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February 24, 2010

VIA FEDERAL EXPRESS

Marcia M. Waldron, Clerk
Office of the Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

ATTENTION: Christina M. Koperna, Case Manager

Re: New Jersey Environmental Federation, *et al.* v. U.S. Nuclear Regulatory Commission, *et al.*, Docket No. 09-2567 (3d Cir.) – Respondent (Exelon) Brief

Dear Ms. Waldron:

Enclosed for filing pursuant to L.A.R. 31.1(a) and 113.1(b), please find the original and eleven copies of "Brief of Private Respondent Exelon Generation Company, L.L.C." All required certifications are contained within the brief. An identical PDF copy of the brief was also e-filed and served on counsel for all parties today per the Court's Local Rules. Please have the extra (*i.e.*, eleventh) copy of the Brief date-stamped and returned to me in the enclosed stamped, self-addressed envelope. Please contact me if you have any questions. Thank you for your attention to this matter.

Sincerely,

Brad Fagg
Counsel for Exelon Generation Company, L.L.C.

cc: Counsel of Record

ML100620258

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2567

NEW JERSEY ENVIRONMENTAL FEDERATION, SIERRA CLUB, NUCLEAR INFORMATION AND RESOURCE SERVICE, NEW JERSEY PUBLIC INTEREST RESEARCH GROUP, AND GRANDMOTHERS, MOTHERS AND MORE FOR ENERGY SAFETY

PETITIONERS,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA, AND EXELON GENERATION COMPANY, L.L.C.,

RESPONDENTS.

PETITION FOR REVIEW OF ORDERS BY THE UNITED STATES NUCLEAR REGULATORY COMMISSION

BRIEF OF INTERVENOR PRIVATE RESPONDENT EXELON GENERATION COMPANY, L.L.C.

OF COUNSEL:

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CORPORATE DISCLOSURE AND STATEMENT OF FINANCIAL INTEREST

No. 09-2567

New Jersey Environmental Federation

v.

NRC

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Intervenor Private Respondent Exelon Generation Company, LLC makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

Exelon Corporation

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Exelon Corporation

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None other than Exelon Corporation

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

s/ Brad Fagg
Brad Fagg, Esq. (DC433645)

February 24, 2010
Date

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

FEDERAL CASES

ADMINISTRATIVE DECISIONS

FEDERAL STATUTES

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER NOTICES

STATEMENT OF THE ISSUES

1. Whether the NRC acted arbitrarily and capriciously regarding Petitioners' challenges concerning the Oyster Creek drywell in license renewal proceedings, when the Commission: (a) upheld the Board's denial of Petitioners' multiple late-filed drywell contentions for failing to meet well-established timing and contention admissibility standards; (b) upheld the Board's rulings, based upon a live evidentiary hearing before the Board, and denied Petitioners' request to reopen the record; and (c) provided direction to the NRC Staff with regard to post-hearing regulatory oversight.

2. Whether the NRC acted arbitrarily and capriciously when it rejected as deficient Petitioners' motions to add contentions and reopen the record to challenge Exelon's aging management program for metal fatigue.

3. Whether the NRC acted arbitrarily and capriciously when it rejected Petitioners' "Supervision Petition" upon the grounds that the petition failed to raise a significant safety issue, requested relief beyond the Commission's hearing process, and failed to meet the standards for motions to reopen the record.

STATEMENT OF THE CASE

This case involves Petitioners' request for review of three orders of the Nuclear Regulatory Commission ("NRC" or "Commission"): (1) *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, slip op. (Oct. 6,

and contention procedures, seeking to relitigate the drywell issue, raise multiple new issues, or otherwise influence the adjudicatory process.[1]

Petitioners now, apparently, seek reversal of each of the Commission's three principal decisions. The exact nature of their claims is difficult to isolate or discern, but they generally appear to involve two types of assertions. First, Petitioners claim the application of well-settled timing and reopening-of-the-record rules by the Board and NRC denied them their rights, under the Atomic Energy Act of 1954 ("AEA"), as amended, 42 U.S.C. § 2011 *et seq.*, to a hearing on all issues that were material to "relicensing." Petitioners' Brief ("PB") at 25. Second, they seek to overturn the Commission's evidentiary and technical judgments by claiming that the Commission did not have sufficient information to make a "definitive finding of safety," that the Commission failed to reopen the record when requested, and that the Commission improperly relied upon its regulatory Staff. *See* PB at 25-26.

The Commission rejected Petitioners' challenges upon the basis of an extensive administrative record developed by its Board and Staff, and upon the

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[1] *See, e.g.*, Letter from R. Webster to Chairman Klein re: Proposed Dredging Project (May 8, 2008) (R-487); Letter from R. Webster to Chairman Klein re: Comments for Consideration [on metal fatigue issue] (Oct. 14, 2008) (R-541); Letter from R. Webster to Chairman Klein re: 3-D Analysis (Jan. 26, 2009) (R-556); Letter from R. Webster to the Commissioners re: Commission Meeting (Mar. 31, 2009) (R-579); Letter from R. Webster to S. Collins re: Request for Public Meeting and to Temporarily Cease Power Production at [Oyster Creek] on April 9, 2009 (Mar. 24, 2009) (R-576).

basis of its technical and predictive judgments with respect to nuclear safety. Every issue that Petitioners raised, and which they pursue here, was addressed in detail by the Commission, its Board, or both. Following the submission of over 130 exhibits and the written and oral testimony of Petitioners, AmerGen, and the NRC Staff, the Board resolved the litigated drywell contention in a thorough 58-page decision, finding that Petitioners' arguments lacked technical merit. *See* LBP-07-17 (R-437). Thereafter, the Commission and its Board applied the Commission's well-settled rules to reject Petitioners' attempts to continue to block the issuance of the renewed license.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. *The Atomic Energy Act.* The AEA establishes "a comprehensive regulatory framework for the ongoing review of nuclear power plants located in the United States." *Rockland County v. NRC*, 709 F.2d 766, 769 (2d Cir. 1983). Sections 103 and 104(b) of the AEA authorize the Commission to issue licenses to operate commercial power reactors. *See* 42 U.S.C. §§ 2133 and 2134(b). The AEA does not elaborate on the standards or procedures to be applied by the NRC in issuing renewed operating licenses. The AEA, however, does give the Commission considerable discretion to determine how to achieve its statutory mandates. *See Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

B. *The NRC's Part 54 License Renewal Regulations.* The NRC's standards and procedures for the renewal of reactor operating licenses appear in 10 C.F.R. Part 54 (2009). As the Commission explained in its seminal Turkey Point decision, "Part 54 centers the license renewal reviews on the most significant overall safety concern posed by extended reactor operation – the detrimental effects of aging." *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 N.R.C. 3, 7 (2001).

The NRC's license renewal framework is premised upon the notion that, with the exception of aging management issues, the NRC's ongoing regulatory process is adequate to ensure that the current licensing basis ("CLB") of operating plants provides and maintains an acceptable level of safety. Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991). The CLB is a "term of art comprehending the various Commission requirements applicable to a specific plant that are in effect at the time of the license renewal application." *Turkey Point,* CLI-01-17, 54 N.R.C. at 9. In implementing Part 54, the Commission made clear that "it would be unnecessary to include in [the agency's] review all those issues already monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight." *Id.* at 8. To obtain a renewed operating license, the application must provide reasonable assurance that the detrimental effects of aging will be managed, such that plant components will continue to

perform their intended functions "consistent with the [CLB] during the period of extended operation." CLI-09-07 at 35 (internal quotations and citations omitted).

C. *The NRC Hearing and Contentions Process.* The NRC hearing procedures applicable to license renewal derive from Section 189(a) of the AEA. 42 U.S.C. § 2239(a). The Commission generally establishes a three-member Board to rule on hearing requests and conduct necessary evidentiary hearings. 10 C.F.R. § 2.321. The three administrative judges generally include a legal judge as chairman and two technical judges. *Id.* § 2.321(a). Petitioners and parties may appeal Board rulings to the Commission. *Id.* §§ 2.311, 2.341.

1. *Contention Admissibility.* Any person seeking to obtain a hearing on a license renewal application must file a petition to intervene. *Id.* § 2.309(a). The petitioner must demonstrate standing and proffer at least one admissible "contention." *Id.* § 2.309(a). A contention is a specific issue of law or fact that the petitioner seeks to have adjudicated. The disputed issue must be within the scope of the proceeding and "material" to the findings the NRC must make to support the licensing action. *Id.* § 2.309(f)(1). It must be substantiated by an explanation of its bases, a statement of supporting facts or expert opinion, appropriate references and citations, and sufficient information to establish that a genuine dispute exists between the petitioner and the applicant. *Id.*

2. *Untimely Contentions.* In NRC adjudicatory proceedings, the deadline for submitting a petition to intervene is typically set in the notice of hearing that is published in the *Federal Register*. *Id.* § 2.309(b)(3). If intervention is granted, the intervenor may submit late-filed contentions if the criteria set forth in 10 C.F.R. § 2.309(f)(2) are satisfied. This regulation requires a showing that there was new information, that the new information was materially different from what was previously available, and that the new contention was submitted in a timely fashion based on the availability of the new information. If the new contention does not meet the criteria in 10 C.F.R. § 2.309(f)(2), its substantive admissibility may still be considered if the intervenor can show that the balance of the eight factors governing untimely filings in 10 C.F.R. § 2.309(c) falls in its favor. The most important of the eight factors is good cause for failure to file on time. *E.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 N.R.C. 551, 564-65 (2005).

3. *The Hearing Process.* Generally, the NRC holds adjudicatory proceedings for the renewal of the operating license of commercial nuclear power plants under the informal procedures in 10 C.F.R. Part 2, Subpart L. 10 C.F.R. § 2.310(a). Subpart L proceedings provide for the mandatory disclosure of relevant documents, *id.* § 2.336, the submittal of prefiled written testimony, rebuttal testimony, and proposed questions for the witnesses, *id.* § 2.1207, an oral

hearing involving direct questioning of witnesses by the Board, *id.*, and the opportunity for all parties to submit post-hearing proposed findings of fact and conclusions of law. *Id.* § 2.1209. The Board will then issue its initial decision ruling on the merits of the admitted contention or contentions. *Id.* §§ 2.340(a), 2.1210.

