December 23, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC AND UNISTAR NUCLEAR OPERATING SERVICES, LLC	)	Docket No. 52-016-COL
	)	
(Calvert Cliffs Nuclear Power Plant, Unit 3)	)	

APPLICANTS' RESPONSE TO NEW PROPOSED CONTENTIONS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC ("UniStar" or "Applicants") hereby respond to the "Submission of New Contentions by Joint Intervenors," dated December 1, 2009 ("Late-Filed Contentions"). For the reasons discussed below, the new proposed contentions (designated as Contentions 8 and 9) do not meet the criteria for late-filing and are otherwise inadmissible in this combined license ("COL") proceeding.

BACKGROUND

The standards governing the admissibility of contentions are found in the Commission's rules of practice in 10 C.F.R. Part 2. Initial contentions must be based on the application at issue. Intervenors may amend those contentions if there are data or conclusions in the Draft or Final Environmental Impact Statement or Draft or Final Safety Evaluation Report that "differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Otherwise, amended or new contentions may be considered only if: (1) the

information upon which the amended or new contentions is based was not previously available; (2) the information upon which the amended or new contention is based is materially different from information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of subsequent information. 10 C.F.R. § 2.309(f)(2)(i)-(iii). However, meeting these criteria is not sufficient to warrant admission of a new contention.[1] The petitioner must also address the criteria in 10 C.F.R. § 2.309(c)(1).[2]

Where the issue of standing has already been resolved, the Licensing Board must weigh the following five factors: (1) good cause, if any, for the failure to file on time;[3] (2) the availability of other means whereby the requestor's interest will be protected; (3) the extent to which the requestor's interests will be represented by existing parties; (4) the extent to which the requestor's participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record.[4] The first factor, good cause for lateness, carries the most weight in the balancing test,

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1 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-50 (1983). The late-filed factors in Section 2.309(c)(1) apply fully even in cases where contentions are filed late only because the information on which they are based was not available until after the filing deadline. Although the Commission has ruled that the first factor — good cause for filing late — is met in such circumstances, the other factors, if implicated, permit the denial of the contention in a given case. *Id.*; *see also Union of Concerned Scientists v. NRC*, 920 F.2d 50, 52 (D.C. Cir. 1990).

2 The requirement to apply the factors in 10 C.F.R. § 2.309(c) did not change with the promulgation of the revised 10 C.F.R. Part 2. *See* "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) ("If information in [a new Staff document] bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding.").

3 The criteria in Section 2.309(f)(2), in effect, codify the test for establishing "good cause."

4 *See* 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii).

and the lack thereof requires the petitioner to make a "compelling case" relative to the remaining factors.[5]

Finally, any new late-filed contentions also must meet the admissibility standards that apply to all contentions. As set forth in 10 C.F.R. § 2.309(f)(1), a proposed contention must contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

DISCUSSION

The Intervenors seek admission of two late-filed contentions in this proceeding. As discussed below, neither proposed contention is timely and neither contention satisfies the NRC's contention admissibility standards.

A. Proposed Contention 8 Should Not Be Admitted

In proposed Contention 8, the Intervenors purport to challenge the validity and accuracy of an NRC Safety Evaluation Report ("SER") issued in October 2009 on the effects of expanding the Cove Point LNG facility *on the presently-operating Calvert Cliffs, Units 1 and 2*.[6]

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[5] *See State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted).

[6] *See* "Safety Evaluation Regarding the Effect of Expanding the Cove Point Liquefied Natural Gas Facility on Safety at Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Docket Nos. 50-317 and 50-318," dated October 28, 2009 (ADAMS Accession No. ML092180424) ("NRC 2009 SER"). The NRC's SER was driven, in part, by allegations made by the Intervenors with respect to Calvert Cliffs Units 1 and 2. Late-Filed Contentions at Attachments 6 and 7. The Intervenors' allegations for Units 1 and 2 raised

The Intervenors cryptically explain that the contention is based on (1) the NRC's use of a "flawed" study by the Maryland Power Plant Research Program ("PPRP"); (2) a failure to address impacts of an LNG spill over water; and (3) the omission of a threat analysis for Calvert Cliffs Unit 3. Late-Filed Contentions at 1-2.

As discussed below, proposed Contention 8 is untimely and the Intervenors have not made a compelling showing with respect to the factors that must be applied to late-filed contentions. None of the bases for the proposed contention reflect materially new or different information than that available at the time the Calvert Cliffs Unit 3 COL application was initially filed. Moreover, in substance, proposed Contention 8 is nothing more than a rehash of arguments that were previously considered and rejected by the Board in connection with the previously-proposed Contention 4. *See Calvert Cliffs 3 Nuclear Project, LLC et al* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-04, __ NRC __, slip op. at 44-53 (March 24, 2009). The Intervenors have not demonstrated a genuine dispute with the Unit 3 COL application.

1. Proposed Contention 8 is Untimely

The finding of good cause for late-filing of contentions is related to the *total previous unavailability* of information.[7] Similarly, a new contention must be based on new information that is materially different from information previously available. *See Exelon Generation Company* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163 (2005) (To be "new," information must "differ significantly" from information available previously, and these differences must be "material" to the outcome of the proceeding.). Here,

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concerns that are nearly identical to those rejected by the Licensing Board for Unit 3 in addressing the admissibility of Contention 4.

