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	)	Docket No. 52-016-COL
SERVICES, LLC	)	
	)	
(Calvert Cliffs Nuclear Power Plant, Unit 3)	)	

NRC STAFF ANSWER TO JOINT INTERVENORS' NEW CONTENTIONS 8 AND 9

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the Nuclear Regulatory Commission (NRC Staff) hereby answers the Submission of New Contentions by Joint Intervenors (New Contention Petition) filed on December 1, 2009, by Michael Mariotte on behalf of Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen, and Southern Maryland CARES (collectively, Joint Intervenors). For the reasons set forth below, the NRC Staff opposes the admission of Joint Intervenors' proposed Contentions 8 and 9.

BACKGROUND

On July 13, 2007, and March 14, 2008, UniStar Nuclear Operating Services, LLC and Calvert Cliffs 3 Nuclear Project, LLC (collectively, Applicant) submitted an application for a combined license (COL) for one U.S. Evolutionary Power Reactor (U.S. EPR) to be located adjacent to the existing Calvert Cliffs Nuclear Power Plant (CCNPP), Units 1 and 2, near Lusby, Calvert County, Maryland (COLA or Application).[1] The proposed unit will be known as Calvert

[1] The original COL applicants were Constellation Generation Group, LLC and UniStar Nuclear Operating Services, LLC. The application was revised by letter dated August 1, 2008, which among other things, changed the applicants to Calvert Cliffs 3 Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC.

Cliffs Nuclear Power Plant, Unit 3 (CCNPP3). The COL Applicants subsequently revised and supplemented the application.

On September 26, 2008, 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. 73 Fed. Reg. 55,876 (Sept. 26, 2008). In response to the Notice of Hearing, the Joint Intervenors submitted their Petition to Intervene in Docket No. 52-016, Calvert Cliffs-3 Nuclear Power Plant Combined Construction and License Application (Petition) on November 19, 2008. On December 15, 2008, the NRC Staff filed an answer to the Petition (Staff Answer). The Licensing Board held a prehearing conference in Rockville, Maryland on February 20, 2009, regarding the admissibility of the proposed contentions.

On March 24, 2009, the Licensing Board issued a Memorandum and Order admitting the Joint Intervenors as parties to this proceeding and admitting three proposed contentions. *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 NRC 170 (2009). The Joint Intervenors filed their New Contention Petition to admit proposed new contentions 8 and 9 on December 1, 2009.

DISCUSSION

A. Legal Standards for Admission of Nontimely, New, or Amended Contentions

Under Commission regulations, a contention filed in a nontimely manner may be admitted only upon the presiding officer's determination, *inter alia*, that the contention should be admitted after balancing the eight factors listed in 10 C.F.R. § 2.309(c), all of which must be addressed in the petitioner's filing. Petitioners seeking the admission of a nontimely contention bear the burden of showing that a balancing of these factors weighs in favor of admittance. *See Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a nontimely petition). The first factor, whether good cause exists for the

failure to file on time, is entitled to the most weight. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 58 NRC 31, 44 (2004); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Where no showing of good cause for nontimely filing is tendered, a petitioner's demonstration on the other factors must be particularly strong. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)).

The Commission's regulations additionally provide that a new or amended contention may be filed only with leave of the presiding officer, and must 1) be based upon new information that was not previously available, 2) show that the new information is materially different than what was previously available, and 3) show that the contention was filed timely once the new information became available. 10 C.F.R. § 2.309(f)(2).

A petitioner must also show that the nontimely, new, or amended contention meets the substantive contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993). These requirements may be summarized as follows. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute with the applicant exists with regard to a material issue of law or fact,

including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

The purpose of these requirements is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[2] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

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[2] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). Although the NRC's Rules of Practice were revised in 2004, 69 Fed. Reg. 2182, § 2.309 incorporates the NRC's long-standing requirements for nontimely, new, and amended contentions. *Compare* 10 C.F.R. § 2.309(c) and (f)(2) *with* 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004).

B. Joint Intervenors' Proposed Contention 8

Joint Intervenors' proposed Contention 8 reads:

> This contention challenges the validity and accuracy of the October 28, 2009 "SAFETY EVALUATION BY THE OFFICE OF NUCLEAR REACTOR REGULATION 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."

New Contention Petition at 1.

