connect this assertion to the rules they seek to attack, nor do they attempt to show how the underlying purpose of these rules, which relate to high-level waste, and not low-level waste, would not be accomplished as a result. Moreover, as recent NRC guidance recognizes, the closure of Barnwell affects "LLRW generators in 36 States" who will have to "store their Class B and C LLRW for an indeterminate amount of time. See RIS-2008-32 at 1 (Dec. 30, 2008) (ADAMS Accession No. ML082190768). Accordingly, this is not a circumstance unique to this Application. The Staff addresses Petitioners' complaints in regard to low-level waste in the Staff Response to Proposed Contention 2.

Petitioners assert that special circumstances exist because the Commission's regulations and the Application are "fractured by [the] reality" that a repository will not be built. *Id.* at 19.

The Secretary of the Department of Energy's statement that the new administration will not go forward with a high level waste repository at Yucca Mountain, and has cut funding for the project, as asserted by Petitioners, is not unique to the proposed Bell Bend plant. *See id.* at 9. The future status of the proposed high level waste repository at Yucca Mountain has been raised in a number of COL proceedings. *See, e.g.*, Transcript, Progress Energy Florida, Inc. Levy County Nuclear Plant at 291 (Apr. 21, 2009) (ADAMS Accession No. ML091200251); "Petition for Intervention and Request for Hearing" at 25 (Apr. 21, 2009) (South Texas COL Proceeding) (ADAMS Accession No. ML091110736); Petition for Intervention and Request for Hearing at 16-17 (Apr. 6, 2009) (Comanche Peak COL Proceeding) (ADAMS Accession No. ML090970373) (all referencing Secretary Chu's statement that Yucca Mountain is no longer an option). Accordingly, this information does not provide circumstances to support a rule waiver in this instance.

Further, Petitioners claim that elimination of funding for Yucca Mountain will create an onsite, *de facto* permanent, storage area. Stilp/TRU Petition at 9, 17. Petitioners' claim, absent more, is not sufficient to show a "significant safety problem exists." *See Millstone*, CLI-05-24, 62 NRC at 560. The Commission has determined that "even in the event that the YM repository will not become available, it retains confidence that spent fuel can be safely stored with no significant environmental impact until a repository can reasonably be expected to be available and that the Commission has a target date for the availability of the repository in that circumstance." Waste Confidence Decision Update (Proposed Rule), 73 Fed. Reg. 59,551, 59,558 (Oct. 9, 2008). Thus, Petitioners' assertions regarding the future funding and availability of



Yucca Mountain fail to meet the requirements for a rule waiver. See 10 C.F.R.

§ 2.335(b); *Millstone*, CLI-05-24, 62 NRC at 559-60.

With respect to Table S-3, Petitioners claim that the proposed EPR design “has a fuel burn up factor that affects the waste content and makes the Applicants lack of addressing the special and unique circumstances surrounding the proposed radioactive nuclear plant even more open to contention and rejection of the ER as inadequate.”

Stilp/TRU Petition at 23. Petitioners claim that a special circumstance exists because Table S-3 needs a makeover. *Id.* at 19. Petitioners do not, however, provide any factual support or expert opinion to demonstrate that these assertions create special and unique circumstances. Mere assertion of the existence of special circumstances in a proceeding is insufficient; Petitioners are required to make a *prima facie* showing that the application of the rule or regulation as written “would not serve the purposes for which the rule was adopted.” See *Shearon Harris*, ALAB-837, 23 NRC at 546.

Petitioners' bare assertions that special circumstances exist, so as to merit further discussion of the matter, fail to satisfy these criteria.

Accordingly, Petitioners have not shown that “unusual and compelling circumstances” exist which would necessitate the granting of a waiver or exception with respect to Proposed Contention 1. See *Monticello*, CLI-72-31, 5 AEC at 26. Petitioners, however, request that, if the Board finds this contention inadmissible, the Board hold the contention in abeyance or refer it to the Commission for its determination. Stilp/TRU Petition at 25.

The suggestion that the contention should be held in abeyance does not make it admissible, nor does it exempt it from the requirements of 10 C.F.R. § 2.309(f)(1). As the Commission recently held, for a contention to be held in abeyance, it must otherwise be admissible. See *Shearon Harris*, CLI-09-08, 68 NRC \_\_ (May 18, 2009) (slip op. at 5) (citing Conduct of New Reactor Licensing Proceedings; Final Policy Statement,

73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (“Final Policy Statement”). As discussed below, Proposed Contention 1 does not satisfy the requirements of 10 C.F.R.

§ 2.309(f)(1), and, therefore, is not admissible and should not be held in abeyance.

Further, because Petitioners have failed to show that application of the Commission’s regulations would not serve the purposes for which the rules were adopted, Proposed Contention 1 should not be certified to the Commission. See 10 C.F.R. § 2.335(d).

Finally, Proposed Contention 1 does not meet the requirements for referral to the Commission. Pursuant to 10 C.F.R. § 2.323(f)(1) and 2.341(f)(1), a decision may be referred to the Commission if it “raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding.” 10 C.F.R. § 2.341(f)(1). As indicated above, Proposed Contention 1 does not raise novel legal or policy issues and Petitioners have not provided any information to indicate that resolution of this contention would materially advance the orderly disposition of this proceeding. See 10 C.F.R. §§ 2.323(f)(1), 2.341(f)(1). Thus, Proposed Contention 1, like similar contentions in other proceedings, should be dismissed without referral to the Commission. See *e.g.*, *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_ (slip op. at 58-59); *Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site)*, LBP-04-17, 60 NRC 229, 246-47 (2004).

Accordingly, Proposed Contention 1 is an impermissible attack on the Commission’s regulations and Petitioners have failed to meet the requirements for a waiver; it is therefore inadmissible and should not be referred or certified to the Commission or held in abeyance.

2. The Contention is an impermissible attack on an ongoing Commission rulemaking.

Proposed Contention 1 is also inadmissible because the issues raised are the subject of an ongoing rulemaking. In October 2008, the Commission published

proposed revisions to the Waste Confidence Decision and Rule. Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008); Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, Proposed Rule, 73 Fed. Reg. 59,547 (Oct. 9, 2008). The proposed revisions do not alter the Commission's findings of reasonable assurance regarding future repository availability and ability to store spent fuel after cessation of reactor operations. 73 Fed. Reg. at 59,551. The Commission has stated that "[i]t has long been agency policy that Licensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." *Oconee*, CLI-99-11, 49 NRC at 345. Therefore, the contention should be rejected on this basis as well. See *Shearon Harris*, LBP-08-21, 67 NRC at \_\_\_ (slip op. at 40 n.36).

3. The Contention is outside the scope of this proceeding, does not demonstrate the existence of a genuine dispute with the Applicant on a material issue of law or fact, and is not supported by alleged facts or expert opinions.

Finally, Proposed Contention 1 is inadmissible because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (v), and (vi). First, Petitioners fail to raise a genuine dispute regarding a material issue of law or fact that is within the scope of this proceeding because they do not reference or dispute any specific portion of the Application. 10 C.F.R. § 2.309(f)(1)(vi). Petitioners' assertions regarding the unavailability of a geologic repository and lack of sufficient capacity in a geologic repository challenge the regulations, but do not address any specific deficiency in the COL application. The Commission has emphasized that "[t]he purpose and scope of a licensing proceeding is to allow interested persons the right to challenge the sufficiency of the *application*." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC \_\_\_ (Oct. 6, 2008) (slip op. at 18) (emphasis added). Because this proposed contention challenges the Commission's generic determinations,

and does not assert legal deficiencies or omissions in the Application, it is outside the scope of the proceeding and fails to raise a genuine dispute regarding this Application.

10 C.F.R. § 2.309(f)(1)(iii) and (vi).

Petitioners also fail to provide a regulatory basis for many of their assertions. For example, Petitioners claim that the Environmental Protection Agency's Final Yucca Mountain Radiation Standards "should apply to any temporary or permanent high level radioactive nuclear waste site." Stip/TRU Petition at 10, 19. Petitioners also claim that the Applicant must assess the environmental impacts of long-term onsite storage of high level radioactive waste, despite the provisions of Table S-3, and that the ER must evaluate the fact that an offsite repository is not foreseeable. *See id.* at 19. Petitioners do not, however, provide a regulatory basis to support any of these assertions. Without a legal basis to demonstrate that allegedly missing information is required by law, Proposed Contention 1 cannot be construed as a contention of omission. *See Calvert Cliffs*, LBP-09-04, 69 NRC \_\_\_ (slip op. at 22) ("A contention of omission claims that 'the application fails to contain information on a relevant matter as required by law . . . and [provides] the supporting reasons for the petitioner's belief.' To satisfy Section 2.309(f)(1)(i)-(ii), the contention of omission must describe the information that should have been included in the ER and provide the legal basis that requires the omitted information to be included.").

Finally, Petitioners cannot rely on bare and speculative assertions to support admission of this contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). For example, Petitioners claim, without support, that there will be synergistic effects on the Chesapeake Bay resulting from radioactive effluents from the proposed facility that should be considered by the Applicant. *See id.* at 21-22. These assertions cannot demonstrate a special circumstance exists at the proposed site because Petitioners do not provide any factual support or expert opinion that would

suggest that the proposed reactors “will have’ a cumulative or synergistic environmental impact upon the Chesapeake Bay.” See *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_ (slip op. at 43) (rejecting an environmental contention where petitioners failed to show that the proposed new reactor would have a cumulative or synergistic environmental impact on the Chesapeake Bay). Further, Petitioners do not reference or dispute the Applicant’s analysis of the cumulative radiological impacts from liquid effluents, gaseous effluents, and direct radiation from Susquehanna Units 1 and 2 and the proposed Bell Bend unit in ER Section 5.4 and Table 5.4-24. Accordingly, Petitioners have failed to support their assertion regarding cumulative and synergistic effects, have failed to demonstrate that such effects are in fact cumulative, have failed to dispute the Applicant’s analysis and, therefore, have not satisfied the requirements of 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

In summary, Proposed Contention 1 impermissibly challenges the Commission’s regulations and Petitioners have failed to show that special circumstances exist. Proposed Contention 1 also inappropriately seeks to address issues that are the subject of an ongoing rulemaking. Finally, Petitioners fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (v) and (vi). Accordingly, Proposed Contention 1 should be denied.