[7] *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

the arguments and information in proposed Contention 8 could have been developed and included in previously-proposed Contention 4, and for the most part were included in Contention 4.[8] Petitioners acknowledge as much in their filing.[9]

With one exception, none of the primary references relied upon in Contention 8 post-date the original petition to intervene in this proceeding.

- Arthur D. Little 1993.[10] This study was submitted to the NRC in 1993 after the licensee for Calvert Cliffs Units 1 and 2 learned of plans to restart the Cove Point facility. This document was not cited by Intervenors in Contention 4, but was discussed in the PPRP Study. To the extent that proposed Contention 8 is based on this document (Late-Filed Contentions at 1, 4, 13-16), the contention is untimely.

- NRC Staff Analysis of A.D. Little Report.[11] The NRC reviewed the A.D. Little Report and performed independent confirmatory analyses. In an analysis documented in 1995, the NRC Staff concluded that the safe operation of CCNPP Units 1 and 2 would not be jeopardized by the LNG facility. To the extent that proposed Contention 8 is based on this document, the contention is untimely.

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8 "Petition to Intervene in Docket 52-016, Calvert Cliffs-3 Nuclear Power Plant Combined Construction and License Application," dated November 19, 2008 ("Petition"). Indeed, as discussed further below, proposed Contention 8 is very similar to Contention 4 and is inadmissible for many of the same reasons that Contention 4 was inadmissible. *See* "Applicant's Answer to Petition to Intervene," dated December 15, 2008.

9 *See, e.g.*, Late-Filed Contentions at 38 ("As previously stated in Petitioner's Contention #4 and incorporated herein by reference, is the fact that CC3 applicant's FSAR contains statements which prove that their analysis, assumptions, and conclusions are severely flawed, are mathematically and scientifically inaccurate by their bootstrapping on a flawed PPRP Study, and any additional calculations and evaluations provided by the applicant in their FSAR do not conform to a catastrophic LNG spill on water as demonstrated by widely accepted expert opinions and studies.").

10 "Liquefied Natural Gas Hazard Analysis for Calvert Cliffs Nuclear Power Plant, Final Report," Arthur D. Little, June 7, 1993 (ADAMS Legacy Accession No. 9306100351) ("A. D. Little").

11 "NRC Staff Analysis of Little Report," dated Aug. 31, 1995 (ADAMS Legacy Accession No. 9509060013).

- PPRP Study.[12] The PPRP Study was issued in 2006 and in fact was cited by the Intervenors in Contention 4 (Petition at 22, 29-32) and again in Contention 8 (Late-Filed Contentions at 3-4, 13-14, 16, 18-21, 26-28). To the extent that proposed Contention 8 is based on this document, the contention is untimely.

- Sandia 2004.[13] This document, dated December 2004, was also cited by the Intervenors both in Contention 4 (Petition at 24, 26, Attachment 15) and now in Contention 8 (Late-Filed Contentions at 2, 3, 13, 14, 18, 19, 22, 23, 24-25, 26). To the extent that proposed Contention 8 is based on this document, the contention is untimely.

- Sandia/DOE 2006.[14] This document was also cited by the Intervenors in Contention 4 (Petition at 26-27, Attachment 17), and now is referenced again in Contention 8 (Late-Filed Contentions at 19). To the extent that proposed Contention 8 is based on this document, the contention is untimely.

- DOE/Sandia 2007.[15] This briefing to the National Association of Regulatory Utility Commissioners ("NARUC") Subcommittee on Gas is dated July 15, 2007. To the extent that proposed Contention 8 is based on this document (Late-Filed Contentions at 13, 19), the contention does not rely on anything new.

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12 "Cove Point LNG Terminal Expansion Project Risk Study, Maryland Power Plant Research Program Report PPRP-CPT-01/DNR 12-7312006-147," Maryland Department of Natural Resources, June 28, 2006 (ADAMS Accession No. ML080630231) ("PPRP Study").

13 "Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water SAND2004-6258," Sandia National Laboratories, December 2004 (ADAMS Accession No. ML093350855).

14 "Guidance on Safety and Risk Management of Large Liquefied Natural Gas (LNG) Spills Over Water," Department of Energy and Sandia National Laboratories, 2006, available at http://fossil.energy.gov/programs/oilgas/storage/lng/houston_p2n2_hanlin.pdf ("Sandia/DOE 2006").

15 "Coordinated Approach for LNG Safety and Security Research, Briefing to NARUC Staff Subcommittee on Gas," Department of Energy and Sandia National Laboratories, July 15, 2007, available at http://www.narucmeetings.org/Presentations/Tom%20Blanchat%20Presentation.ppt ("DOE/Sandia 2007").

- Sandia 2008.[16] This follow-on report to the 2004 Sandia study was published in May 2008. To the extent that proposed Contention 8 is based on this document (Late-Filed Contentions at 13, 25-26), the contention is untimely.

- Clarke Report 2005.[17] This report is dated May 2005. To the extent that proposed Contention 8 is based on this document (Late-Filed Contentions at 2, 5, 13, 15, 19), the contention is untimely.

- CCNPP Violation.[18] This letter from the NRC (and accompanying inspection report) is dated March 9, 2004. Again, to the extent that proposed Contention 8 is based on this document (Late-Filed Contentions at 29), the contention does not offer any new information.