The Joint Intervenors assert that the NRC Safety Evaluation Report (SER) mentioned in the contention[3] is based on a flawed study by the Power Plant Research Program (PPRP) of the Maryland Department of Natural Resources, and on a 1993 study by Arthur D. Little that predates the terrorist attacks on September 11, 2001. *Id.* at 1-2. According to the Intervenors, the NRC SER evaluation is "bootstrapping its calculations on flawed bases" and is "also consequently flawed and invalid." *Id.* at 2. The Joint Intervenors further assert that CCNPP Units 1, 2, and 3 "share safety and structures" and that these shared features were addressed in the SER. *Id.* According to the Joint Intervenors, the NRC approved Unit 3 pipeline overpressure based on an incomplete analysis, because none of the studies took into account overpressures created by liquified natural gas (LNG) spills on water. *Id.* The Joint Intervenors further assert that the NRC did not consider additional information in the SER, even when that information was identified by the Intervenors and provided to the NRC Staff. *Id.* at 4 & Appendix A.

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[3] Safety Evaluation by the Office of Nuclear Reactor Regulation Regarding the Effect of Expanding the Cove Point Liquified Natural Gas Facility on Safety at Calvert Cliffs Nuclear Power Plant, Units 1 and 2 (Oct. 28, 2009), ADAMS Accession No. ML092180424 (SER).

According to the Joint Intervenors, "the NRC's acceptance of UniStar's pipeline overpressure submission underscores the omission from consideration of overpressures which occur when LNG is spilled on water." *Id.* at 3. The Joint Intervenors claim that this is a major omission in the PPRP study, and that the Applicant's COL application and Final Safety Analysis Report (FSAR) rely on this study to a great extent. According to the Joint Intervenors, the information contained in the Sandia National Laboratories "Guidance on Risk Analysis and Safety Implications of a Large LNG Spill Over Water" (SAND2004-6528, Dec 2004)" (2004 Sandia Study) should have been used, and this omission "renders the PPRP deficient and incomplete, as well as mathematically and scientifically flawed, and renders calculations and conclusions drawn therefrom to be partially invalid, thereby compromising the safety of the population . . . and the facilities at CCNPP." *Id.* at 4., The Joint Intervenors claim that this invalidates the COLA and its FSAR. *Id.*

The Joint Intervenors argue that these omissions are relevant and material to the safety of area residents, including those in Washington, DC, which is within 50 miles of the facility. *Id.* at 5. According to the Joint Intervenors, the proximity of the LNG facility to the CCNPP "already compromises the facilities at CCNPP and presents this location as a prime target for intentional threats that could compromise the two existing reactors at CCNPP." *Id.* Adding another reactor to the site, they say, "further emphasizes the CCNPP-Cove Point area as an enhanced target with a bulls-eye for a determined group, given the current situation of threats to the United States from terrorist groups, foreign and home-grown." *Id.* The Joint Intervenors argue that expanding the LNG facility also results in an "elevated potential for catastrophic occurrences [that] was not sufficiently or adequately addressed in the NRC safety evaluation." *Id.*

C. Staff Analysis of the Proposed New Contention 8

Proposed Contention 8 is inadmissible because it: 1) inappropriately challenges a staff review document; 2); is a nontimely attempt to amend and relitigate a contention the Board has

already rejected; and 3) does not meet the pleading requirements of 10 C.F.R. § 2.309(f)(1). Accordingly, proposed Contention 8 should be rejected.

1. *Proposed Contention 8 is an Inappropriate Challenge to the Staff's SER*

The Joint Intervenors' proposed Contention 8 is, in large part, an inappropriate challenge to a Staff SER and therefore fails to meet 10 C.F.R. § 2.309(f)(1). It is a general rule relative to safety-related matters in NRC proceedings that the adequacy of the application, not the adequacy of the Staff's review or evaluation (e.g., its SER) is the focus for a proper contention. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476-77 (2008); *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121-22 (1995). *See also* "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). Intervenors must show that their contentions "show that a genuine dispute exists *with the applicant/licensee* on a material issue of law or fact," 10 C.F.R. § 2.309(f)(vi) (emphasis added), and contentions challenging the Staff's review are generally inadmissible for this reason alone. *Oyster Creek*, CLI-08-23, 68 NRC at 477.

