UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-397-LR
ENERGY NORTHWEST	)	
	)	
(Columbia Generating Station)	)	September 16, 2011

ENERGY NORTHWEST'S ANSWER IN OPPOSITION TO PETITION FOR HEARING AND LEAVE TO INTERVENE

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I. INTRODUCTION

On August 22, 2011, Northwest Environmental Alliance ("Petitioner" or "NWEA") filed in this proceeding, a Petition for Hearing and Leave to Intervene and a single proposed contention that claims to address the environmental implications of the NRC Task Force Report, "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011) ("Task Force Report"), on the Columbia Generating Station ("Columbia" or "CGS") license renewal proceeding.[1] Energy Northwest is filing this timely Answer in opposition pursuant to 10 C.F.R. § 2.309(h)(1).[2]

[1] Petition for Hearing and Leave to Intervene in Operating License Renewal for Energy Northwest's Columbia Generating Station (Aug. 22, 2011) ("Petition"). The Petition also attached the Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011) ("Makhijani Declaration") . The Task Force Report is available at ADAMS Accession No. ML111861807.

[2] Under 10 C.F.R. § 2.309(h)(1), the applicant may file an answer to a request for hearing, a petition to intervene, or a proffered contention within 25 days of service.

To be granted a hearing in this license renewal proceeding, a petitioner must demonstrate standing, meet the relevant timeliness standards, *and* submit at least one admissible contention.[3] As demonstrated below, the Atomic Safety and Licensing Board ("Board") should deny the Petition because it is untimely and because the contention is substantively inadmissible.

II. BACKGROUND

Columbia is located in Washington State and generates approximately 1,150 MWe of baseload electrical power.[4] The current operating license for Columbia expires on December 20, 2023.[5] On January 19, 2010, Energy Northwest submitted its License Renewal Application ("LRA"), requesting that the NRC renew the Columbia operating license for an additional twenty years (*i.e.*, until December 20, 2043).[6] The NRC accepted the Application for docketing and published a Hearing Notice in the *Federal Register* on March 11, 2010.[7] Requests for hearing and petitions for leave to intervene were due 60 days from the publication of the Hearing Notice, by May 10, 2010.[8] No person or entity filed a timely petition to intervene in response to the Hearing Notice.

Subsequently, on April 18, 2011, Petitioner filed with the Commission an Emergency Petition to Suspend Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident

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3 *See* 10 C.F.R. § 2.309(a).

4 Applicant's Environmental Report, Operating License Renewal Stage, Columbia Generating Station at 7-5 (Jan. 2010) ("ER"), *available at* http://www.nrc.gov/reactors/operating/licensing/renewal/applications/columbia/columbia-er.pdf.

5 Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. NPF-21 for an Additional 20-Year Period; Energy Northwest; Columbia Generating Station, 75 Fed. Reg. 11,572, 11,572 (Mar. 11, 2010) ("Hearing Notice").

6 *See id*.

7 *See id*.

8 *See id*. at 11,572-73.

("Suspension Petition").[9] The Suspension Petition requested that the Commission suspend all decisions and hearings in this (and other) proceedings, perform a National Environmental Policy Act ("NEPA") analysis for whether the Fukushima accident constitutes "new and significant" information for NEPA purposes, and take other related actions.[10] The Commission recently denied the Suspension Petition in all respects[11] except the request for a safety analysis of the regulatory implications of the accident at Fukushima.[12] That request had already, "in essence," been granted by the Commission's near-term and longer term regulatory reviews.[13]

Now, over three months after the Suspension Petition and 15 months after the deadline for timely petitions, NWEA filed the instant Petition. As discussed below, the Petition suffers from a host of procedural and substantive deficiencies and should be denied in its entirety.

III. LEGAL STANDARDS

As discussed below, Petitioner must satisfy the requirements for standing under 10 C.F.R. § 2.309(d), the requirements in 10 C.F.R. § 2.309(c) for nontimely filings, the requirements in Section 2.309(f)(2) for late-filed contentions, and the requirements in Section 2.309(f)(1) for contention admissibility. A petition that fails to satisfy any of these regulations must be denied

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9 *See* Docket No. 50-397-LR, Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (dated Apr. 14-18, 2011, but served on Apr. 18, 2011); Decl. of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 20, 2011) ("Makhijani Suspension Petition Declaration"). Several other intervenor groups filed versions of the Suspension Petition on the dockets of other ongoing licensing proceedings.

10 *See* Suspension Petition at 1-3, 28-29.

11 *See generally Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __, slip op. (Sept. 9, 2011) ("CLI-11-05"). Among other deficiencies in the Suspension Petition, it was subject to summary dismissal because the Petitioner, NWEA, was not a party to this proceeding and had not even requested a hearing, *see* Energy Northwest's Answer in Opposition to Emergency Petition to Suspend Licensing Proceedings at 13-14 (May 2, 2011), but this deficiency was not addressed in the Commission's Order. *See* CLI-11-05, slip op. at 19 n.65.

12 *See* CLI-11-05, slip op. at 41-42.

13 *See id*. at 32.

in its entirety.[14] Because the Petition and contention do not meet any of these standards, as fully demonstrated below, they must be rejected by the Board on multiple grounds.

A. Standards for Standing

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).[15] Petitioner here only seeks to intervene in a representative capacity,[16] which requires them to show that: (1) its members would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claims asserted nor the relief requested require an individual member to participate in the organization's lawsuit.[17] NRC case law also requires that the organization identify the member upon whom it is relying for standing by name and address, and show, "preferably by affidavit," that the member has authorized that organization to request a hearing on his or her behalf.[18] Finally, "[w]here an organization is represented by one of its members, the member must also demonstrate authorization by that organization to represent it."[19]

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[14] *See* 10 C.F.R. § 2.309(a) (authorizing the presiding officer to grant a request for hearing and/or petition for leave to intervene "if it determines that the requestor/petitioner has standing . . . *and* has proposed at least one admissible contention") (emphasis added).

[15] *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (*citing Ga. Inst. of Tech*. (Ga. Tech Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 115 (1995)).

[16] *See* Petition at 4-6.

[17] *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998) (*citing Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977)) (presenting the test for representational standing).

[18] *See Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007); *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Indep. Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

[19] *Detroit Edison Co*. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 NRC 575, 583 (1978) (*citing Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1421 (1977)); *see also Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), LBP-90-29, 32 NRC 89, 92 (1990) (holding that a "group must also demonstrate that it has authorized the particular representative appearing before us . . . to represent the group's interest").

B. Standards for Late-Filed Petitions

The Petition itself, having been filed after the initial intervention period, is nontimely and, therefore, must meet the criteria in § 2.309(c).[20] This regulation sets forth an eight-factor balancing test for nontimely filings:

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

The burden is on the petitioner to demonstrate "that a balancing of these factors weighs in favor of granting the petition."[21] The eight factors in Section 2.309(c)(1) are not of equal importance—the first factor, whether "good cause" exists for the failure to file on time, is

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[20] *See Fla. Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-06-21, 64 NRC 30, 33 (2006) (holding that a petition to intervene filed three months after the deadline in the notice of hearing "must satisfy not only our requirements that intervenors demonstrate standing (10 C.F.R. § 2.309(d)) and submit at least one admissible contention (10 C.F.R. § 2.309(f)(1)), but also our stringent requirements for untimely filings (10 C.F.R. § 2.309(c)) and late-filed contentions (10 C.F.R. § 2.309(f)(2)"); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-05-16, 62 NRC 56, 65-66 (evaluating a petition to intervene filed eight months late under Section 2.309(c)(1)), *rev'd on other grounds*, CLI-05-24, 62 NRC 551 (2005).