The only arguably "new" document mentioned in newly proposed Contention 8 is the NRC's SER, dated October 28, 2009, for CCNPP Units 1 and 2. The SER contains the NRC Staff's review of a revision to the LNG hazards analysis for Calvert Cliffs Units 1 and 2, which addressed the planned expansion of the Cove Point LNG facility.[19] The SER references the existing studies of the Cove Point facility, including those submitted on the docket for the Calvert Cliffs Unit 3 COL application. The SER also documents the NRC Staff's conclusion that the planned expansion of Cove Point does not present an undue hazard to the safe operation of the existing units. The Intervenors' time to submit contentions based on the documents

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16 "Breach and Safety Analysis of LNG Spills Over Water from Large Liquefied Natural Gas Carriers SAND2008-3153," Sandia National Laboratories, May 2008, available at http://www.energy.ca.gov/lng/documents/2008-09-11_SANDIA_2008_Report.PDF ("Sandia 2008").

17 "LNG Facilities in Urban Areas: A Security Risk Management Analysis for Attorney General Patrick Lynch Rhode Island GHC-RI-0505A," Richard A. Clarke, May 2005, available at http://www.projo.com/extra/2005/lng/clarkereport.pdf ("Clarke Report").

18 "NRC Integrated Inspection Report 05000317/2004002 and 05000318/2004002," Nov. 8, 2004 (ADAMS Accession No. ML043130432) ("CCNPP Violation").

19 *See* Letter from James Spina, Constellation Energy Nuclear Generation Group, to NRC Document Control Desk, "Revision to Hazards Analysis Related to Liquefied Natural Gas Plant Operations at Cove Point," dated February 20, 2008 (ADAMS Accession No. ML080560423).

referenced in the SER tolled when the information first became available, and not later when the Staff issued the SER for the operating units.[20] Thus, the issuance of an SER for Units 1 and 2 does not present an unfettered opportunity for the Intervenors to resurrect arguments for Unit 3 that could have been (and in most cases were) presented earlier.[21]

Moreover, the Intervenors have not highlighted any information or analyses in the SER that are significantly different from the analysis in the Unit 3 COL application or the PPRP Study.[22] The factual circumstances (sizes of tanks, frequency of shipments) and types of analyses (risks of accidents, overpressure analyses) that form the basis for the SER have long been a matter of public record. And, the SER relies on the A.D. Little Report, the PPRP Study, and other prior analyses of the hazards associated with the LNG facility. The NRC Staff reviewed the earlier reports and studies to ensure that the current circumstances are bounded by

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20 *See, e.g.*, *Union of Concerned Scientists*, 920 F.2d at 55 ("[W]e think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset."). There simply would be no end to NRC licensing proceedings if petitioners could disregard the timeliness requirements and add new contentions at their convenience based on information that could have formed the basis for a timely contention at the outset of the proceeding. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 271-72 (2009) (internal citations omitted).

21 Even if the SER at issue were a Unit 3 SER, there is no right to file additional contentions based on the NRC Staff's safety evaluation under the NRC's rules of practice. According to the Commission, "[t]he adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the SER are not cognizable in a proceeding." 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

22 Contention 8 repeats claims in Contention 4 that the PPRP Study is inadequate. Contention 8 argues, in effect, that the 2009 SER is deficient because the NRC has continued to rely on the PPRP Study. Such circumstances do not establish good cause for late-filing. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (denying late contention where only assertion was that "certain concerns that were not dealt with in the ER have additionally not been dealt with in the DEIS").

the prior analyses — that is, the NRC Staff performed a "confirmatory calculation" based on the existing analyses. NRC SER 2009 at 5. The factual and analytical foundation for the contention was reasonably available prior to the original deadline for filing a petition to intervene. *Cf. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 579 (2006). A newly-created document that is a compilation or repackaging of previously-existing information is not equivalent to, and does not provide, information that is "materially different" under 10 C.F.R. § 2.309(f)(2)(ii). *See Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), Memorandum and Order (Ruling on Request to Admit New Contention) (unpublished), slip op. at 8 (Apr. 29, 2008).

At bottom, it is the Intervenors' obligation to examine the material, form an opinion, and timely file a proposed contention with sufficient basis to demonstrate a genuine dispute. The Intervenors have not highlighted any specific aspect of the 2009 SER that allegedly contains new or materially different information that supports their position. The factual information and analyses relied upon for proposed Contention 8 were previously available, were previously raised by the Intervenors, and were previously rejected by the Licensing Board.

2. Intervenors Have Not Made a Compelling Showing on the Other Late-Filed Factors

As discussed above, the new contention is not timely under 10 C.F.R. § 2.309(f)(2). Non-timely contentions cannot be admitted except upon a balancing of the factors in 10 C.F.R. § 2.309(c)(1). Here, the Petitioners did not address the late-filed criteria in 10 C.F.R. § 2.309(c)(1).[23]

[23] If a petitioner fails to address the criteria in 10 C.F.R. § 2.309(c)(1) that govern late filed contentions, a petitioner does not meet its burden to establish the admissibility of such contentions. *Baltimore Gas and Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 241 (1998).

In any event, the first factor, good cause for lateness, is the most important.[24] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). Here, as already discussed, proposed Contention 8 is merely a repackaging of Contention 4. The Intervenors therefore must make a "compelling showing" relative to the remaining factors. *New Jersey*, CLI-93-25, 38 at 296. They have made no such showing.