Although the New Contention Petition mentions the FSAR in several locations, the overall focus appears to be on challenging the content of the Staff SER. Accordingly, to the extent that Contention 8 focuses on the SER under consideration and not on the Application, it is outside the scope of this proceeding and immaterial to the licensing decision the NRC must make. It therefore fails to satisfy the pleading requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(iv) and should not be admitted.

2. *Contention 8 Is a Nontimely Attempt to Amend and Relitigate Contention 4*

Contention 8 should not be admitted because the proposed issue has already been raised and rejected in this proceeding. With this filing, the Joint Intervenors re-use material and reasoning initially put forth in their presentation of Contention 4. The Licensing Board previously

considered and rejected Contention 4 for failure to satisfy the pleading requirements of 10 C.F.R. § 2.309(f)(1). *See Calvert Cliffs*, LBP-09-4, 69 NRC at 205-13. Specifically, in Contention 4 the Joint Intervenors claimed that:

> The UniStar application's Environmental Report (ER) is unacceptably deficient because it omits from the analysis of CCNPP 3's reactor (USEPR) design and safety of the CCNPP facility, additional relevant impacts arising from the expansion of the Dominion Cove Point Liquified Natural Gas (DCPLNG) facility located 3.2 miles south of the proposed reactor.

Petition at 17. In support of Contention 4, the Joint Intervenors set forth multiple claims collectively challenging the Applicant's safety analysis related to the proximity of CCNPP3 to the DCPLNG facility. *Id.* at 17-32. Now, in proposed Contention 8, the Joint Intervenors challenge the validity and accuracy of the Staff SER related to CCNPP Units 1 and 2, and indirectly challenge the FSAR submitted as part of the CCNPP3 COLA. *See* New Contention Petition at 1.

In support of its challenge, the Joint Intervenors claim that the Staff's reliance on the Maryland PPRP Study indicates that the Staff's calculations were "bootstrapped to unacceptably deficient and disputed studies [and] are relevant and material to the safety of the residents, schools, businesses, communities and facilities at CCNPP and vicinity of the Calvert Cliffs-Cove Point contiguous sites." *Id*. at 4. Rather than rely on the PPRP study, the Joint Intervenors argue (as they did in connection with Contention 4) that the NRC Staff should have relied on studies published by Sandia National Laboratories, including the 2004 Sandia Study. New Contention Petition at 14. *See also* Petition at 26-27.

Contention 4 purported to challenge the Applicant's Environmental Report (ER) in the same manner as proposed Contention 8 now challenges the Staff SER, and indirectly the Applicant's FSAR – by claiming that these documents improperly relied on the PPRP Study and the 1993 Arthur D. Little Study and that they should have relied on the 2004 Sandia Study instead. *See* Petition at 17-32. However, although Contention 4 purported to challenge the

Applicant's ER, and although the Licensing Board analyzed its admissibility in connection with the National Environmental Policy Act (NEPA) and associated 10 C.F.R. Part 51 regulations, *see Calvert Cliffs*, LBP-09-4, 69 NRC at 208-09, the COLA material quoted and challenged in Contention 4 was drawn from the FSAR and not the ER. *See* Petition at 19-22, 25, 27-29, and 30. *See also* Staff Answer at 30.

The Joint Intervenors now appear to be using the publication of the SER, which is not the SER for the Application under consideration in this licensing proceeding,[4] as an opportunity to file a nearly identical contention that challenges the SER and, indirectly, revives the earlier challenge to material in the Applicant's FSAR. *See* New Contention Petition at 4. Issues related to contentions that challenge Staff review documents are discussed above. With respect to any challenges the Joint Intervenors intend to make to the FSAR, however, the New Contention Petition presents no argument as to why publication of the Staff's SER renders proposed Contention 8 timely.

Intervenors filing nontimely contentions are required to address the nontimely filing factors in 10 C.F.R. § 2.309(c)(1)(i)-(viii). The most important of these, good cause for failure to file on time, is found in 10 C.F.R. § 2.309(c)(1)(i). *See Private Fuel Storage*, CLI-04-4, 58 NRC at 44. The Joint Intervenors assert that proposed contention 8 is based on the Staff's SER, which was dated October 28, 2009, and was therefore not previously available. *See* New Contention Petition at 1-6. However, the Joint Intervenors do not use the SER to support a challenge to the FSAR or other part of the COLA, but rather challenge the SER along with the COLA. It is therefore unclear how publication of the SER can be considered good cause for a

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[4] The final SER for the CCNPP3 COLA is scheduled for publication in 2012. *See* Application Review Schedule, http://www.nrc.gov/reactors/new-reactors/col/calvert-cliffs/review-schedule.html.

failure to file a timely contention challenging the COLA, and the Joint Intervenors present no arguments related to good cause for nontimely filing.