4. *Motions to Reopen the Record.* After the adjudicatory record is closed on one or more issues, a party seeking to reopen the record must satisfy the requirements of 10 C.F.R. § 2.326(a). The motion must be timely, address a significant safety or environmental issue, and demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. *Id.* § 2.326(a)(1 – 3). Motions to reopen must be accompanied by affidavits of knowledgeable fact witnesses or competent experts. *Id.* § 2.326(b). The affidavits must set forth the factual and technical bases for the claim, and must separately and specifically address each of the three reopening criteria. *Id.* A motion to reopen relating to a contention not previously in controversy must also meet the eight-factor balancing test for nontimely filings in 10 C.F.R. § 2.309(c). *Id.* § 2.326(d).

5. *Appeals to the Commission.* Initial decisions of the Board may be appealed to the Commission under 10 C.F.R. §§ 2.1212 and 2.341. The Commission may take review of the Board's decision if a finding of fact is clearly

erroneous, a necessary legal conclusion is without precedent or is a departure from or contrary to established law, a substantial question of law, policy, or discretion is raised, if there has been a prejudicial procedural error, or for any other reason the Commission deems to be in the public interest. *Id.* § 2.341(b)(4)(i – v).

II. THE EVIDENCE AND PROCEEDINGS BELOW

A. *The Oyster Creek License Renewal Application.* On July 22, 2005, AmerGen Energy Company, LLC (Exelon's former subsidiary and the predecessor licensee for Oyster Creek) filed an application to renew Operating License No. DPR-16 for Oyster Creek.[2] Oyster Creek is located in Lacey Township, Ocean County, New Jersey. The application sought to renew the Oyster Creek operating license, which would otherwise have expired in April 2009, for an additional 20 years. On September 15, 2005, the NRC published a notice of opportunity for hearing. 70 Fed. Reg. 54,585 (Sept. 15, 2005).

B. *The Drywell.* The drywell shell is a large steel containment structure that encloses the reactor vessel. LBP-07-17 (R-437) at 2. It is shaped like an inverted light bulb, and is approximately 100 feet tall and 70 feet in diameter in its

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[2] AmerGen purchased Oyster Creek from another utility in 2000. Pursuant to a transaction that closed on January 8, 2009, the operating license for the Oyster Creek plant was transferred from AmerGen to Exelon. AmerGen merged into its parent company, Exelon, and has ceased to exist as a separate corporate entity. Exelon is now the holder of the renewed operating license. In this brief, the Oyster Creek licensee is generally referred to as "Exelon," unless the context indicates otherwise.

spherical section. *Id.* The sand bed region is a small area near the base of the shell, between elevations of approximately 8 feet 11 inches and 12 feet 3 inches. *Id.* at 2-3. When the plant was originally constructed, a bed of sand surrounded this region of the shell to provide structural support. *Id.* at 3.

1. *Background: Historical Drywell Corrosion.* Following the discovery of water leakage into the sand bed and subsequent corrosion of the drywell shell in the 1980s, the plant's then-licensee removed the sand, eliminated the sources of leakage, cleaned the shell, coated the shell with an epoxy coating system, and took other corrective actions that arrested the corrosion such that the drywell could continue to perform its intended safety functions. *See id.* at 5-7; AmerGen Ex. B, pt. 1, A.20-24 (R-338).[3]

To prevent and manage potential recurrence of this historical corrosion, Exelon committed to take a series of actions, both prior to and during the period of extended operation (*i.e.*, the period of operation under the renewed license). These

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[3] In their characterization of the drywell shell, the Petitioners state that "it is possible that the shell fails one of [the] currently applied acceptance criteria." PB at 8. That is simply untrue. The implication that the drywell shell is unsafe and unable to perform its intended function today is contrary to the evidence and to the Board's findings. *See* LBP-07-17 at 22-28. Petitioners cite in support one of a series of memoranda prepared by their expert witness and submitted to the Board at the hearing. PB at 8 (*citing* Citizens' Ex. 61, R-268). As the Board correctly found, however, those memoranda, and the technical information in them, were "not reliable." LBP-07-17 at 28 n.30 (*citing* AmerGen Ex. C, pt. 2, A.7 (R-337); *id.*, pt. 3, A.10 & A.40; NRC Staff Ex. C, A.12(d), A.26 & A.27 (R-262)).

commitments included ultrasonic testing ("UT") measurements of the thickness of the drywell shell, visual inspections of the epoxy coating, and various steps to minimize the potential for water leakage and monitor for water. *See* CLI-09-07 at 14-15; AmerGen Ex. 10 (R-362). They included a commitment, prior to entering the period of extended operation, to "perform a 3-D finite element structural analysis of the primary containment drywell shell using modern methods and current drywell thickness data to better quantify the margin that exists above the [American Society of Mechanical Engineers or "ASME"] Code required minimum." CLI-09-07 at 15. Completion of this structural analysis commitment, however, was not a prerequisite for obtaining the renewed license. *See id.* at 15 & 67. Instead, Exelon submitted the analysis to the NRC Staff for its review as part of the ongoing regulatory oversight of the operating nuclear power plant, which includes oversight of Exelon's fulfillment of conditions to be imposed by the renewed license. *See id.*

2. *Petitioners' Initial Drywell Contention.* Petitioners filed their Request for Hearing and Petition to Intervene ("Initial Petition") (R-1) on November 14, 2005. CLI-09-07 at 4-5. The Initial Petition proffered one contention, challenging the adequacy of AmerGen's proposed program for managing potential corrosion of the drywell shell. *See* Initial Petition at 3. The Board found that the Petitioners' general challenge to this aging management

program was insufficiently supported and "overbroad," but admitted a narrower version of the contention, focused only on a small portion of the drywell shell called the "sand bed region." *See* CLI-09-07 at 5; *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-07, slip op. at 33 (Feb. 27, 2006) (R-36) ("LBP-06-07").

3. *Late-Filed Drywell Contentions.* Over the course of the subsequent administrative proceeding, Petitioners repeatedly filed new contentions seeking to broaden the scope of issues for litigation. First, in February 2006 they submitted two new proposed contentions (or, in the alternative, a motion to supplement the basis of their original contention). This filing alleged that "previously unavailable information" revealed problems with the monitoring of inaccessible areas of the drywell shell above the sand bed region, and the Petitioners renewed their efforts to expand the scope of their contention to areas of the drywell shell above and below the sand bed region. CLI-09-07 at 5-6. The Board found this filing both untimely (it was not based on any new information) and substantively inadmissible (*i.e.*, it did not present any genuine dispute on a material issue). *See AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-06-11, slip op. at 2 & 9-10 (Mar. 22, 2006) (R-46) ("LBP-06-11"). Petitioners unsuccessfully sought reconsideration

and interlocutory review of this decision, but did not seek review of LBP-06-11 in their final Petition for Review. CLI-09-07 at 6 & n.28.

In June 2006, after AmerGen docketed enhancements to its drywell program involving commitments to perform UT monitoring in the sand bed region, the previously admitted contention became moot. *Id.* at 7 & n.37. Petitioners then submitted a revised contention attempting to raise or renew seven discrete challenges to the drywell program, including with respect to "acceptance criteria" (*i.e.*, the minimum thickness values established under the current licensing basis as benchmarks for comparison to UT measurements), and the "scope" of the UT monitoring (*i.e.*, the specified locations where UT measurements are taken). The Board ruled that six of these challenges were inadmissible, either because they were untimely (*i.e.* they could have been, or should have been, or were, brought in the Initial Petition), insufficiently supported, outside the scope of a license renewal proceeding, or suffered from a combination of these deficiencies. *See id.* at 9-10. The only admitted challenge alleged that "AmerGen's plan to take [UT] measurements in the sand bed region every four years was not sufficiently frequent to ensure an adequate safety margin is maintained between measurements due to the uncertain condition of the drywell shell, the uncertain corrosive environment, and the uncertain corrosion rate." LBP-07-17 (R-437) at 1.

Thereafter, the Petitioners attempted twice more to raise new challenges to the drywell program. The Board rejected two new contentions filed in December 2006 as untimely and insufficiently supported as a factual matter, and rejected a new contention filed in February 2007 as untimely. *See* CLI-09-07 at 10-12.

4. *The Board Hearing and Ruling.* Following the parties' submission of prefiled written testimony, the Board held its oral evidentiary hearing on September 24 and 25, 2007. LBP-07-17 (R-437) at 2. Following the hearing, the Board found that the Petitioners' contention lacked merit, and that:

> AmerGen has demonstrated that the frequency of its planned UT measurements, in combination with the other elements of its aging management program, provides reasonable assurance that the sand bed region of the drywell shell will maintain the necessary safety margin during the period of extended operation.

Id. The Initial Decision rested, in large part, on the Board's repeated findings that the testimony of multiple AmerGen and NRC Staff witnesses was more credible than the testimony of the Petitioners' single expert witness. *See id.* at 22 n.22 (finding that Petitioners' pre-filed rebuttal testimony (Ex. C, A.6 (R-405)) misunderstood AmerGen Ex. 39 (R-352)); *see also id.* at 27 n.30, 28-31 & n.33, 32 n.35, 33 n.36, 34 & 38-46.

