UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
	)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034 & 52-035
	)	
	)	
(Comanche Peak Nuclear Power Plant, Units 3 & 4)	)	
	)	

NRC STAFF'S ANSWER TO INTERVENORS' PROPOSED CONTENTIONS REGARDING APPLICANT'S ENVIRONMENTAL REPORT REVISIONS AND REQUEST FOR HEARING

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's (Board's) Initial Scheduling Order[1] dated October 28, 2009, and 10 C.F.R. § 2.309(h)(1), the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby answers the five proposed new co-location contentions filed by the Sustainable Energy and Economic Development Coalition (SEED), Nita O'Neal, Public Citizen, Don Young, True Cost of Nukes, J. Nile Fisher and Representative Lon Burnam (collectively Intervenors), on February 16, 2010.[2] For the reasons set forth below, each of the Intervenors' new proposed co-location contentions, CL-1, CL-2, CL-3, CL-4, and CL-5, should be rejected for failure to comply with the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1), as well as for failure to comply with the contention admissibility requirements for late-filed contentions in 10 C.F.R. § 2.309(c) and (f)(2). Additionally, proposed contentions CL-3 and CL-5 should be rejected as impermissible challenges in a COL adjudication to a proposed future design certification rulemaking.

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[1] *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), Unpublished Order (LBP Aug. 6, 2009) (slip op.) (Initial Scheduling Order).

[2] See "Intervenors' Motion for Leave to File New Contentions," (Feb. 16, 2010) (Motion), and "Intervenors' Proposed Contentions Regarding Applicant's Environmental Report Revisions and Request for Hearing" (Feb. 16, 2010) (New Co-location Contentions).

BACKGROUND

On September 19, 2008, Luminant Generation Company LLC and Comanche Peak Nuclear Power Company LLC (Applicant), pursuant to the Atomic Energy Act of 1954, as amended (AEA) and the Commission's regulations, submitted an application for combined licenses (COL) for two US-Advanced Pressurized Water Reactors (US-APWRs) to be located adjacent to the existing Comanche Peak Nuclear Power Plant, Units 1 and 2, near Glen Rose in Somervell County, Texas (Application). The Application references the standard design certification application for the US-APWR, including a design control document (DCD), submitted by Mitsubishi Heavy Industries, Ltd (MHI). The proposed units will be known as Comanche Peak Nuclear Power Plant (CPNPP), Units 3 & 4.

In response to the Notice of Hearing on the Application[3], published on February 5, 2009, Intervenors submitted a "Petition for Intervention and Request for Hearing" on April 6, 2009 (Petition), proposing several contentions. On August 6, 2009, the Board ruled on the Intervenors' proposed contentions, admitting contentions 13 and 18. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-09-17, 70 NRC __, (Aug. 6, 2009) (slip op.). The Board reserved ruling on proposed Contention 7, which is still pending, and dismissed all other proposed contentions. *Id*.

On January 15, 2010, the Applicant notified the Board and the parties of an amendment to the Environmental Report (ER) relating to Contention 13. *See* Letter from Jon Rund, Counsel for Luminant, to Members of the Licensing Board, Notification of Filing Related to Contention 13, (Jan. 15, 2010) (Notification Letter). Attached to this letter was a copy of the Applicant's submission to the NRC, also dated January 15, 2010, of a supplement to the ER. *See* Attachment to Notification Letter, Letter from Donald Woodlan on behalf of Rafael Flores, Luminant, to NRC Document Control Desk (Jan. 15, 2010) (Co-location Submission).

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[3] 74 Fed. Reg. 6177 (Feb. 5, 2009)

On February 16, 2010, the Intervenors filed five new contentions alleging omissions from and deficiencies in the Applicant's Co-location Submission. For the reasons explained below, the NRC Staff opposes the admission of the each of the Intervenors' proposed New Co-location Contentions.

DISCUSSION

The Intervenors have submitted five new contentions (CL-1 through CL-5), none of which meets the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1), (f)(2), and (c). Additionally, proposed contentions CL-3 and CL-5 constitute impermissible challenges in the context of a COL adjudication to the proposed future US-APWR design certification rulemaking. For these reasons, which are explained below, each of the Intervenors' proposed new co-location contentions should be rejected.

I. LEGAL STANDARDS FOR ADMISSION OF NEW, AMENDED OR NONTIMELY CONTENTIONS

The admissibility of new and amended contentions is governed by 10 C.F.R. § 2.309(f)(1), (f)(2), and (c). First, each contention must comply with the general contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must:

> (i) provide a specific statement of the legal or factual issue sought to be raised;
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> (ii) provide a brief explanation of the basis for the contention;
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> (iii) demonstrate that the issue raised is within the scope of the proceeding;
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> (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) 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;

> (vi) . . . 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 . . . .

10 C.F.R. § 2.309(f)(1). 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. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

Second, contentions may be amended or new contentions filed after the initial filing period only with leave of the presiding officer if, in addition to meeting the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1), the contention meets the following requirements in 10 C.F.R. § 2.309(f)(2):

> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii). Specifically, in this proceeding, the Board has stated that a motion and proposed new or amended contention will be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed "within thirty (30) days of the date when the new and material

information on which it is based first becomes available." Initial Scheduling Order at 5 (Oct. 28, 2009).

Third, a non-timely contention that meets the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1) may be admitted if it also satisfies the provisions set forth in 10 C.F.R. § 2.309(c). *See* Initial Scheduling Order at 5. In accordance with § 2.309(c)(1), the presiding officer may admit a late-filed contention after balancing the following eight factors:

> (i) Good cause, if any, for the failure to file on time;
> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
> (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
> (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
> (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
> (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
> (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1). Intervenors seeking admission of a late-filed 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 late-filed petition).

The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for lateness is tendered, a petitioner's demonstration on the other factors must be particularly strong. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992). The fifth and sixth factors, the availability of other means to protect the petitioner's interest, and

the ability of other parties to represent the petitioner's interest, are less important than the other factors, and are therefore entitled to less weight. *Comanche Peak*, CLI-92-12, 36 NRC at 74.

II. INTERVENORS' PROPOSED NEW CO-LOCATION CONTENTIONS SHOULD BE REJECTED

The Intervenors submitted their new co-location contentions together with a motion for leave to file new contentions under both 10 C.F.R. § 2.309(f)(2) and the Board's Initial Scheduling Order. Motion at 1. In the Board's Initial Scheduling Order, the Board stated that parties seeking to submit new or amended contentions should file a "motion or request for leave to file any such contention(s) along with the substance of the proposed contention(s), simultaneously." Initial Scheduling Order at 5. The Board also stated:

> The pleading shall include a motion for leave to file any timely new or amended contention(s) under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file any non-timely new or amended contention(s) under 10 C.F.R. § 2.309(c) (or both), as well as the statement of the contention(s) and the support therefor, demonstrating how the requirements of 10 C.F.R. § 2.309(f)(1)(i) – (vi) are met.

