

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman  
Kristine L. Svinicki  
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William D. Magwood, IV  
William C. Ostendorff

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ENTERGY NUCLEAR VERMONT YANKEE, L.L.C.)  
and ENTERGY NUCLEAR OPERATIONS, INC. )  
(Vermont Yankee Nuclear Power Station) )  
\_\_\_\_\_)

Docket No. 50-271-LR

CLI-11-02

**MEMORANDUM AND ORDER**

We have before us a petition for review in which intervenor New England Coalition (NEC) challenges the Licensing Board's refusal to reopen this adjudication and admit for litigation NEC's latest proposed contention.<sup>1</sup> This contention, which was submitted simultaneously with the Motion to Reopen on August 20, 2010,<sup>2</sup> addresses "the effects of moist or wet environments on buried, below grade, underground, or hard-to-access safety-related electrical cables."<sup>3</sup> The Board concluded that NEC had failed to satisfy our standards for reopening in two respects: NEC's motion was untimely, and NEC had failed to "demonstrate

<sup>1</sup> LBP-10-19, 72 NRC \_\_ (Oct. 28, 2010) (slip op.).

<sup>2</sup> *New England Coalition's Motion to Reopen the Hearing and for the Admission of New Contentions* (Aug. 20, 2010) (Motion to Reopen).

<sup>3</sup> *Petition for Commission Review of ASLBP Memorandum and Order (Ruling on New England Coalition Motion to Reopen and Proffering New Contention)* (Nov. 12, 2010), at 1 (Petition), citing Motion to Reopen at 8. NEC subsequently filed a "supplement" to its petition. See *Supplement to New England Coalition's Petition for Commission Review of ASLBP Memorandum and Order (Ruling on New England Coalition Motion to Reopen and Proffering New Contention)* (Dec. 13, 2010) (NEC Supplemental Filing).

that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.”<sup>4</sup> We affirm.

## I. BACKGROUND

Over the course of a lengthy and complex hearing on Entergy Nuclear Vermont Yankee’s (Entergy) license renewal application,<sup>5</sup> the Board issued two initial decisions, ultimately finding in Entergy’s favor with respect to all of NEC’s substantive arguments.<sup>6</sup> Following appeals of the Board’s initial decisions, we issued CLI-10-17, upholding the Board on all but one of the appealed issues. As for that issue, we found that the Board had not provided NEC its promised opportunity to revise a contention challenging the metal-fatigue portion of Entergy’s Application. We therefore remanded the case with instructions that the Board give NEC that opportunity.<sup>7</sup> We also stated that, if NEC wished to raise “any *genuinely new* issues,” it could move to reopen the record.<sup>8</sup>

NEC declined to submit a revised metal-fatigue contention. But it did move to reopen the record for the purpose of proffering a new contention (designated by the Board as “Contention 7”) challenging the adequacy of the Application’s aging management program (AMP) and/or time-limited aging analysis (TLAA) regarding the effects of moist or wet environments on various safety-related electrical cables. Contention 7 reads, in its entirety:

Applicant has not demonstrated adequate aging management review and/or time-limited aging analysis nor does the applicant have in place an adequate aging management program to address the effects of moist or wet environments

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<sup>4</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 26) (quoting 10 C.F.R. § 2.326(a)(3)).

<sup>5</sup> See *generally* Entergy License Renewal Application: Vermont Yankee Nuclear Power Station (Jan. 25, 2006) (ML060300085) (Application). The Application has since been revised and supplemented. See, e.g., note 55, *infra*.

<sup>6</sup> See LBP-08-25, 68 NRC 763 (2008); LBP-09-9, 70 NRC 41 (2009).

<sup>7</sup> CLI-10-17, 72 NRC \_\_ (July 8, 2010) (slip op. at 51).

<sup>8</sup> *Id.* (slip op. at 10 n.37) (emphasis in original).

on buried, below grade, underground, or hard-to-access safety-related electrical cables[. Thus the applicant does not comply with NRC regulation (10 CFR §54.21(a)[)] and guidance and/or provide adequate assurance of protection of public health and safety (54.21(a)[)].<sup>9</sup>

Both the NRC Staff and Entergy opposed NEC's Motion to Reopen.<sup>10</sup>

In LBP-10-19, the Board concluded that NEC's Motion to Reopen was neither timely nor, if granted, would be likely to change the result in this proceeding. NEC seeks review of the Board's decision. Both the Staff and Entergy oppose NEC's petition for review.<sup>11</sup>

## II. DISCUSSION

Under section 2.341(b)(4) of our procedural rules, we may grant a petition for review if it presents "a substantial question" with respect to one or more of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.<sup>12</sup>

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<sup>9</sup> Motion to Reopen at 8.