First, there are other means whereby the Intervenors' interests are protected. To the extent that the Intervenors are asserting that the expansion of Cove Point presents a risk to the existing Units 1 and 2, their concerns should be directed to the licensing docket for those facilities. Late-Filed Contentions at 6; *id.* at Attachments 6 and 7. And, to the extent that the Intervenors are concerned with violations involving the existing units (Late-Filed Contentions at 29), this proceeding is the wrong forum. Anyone who seeks to influence enforcement action should not file a contention, but instead must file a petition under 10 C.F.R. § 2.206 requesting that the Commission initiate enforcement action pursuant to 10 C.F.R. § 2.202. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67, 77-78 (1992).

Proposed Contention 8 would, if admitted, also broaden the issues in the proceeding. The Intervenors are concerned with the risk of an accident at Cove Point and the threat of a terrorist attack on that facility. Late-Filed Contention at 2; *id*. at Attachment 5. However, the risk of a terrorist attack at the Cove Point facility raises issues beyond the scope of this proceeding. *See N.J. Dep't of Env't Prot. v. U.S. NRC*, 561 F.3d 132 (3rd Cir. 2009) (holding that the NRC need not analyze the environmental impact of a hypothetical terrorist attack on a nuclear reactor). Admitting the contention therefore would expand the proceeding

[24] The criteria in section 2.309(f)(2), in effect, codify the test for establishing "good cause."

beyond the adequacy of the Calvert Cliffs Unit 3 license application to encompass terrorist attacks on non-NRC-regulated facilities.

Finally, the Intervenors have not provided any information to suggest that they may reasonably be expected to assist in developing a sound record on proposed Contention 8. The proposed contention simply regurgitates statements made in other safety evaluations or technical reports. The Intervenors do not identify any LNG or explosive experts, do not present any new evidence, and do not contribute any unique perspectives in the area of risk to Unit 3 from the Cove Point LNG facility. The only new aspect of the proposed contention is the NRC's SER, in which (contrary to the contention) the NRC Staff found that the proposed expansion of the Cove Point facility "does not present an undue hazard to the safety of the CCNPP." NRC 2009 SER at 7.

In sum, there is no good cause for late-filing and there has been no compelling showing with respect to the other criteria for late-filed contentions. Accordingly, the Licensing Board should decline to further consider the admissibility of proposed Contention 8.

3. Proposed Contention 8 Is Not Admissible

Before addressing specific problems with each of the bases for Contention 8, there are overarching shortcomings that render the contention inadmissible as a whole. First, Contention 8 does not present a genuine dispute with the application. The main text of proposed Contention 8 does not contain a single substantive citation to the Unit 3 COL application.[25] A contention that does not directly controvert a position taken by the applicant in the application is

[25] Contention 8 references the Final Safety Analysis Report ("FSAR") in one location, but only to describe the location of Unit 3 in relation to the existing Units 1 and 2. Late-Filed Contentions at 12-13. Appendix B also contains a reference to the COL application, but only in the context of repeating arguments that the Board previously rejected in connection with proposed Contention 4. *Id*. at 38.

subject to dismissal. *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Moreover, even assuming this was an SER on the Unit 3 docket, a contention that challenges the adequacy of the NRC's safety evaluation is inadmissible. *See AmerGen Energy Co, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008) ("The NRC has not, and will not, litigate claims about the adequacy of the Staff's safety review in licensing adjudications."). Contention 8 is therefore inadmissible for failing to demonstrate a genuine dispute with the application on a material issue. 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors also bear the burden to present adequate factual information or expert opinions necessary to support a contention. 10 C.F.R. § 2.309(f)(1)(v). The Intervenors must explain the significance of any factual information upon which they rely. *See Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003). In addition, 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 why the application is inadequate cannot provide a basis for the contention. *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006). Here, the Intervenors cut and paste statements from various reports and studies but never fully explain how the materials would lead to a different conclusion than that in the PPRP Study, the COL application, or the NRC's SER for Units 1 and 2. Their objections are to the existence of the Cove Point facility generally, and not to any specific analysis to date. Contention 8 is therefore also inadmissible for lack of expert and factual support.

The three specific bases presented as support for proposed Contention 8 are discussed below. These bases also raise issues outside the scope of the proceeding and otherwise fail to present a genuine dispute with the Calvert Cliffs Unit 3 COL application.

i. Basis 1: NRC SAFETY EVALUATION is based on a flawed PPRP Study (with admitted errors and identified omissions which have never been corrected) and the Arthur D. Little 1993 study which is pre 9-11, the NRC SER2009 evaluation bootstrapping its calculations on flawed bases are also consequently flawed and invalid.

This aspect of the proposed contention is an impermissible collateral attack on the PPRP Study.[26] Although the Intervenors couch their arguments as being based on the NRC SER, the proposed Contention 8 is nothing more than an attempt to re-assert the same supposed flaws in the PPRP Study that were first raised by Intervenors in Contention 4. Late-Filed Contentions at 18-22.

For example, in Contention 8, the Intervenors argue that the PPRP Study is unacceptably deficient because it relies upon land-based LNG studies to determine risk and consequences for an LNG spill on water. Late-Filed Contentions at 18. This is similar to their arguments in Contention 4: "[T]he PPRP risk study covered mostly land-based scenarios" (Petition at 26) and "the ER omits the effect of the aforementioned LNG spill on water." Petition at 18. The Board rejected this aspect of Contention 4 for failure to establish a genuine dispute with the application. LBP-09-04 at 49.