B. PROPOSED CONTENTION 2:

Low Level Radioactive Nuclear Waste Generated by PPL at Bell Bend

Proposed Contention 2: PPL’s application to construct and operate the radioactive nuclear power plant know[n] as the Bell Bend Nuclear Power Plant violates the National Environmental Policy Act (NEPA) by failing to clearly address the serious environmental, health and safety impacts of the radioactive nuclear waste that it will generate in the absence of licensed low level radioactive nuclear waste disposal facilities or capability to isolate the radioactive waste from the environment. The utility’s self generated and prejudiced environmental report on the radioactive nuclear power plant know[n] as Bell Bend (ER) does not address the environmental, health, safety, security, environmental justice or economic consequences

that will result from the lack of a permanent disposal facility.

Stilp/TRU Petition at 27.

Petitioners state that because the Barnwell facility closed in June 30, 2008, there is not a licensed disposal facility available for generators of Class B and C and Greater Than Class C Waste in Pennsylvania. *Id.* at 27-28. Petitioners argue that although the ER discusses low level radioactive waste (LLRW) in a number of sections, it does not “address the complete long term storage” of this waste and fails to offer a viable storage plan. *Id.* at 28-31 (citing ER at Figure 3.5-8; Section 3.5.4; Section 3.5.4.2; 3.5.4.5; 3.8.4). In addition, Petitioners claim that the ER fails to provide sufficient information regarding “the health effects of extended on site storage of radioactive waste” and argue that the ER must include information for the suggested operating life of 60 years, or at least for the license term of 40 years. *Id.* at 31. Although Petitioners state this contention challenges the ER, they also state that the Applicant did not address the impacts of decommissioning, health, safety and security that will result from long term, onsite storage of LLRW. *See id.* at 27, 36.

Petitioners assert that this contention is within the scope of this proceeding and is material to compliance with NEPA and NRC regulations. *Id.* at 34 (citing 10 C.F.R. § 2.309(f)(1)(iii), (iv)). Further, Petitioners claim that the Applicant failed to include information required by 10 C.F.R. § 51.45(b) and (e) and NEPA, and therefore this is a contention of omission. *See id.* at 35. Finally, to support this contention, Petitioners provide the Declarations of Diane D’Arrigo and Gene Stilp, both of whom claim to be experts in LLRW policy. Declaration of Diane D’Arrigo in Support of Joint Petitioners in the matter of PPL’s Bell Bend Nuclear Power Plant (May 18, 2009) (D’Arrigo Declaration); Declaration of Gene Stilp in Support of Joint Petitioners; Contention Regarding Environmental Policy of Low Level Radioactive Waste Storage in

Pennsylvania (May 18, 2009) (Stilp Declaration). In addition, Petitioners claim that similar contentions were admitted in the *Calvert Cliffs* and *North Anna* COL Proceedings. *Id.* at 32 (citing *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_\_ (slip op. at 67); *North Anna*, LBP-08-15, 68 NRC at 312-325 (2008)).

*Staff Response:* The Staff opposes admission of Proposed Contention 2, which raises issues with regard to safety and environmental impacts of onsite LLRW storage. Whether this contention is interpreted as a safety or environmental contention, as discussed below, it is inadmissible because it does not raise an issue that is material to this proceeding; does not raise a genuine dispute regarding a material issue of law or fact; is not supported by a legal basis; and is not adequately supported by alleged facts or expert opinions. See 10 C.F.R. § 2.309(f)(1)(ii), (iv), (v), (vi). In addition, to the extent Petitioners seek to challenge this Commission's regulation, Proposed Contention 2 should be dismissed because the requirements for a waiver have not been met. See 10 C.F.R. § 2.335(a), (b).

1. The environmental aspects of Proposed Contention 2 fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(ii), (iv), and (vi).

As the Commission stated in *Bellefonte*, questions regarding environmental impacts of onsite low-level radioactive waste storage are “largely site- and design-specific, and appropriately decided in an individual licensing proceeding, *provided that* litigants proffer properly framed and supported contentions.” *Bellefonte*, CLI-09-03, 68 NRC \_\_\_ (slip op. at 11) (emphasis added). As discussed below, Proposed Contention 2 is not a properly framed and supported contention because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1), and therefore is not admissible. See *id.*

- a. Proposed Contention 2 cannot be construed as an environmental contention of omission, fails to raise a genuine dispute regarding a material issue of law or fact, and is not adequately supported.

An admissible contention must show that a “genuine dispute exists with the applicant/licensee on a material issue of law or fact,” identify either specific portions of, or alleged omissions from, the application, and provide supporting reasons for the petitioner’s position. 10 C.F.R. § 2.309(f)(1)(vi). A petitioner must submit more than “bald or conclusory allegation[s] of a dispute with the applicant,” and “must ‘read the pertinent portions of the license application . . . and . . . state the applicant’s position and the petitioner’s opposing view.’” *Millstone*, CLI-01-24, 54 NRC at 358 (citing Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)). In addition, Petitioners must provide alleged facts or expert opinions to support their position. 10 C.F.R. § 2.309(f)(1)(v).

Here, Petitioners argue that Proposed Contention 2 is a contention of omission because the Application assertedly fails to describe how it will manage onsite storage of LLRW for the license term and fails to address the adverse impacts from long term, onsite storage of LLRW, as required by 10 C.F.R. § 51.45(b) and (e) and NEPA. Stilp/TRU Petition at 34-35. Also, Petitioners claim that the Application does not include sufficient information to understand the health impacts from long term, onsite LLRW storage. *See id.* at 31. Finally, Petitioners note that the Board in *Calvert Cliffs* and *North Anna* recently accepted similar contentions. *Id.* at 32 (internal citations omitted).<sup>13</sup>

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<sup>13</sup> The Board in *North Anna* dismissed the environmental LLRW contention because it found that the LLRW issue was resolved in the ESP proceeding. *North Anna*, LBP-08-15, 68 NRC at 325. The safety LLRW contention was, however, admitted. *Id.* at 325.



The fact that one licensing board has admitted a contention is not an adequate basis for admission of a similar contention in a different proceeding. Each licensing board has the responsibility for judging factual and legal disputes between parties. See *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI- 95-16, 42 NRC 221, 225 (1995). While previous board decisions may provide persuasive authority, the decisions of boards in prior, unrelated COL application proceedings should not be treated as binding precedent.

More importantly, the argument for admitting Proposed Contention 2 in this proceeding based on the admission of allegedly similar contentions in prior proceedings ignores the differences among the various COL applications pending before the NRC. For example, in *Calvert Cliffs*, the Board found the environmental LLRW contention was admissible because the applicant failed to “describe how it will store Class B and C waste on-site and the environmental consequences of extended on-site storage . . . .” *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_\_ (slip op. at 66).<sup>14</sup> The *Calvert Cliffs* Board decision

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<sup>14</sup> In *Calvert Cliffs*, the Board narrowed the admitted contention to read:

The ER for CCNPP-3 is deficient in discussing its plans for management of Class B and C wastes. In light of the current lack of a licensed off-site disposal facility, and the uncertainty of whether a new disposal facility will become available during the license term, the ER must either describe how Applicant will store Class B and C wastes on-site and the environmental consequences of extended on-site storage, or show that Applicant will be able to avoid the need for extended on-site storage by transferring its Class B and C wastes to another facility licensed for the storage of LLRW.

*Calvert Cliffs*, LBP-09-04, 69 NRC \_\_\_ (slip op. at 66). In *Calvert Cliffs*, the applicant’s plan stated that the site had “several years’ volume of solid waste.” *Id.* (slip op. at 74-75) (citing EPR FSAR Section 11.4.1.2.1). The Board stated that a “plan for long-term storage of LLRW must provide for much more than” this. *Id.* (slip op. at 74). The *Calvert Cliffs* Board also stated that the applicant must demonstrate it “will be able to store on-site the volume of LLRW that will be generated during the license term.” *Id.* (slip op. at 75). The Board, however, like these Petitioners, did not reference any regulatory basis to support this assertion. An appeal of this (Continued...)

to admit this contention seemed to hinge on the fact that the applicant failed to acknowledge the closing of Barnwell and failed to explain how it intended to manage LLRW in the absence of an offsite disposal facility. See *id.* (slip op. at 70). The Board stated that the applicant did not even “refer to a ‘concept’ for managing LLRW on-site absent a permanent disposal facility.” *Id.* at 75.<sup>15</sup>

Here, the Applicant discusses onsite storage of LLRW in Section 3.5.4.3 in Part 3 of the Application, the ER. This Section states that the Radioactive Waste Storage Buildings provide capacity to store five to six years of Class B and C waste. ER at 3-59. The ER further states that “[i]n the event no offsite disposal facility is available to accept Class B and C waste from BBNPP when it commences operation, *additional waste minimization measures would be implemented to reduce or eliminate the generation of Class B and C waste.*” *Id.* (emphasis added). The ER also states that these measures could extend capacity in the Radioactive Waste Storage Buildings to over 10 years, which “would provide ample time for offsite disposal capability to be developed or additional onsite capacity to be added.” *Id.* If additional onsite capacity is needed, the ER states that additional storage facilities would be built in accordance with NRC guidance. *Id.* at 3-60. Finally, the ER states that the construction of these buildings

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decision is currently pending before the Commission. See Applicants’ Brief in Support of Appeal from LBP-09-04 (Apr. 3, 2009) (ADAMS Accession No. ML090930785).

<sup>15</sup> The *Calvert Cliffs* Board referenced a *Vogtle* decision in which the Licensing Board presiding over that proceeding held that a safety contention regarding onsite disposal of LLRW was admissible. *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_ (slip op. at 75) (citing *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 & 4), LBP-09-03, 69 NRC \_\_ (Mar. 5, 2009)). The *Vogtle* Board stated that while the applicant had referred to a concept for managing LLRW, none of the details were included or explicitly referenced in the FSAR. *Id.* (slip op. at 26-27). An appeal of this decision is currently pending before the Commission. See Southern Nuclear Operating Company’s Brief in Support of Appeal of LBP-09-03 (Mar. 14, 2009) (ADAMS Accession No. ML090750054); NRC Staff Brief in Support of Appeal from LBP-09-03 (Mar. 14, 2009) (ADAMS Accession No. ML090750722).

would have a minimal impact and their operation “would provide appropriate protection against releases, maintain exposures to workers and the public below applicable limits, and result in no significant environmental impact” consistent with NRC guidance. *Id.* at 3-60.

