UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Dr. Gary S. Arnold
Dr. William W. Sager

In the Matter of CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC, and UNISTAR NUCLEAR OPERATING SERVICES, LLC (Combined License Application for Calvert Cliffs Unit 3)	Docket No. 52-016-COL ASLBP No. 09-874-02-COL-BD01 April 5, 2010

MEMORANDUM AND ORDER
(Ruling on Joint Intervenors' Proposed New Contentions 8 and 9 and Applicants' Motion for Summary Disposition of Contention 7)

Before this Board are two new proposed contentions filed by Joint Intervenors Nuclear Information and Resource Service, Beyond Nuclear, Public Citizen Energy Program and Southern Maryland Citizens' Alliance for Renewable Energy Solutions, designated Contention 8 and Contention 9.[1] For the reasons set forth in Section II, the Board will not admit either of these proposed new contentions.

Also before the Board is the Applicants' Motion for Summary Disposition of Contention 7. For the reasons set forth in Section III, the Board grants the Motion, without prejudice to the filing of a new or amended contention challenging the adequacy of revised Section 3.5.4.5 of the Applicants' Environmental Report.

[1] Submission of New Contentions by Joint Intervenors (Dec. 1, 2009) (New Petition).

I. Background

This case arises from an application by UniStar Nuclear Operating Services, LLC and Calvert Cliffs 3 Nuclear Project, LLC (Applicants) for a combined license (COL) for one U.S. Evolutionary Power Reactor (U.S. EPR) to be located at the Calvert Cliffs site in Lusby, Calvert County, Maryland. UniStar submitted an application for a combined license to the NRC in two parts on July 13, 2007 and March 14, 2008. In response to a September 26, 2008 notice of opportunity for hearing in the Federal Register,[2] Joint Intervenors timely filed a petition to intervene and a request for hearing on November 19, 2008.[3]

The Board issued a Memorandum and Order on March 24, 2009, in which it found that Joint Intervenors had standing, admitted their first contention as pleaded, and admitted their second and seventh contentions as modified by the Board.[4] The Board also determined that Joint Intervenors' remaining contentions were inadmissible, admitted Joint Intervenors as parties, and granted their request for a hearing.[5] On July 30, 2009, the Board granted Applicants' and NRC Staff's Motion for Summary Disposition of Joint Intervenors' Contention 2, thereby dismissing Contention 2 from the proceeding.[6]

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[2] See Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Calvert Cliffs Nuclear Power Plant Unit 3, 73 Fed. Reg. 55,876 (Sept. 26, 2008).

[3] Petition to Intervene in Docket No. 52-016, Calvert Cliffs 3 Nuclear Power Plant Combined Construction and License Application (Nov. 19, 2008).

[4] Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Unit 3), LBP-09-04, 69 NRC 170 (2009).

[5] Id.

[6] Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Unit 3), LBP-09-15, 70 NRC __ (slip op.) (July 30, 2009).

On December 1, 2009, Joint Intervenors filed two new contentions in this proceeding, designated Contentions 8 and 9.[7] Applicants and NRC Staff timely filed answers opposing the admission of new Contentions 8 and 9.[8]

On February 5, 2010, Applicants filed a motion for summary disposition of Contention 7. That contention concerned Applicants' failure to explain in the Environmental Report (ER) how they will manage Class B and C low-level radioactive waste (LLRW) in the absence of an offsite disposal facility.[9] Applicants allege that the contention is moot because they have amended the ER to explain their plan for managing Class B and C waste if no offsite disposal facility is available when Calvert Cliffs Nuclear Power Plant, Unit 3 begins operation. Joint Intervenors filed a response opposing the motion on March 4, 2010.[10]

II. Ruling on Joint Intervenors' Proposed New Contentions 8 and 9

A. Legal Standards for Admissibility of New or Amended Contentions and Nontimely Contentions

Under 10 C.F.R. § 2.309(f)(2), a new contention such as Contentions 8 and 9 may be filed after the initial docketing with leave of the presiding officer upon a showing that

> i. The information upon which the amended or new contention is based was not previously available;
> ii. The information upon which the amended or new contention is based is materially different than information previously available; and
> 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).

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[7] See New Petition.