The Intervenors also assert in Contention 8 that the PPRP Study "[o]mitted the use the Sandia2004 risk study for LNG spill on water." Late-Filed Contentions at 18. However, the Intervenors previously asserted in Contention 4 that the PPRP Study "omits risk analysis of a catastrophic LNG spill over water." Petition at 28. The Board also rejected this aspect of Contention 4, explaining that the PPRP study clearly includes evaluation of the consequence of a

[26] *See* Late-Filed Contention at 26 ("Mathematically and scientifically, the PPRP risk analysis is severely flawed, has a flawed scientific basis for its assumptions on LNG spill over water, blatantly omits overpressures on a LNG spill over water that, by volume and intensity, can be of far greater magnitude in both the quantity of spill and ensuing fire and radiant heat.").

LNG spill over water. LBP-09-04 at 52. Moreover, the Board noted that, since this information is contained in the PPRP study, this allegation does not reflect a genuine omission from the COL application. *Id*.

The Intervenors also argue that "errors" in the PPRP Study have never been corrected. Late-Filed Contentions at 27. However, many of the alleged errors in the PPRP Study (*e.g.*, pier expansion, frequency of shipments, ship size) were raised previously in Contention 4 and rejected by the Board. As discussed above, any attempt to reassert those claims now is untimely. In any event, with respect to the size of the storage tanks at Cove Point, the NRC's SER documents that the NRC Staff reviewed the various studies prepared to date in order to ensure that the analyses remain applicable to the current status of the Cove Point facility. For example, the Cove Point facility consists of four 375,000 barrel tanks, and both the 1993 A. D. Little Report and the PPRP Study considered four 375,000 barrel tanks.[27] NRC 2009 SER at 3. For the larger tanks at Cove Point, the A.D. Little Report considered two 600,000 barrel tanks, while the PPRP Study considered an existing 850,000 barrel tank and a future expansion of two 1,000,000 barrel tanks. *Id*. The NRC's SER simply ensures that the agency is comparing "apples to apples" based on the most up-to-date information on the existing Cove Point facility and planned expansions.

Significantly, the Intervenors simply repeat previously-rejected arguments and have not provided a basis to question the NRC's calculations or assumptions. Nor have they established a genuine dispute regarding the validity of the A. D. Little study (other than to note

[27] The text of the PPRP Study describes the Cove Point facility as consisting of four 230,000 barrel tanks (Late-Filed Contentions, Attachment 2, at 4). As the NRC Staff noted in the SER and as confirmed by the Applicants in communications with the sponsor of the PPRP report, this is a mistake. NRC 2009 SER at 3. The conclusions and analyses in the PPRP Study were based on the correct capacities of 375,000 barrels for the four small tanks at Cove Point.

that it is pre-9/11) or the PPRP Study. Given the lack of any expert or factual support for the contention and the absence of any information calling into question the NRC's conclusions, this basis cannot support an admissible contention.

> ii. Basis 2: CCNPP Units 1 and 2 and CC3 share safety and structures and this was addressed in the SER2009 and NRC approved CC3 pipeline overpressure which is incomplete since none of the studies took into account overpressures created by LNG Spill on water (omission of the Sandia 2004 studies and guidance).

The second basis for proposed Contention 8 is again an attempt to resurrect previously-rejected arguments regarding potential LNG blast impacts on CCNPP Unit 3.[28] In their initial Petition, the Intervenors argued the following in support of Contention 4:

> A full breach ship borne LNG spill over water (Chesapeake Bay) is much more catastrophic than a spill over land since this type spill cannot be contained and water and air act as natural vaporizers to the cryogenic LNG, causing over pressures and explosions from Rapid Phase Transition of the LNG to gas. The intensity and occurrences of these overpressures and thermal explosions could damage sensitive equipment and installations in its range.

Petition at 23.

> The overpressures and explosions from this type event [(LNG spill over water)] were omitted in the risk development.

Petition at 26.

> These arguments are the same as those now made in Contention 8:
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> The PPRP Study omitted any information contained in the Sandia2004 risk analysis which dealt specifically with factors including overpressures from Rapid Phase Transition (RPT), which does occur when LNG spills

[28] The NRC's SER references an overpressure analysis that considers the potential blast effects from the LNG pipeline. NRC 2009 SER at 4-5. However, the proposed contention does not assert that this calculation is incorrect or inadequate. Moreover, the overpressure analysis referenced in the SER was submitted by UniStar to the NRC on November 11, 2008, and any contention challenging information in that submittal is untimely.

over water (such as the 1980 Burro tests at China Lake and subsequent 1981 Coyote tests at China Lake).

Late-Filed Contentions at 14.

Contrary to both contentions, the Unit 3 application contains a discussion of overpressures from explosions. FSAR Section 2.2.3.1.1 contains a discussion of the methodology used to assess damage due to explosions, including explosions at the LNG facility. According to the application, the effects of explosions are a concern in analyzing structural response to blast pressures. The allowable and actual distances of hazardous chemicals transported or stored were determined in accordance with NRC Regulatory Guide 1.91, Revision 1, Evaluations of Explosions Postulated to Occur on Transportation Routes Near Nuclear Power Plants. The Licensing Board recognized in rejecting that portion of Contention 4 that this information was included in the application. LBP-09-04 at 51-52. No new expert or factual support is offered in Contention 8.