As noted above, where no showing of good cause for nontimely filing is tendered, a petitioner's demonstration on the other seven factors found in 10 C.F.R. § 2.309(c)(1)(ii)-(viii) must be particularly strong. *Comanche Peak*, CLI-92-12, 36 NRC at 73. Here, the Joint Intervenors do not even attempt to address 10 C.F.R. § 2.309(c)(1)(ii)-(viii). Accordingly, Joint Intervenors have not satisfied 10 C.F.R. § 2.309(c), as a balancing of its factors does not weigh in favor of the proposed contention.

Furthermore, to the extent that the Joint Intervenors intend to invoke the filing requirements for new or amended contentions in 10 C.F.R. § 2.309(f)(2), the information they rely upon in support of their contention is not new. Although the SER is a recent document, the information the Joint Intervenors rely upon to challenge the SER is not new. Nor is the FSAR, the target of any proper challenge, a new document.

For a contention to satisfy the new or amended contention requirements of 10 C.F.R. § 2.309(f)(2), that contention must be based on information that was not previously available and that is materially different from information that was previously available. *See* 10 C.F.R. § 2.309(f)(2)(i)-(ii). Other Licensing Boards have stated that "a central element" in any decision on the admissibility of a new contention under 10 C.F.R. § 2.309(f)(2) "is a determination whether the information provided in support of the contention was, in fact, the appropriate 'trigger' for the contention to the degree the information was not previously available/materially different from information that was [previously] available." *Tennessee Valley Authority* (Bellefonte Nuclear Power Units 3 and 4), Memorandum and Order (Ruling on Request to Admit New Contention) (Apr. 29, 2009) at 6 (unpublished). In filing proposed Contention 8, the Joint Intervenors do not appear to be relying on any new information contained in the SER in support of their contention, but rather using the occasion of the SER's publication as an opportunity to

relitigate Contention 4 in a new guise. As discussed above, the contention itself relies on the 2004 Sandia Study, the PPRP, and the 1993 Arthur D. Little Study that the Joint Intervenors have used in support of their contention in the past. None of this information is new, and the SER therefore does not provide an appropriate "trigger" for a new or amended contention.

The Joint Intervenors present no arguments about how their new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2). On examination, it is clear that they have simply reworded and repeated reasoning which was rejected by the Licensing Board in its ruling on proposed Contention 4. *See Calvert Cliffs*, LBP-09-4, 69 NRC at 205-13. Thus, the Joint Intervenors also fail to satisfy 10 C.F.R. § 2.309(f)(2).

3. *Proposed Contention 8 Attempts to Cure the Defects the Board Found in Contention 4, But Does Not Satisfy the Requirements of 10 C.F.R. § 2.309(f)(1)*

Various arguments found in proposed Contention 8 appear to be explicit attempts to cure deficiencies the Board identified in its order rejecting Contention 4. *See id.* As discussed above, this attempt to revisit Contention 4 is neither timely nor based on new information. However, even if proposed Contention 8 were timely, the Joint Intervenors have not cured the problems associated with Contention 4, and proposed Contention 8 therefore fails to satisfy the pleading requirements of 10 C.F.R. § 2.309(f)(1).

The first of these relates to the legal basis for the contention. In rejecting Contention 4, the Licensing Board stated that the Joint Intervenors, by purportedly challenging the ER, implicitly argued that the COLA failed to comply with NEPA and with 10 C.F.R. Part 51. *Calvert Cliffs*, LBP-09-4, 69 NRC at 208. The Board rejected the contention on the ground that it "fail[ed] to establish that the omissions they allege are required by NEPA." *Id.*

The Joint Intervenors attempt to cure this problem by supplying a new legal basis, 10 C.F.R. § 52.79, to support the admission of proposed Contention 8.[5] In particular, the Joint Intervenors cite to 10 C.F.R. § 52.79(a)(2) regarding description of plant structures, systems, and components (SSCs), 10 C.F.R. § 52.79(a)(5) regarding the performance of these SSCs, 10 C.F.R. § 52.79(a)(6) regarding fire protection design features, and 10 C.F.R. § 52.79(a)(7) regarding pressurized thermal shock. New Contention Petition at 11-12. The Joint Intervenors do not present any arguments about why they should be permitted to litigate a new basis for a previously rejected contention at this late date. However, even if proposed Contention 8 were timely, the joint Intervenors have not explained how the specific omission they allege are required by 10 C.F.R. § 52.79 or any other regulation. For this reason, the Board's decision to reject Contention 4 is equally applicable to proposed Contention 8.