LBP-07-17 also rested upon multiple, independent technical bases. First, "AmerGen has taken effective steps to eliminate a corrosive environment [*i.e.*, water] on the outer [drywell] wall." LBP-07-17 (R-437) at 16 & 28-29 (*citing*

generally to the written and oral testimony of AmerGen and Staff witnesses regarding "Sources of Water" and "The Epoxy Coating"). Second, "even if water were to leak onto that wall, the robust, triple-layered epoxy coating will protect the wall from corrosion." *Id* at 16 & 37-47 (*citing* AmerGen Ex. B, pt. 5 (R-338); AmerGen Ex. C, pt. 5 (R-337)). Third, "there is no evidence of measurable past corrosion on the inner wall, nor does its benign environment pose a significant risk of future corrosion." *Id.* at 16-17 & 47-49 (*citing* AmerGen Ex. C, pt. 6, A.9-12 (R-337)). Fourth, "even assuming, arguendo that corrosion were to occur in the sand bed region during the renewal period, AmerGen's plan to take UT measurements every four years is sufficiently frequent to ensure an adequate safety margin will be maintained." *Id.* at 17 & 49-53 (*citing* AmerGen Ex. C, pt. 6, A-14 to -15 (R-337)). Fifth, the available margin:

> is based on UT measurements at the *top* of the sand bed region, which is the most heavily corroded area due to the presence of sand that retained the moisture and kept it in direct contact with the shell at the air/water interface. Because the sand had been removed . . . any future leakage will not be retained at the top of the region; rather, any leakage will drain to the bottom of the region where much less corrosion has occurred and where the available margin is . . . 300 percent greater . . ., thus increasing our confidence that the frequency of AmerGen's UT measurements will be adequate.

Id. at 17.[4] The decision also included an "Additional Statement" from one of the three Board members. Judge Baratta did not dissent from the majority's decision, but would have imposed additional, more detailed requirements on the 3-D structural analysis AmerGen had committed to perform, including sensitivity analyses designed to establish a "conservative best estimate" structural analysis of the drywell shell. *See id.*, Additional Statement at 6; *see also* CLI-09-07 at 65-66 n.273.

5. *Petitioners' Appeal to the Commission.* Petitioners appealed the Initial Decision to the Commission. CLI-09-07 at 2. Like their brief in this Court, their administrative appeal raised a multitude of issues, including alleged factual and legal errors in the Board's Initial Decision following the evidentiary hearing, challenges to the Board's decisions on the admissibility of late-filed contentions, and various alleged procedural errors. *See id.* at 33.

6. *Motion to Reopen the Drywell Issue.* While their appeal was pending, on February 2, 2009, Petitioners sought to postpone the Commission's final license renewal decision by moving to reopen the record of the drywell contention. *See id.* at 70. This motion alleged that information in a Staff Inspection Report (R-606), issued following the drywell inspections conducted

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[4] Therefore, the Board did *not* estimate that "if the shell experiences another 0.064 inches of general corrosion, it would fail one of the safety requirements." PB at 7.

during the 2008 refueling outage, contained information that purportedly invalidated the Board's decision in LBP-07-17. *Id.* at 70-71. Petitioners focused on alleged deficiencies in moisture monitoring and the discovery, during visual inspections of the sand bed region in accordance with commitments in the license renewal application, of a single blistered area on the exterior drywell shell approximately 1 to 2 square inches in area and 0.003 inches deep at one location in the sand bed region. *Id.* at 80. As the Commission subsequently found, however, Petitioners presented no evidence that the corrosion rate was other than what was assumed by the Board, and failed to call into question the conclusion that the blistered area was not safety significant. *Id.*

7. *The Commission's Final Ruling.* Having previously ruled on the metal fatigue issue and the "supervision" petitions (discussed below), the Commission's final ruling in CLI-09-07 focused on Petitioners' appeals on drywell-related issues. The Commission upheld all of the various challenged Board decisions on contention admissibility, both as to timeliness of the Petitioners' "new" contentions, CLI-09-07 at 48-53, and their lack of factual support. *Id.* at 54-56. The Commission rejected the Petitioners' attempts to challenge the Board's factual determinations after the hearing, instead finding them to be "supported by and consistent with the record." *Id.* at 36-37. In particular, the Commission found, *inter alia*, that the current licensing basis safety factor (of 2.0) will be met (as

established by actual measurements and testimony before the Board), *id.* at 37; *see also* LBP-07-17 (R-437) at 19 n.20 (*citing* AmerGen Ex. B, pt. 2, A.10 (R-338); AmerGen Ex. C, pt. 2, A.6 (R-337); NRC Staff Ex. 6 at 72 (R-295); Tr. at 399, 438-41 & 453-55 (Mehta, Hartzman) (Sept. 24, 2007) (R-258)); that the sand bed region of the drywell shell complies with the local area acceptance criteria (notwithstanding Petitioner's erroneous arguments that data points *selected because they were the most corroded* should be averaged for purposes of determining overall shell thickness), *see* CLI-09-07 at 39-40; LBP-07-17 (R-437) at 19 n.20 (*citing* AmerGen Ex. B, pt. 3, A.22, A.23 & A.30 (R-338); Tr. at 603-605 (Tamburro, Polaski) (R-258)); that the drywell shell satisfies the general area acceptance criterion with margin (as confirmed, appropriately, by internal grid data), CLI-09-07 at 41-42 (*citing*, *e.g.*, LBP-07-17, 66 N.R.C. at 345-46 (slip op. at 23); Tr. at 324, 344-451 & 601 (Tamburro, Hausler, Gallagher) (R-258); AmerGen Ex. B, pt. 3, A.5, A.9-13, A.29, A.15, A.31 & A.38 (R-338); NRC Staff Ex. 1, at 3-120 (R-318)); that the epoxy coating on the shell exterior will serve its purpose; that modeling of local areas of corrosion was appropriate; and that future leakage and the adequacy of leakage prevention was properly addressed. CLI-09-07 at 44-46; *see also*, *e.g.*, Tr. at 744-45 (Sept. 25, 2007) (R-256); Tr. at 446 (R-258).

The Commission took partial review of LBP-07-17 for two limited purposes. First, the Commission clarified that Exelon's commitment regarding the 3-D

structural analysis "is consistent with achieving Judge Baratta's objective: enhancing the NRC's understanding of the drywell shell state by performing a conservative best estimate analysis of the actual drywell shell." CLI-09-07 at 65 (citations and quotations omitted). Second, the Commission directed the Staff to "conduct a thorough examination" of the structural analysis results. *Id.* at 68. In taking review for these purposes, however, the Commission also emphasized that its reasonable assurance finding in support of license renewal did not rest on the submission and review of the new structural analysis:

> [A] complete review of Exelon's compliance with the license condition is *not* a precondition for granting the license renewal application and is *separate and apart* from the resolution of the contention at issue in Citizens' Petition – review and enforcement of license conditions is a normal part of the Staff's oversight function rather than an adjudicatory matter.

Id. at 67-68 (emphasis in original); *see also id.* at 65 n.271 ("Let us be clear: the Board's fundamental conclusion in LBP-07-17, authorizing issuance of the renewed license, stands on its own.").

As to the final motion to reopen, the Commission found that the Petitioners had "mischaracterize[d] the observations and the conclusions of the Inspection Report" regarding the blistered area discovered during the outage. *Id.* at 74. Aside from the Inspection Report, Petitioners' additional expert declaration was insufficient to raise a significant safety issue or show that a materially different

result was likely, and the Commission therefore denied the motion. *See id.* at 75-81. In reaching this decision, the Commission emphasized the multiple, alternative grounds supporting LBP-07-17. *See id.* at 81-84. In particular, even if corrosion were to occur in the sand bed region, the plan to take UT measurements every four years provides reasonable assurance that the minimum thickness acceptance criteria would not be violated. *See id.* at 82. Indeed, the Inspection Report confirmed that the Board's findings on this point were quite conservative, thereby actually reinforcing the Commission's confidence that there was no significant safety issue. *See id.* The Commission also cited Exelon's robust set of inspection commitments—which worked as intended in identifying the tiny blistered area during the 2008 inspection—as providing "another reason for our confidence" in the aging management program. *Id.* at 83-84.[5]

C. *The Metal Fatigue Contention.* In the spring of 2008, while their appeal of the drywell Initial Decision remained pending, the Petitioners filed, among other things, a motion to reopen the record and a new contention, and a "supplemental" motion to reopen and new contention. *See* CLI-08-28 at 2-5. These filings addressed not the drywell, but a completely different technical issue

[5] Then-Commissioner (now Chairman) Jaczko dissented in part, namely with respect to the Inspection Report and motion to reopen. He concurred with the balance of the order regarding the drywell contentions, but would have made a "relatively minor modification" to an Exelon commitment, to require the next sand bed region inspection in 2010, rather than 2012. CLI-09-07, Comm'r Jaczko, Dissenting in Part at 1.

and plant system. In April 2008, the NRC published a draft "issue summary" informing licensees that a mathematical analysis (referred to as a "simplified Green's function") used to evaluate the effects of metal fatigue "could" be non-conservative "if not correctly applied." *See id.* at 3. For recirculation outlet nozzles in the Oyster Creek reactor coolant system, AmerGen—in addition to committing to an aging management program as allowed by the regulations, *see id.* at 7 n.24—had used the simplified Green's function methodology in a fatigue evaluation. *Id.* at 9. Petitioners moved to reopen the evidentiary record to litigate a new contention that sought to have AmerGen perform a confirmatory fatigue analysis, without the use of the simplified Green's function, for the recirculation outlet nozzles. *See id.* at 3-4.

The NRC Staff, however, had already requested that AmerGen perform such a confirmatory analysis, which AmerGen performed and the Staff reviewed. *See id.* at 11. AmerGen submitted a detailed summary of its confirmatory analysis to the NRC, showing that the results of the original analysis were, in fact, conservative and remained acceptable, *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP-08-12, slip op. at 6 (July 24, 2008) (R-517) ("LBP-08-12") (*citing* AmerGen's Response to NRC Request for Additional Information (R-484)), and the Staff concurred. R-534 at 4-

5. Petitioners purported to challenge this confirmatory analysis in their "supplemental" motion to reopen the record. CLI-08-28 at 4-5

The Board ultimately ruled that neither the motion to reopen, nor its supplement, were sufficient to warrant reopening the record under 10 C.F.R. § 2.326, because Petitioners did not raise a significant safety issue or demonstrate that a materially different result was likely. *See* LBP-08-12 at 11-27. Petitioners' supporting declarations purporting to challenge the fatigue analyses were entirely speculative, and fell short of showing that AmerGen's analyses were non-conservative or flawed in any way. *Id.* at 12-13. The Board also found the first motion to reopen moot, because AmerGen had, in fact, performed the confirmatory analysis. *See id.* at 15-18. On appeal, the Commission upheld all aspects of the Board's decision. *See generally* CLI-08-28.[6] The Commission rejected Petitioners' arguments that AmerGen's confirmatory analyses should have included the "cladding" on the recirculation nozzles, in light of the fact that the applicable engineering codes "expressly allowed" the omission of cladding in such calculations. *Id.* at 18 n.51. The Commission also rejected Petitioners' request for "pre-contention" discovery as being inconsistent with long-standing rules and precedent that preclude such fishing expeditions. *Id.* at 25.