[8] Applicants' Response to New Proposed Contentions (Dec. 23, 2009) (Applicants' Answer); NRC Staff Answer to Joint Intervenors' New Contentions 8 and 9 (Dec. 28, 2009) (NRC Staff Answer).

[9] Applicants' Motion for Summary Disposition of Contention 7 (Feb. 5, 2010) (Applicants' Motion).

[10] Joint Intervenors' Response to Applicants' Motion for Summary Disposition of Contention 7 (Mar. 4, 2010) (JI Response).

The Commission's requirements for filing both new and nontimely contentions are "stringent."[11] However, several Licensing Boards have recently recognized a dichotomy between "new" contentions filed under 10 C.F.R. § 2.309(f)(2) and "nontimely" contentions filed under 10 C.F.R. § 2.309(c), based on both the regulatory text and the apparent absurdity of requiring intervenors with contentions rooted in new material information ("new" contentions) to make the same showing as intervenors who have simply delayed filing their contentions until after expiration of the regulatory deadline ("nontimely" contentions).[12] Simply put, "[i]f a contention satisfies the timeliness requirement of 10 C.F.R. § 2.309(f)(2)(iii), then, by definition, it is not subject to 10 C.F.R. § 2.309(c) which specifically applies to 'nontimely filings.'"[13]

If a proposed new contention is not timely under 10 C.F.R. § 2.309(f)(2), then its admissibility is governed by 10 C.F.R. § 2.309(c), which deals with "nontimely filings." The regulations do not define or specify an exact number of days whereby we can measure or determine whether a contention is "timely" or "nontimely." It is subject to a reasonableness standard, depending on the facts and circumstances of each situation. Timely new contentions (i.e., which the petitioner filed promptly) are subject to a three factor test. Nontimely new contentions (i.e., where the petitioner was dilatory) are subject to a more stringent standard – the eight factor balancing test specified in 10 C.F.R. § 2.309(c). The most important of these

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[11] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009) (citations omitted).

[12] See, e.g., Shaw AREVA MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n.95 (2007); AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 396 n.3 (2006); Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 573-74 (2006); Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 n.21 (2005).

[13] Vermont Yankee, LBP-06-14, 63 NRC at 573 n.14 (emphasis in original).

eight factors is the first factor, a showing of "good cause, if any, for the failure to file on time." 10 C.F.R. § 2.309(c)(1).[14]

Any new contention, whether determined to be timely or nontimely, must also meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).

B. Contention 8

1. The Parties' Positions

Joint Intervenors state in Contention 8:

> This contention challenges the validity and accuracy of the October 29, 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 Petition at 1.

Joint Intervenors take issue with the Staff's Safety Evaluation Report (SER) concerning the impact on the existing CCNPP Units 1 and 2 of a liquefied natural gas (LNG) spill over water. Joint Intervenors provide three bases for their challenge to the SER. First, Joint Intervenors argue that the LNG spill impact analysis in the SER is based on a flawed PPRP Study and the outdated Arthur D. Little risk study, thereby rendering the conclusions made in the SER inaccurate and invalid. Id. at 2. Joint Intervenors also assert that CCNPP-3 shares "safety and structures" with CCNPP Units 1 and 2, and that the SER approved "overpressures" on CCNPP-3 pipelines without considering the impact of a LNG spill on water. Id. Finally, Joint Intervenors argue that the failure of the Staff to consider certain expert opinions and threat analysis in the SER compromises the safety of CCNPP and "presents this location as a prime target for intentional threats that could compromise the two existing reactors at CCNPP." Id. at

[14] Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008). See also Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC __, __ (slip op. at 100) (July 8, 2009).