<sup>10</sup> *Entergy's Answer Opposing New England Coalition's Motion to Reopen* (Sept. 14, 2010); *NRC Staff's Opposition to the New England Coalition's Motion to Reopen the Hearing and Answer to Proposed New Contention* (Sept. 14, 2010). NEC replied to these two filings. *New England Coalition's Reply to NRC Staff and Entergy Nuclear Vermont Yankee Opposition to New England Coalition's Motion to Reopen the Hearing and Reply to NRC Staff's Answer to Proposed New Contention* (Sept. 20, 2010) (Reply I).

<sup>11</sup> *Entergy's Answer Opposing New England Coalition's Petition for Commission Review of LBP-10-19* (Nov. 22, 2010) (Entergy Answer); *NRC Staff's Answer in Opposition to New England Coalition's Petition for Review of Licensing Board Memorandum and Order LBP-10-19* (Nov. 22, 2010) (Staff Answer). NEC replied to these two Answers. *New England Coalition's Reply to NRC Staff's And Entergy's Answer In Opposition to New England Coalition's Petition for Review of Licensing Board Memorandum and Order LBP-10-19* (Nov. 26, 2010) (Reply II).

<sup>12</sup> 10 C.F.R. § 2.341(b)(4). See also 10 C.F.R. § 2.1212.

NEC's Petition falls short of satisfying section 2.341(b)(4). The Petition does not specify the subsections upon which it relies, but instead sets forth a series of general grievances fundamentally going to the correctness of the Board's decision denying its Motion to Reopen.<sup>13</sup> NEC has thus failed in its obligation to provide us a clear statement of its position on why it satisfies our standards for granting a petition for review.<sup>14</sup> Further, NEC has not demonstrated that the Board either made clearly erroneous findings of material fact, or drew legal conclusions that depart from, or are contrary to, established law. We find no error in the Board's decision.

We generally disfavor the filing of new contentions at the eleventh hour of an adjudication. This policy is grounded in the doctrine of finality, which states that at some point, an adjudicatory proceeding must come to an end.<sup>15</sup> We consider reopening the record for any

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<sup>13</sup> See Petition at 2. NEC offers a general challenge to the Board's findings of fact, arguing, without elaboration, that "the Board made several gross factual errors in its summation of the parties' positions and in its conclusions regarding them, which, in turn informed an erroneous analysis and ruling denying NEC's Motion to Reopen." Petition at 11.

Among other things, NEC also disagrees with the Board's conclusions as to whether the safety issue it raises in Contention 7 is "significant" for purposes of reopening the record. Petition at 17-19. However, the Board expressly declined to rule on the "significance" factor. See LBP-10-19, 72 NRC \_\_ (slip op. at 24 n.20, 26). Absent an actual ruling adverse to NEC, the "significance" issue is not properly before us on appeal.

<sup>14</sup> See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 277 n.240 (2009) ("The burden of setting forth a clear and coherent argument ... is on the petitioner. It should not be necessary to speculate about what a pleading is supposed to mean. . . . [T]he Commission will not accept the filing of a vague, unparticularized issue." (citations and internal quotation marks omitted)).

<sup>15</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) ("Obviously, 'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings" (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 555 (1978))), *petition for review held in abeyance sub nom. Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007). See also Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (applying "[p]rinciples of finality" to intervenors in the context of motions to reopen the record), 19,539 ("The purpose of this rule is . . . to ensure that, once a record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process. Otherwise it is (continued . . . )

reason to be “an ‘extraordinary’ action”<sup>16</sup> and we therefore impose a “deliberately heavy” burden<sup>17</sup> upon an intervenor who seeks to supplement the evidentiary record after it has been closed, even with respect to an existing contention.<sup>18</sup> We likewise frown on intervenors seeking to introduce a new contention later than the deadline established by our regulations, and we accordingly hold them to a higher standard for the admission of such contentions.<sup>19</sup> Because NEC here seeks both to reopen the record and to submit a late contention, it must successfully satisfy both of these elevated standards.<sup>20</sup> The Board, in concluding that NEC failed to meet these burdens, focused on the reopening standard, and, in particular, on two requirements of that rule – a motion to reopen must be timely and the newly proffered information and/or argument would likely have resulted in a materially different outcome in the adjudication.<sup>21</sup> We consider each in turn.

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doubtful whether a proceeding could ever be completed.”) (May 30, 1986) (Criteria for Reopening Records).

<sup>16</sup> Criteria for Reopening Records, 51 Fed. Reg. at 19,538.

<sup>17</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008). *Accord Oyster Creek*, CLI-09-7, 69 NRC at 287.

<sup>18</sup> 10 C.F.R. § 2.326(a).

<sup>19</sup> 10 C.F.R. § 2.309(c).

<sup>20</sup> *Oyster Creek*, CLI-08-28, 68 NRC at 668. *See also Private Fuel Storage*, CLI-05-12, 61 NRC at 350 (“Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention”). *Accord Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 NRC 1712, 1715 (1982).