In rejecting Contention 4, the Board also noted that the Joint Intervenors failed to "[p]rovide a concise statement of the alleged facts or expert opinions which support the[ir] position" or to "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," as required by the contention pleading standards of 10 C.F.R. § 2.309(f)(1)(v)-(vi). *Calvert Cliffs*, LBP-09-4, 69 NRC at 207.

Proposed Contention 8 attempts to cure these problems by including discussions explicitly labeled as addressing the issues related to 10 C.F.R. § 2.309(f)(1)(v)-(vi) that the Board identified in its order rejecting Contention 4. New Contention Petition at 23-29. Again, the Joint Intervenors provide no argument as to why amendments to a previously rejected contention should be permitted at this time. However, even if proposed Contention 8 were

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[5] New Contention Petition at 10-13. The Joint Intervenors also mention 10 C.F.R. Part 50, but do not cite to any specific regulation therein.

timely, the materials provided in support of the New Contention Petition do not cure the problems the Board identified in rejecting Contention 4. The Joint Intervenors state that they have provided "expert opinions," but instead cite to the same studies they cited in support of Contention 4. *Id.* at 23-26. The Joint Intervenors also state that they have demonstrated that a genuine dispute exists, but it is unclear how any of the information they present does so when Contention 4 did not.

For the reasons set forth above, and for those articulated by the Board in *Calvert Cliffs*, LBP-09-4, 69 NRC at 205-13, proposed Contention 8 should not be admitted.

D. Joint Intervenors' Proposed Contention 9

Joint Intervenors' proposed Contention 9 reads:

> UniStar Nuclear's application does not address a fundamental safety problem identified by European nuclear regulators.

New Contention Petition at 29. As support for this contention, the Joint Intervenors include a one-page regulatory position statement which they say was released on November 2, 2009, by the British, French, and Finnish nuclear regulators to AREVA, the vendor of the EPR design. *Id.* at 30. (The document itself is dated October 22, 2009.) The Joint Intervenors state that this statement raises issues related to the digital Instrumentation and Control (I&C) systems, specifically the independence of systems used to operate the plant under normal conditions and those used to maintain control of the plant if it departs from normal conditions. *Id.* According to the Joint Intervenors, the COLA does not address the issues identified in this regulatory position statement or how they may be corrected. *Id.* For that reason, the Joint Intervenors claim that the COLA is incomplete. *Id.* The Joint Intervenors provide no factual or expert support for this contention besides the European position statement.

E. Staff Analysis of the Proposed New Contention 9

Proposed Contention 9 is inadmissible for three reasons. First, it neither addresses the eight-part test for nontimely filings found in 10 C.F.R. § 2.309(c) nor makes a case for admission under the rules for new and amended contentions found in 10 C.F.R. § 2.309(f)(2). Second, it represents a challenge to the EPR design certification document (DCD) and should have been submitted as a comment in the rulemaking associated with that design rather than in this adjudicatory proceeding on the Calvert Cliffs COLA. Finally, it fails to satisfy the contention pleading standards of 10 C.F.R. § 2.309(f)(1)(v)-(vi) in that it provides neither a "concise statement of the alleged facts or expert opinions which support [their] position" nor "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." For these reasons, proposed Contention 9 should be rejected.

1. *Proposed Contention 9 Does Not Address Standards for Nontimely or New Contentions*

Proposed Contention 9 includes no text that addresses either the standards for nontimely filings found in 10 C.F.R. § 2.309(c) or the standards for new or amended contentions found in 10 C.F.R. § 2.309(f)(2). The 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, was filed on September 26, 2008. 73 Fed. Reg. 55,876 (Sept. 26, 2008). Contentions were therefore due by November 24, 2008, and the Joint Intervenors filed their Petition on November 19, 2008. The New Contention Petition, filed on December 1, 2009, was filed more than a year after the deadline for contention filing established in the notice of hearing, and the Joint Intervenors have not addressed the nontimely filing standards of 10 C.F.R. § 2.309(c). The Commission has previously dismissed petitioners who do not address regulatory criteria for nontimely filings when filing late contentions. *See Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998).