5. The addition of CCNPP-3 further categorizes the CCNPP site as a safety risk, according to Joint Intervenors. Id.

Both NRC Staff and Applicants oppose the admission of proposed Contention 8. The NRC Staff argues that 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)." Staff Answer at 6-7. The Staff asserts that Commission case law precludes an intervenor from raising a contention that challenges the adequacy of the Staff's SER, and that only contentions that challenge the adequacy of the applicant's application are appropriate. Id. at 7. Further, the Staff contends that Contention 8 is nontimely because the Board rejected this same issue in LBP-09-04. Id. at 7-8. Joint Intervenors, the Staff argues, challenge the Staff's SER in this contention in the same way that Applicants' Environmental Report (ER) was challenged in the original petition as Contention 4. Id. at 8. Further, the Staff asserts that the information in the SER was previously available, even though the SER itself was only recently released, and therefore cannot support Joint Intervenors' argument that Contention 8 is based on new information. Id. at 10. Finally, the Staff argues that Contention 8 does not meet the requirements of 10 C.F.R. § 2.309(f)(1) because Joint Intervenors fail to assert a material dispute with the application. Id. at 12-13.

Applicants oppose proposed Contention 8 because it is based on previously available information (used by Joint Intervenors themselves in Contention 4, dismissed by the Board in LBP-09-04) and is therefore nontimely. Applicants' Answer at 4-5. Further, Applicants argue that Joint Intervenors have not made a compelling showing that they had good cause to file Contention 8 as a non-timely contention under 10 C.F.R. § 2.309(c)(1). Id. at 9. Finally, Applicants assert that Contention 8 is inadmissible because it fails to raise a genuine dispute with the application, raises bases that are outside the scope of the proceeding, fails to allege

adequate factual information or expert opinion, and impermissibly challenges the Staff's SER, in contravention of 10 C.F.R. § 2.309(f)(1). Id. at 11-12.

2. Analysis

The Board finds that Contention 8 is inadmissible. Contention 8 fails to meet the requirements of 10 C.F. R. § 2.309(f)(2) for new or amended contentions because it is not based on new information. Also, Contention 8 will not be accepted by the Board as an nontimely contention under 10 C.F.R. § 2.309(c) because Joint Intervenors have failed to show good cause for filing Contention 8, which raises the same issues as Contention 4, at this late date. Furthermore, Contention 8 is an impermissible challenge to a Staff review document and does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) because it is outside the scope of this proceeding and fails to raise a material dispute with Applicants' application.

As discussed at length, supra, new or amended contentions must meet the requirements of 10 C.F.R. § 2.309(f)(2). New or amended contentions must be based on new or materially different information and must be timely filed after the new or materially different information becomes available. Contention 8 challenges the Staff's SER for Calvert Cliffs Units 1 and 2, which was published on October 28, 2009, and would therefore appear to be a new document. However, while Joint Intervenors challenge the SER, the Board does not consider the issues Joint Intervenors raise to be new because these issues were raised by Joint Intervenors in Contention 4, which has already been considered and rejected by the Board.[15]

Joint Intervenors claim that the SER is based on deficient studies that render the SER inadequate, and they argue that the flaws in the PPRP study affect the safety of CCNPP Units 1 and 2, and, by extension, CCNPP-3.[16] Joint Intervenors made a similar claim in Contention 4,

[15] See LBP-09-04, 69 NRC at 205-13.

[16] See New Petition at 22-23, 26-28.

arguing that Applicants' application was deficient because it was based on this inadequate PPRP study. In LBP-09-04, the Board considered this claim and rejected it.[17] Now, in Contention 8, Joint Intervenors raise the same claim but provide no new information to justify the Board considering this issue again.

The SER may be a new document, but Joint Intervenors do not use any new information published in the SER to support Contention 8. Indeed, Joint Intervenors merely reiterate their concern that the PPRP study is inadequate and should not be used as a basis for risk analyses of either the existing CCNPP units or the proposed Unit 3. Joint Intervenors also do not explain how the SER, prepared for CCNPP Units 1 and 2, impacts CCNPP-3 beyond stating that the allegedly invalid SER "exacerbates the potential for harm with the addition of the 3rd double reactor. . . ." New Petition at 6. Because Joint Intervenors have not shown that Contention 8 is based upon information that is new or materially different from the information they presented in Contention 4, and because Joint Intervenors failed to show how the SER impacts the CCNPP-3 proceeding, the Board will not admit Contention 8 in this proceeding.

Under 10 C.F.R. § 2.309(c), a contention can be submitted as nontimely if the petitioner shows they had good cause to file the contention in an nontimely manner. Here, Joint Intervenors have made no such showing. Again, the pertinent issues to this proceeding that Joint Intervenors raise in Contention 8 were already considered by the Board in LBP-09-04. Joint Intervenors have not established that they have good cause to re-file these issues as a new contention.