<sup>21</sup> To the extent that NEC challenges the Board’s decision to apply strictly the reopening standards (see Petition at 10), its challenge constitutes an improper collateral attack on our regulations. *See* 10 C.F.R. § 2.335(a).

**A. Timeliness**

As we held in *Oyster Creek*:

[O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.<sup>22</sup>

This policy underpins our regulatory requirement that motions to reopen be “timely” filed.<sup>23</sup> It likewise undergirds our regulation permitting the admission of late-filed contentions “only . . . upon a showing that –

- (i) The information upon which the . . . new contention is based was not previously available;
- (ii) The information upon which the . . . new contention is based is materially different than information previously available; and
- (iii) The . . . new contention has been submitted in a timely fashion based on the availability of the subsequent information.”<sup>24</sup>

As the Board correctly concluded, timeliness turns here on the threshold question of when NEC first had access to information sufficient to enable it to proffer Contention 7.<sup>25</sup>

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<sup>22</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 271-72 (footnotes, internal quotation marks, and citations omitted). See generally *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC \_\_ (slip op. at 18) (Sept. 30, 2010) (stating, in the context of a new contention filed after the initial petition, that the Commission has a “longstanding policy that a petitioner has an ‘iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention’”) (quoting *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993)); *Three Mile Island Alert v. NRC*, 771 F.2d 720, 728 (3d Cir. 1985), cert. denied sub nom. *Aamodt v. NRC*, 475 U.S. 1082, reh’g denied, 476 U.S. 1179 (1986).

<sup>23</sup> 10 C.F.R. § 2.326(a)(1).

<sup>24</sup> 10 C.F.R. § 2.309(f)(2)(i)-(iii).

<sup>25</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 21).

1. Motion to Reopen

NEC claimed to have filed its Motion to Reopen (and, with it, Contention 7) “as soon as sufficient evidence had accrued to adduce the basis and substance of the contention” and that “no relevant evidence was available” by the deadline for filing its initial intervention petition.<sup>26</sup> According to NEC, the first available, relevant factual information that triggered the filing of Contention 7 was a May 10, 2010 NRC Inspection Report.<sup>27</sup> Among other things, the Inspection Report indicated that, on November 29, 2009, an NRC inspection had revealed submerged safety-related cables. According to NEC, this information was contained in an “AMP” dated November 2009, and first came to NEC’s attention through the Inspection Report.<sup>28</sup> NEC also asserted that it considered the information in the Inspection Report insufficient grounds for a new contention, so it continued to seek additional supporting information during the three months following the issuance of the Inspection Report.<sup>29</sup>

2. LBP-10-19

The Board rejected NEC’s argument regarding timeliness, observing that the potential for submerged safety-related cables and the consequent need to manage and address the risks stemming from submergence have “been apparent from the outset of this proceeding.”<sup>30</sup> The

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<sup>26</sup> Motion to Reopen at 5.

<sup>27</sup> See Motion to Reopen at 5 (citing NRC Inspection Report 0500271/2010002 (May 10, 2010) (ML101300363) (Inspection Report)). The Motion to Reopen (at 10-13) quotes at length from the Inspection Report (specifically, pp. 4-5 and 19-21).

<sup>28</sup> See Petition at 6 (referring to a “newly deployed (November 2009) AMP for cables susceptible to wetting or submergence”). Although NEC provides no citation for this document, it appears to refer to an Entergy condition report, CR-VTY-2009-04142, cited in NEC’s earlier Motion to Reopen at 11-12.

<sup>29</sup> Motion to Reopen at 5; Petition at 14; Reply I at 3 (describing the Inspection Report as “itself inadequate to lay the basis for a contention”), 8 (similar language). This search period continued until mid-August 2010, when NEC filed its Motion to Reopen. See Motion to Reopen at 5; Reply I at 3-4.

<sup>30</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 23).

Board pointed specifically to the Application's AMP for medium-voltage cables, which provides for periodic inspections of manholes, draining of water as needed and periodic cable testing.<sup>31</sup> Further, the Board noted that the issues raised in Contention 7 were addressed in numerous NRC and industry documents well prior to the May 10 Inspection Report.<sup>32</sup> Based on these factors, the Board concluded that the May 10 Inspection Report "is not an unexpected revelation that entitles NEC to raise these issues now."<sup>33</sup>

3. Petition for Review

NEC's Petition for Review targets the Board's dual conclusions that NEC earlier had sufficient factual basis to submit Contention 7 and that NEC's Motion to Reopen was, therefore, untimely. NEC argues that the Application "only vaguely described or [did] not describe[] at all" Entergy's proposed "aging management of safety-related electrical [cables] susceptible to submergence."<sup>34</sup> According to NEC, detailed information became available only upon the issuance of the May 10 Inspection Report.<sup>35</sup>

4. Analysis

To determine timeliness, we examine the information and authority that NEC cites in its Motion to Reopen and that it preserves as a basis for its Petition. In support of Contention 7, NEC fundamentally relies on the May 10, 2010 Inspection Report.<sup>36</sup> In an effort to satisfy the timeliness criterion, NEC asserts that the Inspection Report provided it with insufficient factual

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<sup>31</sup> *Id.* Entergy's initial Application included an AMP for non-environmentally-qualified inaccessible medium voltage cable. See Application, App. B, § B.1.17, at p. B-61 (Non-EQ Inaccessible Cable AMP).