[21] *See Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

entitled to the most weight.[22] If good cause is lacking, then a "compelling showing" must be made as to the remaining factors to outweigh the lack of good cause.[23] After good cause, the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) is the most significant factor.[24] Factors five (availability of other means) and six (interests represented by other parties) are entitled to the least weight.[25]

Additionally, a new contention filed after the initial intervention period must meet the requirements of 10 C.F.R. § 2.309(f)(2)(i) to (iii), which provide that a petitioner may submit a new contention only with leave of the presiding officer upon a showing that:

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

The Commission very recently reiterated that the publication of a new document, standing alone, does not meet the new and materially different standard in 10 C.F.R. § 2.309(f)(2) unless the information in that document is new and materially different from what was

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22 *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-26 (2009) ("[Section 2.309(c)(1)] sets forth eight factors, the most important of which is 'good cause' for the failure to file on time. Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available.") (*citing Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008); *Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 164-165 (1993)).

23 *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

24 *See, e.g.*, *Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 395 (1976).

25 *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-8, 51 NRC 146, 154 (2000) (*citing Braidwood*, CLI-86-8, 23 NRC at 244-45).

previously available.[26] If an intervenor cannot satisfy the criteria of 10 C.F.R. § 2.309(f)(2), then a contention is considered nontimely.[27]

C. Standards for Contention Admissibility

Apart from the criteria set forth in 10 C.F.R. §§ 2.309(f)(2) and (c), any new contention must also meet the substantive admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[28] Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." In addition, that section specifies that each contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised is within the scope of the proceeding; (4) a demonstration that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[29]

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[26] *See*, *e.g.*, *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, slip op. at 13-18 (Sept. 30, 2010).

[27] The Commission has indicated that for new contentions filed by an admitted party, the timeliness standard is 10 C.F.R. § 2.309(f)(2), not 10 C.F.R. § 2.309(c). *See Pa'ina Haw., LLC* (Materials License Application), CLI-10-18, 72 NRC __, slip op. at 40 n.171 (July 8, 2010) (discussing the applicability of Section 2.309(f)(2) versus Section 2.309(c), and stating: "To be clear, in the circumstances presented here, where [the intervenor] was admitted to this case as a party at the time it filed [the new contention], consideration of the contention's admissibility is governed by the provisions of § 2.309(f)(2), as well as the general contention admissibility requirements of § 2.309(f)(1)."). Therefore, because the contention does not meet the timeliness requirements of Section 2.309(f)(2), the analysis should end.

[28] *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993); *see also Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Neb.), CLI-09-9, 69 NRC 331, 364 (2009) (stating that the timeliness of the late-filed contention need not be evaluated because the contention did not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)).

[29] *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi). The seventh contention admissibility requirement—10 C.F.R. § 2.309(f)(1)(vii)—only is applicable in proceedings arising under 10 C.F.R. § 52.103(b) and, therefore, has no bearing on the admissibility of Petitioner's proposed contentions in this proceeding.

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[30] The licensing board will deny a petition to intervene and request for hearing from a petitioner who has standing, but has not proffered at least one admissible contention.[31] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[32]

The NRC's contention admissibility rules are, thus, "strict by design."[33] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[34] In 2004, the NRC implemented additional amendments to the adjudicatory process, continuing its requirement that "well-supported, specific contentions . . . [be submitted] in all proceedings."[35] Thus, failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[36] As the Commission recently reiterated, "the initial burden of showing whether the contention meets our admissibility standards" lies with the petitioner.[37] The legal principles governing each of the six pertinent criteria in 10 C.F.R. § 2.309(f)(1) are discussed briefly below.

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30 Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

31 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 26 (2001).

32 Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

33 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

34 *Id.*

35 Changes to Adjudicatory Process, 69 Fed. Reg. at 2188.

36 *See id.* at 2221; *see also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

37 *Progress Energy Carolinas, Inc.* (Shearon Harris, Units 2 & 3), CLI-09-8, 69 NRC 317, 325 (2009).

1. Petitioner Must Specifically State the Issue of Law or Fact to Be Raised

A petitioner must "articulate at the outset the specific issues [it] wish[es] to litigate as a prerequisite to gaining formal admission as [a party]."[38] Namely, an admissible contention must explain, with specificity, "particular safety or legal reasons requiring rejection of the contested [application]."[39] The contention rules "bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later.'"[40]

2. Petitioner Must Briefly Explain the Basis for the Contention

A petitioner must provide "a brief explanation of the basis for the contention."[41] This includes "sufficient foundation" to "warrant further exploration."[42] The petitioner's explanation serves to define the scope of a contention, as "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases."[43] The licensing board, however, must determine the admissibility of the contention itself, not the admissibility of individual "bases."[44]

As the Commission has observed, "[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of [the] proceeding."[45] In other words, "[a] contention's proponent, not the licensing board, is responsible for formulating the

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38 *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 338 (1999); *see also* 10 C.F.R. § 2.309(f)(1)(i).

39 *Millstone*, CLI-01-24, 54 NRC at 359-60.

40 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 424 (2003) (*quoting Oconee*, CLI-99-11, 49 NRC at 337-39).

41 10 C.F.R. § 2.309(f)(1)(ii); *see also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

42 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-942, 32 NRC 395, 428 (1990).

43 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom.*, *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991).

44 *See La. Energy Servs., L.P.* (Nat'l Enrichment Facility), LBP-04-14, 60 NRC 40, 57 (2004) ("licensing boards generally are to litigate 'contentions' rather than 'bases'").

45 *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-14, 48 NRC 39, 41 (1998).

contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[46]

3. Contentions Must Be Within the Scope of the Proceeding

A petitioner must demonstrate "that the issue raised in the contention is within the scope of the proceeding."[47] The scope of the proceeding is defined by the Commission's notice of opportunity for a hearing.[48] Moreover, contentions are necessarily limited to issues that are germane to the specific application pending before the licensing board.[49] Any contention that falls outside the specified scope of the proceeding must be rejected.[50]

A contention that challenges an NRC rule is outside the scope of the proceeding because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[51] Furthermore, a contention that raises a matter that is, or is about to become, the subject of a rulemaking, is also outside the scope of this proceeding.[52] This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.[53]

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46 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

47 10 C.F.R. § 2.309(f)(1)(iii).

48 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985).

49 *See Yankee Atomic*, CLI-98-21, 48 NRC at 204.

50 *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) (affirming the board's rejection of issues raised by intervenors that fell outside the scope of issue identified in the notice of hearing).

51 10 C.F.R. § 2.335(a).

52 *See Oconee*, CLI-99-11, 49 NRC at 345 (*citing Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)) (affirming the board's rejection of a contention regarding the transportation of spent fuel rods because it was the subject of a pending rulemaking); *see also* Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (referring to the Commission's "longstanding precedent that 'licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission'").

53 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159-60, *aff'd*, CLI-01-17, 54 NRC 3 (2001) (rejecting the petitioner's contention that a license renewal applicant was required to prepare a probabilistic risk assessment ("PRA"), where the Commission's license renewal regulations did not require a PRA).

Similarly, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must be rejected by the licensing board as outside the scope of the proceeding.[54] Accordingly, a contention that simply states the petitioner's views about regulatory policy—or takes issue with the nature of existing regulations—does not present a litigable issue.[55]

4. Contentions Must Raise a Material Issue

A petitioner must demonstrate "that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding."[56] As the Commission has observed, "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[57] In this regard, each contention must be one that, if proven, would entitle the petitioner to relief.[58] Additionally, contentions alleging an error or omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment.[59]

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54 *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 57-58 (2007) (stating that a contention that attacks applicable statutory requirements "must be rejected by a licensing board as outside the scope of the proceeding") (*citing Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974)).

55 *See Peach Bottom*, ALAB-216, 8 AEC at 20-21. Within the adjudicatory context, however, a petitioner may submit a request for waiver of a rule under 10 C.F.R. § 2.335(b). Conversely, outside the adjudicatory context, a petitioner may file a petition for rulemaking under 10 C.F.R. § 2.802 or request that the NRC staff take enforcement action under 10 C.F.R. § 2.206.

56 10 C.F.R. § 2.309(f)(1)(iv).

57 *Oconee*, CLI-99-11, 49 NRC at 333-34 (*citing* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172).

58 *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 n.10 (2002) (stating that an issue is material "only if it would entitle petitioner to relief").

59 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004).