Petitioners reference this section of the ER and claim that the Applicant’s plan for onsite storage is not complete and viable and that the impacts of onsite storage beyond ten years have not been assessed. Stilp/TRU Petition at 32-34.<sup>16</sup> The Applicant does, however, discuss storage beyond ten years. As discussed above, the ER states that waste minimization measures would be implemented, which “could extend capacity of the Radioactive Waste Processing Building to store Class B and C waste to over 10 years.” ER at 3-59. And, “[i]f *additional* storage capacity for Class B and C waste were necessary,” then the ER states that an additional storage facility can be constructed. *Id.* at 3-60 (emphasis added).

Petitioners do not provide any facts or expert opinions to show that this plan is not adequate, nor have Petitioners referenced any regulatory requirements mandating that additional analyses be provided. In fact, Petitioners state that there are not “any solid NRC rules” with regard to onsite storage of LLRW between ten and sixty years after operations commence. See Stilp/TUR Petition at 32. Therefore, because Petitioners have failed to provide a regulatory basis to support their position that

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<sup>16</sup> Petitioners claim that the Applicant’s plan for “disposal of Class B and C radioactive nuclear waste along with *Greater than Class C waste*” is not sufficient. Stilp/TRU Petition at 28 (emphasis added). As the Board acknowledged in *Calvert Cliffs*, the closure of Barnwell does not affect disposal of Greater-Than-Class C waste because the federal government is responsible for disposing of this waste. See *Calvert Cliffs*, LBP-09-04, 69 NRC at \_\_ (slip op. at 62-63) (internal citations omitted). Petitioners have not offered any facts or expert opinion to indicate that the government will not fulfill its responsibility to provide a disposal facility for this waste. See *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_ at (slip op. at 63). Therefore, portions of NEPA-1 challenging plans for disposal of Greater-Than-Class C waste are speculative and unsupported. See 10 C.F.R. § 2.309(f)(1)(v).

information required by law has been omitted, Proposed Contention 2 cannot be construed as a contention of omission. See *Calvert Cliffs*, LBP-09-04, 69 NRC \_\_\_ (slip op. at 22) (“A contention of omission claims that ‘the application fails to contain information on a relevant matter as required by law . . . and [provides] the supporting reasons for the petitioner’s belief.’ To satisfy Section 2.309(f)(1)(i)-(ii), the contention of omission must describe the information that should have been included in the ER and provide the legal basis that requires the omitted information to be included.”). Furthermore, because Petitioners have failed to provide sufficient information to demonstrate that the Applicant’s plan is not sufficient to meet NRC requirements, Petitioners have failed to raise a genuine dispute. See 10 C.F.R. § 2.309(f)(1)(vi); *Millstone*, CLI-01-24, 54 NRC at 358.

Similarly, Proposed Contention 2 claims that the ER fails to provide sufficient information regarding health impacts of onsite LLRW storage. Stilp/TRU Petition at 31. Petitioners, however, fail to note that the Applicant does include an assessment of doses to the public and workers in ER Sections 5.4, 5.5.2, 5.7.6, and 5.7.7. Petitioners do not reference and dispute these portions of the ER. In addition, Petitioners have failed to provide information to demonstrate that the Applicant’s analyses in these sections are flawed or that additional analyses are required by law. Therefore, Petitioners’ assertions fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and Proposed Contention 2 should be dismissed.

- b. Proposed Contention 2 fails to satisfy 10 C.F.R. § 2.309(f)(1)(iv).

With respect to environmental contentions, the Commission has stated that in “NRC licensing hearings, petitioners may raise contentions seeking correction of significant inaccuracies and omissions in the ER. Our boards do not sit to ‘flyspeck’ environmental documents or to add details or nuances.” *System Energy Resources, Inc.*

(Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005) (internal citation omitted). NEPA analyses are subject to a “rule of reason,’ which frees the agency from pursuing unnecessary or fruitless inquiries.” *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004) (internal citation omitted). NEPA only requires an analysis of reasonably foreseeable environmental effects, not those that are speculative. *See Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (stating that “[r]easonable forecasting . . . is . . . implicit in NEPA”, but “[a]n environmental effect would be considered ‘too speculative’ for inclusion in the EIS if it cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker.”) (internal citation omitted).

Petitioners fail to demonstrate that the issues raised in Proposed Contention 2 are material to the NRC findings needed to support the requested action and “seek correction[ ] of significant inaccuracies and omissions . . . .” *See Grand Gulf ESP*, CLI-05-5, 61 NRC at 13. Petitioners have not provided any information to demonstrate the impacts long term, onsite storage of LLRW may have on the environment. Nor have Petitioners demonstrated that additional, detailed analyses of impacts for forty to sixty years after commencement of operation is not “‘too speculative’ for inclusion in the EIS” and can “be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker.” *See Dubois*, 102 F.3d at 1286. 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 sets forth the necessary technical analysis to show why the proffered bases support its contention.” *PFS*, LBP-98-7, 47 NRC at 180 (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10,

42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (A petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “showing why its bases support its contention.”)). Because Petitioners have not provided information to demonstrate that additional consideration of onsite, long-term storage of LLRW is required and may be material to this proceeding, Proposed Contention 2 should be dismissed. See 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

c. To the extent Petitioners seek to challenge Table S-3, Proposed Contention 2 should be dismissed.

The regulation that applies to the environmental effects of LLRW is 10 C.F.R. § 51.51, in particular, Table S-3. See *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 & 4), CLI-09-03, 69 NRC at \_\_\_ (Feb. 17, 2009) (slip op. at 8-9) (citing *Virginia Electric & Power Co.* (Combined License Application for North Anna, Unit 3), LBP-08-15, 68 NRC 294, 316 (2008)). Section 51.51 requires COL applicants to use Table S-3, “Table of Uranium Fuel Cycle Environmental Data,” as the basis for evaluating the contribution of the environmental effects of many stages of the uranium fuel cycle, including low-level waste management, to the environmental costs of licensing a nuclear reactor. 10 C.F.R. § 51.51(a). Table S-3 provides a list of effluents and other environmental impacts for light-water-cooled reactors and “may be supplemented by a discussion of the environmental significance of the data set forth in the table as weighted in the analysis for the proposed facility.” *Id.*

To the extent that Petitioners seek to challenge 10 C.F.R. § 51.51, this contention is barred from consideration in this proceeding by 10 C.F.R. § 2.335(a). See *also Bellefonte*, CLI-09-03, 69 NRC \_\_\_ (slip op. at 9) (overturning a licensing board’s decision to admit an environmental contention regarding LLRW because it was an impermissible attack on the Commission’s regulation).

An attack on a Commission regulation is only permitted where a waiver is explicitly granted or an exception is made for a particular proceeding. 10 C.F.R. § 2.335(a), (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.” 10 C.F.R. § 2.335(b). 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.* Petitioners have failed to establish that they meet any of these requirements. Therefore, to the extent Proposed Contention 2 is an attack on a Commission regulation and a waiver or exception has not been granted, it should not be admitted. See 10 C.F.R. § 2.335; *Oconee*, CLI-99-11, 49 NRC at 334.

2. Proposed Contention 2 cannot be admitted as a safety contention of omission and fails to raise a genuine dispute.

In addition to arguing that the ER fails to address environmental impacts of onsite storage of LLRW, Petitioners also assert that the Application fails to address the serious health, safety and economic impacts from onsite, long term storage of LLRW. Stilp/TRU Petition at 27. Petitioners do not, however, provide support for this assertion. Petitioners do not reference any portion of the Final Safety Analysis Report (“FSAR”) nor do Petitioners provide a reference to a specific regulation to support their assertion; rather, Petitioners generally state that Proposed Contention 2 “challenges the legal sufficiency of the Applicant’s ER under Part 52” and that the this failure “violates the environmental security and safety requirements under the law.” *Id.* at 33, 34.

Petitioners do not reference any particular regulation and in fact state, in the preceding paragraph, that while there are NRC Guidance documents regarding the issue of onsite storage of LLRW, there are no “solid NRC rules.” See Stilp/TRU Petition at 32.

Petitioners are correct; the Commission’s regulations do not dictate the duration and capacity for onsite LLRW storage that COL applicants must include. Applicants must simply comply with Part 20 dose limits. The Staff’s most recent guidance on interim LLRW storage, issued December 30, 2008, “specifies the information that NRC staff has determined should be included in a Construction and Operating License Application” and Appendix 11.4-A of the Standard Review Plan, NUREG-0800, “provides specific guidance to licensees for increasing on-site LLRW storage capacity.” See RIS 2008-32, Interim Low Level Radioactive Waste Storage at Reactor Sites at 4 (Dec. 30, 2008) (ADAMS Accession No. ML082190768) (discussing Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants (Mar. 2007) (“RIS 2008-32”)). RIS 2008-32 also explains that additional storage facilities may be added to a facility through the 10 C.F.R. § 50.59 process. See RIS 2008-32 at 2, 3, 4 (consolidating relevant information from previous staff guidance documents on interim long-term storage). Nothing in the Commission’s regulations or guidance indicates that a COL applicant is required to provide a detailed explanation of how long-term storage of LLRW will be handled in the event that an offsite disposal facility is unavailable.<sup>17</sup> Because Petitioners have failed to demonstrate that the allegedly missing information is required by law, Proposed Contention 2 cannot be construed as a safety contention of

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<sup>17</sup> The Board in the *Vogtle* COL proceeding did, however, admit a similar safety contention. *Vogtle*, LBP-09-03, 69 NRC \_\_\_ (slip op. at 24-25). An appeal of this decision is currently pending before the Commission. See Southern Nuclear Operating Company’s Brief in Support of Appeal of LBP-09-03 (Mar. 14, 2009); NRC Staff Brief in Support of Appeal from LBP-09-03 (Mar. 14, 2009).



omission. See 10 C.F.R. § 2.309(f)(1)(vi); *Pa'ina Hawaii, LLC* (Material License Application), LBP-06-12, 63 NRC 403, 414 (2006) (stating that a petitioner must show that missing information is required by the Commission's regulations).