<sup>32</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 23-24).

<sup>33</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 24).

<sup>34</sup> Petition at 13.

<sup>35</sup> Petition at 13-14, 16; Reply II at unnumbered p. 3.

<sup>36</sup> Motion to Reopen at 5, 7, 10-13, 17-18, 22; Declaration and Affidavit of Paul Blanch (Aug. 20, 2010), at 5-6 (Blanch Declaration) (ML102420042), appended to Motion to Reopen.

grounds for Contention 7<sup>37</sup> and that NEC therefore spent the next three months searching for additional support by conferring with NRC's Region I and the Staff of NRC's Office of Nuclear Reactor Regulation, searching NRC, academic and trade literature, and monitoring Vermont Yankee's communications and public statements.<sup>38</sup> NEC relies upon the results of these efforts as support for its claim that it timely filed its Motion to Reopen.

NEC's argument is flawed in several critical respects. The first and most significant difficulty is that Contention 7 is based on the premise that the cable AMP in Entergy's Application is incomplete<sup>39</sup> – an assertion that, if true today, was equally true when Entergy filed its Application in 2006. Consequently, NEC could have raised the contention in its Petition to Intervene, or any time after that pleading's filing date. The fact that the May 10 Inspection Report revealed that certain safety-related electrical cables had, in fact, been exposed to submerged conditions does not inform the issue of timeliness. As the Board explained, the fact that long-term submergence of safety-related cables was a possibility has been evident since the outset of the proceeding, as evidenced by both Entergy's 2006 AMP<sup>40</sup> and the guidance in the 2005 GALL Report.<sup>41</sup> Stated differently, the contention raises the question of whether the

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<sup>37</sup> See, e.g., Petition at 7, 14.

<sup>38</sup> Petition at 7; Reply I at 8.

<sup>39</sup> See, e.g., Motion to Reopen at 13-14 (NEC “disputes . . . the applicant’s attestation that their [*sic*] [Application] is accurate and complete” and “the applicant has not included . . . adequate consideration of environmentally accelerated age-related degradation”), 16 (NEC’s “contention concerns the unanalyzed, unplanned[-]for aging of wetted or submerged safety related electrical cables”), 19 (the Application “is inaccurate and incomplete” (quoting, but not citing, Blanch Declaration at 8)), 22 (the Application lacks “important and telling detail” regarding “period[ic] inspections and ‘de-waterings’” and the Application “lacks a complete and accurate description of its cable aging management programs”).

<sup>40</sup> See generally Non-EQ Inaccessible Cable AMP, *supra* note 31.

<sup>41</sup> See NUREG-1801, Generic Aging Lessons Learned (GALL) Report (Rev. 1, Sept. 2005), Vol. 2, at XI E-7 through XI E-9 (§ XI.E3: Inaccessible Medium-Voltage Cables not Subject to 10 CFR 50.49 Environmental Qualification Requirements) (ML052780376) (GALL Report). See (continued . . . )

AMP in the Application adequately addresses the issue of submerged electric cables during the twenty-year period of extended operation – an issue of which NEC should have been aware since the filing of the 2006 Application.<sup>42</sup>

The second difficulty is that ten of the fifteen documents or events on which NEC relies as “new information” in its Motion to Reopen (or in later filings) have been publicly available for too long to be considered “new information.” NEC filed its Motion to Reopen more than 100 days after the issuance of the May 10 Inspection Report, the document upon which NEC relies most heavily. So, even had that Report contained information providing a sufficient factual basis for Contention 7, the Motion to Reopen still would have been untimely— at least insofar as it relies on the May 10 Inspection Report.<sup>43</sup> Therefore, to the extent NEC relies on the May 10 Inspection Report to demonstrate timeliness of Contention 7 and the Motion to Reopen, we do not find fault with the Board’s rejection of NEC’s position. Likewise, most of the remaining

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*also id.*, Vol. 1, at 91 (Table 6: Summary of Aging Management Programs for the Electrical Components Evaluated in Chapter VI of the GALL Report) (ML052770419).

<sup>42</sup> NEC’s conclusion that the Inspection Report revealed “newly discovered vulnerability” in the electrical cable AMP (Motion to Reopen at 13) is contradicted by its many references to earlier agency and industry documents expressing concern over the same issue. See, e.g., Motion to Reopen at 17-18, 20 (citing GALL Report); Blanch Declaration at 5, 10 (citing same). See *also* LBP-10-19, 72 NRC \_\_\_ (slip op. at 23) (citing Motion to Reopen at 14).