At bottom, this basis fails to establish that there is an omission or a genuine dispute with the application. Accordingly, this basis cannot support an admissible contention.

iii. Basis 3: Omission of expert opinion of threat analysis specifically for CCNPP (such as the Clarke Report 2005 which was done for Naraganssett Bay at the request of the Attorney General of Rhode Island) invalidates the calculations of impact to CCNPP structures and personnel as well as residents of nearby area and the SER2009 did not consider valid distance and burn/pain criteria on the effect of radiant heat on personnel which operate CCNPP (this was covered in the Clarke Report 2005).

The third purported basis for proposed Contention 8 relates to the Clarke Report and, as with the other bases, attempts to revive rejected aspects of Contention 4.[29] Late-Filed

[29] As noted above, to the extent Contention 8 is based on the Clarke Report, it is untimely. *See, e.g.*, Late-Filed Contentions at 46 ("[T]he PPRP also failed to consult with widely accepted terrorist expert opinions and analysis available in the public domain, such as the Clarke Report 2005."). The Clarke Report was first published in 2005. The Intervenors

Contentions at 44-54. This aspect of the proposed contention also fails to support an admissible contention.

First, to the extent that the Intervenors are seeking to require a specific threat analysis for Calvert Cliffs, they are raising an issue outside the scope of the COL proceeding. The Commission and its licensing boards have consistently held that the NRC Staff does not need to consider, as part of its environmental review, terrorist attacks on nuclear power plants. *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 145-146 (2007). According to the Commission, the environmental effect caused by third-party miscreants is simply too far removed from the natural or expected consequences of agency action to require a study under NEPA. *Id*., at 146-47; *see also Oyster Creek*, 561 F.3d at 138-141 (holding that the NRC, when licensing a nuclear power facility, need not analyze the environmental impact of a hypothetical terrorist attack on that facility). That link is even more attenuated where the hypothetical attack is not on a nuclear facility, but rather on another facility (*i.e.*, Cove Point).

This basis for proposed Contention 8 also asserts that the NRC's SER did not consider valid distance or burn/pain criteria in evaluating the effect of radiant heat on the personnel that operate CCNPP. Late-Filed Contentions at 53-54. This assertion is again similar to arguments previously raised in Contention 4. There, the Intervenors argued that "the ER and PPRP omit risk analysis of secondary fires that would probably occur with instantaneous combustion from radiant heat of the LNG pool fire which will burn office paper, carpet, office furniture and computers and risk damaging sensitive equipment, negatively impacting safety and operations of CCNPP-3 and the proposed reactor" (Petition at 30) and noted that the "[t]he

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have provided no explanation for their failure to address the Clarke Report in their initial petition.

commonly used 'permissible safe zone' is a heat flux of 5 kW/m^2 which can cause second degree burns after about 30 seconds of exposure to bare skin" (Petition at 25-26). The Licensing Board concluded that the Intervenors failed to provide any information that would suggest that secondary fires could be started at the CCNPP-3 due to radiant heat from a LNG fire. LBP-09-04 at 53. Additionally, the Board explained that the PPRP Study and the COL application both include the allegedly missing evaluation. *Id*. Thus, even if Contention 8 were timely (and it is not), this basis for Contention 8 again fails to establish a genuine dispute with the COL application on a material issue.

B. Proposed Contention 9 Should Not Be Admitted

In proposed Contention 9, the Intervenors argue that the COL application "does not address a fundamental safety problem identified by European nuclear regulators." Late-Filed Contentions at 29-30. The sole basis for the proposed contention is an October 22, 2009 Joint Statement by the nuclear safety regulatory bodies in the United Kingdom, France, and Finland regarding the "EPR Pressurised Water Reactor."[30] The Joint Statement discusses an issue surrounding the separation between and independence of the safety and the control systems for the EPR reactor designs used within their regulatory jurisdiction. The Intervenors here argue that the COL application "does not address these recently identified deficiencies in the EPR design, nor how they may be corrected." Late-Filed Contentions at 30. The contention, however, provides no further discussion of how the Joint Statement relates to Calvert Cliffs Unit 3 or to this proceeding, and offers no independent expertise on Instrumentation and Control ("I&C") systems.

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[30] *See* "Joint Regulatory Position Statement on the EPR Pressurised Water Reactor," dated October 22, 2009 (available at http://www.stuk.fi/stuk/tiedotteet/fi_FI/news_571/_files/82389003978932250/default/epr_stuk_asn_ja_hse_englanniksi.pdf ("Joint Statement").

As discussed below, proposed Contention 9 is untimely, outside the scope of the proceeding, and not otherwise admissible. Contentions related to the U.S. EPR design could (and should) have been submitted as part of the Intervenor's initial petition to intervene. Further, such contentions are outside the scope of this COL proceeding, as the design issue is being reviewed by the NRC in the ongoing U.S. EPR design certification process. The Intervenors have also failed to point to any specific aspect of the COL application or the U.S. EPR design, and failed to address how the application or design are deficient with respect to NRC requirements. The only basis offered for the contention is the Joint Statement, which addresses a specific design (the European EPR) that differs from the design proposed in the United States. As discussed further below, the U.S. EPR design referenced in the Unit 3 COL application was specifically designed to align with U.S. regulations. Thus, the contention fails to establish a genuine dispute on a material issue.