Further, Petitioners fail to reference any portion of the FSAR to demonstrate that its safety contention raises a genuine dispute. See 10 C.F.R. § 2.309(f)(1)(vi). Because Petitioners have failed to demonstrate that Proposed Contention 2 raises a genuine dispute regarding the Application and that allegedly missing information is required by law, their contention should be dismissed. See 10 C.F.R. § 2.309(f)(1)(vi). Accordingly, for the reasons discussed above, Proposed Contention 2 should not be admitted as a safety contention.

3. The attached declarations from Mr. Stlip and Ms. D'Arrigo cannot support admission of either an environmental or safety contention.

To support this contention, Petitioners provide the declarations of Mr. Stlip and Ms. D'Arrigo. These declarations do not, however, provide information sufficient to support admission of this contention in accordance with 10 C.F.R. § 2.309(f)(1)(v).

Ms. D'Arrigo's declaration cannot provide support for admission of this contention because not only do Petitioners fail to reference this Declaration anywhere in Proposed Contention 2 as support for this contention, but the declaration also includes a number of unsupported statements. For example, Ms. D'Arrigo speculates, without support, that the outcome for LLRW "could likely be de-facto permanent onsite storage" (D'Arrigo Declaration at ¶6) and that "[i]f perpetual or extended on-site storage of Class B, C and GTCC radioactive wastes is the 'fall back' it could significantly decrease the safety and security of this site" (*id.* at ¶7). Ms. D'Arrigo references a 1998 GAO report discussing the consequences of exposure of unshielded individuals to LLRW in short time frames (approximately 20 minutes) (*id.* at ¶9 (citing GAO/RCED-98-40R Questions on Ward Valley at 99-52 (May 22, 1998) ("GAO Report"))). Ms. D'Arrigo, however, does not

provide any reasoned explanation or analysis to show why or how such exposures might occur, or might be indicative of the effects of long term, onsite storage such that the GAO Report provides a basis for the admission of this contention. A petitioner cannot simply attach material without explaining how or why it is relevant to the contention. See *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 23 (2007) (citing *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204-05 (2003) (“Simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information’s significance, is inadequate to support the admission of the contention.”)). Similarly, Ms. D’Arrigo does not explain how safety and security may be impacted. See D’Arrigo Declaration at ¶6. “An expert opinion that merely states a conclusion (e.g., the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion.” See *USEC Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006) (internal citation omitted).

Similarly, Ms. D’Arrigo asserts, without providing a regulatory basis, that “the applicant must analyze the environmental, safety and security impacts of alternatives for the long-term, indefinite storage of the ‘low-level’ radioactive waste generated by the Bell Bend reactor for its operating years and beyond.” D’Arrigo Declaration. at ¶8. See also *id.* at ¶¶10, 12. 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.” *PFS*, LBP-98-7, 47 NRC at 180-81 (internal citation omitted). Finally, Ms. D’Arrigo suggests that if compaction and incineration are going to be used onsite, this should be included in the Application

so the public can comment on these practices. D'Arrigo Declaration at ¶13. Again, Ms. D'Arrigo provides no regulatory basis or technical analyses to support this assertion.

For similar reasons, Mr. Stilp's Declaration cannot support admission of this contention. Mr. Stilp's Declaration simply states he is an expert, that he prepared Contention 2 and that in his "expert opinion . . . the Bell Bend site is likely to become a long-term storage facility for LLRW because of the lack of any reasonable prospect that a disposal facility will become available at any time in the foreseeable future." Stilp Declaration at ¶¶3, 5. Mr. Stilp does not, however, provide a resume or any indication of the qualifications that render him an expert qualified to make the assertions he makes in support of Proposed Contention 2. Licensing Boards have discounted affidavits in the past where a petitioner failed to "provide sufficient information to establish any expertise . . . ." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 91 n.39 (2004), *aff'd* CLI-04-36, 60 NRC 631 (2004). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 367 (1998), *reconsideration granted on another issue*, LBP-98-17, 48 NRC 69 (1998) (discounting an affidavit of a proffered expert because the intervenor "failed to establish he has the requisite knowledge, skill, training, education, or experience to be considered an expert on physical security matters."). Furthermore, Mr. Stilp, like Ms. D'Arrigo, fails to provide a regulatory basis to support his assertion that the Applicant's plan is inadequate because it does not include a detailed analysis of potentially permanent onsite LLRW storage. *See Stilp/TRU Petition* at 33. "[N]either mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention." *Vogtle ESP*, LBP-07-03, 65 NRC at 253. Because the attached declarations do not contain information to support Petitioners' assertions regarding

alleged inadequacies and omissions, Proposed Contention 2 fails to satisfy 10 C.F.R. § 2.309(f)(1)(v). Accordingly, Proposed Contention 2 should be denied.

C. PROPOSED CONTENTION 3:

Terrorism and Bell Bend: Health, Safety and Environmental Impacts

The Applicant, PPL's, Environmental Report (ER) is deficient because it does not look at the environmental, health and safety effects of a terrorist attack against the proposed radioactive nuclear power plant at Bell Bend or its proposed high level and possibly de facto permanent radioactive nuclear waste facility or its proposed low level radioactive low level nuclear waste storage area.

Stilp/TRU Petition at 38.

In this contention, Petitioners assert that the ER is deficient because it does not address the environmental or health and safety impacts of terrorist actions against either the proposed new nuclear power plant or the high level and low level radioactive nuclear waste that will be stored at the site. Stilp/TRU Petition at 38. Petitioners also assert that the NRC should admit this contention and hold it in abeyance until the Waste Confidence proceeding is resolved, because of the environmental impact that must be assessed in that proceeding. *Id.* at 52. Petitioners also request that this Board not follow previous Commission decisions holding that there is no causal link between an NRC licensing action and any risk of a terrorist attack. *Id.* at 54-58. Although Petitioners refer to certain health and safety matters, they indicate that they do not take issue with the Applicant's preparations for security but intend to focus on the environmental impacts (health and safety) of the proposed facility. *Id.* at 41, 49.

Staff Response: The Staff opposes admission of this contention because it raises issues that are outside the scope of this proceeding and are not material to a decision the NRC must make to grant or deny the Application, it fails to allege facts for support on the asserted issue, and it fails to demonstrate a genuine dispute with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).

Inasmuch as Petitioners state that the proposed contention concerns environmental matters, they are required to identify the specific portions of the ER they seek to challenge, but they do not do so. 10 C.F.R. § 2.309(f)(1)(vi). In addition, the terrorism concerns that Petitioners raise do not meet the NRC's requirements for admitting a contention and holding it in abeyance. Accordingly, Proposed Contention 3 should be dismissed.

1. Proposed Contention 3 raises issues that are outside the scope of this proceeding and not material to a decision the NRC must make to grant or deny the Application.

The Petitioner's main point in this contention is that Part 3 of the Application, the ER, is deficient because it does not address what happens radiologically when an airliner is hijacked and flown directly into a nuclear power plant or high level radioactive spent fuel storage pool. Stilp/TRU Petition at 49. Petitioners assert that the ER does not address the environmental or health and safety impacts of terrorist actions against the proposed nuclear power plant or high or low level radioactive waste that will be stored on-site, and fails to give terrorist attacks the "hard look" that NEPA requires. Stilp/TRU Petition at 50 (citing 40 C.F.R. § 1501). Petitioners assert further that the Applicant has failed to analyze the direct, indirect, and cumulative impacts of the proposed action with respect to the above matters, and has not included an analysis of adverse information. *Id.* at 50-51, (citing 40 C.F.R. §§ 1508.7, 1508.8, and 1508.25; 10 C.F.R § 51.45(e)). Petitioners, however, do not specify what adverse information they believe the Applicant has omitted. *See id.* To support their argument, Petitioners cite the decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1030-31 (9th Cir. 2006), which Petitioners argue requires the NRC to consider the environmental impacts of terrorist attacks. Stilp/TRU Petition at 54. Based on this decision, Petitioners argue that terrorist attacks are foreseeable and the environmental impacts on the health and safety of the surrounding population have to be assessed. *Id.*

The Commission has held that “[n]otwithstanding a recent decision by the United States Court of Appeals for the Ninth Circuit, holding that the NRC may not exclude NEPA-terrorism contentions categorically, we reiterate our longstanding view that NEPA demands no terrorism inquiry.” *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007) (footnote omitted) (license renewal proceeding). The United States Court of Appeals for the Third Circuit upheld this Commission position. In its decision, the Third Circuit determined that “NRC’s lack of control over airspace supports our holding that a terrorist aircraft attack lengthens the causal chain beyond the ‘reasonably close causal relationship.’” *New Jersey Dept. of Env’t. Prot. v. U.S. Nuclear Reg. Comm’n.*, 561 F.3d 132, 140 (3rd Cir. 2009) (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). The Court of Appeals also reasoned that, “if NEPA required the NRC to analyze the potential consequences of an airborne attack, the NRC would spend time and resources assessing security risks over which it has little control and which would not likely aid its other assigned functions to assure the safety and security of nuclear facilities.” *Id.* at 141. Since the proposed facility is to be located in Pennsylvania, which is in the jurisdiction of the Third Circuit, Contention 3 is contrary to controlling Federal Circuit Court and Commission decisions. Accordingly, proposed Contention 3 is beyond the scope of this proceeding and is not material to the findings the NRC must make to support the issuance of the COL, pursuant to 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

2. Petitioners have failed to demonstrate a genuine dispute exists with the Applicant on a material issue of law or fact.