<sup>43</sup> We and our Licensing Boards generally consider approximately 30-60 days as the limit for timely filings based on new information. See, e.g., *Prairie Island*, CLI-10-27, 72 NRC \_\_\_ (slip op. at 15) (a two-month delay is too long); Initial Scheduling Order (Nov. 17, 2006), at 7 (unpublished) (“A motion and proposed contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii), if it is filed within thirty . . . days of the date when the new and material information on which it is based first becomes available.”).

Separately, we recognize that 10 C.F.R. § 2.326(a)(1) provides an exception to the “timeliness” requirement in those rare instances where a petitioner raises an “exceptionally grave issue.” NEC referred to this standard, but makes little, if any, effort to explain its applicability. The Board addressed the standard briefly in *dictum*, stating merely that “[w]e have no doubt in concluding that NEC has failed to show that the issues raised in Contention 7 are “exceptionally grave.” LBP-10-19, 72 NRC \_\_\_ (slip op at 24 n.20) (quoting 10 C.F.R. § 2.326(a)(1)). Given the thinness of NEC’s evidentiary presentation supporting its motion to reopen, including the absence of expert support, we are inclined to agree with the Board. See *generally* 10 C.F.R. § 2.326(b).

information on which NEC relies in its Motion to Reopen and accompanying Declaration was available to the public well before even the May 10 Inspection Report.<sup>44</sup> Consequently, neither Contention 7 nor the Motion to Reopen can be considered timely filed to the extent they are grounded on these additional, still-older pieces of information. So here, too, we find no error on the Board's part.

The third difficulty relates to three pieces of purportedly "new information" that NEC cites on appeal — pieces that were made publicly available *after* May 10, 2010. Our ruling on these remaining sources of information turns not on the timeliness with which NEC raised them, but rather on the information's failure to support Contention 7.

NEC alludes to a June 2010 public meeting.<sup>45</sup> Yet NEC states merely that this was an example of its efforts to determine whether Entergy had amended the relevant AMP to address

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<sup>44</sup> See Motion to Reopen at 6, 9, 13-14, 17-23; Blanch Declaration at 5, 8-10 & n.2, 11-13. Documents cited include: Information Notice 1989-63, "Possible Submergence of Electrical Circuits Located Above the Flood Level Because of Water Intrusion and Lack of Drainage," (Sept. 5, 1989) (Legacy Library Accession No. 8908290014); Information Notice 2002-12, "Submerged Safety-Related Electrical Cables" (Mar. 21, 2002) (ML020790238); GALL Report (Sept. 2005), *supra* note 41; Application (Jan. 25, 2006), *supra* note 5; Generic Letter 2007-01, "Inaccessible or Underground Power Cable Failures that Disable Accident Mitigation Systems of Cause Plant Transients" (Feb. 7, 2007) (ML070360665); NUREG-1907, Staff Safety Evaluation Report, Related to the License Renewal of Vermont Yankee Nuclear Power Station (May 2008) (Vol. 1: ML081430057; Vol. 2: ML081430109); Generic Letter 2007-01, "Inaccessible or Underground Power Cable Failures that Disable Accident Mitigation Systems or Cause Plant Transients": Summary Report (Nov. 12, 2008) (ML082760385); NUREG/CR 7000, "Essential Elements of an Electric Cable Condition Monitoring Program" (Jan. 2010) (ML100540050). See *also* Petition at 14 (referring to "a PowerPoint presentation from an August 2010 NRC meeting led by NRC Staff's expert witness, Roy K. Matthew [*sic*]"). The Staff actually made the presentation a year earlier, on August 19, 2009, in conjunction with a public meeting to discuss a submerged cable pilot project. See "Regulatory Issue Resolution Protocol, Inaccessible or Underground Cable Performance Issues at Nuclear Power Plants" (Aug. 19, 2009) (ML092460425); Memorandum, "Summary of August 19, 2009, Second Public Meeting with Stakeholders to Discuss Submerged Cables Pilot Project – Regulatory Issue Resolution Protocol (RIRP)" (Sept. 10, 2009) (ML092460408).

<sup>45</sup> See Petition at 7 (referring to a June 14, 2010 Annual Assessment Meeting). See *also* Motion to Reopen at 13 (referring to a June 22, 2010 Annual Assessment Meeting). The meeting occurred on June 22, 2010. See Meeting Summary, "Summary of the June 22, 2010, Annual Assessment Open House and Public Meeting" (Aug. 10, 2010) (ML102220455).

the issues that formed the bases of Contention 7.<sup>46</sup> Thus, this does not constitute information (new or otherwise) supportive of Contention 7.