Id. To support their Motion, the Intervenors addressed the late-filing factors in 10 C.F.R. § 2.309(f)(2)(i)-(v), generally, but not with respect to any particular contention. The Staff will address the contention admissibility criteria in 10 C.F.R. § 2.309(f)(1), (f)(2) and (c) for each proposed new contention.

A. Contention CL-1: The Applicant's failure to address externally initiated accident scenarios is a material omission from the Environmental Report.

New Co-location Contentions at 2. The Intervenors argue that the Applicant's revisions to the ER in the Co-location Submission only consider internally initiated events in the severe accident scenarios. New Co-location Contentions at 2. The Intervenors argue that "the Applicant's ER revisions do not evaluate externally initiated, rapid onset, catastrophic events that would cause large releases of radiation before the 10/12 hours required to bring co-located units into cold shutdown status." *Id*. at 3. The Intervenors also argue that the Applicant's assumption that release frequencies for external events are negligible compared to internal events was improper. *Id*. at 3. The Intervenors claim that the Applicant has "arbitrarily concluded that there

is no need to consider the co-location accident implications that would result from aircraft impacts." *Id*. at 4.

The Intervenors' proposed contention CL-1 is inadmissible because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (vi), (f)(2), and (c). The Intervenors state that the "Applicant has arbitrarily concluded that there is no need to consider the co-location accident implications that would result from aircraft impacts." New Co-location Contentions at 4. Contrary to the language of proposed contention CL-1, the Applicant has addressed externally initiated accident scenarios in the ER. Co-location Submission at 7.5-4. Therefore, proposed contention CL-1 may be more appropriately described as a challenge to the Applicant's conclusion that externally initiated events are "remote and speculative." Co-location Submission at 7.5-4. However, the Intervenors have failed to provide a legal basis to support their assertion that the Applicant cannot screen impacts that are described as remote and speculative. Additionally, although the Intervenors characterize proposed contention CL-1 as a contention of omission, the Intervenors fail to provide sufficient information to show a genuine dispute on a material issue or law or fact. 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors cite *Limerick Ecology Action v. NRC*, 869 F.2d 719 (3rd Cir. 1989), to support their argument that disregarding serious accident scenarios after the Three Mile Island incident would be "irrational". New Co-location Contentions at 5. As the Intervenors note, *Limerick* held that a NRC policy statement could not support a generic severe accident mitigation design alternatives (SAMDA) decision where the power plant was located near a densely populated area. *Limerick*, 869 F.2d at 723. However, the *Limerick* court noted that "[i]t is undisputed that NEPA does not require consideration of remote and speculative risks." *Id.* at 739. Therefore, because the Intervenors have not provided a legal basis to challenge the Applicant's conclusion in its Co-location Submission at 7.5-4, the Intervenors have not met their burden to show a genuine dispute on a material issue of law. 10 C.F.R. § 2.309(f)(1)(vi).

Here, the Intervenors attempt to controvert the Applicant's conclusion that unintentional aircraft-related accidents are "not credible." Co-location Submission at 7.5-1. The Intervenors argue that the "recognitions" inherent to the adoption of the aircraft impact design rule, 10 C.F.R. § 50.150, and the mitigation requirements of 10 CFR § 50.54(hh) require the Applicant to analyze accident scenarios screened out by the Applicant in the ER because of their low release frequencies. New Co-location Contentions at 3-4. This argument appears to confuse what is required for the NRC's safety review of a COL application with what NEPA requires in an environmental review. The requirements of NEPA are governed by a "rule of reason". *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1982). The Commission has held that "low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specific accident scenario presents a significant environmental impact that must be evaluated." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-07, 32 NRC 129, 131 (1990). "If the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-04, 31 NRC 333, 335 (1990). Therefore, proposed contention CL-1 fails to cite any legal requirement for the Applicant to discuss externally initiated accident scenarios which the Applicant has concluded are remote and speculative. 10 C.F.R. § 2.309(f)(1)(vi).

To the extent that the Intervenors argue that the Applicant must consider aircraft impacts that are intentional, such arguments are without a legal basis. The Intervenors cite the terrorist attacks of September 11, 2001 in two separate instances in proposed contention CL-1. New Co-location Contentions at 4-5. The Intervenors argue that "[r]egulatory assumptions about probability of severe accidents have been altered since the attacks of September 11, 2001." *Id*. at 4. Furthermore, the Intervenors state that "it would be irrational to conclude similar attacks on nuclear plants are too remote for inclusion in the ER." *Id*. at 5. Contention 19, which raised

issues associated with the environmental impacts of an aircraft attack, was considered and rejected by this Board for failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii) and (vi). *Comanche Peak*, LBP-09-17, 70 NRC __, (Aug. 6, 2009) (slip op. at 84). Therefore, where proposed contention CL-1 attempts to relitigate issues raised in Contention 19, these challenges must be rejected.

Moreover, to the extent that the Intervenors are asserting that terrorist attacks should be considered in the ER, this issue is outside the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). The Commission has explicitly held that "notwithstanding a recent decision by the United States Court of Appeals for the Ninth Circuit . . . we reiterate our longstanding view that NEPA demands no terrorism inquiry." *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007) (internal citations omitted). The Commission's view was recently upheld in *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3rd Cir. 2009). Furthermore, the Commission has stated that its "decision against including terrorism within our NEPA reviews does not mean that we plan to rule out the possibility of a terrorism attack against NRC-regulated facilities." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347-48 (2002) ("[W]e see no practical benefit in conducting that review, case-by-case, under the rubric of NEPA, *nor any legal duty to do so*.") (emphasis added). Therefore, proposed contention CL-1 raises issues beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), and also fails to raise a genuine dispute with the COL Application on a material issue of fact or law, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors cite the Board's decision in *Virginia Electric and Power Co.* (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC 294, 314 (2008), for the proposition that contentions of omission need not include all of the requirements of 10 C.F.R. § 2.309(f)(1)(v) beyond "identifying the omitted information required under the regulation in question." New Co-location Contentions at 3, n.8. However, the Intervenors fail to address the

requirement that an Intervenor who believes that the application fails to contain information on a relevant matter as required by law, must provide the identification of each failure and the supporting reasons for the Intervenor's belief. 10 C.F.R. § 2.309(f)(1)(vi). Proposed contention CL-1 claims that the Applicant failed to consider externally initiated accident scenarios, but does not provide the legal requirement for the Applicant to do so. Therefore, proposed contention CL-1 is inadmissible. 10 C.F.R. § 2.309(f)(1)(vi).