To support this contention, Petitioners recall the events of September 11, 2001, and note that the hijacked plane that crashed into a field in Somerset County, Pennsylvania, passed through the emergency planning zone for the nuclear power plants Susquehanna Units 1 and 2, near Berwick, Pennsylvania, which is the same

emergency planning zone proposed for the Bell Bend Nuclear Power Plant. Stilp/TRU Petition at 37-39. Petitioners also state, generally, that terrorists could cause a major health and safety disaster and an immense loss of life if they crashed a jumbo jet into a nuclear power plant or a radioactive nuclear waste storage site at a nuclear power plant anywhere in the United States, including Susquehanna Units 1 and 2 or the proposed nuclear power plant at Bell Bend. *Id.* at 40. Petitioners also reference man-made disasters at Three Mile Island and Chernobyl, and the uncertainty of the proposed high level radioactive waste underground storage facility at Yucca Mountain as additional factors that impact the licensing and construction of any new nuclear power plant, and should be evaluated. *Id.* Petitioners also generally reference the potential for domestic terrorists to pose threats to a nuclear power plant, and opine that a nuclear power plant is a prime terrorist target, as is a radioactive nuclear waste site, whether it is high level or low level, temporary or permanent. *Id.* at 40-41.

Petitioners note that the focus of the contention is on the environmental, health and safety impacts of the proposed radioactive nuclear power plant for Bell Bend, but do not take issue with the Applicant's preparations for security. *Id.* at 41, 49. Petitioners emphasize that the focus of the contention is to demand that the environmental consequences of the threat of a terrorist attack on the proposed plant are understood and addressed. *Id.* at 49. Although Petitioners state that the security of the proposed plant is not the focus of their contention, Petitioners make several references to emergency plan (EP) information, definitions, and emergency action level (EAL) information. *Id.* at 41-48. Petitioners, however, do not dispute the EP or the EAL information. *Id.* Petitioners note a variety of definitions in the Emergency Planning section of the Application, including the various situations that could initiate EAL classifications. Stilp/TRU Petition at 43-45. Petitioners do not, however, dispute any of this information. With respect to substantive emergency planning and security matters,

Petitioners have failed to demonstrate that there is a genuine dispute with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi).<sup>18</sup>

Petitioners' generalized statements about the possibility of threats or sabotage are insufficient to support this contention. "A petitioner must 'read the pertinent portions of the license application, including the Safety Analysis report and the Environmental Report, state the applicant's position and the petitioner's opposing view,' and explain why it disagrees with the applicant." *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-6, 67 NRC 241, 292 (2008). The Petitioners assert that the ER does not address the environmental impacts when the reactor fails or a high level radioactive spent nuclear fuel pool is breached from terrorist actions and the plume from the radioactive release travels from the immediate plant site. *Id.* at 49-50. Petitioners, however, do not identify any portion of the ER they dispute as deficient or lacking, or discuss the reasons why they dispute any specific information

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<sup>18</sup> Petitioners dispute whether the NRC's provisions regarding notifying the prospective licensee of the proposed Bell Bend Nuclear Power Plant of a large aircraft or of a large aircraft threat within 30 minutes of the site would be sufficient to protect those in the vicinity of the plant. Stilp/TRU Petition at 47-48. To support this aspect of their contention, Petitioners assert that Wilkes-Barre/Scranton Airport, Allentown/ Bethlehem/Easton Airport, Harrisburg International Airport, Binghamton Airport, and airports in Philadelphia or New York, are all closer to the proposed site for the Bell Bend Nuclear Power Plant than 30 minutes by air, such that a 30-minute notification of a threat originating in one of those locations would be inadequate. *Id.* Petitioners also assert the possibility that a terrorist attack could be of a cyber-nature – an attack that reaches into a nuclear power plant's computer system and inflicts damage – or that a Bell Bend or Susquehanna employee with access could start a hostile action resulting in a radioactive deadly release damaging to the health and safety of the people surrounding the proposed site. Stilp/TRU Petition at 54.

The foregoing assertions and asserted facts, however, do not relate to the ER, and therefore do not establish a dispute with the ER. Accordingly, they do not form a basis for the proposed contention. Moreover, these assertions are unsupported by expert opinion, and Petitioners have not provided any references to specific sources or documents the Petitioners would rely on at trial to support these assertions, as required by 10 C.F.R. § 2.309(f)(1)(v). Accordingly, Petitioners' discussion of the issues discussed above is insufficient to justify their admission as contentions in their own right.



presented in ER. See *id.* Accordingly, Petitioners provide no basis for their claim that severe radiological emergencies have not been addressed in the Application, and the Proposed Contention does not satisfy the standards of § 2.309(f)(1)(vi) in this respect.

Petitioners raise several claims concerning the Susquehanna Steam Electric Station (“SSES”), which is adjacent to the site proposed for Bell Bend. Stilp/TRU Petition at 38, 40, 41, 42, 54. Issues concerning the operation of SSES are outside the scope of this proceeding and are not material to any finding the NRC would have to make to grant or deny this COL application. 10 C.F.R. § 2.309(f)(1)(iii)-(iv); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 24 (2007) (For an issue to be material, “the subject matter of the contention must impact the grant or denial of a pending license application.”).

3. Petitioners’ terrorism concerns do not meet the standards for admitting a contention and holding it in abeyance.

Petitioners complain that, given news reports that the Yucca Mountain high level radioactive waste repository is no longer a viable storage option, the Applicant and the NRC may want to store both high and low level radioactive waste in Northeast Pennsylvania.<sup>19</sup> Stilp/TRU Petition at 51. As a result, Petitioners argue that the NRC should hold this contention in abeyance until the Waste Confidence proceeding is resolved, given the environmental impact that must be assessed in that proceeding. *Id.* at 52.

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<sup>19</sup> The NRC establishes and enforces requirements for the possession of radioactive waste, *inter alia*, and does not “want” to store such materials at any particular location. Rather, the NRC licenses the possession of such materials if an applicant demonstrates that it will satisfy the NRC regulations applicable to the requested activity such that the applicant’s proposed activities will provide adequate protection to the public health and safety. See AEA, §§ 53a., 62, 81a., and 182a., 42 U.S.C. §§ 2073(a), 2092, 2111(a) and 2232(a).

As the Staff explained in its responses to Proposed Contentions 1 and 2, above, Petitioners' assertions constitute impermissible attacks on the Commission's Waste Confidence Rule and Table S-3. The Waste Confidence Rule states that the Commission has determined that there is reasonable assurance that a geologic repository will be available by 2025 and that sufficient repository capacity will be available within 30 years to dispose of high level waste and spent fuel generated by any reactor up to that time. 10 C.F.R. § 51.23(a). Furthermore, the Commission has also determined that, "if necessary, spent fuel generated in any reactor can be stored *safely and without significant environmental impacts for at least 30 years*" in an onsite spent fuel pool or an on-site or off-site independent spent fuel storage installation (ISFISI). *Id.* (emphasis added). Based on the Commission's generic findings, the regulations expressly state that no discussion of environmental impacts of long-term spent fuel storage is required in an ER. 10 C.F.R. § 51.23(b).

Similar contentions attacking the Commission's Waste Confidence Decision and Rule have been uniformly rejected.<sup>20</sup> As previous Boards have stated, the Waste Confidence Rule is applicable to new reactor proceedings and "contentions challenging this rule or seeking its reconsideration" should not be admitted. *See Bellefonte*, LBP-08-16, 68 NRC 416. Longstanding NRC precedent indicates that "licensing boards

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<sup>20</sup> Other decisions rejecting such contentions include *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC \_\_ (Oct. 30, 2008) (slip op. at 38-40); *Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 & 2), LBP-08-17, 68 NRC \_\_ (Sept. 22, 2008) (slip op. at 29); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 416-417 (Sept. 12, 2008); *Virginia Elec. & Power Co.* (Combined License Application for North Anna, Unit 3), LBP-08-15, 68 NRC 294, 336-337 (2008); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 267-68 (2007); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 246-47 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 268-69 (2004); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277, 296-97 (2004).

should not accept in individual licensing proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 345 (1999) (internal citation omitted).

Nor does proposed Contention 3 meet the NRC’s admissibility standards for contentions such that it could be admitted conditionally. There is a “longstanding NRC precedent that ‘a licensing board is not authorized to admit conditionally, for *any* reason, a contention that falls short of meeting the specificity requirements’ set forth in our procedural rules.” *Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 69 NRC \_\_\_\_ (Feb. 4, 2009) (slip op. at 3) (quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982)). Instead, the Commission has held that the Board must dismiss insufficient contentions. *Id.* This contention does not meet the standards of admissibility and should be dismissed.

4. Proposed Contention 3 does not identify any basis for departing from settled Commission precedent.

Petitioners assail as deficient the NRC’s actions in reviewing the Application because, according to Petitioners, the NRC “only calls a potential fire at a high density radioactive spent fuel pool a security issue.” *Stilp/TRU* Petition at 50. Petitioners also take issue with what they perceive to be the NRC’s failure to address all environmental impacts of onsite storage of high and low level radioactive waste, and the assertedly greater risk of harm that storage poses due to risks of terrorism. *Id.* at 50 (citing 73 Fed. Reg. 59,551 (Oct. 9, 2008)).

Petitioners nonetheless appear to request that the Commission reconsider its previous decisions in this regard. As discussed above, Petitioners acknowledge that the Commission has determined that NEPA does not require the NRC to consider the

environmental impacts of terrorist attacks as part of its environmental review of license applications. Stilp/TRU Petition at 56 (alluding to the Third Circuit decision in *Amergen*). In addition, as the Commission has repeatedly explained, the fact that the NRC has taken extensive actions to address the safety of nuclear facilities against the risk of terrorism does not mean that, in licensing proceedings, a review of the environmental impacts of terrorist attacks is also necessary under NEPA. See, e.g., *Amergen Energy Co.* (License Renewal for Oyster Creek Generating Station), CLI-07-08, 65 NRC 124, 130-31 (2007); *Private Fuel Storage*, CLI-02-25, 56 NRC at 343-45, 347-48; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335, 339 (2002). Indeed, Petitioners acknowledge the Commission's longstanding position on this issue; but, Petitioners have failed to raise any specific issues regarding Bell Bend that would make application of this settled Commission precedent inappropriate in this proceeding.<sup>21</sup> See Stilp/TRU Petition at 56-57.

To summarize, the NRC staff opposes Proposed Contention 3 for several reasons. The Petition fails to identify an issue within the scope of the proceeding, provides no relevant factual support, and identifies no dispute with the ER. § 2.309(f)(1)(iii), (v), (vi). Additionally, the contention does not meet the standard for being admitted and held in abeyance. Finally, Petitioners appear to request that the Board disregard Commission controlling precedent on the subject of this proposed contention. Petitioners have not provided any basis, facts, threats, or challenges specific to the proposed Bell Bend Nuclear Power Plant, and therefore have not shown why this precedent should not be followed. For these reasons, Proposed Contention 3 is inadmissible and should be dismissed. 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).