NEC also cites a June 2010 Report by the Electric Power Research Institute (EPRI).<sup>47</sup> The cited portion of the EPRI Report addresses only the increasing general concern of regulators and industry alike, over the last “5-10 years,” regarding reliability of wetted medium-voltage cables.<sup>48</sup> By its terms, this is not “new” information, nor does it specifically relate to the Vermont Yankee facility or Entergy’s Application at issue here. It therefore does not provide support for either NEC’s Motion to Reopen or its Contention 7.

Third, NEC filed an additional pleading on December 13, 2010. NEC’s filing directs our attention to language in NRC Information Notice 2010-26.<sup>49</sup> Arguing that the Information Notice “corroborate[s] many of the concerns and assessments in NEC’s Motion to Reopen,” NEC presents the Information Notice to us as “new” information supporting its petition and Motion to Reopen.<sup>50</sup>

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<sup>46</sup> Motion to Reopen at 13.

<sup>47</sup> NEC alludes to the June 2010 EPRI Report in its Petition for Review (at 17), but only in general terms. NEC, however, did specifically cite that report in its Motion to Reopen. See Motion to Reopen at 5-7, 23 (all referencing or quoting EPRI Report 1020805, “Plant Support Engineering, Aging Management Program Guidance for Medium-Voltage Cable Systems for Nuclear Power Plants” (June 10, 2010) (EPRI Report) (made available in ADAMS on August 11, 2010, as an attachment to “Note to File” from Brian Holian, Director, Division of License Renewal, Office of Nuclear Reactor Regulation, “Documents to be Declared Public” (Aug. 6, 2010) (ML102210457)). Although we justifiably could disregard NEC’s general reference to the EPRI Report, we assume that the June Report was the one to which NEC intends to direct our attention on appeal.

<sup>48</sup> Motion to Reopen at 6 (quoting EPRI Report, *supra* note 47, at v (miscited as page 1)).

<sup>49</sup> “Submerged Electrical Cables” (Dec. 2, 2010) (ML102800456) (Information Notice).

<sup>50</sup> NEC Supplemental Filing at 2-3.

The Information Notice merely summarizes information from documents previously available well prior to NEC's Motion to Reopen.<sup>51</sup> We find unconvincing NEC's argument that the December 2, 2010 date on the Information Notice renders the information in that document "new" for purposes of timeliness.<sup>52</sup> As we recently have reiterated, documents merely summarizing earlier documents or compiling pre-existing, publicly available information into a single source do not render "new" the summarized or compiled information.<sup>53</sup> The tardy filing of a contention may be excusable only where the facts upon which the amended or new contention is based were previously unavailable.<sup>54</sup>

Finally, NEC cites Entergy's September 3, 2010 Supplement to the Application, which amended the Application by expanding the medium-voltage electrical cable AMP to include certain low-voltage cables.<sup>55</sup> Entergy argued, in opposing NEC's Motion to Reopen, that the September 3 Supplement rendered Contention 7 moot, to the extent that NEC asserted the

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<sup>51</sup> See Information Notice at A-1 to A-2 (listing documents dated from April 21, 2008, through May 11, 2010).

<sup>52</sup> *New England Coalition's Reply to NRC Staff's Objection to NEC's Notification of Information Notice 2010-26 and Entergy's Response to the Supplement to NEC's Petition for Commission Review of LBP-10-19* (Dec. 30, 2010), at 4.

<sup>53</sup> See *Prairie Island*, CLI-10-27, 72 NRC \_\_\_ (slip op. at 14-18) (finding that a contention based on pre-existing information compiled in a safety evaluation report was untimely).

<sup>54</sup> See *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 146 (2007).

<sup>55</sup> Petition at 8, 18. Specifically, Entergy expanded its "Non-EQ Inaccessible Medium-Voltage Cable" program in § B.1.17 to include certain low-voltage cables. See Letter from Michael J. Colomb to Document Control Desk, "License Renewal Application Supplemental Information" (Sept. 3, 2010) (ML102500065) (Supplement). Attachment 1 to that letter (at 2) shows the provisions in section B.1.17 as currently amended. The Supplement was prompted by "information provided in the industry responses to G[eneric] L[etter] 2007-01, recent NRC and [EPRI] guidance documents, and recent industry/NRC meetings on this topic" (Supplement, Att. 1 at 1), and also in anticipation of the Staff's then-impending issuance of a Revised GALL Report (Entergy Answer at 4 n.7). The NRC Staff issued Revision 2 of the GALL Report in December 2010. See NUREG-1801, Final Report, Generic Aging Lessons Learned Report (Rev. 2, Dec. 2010) (ML103490041).