Moreover, proposed contention CL-1 fails to meet the requirements for a new or amended contention pursuant to 10 CFR § 2.309(c) or (f)(2). The Intervenors assert that the "Applicant's ER revisions did not consider external events because it assumed that release frequencies for external events are 'negligible' compared to internal events." New Co-location Contentions at 3. To the extent that the Intervenors challenge the Applicant's conclusion that externally initiated event scenarios are negligible, such information is not new and appears in the unrevised portion of the ER, in Section 7.2.2, which is entitled "Evaluation of Potential Severe Accident Releases." ER § 7.2-4.[4] Therefore, this information is not new or significantly different from previously available information and the Intervenors have neither addressed nor met the late-filed or amended contention requirements 10 C.F.R. § 2.309(c) or (f)(2).

In sum, the issue raised in proposed contention CL-1 pertaining to terrorist attacks is not within the scope of this proceeding, and does not provide a legal basis to support the Intervenors' assertion that this issue must be addressed in the Applicant's ER. 10 C.F.R. § 2.309(f)(1)(iii) and (vi). The Intervenors also attempt to relitigate issues that the Board disposed of in its previous ruling on standing and contention admissibility and have not demonstrated good cause or otherwise met the late-filed contention admissibility requirements for restating these issues here. 10 C.F.R. § 2.309(f)(2) and (c). For these reasons, Contention CL-1 should be rejected.

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[4] COL ER § 7.2 (Nov. 20, 2009) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML100080530).

B. Contention CL-2: The Applicant fails to consider and evaluate the impacts of severe accident scenarios, regardless of probability, with release times shorter than the duration needed to achieve cold shutdown.

New Co-location Contentions at 6. The Intervenors note that the "ER revisions only consider severe accident scenarios with a probability of more than 1.0 E-6 and eliminate events with a probability less than 1.0 E-6 from further consideration as 'remote and speculative.'" *Id.* The Intervenors categorize this proposed contention as an omission contention raising the question "whether the ER revisions are adequate because they exclude an evaluation of the impacts of events with release times shorter than the time needed to achieve cold shutdown." *Id.* The Intervenors argue that "the failure to consider the impacts from such events is contrary to the Board's Order admitting Contention 13 and 10 C.F.R. § 52.79(a)(29)(ii)." *Id.* at 7. The Intervenors also state that this contention is "material to findings the NRC must make in this proceeding related to the adequacy of Applicant's capacity to safely shut down reactors and its ability to deal with accidents." *Id.* at 6.

The Intervenors' proposed contention CL-2 is inadmissible because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi), (f)(2), and (c). The Intervenors do not provide a legal basis to support their assertion that severe accident initiating sequences with a probability less than 1.0 E-6 per reactor-year that lead to a severe accident must be considered in the Applicant's Environmental Report under NEPA. 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors have not raised a genuine dispute with the Applicant on a material issue because they do not dispute the probability the Applicant assigned to excluded events. Additionally, the Intervenors have not addressed the general admissibility criteria or raised a timely dispute with the Applicant regarding its Emergency Plan or Safety Requirements where they claim that this contention is related to the ability to safely shut down the reactors and deal with accidents. 10 C.F.R. § 2.309(f)(1)(vi), (f)(2), and (c); New Co-location Contentions at 6.

The Intervenors do not provide a legal basis to support their assertion that the Applicant cannot screen out severe accident initiating events based on their probability. The Intervenors

note that "Applicant's ER revisions eliminate events from further consideration based on low probability, not whether they would cause large releases of radiation." New Co-location Contentions at 7. In support of proposed contention CL-2, the Intervenors provide that "failure to consider the impacts from such events is contrary to the Board's Order admitting Contention 13 and 10 C.F.R. § 52.79(a)(29)(ii)." *Id.* (referencing *Comanche Peak,* LBP-09-17, 70 NRC ___ (Aug. 6, 2009) (slip op.)). However, the Intervenors do not identify what holding by this Board specifically makes this newly proposed contention admissible. More specifically, the Intervenors do not identify where this Board has held that events which are considered "remote and speculative" must be analyzed under NEPA. Therefore, the Intervenors have not shown that the Board's Order admitting Contention 13 provides a legal basis showing that the Application fails to contain information on a relevant matter as required by law. 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors' citation to 10 C.F.R. § 52.79(a)(29)(ii) is inapposite because it does not establish a legal basis for inclusion of the allegedly omitted information in the ER. Section 52.79(a) enumerates information that must be contained in an Applicant's final safety analysis report (FSAR) including "[p]lans for coping with emergencies, other than the plans required by § 52.79(a)(21)[,]" in § 52.79(a)(29)(ii). 10 C.F.R. § 52.79(a), (a)(29)(ii). This Section does not provide a legal basis for information that must be included in an environmental report or analyzed pursuant to NEPA. 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors next cite *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681 (1985) as support for the proposition that "it is not only the statistical probability of a serious accident that bears on the determination whether, in a given circumstance, such should be anticipated and thereby considered in the context of the ER." New Co-location Contentions at 7. However, *Limerick* does not support the Intervenors' position, and the language the Intervenors' cite does not address how severe accidents must be analyzed under NEPA; rather, the discussion relied upon by the Intervenors in *Limerick*

explained the appropriate role of severe accidents in an emergency planning context. In *Limerick,* as quoted by the Intervenors, the Appeal Board explained,

> emergency planning regulations are premised on the assumption that a serious accident might occur and that evacuation of the EPZ [emergency planning zone] might well be necessary. The adequacy of a given emergency plan therefore must be adjudged with this underlying assumption in mind.

New Co-location Contentions at 7 (quoting *Limerick,* ALAB-819, 22 NRC at 713). The Intervenors do not explain why the assumption identified by the Appeal Board for emergency planning should apply in the context of NEPA, nor do the Intervenors specifically establish how an emergency planning requirement provides the legal basis of a requirement for inclusion of information in an environmental report. 10 C.F.R. § 2.309(f)(1)(vi).