5. Contentions Must Be Supported by Adequate Factual Information or Expert Opinion

A petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately, and failure to do so requires the licensing board to reject the contention.[60] The petitioner's obligation in this regard has been described as follows:

> [A]n intervention petitioner has an *ironclad obligation* to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section [2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.[61]

Where a petitioner neglects to provide the requisite support for its contentions, the licensing board may not make assumptions of fact that favor the petitioner or supply information that is lacking.[62] The petitioner must explain the significance of any factual information upon which it relies.[63]

With respect to factual information or expert opinion proffered in support of a contention, "the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[64] In addition, "an expert opinion that

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60 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262-63 (1996); *see also* 10 C.F.R. § 2.309(f)(1)(v).

61 *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added).

62 *See Crow Butte Res., Inc.* (N. Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009) ("[A] board should not add material not raised by a petitioner in order to render a contention admissible."); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991) (rejecting petitioners' basis for a contention, where the board inferred information that was not presented in the proposed contention).

63 *See Fansteel, Inc.* (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 204-05 (2003) (rejecting a contention regarding decommissioning funding assurance where petitioner relied on its brief reference to applicant's "Disclosure Statement and Reorganization Plan" without explaining how that document undermined the applicant's assurance of funding).

64 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd*, CLI-98-13, 48 NRC 26 (1998).

merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion" as it is alleged to provide a basis for the contention.[65]

Any supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to licensing board scrutiny, "both for what it does and does not show."[66] The licensing board will examine documents to confirm that they support the proposed contentions.[67] A petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[68] Moreover, vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.[69] The mere incorporation of massive documents by reference is unacceptable.[70]

6. Contentions Must Raise a Genuine Dispute of Material Law or Fact

The Commission has stated that the petitioner must "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant.[71] If a petitioner believes the license application fails to adequately address a relevant issue, then the petitioner is to "explain why the application is

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65 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (*quoting Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

66 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996).

67 *See Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

68 *Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300, *aff'd*, CLI-95-12, 42 NRC 111 (1995).

69 *See Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

70 *Id.*; *see also Tenn. Valley Auth.* (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 NRC 209, 216 (1976).

71 Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Millstone*, CLI-01-24, 54 NRC at 358.

deficient."[72] A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal.[73] Similarly, a petitioner's oversight does not raise a genuine issue. For example, if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine dispute.[74]

Further, an allegation that some aspect of a license application is "inadequate" or "unacceptable" does not establish a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.[75] Thus, in order to raise a genuine dispute with an applicant's analysis, a petitioner must make at least a "minimal demonstration" that the "analysis fails to meet a statutory or regulatory requirement."[76]

IV. ARGUMENT

A. Based on Petitioner's Representations, Energy Northwest Does Not Object to Petitioner's Standing

Based on NWEA's representations, Energy Northwest does not object to Petitioner's standing to intervene in this proceeding. Petitioner's declarant, Mr. Tom Bailie, asserts that he lives "approximately 18 miles from the site of Columbia Generating Station."[77] Mr. Bailie provides his address and states that NWEA is authorized to represent his interests in this

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72 Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Palo Verde*, CLI-91-12, 34 NRC at 156.

73 *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992), *vacated as moot*, CLI-93-10, 37 NRC 192 (1993).

74 *See Millstone*, LBP-04-15, 60 NRC at 95.

75 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509, 521, 521 n.12 (1990).

76 *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 187 (2008).

77 Declaration of Standing of Tom Bailie at 1.

proceeding.[78] Energy Northwest does not object to Petitioner's showing of standing based on Mr. Bailie's representations.[79]

B. The Petition and Contention Do Not Satisfy the Timeliness Requirements in 10 C.F.R. § 2.309(c) and (f)(2)

Pursuant to the Hearing Notice and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired on May 10, 2010, over fifteen months ago without an intervention by Petitioner or any other potential intervenors. Therefore, the Petition is subject to 10 C.F.R. § 2.309(c), which governs nontimely petitions.[80] Additionally, as explained above, the contention must meet the standards of a late-filed contention found in Section 2.309(f)(2). The Petitioner bears the burden of successfully addressing the "stringent" late-filing criteria.[81] As the Commission recently explained in *Vermont Yankee*: "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."[82]

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78 *Id.* at 2.

79 Energy Northwest objects to NWEA's standing based on the Declaration of Mr. Bruce Smartlowit, who appears to live outside of a 50-mile radius of Columbia. He identifies his post office box in Toppenish, Washington, approximately 47 miles from Columbia, and asserts that he is "frequently within 50 miles" of the site, for example to pick up his mail. Declaration of Standing of Bruce Smartlowit at 1. However, that Declaration does not define what is meant by "frequent." Energy Northwest also objects to NWEA's standing based on the other Declarant, Mr. Scott Madison, who does not assert that he lives within 50 miles of Columbia. Based on his address, it appears he lives outside the 50-mile area within which the proximity presumption applies. Declaration of Standing of Scott Madison at 1.

80 *See Calvert Cliffs*, CLI-06-21, 64 NRC at 33 ("Our notices of opportunity for hearing with regard to the Applications specified that potential parties must file their petitions to intervene no later than March 14, 2006. The Union's June 6th filings are therefore nearly 3 months late. As such, they must satisfy not only our requirements that intervenors demonstrate standing (10 C.F.R. § 2.309(d)) and submit at least one admissible contention (10 C.F.R. § 2.309(f)(1)), but also our stringent requirements for untimely filings (10 C.F.R. § 2.309(c)) and late-filed contentions (10 C.F.R. § 2.309(f)(2)).").

81 *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC __, slip op. at 5 (March 10, 2011); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260-61 (2009).

82 *Vt. Yankee*, CLI-11-02, slip op. at 5.

1. The Petition Does Not Satisfy the Requirements for Nontimely Filings Under 10 C.F.R. § 2.309(c)

An initial petition to intervene filed after the deadline set forth in the Hearing Notice is nontimely and, therefore, subject to the requirements of 2.309(c).[83] As discussed below, Petitioner fails to demonstrate the necessary "good cause" for its tardy initial petition, filed fifteen months after the publication of the Hearing Notice. Nor has Petitioner made a "compelling showing" as to the remaining factors to outweigh the lack of good cause.[84] Accordingly, the balance of the factors under 10 C.F.R. § 2.309(c)(1) warrants rejection of the Petition.

a. *Petitioner Has Not Shown Good Cause for Failing to File on Time*

Petitioner asserts several reasons why it allegedly has "good cause" for its failure to seek intervention in a timely manner, none of which are sufficient to meet the standard under Section 2.309(c)(1)(i).

First, Petitioner claims that it "was not made aware of the opportunity to petition to intervene when Energy Northwest submitted its application."[85] According to Petitioner, given its "longtime interest in commercial nuclear reactors in Washington State" and its intervention in prior licensing proceedings, "we incorrectly assumed that the licensee and NRC Staff would consider us potentially interested parties and would therefore inform us of the notice when it was issued."[86] Essentially, Petitioner asserts that notice in the *Federal Register* was insufficient, and

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83 *See Calvert Cliffs*, CLI-06-21, 64 NRC at 33.

84 *See Braidwood*, CLI-86-8, 23 NRC at 244.

85 Petition at 10.

86 *Id*.

that it was entitled to "physical mailings of any notice associated with the operating license of the CGS."[87]

Petitioner concedes, however, that "the NRC issued a notice of opportunity for a hearing regarding the renewal of the CGS in the Federal Register on March 11, 2010."[88] That is all the notice Petitioner is entitled to under 10 C.F.R. § 2.101(c).[89] As the Appeal Board explained long ago in *WPPSS Unit 3*, a petitioner cannot demand additional, personal notice.[90] Indeed, NWEA should be well aware of this principle, as its representative in this proceeding also represented the intervenor who demanded personal notice in *WPPSS Unit 3*.[91] Numerous Boards have similarly concluded that the "failure to read the Federal Register does not justify non-timely filing of a petition."[92] Thus, Petitioner's desire for special, personal notice is unfounded and fails to provide good cause for its tardy filing.

Petitioner also claims that it "did not anticipate the notice of opportunity for hearing would be filed so many years prior to expiration of the operating license."[93] NRC regulations, however, clearly permit applicants to file an LRA as early as "*20 years* before the expiration of

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87 *Id*.