AMP should address low-voltage cables.<sup>56</sup> The Board agreed with Entergy in *dictum*.<sup>57</sup> NEC complains that the Board should not have “accepted” the Supplement.<sup>58</sup> We see no merit in NEC’s position. Nothing in our rules prevents an applicant from amending its application at any time. Permitting an application to be “modified or improved” throughout the NRC’s review is compatible “with the dynamic licensing process followed in Commission licensing proceedings.”<sup>59</sup>

Notwithstanding NEC’s argument to the contrary,<sup>60</sup> NEC has not shown that it has been harmed or prejudiced by the agency’s consideration of the Supplement. NEC has had ample time to review, and adequate means by which to address, the Supplement.<sup>61</sup> Specifically, NEC could either have filed a second motion to reopen the proceeding on the basis of the Supplement, or requested leave to amend its August 20 Motion to Reopen, and (either way) to file a revised Contention 7. NEC has taken none of these steps.

In sum, the Board did not err in determining that NEC offered no “new” information supporting Contention 7 and that the information therefore did not support NEC’s Motion to Reopen.

## **B. The Likelihood of a Materially Different Result**

Section 2.326(a)(3) of our procedural rules provides that the proponent of a motion to reopen the record must demonstrate that a materially different result . . . would have been likely

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<sup>56</sup> *Entergy’s Answer Opposing New England Coalition’s Motion To Reopen* (Sept. 14, 2010), at 39.

<sup>57</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 26).

<sup>58</sup> See Petition at 8, 11; NEC Reply I at 11-12 (raising questions as to the appropriateness of Entergy’s submittal of the Supplement).

<sup>59</sup> *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995).

<sup>60</sup> Petition at 18.

<sup>61</sup> See 10 C.F.R. §§ 2.326, 2.309(f)(2).

had the newly proffered evidence been considered initially.”<sup>62</sup> The burden of satisfying this requirement (as is the case for each of the reopening requirements) is a heavy one.<sup>63</sup> And, as we recently reiterated, “[b]are assertions and speculation . . . do not supply the requisite support.”<sup>64</sup> To justify reopening the record, “the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition.”<sup>65</sup>

The entire argument on this issue in NEC’s Motion to Reopen consisted of the following brief discussion:

Had the newly proffered evidence been considered initially, it is reasonable to assume, based on the weight of the evidence and the safety significance of the issue, that, in keeping with 10 CFR § 54 [*sic*] the Board would have rejected Entergy’s LRA pending a submittal and demonstration of an adequate AMP or TLAA for electrical cables susceptible to wetting or submergence, because in considering the evidence it is highly unlikely that the Board could have positively contributed to a Commission finding that aging management review, aging management planning, or aging analysis had been properly performed in keeping with 10 CFR § 54.29(a) and 54.21(a). (Please see EPRI Report above, NRC Inspection Report following, and the Declaration of Paul M. Blanch (attached)[]).<sup>66</sup>

The Petition’s discussion with respect to this factor is even shorter:

NEC has presented the testimony of a credentialed electrical engineer with more than 40 years of experience in nuclear power generation, and cited in support of its pleadings numerous authorities, including NRC’s own technical studies, all of it more than sufficient to show that its proposed contention has merit sufficient to be heard and at some level to raise issues requiring, if nothing more, additional analysis and/or improvements to the cable amps. NEC cannot be expected to prove its case at this point for that would be an impossibly high standard; one negating the basic purpose of the hearing for which NEC is asking.<sup>67</sup>

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<sup>62</sup> 10 C.F.R. § 2.326(a)(3).

<sup>63</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 287 (quoting *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, CLI-86-1, 23 NRC 1, 5 (1986)).

<sup>64</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 287 (quoting *Oyster Creek*, CLI-08-28, 68 NRC at 674). See generally 10 C.F.R. § 2.326(b).

<sup>65</sup> *Private Fuel Storage*, CLI-05-12, 61 NRC at 350 (internal quotations omitted).

<sup>66</sup> Motion to Reopen at 7.

<sup>67</sup> Petition for Review at 19.

We agree with the Board that the Motion to Reopen's language is cursory in the extreme, consisting merely of "conclusory assumptions and predictions"<sup>68</sup> rather than the kind of substantive information and argument that would constitute a successful demonstration of "likelihood" under section 2.326(a)(3). We rejected a similarly cursory argument in *Oyster Creek* regarding that same regulation, concluding that the intervenor's argument "falls far short of meeting its burden."<sup>69</sup> Our conclusion in *Oyster Creek* applies here as well.

NEC's appellate argument is likewise "too thinly supported" to pass regulatory muster under the rigorous standards established in section 2.326(a)(3).<sup>70</sup> NEC's general references to authorities in support of Contention 7 are insufficient to meet NEC's burden under section 2.326(a) to show *likelihood* of a materially changed result. NEC argues that its supporting evidence is "more than sufficient to show that its proposed contention has *merit sufficient to be heard*."<sup>71</sup> But by arguing about whether its new contention has "merit sufficient to be heard," NEC confuses the standard for contention admissibility (section 2.309(f)) with the more rigorous evidentiary standard for reopening the record, i.e., a *likely* material change of result, pursuant to section 2.326(a). NEC is similarly incorrect that the Board improperly imposed upon it the

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<sup>68</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 27).