Nothing in the Intervenors' arguments challenges the underlying assertion that the severe accident initiating events excluded by the Applicant are remote and speculative. The requirements of NEPA are governed by a "rule of reason." *Natural Resources Defense Council,* 458 F.2d at 834. The Commission has held that "low probability is the key to applying NEPA's rule-of-reason test to contentions that allege that a specifi[c] accident scenario presents a significant environmental impact that must be evaluated." *Vermont Yankee,* CLI-90-04, 32 NRC at 131. "If the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law."[5] *Vermont Yankee,* CLI-90-07, 31 NRC at 335. *See also Limerick Ecology*

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[5] It should be noted that although the Commission decided that events with a low probability can fairly be determined to be "remote and speculative," the Commission declined to set a numerical probability threshold for analysis under NEPA. *Vermont Yankee,* CLI-90-07, 31 NRC at 335. The Commission overturned the Appeal Board decision "to the extent that ALAB-919 amounts to a holding that an accident with a probability on the order of 10^{-4} per reactor-year is remote and speculative." *Id.* The Commission stated that it was, "reluctant either to endorse or reject a holding that accidents of this probability [10^{-4} per reactor-year] should be considered remote and speculative, both because such a determination may be unnecessary here and because such a decision could have broader ramifications for the NRC's regulatory program that are better explored outside the scope of a particular case involving only a few parties." *Id.*; s*ee also, Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant) LBP-01-9, 53 NRC 239 (2001), *pet. for rev. denied*, 53 NRC 370, CLI-01-11 (2001) (holding that an event with a probability of 2.0E-07 per reactor-year was remote and speculative).

Action, 869 F.2d at 739 ("It is undisputed that NEPA does not require consideration of remote and speculative risks.").

Here, the Applicant has characterized events with a probability less than 1.0 E-6 per reactor-year as remote and speculative. Co-location Submission § 7.5.2, "Severe Accident Scenarios," at 7.5-3. The Intervenors, having limited their proposed contention to an "omission contention," have not raised a dispute with the Applicant's characterization of such low probability events as remote and speculative under NEPA, and therefore do not show that a genuine dispute exists with the Applicant on a material issue of law or fact. *See* New Co-location Contentions at 6; 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors' arguments do not support the admission of this contention; moreover, the Intervenors fail to demonstrate that these issues meet the contention admissibility criteria and the late filed contention criteria. By the Intervenors' own description, proposed Contention CL-2 is a contention alleging an omission in the Applicant's Environmental Report.[6] However, the Intervenors also appear to raise broader issues with the Applicant's FSAR or Emergency Plan. The Intervenors state that there is an "omission in the context of dealing with emergencies" and cite an FSAR requirement in 10 C.F.R. § 52.79(a)(29)(ii). New Co-location Contentions at 6. Intervenors further argue that, "This contention is material to findings the NRC must make in this proceeding related to the adequacy of Applicant's capacity to safely shut down reactors and its ability to deal with accidents." *Id.* Similarly, the Intervenors also state that, "[a] genuine dispute exists with the Applicant based on its decision to exclude severe accident event scenarios that may prevent safe shutdown and/or require additional time to bring co-located units to safe shutdown status." *Id.* at 8. Where the Intervenors challenge the ability

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[6] In the Intervenors' own words, "[t]his omission contention raises the question whether the ER revisions are adequate because they exclude an evaluation of the impacts of events with a release time shorter than the time needed to achieve cold shutdown." New Co-location Contentions at 6. Intervenors are bound by the literal terms of their own contention. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 371-372 and fn.310 (1991), *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985).

to safely shut down the reactors, deal with accidents, and cite regulatory requirements for the Applicant's FSAR, the Intervenors appear to raise a substantive challenge to the adequacy of the Applicants' FSAR and Emergency Plan, rather than a contention of omission. Through these arguments, the Intervenors raise issues that are outside of the Applicant's Co-location Submission and are not based on new or materially different information, but the Intervenors have not addressed the late filed contention admissibility criteria of 10 C.F.R. § 2.309(c) and (f)(2). Additionally, the Intervenors do not address the contention admissibility criteria to show a genuine dispute with the FSAR or Emergency Plan. 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors have not provided a legal basis to support their argument that severe accident initiating sequences with a probability less than 1.0 E-6 per reactor-year that lead to a severe accident must be considered in the Applicant's Environmental Report under NEPA. 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors do not raise a genuine dispute with the Applicant's determination that severe accident initiating sequences with a probability less than 1.0 E-6 per reactor-year are remote and speculative. To the extent that Contention CL-2 raises a challenge to either the Applicant's COL FSAR (for safety analysis including safe shut down) or Emergency Plan, it challenges information that is not new, and the Intervenors have not met the requirements of 10 C.F.R. § 2.309(c) or (f)(2). As discussed previously, the Intervenors must address the criteria of 10 C.F.R. § 2.309(c) and (f)(2) as well as (f)(1) in order to establish the admissibility of a proposed contention which is based on information that is not new. As they have not done so, this proposed contention should be rejected.

C. Contention CL-3: The Applicant fails to evaluate the impact of a severe accident at one CP unit on the other units when the initiating event of the accident is an external event, such as an earthquake, that could result in common-cause failures of systems at one or more of the other units, potentially extending the time necessary for operators to put the units into stable long-term decay heat removal configurations.

New Co-location Contentions at 8. This proposed contention is presented both as a contention of omission and as a challenge to the adequacy of information in the COL Application. The

Intervenors characterize what they describe as the Applicant's failure to address how externally initiated events and common-cause failures on one unit could increase the time needed to bring unaffected units into cold shutdown, as a material omission in the context of dealing with emergencies. *Id*. at 8. The Intervenors also argue that the Applicant's Co-location Submission is inadequate because it excludes externally initiated events, such as earthquakes, that result in common cause failures. *Id*. at 9. The Intervenors cite 10 C.F.R. § 52.79(a)(29)(ii) and 42 U.S.C. § 2133(d), which the Intervenors argue require the Applicant to be able to "safely shut down reactors" and "deal with accidents[,]" as support for this proposed contention *Id*. at 9. The Intervenors generally dispute the Applicant's assertion that severe accidents would only initially involve one of the co-located units such that other units would arguably have all of their systems available to be put into "stable long-term configurations." *Id*. at 9 (citing ER § 7.5 (Co-location Submission)).

This proposed contention is not supported by facts or expert opinions, does not demonstrate that the ER is missing information it is required by law to contain, and does not provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact, and therefore should be rejected for failure to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). The Intervenors challenge the Applicant's new Co-Location Submission generally, and argue that it omits "externally initiated events that result in common cause failures (e.g. earthquakes)." New Co-location Contentions at 9. The Intervenors fail, however, to acknowledge that the Applicant has addressed common-cause external events, such as seismic events, floods, hurricanes, and tornadoes in ER § 7.2 and in the COL FSAR. ER § 7.2 (Nov. 20, 2009) (ML100080530); COL FSAR §§ 2.2, 2.4, (Nov. 20, 2009); §§ 3.3, 3.4, 3.5, 3.7, 3.8 (Nov. 20, 2009) (ML100082056); and § 8.2 (Nov. 20, 2009) (ML100082075). These events are also addressed in the US-APWR DCD, which the COL FSAR incorporates by reference. US-APWR DCD FSAR §§ 3.3, 3.4, 3.7, and 3.8 (Oct. 31, 2009) (ML093070252).