88 *Id.*

89 *See Millstone*, CLI-05-24, 62 NRC at 565 n. 60 ("The Board correctly viewed *Federal Register* publication of a notice of hearing opportunity as legally adequate notice.") (*citing California v. FERC*, 329 F.3d 700, 707 (9th Cir. 2003) ("Publication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice.")).

90 *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171-72 (1983) ("concur[ring] fully" with the Licensing Board's determination of no good cause based on a petitioner's expectation that notice be published in a particular newspaper, and because it "had cause to assume that one of its members . . . would be informed by the NRC of both the docketing of the operating license application and the opportunity for hearing on it") ("WPPSS Unit 3").

91 *Id*. at 1169 ("Nina Bell, Portland, Oregon, for the petitioner, Coalition for Safe Power.").

92 *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), LBP-81-11, 13 NRC 420, 423 (1981), (*citing New Eng. Power & Light Co.* (NEP Units 1 & 2), LBP-78-18, 7 NRC 932, 933-934 (1978)); *see also Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-5, 31 NRC 73, 79 (1990) (*citing Tenn. Valley Auth.* (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB–341, 4 NRC 95 (1976)), *aff'd,* ALAB-950, 33 NRC 492, 495-96 (1991).

93 Petition at 10.

the operating license . . . currently in effect."[94] As with Petitioner's failure to review the Federal Register (or the NRC's website), its failure to anticipate the possibility that Energy Northwest would submit an LRA when it did does not provide good cause. In fact, given Petitioner's asserted experience in numerous NRC licensing proceedings,[95] it should have been well aware of its obligation to seek a hearing promptly after the publication of the Hearing Notice.

Additionally, the Petitioner claims that it has good cause for the late Petition, because its proposed contention is based upon the NRC's Task Force Report that did not become available until July 12, 2011.[96] However, as described below in Section IV.B.2, the proposed contention was not filed in a timely manner even considering the date of the Task Force Report. Therefore, the Petitioner does not have good cause for its nontimeliness due to the release of new information.

b. *Petitioner Has Not Made a Compelling Showing on the Remaining Factors*

Since Petitioner has failed to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), the remaining seven factors must weigh heavily in its favor in order for the Petition to be granted.[97] They do not.

The fifth factor is the availability of other means whereby the petitioner's interest will be protected.[98] Petitioner claims that this proceeding is the only means for its concerns to be addressed.[99] However, the Commission has already taken steps to protect Petitioner's interests by planning broader stakeholder involvement, including potential rulemakings, concerning the

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94 10 C.F.R. § 54.17(c) (emphasis added).

95 *See* Petition at 11.

96 *See id*. at 11-12.

97 *See Braidwood*, CLI-86-8, 23 NRC at 244.

98 10 C.F.R. § 2.309(c)(1)(v).

99 *See* Petition at 13-14.

Task Force recommendations.[100] Just recently, the Commission issued a Staff Requirements Memorandum emphasizing the critical importance of "engaging internal and external stakeholders" and directing the Staff to take numerous specific actions to lend additional credibility and transparency to the agency's actions related to the Task Force Report.[101] Accordingly, ongoing Task Force-related activities and proceedings provide Petitioner with means to protect its interests.[102] Additionally, Petitioner may submit a petition for rulemaking under 10 C.F.R. § 2.802 or a petition for enforcement under 10 C.F.R. § 2.206.[103] As such, factor five also weighs against the Petition.

Factor seven, the second most important factor after good cause,[104] requires the evaluation of the extent to which the petitioner's participation will broaden the issues or delay the proceeding.[105] As Petitioner concedes "any participation by any member of the public will perforce broaden the issues or delay a currently non-existent proceeding."[106] The Commission has specifically held that granting a request that results in the establishment of an entirely new

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100 *See* Commission Staff Requirements Memorandum ["SRM"] Regarding SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan at 1 (Aug. 19, 2011), *available at* ADAMS Accession No. ML112310021 ("SRM on SECY-11-0093") ("The Commission directs the staff to engage promptly with stakeholders to review and assess the recommendations of the Near-Term Task Force in a comprehensive and holistic manner for the purpose of providing the Commission with fully-informed options and recommendations. Staff is instructed to remain open to strategies and proposals presented by stakeholders, expert staff members, and others as it provides its recommendations to the Commission.").

101 Commission SRM Regarding COMWDM-11-0001/COMWCO-11-0001, Engagement of Stakeholders Regarding the Events in Japan at 1 (Aug. 22, 2011), *available at* ADAMS Accession No. ML112340693.

102 *See Millstone*, CLI-05-24, 62 NRC at 565-66 (finding that opportunity to petition for rulemaking and opportunity to comment on pending petition for rulemaking provides a means for petitioner to protect its interests).

103 *See id*. Petitioner here has in fact submitted a petition for rulemaking raising issues very similar to those raised in its proposed contention.

104 *See Braidwood*, CLI-86-8, 23 NRC at 244, 247.

105 10. C.F.R. § 2.309(c)(1)(vii).

106 Petition at 14-15. The Petitioner argues that its participation will not delay the proceeding because the license for Columbia will not expire for 12 years. *See id*. at 14. However, under 10 C.F.R. § 2.309(c), the question is whether petitioner's participation will delay the "proceeding," not the date of expiration of the license. Petitioner also argues that its participation will not delay the proceeding, because its contention could not have been submitted in 2010. *Id*. at 15. However, that argument relates to "good cause," not delay in the proceeding.

proceeding weighs heavily against Petitioner.[107] The Commission has specifically held that even when the NRC Staff is months away from completing its reviews of the application, its policy of "expediting the handling of license renewal applications" accorded giving this factor full weight.[108] This factor, therefore, weighs squarely against Petitioner.

The eighth factor is the extent to which Petitioner's participation will contribute to the development of a sound record.[109] Petitioner provides no indication that its participation would do so. To the contrary, Petitioner essentially stated that it did not wish to litigate the "environmental implications of the Fukushima accident" in this proceeding and instead wished to suspend all licensing proceedings while the Commission performed a generic evaluation.[110] The Commission has already undertaken consideration of the issues in the Task Force Report, so simply admitting these same issues in a new proceeding here—and potentially holding them in abeyance—will not in any way contribute to the development of a sound record.

The Petitioner also refers to the Makhijani Declaration in support of its claim that it will assist in developing a sound record.[111] Initially, we note that the Makhijani Declaration does not mention Columbia, is entirely generic, and has been submitted in numerous other proceedings.[112] The Petition does not aver that Dr. Makhijani will actually be working for the Petitioner. Furthermore, as the Commission has recently noted with respect to the declaration of Dr. Makhijani submitted with the Suspension Petition (which is similar to the Declaration filed with the proposed contention), "Dr. Makhijani provides mostly speculation, not facts or evidence, on

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107 *See Comanche Peak*, CLI-93-4, 37 NRC at 167; *see also Millstone*, 62 NRC at 556.

108 *Millstone*, 62 NRC at 556-57.

109 10 C.F.R. § 2.309(c)(1)(viii).

110 *See, e.g.*, Petition at 19 ("these contentions and the rulemaking petitions follow up on the Emergency Petition's demand"). The Commission has since rejected the "Emergency" Suspension Petition. *See* CLI-11-05, slip op. at 41-42.

111 Petition at 17.

112 *See generally* Makhijani Declaration.

potential implications for U.S. facilities."[113] Therefore, the Makhijani Declaration does not indicate that he will be able to assist in developing a sound record in this proceeding.