Even if Contention 8 were found to be timely under 10 C.F.R. § 2.309(f)(2), or met the requirements for nontimely contentions under 10 C.F.R. § 2.309(c), Contention 8 would still be inadmissible for failing to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). For one, Contention 8 is outside the scope of this licensing proceeding. Joint Intervenors take issue with the Staff's SER, which was issued in the CCNPP Units 1 and 2

[17] LBP-09-04, 69 NRC at 205-13.

proceeding, and only tangentially applies to the proceeding before this Board. Even if the Staff's SER applied to the CCNPP-3 proceeding, Contention 8 would still be inadmissible because it constitutes an impermissible challenge to a Staff review document. It is a well-established rule that intervenors may only raise contentions challenging the adequacy and sufficiency of a licensing application. A licensing board will not ". . . litigate claims about the adequacy of the Staff's safety review in licensing adjudications."[18] While Joint Intervenors ostensibly raise a challenge to the Staff's SER, Contention 8 nevertheless functions as a challenge to Applicants' FSAR. This challenge was raised in Contention 4 and was denied by the Board in LBP-09-04. Therefore, Joint Intervenors' challenge is both outside the scope of the proceeding and fails to raise a genuine dispute with the application, as required by 10 C.F.R. § 2.309(f)(1).

For the foregoing reasons, Contention 8 is not admitted.

C. Contention 9

1. The Parties' Positions

Joint Intervenors state in Contention 9:

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

New Petition at 29.

Joint Intervenors argue that nuclear regulatory agencies in the United Kingdom, Finland, and France identified a problem with "fundamental digital Instrumentation and Control (I&C) systems" in Areva's U.S. EPR design. Id. at 30. Joint Intervenors contend that, because Applicants do not address the deficiencies identified by these foreign regulatory agencies in its license application to construct and operate a U.S. EPR reactor, Applicants are ignoring a "safety issue of the highest significance." Id.

[18] Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-23, 68 NRC 461, 476-77 (2008). See also Curators of the Univ. of Missouri, CLI-95-1, 41 NRC 71, 121-22 (1995); Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

NRC Staff and Applicants both oppose the admission of Contention 9. Applicants claim that Contention 9 is "untimely, outside the scope of the proceeding, and not otherwise admissible." Applicants' Answer at 19. Applicants argue that Contention 9 should have been filed with Joint Intervenors' original petition because the information contained in the statement issued by the European regulators was previously available in the design certification application and in Applicants' COL application. Id. at 20. Further, Applicants assert that if Joint Intervenors have concerns with the U.S. EPR design, these concerns should be raised in the design certification rulemaking, and not in this proceeding. Id. at 21. Finally, Applicants argue that Joint Intervenors fail to meet the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1) because Contention 9 fails to raise a genuine dispute with the application, and because Joint Intervenors fail to explain the basis of their contention. Id. at 22.

NRC Staff argues that Joint Intervenors' Contention 9 does not meet the requirements for new or amended contentions under 10 C.F.R. § 2.309(f)(2) or for untimely contentions under 10 C.F.R. § 2.309(c). Staff Answer at 14. Like Applicants, NRC Staff asserts that Joint Intervenors' challenge to the U.S. EPR's design should be raised in an NRC rulemaking, not in a proceeding before this Board. Id. at 15. Finally, NRC Staff argues that Contention 9 fails to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) because Joint Intervenors fail to allege facts or expert opinion to support their contention and because they fail to raise a genuine dispute with Applicants' COL application. Id. at 18.

2. Analysis

We will not admit Contention 9 because it fails to allege a genuine dispute with Applicants on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi).

Contention 9 alleges that Applicants do not address a "fundamental safety problem identified by European nuclear regulators" concerning the design of the U.S. EPR. New Petition

at 29. The support for this contention is a cite to a web page (no longer posted) containing a joint statement (the Joint Statement) by three European nuclear safety regulators (the British, French, and Finnish nuclear safety authorities). According to the Joint Statement, "[t]he EPR design, as originally proposed by the licensees and the manufacturer, Areva, doesn't comply with the independence principle, as there is a high degree of complex interconnectivity between the control and safety systems." Id. at 30.