The Applicant's New Co-location Submission references sections of the COL FSAR and the DCD as well as other sections of the ER which discuss and analyze accident scenarios, but these referenced sections have not been updated recently with new or materially different information, and do not contain information that was not previously available to the Intervenors. To the extent the Intervenors challenge the sections of the Applicant's COL FSAR and sections of the ER other than the new Co-location Submission (ER § 7.5), these challenges are untimely and the Intervenors have not demonstrated how their proposed contention meets the contention admissibility requirements for amended or late-filed contentions in 10 C.F.R. § 2.309(c) and (f)(2).

To the extent the Intervenors challenge the sections of the US-APWR DCD that address external events, including seismic events, which are also referenced in the Co-Location Submission, this proposed contention is not only untimely but also constitutes an impermissible challenge to a proposed future design certification rulemaking. The Commission has determined that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, not in the COL proceeding. Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,962, 20,972 (Apr. 17, 2008). The Commission has stated that "[i]t has long been agency policy that Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'" *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 345 (1999) (quoting *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)). Since this COL application references a docketed design certification application, the Board should, if this contention were otherwise admissible, refer CL-3 to the Staff for consideration in the proposed future design certification rulemaking, and hold it in abeyance. Final Policy Statement, 73 Fed. Reg. at 20,972; *Progress Energy Carolinas* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-

09-08, 69 NRC ___ (May 18, 2009) (slip op. at 5). Upon adoption of a final design certification rule, contention CL-3, were it otherwise admissible, should be denied. *Id*. Where, however, as here, the Intervenors have not met the contention admissibility requirements for new, amended or late-filed contentions with respect to CL-3, the contention should be rejected.

The Intervenors argue that the information they allege has been omitted from the Co-location Submission raises questions as to whether the Co-location Submission is "adequate," New Co-location Contentions at 9, but do not cite any facts or expert opinion that supports their general assertions that the Co-location Submission is deficient and inadequate. CL-03 should, therefore, be rejected for failure to meet 10 C.F.R. § 2.309(f)(1)(v). "'A contention must directly controvert a position taken by the applicant in the application,' and 'explain why the application is deficient.'" *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-6, 67 NRC 241, 292 (2008) (internal citations omitted). A "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;" rather, an Intervenor "must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998) (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (A petitioner is obligated "to provide the [technical] analyses and expert opinion" or other information "showing why its bases support its contention.")). Without the requisite supporting facts, documents or expert opinions, the Intervenors have not met the requirements of 10 C.F.R. § 2.309(f)(1)(v).

Contention CL-3 should also be rejected because it does not provide sufficient information to establish a genuine dispute with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors argue that the Applicant's exclusion of common cause externally initiated accident scenarios, such as earthquakes, that may prevent

safe shutdown and/or require additional time to bring co-located units to safe shutdown status, could result in core-melt at one of the other units and large, uncontrolled and unmitigated releases of radiation. New Co-location Contentions at 9-10. The Co-location Submission states, however, that the impact of a severe accident at one unit on another unit on site would be negligible as long as containment integrity at the affected unit is maintained, and describes how the impact to other units on site would be bounded by the impact of a design basis accident at the other units, which the units are designed to withstand, as well as the time needed for each of the reactors to achieve cold shutdown. Co-location Submission at 7.5-1 – 7.5-2. Other than to state generally that the "accident impacts at one unit may materially affect other units[,]" New Co-location Contentions at 9, the Intervenors do not dispute the information in the Co-location Submission. To be material, environmental contentions must focus on "significant inaccuracies or omissions in the ER." *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005). Contentions based in speculation are not admissible. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site) LBP-07-03, 65 NRC 237, 253 (2007). In this instance, the Intervenors do not present an adequately explained and supported dispute with any specific portion of the Application at issue. Contention CL-3 only provides vague, unsupported assertions about what might potentially happen. This contention, therefore, does not provide sufficient information to demonstrate a genuine dispute about a significant error or omission in the new Co-location Submission, and should be rejected. 10 C.F.R. § 2.309(f)(1)(vi).

Similarly, the Intervenors offer no support for their assertion that the Applicant has failed to consider severe accidents caused by external events, such as earthquakes, that could result in common-cause failures of safety systems at one or more co-located units, and that in such scenarios, additional time may be required to restore the operability of safety systems and achieve stable long-term configurations. New Co-location Contentions at 9 The Intervenors argue that "additional time may be required to restore operability of safety systems and achieve

stable long-term configurations, increasing the risk that stable shutdown will not be achieved and core-melt may occur at one of the other units[,]" *Id*. at 9 (citing 10 C.F.R. § 2.309(f)(1)(v)), but they do not describe which safety systems they believe might fail or provide any facts or other support for their assertion that the Co-location Submission is deficient. With respect to common-cause failures, the Co-location Submission states that "[t]here is no direct mechanism for a severe accident at one unit to propagate and cause an accident at an adjacent unit[,]" and "[t]here are no shared safety systems between units which would allow accident propagation from one unit to another[,]" such that "[t]he only possible impact on an adjacent unit would be the result of radiological releases and the subsequent potential impact on the plant operators and equipment operability." Co-location Submission at 7.5-1 – 7.5-2. The Intervenors do not explain why this information is inadequate or deficient. As Contention CL-3 provides only vague, unsupported assertions about what might potentially happen and does not provide sufficient information to demonstrate a genuine dispute about a significant error or omission in the new Co-location Submission, it should be rejected. 10 C.F.R. § 2.309(f)(1)(vi).

With respect to the Intervenors' assertion that the ER categorically excludes external events such as earthquakes from accident scenarios, the Intervenors fail to note that the COL application does contain this information. New Co-location Contentions at 9, n.32. This information is contained in the COL FSAR and in other portions of the ER that have not been recently updated. The presence in the COL application of the information the Intervenors claim it lacks renders Contention CL-3 inadmissible as a contention of omission because no such omission exists. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-09-08, 69 NRC __ (June 30, 2009) (slip op. at 6.).

The COL application contains the following description and analysis of external events, which the Intervenors have not specifically referenced, discussed, or provided any facts to dispute:

(1) In the COL FSAR § 2.4, Luminant presented its analysis for flooding, ice effects, potential dam failures, surge flooding, flooding protection requirements, and impact of low water for CPNPP, Units 3 and 4. COL FSAR § 2.4 (Nov. 20, 1999) (ML100081562).