Similarly, no argument is presented regarding the standards for new or amended contentions found in 10 C.F.R. § 2.309(f)(2). Proposed Contention 9 is based entirely on the regulatory position statement issued on November 2, 2009, by the British, French, and Finnish nuclear regulators to AREVA, the manufacturer of the EPR design. HSE, STUK, and ASN Joint Regulatory Position Statement on the EPR Pressurized Water Reactor (Oct. 22, 2009) (Position Statement). It is possible that the Joint Intervenors intended to argue that this information was not previously available and materially different from previously available information, as required by 10 C.F.R. § 2.309(f)(2)(i)-(ii). If so, they have presented no information to this effect.

Even if the Joint Intervenors had wished to make such an argument, the information in question is not, in fact, new information. The issue of the independence of digital I&C systems has been addressed extensively and for more than a year in the context of the rulemaking on the EPR DCD. This rulemaking is being conducted under Docket No. 52-020. *See* Letter from Getachew Tesfaye, NRC to Sandra M. Sloan, AREVA NP Inc., Acceptance of the Application for Standard Design Certification of the U.S. EPR (Feb. 25, 2008), ADAMS Accession No. ML080560167.

A number of documents that address this issue in detail can be found on the docket of that rulemaking. This includes Requests for Additional Information (RAIs) and responses thereto.[6] These issues have also been discussed in technical reports dating back to at least

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[6] *See* Response to Request for Additional Information No. 56, Supplement 1 (Sept. 12, 2008), ADAMS Accession No ML090140403; Response to Request for Additional Information No. 56, Supplement 2 (Sept. 12, 2008), ADAMS Accession No. ML090350635; Request for Additional Information No. 56, Supplement 3 (Sept. 12, 2008), ADAMS Accession No. ML090620715**;** Request for Additional Information No. 36 (553, 1026), Revision 0 (Aug. 14, 2008), ADAMS Accession No. ML082380247; Response to Request for Additional Information No. 36 (553, 1026), Revision 0 (Aug. 14, 2008), ADAMS Accession No. ML082750206.

2006.[7] Even the regulatory position statement cited by the Joint Intervenors summarizes the outcome of regulatory processes in Europe, rather than presenting new technical information related to a problem not previously identified. Position Statement ¶ 7. Because an extensive record related to this issue existed long before the regulatory position statement summarizing the issue was published, that document cannot be considered to contain information that was not previously available or materially different from previously available information.

2. *Proposed Contention 9 Addresses the EPR DCD, not the COLA*

Proposed Contention 9 is also inadmissible because it raises a challenge to the EPR DCD that should be resolved in the aforementioned rulemaking associated with that design. If this contention were otherwise admissible, the proper procedure would be to refer it for resolution in the rulemaking and hold it in abeyance in the COL proceeding.[8] As discussed below, however, the contention is not otherwise admissible and should be rejected.

NRC regulations allow a COL applicant to reference a design for which a design certification application has been docketed but for which the final design certification rulemaking has not been completed. *See* 10 C.F.R. § 52.55(c). A 2008 *Federal Register* statement sets forth the policy that the Commission applies when a COL applicant chooses this approach. *See* Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963 (Apr. 17, 2008).

The Commission's Policy Statement on new reactor licensing states that the decision to docket a design certification application serves as the Commission's determination that the

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[7] *See, e.g.*, AV42 Priority Activation and Control Module, Topical Report, ANP-10273NP, Rev. 0 (November 2006), ADAMS Accession No. ML063380086.

[8] As noted above, the issue is already being considered as part of that rulemaking even in the absence of such a referral.

design is subject to a general rulemaking. 73 Fed. Reg. at 20,972. Any otherwise admissible contentions challenging such a design that are submitted in a COL adjudicatory proceeding should be referred for resolution in the rulemaking process and their litigation held in abeyance until either the rulemaking is complete or the applicant chooses to proceed in the absence of a final rule on the issue. *Id*. Such contentions would eventually be denied if the final rule is adopted, but could become active litigation issues in the event that the applicant chose to proceed with an uncertified design (for example if the design certification were delayed or denied). *Id.* However, this procedure applies only if the contentions involved are otherwise admissible under the provisions of 10 C.F.R. § 2.309. *See id*.