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<sup>21</sup> Petitioners suggest that this Board not follow applicable Commission decisions on this topic; the Board should not adopt the suggestion.

D. PROPOSED CONTENTION 4:

Uncertified Nuclear Reactor in Bell Bend Application

This entire proceeding for approval of a combined construction and licensing application, is, at this time, premature and must be suspended or held in abeyance because the redesign of radioactive European Pressurized Reactor that PPL wants to use at the proposed radioactive nuclear plant at Bell Bend is not approved by the Nuclear Regulatory Commission under the Nuclear Regulatory Commission design certification process.

Stilp/TRU Petition at 59.

The essence of Proposed Contention 4, which Petitioners indicate in the basis they assert to support the proposed contention, is that the application is incomplete. *Id.* at 62. Petitioners also assert that “the NRC must show that it has taken a hard look at the environmental impacts associated with” the proposed action. *Id.* at 63. Petitioners appear to argue that the EPR design must be certified before it is possible for the NRC to take a “hard look” in its NEPA review of the Application. *Id.* at 63-64. Petitioners appear to request two forms of relief from the Licensing Board: (1) Admit the contention and hold it in abeyance pending the outcome of the generic (design certification) proceeding (*id.*), and (2) suspend the proceeding or hold it in abeyance until the design certification proceeding is concluded (*id.* at 59, 61-62).

Staff Response: Proposed Contention 4 should be denied because it challenges a rule, which is prohibited under § 2.335(a); it does not raise a genuine dispute regarding any particular portion of the application, as required by 10 C.F.R. § 2.309(f)(vi); and it lacks the specificity and basis required of contentions under § 2.309(f)(i) and (ii). As explained below, the Board should deny this improperly filed motion to suspend the proceeding because it does not meet the requirements applicable to motions.

1. Petitioners challenge an NRC rule without addressing the factors for doing so.

Part 52 specifically allows an applicant to reference a certified design that has been docketed but not approved. 10 C.F.R. § 52.55(c); See *Progress Energy Carolinas* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-08-15, 68 NRC 1, 3 (2008) (*Shearon Harris*). A petitioner may not challenge Commission regulations in licensing proceedings unless it requests a waiver and shows that application of the rule or regulation would not serve the purposes for which it was adopted. 10 C.F.R. § 2.335(a), (b); *Shearon Harris*, CLI-08-15, 68 NRC at 3-4. Since Petitioners appear to assert that the requested design certification rule for the EPR must be completed before the Application may be submitted (Stilp/TRU Petition at 62), their proposed Contention 4 is a challenge to § 52.55(c). In order for Petitioners to challenge a rule through this contention, § 2.335(b) requires that they provide reasons that justify a waiver to the prohibition in § 2.335(a) on challenges to Commission regulations. Petitioners do not request any such waiver, nor do they attempt to satisfy the standard in § 2.335(b) for considering a request for a waiver. Accordingly, Petitioners do not comply with the 10 C.F.R. § 2.335 procedure for bringing such a challenge, and Petitioners' request to suspend this proceeding or hold it in abeyance should be denied.

2. Petitioners do not dispute any particular portion of the Application.

With respect to safety matters, Petitioners assert that “you have to hold a licensing hearing on the whole application” and that they will be unable to evaluate a variety of topics, including “radioactive waste characteristics, accident types, radioactive emissions, control mechanisms and cyber systems changes, [and] security concerns”

until the design certification proceeding is completed.<sup>22</sup> Stilp/TRU Petition at 60-61. Petitioners, however, do not identify any dispute with any particular portion of the Application or the application for certification of the EPR design.<sup>23</sup> Accordingly, proposed Contention 4 does not satisfy § 2.309(f)(vi).

Further, as indicated above, the NRC may resolve generic issues in rulemaking rather than through litigation in individual cases. See *Massachusetts v. U.S.*, 522 F.3d 115, 119 (1st Cir. 2008). The NRC certifies generic nuclear reactor designs through rulemaking. As set forth in an April 2008 policy statement, the Commission has determined that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. See Final Policy Statement, 73 Fed. Reg. at 20,972. The Commission has stated that in a proceeding in which the COL application references a docketed design certification application, the licensing board should refer such a contention to the Staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. *Id.*; *Shearon Harris*, CLI-09-08, 69 NRC \_\_\_ (May 18, 2009) (slip op. at 5) (citing 73 Fed. Reg. at 20,972). Upon adoption of a final design certification rule, such a contention should be denied. Final Policy Statement, 73 Fed. Reg. at 20,972; *Shearon Harris*,

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<sup>22</sup> Petitioners assert that the “incomplete application” should be withdrawn and resubmitted only after the design certification proceeding is completed. Stilp/TRU Petition at 62. Petitioners assert further that the NRC Staff, and not this Licensing Board, “should be making the determination that this Application is complete [enough] to be on the docket[.]” *Id.* at 64. Petitioners are entirely correct that the decision on whether to docket an application is entirely within the Staff’s discretion. Cf. *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-79 (1978) (“the Board does not have the power to direct the Staff in the performance of its independent responsibilities”).

<sup>23</sup> The extent to which any of Petitioners’ four other proposed contentions raise any dispute with the Application is discussed in the context of those proposed contentions. None of these other proposed contentions, however, identify an admissible contention in regard to the EPR design certification application.

CLI-09-08, 69 NRC \_\_\_\_ (slip op. at 5). Accordingly, proposed contentions relating to applications for design certification must satisfy the contention filing requirements set forth in § 2.309(f).

As described above, Petitioners do not identify any dispute with application for certification of the EPR design, and fail to satisfy the requirements of § 2.309(f)(vi). Accordingly, Petitioners have not proposed, in Contention 4, an admissible contention that could be held in abeyance in accordance with the Final Policy Statement and the Commission decision in *Shearon Harris*. With respect to environmental matters, Petitioners merely refer to NEPA. Stilp/TRU Petition at 63-64. Petitioners do not identify any environmental issue with which the ER fails to grapple, or which cannot now be analyzed, in the absence of design information within the scope of the EPR design certification application that is not settled. *See id.* Accordingly, proposed Contention 4 does not satisfy the requirements of § 2.309(f)(vi) with respect to environmental matters.

In sum, this proposed contention challenges a rule, which is prohibited under § 2.335(a); does not raise a genuine dispute regarding any particular portion of the application, as required by 10 C.F.R. § 2.309(f)(vi); and lacks the specificity and basis required of contentions under § 2.309(f)(i) and (ii).<sup>24</sup> For these reasons, Proposed Contention 4 should be denied admission into this proceeding.

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<sup>24</sup> In proposed Contention 4, Petitioners state that the “entire proceeding . . . must be suspended or held in abeyance.” Stilp/TRU Petition at 59. The proposed Contention could be read to request that the Licensing Board stay the proceeding. At this stage of this proceeding, a request for a stay is governed by the provisions of 10 C.F.R. § 2.323, which applies to motions. A motion must “state with particularity the grounds and the relief sought, [and] be accompanied by any affidavits or other evidence relied on.” 10 C.F.R. § 2.323(b). Petitioners have not done so. As Petitioners acknowledge, the Applicant “has to provide the results of the final design and certification process . . . in the [Application] before the license can be approved by the NRC.” Stilp/TRU Petition at 64. Since the design certification application, if approved, is a prerequisite to any Commission decision to grant the requested COL for the Bell Bend facility, Petitioners have not asserted any grounds to suspend the proceeding in view of the Applicant’s reference to an application for design certification under 10 C.F.R. § 52.55(c). Also, Petitioners have not (Continued...)



E. PROPOSED CONTENTION 5:

Inadequate PPL Funds for Radioactive Decommissioning of Bell Bend

The interveners contend that the decommissioning Funding Assurance in the Application is not enough and the Applicant must immediately show that the Applicant's selected method of funding must pass an immediate financial test to assure adequate funding. If the proposed radioactive nuclear power plant at Bell Bend and all the related radioactive parts are to be cleaned and decontaminated of all radioactivity and decommissioned at the end of a forty year license or at the end of sixty years as PPL depicts the possible active life of this plant to be, the interveners contend that the amount of money that PPL says it is required to assure sufficient funds for the decommissioning of this radioactive nuclear plant will not be enough and that the Applicant PPL Bell Bend LLC must show that the method of assurance is financially possible now.

Stilp/TRU Petition at 66.

In this contention, Petitioners assert that the Application, at 1-11, is deficient because it states that financial assurance for decommissioning funding will be provided by a parent company guarantee, but does not include sufficient information to demonstrate that the parent company can provide the funding or pass a financial test. *Id.* at 66-67. Petitioners further assert that because the company providing the parent company guarantee is already committed to providing decommissioning funding for Susquehanna Units 1 and 2, which it owns, and has experienced substantial financial

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submitted any affidavits or other evidence in support of the requested suspension of the proceeding. In addition, "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's effort to resolve the issue(s) have been unsuccessful." 10 C.F.R. § 2.323(b). The Petition fails to include the required certification. Accordingly, to the extent that proposed Contention 4 requests a stay of the proceeding, the motion should be denied.

losses, the Applicant should be required to demonstrate now that its parent company has the financial ability to assure decommissioning funding for Bell Bend Nuclear Power Plant. *Id.* at 67-68. Petitioners assert that the Application is deficient because it omits any actual figures or other information which would demonstrate that it is financially possible for PPL to provide decommissioning funding assurance. *Id.* at 68.

Staff Response: The Staff opposes admission of this contention because it raises issues that are outside the scope of this licensing action. 10 C.F.R. § 2.309(f)(1)(iii). Petitioners do not demonstrate that there is a genuine dispute with the Applicant on an issue of law or fact which is material to any finding the NRC must make to grant or deny this application for a combined license. 10 C.F.R. § 2.309(f)(1)(iii), (iv) and (vi). Petitioners also fail to provide any specific information, alleged facts or expert opinions which support their argument that there is a dispute as to the adequacy of the Application. 10 C.F.R. § 2.309(f)(1)(v). Since Petitioners also challenge the NRC's regulations regarding the method and timing of providing reasonable assurance of decommissioning funding, and argue that their preferred process should be implemented instead, their contention is also inadmissible as an impermissible challenge to the NRC's rules. 10 C.F.R. § 2.335.