(2) In the COL FSAR § 2.2, Luminant identified potential accidents/ hazards to both units from industrial, transportation, and military facilities for both units. In this same section, Luminant conducted an evaluation of these hazards to both units. COL FSAR § 2.2 (Nov. 20, 1999) (ML100081562).

(3) In the COL FSAR § 2.2.2.7.1 – 2, Luminant identified the location of commercial airports and airways surrounding CPNPP, Units 3 and 4. In COL FSAR § 3.5.1.6, Luminant calculated the probability of aircraft related accidents for the new units and compared it with the values presented in Standard Review Plan (SRP) § 3.5.16. COL FSAR § 2.2.2.7.1 – 2 (Nov. 20, 1999) (ML100081562); COL FSAR § 3.5.1.6 (Nov. 20, 1999) (ML100082056).[7]

(4) Regarding wind and tornado loadings for Units 3 and 4, MHI presented its analysis in the US-APWR DCD FSAR § 3.3 and Luminant placed its supplemental analysis for CPNPP Units 3 and 4 in Part 2 of the COL FSAR 3.3. US-APWR DCD FSAR § 3.3 (Oct. 31, 2009) (ML093070252); COL FSAR § 3.3 (Nov. 20, 2009) (ML100082056).

(5) Both US-APWR DCD § 3.4 and COL FSAR § 3.4 discuss flood design protection from external flooding for Units 3 and 4. Section 3.7 of the US-APWR DCD discusses seismic design of the safety systems and components for Units 3 and 4. The COL FSAR incorporates this section by reference and discusses site-specific information. Section 3.8 of the US-APWR DCD discusses design of category 1 structures (containment, ultimate heat sink (UHS), essential service water pipe tunnel (ESWPT), power source fuel storage vault, and seismic design of the safety systems and components. The COL FSAR incorporates this DCD section by reference and discusses site specific information. US-APWR DCD FSAR §§ 3.4, 3.7 and 3.8 (Oct. 31, 2009) (ML093070252); COL FSAR §§ 3.4, 3.7 and 3.8 (Nov. 20, 2009) (ML100082056).

(6) COL FSAR § 8.2 evaluates the offsite power system for Units 3 and 4. COL FSAR § 8.2 (Nov. 20, 2009) (ML100082075).

Additionally, ER § 7.2, which is not new or materially different information but which is referenced in the new Co-location Submission in ER § 7.5.2, at p. 7.5-2, describes the off-site

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[7] The COL FSAR states that there are no airports within 5 miles of CPNPP and only one airport within 10 miles. Luminant stated the airport within 10 miles of proposed new units was below the 500D^2 threshold and there were no airports within the region that exceeded the 100D^2 criterion. Luminant also stated there were no airways within 5 miles of CPNPP, but 2 air routes pass within 10 miles of the new units. COL FSAR § 2.2.2.7.1 – 2 (Nov. 20, 1999) (ML100081562); COL FSAR § 3.5.1.6 (Nov. 20, 1999) (ML100082056).

dose and cost risks that could accompany a severe accident at either Unit 3 or Unit 4, and analyzes a number of accident sequences, each of which represents a broader family of accidents. COL ER § 7.2 (Nov. 20, 2009) (ML100080530).

The Intervenors have not specifically referenced, discussed, or disputed any of this information. To the extent the Intervenors intend by their proposed contention to challenge COL FSAR §§ 2.4, 2.2, 2.2.2.7.1 – 2, 3.5.1.6 , 3.3, 3.4 , or 8.2, or ER § 7.2, none of which is new, not previously available or materially different information, proposed contention CL-3 fails to meet the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii). The Intervenors have not met the requirements for a late-filed contention, either. While the Intervenors are parties to this proceeding, they have not articulated good cause for failing to raise their challenges to the accident analyses in the COL FSAR and ER § 7.2 in a timely fashion, nor have they otherwise demonstrated how this proposed contention – which will broaden the issues and cannot be expected to help develop a sound record – meets the late-filed contention admissibility requirements. 10 C.F.R. § 2.309(c)(1)(i), (vii) and (viii).

The Intervenors have not demonstrated any omission from the COL Application and have not challenged any of the data, analysis or conclusions the Applicant included in the COL FSAR or ER § 7.2. The COL application contains the information and analysis the Intervenors claim it omits, albeit in the COL FSAR, portions of the ER other than the new Co-location Submission, and in portions of the US-APWR DCD that are incorporated in the COL Application by reference. "A petitioner must 'read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view,' and explain why it disagrees with the applicant." *Crow Butte,* LBP-08-6, 67 NRC at 292. As this contention both fails to directly controvert the COL Application, and mistakenly asserts that the Application does not address a relevant issue, it may therefore be dismissed on both grounds. 10 C.F.R. § 2.309(f)(1)(v), and (vi). *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 19-21 (2007). *See*

also Georgia Tech Research Reactor, LBP-95-6, 41 NRC at 300 ("A petitioner's imprecise reading of a reference document cannot serve to generate an issue suitable for litigation.").

In support of their contention, the Intervenors cite two federal court cases, *Druid Hills Civic Association, Inc. v. Federal Highway Administration*, 772 F.2d 700, 709 (11th Cir. 1985) and *Ohio River Valley Environmental Coalition, Inc., v. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006). On the basis of these two cases, the Intervenors argue that the Applicant's failure to consider the large release scenario on safe shutdown ignores an obvious factor that bears on impacts on co-located units. New Co-location Contentions at 9, n.32. The Intervenors do not explain how these cases support their contention, and neither of these cases appears to support their argument that the ER or COL application omits information it is legally required to contain under NEPA, or that the Intervenors' unspecified issues demonstrate a genuine dispute with the Applicant on a material issue. 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Druid Hills discusses the Court of Appeals' standard of review for NEPA cases, which the court found was governed by the "rule of reason" and was not intended to impose an impossible standard on a federal agency. *Druid Hills,* 772 F.2d at 708-709 (citations omitted). The court of appeals also reiterated the holding in prior NEPA decisions that "NEPA does not mandate perfection in preparing an EIS. *Id.* at 712 (quoting *Sierra Club v. Morton*, 510 F.2d 813, 820 (5th Cir. 1975)). The *Druid Hills* plaintiffs asserted that an inadequate EIS prevented the federal decision maker from making an informed and objective decision, but the court of appeals found that there was nothing in the record to support their assertions. *Id*. at 710 - 712. Similarly, the holding in *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne,* which involves the review of a Department of the Interior rulemaking, and is unrelated to an examination of alternatives under NEPA, does not support admission of this contention. *See* New Co-location Contentions at 9, n.32 (citing *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne,* 473 F.3d 94, 102 (4th Cir. 2006)). *Ohio River Valley* defines "arbitrary and capricious" as an agency's (1) reliance on factors Congress did not intend the agency to

consider; (2) failure to consider an important aspect of the problem; or (3) offering an explanation for its decision that runs counter to the evidence before it, or is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Ohio River Valley,* 473 F.3d at 102 (citing *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)). Where, as here, the Intervenors fail to carry their burden to demonstrate the legal basis that requires that the ER or COL application contain information they allege it omits, and fail to provide facts or other support for their arguments that the ER or COL application is otherwise inadequate, *Druid Hills* and *Ohio River Valley* support rejecting, rather than admitting, the proffered contention. *Ohio River Valley,* 473 F.3d at 102; *Druid Hills*, 772 F.2d at 713-714.