Because Contention 9 alleges a design defect in the U.S. EPR, we must first determine whether that affects the admissibility of the contention. Areva has submitted a design certification application for the U.S. EPR to the NRC pursuant to 10 C.F.R. Part 52, Subpart B.[19] The design is the subject of an ongoing rulemaking.[20] As permitted by NRC regulations, the COLA for CCNPP-3 refers to the design certification application for the U.S. EPR.[21] When and if the NRC issues a regulation certifying the U.S. EPR design, licensing boards will be prohibited from admitting contentions that challenge the design absent a waiver from the Commission.[22]

The Commission has explained how Boards should manage contentions that, like Contention 9, challenge a design matter that is the subject of a design certification rulemaking that is not yet completed.

> With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent that "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general

[19] A design certification application is an application submitted to the NRC for "an essentially complete nuclear power plant design." 10 C.F.R. § 52.41(b). The reactor design that is the subject of such an application may be referenced in individual COL applications, even if, as in the case of the U.S. EPR, the NRC has not yet completed the design certification rulemaking. 10 C.F.R. § 52.55(c).

[20] The NRC Staff's current target date for issuing a final rule is June 2012. See U.S. Nuclear Regulatory Commission, U.S. EPR Application Review Schedule, http://www.nrc.gov/reactors new-reactors/design-cert/epr/review-schedule.html (last visited April 2, 2010).

[21] Calvert Cliffs Nuclear Power Plant, Unit 3 Combined License Application, Part 7, DCD Departures, Sec. 1.1 (Rev. 6) (Sept. 2009).

[22] 10 C.F.R. § 2.335(a)-(d).

> 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 Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974). In accordance with these decisions, a licensing board should treat the NRC's docketing of a design certification application as the Commission's determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final design certification rule, such a contention should be denied.[23]

Thus, when a COLA references a docketed design certification application that the Commission has not yet approved, "an Atomic Safety and Licensing Board should hold any contentions on the design filed in the COLA adjudication in abeyance, pending the results of the rulemaking proceeding on the design certification," if the contention is "otherwise admissible."[24] Accordingly, the Board must decide if Contention 9 is "otherwise admissible." If it is, it should be referred to the NRC Staff for resolution in the U.S. EPR design certification rulemaking. If it is not, it should not be admitted. To resolve this matter, we consider the same issues of timeliness and admissibility discussed above with reference to Contention 8.

On the question of timeliness, the Joint Statement is dated October 22, 2009. Joint Intervenors inform us that the Joint Statement was actually issued on November 2, 2009. Contention 9 was filed on December 1, 2009. There is no indication that the Joint Statement was available to Joint Intervenors before it was issued. The Joint Statement appears to be materially different from information previously available to Joint Intervenors. We have not been presented with any earlier statement by a nuclear safety regulatory authority indicating concern

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[23] Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

[24] Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 84-85 (2009) (quoting 73 Fed. Reg. at 20,972-73).

with the "high degree of complex interconnectivity between the control and safety systems" in the EPR design. And, given that the new contention was filed approximately thirty days after the joint statement was apparently issued, we conclude that Contention 9 was submitted in a timely fashion based on the availability of the Joint Statement. Contention 9 therefore satisfies 10 C.F.R. § 2.309(f)(2).

Applicants object that, while the Joint Statement may have been issued shortly before the new contention was filed, the design certification application for the U.S. EPR was filed on December 11, 2007, and a Federal Register notice announcing the receipt and availability of the design certification application was issued on January 14, 2008. Applicants' Answer at 20. Applicants contend that Joint Intervenors should have examined the U.S. EPR design certification application and the COLA for CCNPP-3 and filed Contention 9 based on those documents. Id.