It is general NRC policy to resolve generic issues common to many nuclear power plants through the rulemaking process rather than through litigation of individual cases.[9] Because generic issues are resolved in this way, administrative litigation is reserved for site-specific issues and for issues for which a waiver of a general rule is obtained. *See* 10 C.F.R. § 2.335. A design certification rulemaking is not treated differently from any other rulemaking on issues common to many plants, and the use of the rulemaking process specifically to resolve design certification issues has been upheld in Federal court. *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1171-72 (D.C. Cir. 1992). With limited exceptions, Commission rules and regulations, as well as issues "which are (or are about to become) the subject of general rulemaking by the Commission" are not subject to challenge by any party in NRC adjudicatory

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[9] *See, e.g.*, *Baltimore Gas & Elec. Co. v. NRDC*, 46 U.S. 87, 101 (1983) ("Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event."). S*ee also Massachusetts v. United States*, 522 F.3d 115, 119 (1st Cir. 2008); *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974).

proceedings.[10] Because proposed Contention 9 is a challenge to the DCD, it is not subject to litigation here.

3. *Proposed Contention 9 Fails to Satisfy the Pleading Requirements of 10 C.F.R. § 2.309(f)(1)*

In addition to the issues described above, proposed Contention 9 fails to satisfy the contention pleading standards of 10 C.F.R. § 2.309(f)(1)(v)-(vi) in that it provides neither a "concise statement of the alleged facts or expert opinions which support [their] position" nor "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." The Joint Intervenors allege that "UniStar Nuclear's [COLA] does not address these recently identified deficiencies in the EPR design, nor how they may be corrected. Thus, the license application is incomplete on a fundamental safety issue." New Contention Petition at 30.

The Joint Intervenors make no other mention of the COLA, and do not cite to any specific portion that they allege is deficient. Nor do they address any specific portion of the EPR DCD. There is extensive discussion of Instrumentation and Control issues in FSAR Chapter 7 of the DCD for the EPR design. US EPR Final Safety Analysis Report, Chapter 7, Instrumentation and Controls, Rev. 1 (May 29, 2009), ADAMS Accession No. ML092460518. This information is incorporated by reference into the FSAR for the CCNPP3 COLA. FSAR, Chapter 7, Instrumentation and Controls, Rev. 6 (Sept. 30, 2009), ADAMS Accession No. ML093310227. The Joint Intervenors do not identify any portion of this material that is in dispute, nor do they provide any information on how the issue identified by the European

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[10] 73 Fed. Reg. at 20,972 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999), *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)); 10 C.F.R. § 2.335(a).

regulators is being addressed in the U.S. regulatory context. The pleading standards of 10 C.F.R. § 2.309(f)(1) require proponents of contentions to identify "specific portions of the application . . . that the petitioner disputes and the supporting reason for each dispute." 10 C.F.R. § 2.309(f)(1)(vi). The Joint Intervenors have not satisfied this requirement here.

Similarly, the Joint Intervenors have not supplied any factual or expert support for any specific challenge to the Application, as required by 10 C.F.R. § 2.309(f)(1)(v). The Position Statement that the Joint Intervenors supply in support of their contention contains only generalized conclusions, not expert opinion or factual information addressing the specific content of the COLA and/or DCD or any alleged deficiencies therein. For this reason, proposed Contention 9 also fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and should be rejected.

CONCLUSION

In view of the foregoing, the Licensing Board should reject both of the proposed new contentions in the December 1, 2009, filing from the Joint Intervenors.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 28th 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	)	Docket No. 52-016-COL
SERVICES, LLC	)	
	)	
(Calvert Cliffs Nuclear Power Plant, Unit 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff Answer to Joint Intervenors' New Contention 8 and 9, dated December 28, 2009, have been served upon the following persons by Electronic Information Exchange this 28th day of December, 2009:

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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

NOTICE OF APPEARANCE OF MARCIA CARPENTIER

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter in accordance with 10 C.F.R. § 2.314(b).

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Dated at Rockville, Maryland
this 28th day of December, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NOTICE OF APPEARANCE OF MARCIA CARPENTIER" have been served on the following persons by Electronic Information Exchange on this 28th day of December, 2009:

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