Furthermore, Petitioner is attempting to help develop a sound record related to an inadmissible contention. As explained below, in Section IV.C.1, the contention impermissibly challenges Commission regulations and is therefore outside the scope of the proceeding. The Commission has held that contribution to the record outside the scope of the proceeding does not assist in the development of a sound record.[114]

Finally, the analysis of a petitioner's ability to contribute to the record is particularly stringent when the granting of such a petition will decide whether there is an adjudicatory hearing at all.[115] As the Appeals Board explained, there is "no reason to allow an inexcusably belated intervention petition to trigger a hearing unless there is cause to believe that the petitioner not only proposes to raise at least one substantial safety or environmental issue but, as well, is equipped to make a worthwhile contribution on it."[116] In the present case, Petitioner cannot demonstrate that it will make a worthwhile contribution by merely relying upon the Task Force Report prepared by the NRC Staff, along with the opinions of an expert whose previous report was dismissed by the Commission as "mostly speculation."[117] Under these circumstances, factor eight weighs heavily against Petitioner.

The remaining factors in 10 C.F.R. § 2.309(c)(1)—the second, third, fourth, and sixth—are less important and by no means outweigh Petitioner's failure to demonstrate good cause or

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113 CLI-11-05, slip op. at 27.

114 *See Millstone*, 62 NRC at 567.

115 *WPPSS No. 3*, ALAB-747, 18 NRC at 1180-81.

116 *Id.*

117 CLI-11-05, slip op. at 27.

meet factors five, seven, and eight.[118] Having failed to establish good cause and make a compelling showing on three of the remaining seven factors, the balance of the nontimely factors weighs against Petitioner. Therefore, Petitioner fails to meet 10 C.F.R. § 2.309(c), and its Petition should be denied.

2. The Contention Is Nontimely Under 10 C.F.R. § 2.309(f)(2)

In addition to the requirements for nontimely petitions to intervene, the timeliness of a contention is evaluated under 10 C.F.R. § 2.309(f)(2).[119] In some circumstances, the availability of new information may provide good cause for a late filing. In this regard, the Commission has held:

> [T]he test is when the information became available and when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.[120]

However, the Commission very recently reiterated that the publication of a new document, standing alone, does not meet the requirements of 10 C.F.R. § 2.309(f)(2) unless the *facts* in that document are new and materially different from what was previously available.[121] In other words, the publication of a document wherein the NRC Staff compiles, organizes, and evaluates previously available facts cannot be the trigger for a timely new contention.[122]

NWEA asserts that its Petition is timely because it was filed "promptly" after the issuance of the Task Force Report, and that "prior to issuance of the . . . [Task Force Report], the

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118 *See, e.g.*, *Comanche Peak*, CLI-93-4, 37 NRC at 165.

119 *See Pa'ina*, CLI-10-18, slip op. at 40 n.171.

120 *Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 70 (1992).

121 *See, e.g.*, *Prairie Island*, CLI-10-27, slip op. at 13-18.

122 *See id.* at 14 (reversing a Board's admission of an untimely contention because the NRC Staff's Safety Evaluation Report "merely compiled and organized certain pre-existing information" and provided the Staff's conclusions).

information material to the contention was simply unavailable."[123] Petitioner does not, however, identify any new information supporting the Task Force's recommendations that was first revealed in the Task Force Report. Because Petitioner has not carried its burden of identifying when any new *facts* supporting its contention became public, and point instead to the publication of the Task Force's *opinions and recommendations* regarding the events in Japan, the contention is not timely.[124] Indeed, Petitioner's theory would defeat the purpose of the timeliness rules and authorize petitioners to wait to file contentions after the NRC Staff publishes its review of new information, a practice the Commission has rejected.[125]

Moreover, Petitioner readily admits:

> In the aggregate, these contentions and the rulemaking petitions follow up on the Emergency Petition's demand that the NRC comply with NEPA by addressing the lessons of the Fukushima accident in its environmental analyses for licensing decisions. Having received no response to their Emergency Petition, the signatories to the Emergency Petition now seek consideration of the Task Force's far-reaching conclusions and recommendations in each individual licensing proceeding, including the instant case.[126]

Thus, Petitioner essentially concedes that its contention is simply an alternative approach to reargue the same issues raised some *four months ago* in the Suspension Petition they already filed with the Commission. Consequently, the contention is not timely and the contention must be denied.

Furthermore, even if the date of the Task Force Report were treated as the trigger date for a new contention, the Petitioner's proposed contention would be late. Petitioner waited 41 days following the release of the Task Force report to file its Petition, and eleven days after numerous

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123 Petition at 11.

124 *See Prairie Island*, CLI-10-27, slip op. at 14.

125 *See Vt. Yankee*, CLI-11-02, slip op. at 13 (upholding the Board's denial of an untimely contention which relied upon an NRC Information Notice which "summarized" and "compiled" previously available facts); *Prairie Island*, CLI-10-27, slip op. at 14.

126 Petition at 19.

other petitioners filed substantively identical petitions on August 11, 2011.[127] As has been held in numerous proceedings, a contention is considered timely under 10 C.F.R. § 2.309(f)(2) if it is filed within 30 days of the trigger event.[128] Therefore, Petitioner waited too long after the release of the Task Force Report to file its contention and therefore does not meet 10 C.F.R. § 2.309(f)(2).

C. The Petitioner's Proposed Contention Does Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

Petitioner's contention states:

> The ER for CGS license renewal fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.[129]

According to Petitioner, the NRC Task Force Report recommends that the Commission establish new safety regulations for severe accidents because, in Petitioner's view, the Task Force found that "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment throughout the licensed life of nuclear reactors."[130]

Petitioner claims this recommendation concerning the imposition of severe accident mitigation measures as design basis requirements constitutes "new and significant information" that "must be considered before the NRC may make a decision that approves license renewal for CGS."[131] In the view of Petitioner, this information is "new" because the Task Force Report was released only recently and is "significant" because of the "extraordinary level of concern" over

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127 *See* CLI-11-05, slip op. at 27 n.91.

128 *See*, *e.g.*, *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007) ("many boards, including this one, have established a general 30-day rule for the filing of such motions" for leave to file a late-filed contention under 10 C.F.R. § 2.309(f)(2)).

129 *Id.* at 20.

130 *Id*. at 18.

131 *Id.* at 25.

the safe operation of Columbia.[132] Petitioner further argues that the imposition of severe accident mitigation measures is "significant" from a NEPA perspective because: (1) such measures may have been rejected as too costly but may now be required, improving plant safety and (2) consideration of the economic costs of mandatory mitigation measures could impact the overall NEPA cost-benefit analysis.[133]

As demonstrated below, this contention should be rejected because it challenges the adequacy of NRC's regulatory programs and raises issues that are about to become the subject of rulemaking, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a); calls for consideration of issues that are not material to NRC's NEPA review, contrary to 10 C.F.R. § 2.309(f)(1)(iv); lacks adequate factual support and mischaracterizes the Task Force Report, contrary to 10 C.F.R. § 2.309(f)(1)(v); and fails to raise a dispute of material fact or law, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

1. The Contention Challenges the Adequacy of Existing NRC Regulations and Raises Issues That Are Likely to Become the Subject of Rulemaking, Contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a)

The contention should be rejected because it impermissibly mounts a direct challenge to the adequacy of NRC regulations and attempts to litigate issues that are likely to be part of future NRC rulemaking.[134] Such challenges are specifically prohibited by 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).[135]

First, NRC case law makes it abundantly clear that any contention that collaterally attacks the basic structure of the NRC regulatory process must be rejected as outside the scope of the

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132 *Id.*

133 *Id.* at 27-28.

134 *See* SRM on SECY-11-0093, at 1-2.

135 *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC __, slip op. at 38 (Mar. 11, 2010).

proceeding.[136] A contention—such as this one—that simply states the Petitioner's views about what regulatory policy should be does not present a litigable issue.[137]

As demonstrated below, Petitioner's claim that the Task Force Report found "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment"[138] is simply wrong.[139] Nonetheless, this claimed inadequacy in NRC's regulatory framework is the central thesis of the Petitioner's claim that additional NEPA analysis is necessary.[140] Because Petitioner advocates for stricter requirements than current agency rules impose (*i.e.*, evaluation of potential additional severe accident mitigation regulations), the contention should be rejected as it falls outside the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii).[141]

Second, the contention should be rejected because it attempts to litigate issues that are likely to be part of future NRC rulemaking.[142] Commission precedent dictates that a contention that raises a matter that is, or is about to become, the subject of a rulemaking is outside the scope of a licensing proceeding and, thus, does not provide the basis for a litigable contention.[143] As evidenced by the SRM on SECY-11-0093, the issues raised in the contention are the subject of ongoing Commission deliberation—a process that Petitioner will have full opportunity in which

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136 *Shearon Harris*, LBP-07-11, 65 NRC at 57-58 (*citing Peach Bottom,* ALAB-216, 8 AEC at 20).