This argument ignores the basis of Contention 9. Joint Intervenors do not claim to have independently identified a specific defect in the U.S. EPR certified design application. Rather, they rely on the opinion of European nuclear safety regulators that the interconnectivity of safety and control systems in the U.S. EPR design is inconsistent with the general design principle that those systems should be independent, and Applicants' failure to address that issue in the COLA. Below, we examine whether the Joint Statement is sufficient to make the contention admissible under 10 C.F.R. § 2.309(f)(1). For purposes of the timeliness analysis, however, we must begin with the information upon which Joint Intervenors based the proposed new contention, not other information that might have served as the basis of a different contention. Under 10 C.F.R. § 2.309(f)(2), Contention 9 is timely if the information upon which it is based was not previously available to intervenors, the information is materially different from information previously available, and the new contention was submitted in a timely fashion based on the availability of the new information. Applicants' objection relates primarily to the second factor. Applicants argue, in substance, that the joint statement added nothing new to

information that Joint Intervenors could have derived form the U.S. EPR certified design application and the COLA. We think, however, that the joint statement did add something materially different because it represented the judgment of three nuclear safety agencies that the U.S. EPR design raises a significant safety issue under the requirements they enforce.[25] We therefore think the Joint Statement constituted new information related to the safety of the U.S. EPR design that was materially different from the information previously available to Joint Intervenors, and that Contention 9 was timely filed based upon the availability of the Joint Statement.

Having concluded that Contention 9 was timely filed, we must decide whether it is admissible under 10 C.F.R. § 2.309(f)(1). To pass that test, Contention 9 must, among other things, "provide sufficient information to 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)(1)(vi). This requires that we determine whether the independence principle cited in the joint statement is incorporated in relevant NRC regulations and, if so, whether the joint statement is sufficient to generate a genuine dispute of fact or law as to whether the U.S. EPR complies with those regulations.

In explaining the legal basis of this contention, Joint Intervenors point generally to 10 C.F.R. § 52.79 and 10 C.F.R. Part 50. Neither of these references aids our inquiry. The first of these, 10 C.F.R. § 52.79, specifies the entire technical content of the Safety Analysis Report for a COL application, and the second, 10 C.F.R. Part 50, contains the voluminous regulations regarding licensing of utilization facilities. The contention does not clarify which sections of these regulations are relevant to this contention.

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[25] In Contention 8, by contrast, while the Joinit Intervenors cited a new document, they failed to show that the new document contained materially different information relevant to this proceeding. See Section II(B)(1), supra.

However, the issue of the independence of protection and control systems is directly addressed by General Design Criterion (GDC) 24 of 10 C.F.R. Part 50, which provides:

> *Criterion 24--Separation of protection and control systems*. The protection system shall be separated from control systems to the extent that failure of any single control system component or channel, or failure or removal from service of any single protection system component or channel which is common to the control and protection systems leaves intact a system satisfying all reliability, redundancy, and independence requirements of the protection system. Interconnection of the protection and control systems shall be limited so as to assure that safety is not significantly impaired.

Thus, this regulation permits some degree of overlap of the protective (safety) system and the control system. It also provides a limit on how far the systems may overlap.

The joint statement does not address, directly or indirectly, the question whether the U.S. EPR is consistent with the GDC. The joint statement is an expression of concern by three European nuclear safety regulators that the U.S. EPR design they were reviewing may be inconsistent with the requirements they enforce, but it lacks any link to NRC regulatory requirements. Joint Intervenors have provided no other information to show that the U.S. EPR design violates GDC 24. As Applicants point out, "[t]he Intervenors have not provided in proposed Contention 9 any technical basis documents specifically addressing the U.S. design and have not pointed to any specific aspect of the U.S. EPR design that [they allege] to be in non-conformance with either NRC requirements or guidance." Applicants' Answer at 25. Lacking such support, this contention does not "provide sufficient information to 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)(1)(vi).

We will accordingly not admit Contention 9.

III. Motion for Summary Disposition of Contention 7

Contention 7, as admitted by the Board, states:

> The ER for CCNPP-3 is deficient in discussing its plans for management of Class B and C wastes. In light of the current lack of a licensed off-site disposal facility, and the uncertainty of whether a new disposal facility

> will become available during the license term, the ER must either describe how Applicant will store Class B and C wastes on-site and the environmental consequences of extended on-site storage, or show that Applicant will be able to avoid the need for extended on-site storage by transferring its Class B and C wastes to another facility licensed for the storage of LLRW.

LBP-09-04, 70 NRC at 224.