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[6] Contrary to Petitioners' assertion, PB at 40, the Commission affirmed the mootness finding by the Board. *See* CLI-08-28 at 25 n.72.

D. *The Supervision Petitions.* In parallel with their appeal of the Board's decision regarding the drywell contention in LBP-07-17, Petitioners submitted a separate petition to the Commission on January 3, 2008, followed by a related "supplemental" petition on May 15, 2008, seeking to "suspend" the Oyster Creek license renewal proceeding. R-452.[7] These "Supervision Petitions"—as Petitioners style them—relied upon an NRC Office of the Inspector General ("OIG") Report (R-588) and subsequent memorandum, which recommended certain improvements to the NRC Staff's license renewal review process. *See* CLI-08-23 at 7-9. Although the OIG found that the Staff had developed a comprehensive license renewal review process, it made a number of specific recommendations for improvement, including improvements in documenting and reporting the results of its reviews, and in the evaluation of licensee operating experience. *See id.* at 8-9. Petitioners alleged that these deficiencies were so severe that the Commission should suspend the review of all license renewal applications (including Oyster Creek's) until it has conducted a "comprehensive overhaul" of the entire license renewal review process. *Id.* at 2.

The Commission denied the petitions because neither the OIG's documents nor the Commission's review showed that the Staff's license renewal reviews were

[7] Other organizations submitted identical petitions in other NRC license renewal proceedings. CLI-08-23 at 1-2. The Commission's decision applies to all of these other petitioners and proceedings, but only Petitioners have appealed CLI-08-23 to this Court, and only with respect to Oyster Creek.

inadequate or that the license renewal review process required comprehensive revision, *id.* at 3, much less an did they show the need for the extraordinary action of suspending licensing proceedings or reopening a closed evidentiary record, as the petitions requested for Oyster Creek. *See id.* at 28-31. In addition, the Commission found that seeking to litigate the adequacy of the Staff's review fell outside the scope of NRC adjudicatory proceedings. *Id.* at 18. Such proceedings are intended to provide interested persons with the right to challenge the adequacy of an application for an NRC license, not the general adequacy of the Staff's safety reviews. *Id.*

STANDARD OF REVIEW

This Court may review agency decisions that result in a "final agency action." Such decisions must be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). A reviewing court must consider whether "the agency examined the relevant data and articulated a satisfactory explanation for its action," or whether "the agency has made a clear error in judgment." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 389-90 (3d Cir. 2004). This court will "usually afford deference to decisions of administrative agencies when we are reviewing the

agency's interpretation of a statute the agency is charged with administering." *New Jersey Dept. of Envtl. Protection v. NRC*, 561 F.3d 132, 137 n.4 (3d Cir. 2009). This is particularly true for decisions of the NRC under the AEA, where a "narrow standard is particularly appropriate" because the NRC is "virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Three Mile Island Alert, Inc. v. NRC*, 771 F.2d 720, 727-28 (3d Cir. 1985) ("*TMIA*").

In addition, an agency is presumptively owed deference in the interpretation of its own regulations, unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation." *Beazer East, Inc. v. EPA*, 963 F.2d 603, 606 (3d Cir. 1992) (citations omitted). Petitioners' appeal involves at least three challenges to Commission decisions, under its regulations, to deny their requests to reopen a closed adjudicatory record, and on these questions "a narrow standard is particularly appropriate." *TMIA*, 771 F.2d at 728. For similar reasons, a Commission contention admissibility decision, including a question of timeliness, "is a matter for the NRC to determine in the first instance and is reviewed deferentially." *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) ("*UCS II*").

Where, as here, the issues turn upon scientific, technical, and predictive judgments by the agency, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *Limerick Ecology Action v. NRC,* 869 F.2d 719, 744 (3d Cir. 1989), *reh'g denied* (Apr. 25, 1989). Therefore, in reviewing the Commission's factual determinations, the role of a reviewing court "is not to weigh the evidence, but to determine whether substantial evidence supports the Commission's decision." *Limerick*, 869 F.2d at 753.

SUMMARY OF ARGUMENT

From Petitioners' brief, it is hard to know what, exactly, is being challenged in this appeal. Petitioners allude to disagreements with "a number of decisions by the NRC," allege denial of purported hearing rights on a "number of issues," contend that the NRC "left many issues for post-hearing resolution" (but then admit that they "do not now contest the legality of the Commission's chosen approach"), and aver that deferral to agency regulatory processes "in many areas" was inappropriate because the NRC "knew" that the regulatory processes were inadequate. PB at 25 & 54. At times, Petitioners seem to be complaining not about any action below, but, rather, about the very nature of the long-standing regulations applicable to the renewal of nuclear power plant operating licenses. *E.g.*, PB at 22. Petitioners rely upon those few dissents that favor them, largely

ignore majority findings of the agency and the compelling evidence and reasoning that does not, and contend that routine application of well-settled timeliness rules deprived them of purportedly "absolute" and unlimited statutory hearing rights. Repeatedly, Petitioners seek, without justification, to have this Court substitute its judgment for the technical and predictive judgments of the Commission, its Board, and its technical Staff.

What is clear from the massive record in this case is that Oyster Creek can be safely operated for twenty more years. With respect to the drywell, the facts are that the current licensing basis safety factor (of 2.0) will be met (as established by actual measurements and testimony before the Board); that effective steps were taken to eliminate a corrosive environment on the drywell wall; that a robust, triple-layered epoxy coating on the shell exterior will serve its purpose; that that the sand bed region of the drywell shell complies with the local area acceptance criteria (notwithstanding Petitioners' erroneous arguments that data points selected *because they were the most corroded* should be averaged for purposes of determining overall shell thickness); that the drywell shell satisfies the general area acceptance criterion with margin (as confirmed, appropriately, by internal grid data); that modeling of local areas of corrosion was appropriate; that future leakage and the adequacy of leakage prevention was properly addressed; and that all of the other myriad of factors addressed in the thousands and thousands of

pages of the factual record in this case were properly, thoroughly, and correctly considered. These facts remain true, notwithstanding the never-ending and repetitive protestations of Petitioners. The Commission correctly found and accounted for these facts in issuing the renewed license.

With respect to metal fatigue and the recirculation outlet nozzles in the reactor coolant system, Exelon committed to an aging management program as contemplated by the regulations and, moreover, used a fatigue analysis method with which there was no inherent problem, and performed a subsequent confirmatory analysis that established the fatigue analyses were sound and that the earlier analysis was permissibly conservative. Petitioners' submissions did not demonstrate a safety issue warranting further inquiry—indeed, the bare assertions and speculation in the proffered affidavits did not even make a "mere showing" of a "possible violation," which Petitioners erroneously argued was the applicable legal threshold.

As described further below, the Commission: (1) did not err by denying late-filed dry-well related contentions, declining to reopen the record after a thorough hearing on the admitted drywell contention, or by impermissibly qualifying or deferring any drywell related safety findings; (2) did not err by declining to reopen the record with respect to Petitioners' metal fatigue contentions; and (3) did not err by declining to suspend the Oyster Creek license renewal proceedings upon the

basis of speculative assertions regarding the general alleged insufficiency of agency oversight of staff reviews. Petitioners' claims must be denied under the applicable standards, and the NRC determinations affirmed.

ARGUMENT

I. THE COMMISSION'S DRYWELL DECISIONS WERE FULLY SUPPORTED AND WERE NOT ARBITRARY, CAPRICIOUS, OR OTHERWISE ERRONEOUS

Much of Petitioners' brief is devoted to repeating, in scattershot fashion, their disagreements with the Commission's disposition of the virtual blizzard of filings, motions, and submissions lodged by Petitioners regarding the drywell. While it is unclear which of the purported "many procedural errors" are actually alleged by Petitioners to require remand, the complaints appear to fall into three categories. First, at pages 28-33, Petitioners' complain about timeliness rulings, but: (a) present no grounds for finding such rulings to be in error, arguing only—incorrectly—that they could not have brought the challenges in a timely manner; and (b) for the most part ignore alternative, well-supported factual grounds for rejection of their arguments. Second, at pages 33-38, Petitioners dispute the Commissions' rejection of still more late-filed drywell contentions, filed in response to voluntary monitoring program enhancements undertaken by Exelon after a 2006 refueling outage at Oyster Creek, when Petitioners had failed to challenge the original, un-enhanced programs in a timely manner, and where they, again, ignore alternative and independently sufficient grounds for rejection of their claims. Third, at pages 53-59, Petitioners argue that the Commission improperly qualified or conditioned its safety findings regarding the drywell, in light of an

Inspection Report generated during a 2008 refueling outage (which Petitioners acknowledge was subject to "extensive discussion" by the Commission, PB at 57), and in light of the Commission's exercise of its well-established authority to direct the Staff with regard to its ongoing regulatory oversight functions, outside of the licensing process. Indeed, the Commission was quite clear in stating that it was not making any conditional or qualified findings, and no basis exists to find the contrary.