137 *See Peach Bottom*, ALAB-216, 8 AEC at 20-21.

138 Petition at 18.

139 *See* Task Force Report at 73.

140 Petition at 20, 23.

141 *See Turkey Point*, LBP-01-6, 53 NRC at 159; *see also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-19, 60 NRC 5, 12 (2004) ("compliance with applicable NRC regulations ensures that public health and safety are adequately protected in areas covered by the regulations").

142 *See* SRM on SECY-11-0093, at 1-2.

143 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC __, slip op. at 2-3 (July 8, 2010); *Oconee*, CLI-99-11, 49 NRC at 345 (holding that while the topic petitioners sought to raise was not governed by a current rule, the issuance of an SRM for the NRC Staff to initiate a rulemaking on the topic was sufficient to preclude the topic from litigation in individual licensing proceedings) (*citing Douglas Point*, ALAB-218, 8 AEC at 85).

to participate.[144] This process will take place irrespective of and wholly apart from the license renewal process.[145] Even before the Task Force Report, the NRC stated that post-Fukushima regulatory changes will be considered in a generic manner.[146] Petitioner, in turn, agrees that the issues raised in the contention may be appropriate for generic consideration in a rulemaking and have even submitted its own rulemaking petition.[147] Because Petitioner may not seek adjudication of issues to be addressed by the Commission generically as part of the rulemaking process resulting from the Task Force Report, the contention should be rejected.

Third, the contention should be rejected because it impermissibly challenges the finding in 10 C.F.R. Part 51, Appendix B, that the environmental impacts of design basis accidents, severe accidents, and spent fuel storage are "SMALL." These conclusions may not be challenged in litigation unless the regulations are waived by the Commission for a particular proceeding, or the rule itself is suspended or altered in a rulemaking proceeding—none of which has occurred here.[148] The Commission has emphasized that litigating generic "issues site by site based merely on a claim of 'new and significant information,' would defeat the purpose of

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144 SRM on SECY-11-0093, at 1.

145 *See* Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 13, *N. J. Envtl. Fed'n v. NRC*, No. 09-2567 (3d Cir. Apr. 4, 2011), *available at* ADAMS Accession No. ML110950095 ("As with the post-TMI and post-9/11 regulatory enhancements, any 'lessons learned' from the Fukushima Daiichi event will be applied generically to all reactors, . . . as appropriate to their location, design, construction, and operation. No safety, technical, or policy justification exists to single out particular reactors for different treatment just because of their place in the licensing queue . . . ."); *id.* at 17-18 ("NRC has in place many broader regulatory tools that are appropriate vehicles to implement 'lessons learned' from the events at Fukushima Daiichi, including mechanisms for members of the public to bring to NRC's attention safety concerns that they believe the agency might have overlooked or underappreciated. . . . NRC's comprehensive and ongoing oversight of licensed facilities will assure that useful data and 'lessons learned' from Fukushima Daiichi disaster will be absorbed by changes in NRC rules, orders, and license amendments as needed, accompanied by the public participation required by statute and regulation. This process is distinct, however, from the disposition of specific contentions admitted for hearing (or proposed for admission) in a license renewal adjudication . . . .").

146 *See id.* at 13.

147 *See* Petition at 32.

148 *See Indian Point*, LBP-08-13, 68 NRC at 185-86; *Entergy Nuclear Vt. Yankee LLC* (Vt. Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 (2007), *aff'd Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008); *Turkey Point*, CLI-01-17, 54 NRC at 12.

resolving generic issues in a GEIS."[149] Thus, the challenge to NRC's Part 51 regulations is outside the scope of this proceeding and inadmissible under 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a).

2. The Contention Improperly Interprets the NEPA "New and Significant" Standard for a Supplemental EIS, Failing to Raise a Material Issue of Fact or Law, Contrary to 10 C.F.R. § 2.309(f)(1)(iv)

The contention also should be rejected because it raises issues that are not material to the NRC Staff's environmental findings in this proceeding. Contrary to the Petitioner's claim, an issue is not deemed "significant" for purposes of preparation of a supplemental EIS merely "because it raises an extraordinary level of concern."[150] Instead, pursuant to 10 C.F.R. § 51.72(a), NRC must only supplement a draft EIS if there are (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. To be significant, "new information must present 'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'" [151] For the reasons stated below, the recommendations in the Task Force Report are neither new nor significant.

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149 *Vt. Yankee*, CLI-07-3, 65 NRC at 21.

150 Petition at 25.

151 *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-99-22, 50 NRC 3, 14 (1999) (*citing Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); *accord Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).

a. *The Commission Has Already Determined that the Task Force Report Has Revealed No New and Significant Information for NEPA Purposes*

In CLI-11-05, the Commission determined that, currently, the Fukushima accident, including the Task Force Report, have not revealed any "new and significant" information under 10 C.F.R. § 51.72(a).[152] The Commission explained:

> Although the Task Force completed its review and provided its recommendations to us, the agency continues to evaluate the accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear. In short, we do not know today the full implications of the Japan events for U.S. facilities. Therefore, any generic NEPA duty—if one were appropriate at all—does not accrue now.[153]

The Commission went on to note that "*if* . . . new and significant information comes to light," the agency will reasses the situation.[154] But at this time, it held that "given the current state of information available to us" there is no new and significant information requiring further NEPA analysis.[155]

b. *The Contention Fails to Identify Any "New and Significant" Information*

Contrary to Petitioner's claim, an issue is not deemed "significant" for purposes of preparing a supplemental EIS merely "because it raises an extraordinary level of concern."[156] That definition of "significant" is neither compatible with nor satisfies 10 C.F.R. § 51.72(a).[157] Instead, the Petitioner must identify a change in the project or the environmental impacts of the project. The Petitioner does neither.

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152 CLI-11-05, slip op. at 30-31.

153 *Id*. at 30.

154 *Id.* (emphasis added).

155 *Id*. at 31.

156 Petition at 25.

157 *See Sierra Club v. Wagner*, 555 F.3d 21, 30-31 (1st Cir. 2009) (holding that potentially controversial nature of a project is not sufficient to require preparation of an EIS); *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 233-234 (5th Cir. 2006) (holding that general public opposition is insufficient to require preparation of an EIS).

The ER and DSEIS considers design basis accidents, severe accidents, and severe accident mitigation alternatives ("SAMAs").[158] The Task Force Report contains no "new and significant" information that might indicate deficiencies in the ER or DSEIS. Nothing in the Task Force Report addresses or even mentions Columbia, the ER or DSEIS, the SAMA analysis for license renewal, or any environmental issue. To the contrary, the Task Force concluded that, in light of the low likelihood of a beyond design basis event at a U.S. nuclear power plant and the current mitigation capabilities at those facilities, continued operation and continued licensing activities do not pose an imminent risk to the public health.[159]

Nor does the contention identify any other information that is "significant" to this proceeding, as that term is defined in NEPA case law and NRC regulations. Indeed, Petitioner does not identify with the requisite specificity any substantial changes in the environmental analysis of the proposed Columbia license renewal action resulting from the Task Force recommendations. That is not surprising, given that the Task Force Report does not bear on or even discuss the environmental impacts from this (or any other) proposed licensing action. In fact, the Task Force Report does not discuss NEPA issues at all.

Petitioner appears to argue that the imposition of severe accident mitigation measures recommended in the Task Force Report would be "significant" because such measures would improve plant safety.[160] Such speculation, however, is not material in the context of the environmental analysis supporting the Columbia licensing action at issue. Also, to the extent

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158 *See* NUREG-1437, Supp. 47, Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Columbia Generating Station Draft Report for Comment at 5-2 ("The Commission has determined that the environmental impacts of [design basis accidents] are of SMALL significance for all nuclear power plants because the plants were designed to successfully withstand these accidents."), B-7 ("The probability weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to groundwater, and societal and economic impacts from severe accidents are small for all plants"), 5-11 (presenting detailed, site-specific SAMA evaluation for Columbia), (Aug. 2011) ("DSEIS"), *available at* ADAMS Accession No. ML11227A007.