Accordingly, proposed Contention 9 should be rejected.

1. Proposed Contention 9 is Untimely

The finding of good cause for late-filing of contentions is related to the total previous unavailability of information. *Limerick*, LBP-83-39, 18 NRC at 69. Similarly, a new contention must be based on new information that is materially different from information previously available. It is long established in NRC adjudication that a petitioner has an ironclad obligation to examine publicly available information with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). In this light, the

Intervenors' proposed Contention 9 is simply late, and they have offered no good reason for their tardiness.

Here, relevant information on the subject of the contention was available in the U.S. EPR design certification application long before the Joint Statement of the European regulators. The design certification application for the U.S. EPR was filed on December 11, 2007, and a *Federal Register* notice announcing the receipt and availability of the design certification application was issued on January 14, 2008. 73 Fed. Reg. 2286.[31] The NRC accepted the two parts of the COL application for Calvert Cliffs Unit 3, including the SAR, for docketing on January 25, 2008, and June 3, 2008. 73 Fed. Reg. 5877; 73 Fed. Reg. 32606. The Intervenors had an obligation to examine the design certification and COL application materials, to independently form an opinion, and to timely file a proposed contention with sufficient basis to demonstrate a genuine dispute.

Having failed to raise an issue based on the U.S. EPR design certification application or the Unit 3 COL application, the Intervenors now attempt to "piggyback" on statements made by regulators in Europe regarding the European design. The proposed contention is untimely. There can be no excuse for tardiness where, as here, the information that supposedly is the subject of the contention has been publicly available on the NRC docket for years.

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[31] See below for a discussion of where the design certification application specifically addresses the issues germane to the Joint Statement.

2. Intervenors Have Not Made a Compelling Showing on the Other Late-Filed Factors

Non-timely contentions cannot be admitted except upon a balancing of the factors in 10 C.F.R. § 2.309(c)(1). The first factor, good cause for lateness, is the most important. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). The Intervenors have provided no excuse for their failure to file a contention based on the U.S. EPR design certification or the Calvert Cliffs Unit 3 COL application. This lack of good cause for late-filing requires the petitioner to make a "compelling showing" relative to the remaining factors. *New Jersey*, CLI-93-25, 38 at 296. The Intervenors have not made such a showing.

First, there are other means whereby the Intervenors' interests are protected. If the Intervenors have concerns with the U.S. EPR design, they may raise those concerns in conjunction with the U.S. EPR design certification rulemaking. Indeed, under the NRC's rules and policy, design issues should be appropriately addressed in the design certification process rather than the COL process. Moreover, to the extent that the Intervenors are concerned with the adequacy of the European EPR design (*i.e.*, the specific design referenced by the three regulators in the Joint Statement), they should raise those concerns with the European regulators.

Proposed Contention 9 will, if admitted, also clearly broaden the issues in the proceeding. The Joint Statement raises issues that are unique to the European EPR design. Admitting the contention would expand the proceeding beyond the adequacy of the Calvert Cliffs Unit 3 COL application to include the U.S. EPR design certification and ultimately would encompass compliance with the requirements of foreign regulators.

Finally, the Intervenors have not provided any information to suggest that they may reasonably be expected to assist in developing a sound record on proposed Contention 9.

The proposed contention simply repeats portions of the Joint Statement. As noted above, the Intervenors do not identify any I&C experts, do not present any independent evidence or analysis, and do not contribute any unique perspectives.

In sum, there is no good cause for late-filing and there has been no compelling showing with respect to the other criteria for late-filed contentions. Accordingly, the Licensing Board should decline to further consider the admissibility of proposed Contention 9.

3. Proposed Contention 9 Is Not Admissible

First, proposed Contention 9 does not contain a single citation to the Unit 3 COL application (or even to the U.S. EPR design certification). Late-Filed Contentions at 30. A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. *See Comanche Peak*, LBP-92-37, 36 NRC at 384.

Second, Intervenors must explain the significance of any factual information upon which they rely. *See* 10 C.F.R. § 2.309(f)(ii); *see also Fansteel, Inc.*, CLI-03-13, 58 NRC at 204-05. Here, the Intervenors simply parrot statements by the European regulators, made in an entirely different context than the NRC licensing review for Calvert Cliffs Unit 3. The Intervenors make no attempt to link the concerns of the European regulators to the specific design under review in the United States, or to demonstrate that the concern is within the scope of this COL proceeding. *See* 10 C.F.R. §§ 2.309(f)(iii), 2.309(f)(iv). Even an expert opinion (as opposed to the bald assertion offered in proposed Contention 9) that merely states a conclusion (*e.g.*, the application is deficient, inadequate, or wrong), without providing *a reasoned basis or explanation* for why the application is inadequate, cannot provide a basis for a contention. *USEC, Inc.*, CLI-06-10, 63 NRC at 472.

Third, by relying on no more than the Joint Statement the Intervenors have failed to provide sufficient information to demonstrate a genuine dispute specifically related to the U.S. EPR proposed for Calvert Cliffs. *See* 10 C.F.R. § 2.309(f)(vi). Proposed Contention 9 merely quotes the Joint Statement as follows:

> The issue is primarily around ensuring the adequacy of the safety systems (those used to maintain control of the plant if it goes outside normal conditions), and their independence from the control systems (those used to operate the plant under normal conditions).
>
> Independence is important because, if a safety system provides protection against the failure of a control system, then they should not fail together. The EPR design, as originally proposed by the licensees and the manufacturer, AREVA, doesn't comply with the independence principle, as there is a very high degree of complex interconnectivity between the control and safety systems.