A. *The NRC's Rulings on Petitioners' Untimely Contentions Were Correct, Routine, And In Any Event Generally Were Supported By Alternative And Well-Founded Grounds.*

1. *Contention standards.* Section 189(a) of the AEA "does not confer the automatic right of intervention upon anyone." *UCS II*, 920 F.2d at 55 (quoting *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974)); *see also Limerick,* 869 F.2d at 724-25 ("a hearing must be held on material issues that are specifically and timely raised upon the request of an interested person") (emphasis supplied). Consistent with its statutory authority under the AEA, the Commission has established contention admissibility criteria, including both substantive and timeliness standards. The Commission strengthened its pleading standards in 1989 because, prior to the changes, "licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation." *Dominion*

Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 N.R.C. 349, 358 (2001) (citations and quotations omitted); *see also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170-72 (Aug. 11, 1989). The existing standards are well within the discretion of the Commission to issue, and "even the combined effect of the new contentions rule [promulgated in 1989] and the late-filing rule does not violate the Atomic Energy Act [or] the APA." *UCS II*, 920 F.2d at 53 n.2. The Commissions' decisions in applying these standards are generally entitled to deference. *See id.* at 55; *see also Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1448 (D.C. Cir. 1984) ("*UCS I*") ("section 189(a)'s hearing requirement does not unduly limit the Commission's wide discretion to structure its licensing hearings in the interests of speed and efficiency").

2. *Petitioners' contentions.* At page 28 of their brief, Petitioners begin their Argument by complaining about the Board's decision, in *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-22, slip. op (Oct. 10, 2006) (R-99) ("LBP-06-22"), to admit only one of seven discrete aspects of their July 23, 2006 contention. Petitioners recite vague and sweeping accusations that the Board's "internally inconsistent" decision was "arbitrary on its face," that it violated Petitioners' right to a hearing under the AEA, and that the Board's decision suffers from a purported logical flaw dubbed by Petitioners the "White

Queen Fallacy." PB at 29-31. (Petitioner's so-called "White Queen Fallacy," of course, rests upon the uniformly faulty assumption that the untimely challenges could not have been brought in a timely manner—acceptance of Petitioners' arguments would necessarily eviscerate all timeliness rules.) Petitioners conclude that "all of these issues raised in the new contention regarding the new monitoring regime were timely." *Id.* at 30.

Ultimately, however, Petitioners only present arguments regarding two aspects of their claims: (1) denial of their challenge to the spatial scope of the UT monitoring regime, *see id.* at 31-32; and (2) denial of their challenges to the adequacy of the minimum shell thickness acceptance criteria. *See id.* at 32.

3. *"Spatial Scope."* The Board properly rejected Petitioners' challenge to the spatial scope of UT monitoring as untimely, because such a challenge should have been raised in response to AmerGen's December 9, 2005 commitment to take UT measurements as a condition of license renewal, rather than many months later.

As the Board explained, Petitioners' challenge to the spatial scope of the UT measurements was late because it was not filed promptly after AmerGen docketed its *license renewal* commitment to perform a set of confirmatory UT measurements, which would be taken at the same locations tested in the 1990s. *See* LBP-06-22 at 3-4 & 28-29. At that point, Petitioners had all of the information they needed to lodge a spatial scope contention, but failed to do so. Petitioners'

pleadings before the Board argued, incorrectly, that the December 2005 commitment "did not specify . . . where the measurements would be carried out," *id.* at 30, but the Board correctly found that Petitioners had been aware, prior to their Initial Petition back in November 2005, of the locations of the UT measurements. *Id.* at 29. The Commission affirmed the Board's decision that this aspect of the contention was untimely when proffered in June 2006, *see* CLI-09-07 at 50, and the agency's action was not erroneous, much less arbitrary and capricious.

4. *"Acceptance criteria."* The Board correctly ruled that Petitioners' challenges to the shell thickness acceptance criteria, first raised in June 2006, were untimely because those acceptance criteria had been in effect for years, had been used to evaluate the 1992, 1994, and 1996 UT results, and could have been raised at the time of the Initial Petition. *See* LBP-06-22 at 12; CLI-09-07 at 49. Petitioners were well aware of the acceptance criteria and how they were derived at the time of their Initial Petition in November 2005. LBP-06-22 at 12-13 (*citing* Initial Petition, Exs. 3 & 4 (R-2)). The Initial Petition, however, raised no dispute over the adequacy of the acceptance criteria. *See id.* at 12. Petitioners have not shown how the timeliness decisions regarding the acceptance criteria could have been arbitrary or capricious, particularly given the deference afforded the NRC in both the interpretation of its own rules, and its technical judgment on matters of

nuclear safety, both of which are implicated in these decisions. *See, e.g., Beazer East*, 963 F.2d at 606; *UCS II*, 920 F.2d at 54-55.

Moreover, Petitioners incorrectly assert that "neither the Commission nor the Board" found any other fault with the elements of the new contentions regarding acceptance criteria "apart from timeliness." PB at 33. On the contrary, the Commission found that the acceptance criteria were part of the plant's current licensing basis, and therefore not subject to challenge in the license renewal litigation. CLI-09-07 at 49 n.209 ("even if it had been timely, a challenge to the adequacy of the acceptance criteria (or any other component of the current licensing basis) is not within the scope of the license renewal proceeding"). Petitioners fail to recognize or dispute this independent, alternative rationale, and for that additional reason their appeal on this point must fail.

B. *The Commission Properly Rejected As Untimely and Lacking In Technical Merit The Proposed Contentions Regarding Exelon's Enhancement of Its Monitoring Program Arising From the 2006 Outage.*

During a 2006 refueling outage at Oyster Creek, AmerGen conducted extensive inspections of the drywell shell in the sand bed region, including UT measurements and visual inspections, and undertook certain enhancements to its existing moisture and corrosion monitoring programs. *See* Licensing Board Memorandum and Order (Feb. 2, 2009) at 2 (R-125). On December 20, 2006,

Petitioners submitted two contentions, allegedly based on new and materially different information, which the Board denied on February 9, 2007. The first challenged AmerGen's UT monitoring for the "embedded" region of the drywell (*i.e.*, the region of the shell below the sand bed region that is encased in concrete on both sides, *id.* at 11 n.11), and the second claimed that the UT program was insufficient to monitor potential corrosion on the interior of the drywell, as opposed to the known historical corrosion on the exterior. *See id.* at 5.

In applying the timeliness rules,[8] the Board and Commission reasoned that if Petitioners had chosen not to challenge the original, un-enhanced monitoring and testing programs as inadequate, then they could not later challenge those same programs merely upon the grounds that the programs had been enhanced:

> [A]s a matter of law and logic, if – as Citizens allege – AmerGen's *enhanced* [Protective Coating Monitoring and Maintenance Program ("PCMMP")] is inadequate, then AmerGen's *unenhanced* monitoring program was *a fortiori* inadequate, and Citizens had a regulatory obligation to challenge it in their original Petition to Intervene.

CLI-09-07 at 52 (*quoting* LBP-06-22, 64 N.R.C. at 246 (slip op. at 22-23)). Thus, without more, an enhancement to an existing program is not "new information" which is "materially different" than information previously available that would

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[8] Those timeliness rules have been upheld in the courts, and the Commission's decisions regarding such rules are "reviewed deferentially." *See UCS II*, 920 F.2d at 55.

permit the filing of a late-filed contention under 10 C.F.R. § 2.309(f)(2). The Board and Commission also noted the "sensible" and self-apparent proposition that "all things being equal, we ought not to establish disincentives to improvements." CLI-09-07 at 52.

Petitioners argue that this straightforward application of well-settled timeliness rules was a "novel and arbitrary policy" that was "newly minted" by the Board and then "endorsed" by the Commission. PB at 34. It was not—the Commission's timeliness rules have been on the books for decades, and nothing about their eminently sensible application here presented any new "policy" or departure from prior practices or precedent. Cases cited by Petitioners that counsel against such departures are inapplicable,[9] and no grounds exist for finding the agency actions erroneous, much less arbitrary and capricious under the applicable deferential review standards.

Alternatively, Petitioners suggest that the Court should overturn the Commission's interpretation of its own contention admissibility rules based on "policy considerations." *Id.* In Petitioners' view, the timeliness rules should be judicially modified (or stricken) by this Court to ensure that applicants do not propose safety enhancements during the course of the licensing review. Quite

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[9] PB at 34-35 (*citing Beazer East, Inc.*, 963 F.2d at 603; *Northwest Indiana Public Serv. Co. v. Porter County Chapter of the Izaak Walton League of America, Inc.*, 423 U.S. 12, 14-15 (1975)).

aside from the incongruity of asking this Court to substitute its judgment for that of the Commission in matters of nuclear safety "policy," Petitioners have it completely backwards. The Commission explained the sensible policy underlying its decision, which was that "conferring an automatic right to file a new contention whenever an applicant improves an existing program might have 'the perverse effect of discouraging applicants from enhancing safety, health, and environmental programs on a voluntary basis.'" CLI-09-07 at 51-52 (*quoting* LBP-06-22, 64 N.R.C. at 246 (slip op. at 23)). Such judgments by the Commission are entitled to extraordinary deference, *see TMIA*, 771 F.2d at 727-78, and "policy considerations" provide no support for Petitioners here.