159 Task Force Report at 18.

160 *See* Petition at 25-26.

that some of the Task Force Report recommendations might eventually become regulatory requirements, such safety enhancements would serve to reduce the risk-based environmental impacts of the project below the level currently specified in the ER or DSEIS. NEPA case law is clear—an agency need not prepare a supplemental EIS when a change will reduce the risk of environmental harm as compared to the original project.[161]

Furthermore, if the Commission were to require plants to make design modifications, then those design modifications would no longer be mitigation alternatives under NEPA but would be actual elements of the plant's design. As a result, such design provisions would not need to be considered as part of the NRC's SAMA evaluation. Accordingly, Petitioner's allegations regarding potential environmental benefits of implementing the recommendations are not material to the findings that must be made in this license renewal proceeding.

Petitioner's citations to *Calvert Cliffs* and *Limerick Ecology Action* lend no support to its claim that the NRC must consider the Task Force recommendations in an EIS before reaching a decision in this proceeding.[162] Those cases simply hold that the NRC cannot avoid performing a NEPA evaluation because of overlapping safety responsibilities under the Atomic Energy Act ("AEA").[163] But here, the NRC has already prepared a GEIS and a DSEIS that address the very

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[161] *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1221-22 (11th Cir. 2002); *So. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663-668 (3d Cir. 1999) (holding that design changes that cause less environmental harm do not require a supplemental EIS); *Township of Springfield v. Lewis*, 702 F.2d 426, 436 (3d Cir. 1983) (acknowledging that changes which "unquestionably mitigate adverse environmental effects of the project do not require a supplemental EIS"); *Concerned Citizens on I-190 v. Sec'y of Transp.,* 641 F.2d 1, 6 (1st Cir. 1981) (holding that adoption of a new environmental protection "statute or regulation clearly does not constitute a change in the proposed action or any 'information' in the relevant sense"); *New Eng. Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (holding that NRC need not supplement an EIS even though the EIS did not discuss the new cooling intake location that "would have a smaller impact on the aquatic environment than would the original location"); *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 137-138 (D.D.C. 2009) ("When a change reduces the environmental effects of an action, a supplemental EIS is not required.").

[162] Petition at 31 (*citing Calvert Cliffs Coordinating Comm. v, AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989)).

[163] *See, e.g.*, *Limerick Ecology Action*, 869 F.2d at 730-31 (holding that NRC cannot avoid performing a severe accident design mitigation alternative evaluation by simply relying on its obligations under the AEA).

issues Petitioner claims should be considered in light of the Task Force Report (*i.e.*, design basis accidents, severe accidents, and SAMAs). Petitioner fails to identify any new information in the Task Force Report that suggests there are deficiencies in the site-specific evaluations that already have been performed and approved by the NRC in this proceeding.

Petitioner next argues that the potential imposition of severe accident mitigation measures identified in the Task Force Report is "significant" from a NEPA perspective because considering economic costs of mandatory mitigation measures could impact the "overall cost-benefit analysis for the reactor."[164] In support, Petitioner references the Makhijani Declaration, which merely summarizes a number of potential plant changes related to implementing the Task Force's recommendations and notes that such changes may involve significant costs.[165]

But in this license renewal proceeding, considering how or whether the economic costs of mandatory mitigation measures might impact the "overall" NEPA cost-benefit analysis is not only unnecessary, but also impermissible. Specifically, 10 C.F.R. § 51.95(c)(2) expressly precludes consideration of the economic costs and economic benefits of the proposed action.[166] Thus, in this proceeding the NRC need not perform a cost-benefit analysis. Accordingly, Petitioner's allegations related to economic costs raise an issue that is not legally material to this proceeding and should be rejected in accordance with 10 C.F.R. § 2.309(f)(1)(iv).

3. The Contention Lacks Adequate Factual Support and Mischaracterizes the Task Force Report, Contrary to 10 C.F.R. § 2.309(f)(1)(v)

The contention should be dismissed because it mischaracterizes the Task Force Report and therefore lacks adequate factual support. The central thesis of Petitioner's contention is that additional NEPA evaluations are necessary because current NRC regulations do not provide

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164 Petition at 28.

165 *See id.* at 28; Makhijani Declaration ¶¶ 13-24.

166 *See also* 10 C.F.R. § 51.53(c)(2) (applying the same preclusion to the applicant's environmental report).

adequate protection. According to Petitioner, the Task Force Report supports its view because it recommends the promulgation of "mandatory safety regulations for severe accidents"—something that "would not be logical or necessary to recommend . . . unless [the] existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[167]

Contrary to Petitioner's suppositions, the Task Force Report did not find that the current regulations fail to provide adequate protection. In fact, the Task Force Report could not have been clearer in reaching the opposite conclusion. It plainly stated that "continued operation and continued licensing activities do not pose an imminent risk to the public health and safety and are not inimical to the common defense and security."[168] Thus, the Task Force found that current regulatory requirements continue to provide "reasonable assurance of adequate protection of public health and safety until [its recommendations] have been implemented."[169] Accordingly, the Task Force Report provides no support for Petitioner's assertion that NRC regulations are somehow inadequate.[170]

Petitioner further incorrectly claims that the Task Force Report recommended that features to protect against severe accidents be made part of a plant's "design basis" and that NRC regulations do not currently include severe accident mitigation requirements.[171] The Task Force actually recommended that the Commission create a new regulatory framework referred to as "extended" design basis requirements.[172] Most of the elements of these "extended" design basis

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167 Petition at 18.

168 Task Force Report at 18, 23.

169 *Id.* at 23

170 *See Ga. Tech*, LBP-95-6, 41 NRC at 300 (holding that a petitioner's imprecise reading of a document cannot be the basis for a litigable contention).

171 *See* Petition at 21.

172 Task Force Report at 22.

requirements are already contained in existing mandatory safety regulations (*e.g.*, 10 C.F.R. §§ 50.54(hh), 50.62, 50.63, 50.65). As the Task Force noted, under this new framework, "current design-basis requirements . . . would remain largely unchanged" and the new framework, "by itself, would not create new requirements nor eliminate any current requirements."[173] Therefore, the Petitioner's misinterpretation of the Task Force's recommendations cannot support the admission of the contention.

In addition, Petitioner misapprehends the legal import (or lack thereof) of the Task Force Report. The Commission has not decided whether to adopt the Task Force recommendations, making Petitioner's reliance on the Report unduly speculative, contrary to 10 C.F.R. § 2.309(f)(1)(v).[174] Indeed, the Commission has directed the Staff to engage with stakeholders to review and assess the recommendations of the Task Force for the purpose of providing the Commission with fully informed options and recommendations.[175]

The Task Force Report itself acknowledges that its findings and recommendations will require further study and consideration.[176] The contention is thus too speculative to trigger any

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173 *See id.* at 20-21.

174 *See, e.g.*, Comm'r Svinicki Notation Votes on SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan at 1-2 (July 19, 2011), *available at* ADAMS Accession No. ML112010167 ("The SECY paper itself provides no NRC staff view of the Task Force Report. Lacking the NRC technical and programmatic staff's evaluation (beyond that of the six NRC staff members who produced the Task Force Report), I do not have a sufficient basis to accept or reject the recommendations of the Near-Term Task Force. . . . Executive Order 13579, on the topic of 'Regulation and Independent Regulatory Agencies' states that wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. In that vein, the delivery of the Near-Term Task Force report is not the final step in the process of learning from the events at Fukushima. It is an important, but early step. Now, the conclusions drawn by the six individual members of the Near-Term Task Force must be open to challenge by our many stakeholders and tested by the scrutiny of a wider body of experts, including the [Advisory Committee on Reactor Safeguards], prior to final Commission action.").