A. The Parties' Positions

Applicants' position is that Contention 7, as admitted by the Board, is an "environmental 'contention of omission.'" Applicants' Motion at 4-5. By this they mean a contention alleging that the ER omits information that should have been included to satisfy the requirements of the National Environmental Policy Act (NEPA)[26] and the NRC's regulations implementing NEPA. 10 C.F.R. Part 51. The Board, Applicants note, faulted the ER because it failed to acknowledge the closure of the disposal facility located in Barnwell, South Carolina, to Class B and C waste from the Calvert Cliffs reactors. Applicants' Motion at 4-5 (citing LBP-09-04, 69 NRC at 224). Contention 7 required that the ER explain how the Class B and C waste from the new reactor would be managed given the lack of access to such a disposal facility. Id. (citing LBP-09-04, 69 NRC at 226-27). Applicants maintain that Contention 7 is "limited to (1) the ER's failure to acknowledge the closure of Barnwell to out-of-compact waste; and (2) the ER's failure to either (a) address the need for, and the environmental consequences of, long-term storage of Class B and C waste at the Calvert Cliffs site, or (b) demonstrate that long-term storage at the Calvert Cliffs site will not be necessary." Id. at 5.

Applicants state that, on December 9, 2009, they revised the ER to address the omissions that were the subject of Contention 7. Id. at 6. The ER now acknowledges that the Barnwell facility no longer accepts Class B and C waste from sources in Maryland. Id. According to Applicants, "[t]he revised ER also describes how, in the absence of an offsite disposal facility for Class B and C [waste] generated at Calvert Cliffs Unit 3, Applicants would

[26] 42 U.S.C. § 4321 (1969).

store Class B and C waste on-site and discusses the environmental consequences of extended on-site storage." Id. In addition, the revised ER also discusses the possibility that "the site could enter into a commercial agreement with a third party contractor to process, store, own, and ultimately dispose low-level waste generated as a result of Unit 3 operations." Id. at 7-8. Applicants argue that, because they have supplied the information that Contention 7 claims was improperly omitted from the ER, the contention is now moot.

Joint Intervenors respond that "Applicants' revised ER Section 3.5.4.5 is an improvement only to the extent that it finally acknowledges that the Barnwell, South Carolina LLRW disposal facility is not available for the Class B and C radioactive waste that would be produced by CCNPP3." JI Response at 6. They complain that "[n]o actual plans to address the deficiencies stated in Contention 7 are offered, only four possible approaches (including one possible approach that even Applicants admit is not available to them). Each of the remaining three possibilities consists primarily of assertion, with little to no supporting information or documentation." Id. Because Joint Intervenors believe the information supplied in revised ER Section 3.5.4.5 is too general and not supported by commitments to take specific actions, they argue that the revision "provides no information that would assure 'the ER's compliance with 10 C.F.R. § 51.45(b) and (e), and to the agency's compliance with NEPA.'" Id.

B. Analysis

We agree with Applicants that Contention 7 is moot because they have submitted an ER revision acknowledging the partial closure of the Barnwell facility and explaining how they will manage Class B and C waste given the lack of access to such a facility. Issues relating to the adequacy of Applicants' new LLRW management plan must be presented in a new or amended contention, which we do not have before us.

To decide summary disposition motions in Subpart L proceedings such as this, licensing boards apply the standards of Subpart G, which are set forth in 10 C.F.R. § 2.710(d)(2). See 10 C.F.R. § 2.1205(c). A motion for summary disposition must be granted "if the filings in the

proceeding . . . together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.710(d).

As Applicants correctly argue, Contention 7, as admitted by the Board, required Applicants to explain their current plan for the management of LLRW generated at CCNPP-3 given the lack of access to an offsite disposal facility. LBP-09-04, 69 NRC at 224. We construed Contention 7 as a "'contention of omission, one that claims, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that "the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief."'" Id. at 225. As another board recently explained,

> for a contention of omission, the petitioner's burden is only to show the facts necessary to establish that the application omits information that should have been included. The facts relied on need not show that the facility cannot be safely operated, but rather that the application is incomplete. If the Applicant cures the omission, the contention will become moot. Then, [the intervenor] must timely file a new or amended contention if it intends to challenge the sufficiency of the new information supplied by the Applicant.[27]

Applicants maintain that they have amended the ER to explain their plans for managing Class B and C wastes if an offsite facility is not available to accept such wastes. In response, Joint Intervenors dispute the adequacy of the new plan described in the revised ER. However, it is no longer true that the ER lacks a plan for the management of such wastes in the absence of a disposal facility. The dispute has shifted from the COLA's lack of a plan to the adequacy of the plan. The contention of omission that the Board previously admitted has therefore become moot.