1. This Proposed Contention is outside the scope of this proceeding.

Petitioners argue that the Applicant must demonstrate in the Application that the method selected for demonstrating financial assurance for decommissioning is financially possible, and that the method selected can pass a financial test now, but this argument raises issues that are outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii). Petitioners' foregoing argument is based upon their further argument that an applicant for a combined license must provide a financial instrument with the application as part of its certification that financial assurance for decommissioning will be

provided. This latter argument is an impermissible attack on § 50.75, which the Staff addresses in Section III.E.4, *infra*. As set forth below, § 50.75 does not require that an applicant for a combined license provide such a financial instrument with its application. Nor does § 50.75 require an applicant to demonstrate in the application that, if it chooses to use a parent company guarantee, the parent company can pass a financial test when the combined license application is filed. Accordingly, the adequacy of any financial instrument, whether implementing a parent company guarantee or any other method of providing financial assurance for decommissioning, is not now before the NRC for decision, and is not within the scope of this proceeding.

A combined license *applicant* is not required to provide the NRC with a final, executed financial instrument. 10 C.F.R. § 50.75(b)(4) and (e)(3). In fact, even after a license has been issued, a *combined license holder* is not required to provide the NRC with a final, executed financial instrument *until 30 days after the Commission publishes notice in the Federal Register under 10 C.F.R. § 52.103(a)*. 10 C.F.R. § 50.75(e)(3). The rulemaking record for these provisions supports the foregoing conclusions. See Licenses, Certifications, and Approvals for Nuclear Power Plants; Final Rule, 72 Fed. Reg. 49,397 (Aug. 28, 2007) (“Statements of Consideration”).

In preparation for receiving new COL applications under Part 52, the NRC reviewed its licensing rules, including those governing decommissioning funding assurance. In drafting the rules and regulations pertaining to decommissioning funding assurance requirements for combined license applications, the NRC made changes “reflecting the unique considerations of a combined license.” *Id.* at 49,406. The NRC noted that some of the requirements in 10 C.F.R. § 50.75 “are directed at the two-phase licensing process in 10 C.F.R. Part 50, in which the NRC issues a construction permit followed by an operating license.” *Id.* The NRC also noted that the requirements of 10 C.F.R. § 50.75 that pertain to the two-phase licensing process were “not well suited

to the combined license process under Part 52” because requiring an applicant for a COL to submit a copy of the financial instrument obtained to satisfy the requirements of § 50.75(e) “would place a more stringent requirement on the combined license applicant” than on an operating license applicant, “inasmuch as that [COL] applicant would be required to fund decommissioning assurance at an earlier date as compared with the operating license applicant.” *Id.*

To address these issues, the NRC revised its regulations to require that a COL applicant submit “information in the form of a report, as described in § 50.75, indicating how reasonable assurance will be provided that funds will be available to decommission the facility.” 10 C.F.R. § 50.33(k)(1). The NRC did not, however, require that a COL applicant obtain a financial instrument to fund decommissioning or submit a copy of that instrument to the NRC in the application. Instead, under § 50.75(b)(1) and (4), the NRC required that the COL application include a certification that financial assurance of decommissioning funding will be provided no later than 30 days after the NRC publishes notice in the *Federal Register* under § 52.103(a).<sup>25</sup> 10 C.F.R. § 50.75(b)(3) and (4).

The Statements of Consideration (“SOC”), which explains the Commission’s basis for, and interpretation of, the regulations’ language, provides useful guidance on

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<sup>25</sup> Requiring the NRC Staff to analyze a financial test for a proposed parent company guarantee now, before a COL applicant or licensee certifies that it will use that particular method and provides a final, executed financial instrument containing the terms of the guarantee and financial test information the NRC Staff would review, would waste the NRC Staff’s limited resources and serve no useful purpose. A parent company’s financial condition, and its ability to pass the NRC’s financial tests, can change over time, and the NRC’s regulations regarding financial tests take this uncertainty into consideration. 10 C.F.R. Part 30, App. A, II.C.1 and 2. The Commission has found that its “generic formula, along with [its] end-of-license requirements, will result in reasonable assurance of adequate decommissioning funding[,]” and that “[m]ore detailed consideration by the NRC early in life ... is not considered necessary....” *Consolidated Energy Co., Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 & 2), CLI-01-19, 54 N.R.C. 109, 144 (2001) (citing and quoting General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030-31 (June 27, 1988)).

the proper application of the regulations – guidance that is entitled to “special weight.” *Connecticut Yankee Atomic Power Company* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, 47 (2001) (citing *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988)). The SOC explains the Commission’s intent when it modified the decommissioning funding assurance methods for reactors to be licensed under the 10 C.F.R. Part 52 process:

The Commission’s objective is to have sufficient time to evaluate the projected costs of decommissioning, and any licensee-proposed changes in the financial assurance mechanism for funding before fuel is loaded into the reactor and operation commences. This will allow the Commission to take any necessary regulatory action before fuel loading and commencement of operation.

72 Fed. Reg. at 49,407. The Commission created a method of providing reasonable assurance of financial assurance of decommissioning funding which “consists of a series of steps,” some of which apply during the application phase, and others which apply after a license has been issued. 10 C.F.R. § 50.75(a).

In drafting these revisions to the regulations, the Commission considered both the lengthy process of licensing and constructing a plant and the provisions in the regulations that permit applicants and licensees to change the method by which they certify and provide financial assurance for decommissioning. The Commission then revised the regulations to minimize burdens and optimize the usefulness of the information provided and the time needed to analyze it. For example, initially, the proposed revision of § 50.75 required a combined license holder to submit updated certifications of the method of providing decommissioning funding assurance on an annual basis, but the NRC received comments objecting that annual updates of decommissioning funding assurance and certification during the construction phase of a plant would be unduly burdensome, unnecessary, and would serve no purpose. 72 Fed. Reg. at 49,406. In response to these comments, the Commission eliminated the annual

reporting requirement and instead required that the license holder update its reports two years before and again one year before the date scheduled for initial loading of fuel, consistent with the schedule required by 10 C.F.R. § 52.99(a), which pertains to inspections during construction of the plant.<sup>26</sup> 10 C.F.R. § 50.75(e)(3); see *also* 72 Fed. Reg. at 49,406-407.

The regulations now require biennial updates of the status of decommissioning funding, which contemplates that the information might change over time. Once the Commission has issued a COL, the holder of that COL need not begin filing the requisite biennial reports on the status of decommissioning funding until the day the Commission makes a finding that all acceptance criteria in the COL are met. 10 C.F.R. §§ 50.75(f)(1) (citing § 52.103(g)). The reports include the information specified in § 50.75(f)(1) including “any modification occurring to a licensee’s current method of providing financial assurance since the last submitted report.”

In the Application, the Applicant has provided more information than the regulations require. As stated in the Application, PPL Energy Supply, LLC, which is the parent company of the Applicant, will, pursuant to 10 C.F.R. § 50.75(e)(1)(iii), provide a

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<sup>26</sup> These reports must contain a certification updating the information provided at the COL application stage, and a copy of the financial instrument. See Regulatory Guide 1.206, “[COL] Application for Nuclear Power Plants,” Regulatory Position Part IV: Miscellaneous Topics, C.IV.5.4.1, “Estimates of Funding Requirements.” (June 2007) (“RG 1.206”). Even when these reports are submitted, however, “[t]he financial instrument used to provide financial assurance for decommissioning may be in draft and unexecuted.” *Id.* A COL holder’s ability to delay committing to a particular method, and to submit financial information unexecuted and in draft form, indicates that the Commission anticipated that financial circumstances may change over time and a license holder, and certainly an applicant, may – consistent with the regulations – change the method by which financial assurance is ultimately provided. See *id.* While interpretation of the regulations pertaining to decommissioning funding assurance in COL applications must begin with the regulations themselves, guidance documents which do not conflict with the regulations and are at least implicitly endorsed by the Commission are entitled to special weight. *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288, 290 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988) (citing *Lewis v. United States*, 445 U.S. 55, 60 (1980)).

parent company guarantee as the decommissioning funding mechanism, as well as initial capitalization and equity for construction of the proposed plant. In Part 9, Appendix A, of the Application, the Applicant has also included the NRC's financial test for parent company guarantees to show that its parent company can meet the requirements of 10 C.F.R. Part 30, Appendix A. The regulations, however, do not require a COL applicant to include this information in the application for consideration in a combined license proceeding.

Where, as here, an applicant voluntarily provides information that NRC regulations do not require be included in an application, and which the NRC Staff is not required to analyze in order for the Commission to grant or deny the application, issues concerning that information are outside the scope of the proceeding. *Exelon Generating Company, LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 179 (July 28, 2005) (citing *Exelon Generating Company, LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 241 (2004)). In short, neither a financial instrument, nor the test applied to determine if the instrument is sufficient, nor issues pertaining to the timing of submission of that test are now before the NRC for decision, and are outside the scope of this licensing proceeding. Accordingly, proposed Contention 5 is not litigable because its challenge to the adequacy of the Applicant's proposed parent company guarantee is outside the scope of this proceeding.

2. Petitioners have not demonstrated that there is a genuine dispute on an issue of law or fact which is material to any finding the NRC must make to grant or deny a combined license.

The NRC's regulations in 10 C.F.R. Part 50 require a COL applicant to provide decommissioning funding assurance through a series of steps, not all of which must be taken during the course of this combined license action, as described above. 10 C.F.R. § 50.75(a). Petitioners' Proposed Contention 5 focuses on the methods set out in 10 C.F.R. § 50.75 by which a *COL license holder* indicates to the NRC that the *licensee*

will provide reasonable assurance that funds will be available for the decommissioning process. The Applicant, however, is not now required to provide a financial instrument (including the parent company guarantee identified in the Application). 10 C.F.R. § 50.75(e)(3).