<sup>69</sup> CLI-09-7, 69 NRC at 291 (rejecting the intervenor's cursory argument, the entirety of which was that "this prong of the reopening test is met"). Elsewhere in that same proceeding, we held that

Bare assertions and speculation, such as Citizens' expert's speculation that "[i]t is . . . likely that an analysis that complies with the ASME Code would predict that the [cumulative usage factor] would become greater than one during the proposed period of extended operation," and that "the environmental factors in the [license renewal application] and the [request for additional information] are probably non-conservative," do not supply the requisite support.

CLI-08-28, 68 NRC at 674 (emphases and ellipsis in original, footnotes omitted).

<sup>70</sup> *Private Fuel Storage*, CLI-05-12, 61 NRC at 355.

<sup>71</sup> Petition for Review at 19 (emphasis added).

standard of proof for actual success on the merits (to “prove its case at this point”<sup>72</sup>), as it disregards the Board’s repeated references to the “likelihood” standard applicable to its Motion to Reopen.<sup>73</sup>

We also reject NEC’s assertion that Information Notice 2010-26 “corroborates” many of the concerns that NEC set forth in its Motion to Reopen and is therefore “material” to NEC’s instant appeal.<sup>74</sup> NEC directs our attention to four generic statements in the Information Notice. Yet these statements make no mention of either the Vermont Yankee facility generally or the Vermont Yankee license renewal application in particular.<sup>75</sup> Consequently, they are too general to satisfy our requirement of materiality – either as a requirement for contention admissibility or as part of the required showing that new evidence would be likely to lead to a “materially different result” in the case.<sup>76</sup> As Entergy correctly points out, “while the information notice may show that it is important to monitor and maintain safety-related cable, the information notice says nothing bearing on whether NEC had identified any significant deficiency in the AMP [and] has no bearing on the Licensing Board’s rulings in LBP-10-19 that NEC’s motion to reopen had failed to satisfy the requirements of 10 C.F.R. § 2.326(a)(1) and (3).”<sup>77</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> LBP-10-19, 72 NRC \_\_ (slip op. at 26-27).

<sup>74</sup> NEC Supplemental Filing at 2-3; *New England Coalition’s Motion for Leave to Reply to NRC Staff’s Objection to NEC’s Notification of Information Notice 2010-26 and Entergy’s Response to the Supplement to NEC’s Petition for Commission Review of LBP-10-19* (Dec. 30, 2010), at 3.

<sup>75</sup> See NEC Supplemental Filing at 4-5.

<sup>76</sup> See 10 C.F.R. §§ 2.309(f)(1)(iv), 2.326(a)(3).

<sup>77</sup> *Entergy’s Response to the Supplement to New England Coalition’s Petition for Commission Review of LBP-10-19* (Dec. 23, 2010), at 2. Moreover, the four generic statements in the Information Notice address current operating issues which are, by their very nature, beyond the scope of this license renewal proceeding. See *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-14, 71 NRC \_\_ (June 17, 2010) (slip op. at 15-16) (stating that license renewal is limited to age-related issues, not issues already monitored and reviewed in the ongoing regulatory oversight processes). We also observe that the single reference to Vermont (continued . . . )

In sum, NEC does not come close to demonstrating a likelihood that it would have prevailed on the merits of Contention 7 and that its success would have materially altered the outcome of this proceeding. Nor does our independent review of the record reveal any such likelihood.<sup>78</sup>

### III. CONCLUSION

For the foregoing reasons, we *deny* NEC's petition for review, *affirm* LBP-10-19, and *terminate* this proceeding.

IT IS SO ORDERED.<sup>79</sup>

For the Commission

**[NRC SEAL]**

**/RA/**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 10<sup>th</sup> day of March, 2011.

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Yankee in the Information Notice merely describes the content of the May 10, 2010 Inspection Report, *supra*, and therefore does not qualify as "new information." See Information Notice at 5.

<sup>78</sup> We observe, without ruling on the merits, that Entergy's and the Staff's initial arguments on the admissibility of Contention 7 appear to be sufficiently strong that we cannot conclude that NEC likely would have succeeded on its merits.

<sup>79</sup> Commissioner Apostolakis did not participate in this matter.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
ENTERGY NUCLEAR VERMONT YANKEE, ) Docket No. 50-271-LR  
LLC, and ENTERGY NUCLEAR )  
OPERATIONS, INC. )  
)  
(Vermont Yankee Nuclear Power Station) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-11-02) have been served upon the following persons by e-mail and first class mail or through NRC internal distribution in this license renewal proceeding.

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Dated at Rockville, Maryland  
this 10<sup>th</sup> day of March 2011.