Aside from timeliness,[10] Petitioners argue that the Board improperly "adjudicat[ed]" their embedded region and interior corrosion contentions when Board found that neither raised a genuine dispute. *See* PB at 36. Instead of applying the Commission's regulations, Petitioners claim—without support or citation—that the Board should have applied a "motion to dismiss standard and construed the facts in favor of Petitioners." *Id.* at 36-37. The Commission's

[10] Petitioners also assert that their purported "White Queen Fallacy" applies to the Board's decisions on these contentions. *See* PB at 36 & n.28 (*citing* CLI-09-07 at 56). But this argument mischaracterizes the agency's decisions. As explained below, *in addition to being late*, Petitioners' claim about the possibility of corrosion of the drywell shell interior was speculation, and therefore was *substantively* inadmissible under 10 C.F.R. § 2.309(f)(1). The contention, therefore, was never "too early." It simply lacked sufficient support.

contention admissibility rules, however, are not mere "notice pleading." Those rules instead require support through alleged facts or expert opinion, 10 C.F.R. § 2.309(f)(1)(v), and require a genuine dispute on a material issue of law or fact to be shown. *Id.* § 2.309(f)(1)(vi); *see also* 54 Fed. Reg. at 33,170-72. The rules have now been in place for some twenty years, have been upheld against challenges in the federal courts, and have consistently been held to be "valid on their face." *See UCS II*, 920 F.2d at 57.[11]

With regard to the contention regarding monitoring of the embedded region of the drywell, the Board correctly held that the contention was not sufficiently supported with alleged facts or expert opinion to establish a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi). *See* R-125 at 10. Among other things, the Board found that Petitioners failed to support their claim that the drywell bays chosen by AmerGen for monitoring of the embedded region were not representative of the overall shell, failed to provide any support for the extremely high rates of corrosion that their allegations implicitly

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[11] *Sierra Club v. NRC,* 862 F.2d 222 (9th Cir. 1988), cited by Petitioners at pages 36-37 of their brief, is not to the contrary. *Sierra Club* reversed a contention admissibility ruling based on then-extant regulations, which have long since been superseded. The *Sierra Club* decision rested on the agency's failure to follow its own then-current contention admissibility regulations. Ironically, Petitioners now urge that the Board should have declined to follow its current regulations here.

assumed, and failed to provide expert opinion support for essential aspects of their contention. *See id.* at 11-14.

Similarly, with regard to the interior corrosion contention, the Board correctly found Petitioners' claims to be insufficiently supported and to therefore fail to raise a genuine dispute. Petitioners "presented no evidence of actual corrosion on the *interior* of the drywell shell at Oyster Creek, but merely assert[ed] that such corrosion is a 'possibility.'" *Id.* at 17 (*quoting* Citizens' Reply at 8 (Jan. 23, 2007) (R-120)). In addition, the contention revealed Petitioners' "serious misunderstanding of the central purpose of the UT program," which was to measure the thickness of the shell to identify potential corrosion regardless of whether it was occurring on the interior or exterior of the shell. *See id.* at 18. The Commission properly upheld these rulings on appeal. *See* CLI-09-07 at 56. [12]

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[12] Petitioners do not challenge the Board's findings that: (1) the embedded region contention was untimely because Petitioners were aware of AmerGen's commitment to conduct inspections in the embedded region trenches for approximately eight months, R-125 at 8 n.9; and (2) by demanding additional UT monitoring locations to account for potential corrosion from the drywell shell interior, the interior corrosion contention was a challenge to the spatial scope of UT; a challenge the Board had previously rejected as untimely. *See id.* at 16 n.17 (*citing* LBP-06-22, 64 N.R.C. at 249 (slip op. at 27)). Because Petitioners do not challenge these alternative grounds, even if the Court were to accept the arguments that they do proffer, the Commission's decision should still be affirmed.

C. *The Commission's Findings and Technical Judgments Regarding the Drywell Contention Hearing Were Not Erroneous, and The Commission Did Not Impermissibly Qualify, Condition, or Delegate Its Findings.* During a 2008 refueling outage at Oyster Creek, AmerGen once again conducted an extensive drywell inspection, including UT monitoring, water monitoring, and visual inspections, *see* CLI-09-07 at 26-27, and the NRC Staff issued an Inspection Report following the outage. Petitioners (of course) cited those matters as grounds for denial of the renewed license, and, more particularly, urged them as a basis for reopening the record pursuant to 10 C.F.R. § 2.326. The Commission denied that request.

At pages 53-59 of their brief, Petitioners purport to challenge "many issues contested at the hearing," arguing: (1) that the Commission improperly shifted burdens to them; and (2) that, in light of the Inspection Report following the 2008 refueling outage, the Commission improperly qualified or conditioned its safety findings regarding the drywell, and impermissibly "delegated" its responsibilities by exercising its well-established authority to direct the Staff with regard to its post-licensing regulatory function. Neither assertion has merit.

1. *Reopening burdens.* Contrary to Petitioners' claims, the Commission did not impermissibly "shift" any burden to them. Under the reopening rules, it was fully appropriate—indeed, required—for the Commission to place the burden

on Petitioners, rather than the applicant. The "proponents of a reopening motion bear the burden" of meeting all three of the criteria in 10 C.F.R. § 2.326, and must do so through affidavits and admissible evidence. CLI-09-07 at 71-72. The Commission imposes this elevated burden on the movant because otherwise, "there would be little hope of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings." CLI-08-28 at 13 n.38. After a thorough analysis and what even Petitioners admit was an "extensive discussion of the issues raised by the Inspection Report" (PB at 57), the Commission correctly held that the motion failed to raise a significant safety issue or show that a materially different result would have been likely. *See id.* CLI-09-07 at 74-77. As described further in the "metal fatigue" discussion below, *see* page 47-51, the NRC's reopening rules have been routinely applied by the Commission and upheld by courts. *E.g., TMIA*, 771 F.2d at 732.

The only "example" from the motion to reopen invoked by Petitioners in their brief involves water monitoring—Petitioners allege that the Inspection Report showed that "water can be present in the sandbed region, but not be observed in the bottles connected to the drains." PB at 58 (*citing* Inspection Report at 6-7). Petitioners, however, wholly and fatally ignore the fact—as correctly found by the Commission—that water bottle monitoring was but one of a comprehensive array of monitoring activities designed to prevent and detect the potential for a corrosive

environment in the sand bed region. *See* CLI-09-07 at 15. For this reason, after reviewing the Inspection Report and all of the evidence in connection with the motion to reopen, the Commission rejected Petitioners' allegations: "We find to the contrary that the Inspection Report demonstrates that, applied correctly, the aging management and inspection programs will detect problems with the drywell liner. Moreover, problems discovered during the implementation of these programs are routinely identified for corrective action." *Id.* at 76. The Commission recognized the multiple, independent technical bases underlying the Board's decision, and relied on the Board's conclusion that even if it applied Petitioners' "enormously conservative corrosion rate," Exelon's plan to take UT measurements at four-year intervals would still prevent the drywell shell from exceeding the acceptance criteria. *Id.* at 82. Thus, the Commission found that Exelon's programs, taken as a whole, worked as designed to assure safety. No basis exists to overturn this well-founded technical judgment.[13]

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[13] Petitioners rely heavily on Commissioner Jaczko's partial dissent in CLI-09-07, repeatedly citing to it in support of their claim that the motion to reopen should have been granted. *See* PB at 55-59. Although Commissioner Jaczko would have taken a different approach to the motion to reopen than the Commission majority, he would still—significantly—have granted the renewed license. Rather than denying the motion outright, in the interests of transparency he "would have preferred that the Commission, on its own motion, admit the Inspection Report into evidence, rendering moot the motion to reopen." CLI-09-07, Comm'r Jaczko, Dissenting in Part, at 1. Because Commissioner Jaczko would not have reopened the record for further hearings,

2. *Alleged "qualification" of findings.* Contrary to Petitioners' mischaracterizations, the Commission did not impermissibly "qualify" or "condition" its safety findings in CLI-09-07.

The single phrase upon which Petitioners seize was not a qualification of the Commission's safety findings, but, rather, a qualification of the denial of Petitioners' request for review of LBP-07-17. Petitioners quote part of one sentence: "Subject to the considerations we discuss below . . . [in Section D, infra], we agree with the Board's finding that the ultrasonic testing program provides reasonable assurance that the drywell liner will not violate that acceptance criteria during the period of extended operations." *See* PB at 53 (*quoting* CLI-09-07 at 35-36). Section D, in turn, explains why, although the Commission upheld LBP-07-17 and therefore denied the relief sought by Petitioners, CLI-09-07 at 4, the Commission took "partial review" of the decision for "two very limited purposes: clarification and direction to the NRC Staff." *Id.* at 65. First, it clarified that Exelon's commitment to perform a 3-D structural analysis of the drywell was consistent with Judge Baratta's objective in his Additional Statement in LBP-07-17, *id.* at 65, and, second, the Commission exercised its inherent supervisory authority over the Staff by directing it to enhance its review of the structural

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even if this Court were to reject the majority decision and agree with the partial dissent, no remand is warranted.

analysis. *Id.* at 67. Therefore, the language that Petitioners rely on was not a qualification on the Commission's findings, but, instead, a qualification on the denial of the petition for review. This is confirmed by any fair reading of the Commission decision itself. *E.g., id.* at 65 n.271 ("Let us be clear: the Board's fundamental conclusion in LBP-07-17, authorizing issuance of the renewed license, stands on its own.").

The structural analysis, which would be undertaken prior to the period of extended operation, was part of a series of commitments that Exelon made as part of its aging management program. *See* LBP-07-17 (R-437) at 52 n.55. Actual completion and review of the analysis was never a prerequisite for issuance of the renewed license, and the commitment was never the subject of a contention by Petitioners.[14] Instead, Petitioners submitted their criticisms to the Commission via letter, outside of the adjudicatory process. *See* CLI-09-07 at 67 n.277. The safety of the drywell and the existence of sufficient margin were not in question because the Commission's licensing decision rested on abundant alternative technical bases. *See* CLI-09-07 at 65 n.271 & 67-68.

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[14] Petitioners argue that the *UCS I* case requires Commission hearings to "encompass all issues material to licensing." PB at 48 (*citing* 735 F.2d at 1438-50). The drywell structural analysis, however, was correctly held not to be material to the licensing decision here, and *UCS I* therefore fails to support Petitioners. *Compare* 735 F.2d at 1441 *with* CLI-09-07 at 67-68.

It is of course well-settled and "established NRC practice" that the Commission "may make predictive findings . . . that are subject to post-hearing verification." *See Massachusetts v. NRC*, 924 F.2d 311, 331 (D.C. Cir. 1991). The Commission's decision to base its safety findings on the Board's conclusions in LBP-07-17, and to direct the Staff in the routine post-licensing regulatory function of reviewing the structural analysis, fall comfortably within the bounds of agency practice, discretion, and the law.