The NRC's regulations contemplate and provide for changes in the method by which applicants or licensees provide reasonable assurance of decommissioning funding, and only require a licensee to provide a financial instrument to assure decommissioning funding after a license has been issued and the initial loading of fuel has been scheduled. 10 C.F.R. § 50.75(e). Accordingly, the financial instrument a combined license applicant may eventually employ and the timing of the NRC financial review of that instrument and applicable tests do not affect the Commission's decision to grant or deny an application for a combined license.<sup>27</sup> The regulations do not require the Applicant to submit a financial instrument to provide decommissioning funding assurance with its Application, and the NRC is not required to make findings regarding such an instrument in order to grant or deny the Application.

In order for a contention to be admissible, the subject matter of the contention must impact the grant or denial of a pending license application. *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), LBP-08-15, 67 NRC 294, 315 (2008) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage

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<sup>27</sup> The Applicant may choose any mechanism or combination of mechanisms pursuant to 10 C.F.R. § 50.75(e)(1)(vi) which provides, "[a]ny other mechanism or combination of mechanisms that provides, as determined by the NRC upon its evaluation of the specific circumstances of each licensee submittal, assurance of decommissioning funding . . . ." As the Licensing Board in *Calvert Cliffs* recently recognized, "[T]here is no provision that requires an applicant or a licensee to choose one form of decommissioning assurance over another." *Calvert Cliffs 3*, LBP-09-04, 69 NRC \_\_\_ (slip op. at 35). "Licensees and applicants can demonstrate financial assurance by 'one or more' of the funding mechanisms." *Id.* at 35-36 (citing NUREG-1577 at 13). The Applicant has chosen to use a parent company guarantee, but the Applicant is free to change this method between now and the time the Commission issues the requisite notice pertaining to fuel load.



Installation), LBP-98-7, 47 NRC 142, 179 (1998)). As explained above, no findings regarding a proposed financial instrument providing decommissioning funding assurance are required in order for the Commission to grant or deny a COL application. Therefore, the final financial instrument providing a parent company guarantee and the financial tests of that instrument are not material to the findings the NRC must make to grant or deny the Application, and cannot be invoked to raise a genuine dispute with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).

3. Petitioners have not provided any facts, specific information, or expert opinions to support this contention.

Petitioners state that there is a factual dispute as to when the Applicant must show that it can meet the criteria for providing financial assurance for decommissioning funding, but they do not identify that factual dispute, other than to state that Petitioners believe the Application must contain this information now, and it does not. Stilp/TRU Petition at 68. Petitioners have not, however, provided a sufficient basis for the Board to reach the same conclusion. Petitioners' beliefs that the Application should contain additional information that the regulations do not require do not qualify as sufficient support for this contention under 10 C.F.R. § 2.309(f)(1)(v). "[A] contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue." *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 23 (2007) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)).

As support for this contention, Petitioners ask the Board to "take judicial notice of the huge financial losses in the financial markets and the existence of the current recession[,]" but they do not provide any specific information as to which financial markets they are referring, or provide specific information about PPL Energy Supply

Company's finances. Stilp/TRU Petition at 68. "[T]he Commission's Rules of Practice allow the taking of official notice only of 'any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body.'" *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-911, 29 NRC 247, 253 n. 26 (1989) (citing 10 C.F.R. § 2.743(i), recodified in 2004 at 10 C.F.R. § 2.337(f)). In order for the Board to take official notice of the facts Petitioners assert, those facts would have to be "not subject to reasonable dispute' within the meaning of Rule 201(b) of the Federal Rules of Evidence, governing judicial notice of adjudicative facts in the United States courts[,]" or within the knowledge of the Board as an expert body. *Id.* Since neither the state of our financial markets nor the current recession is a "matter beyond reasonable controversy' and is 'capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy[,]" taking official notice of these unspecified facts would violate 10 C.F.R. § 2.337(f). *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 75 (1991) (quoting *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 147 (3d Cir. 1975)).

Petitioners cite the Application as indicating that financial assurance for decommissioning the proposed facility will be provided by a parent company guarantee in the amount of \$398.6 million, and argue that the Application is deficient because it does not demonstrate that PPL Energy Supply Company, the parent company, can provide this funding. Stilp/TRU Petition at 66-67 (citing Application at 1-11, section 1.6.2). Petitioners also note that the Applicant claims to provide the minimum required amount of decommissioning funding, *i.e.*, \$398.6 million, but assert that this amount is insufficient according to 10 C.F.R. § 50.75 and 10 C.F.R. Part 30, Appendix A. Stilp/TRU Petition at 66-67. Petitioners also object to the Applicant's use of a parent company guarantee from PPL Energy Supply Company to provide this assurance. *Id.*

Petitioners also assert that “PPL’s resources for decommissioning Susquehanna 1 & 2 have experienced a substantial decrease and PPL should provide facts and figures at this time to prove that it has the ability to assure decommissioning” for the proposed Bell Bend Nuclear Power Plant. Stilp/TRU Petition at 68.

Aside from stating these assertions, Petitioners offer no facts, expert opinions, or other information to support them. 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 sets forth the necessary technical analysis to show why the proffered bases support its contention.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998) (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff’d in part*, CLI-95-12, 42 NRC 111 (1995) (A petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “showing why its bases support its contention.”)). Without the support of facts, documents, sources or expert opinions to support their contention, Petitioners have not met the requirements of 10 C.F.R. § 2.309(f)(1)(v).

4. The Proposed Contention impermissibly challenges NRC regulations.

Petitioners’ proposed contention is an attack on Commission regulations that establish minimum decommissioning funding requirements and methods for providing financial assurance of decommissioning funding. Specifically, Petitioners complain that although the Applicant has computed the NRC’s minimum funding requirements for decommissioning funding, the NRC’s minimum funding calculation is inadequate to provide financial assurance for decommissioning. Likewise, Petitioners take issue with

the Applicant's proposal to use a parent company guarantee to provide those funds, which is permitted by the regulations. Stip/TRU Petition at 66-67.

Specifically, Petitioners assert that PPL Energy Supply Company is already committed to providing decommissioning funding for two other nuclear reactors that it owns, and that, due to financial problems which Petitioners do not specify, PPL Energy Supply Company does not have the resources or financial ability to qualify for a parent company guarantee. Stip/TRU Petition at 67-68. Petitioners argue that the Application is deficient because the Applicant has not provided facts and figures to prove -- right now -- that PPL Energy Supply Company can pass the NRC's financial tests for providing parent company guarantees. *Id.* at 68.

It is well settled that a petitioner in an individual adjudication cannot challenge generic decisions that the Commission has made in rulemaking. 10 C.F.R. § 2.335; *Vermont Yankee Nuclear Power Corporation and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 166 (2000). A contention that advocates stricter requirements than agency rules impose, or that otherwise seeks to litigate a generic determination established by the Commission is inadmissible. *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-01, 66 NRC 1, 22 (2007) (*citing Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991)).

To the extent Petitioners seek to substitute their judgment for what the regulatory process should require for the NRC's regulations, or to argue that the regulations should be read to include a requirement the NRC could have included but did not, their argument constitutes an impermissible challenge to the Commission's regulations. 10 C.F.R. § 2.335. NRC regulations in 10 C.F.R. § 50.75(c) set the minimum required amount of financial assurance for decommissioning. To the extent Petitioners dispute the amount obtained using § 50.75(c), their proposed contention attacks this regulation.<sup>28</sup> Similarly, Petitioners argue that the Applicant's proposed parent company guarantor ought to pass the NRC's financial test for a parent company guarantor now, but § 50.75 does not require this, as explained throughout the foregoing Staff response to proposed Contention 5. Proposed Contention 5 amounts to an impermissible attack on 10 C.F.R. § 50.75.<sup>29</sup> It should be rejected. 10 C.F.R. § 2.335.

In conclusion, Petitioners have not demonstrated that their contention is within the scope of this proceeding, or material to any finding the NRC must make to grant or deny this application for a combined license. Petitioners have also failed to support their contention with facts, documents, expert opinions or any other specific information, and have not provided sufficient information to show that there is a genuine dispute with the Applicant on an issue of law or fact that is material to this proceeding. By attempting to substitute their own process for the regulatory process the Commission has designed, Petitioners have also impermissibly challenged the NRC's regulations regarding financial

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<sup>28</sup> The Staff does not understand Petitioners to assert that the Applicant incorrectly implemented the formula set forth in § 50.75(c) or made arithmetic errors.

<sup>29</sup> Petitioners do not seek a waiver under 10 C.F.R. § 2.335(b) to allow them to pursue their attack on the regulations. To justify a waiver of the § 2.335(a) prohibition on attacks on NRC rules and regulations, § 2.335(b) requires that special circumstances with respect to the subject matter of the proceeding are such that application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. In this proceeding, application of § 50.75 is precisely as intended. See SOC, 73 Fed. Reg. at 49,406-49,407.

assurance for decommissioning funding. This proposed contention does not meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), (v) and (vi), or § 2.335, and is therefore inadmissible.

**CONCLUSION**

For the reasons set forth above, TRU has demonstrated representational standing to intervene in this proceeding, Mr. Stilp has not demonstrated his individual standing, and the Petitioners have not submitted an admissible contention. Therefore, pursuant to 10 C.F.R. § 2.309(a), the Petition should be denied.

Respectfully submitted,

**/Signed (electronically) by/**

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**Executed in Accord with 10 C.F.R. § 2.304(d)**

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Dated at Rockville, Maryland  
this 12th day of June, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
)  
PPL BELL BEND, LLC ) Docket No. 52-039  
)  
)  
(Bell Bend Nuclear Power Plant) )

NOTICE OF APPEARANCE OF ROBERT M. WEISMAN

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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Dated at Rockville, Maryland  
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Dated at Rockville, Maryland  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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(Bell Bend Nuclear Power Plant) )

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO PETITION FOR INTERVENTION AND REQUEST FOR HEARING FILED BY GENE STILP AND TAXPAYERS AND RATEPAYERS UNITED (TRU)," "NOTICE OF APPEARANCE OF ROBERT M. WEISMAN," "NOTICE OF APPEARANCE OF SUSAN H. VRAHORETIS," and "NOTICE OF APPEARANCE OF JESSICA A. BIELECKI" have been served on the following persons by Electronic Information Exchange on this 12th day of June, 2009:

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