[27] Virginia Elec. and Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC 294, 317 (2008) (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383, (2002)).

Joint Intervenors have alleged various inadequacies in Applicants' plan. But, we have no new or amended contention before us that challenges the adequacy of revised ER Section 3.5.4.5. That fact distinguishes this case from the North Anna COL proceeding, in which the Board also dismissed a LLRW contention as moot after the applicant submitted a revision to its ER,[28] but subsequently admitted in part a new contention challenging the adequacy of the LLRW management plan described in the revision.[29] Here, by contrast, we have no new contention to evaluate, but only various arguments in the Joint Intervenors' Response to the Summary Disposition Motion challenging the adequacy of Applicants' revision. Contention 7 as admitted by the Board cannot support a challenge to the revised ER, since Contention 7 concerned the omission from the original ER of a LLRW management plan that took into account the partial closure of the Barnwell facility. The Commission has made clear that an intervenor challenging the adequacy of information submitted to cure such an omission must file a new contention:

> If we did not require an amended or new contention in "omission" situations, an original contention alleging simply a failure to address a subject could readily be transformed — without basis or support — into a broad series of disparate new claims. This approach effectively would circumvent NRC contention-pleading standards and defeat the contention rule's purposes: (1) providing notice to the opposing party of the issues that will be litigated; (2) ensuring that at least a minimal factual or legal foundation exists for the different claims that have been alleged; and (3) ensuring there exists an actual "genuine dispute" with the applicant on a material issue of law or fact.[30]

We therefore conclude that we may not now consider Joint Intervenors' arguments concerning the adequacy of the new LLRW management plan. We will consider those arguments only if they are presented in the form of a new or amended contention. If Joint

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[28] North Anna Unit 3, Licensing Board Order (Denying Contention 1 as Moot) at 3-4 (Aug. 19, 2009) (unpublished).

[29] Virginia Elec. and Power Co. (Combined License Application for North Anna Unit 3), LBP-09-27, 70 NRC ___ (slip op.) (Nov. 25, 2009).

[30] Duke Energy Corp., 56 NRC at 383 (footnote and citations omitted).

Intervenors do submit such a contention, they must address not only the admissibility factors listed in 10 C.F.R. § 2.309(f)(1), but also the requirements for late-filed contentions in 10 C.F.R. § 2.309(c).

CONCLUSION

Contentions 8 and 9 are not admitted. Applicants' Motion for Summary Disposition of Contention 7 is granted without prejudice to the filing of a new or amended contention challenging the adequacy of revised ER Section 3.5.4.5.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[31]

_____***/RA/***_____
Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

_____***/RA/***_____
Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

_____***/RA/***_____
Dr. William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 5, 2010

[31] Copies of this Order were sent this date by the agency's E-Filing system to the counsel/representatives for: (1) Joint Petitioners Nuclear Information and Resource Services, Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizens Alliance for Renewable Energy Solutions; (2) UniStar Nuclear Operating Services, LLC and Calvert Cliffs-3 Nuclear Project, LLC; (3) NRC Staff; and (4) State of Maryland.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM ORDER (RULING ON JOINT INTERVENORS' PROPOSED NEW CONTENTIONS 8 AND 9 AND APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF CONTENTION 7) have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-016-COL
MEMORANDUM ORDER (RULING ON JOINT INTERVENORS' PROPOSED NEW CONTENTIONS 8 AND 9 AND APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF CONTENTION 7)

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Docket No. 52-016-COL
MEMORANDUM ORDER (RULING ON JOINT INTERVENORS' PROPOSED NEW CONTENTIONS 8 AND 9 AND APPLICANTS' MOTION FOR SUMMARY DISPOSITION OF CONTENTION 7)

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Dated at Rockville, Maryland
this 5th day of April 2010