Finally—and perhaps most simply and significantly—regarding Petitioners' purported "conditional" findings and "impermissible delegation": Petitioners admit that they "do not now contest the legality of the Commission's chosen approach to resolving the structural analysis issue," because the Staff's review "did not reveal any major new issues with regard to the structural integrity of the containment system." PB at 54. So (one has to ask), what is the point? Petitioners appear to concede that even if the Court were to find some error in the Commission's decision regarding the structural analysis, a remand would serve no purpose because any potential or argued safety issues have been resolved. Exelon agrees. *See San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1316-17 (D.C. Cir. 1984) ("*Deukmejian*") (where issues raised in an improperly rejected motion to reopen would not have changed the licensing decision, a remand "would serve no meaningful purpose").

In sum, the NRC thoroughly and comprehensively assessed Petitioners' drywell claims. Despite an indiscriminant barrage of repetitive, duplicative, and often misleading submissions, Petitioners were given every benefit of every doubt, and the NRC bent over backwards to afford full opportunities for review and hearing, consistent with 10 C.F.R. Part 2. No basis for reversal exists.

II. THE COMMISSION'S REJECTIONS OF PETITIONERS' CLAIMS REGARDING METAL FATIGUE WERE NOT ARBITRARY AND CAPRICIOUS.

At pages 39-47 of their brief, Petitioners argue that the Commission erred with respect to their post-hearing "metal fatigue" claims. In particular, Petitioners claim: (a) that the Commission should not have applied the standards for reopening the record; (b) or, alternatively, that such standards were, in fact, satisfied; and (c) that Petitioners should—under the guise of a "cardinal rule of fairness," and despite well-settled regulations and standards to the contrary—have been afforded the opportunity to take discovery prior to the submission of a valid contention or a sufficient motion to reopen the record. None of these assertions have merit.

A. *The Commission Properly Applied Its Rules Regarding Reopening of the Record to Petitioners' Metal Fatigue Claims.* Petitioners claim that the Commission failed to follow alleged holdings of the D.C. Circuit when the Commission applied its rules regarding motions to reopen the record to Petitioners' post-hearing metal fatigue claims. Petitioners primarily rely upon *Deukmejian*,

751 F.2d at 1316-17, which they contend stands for the proposition that "the stringency of the reopening standards mean they cannot be applied to new material contentions that deal with unlitigated issues." PB at 41. *Deukmejian* does not so hold, the other cases cited by Petitioners are inapposite, and Petitioners have not shown that the Commission's routine application of its well-established reopening rules in these circumstances was arbitrary and capricious.

Deukmejian involved multiple challenges to the Commission's issuance of low-power and full-power licenses to operate the Diablo Canyon nuclear plant. *See* 751 F.2d at 1293, 1311-12. A key and distinguishing fact there was that there were two, separate licensing proceedings—one new one involving a request for a low-power license extension, and a second, already-closed proceeding regarding a full-power license. *Id.* at 1311-12. The petitioners there sought to raise issues regarding alleged deficiencies in quality assurance for design and construction of the plant in the new low-power license extension proceeding, and also sought to reopen the record in the already-closed full-power proceeding upon such grounds. The Commission held that the contentions in the new low-power extension proceedings should be considered in conjunction with, and under standards applicable to, the motion to reopen the closed full-power license proceeding. It was in that context—where, unlike here, a petitioner had a timely contention in one

licensing proceeding that was impermissibly treated as a motion to reopen a second, already-closed proceeding—that the D.C. Circuit found error. *Id.* at 1316.

Deukmejian did not hold, as Petitioners here essentially argue, that the NRC could not promulgate and apply appropriate rules for the reopening of closed proceedings upon assertions of new, unlitigated contentions. Indeed, after *Deukmejian* and the admonition by the D.C. Circuit that such future denials would work a presumption of "bad faith," PB at 43, the NRC codified its reopening rules, and confirmed that they applied to new, unlitigated contentions. *See* Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535 (May 30, 1986). The rules include a provision specifying that a "contention not previously in controversy among the parties must also satisfy the requirements for non-timely contentions . . . ." *Id.* at 19,539; *see also* 10 C.F.R. § 2.326(d). Clearly, the NRC did not view such a rule as contrary to *Deukmejian*, nor have authorities since then so held. The NRC's reopening provisions have been routinely applied by the Commission, and specifically upheld by courts, including this one. *E.g., TMIA*, 771 F.2d at 732; *Ohio v. NRC*, 814 F.2d 258, 261-63 (6th Cir. 1987).

Other cases cited by Petitioners are similarly unavailing. For example, *UCS I* involved a facial challenge to a Commission rule that categorically excluded all contentions involving the results of emergency planning exercises, providing

instead for satisfactory completion of a preparedness exercise, subject to application of reopening standards if deficiencies were discovered. *See* 735 F.2d at 1438. The case presented the question of whether the NRC could categorically hold all such contentions to the reopening standards and thereby structure its licensing process in such a way as to "eliminate a material public safety-related factor in its decision from the licensing hearing," a question that the court answered in the negative. *Id.* at 1444; *see also id.* at 1447. *UCS I* does not address—and has nothing to do with—the question of whether the reopening rules apply to specific new technical issues that *a party raises* after the close of the evidentiary record, such as the metal fatigue issue here. Neither *UCS I* nor any other case holds that the NRC cannot apply its reopening standards to new, non-litigated issues that a party attempts to raise after the close of an evidentiary record. *See, e.g. San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1026 (9th Cir. 2006) (rejecting a similar argument because "the D.C. Circuit held only that the agency cannot by rule presumptively eliminate a material issue from consideration in a hearing petition. [*UCS I*] requires the agency to consider a petition; it does not require that the agency grant it.").

Similarly, in *Massachusetts*, the court reviewed, among other things, whether the NRC had appropriately applied its standards for late-filed contentions to a new contention filed after the conclusion of an emergency planning exercise.

See 924 F.2d at 333. As noted above, the late-filing rules apply a balancing test of multiple factors, the most important of which is good cause. In addressing this question, the D.C. Circuit noted that the NRC's decision to apply the late-filing rules, including the good cause factor, did not conflict with its previous decision in *Deukmejian*. *See* 924 F.2d at 334.[15] In particular, the court summarized its previous holding in *Deukmejian* as follows: "the NRC may not *unjustifiably* require that a material contention satisfy the heightened evidentiary standards for reopening a closed record." *Id.* (emphasis added). The court did not broadly "confirm," as Petitioners argue, that "the Commission cannot apply the standards for reopening the record to a new contention that raises a new material issue, as opposed to new evidence about an issue that has already been heard." PB at 41. No case so holds. Properly read, *Massachusetts* confirms the propriety of the Commission's reopening rules, and provides no support for Petitioners' claims.

B. *Petitioners' Motion to Reopen the Record Failed to Meet the Applicable Commission Standards*. In the alternative, Petitioners ask this Court to overrule the Commission's technical and evidentiary judgments regarding the failure of the metal fatigue claims to meet the applicable reopening standards. *See* PB at 44. Petitioners are necessarily asking the Court to review the evidence

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[15] The court ultimately found errors in how the Commission's Appeal Board applied the late-filing rules. *See* 924 F.2d at 335. Such errors are not relevant to the issues the Petitioners raise here.

submitted by the parties and to conclude: (1) that, contrary to the agency's determinations, Petitioners' metal fatigue contention raised a significant nuclear safety issue; *and* (2) that after weighing the evidence, it is likely that there would have been a materially different result in the licensing proceeding.[16] These are extraordinary evidentiary conclusions to ask the Court to reach. That is generally so in light of the great deference given by courts to the NRC in matters of nuclear safety, but it is particularly so here, in light of the narrow judicial review afforded to Commission refusals to reopen the record of a closed proceeding. *E.g., TMIA*, 771 F.2d at 728.

Petitioners claim that the Board "prematurely adjudicated" issues related to the application of the ASME Code to metal fatigue calculations. Specifically, Petitioners seek reversal of the Commission's finding that, under the Code, it was permissible for fatigue testing calculations to omit the effects of the recirculation outlet nozzle cladding (*i.e.*, the relatively thin stainless steel interior surface of the nozzle), when application of the Code standards was allegedly in dispute.

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[16] Petitioners' metal fatigue challenge also focused solely on AmerGen's fatigue analyses under 10 C.F.R. § 54.21(c)(ii). They did not challenge AmerGen's additional commitment to establish an aging management program under section 54.21(c)(iii), which is an independent method for establishing compliance. *See* CLI-08-28 at 7 n.24. This is a further basis for concluding that Petitioners were unlikely to demonstrate that a *materially* different result would be likely, *i.e.*, that the application did not comply with the regulations.

Petitioners' arguments ignore the intent and structure of the Commission's reopening process, which requires evidentiary submissions from the movant, 10 C.F.R. § 2.326(b), permits counter affidavits, *see* LBP-08-12 at 10, and expects that "the affidavits or submissions of experts must be weighed" as part of the decision of *whether* to reopen the record for a new full evidentiary hearing. CLI-08-28 at 24.

Consistent with this approach, after considering the expert affidavits submitted by all parties, the Board concluded that Petitioners failed to show that the confirmatory analysis should have accounted for the effects of the cladding in the fatigue calculation. *See* LBP-08-12 at 24-25. The Commission affirmed, explaining that in AmerGen's fatigue calculation under the ASME Code, omission of the cladding was permissible, and that Petitioners failed to provide evidence to the contrary. *See* CLI-08-28 at 18-19. Moreover, AmerGen's original metal fatigue analysis did not omit consideration of the cladding (a fact ignored by Petitioners), and Petitioners did not show that this original analysis was deficient. That is an additional, independent basis for the conclusion that there was no significant safety issue, and that a materially different result was unlikely. *See id.* at 19.