175 *See* SRM on SECY-11-0093, at 1-2; *see also* Letter from Chairman Jaczko, to Sen. D. Feinstein (Aug. 10, 2011), *available at* ADAMS Accession No. ML11143A053 ("Following the events in Japan, the Commission established a task force to conduct a near-term review of recent events in Japan and to recommend issues for additional analysis and/or regulation over a longer term. The topics you cite are among those being examined by the task force or are otherwise under active review within the agency.").

176 Task Force Report at 73-76 (listing recommendations for future Commission and NRC Staff assessments and activities, including areas for future rulemakings and long-term evaluations).

NEPA supplementation obligation.[177] The Commission recently rejected the Suspension Petition for this very reason:

> Although the Task Force completed its review and provided its recommendations to us, the agency continues to evaluate the accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear. In short, we do not know today the full implications of the Japan events for U.S. facilities. Therefore, any generic NEPA duty—if one were appropriate at all—does not accrue now.[178]

In sum, Petitioner's fundamental misunderstandings and misconceptions about the Task Force Report cannot provide adequate factual support for a litigable contention.[179]

4. The Contention Does Not Provide Sufficient Information to Show That a Genuine Dispute Exists with the ER's Evaluation of Severe Accidents or SAMAs, Contrary to 10 C.F.R. § 2.309(f)(1)(vi)

In addition, the contention should be rejected for failing to provide sufficient information to show that a genuine dispute exists with the Columbia ER or DSEIS evaluation of accidents or SAMAs, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

As an initial matter, Section 4.20 of the ER and Section 5.3 of the DSEIS contain evaluations of the environmental impacts of design basis accidents and severe accidents, appropriately incorporating the generic conclusions in the GEIS and Table B-1. Petitioner identifies nothing in the Task Force Report (or relating more generally to the Fukushima accident) with any specificity that suggests there is any inaccuracy or other deficiency in these

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177 *See Benton County v. DOE*, 256 F. Supp. 2d 1195, 1201-1202 (E.D. Wash. 2003) (holding that "[a] supplement is not required if concerns are based partly on fact and partly on speculation," and therefore, because "the DOE has not finally decided whether the Plutonium Finishing Plant will be closed[,] . . . the Court need not determine whether this is a significant circumstance because to do so would require speculation"); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 295 (2002) (explaining that EIS "need not delve into the possible effects of a hypothetical project") *(quoting Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1478 (D.C. Cir. 1990)).

178 CLI-11-05, slip op. at 30.

179 *See Ga. Tech*, LBP-95-6, 41 NRC at 300.

evaluations.[180] Neither the Task Force Report nor any other information identified by the Petitioner relating to the accident at Fukushima indicates that the environmental risk of a design basis or severe accident at Columbia is anything but SMALL. In fact, there is nothing in the Task Force Report that evaluates the environmental risk posed by reactors operating under initial, renewed, or new licenses. As the D.C. Circuit explained in rejecting a similar argument about the need to supplement an EIS after the Three Mile Island accident, "the fact that the accident occurred does not establish that accidents with significant environmental impacts will have significant probabilities of occurrence."[181] Similarly here, the Petitioner fails to provide sufficient information to establish a genuine dispute with the ER or DSEIS evaluation of the design basis or severe accidents.

Citing the Makhijani Declaration, the Petitioner asserts that the Task Force Report indicates that the NRC has not considered the full spectrum of design-basis accidents and that the consequences of a severe accident are worse than previously anticipated.[182] But the Makhijani Declaration merely makes conclusory statements, and those statements do not address Columbia. Section 4.20 and Attachment E of the ER and Section 5.3 and Appendix F of the DSEIS contain systematic analyses of SAMAs. The Makhijani Declaration does not address the evaluations in ER or DSEIS and does not provide any reason for making any change to the core damage frequency or large release frequency for any plant, let alone Columbia. Thus, the Makhijani Declaration lacks sufficient information to establish a genuine dispute. In that regard, it has long

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[180] Moreover, a number of Petitioner's key allegations are irrelevant to Columbia and therefore raise no genuine factual dispute. Petitioner's allegation that plants on the Atlantic Ocean and Gulf of Mexico may have underestimated tsunami hazards, *see* Petition at 29, is not relevant to Columbia, which is not located near either of those bodies of water. Similarly, the Petitioner's allegations regarding multi-unit sites*, see, e.g.,* Petition at 30, are not relevant, because Columbia is not a multi-unit site. The Task Force recommendations related to design certifications and COL applications, *see* Petition at 30-31, also do not apply to Columbia, which is seeking license renewal.

[181] *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1301 (D.C. Cir. 1984), *aff'd en banc,* 789 F.2d 252 (D.C. Cir. 1986).

[182] *See* Petition at 26.

been held that a conclusory statement, even by an expert, is not a sufficient basis for a contention.[183]

Furthermore, the Petitioner has not attempted to identify any cost-beneficial SAMA. As the Commission has explained, "[i]t would be unreasonable to trigger full adjudicatory proceedings . . . under circumstances in which the Petitioners have done nothing to indicate the approximate relative cost and benefit of [any proposed SAMA]."[184] That is precisely the situation here. Neither the Task Force Report nor any other information identified by the Petitioner relating to the accident at Fukushima provides any reason to question the analysis already contained in the Columbia ER or DSEIS.

Petitioner also highlights Task Force recommendations relating to external hazards (*e.g.*, seismic and flooding risk), station blackout ("SBO"), emergency response procedures and guidelines, spent fuel instrumentation and makeup, and hardened vent designs in boiling water reactors ("BWRs") with Mark I and II containments.[185] These general references, however, fail to establish a genuine issue with the ER or DSEIS. The ER and DSEIS already consider external hazards and SAMAs associated with SBO, seismic events, and flooding,[186] and Petitioner identifies no errors in these analyses. Second, the Commission has held that as a matter of law, the ER and DSEIS need not consider SAMAs associated with spent fuel storage.[187] The

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183 *USEC*, CLI-06-10, 63 NRC at 472.

184 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 11-12 (2002) (*quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519, 551 (1978)) (*citing Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).

185 *See* Petition at 30.

186 *See, e.g.*, DSEIS, at 5-11 to 5-12 (seismic risk), 5-12 (external flooding risk), 5-12 (SBO).

187 *Vt. Yankee*, CLI-07-3, 65 NRC at 21 (affirming Board decision to reject contention claiming that SAMAs related to spent fuel storage should have been considered because "it is not necessary to discuss mitigation alternatives when the GEIS has already determined that, due to existing regulatory requirements, the probability of a spent fuel pool accident causing significant harm is remote").

contention should therefore be rejected as containing insufficient information to demonstrate the existence of genuine dispute on a material fact.

VI. THE RULEMAKING PETITION IS NOT BEFORE THIS BOARD

Petitioner attached to its Petition to Intervene a Rulemaking Petition that includes a request for suspending this proceeding. The Commission has already rejected that request to suspend this proceeding.[188] Accordingly, to the extent that Petitioner seeks any adjudicatory action on the Rulemaking Petition, that matter has been resolved by the Commission.[189]

[188] *See* CLI-11-05, slip op. at 39; *id.* App. at 18.

[189] The Rulemaking Petition also has not been referred to the Board. *See* Memorandum from A. Cook, NRC Sec'y, to E. Hawkens, Chief Admin. Judge, Request for Hearing with Respect to Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License for Additional 20-Year Period for Energy Northwest Columbia Generating Station, Docket No. 50-397-LR (Aug. 31, 2011) ("Please note that a petition for rulemaking, coupled with a request to suspend licensing decision, have also been submitted by Ms. Bell, but are not included in this referral.").

VII. CONCLUSION

For all the reasons discussed above, the Petition must be denied. The Petition does not satisfy the late-filing requirements of 10 C.F.R. § 2.309(c). The contention does not meet the requirements of a timely contention under 10 C.F.R. § 2.309(f)(2) or for substantive admissibility under 10 C.F.R. § 2.309(f)(1). Therefore, the Petition must be denied under 10 C.F.R. § 2.309(a).

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)
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