D. Contention CL-4: The Applicant fails to address the radiological impacts of a severe accident at a CP unit during shutdown, when the primary containment head is removed, on the other CP units.

New Co-location Contentions at 10. The Intervenors assert that "[f]uel damage events occurring during refueling outages have a much higher risk of early large radiological releases to the environment than when the reactor is at power." New Co-location Contentions at 10. The Intervenors argue that "shutdown events should be of particular concern with regard to any analysis of co-location environmental impacts including impacts on safe shutdown of co-located units." *Id*. at 10-11. The Intervenors further argue that "[i]t is not only the statistical improbability of a serious accident that bears on the determination whether, in a given circumstance, a severe accident should be anticipated and thereby considered in the context of the COLA." *Id*. at 11.

The Intervenors' proposed contention is inadmissible because it does not meet the requirements of 10 CFR § 2.309(f)(1)(vi), (f)(2), and (c). The Applicant's Co-location Submission states that low power and shutdown events have low release frequencies and that all external events are "remote and speculative." Co-location Submission at 7.5-4. The Intervenors cite Co-location Submission 7.5-4, which provides the Applicant's conclusion regarding shutdown events, but fail to articulate what information the Applicant has left out of its

ER analysis. Furthermore, the Intervenors fail to provide any legal requirement that compels an analysis beyond the information provided in the ER. Where the Intervenors have characterized proposed contention CL-4 as a contention of omission, the Intervenors must identify each failure and the supporting reasons for the Intervenors' belief. 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors have failed to do so in proposed contention CL-4; therefore, this proposed contention is inadmissible as a contention of omission.

The Intervenors cite *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2) ALAB-819, 22 NRC 681 (1985) as support for the proposition that "it is not only the statistical improbability of a serious accident that bears on the determination whether, in a given circumstance, such a severe accident should be anticipated and thereby considered in the context of the COLA." New Co-location Contentions at 11. However, *Limerick* does not support the Intervenors' position. In *Limerick*, the Commission explained the appropriate role of severe accidents in an emergency planning context, but noted that it "is not required by NEPA and has only served to confirm the Commission's view of the low risk posed by the facility." *Limerick*, 22 NRC at 697. The Intervenors provide no legal requirement that the assumption identified by the Appeal Board in *Limerick* for emergency planning should apply in the context of NEPA, nor do the Intervenors specifically establish how an emergency planning requirement provides the legal basis of a requirement for inclusion of information in an environmental report. 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors state that categorically excluding events during shutdown is contrary to the Atomic Energy Act, 42 U.S.C. § 2133(d). New Co-location Contentions at 11, n.35. Furthermore, the Intervenors cite *Druid Hills Civic Association, Inc. v. Federal Highway Administration,* 772 F.2d 700, 709 (11th Cir. 1985) and *Ohio River Valley Environmental Coalition v. Kempthorne*, 473 F.3d 94, 102 (4th Cir. 2006) to support their argument that "failure to consider the shutdown accident scenario ignores an obvious factor that bears on impacts on co-located units." New Co-location Contentions at 11, n.35. As discussed above with respect

to proposed contention CL-3, these authorities provide no legal basis for the Intervenors' contention of omission. Furthermore, the Intervenors appear to confuse what is required for the NRC's safety review of a license with what NEPA requires in an environmental review. As discussed previously, the requirements of NEPA are governed by a "rule of reason." *Natural Resources Defense Council,* 458 F.2d at 834. "If the accident sought to be considered is sufficiently unlikely that it can be characterized fairly as remote and speculative, then consideration under NEPA is not required as a matter of law." *Vermont Yankee*, CLI-90-07, 31 NRC at 335. *See also Limerick Ecology Action, Inc.,* 869 F.2d at 739 ("It is undisputed that NEPA does not require consideration of remote and speculative risks."). Therefore, the Intervenors have failed to raise a genuine dispute with the Applicant on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(vi).

The Intervenors argue that the "ER revisions specifically exclude shutdown events and assume the containment is sealed." New Co-location Contentions at 10 n.33. While the Applicant mentions in the Co-location Submission at 7.5-4 that such events were screened because of low release frequencies, the Applicant had already evaluated shutdown scenarios in ER, Section 7.2.4, which has not been recently revised. COL ER § 7.2-7 (Nov. 20, 2009) (ML100080530). Therefore, this information is not new and the Intervenors have not met the late-filed contention admissibility requirements of 10 C.F.R. § 2.309(c) or (f)(2). Because proposed contention CL-4 fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1) and the late or amended contention requirements of 2.309(c) and (f)(2), it should be rejected.

E. Contention CL-5: The Applicant fails to fully evaluate the impact of a chain-reaction that leads to more than one unit experiencing a severe accident.

New Co-location Contentions at 12. The Intervenors characterize this proposed contention as an omission contention raising the question "whether the ER revisions are adequate because they exclude any accident scenarios that involve more than one unit being directly affected by the accident." *Id.* The Intervenors argue that the Board's Order admitting Contention 13 "recognized that accident impacts at one unit may materially affect other units." *Id.* The Intervenors argue that this issue is "material to the findings the NRC must make in this proceeding related to the adequacy of Applicant's capacity to safely shut down reactors and its ability to deal with accidents." *Id.* at 13. The Intervenors also contend that if the impacts of all four units experiencing a severe accident are coupled, "the combined radiological consequences could have a significant impact on the US-APWR severe accident mitigation design alternatives (SAMDA) analysis." *Id.*

The Intervenors' proposed contention CL-5 is inadmissible because it does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi), (f)(2), and (c) and it is an impermissible attack on a proposed future design certification rulemaking. The Intervenors have not shown that a genuine dispute exists with the Applicant on a material issue. 10 C.F.R. § 2.309(f)(1)(vi). The Intervenors have not raised a timely dispute with the Applicant regarding its Emergency Plan or Safety Requirements. 10 C.F.R. § 2.309(c), (f)(1), and (f)(2). Additionally, the Intervenors raise an impermissible challenge to the SAMDA analysis for the proposed future US-APWR design certification rulemaking.