The Commission's approach to evaluating motions to reopen, including the weighing of evidentiary submittals by all of the parties, has been specifically

reviewed and approved by this Court. *See TMIA*, 771 F.2d at 732 ("At the outset, we reject petitioners' contention that the Commission cannot rely on extra-record material in assessing the significance of evidence submitted in support of a motion to reopen the record."). No grounds to depart from that ruling exist here. The Board and Commission did not "erroneously dismiss[]" the statements of their expert regarding the original and confirmatory metal fatigue analyses, *see* PB at 46, but, rather, carefully considered these statements and rejected them. *See* LBP-08-12 at 12-14, 15 n.12 & 23-25; CLI-08-28 at 16-19; *see also Deukmejian*, 751 F.2d at 1322 ("The Board did not ignore petitioners' allegations [in a motion to reopen], it rejected them.").[17] Petitioners offer no sufficient basis to overturn these technical determinations, and have certainly not shown them to be arbitrary and capricious.

Petitioners' additional efforts to second-guess the evidentiary, technical, and predictive judgments of the agency with respect to metal fatigue are similarly unavailing. The Staff's expert affidavit about which Petitioners complain, PB at 45-46, was appropriately credited, and, in any event, was an additional, alternative basis for concluding that no significant safety issue was raised, separate and apart

[17] *Sierra Club*, cited by Petitioners at page 45 of their brief, concerned the then-extant contention admissibility standards. *See* 862 F.2d at 228. The Ninth Circuit did not analyze the Commission's reopening rules, and did not address whether it was within the Commission's discretion to set an evidentiary threshold for motions to reopen that is higher than that for other contentions. *Sierra Club* is irrelevant to Petitioners' metal fatigue claims.

from the deficiencies of Petitioners' proffered affidavits. *See* CLI-08-28 at 20 (*citing* R-519 at 10, R-482 ¶8; LBP-08-12 at 21 & n.19). Likewise, Petitioners fasten upon the alleged evidentiary admissibility of a newspaper article in which an NRC official was quoted as acknowledging the potential safety significance of the *component* with which the metal fatigue claims were involved (PB at 46), but they miss the essential point. That point—correctly discerned by the Commission—is that such a statement does not mean that any and all potential *contentions* about such components are automatically safety significant from a nuclear perspective. CLI-08-28 at 19. Indeed, it is a "truism" that many or most components in a nuclear power plant have some potential safety significance, *see* LBP-08-12 at 14, but the material inquiry is whether the particular proffered basis for reopening the record raises a significant safety issue. In this case, it did not.[18]

C. *Petitioners Were Not Entitled to Advance Discovery to Try to Substantiate Their Metal Fatigue Claims or to Reopen the Record.* Petitioners allege that the Commission erred by denying their motion to reopen as insufficiently supported without first granting them discovery (or granting their

[18] Petitioners claim that the Commission failed to recognize the alleged "broader" safety significance of its allegations, for plants other than Oyster Creek. PB at 46-47. As noted, because the Commission found no nuclear safety significance for Oyster Creek, there is no logical basis from which to extrapolate any "broader" safety significance for other plants. The scope of the proceeding below was limited to Oyster Creek. CLI-08-28 at 19 n.54. Whether or not different facts or showings might exist for other plants or in other proceedings is beyond the scope of this record and is simply immaterial.

Freedom of Information Act ("FOIA") request), leaving them in an alleged "Catch-22." *See* PB at 43-44. Petitioners, however, are in no more of a "Catch-22" than any other unsuccessful claimant—a party does not get to take discovery upon the mere hope that such a fishing expedition will reveal a basis to assert an admissible contention or to reopen the record.

First, the NRC properly denied Petitioners' requests for discovery because its rules and longstanding precedent provide discovery only after a proposed contention has been admitted or a motion to reopen granted. *See* CLI-08-28 at 25 & n.73 (*citing* 10 C.F.R. § 2.336); *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 N.R.C. 399, 416 (2007) ("We have long precluded petitioners from using discovery as a device to uncover additional information supporting the admissibility of contentions."); *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 351 (1998); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-7, 21 N.R.C. 1104, 1106 (1985) ("The movant is not entitled to engage in discovery in order to support a motion to reopen."). Petitioners do not even mention this rule or its associated administrative case law in their brief, much less present any reason for this Court to overturn the well-settled rule.[19]

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[19] Petitioners' allegation that the Commission improperly denied their FOIA request (PB at 44) is not before this Court—challenges to such denials must of course be pursued in district courts, 5 U.S.C. § 552(a)(4)(B); *McDonnell v.*

Second, the agency correctly concluded that there was sufficient technical information regarding the metal fatigue issues already available to Petitioners *without* discovery. This was confirmed by some of Petitioner's own duplicative submissions, including an unauthorized, eleventh-hour letter to the Chairman of the Commission. *See* CLI-08-28 at 25-26 n.74. The Board also reached a similar conclusion, observing that there was no reason why Petitioners' "inability to examine the underlying analysis would have prevented an expert from analyzing what could happen and showing the likelihood of a materially different outcome based on a solid technical foundation – *if* such a foundation existed." LBP-08-12 at 20. n.17 (emphasis supplied). In effect, Petitioners again ask the Court to overturn the agency's technical judgments regarding the metal fatigue allegations. That, however, is a matter where judicial review "must generally be at its most deferential." *Baltimore Gas & Electric Co.*, 462 U.S. at 103.

United States, 4 F.3d 1227, 1235 (3d Cir. 1993)—but in any event is as unavailing as their claim for pre-contention discovery. The Commission unquestionably has the discretion to determine how it can best secure information it needs, and is certainly under no obligation to obtain information necessary for its regulatory functions "in a manner that will maximize the amount of information that will be made available to the public through [FOIA]." *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (1992).

III. THE COMMISSION PROPERLY REJECTED THE "SUPERVISION PETITION"

On January 3, 2008, after the closure of the record, Petitioners filed a request to suspend the proceeding pending a "comprehensive overhaul" of the Commission's license renewal review process. The primary basis for this "Supervision Petition" was the NRC OIG Report, issued some four months earlier. With respect to Oyster Creek, the petition effectively asked the Commission to provide Petitioners the opportunity to direct the Staff in the performance of its regulatory functions, to suspend the proceeding, and reopen the record. CLI-08-23 at 28-29. Later, Petitioners submitted a "supplemental" petition that focused on alleged inadequacies in the amount of Staff documentation that is publicly available. *Id.* at 19. The Commission properly denied these petitions because they failed to justify the relief requested, and in particular because there was no significant nuclear safety issue raised. Petitioners seek to have the Court overturn the judgment of the three-Commissioner majority, primarily on the basis of the statements of the single dissenting Commissioner. *See* PB at 59-61.

First, the "Supervision Petition" rested on the "fundamentally flawed premise" that Petitioners could demand the opportunity to direct the Staff in the performance of its duties, contrary to longstanding policy and regulation. CLI-08-23 at 18. This rule stems from the principle that the license applicant, not the Staff, bears the burden of proof on safety matters. *Id.* Therefore, the request to

direct the Staff's actions was not properly an adjudicatory matter—rather, direction of the Staff is a matter within the Commission's discretion and its ultimate supervisory authority.

Second, the petition requested the reopening of the Oyster Creek hearing record. R-452 at 2. The petition failed to meet the reopening standards, in particular because, rather than raising a significant safety issue, it only offered speculation that the Staff's review might not have been sufficiently thorough. CLI-08-23 at 30.[20] Petitioners present no facts, other than vague references to admittedly "anecdotal information," as argued bases for reversal. PB at 60.

Third and finally, despite its technical and substantive shortcomings, the Commission, in its discretion, *took review* of the petition. *See* CLI-08-23 at 17. The Commission evaluated its allegations seriously and in considerable detail in its 33-page decision. Ultimately, the Commission concluded that the Staff had taken appropriate corrective action to address the deficiencies identified by the OIG, that there was no basis for concluding that the Staff's reviews were inadequate, and that as a result "[n]either the Petition nor the OIG Report has identified any safety issue." *Id.* at 32. Once again, Petitioners merely seek, without justification, to have the Court substitute its judgment for that of the Commission on matters of

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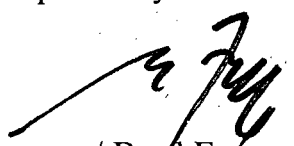
[20] The petition was also late. CLI-08-23 at 30. Indeed, during the four-month interval between the OIG Report and the petition, the Oyster Creek hearing was held and the record closed.

nuclear safety. They do not demonstrate that CLI-08-23 was arbitrary, capricious or an abuse of discretion.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for review.

Respectfully submitted,



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Dated: February 24, 2010

STATEMENT OF RELATED CASES

Exelon is aware of one related case within the meaning of Third Circuit Rule 28.1(a)(2), which is the State of New Jersey's appeal of the Commission's denial of its National Environmental policy Act ("NEPA") contention, decided by this Court in *New Jersey Dept. of Env't Protection v. NRC*, 561 F.3d 132 (3d Cir. 2009).

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to L.A.R. 28.3(d) and 46.1(e), I, Brad Fagg, certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

DATED: February 24, 2010

s/ Brad Fagg
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CERTIFICATIONS OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, TYPE STYLE REQUIREMENTS, CONSISTENCY, AND VIRUS CHECK

1. The foregoing Brief of Intervenor Private Respondent Exelon Generation Company, L.L.C. ("Brief") complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 13,958 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word processing system used to prepare the foregoing Brief: Microsoft Office Word 2003.

2. The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman font.

3. The text of the electronic brief and hard copies of same are identical, as required by L.A.R. 31.1.

4. The foregoing Brief was scanned for viruses by McAfee Virus Scan Enterprise & AntiSpyware Enterprise, version 8.5.0i, and no viruses have been detected.

DATED: February 24, 2010

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rules 25.1, 31.1, and 113.4 of this Court, I hereby certify that I have this 24th day of February, 2010, served the "Brief of Intervenor Private Respondent Exelon Generation Company, L.L.C." in Case No. 09-2567, through the electronic filing system upon all the parties set forth below. In addition, the original and ten (10) paper copies were filed with the clerk for the convenience of the Court through an overnight delivery service, postage prepaid, addressed to this Court.

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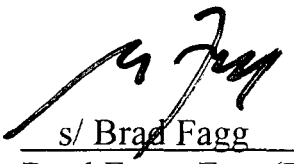

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