However, mere reliance on this passage does not establish an issue for the U.S. EPR or for Calvert Cliffs Unit 3.

The U.S. EPR and European EPR designs both include two distinct I&C systems — one dedicated to normal process command and control and another dedicated to safety functions outside normal conditions. However, the NRC imposes specific requirements related to the independence of "safety" and "non-safety" systems for U.S. reactor designs. *See* 10 C.F.R. § 50.55a(h), which incorporates by reference IEEE Std. 603-1991, Clause 5.6.3, "Independence Between Safety Systems and Other Systems"; 10 C.F.R. Part 50, Appendix A, *General Design Criteria for Nuclear Power Plants* (Criterion 22, *Protection system*

independence, and Criterion 24, *Separation of protection and control systems*).[32] The NRC also has established regulatory guidance on the subject of safety to non-safety system interfaces.[33]

As a result, during the preparation of the design certification application the U.S. EPR was specifically designed to establish compliance with NRC regulations and does not have the same I&C architecture as the European plants.[34] Furthermore, in the United States, safety systems are classified as Class 1E. *See generally* U.S. EPR Final Safety Analysis Report at Chapter 7, *Instrumentation and Controls*.[35] There are no requirements for independence

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32 The principle of independence has for a goal that no incidental fault scenario on the process control I&C side generate a failure on the safety I&C side.

33 *See* Regulatory Guide 1.75, *Criteria for Independence of Electrical Safety Systems* , Revision 3, which endorses IEEE Std. 384-1992, *Standard Criteria for Independence of Class 1E Equipment and Circuits*, and DI&C-ISG-04, *Task Working Group #4: Highly-Integrated Control Rooms—Communications Issues (HICRc) Interim Staff Guidance*, September 28, 2007.

34 Compliance with the NRC requirements for independence between the safety and non-safety I&C systems for the U.S. EPR is discussed at several points in the design certification FSAR. *See, e.g.*, U.S. EPR Design Certification FSAR, at 7.1.1.6.4, *Independence* ("The following measures are implemented for the safety I&C systems: . . . Independence between the safety-related I&C systems and the non-safety-related I&C systems."); *id*. ("The safety-related I&C systems are physically separated from non-safety-related I&C systems."); *id*. at 7.1.2.2.11, *GDC 22 − Protection System Independence*, and 7.1.2.2.13, *GDC 24 − Separation of Protection and Control Systems* (ADAMS Accession No. ML091671503); *see also id*. at 7.7.2.6, *Effects of Control System Operation Upon Accidents*, 7.7.2.7, *Effects of Control System Failures*, 7.7.2.9, *Independence*, 7.7.2.10, *Interactions between Safety and Non-Safety I&C Systems*, and 7.7.2.12, *Potential for Inadvertent Actuation* (ADAMS Accession No. ML091671516). None of this is acknowledged, much less challenged, in the proposed contention.

35 *See, e.g.,* (a) Tier 2, Section 7.1.1, *U.S. EPR I&C Architecture*, at Subsections 7.1.1.6, *I&C Architecture Design Principles*, and 7.1.1.6.4, *Independence* (including discussion of independence between he safety I&C systems and non-safety I&C systems); (b) Tier 2, Section 7.1.2, *Identification of Safety Criteria*, at Subsections 7.1.2.6.17, *Independence (Clause 5.6),* 7.1.2.2.11, *GDC 22 – Protections System Independence*, and 7.1.2.2.13 *GDC 24 – Separation of Protection and Control Systems*; and (c) Tier 2, Section 7.7, *Control Systems Not Required for Safety*, at Subsections 7.7.2.6, *Effects of Control System Operation Upon Accidence*, 7.7.2.7, *Effects of Control System Failures*, 7.7.2.9,

among Class 1E systems. The Intervenors have not provided in proposed Contention 9 any technical basis documents specifically addressing the U.S. design and have not pointed to any specific aspect of the U.S. EPR design that it alleges to be in non-conformance with either NRC requirements or guidance.

In sum, the concern raised by the European regulators in the Joint Statement is not directly applicable to the U.S. EPR design referenced in the Unit 3 COL application. Given the regulatory and factual distinctions involved, the Intervenors mere reliance on the Joint Statement is inadequate to demonstrate a genuine dispute on a material issue. For all of these reasons, proposed Contention 9 is inadmissible.

Independence, 7.7.2.10, *Interactions between Safety and Non-Safety I&C Systems*, and 7.7.2.12 *Potential for Inadvertent Actuation*.

CONCLUSION

For the above reasons, the Intervenors' proposed new contentions should not be admitted for hearing.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 23rd day of December 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC AND UNISTAR NUCLEAR OPERATING SERVICES, LLC	)	Docket No. 52-016-COL
	)	
(Calvert Cliffs Nuclear Power Plant, Unit 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANTS' RESPONSE TO NEW PROPOSED CONTENTIONS" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 23rd day of December 2009, which to the best of my knowledge resulted in transmittal of the foregoing to the following persons:

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