The Intervenors describe their proposed Contention CL-5 stating, "[t]his omission contention raises the question whether the ER revisions are adequate because they exclude any accident scenarios that involve more than one unit being directly affected by the accident." New Co-location Contentions at 12. However, in order for a genuine dispute to exist, the information must be omitted from the Application. Where the Intervenors believe that the

Application fails to contain information on a relevant matter as required by law, the Intervenors must provide the identification of each failure and the supporting reasons for the Intervenors' belief. 10 C.F.R. § 2.309(f)(1)(vi). The Application, in the Co-location Submission, provides an analysis of the environmental impacts from an event where "severe accidents . . . occur in all four units simultaneously." Co-location Submission § 7.5.5, "Conclusions," at 7.5-12. The Intervenors actually cite to this information, but do not distinguish it from what they claim is omitted from the Application for "a chain reaction that leads to more than one unit experiencing a severe accident." *See* New Co-location Contentions at 12-13. Therefore, this Contention is inadmissible as a contention of omission. 10 C.F.R. § 2.309(f)(1)(vi); *see also Susquehanna EPU*, 66 NRC at 24 (citing *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *rev. declined*, CLI-94-2, 39 NRC 91 (1994)) ("Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed.").

By the Intervenors' own description, proposed Contention CL-5 is a contention alleging an omission in the Applicant's Environmental Report, however, the Intervenors also appear to raise broader issues with the Applicant's COL FSAR or Emergency Plan.[8] The Intervenors state that there is an "omission in the context of dealing with emergencies" and cite an FSAR requirement in 10 C.F.R. § 52.79(a)(29)(ii). New Co-location Contentions at 12. Intervenors further argue that, "accidents that occur at all four units in close temporal proximity may affect capacity of plant operators to achieve safe shutdown of the units" and "this contention bears on the requirements of 10 C.F.R. § 52.79(a)(29)(ii) and 42 USC 2133(d)." *Id.* Similarly, the Intervenors state, "This issue is material to findings the NRC must make in this proceeding

[8] As discussed previously, the Intervenors are bound by the literal terms of their own contention. "This omission contention raises the question whether the ER revisions are adequate because they exclude any accident scenarios that involve more than one unit being directly affected by the accident." New Co-location Contentions at 12.

related to the adequacy of Applicant's capacity to safely shut down reactors and its ability to deal with accidents" *Id.* at 13 (citing 10 C.F.R. § 52.79(a)(29)(ii)).

As previously discussed in response to Contention CL-2, such issues purporting to raise challenges to the Applicant's FSAR and Emergency Plan should be rejected because the Intervenors did not address the contention requirements for such a challenge. 10 C.F.R. § 2.309(f)(1), (f)(2), and (c). To the extent that proposed Contention CL-5 raises a challenge to either the Applicant's COL FSAR or Emergency Plan, it challenges information that is not new, and the Intervenors have not met the requirements of 10 C.F.R. § 2.309(c) or (f)(2). The Intervenors must address the criteria of 10 C.F.R. § 2.309(c) and (f)(2) as well as (f)(1) in order to establish the admissibility of a proposed contention which is based on information that is not new, and they have not done so.

The Intervenors also argue that, "the combined radiological consequences [from a severe accident at all four units] could have a significant impact on the US-APWR severe accident mitigation design alternatives (SAMDA) analysis." New Co-location Contentions at 13. The US-APWR SAMDA analysis is part of the design certification application, and this portion of proposed Contention CL-5 constitutes an impermissible challenge to a future rulemaking. *See* Areva NP Environmental Report Standard Design Certification (Nov. 30, 2007) (ML073530589). The Commission has stated that "[i]t has long been agency policy that Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'" *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 345 (1999). In *Oconee*, the Commission also stated that "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies." *Id*. at 334. Specifically, with respect to pending design certification rulemakings, the Commission recently noted that the NRC regulations allow a COL applicant to reference a design that is not yet certified. *See South Carolina Electric and Gas Co. and South Carolina Public Service*

Authority (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3) CLI-10-01 at 10-11, 71 NRC __ (Jan. 7, 2010) (slip op. at 10-11). The Commission has held that a Licensing Board should first assess the admissibility of a contention, and if found admissible, refer the contention to the Staff for consideration in conjunction with the design certification rulemaking. *Id.* Pending the outcome of the proposed design certification rulemaking, the otherwise admissible contention would be held in abeyance. *Id.* An attack on related matters resolved in relation to the future rulemaking is likewise limited. Except as provided in 10 C.F.R. § 2.335, in making the findings required for issuance of a combined license, the Commission shall treat as resolved those matters resolved in connection with the issuance of a design certification. 10 C.F.R. § 52.63(a)(5). Here, the Intervenors raise a challenge in a COL adjudication to an environmental review of a SAMDA analysis for the U.S. APWR, which will be resolved in connection with a proposed future design certification rulemaking, but they do not meet the contention admissibility requirements to raise a challenge to the proposed design certification SAMDA analysis. 10 C.F.R. § 2.309(f)(1).

The Intervenors incorporate their arguments from proposed Contention CL-2 and reference their arguments from proposed Contentions CL-1 through CL-4 as support for CL-5. *See*, New Co-location Contentions at 13, nn.34 & 44. To the extent that proposed Contention CL-5 incorporates the previous contentions, it is inadmissible for the reasons provided in the Staff's responses to proposed Contentions CL-1 through CL-4. In sum, proposed Contention CL-5 is inadmissible because the Intervenors do not meet the requirements of 10 C.F.R. § 2.309(c), (f)(1), and (f)(2), and because it constitutes an impermissible challenge to a proposed future design certification rulemaking. For all of these reasons, the Board should reject proposed Contention CL-5.

CONCLUSION

As explained above, none of the new co-location contentions submitted by the Intervenors satisfies the new or late-filed contention admissibility requirements of 10 C.F.R.

§ 2.309(f)(1), (f)(2) or (c), and proposed contentions CL-3 and CL-5 constitute impermissible challenges to a proposed future design certification rulemaking. For these reasons, each of the Intervenors' proposed new co-location contentions, CL-1, CL-2, CL-3, CL-4 and CL-5, should be rejected.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
	)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034 & 52-035
	)	
	)	
(Comanche Peak Nuclear Power Plant, Units 3 & 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF'S ANSWER TO INTERVENORS' PROPOSED CONTENTIONS REGARDING APPLICANT'S ENVIRONMENTAL REPORT REVISIONS AND REQUEST FOR HEARING, have been served upon the following persons by Electronic Information Exchange this 8th day of March, 2010:

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