

November 19, 2012

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

NextEra Energy Seabrook, LLC)	Docket No. 50-443-LR
)	
(Seabrook Station))	
)	ASLBP No. 10-906-02-LR-BD01
(Operating License Renewal))	

**NEW ENGLAND COALITION AND FRIENDS OF THE COAST 'S
 NOTICE OF APPEAL OF ASLBP No. 10-906-02-LR-BD01
 TO NEXTERA ENERGY SEABROOK, LLC**

Pursuant to 10 C.F.R. §§ 2.311(a) and (d), Friends of the Coast and New England Coalition (“Friends/NEC”) files this Notice of Appeal of the Atomic Safety and Licensing Board’s Memorandum and Order, dated November 8, 2012, which denied admission for litigation in the above-captioned proceeding a single new contention jointly proffered by Friends/NEC regarding NextEra’s aging management for effects of alkali-silica reaction on concrete structures subject to aging management review.. Attached hereto is a brief in support of this appeal.

Respectfully Submitted,

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 FRIENDS OF THE COAST AND
NEW ENGLAND COALITION**

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(Operating License Renewal))

**BRIEF IN SUPPORT OF THE NEW ENGLAND COALITION AND FRIENDS OF
THE COAST APPEAL OF ASLBP NO. 10-906-02-LR-BD01 (DENYING MOTION FOR
LEAVE TO FILE NEW CONTENTION)**

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I. INTRODUCTION

On November 8, 2012, the Atomic Safety and Licensing Board (“ASLB” or “Board”) in the above-captioned proceeding denied a Petition for Leave to File a New Contention submitted by Friends of the Coast and the New England Coalition (“Friends/NEC” or “Petitioners”) on August 2 while also refusing to entertain or consider three subsequent and related Friends/NEC submissions.¹

Pursuant to 10 C.F.R. § 2.311 (a) and (d), Friends/NEC respectfully requests that the Commission reverse the Board’s decision to deny admission of this contention for hearing and find that the Petition was timely, provided adequate basis, and should have been, and should now be, admitted.

Further, as the Commission will see from a review of the Board’s Memorandum and Order (denying the Friends/NEC Petition); NRC Staff and NextEra Answers, the Friends/NEC Petition, and the discussion below, there remains confusion as to the exact meaning and application of terms and requirements embodied in NRC regulation and caselaw regarding establishment of “sufficient basis” and “material dispute;” and the nature of “new information” upon which a timely new contention must be based. Friends/NEC also, therefore respectfully requests that the Commission issue clarifying opinion providing concise workable definitions of its terminology so that future litigants will hopefully waste less of their time (and that of the agency) in trying to capture fleeting NRC expectations.

¹ Friends of the Coast and New England Coalition’s Motion for Leave to File a New Contention Concerning NextEra Energy Seabrook’s Amendment of its Aging Management Program for Safety-Related Concrete Structures (Aug. 27, 2011) [hereinafter *Intervenors’ Motion for Leave*]. See also Friends of the Coast and New England Coalition’s Motion (with September 19, 2012 Corrections) for Leave to File a New Contention Concerning NextEra Energy Seabrook’s Amendment of its Aging Management Program for Safety-Related Concrete Structures (Sept. 19, 2012) [hereinafter *Intervenors’ Sept. 19 Corrected Motion*]; Supplement to Friends of the Coast and New England Coalition’s Motion for Leave to File a New Contention Concerning NextEra Energy Seabrook’s Amendment of its Aging Management Program for Safety-Related Concrete Structures (Sept. 21, 2012) [hereinafter *Intervenors’ Sept. 21 Supplement*]; Friends of the Coast and New England Coalition’s Motion for Oral Argument and a Site Visit (Nov. 6, 2012) [hereinafter *Argument Motion*].

In the meanwhile, the Petitioners plead below for an opportunity to redress grievances in an adjudicatory setting, under due process and on a relatively level playing field.

II. BACKGROUND

This proceeding concerns NextEra's application to renew the operating license for Seabrook Station, a nuclear power reactor located on the New Hampshire Seacoast.³ Absent renewal this license will expire in 2032. On August 27, 2012, Friends/NEC filed a motion for leave to file a new contention. The proposed new contention states:

The NextEra Energy Seabrook License Renewal Application, as amended by the Structures Monitoring Program Supplement-Alkali-Silica Reaction ("ASR") Monitoring, (dated May 16, 2012 and provided to Friends/NEC in NRC Staff Disclosures, July 6, 2012) fails to demonstrate as required by Part 54, "Requirements for Renewal of Operating Licenses for Nuclear Power Plants," Section 21(a)(3), of Title 10 of the *Code of Federal Regulations* (10 CFR 54.21 (a)(3)), that the effects of aging on structures and components subject to an aging management review (AMR) are adequately managed so that the intended function(s) will be maintained consistent with the current licensing basis (CLB) for the period of extended operation.⁴

Petitioners premise their proposed new contention ("ASR Contention") on two overarching assertions, which in turn are supported by a total of eight sub points (bases). First, Petitioners claim that the Applicant's proposed ASR structures monitoring program is not a functionally effective tool for managing the effects of ASR for six separate reasons:

1. The Structures Monitoring Program does not provide a baseline for all affected structures from which to register and monitor trending.
 2. Visual inspection of surface indications alone is not [an] adequate gauge [of] the status of internal chemical processes, such as ASR.
 3. The proposed monitoring program makes no allowance for inspection of inaccessible or buried concrete save for opportunistic inspections which may never happen, or which are not necessarily biased toward areas and structures most likely to be severely affected. In the event that excavations and hence opportunistic inspections happen in lightly affected or non-affected areas, findings will be of little use in locating potential structural failures.
 4. The proposed monitoring program makes no provision for monitoring ASR – aggravating factors, such as the moisture content, the presence of liquid
-

water, the potential of chemically aggressive water, or the temperature of affected of [sic] susceptible concrete.

5. First field observations are to be done by untrained or minimally-trained personnel, who must make the first cut on what is reportable for further examination by a qualified professional engineer.
6. If this monitoring program is the AMP in its entirety it fails because there is no active component proposed to arrest, mitigate or manage the growth of ASR, such as a stringent de-watering program, waterproofing or waterproof membranes restoration, concrete cladding to restore surfaces, or chemical treatment, such as that using lithium compounds.²¹

Second, Intervenors aver that the Applicant has not developed reliable inventory and analysis on which to base an ASR monitoring program or aging management program, for two separate reasons:

1. NextEra has proposed intervals of inspection of sixth months [sic] but the interval appears nominal; not tied to any calculation of the rate of growth of ASR in any given set of locations.
2. NextEra has determined the extent to which concrete has degraded or lost its structural function by relying on testing measurements of a very limited number of samples for a very limited number of structural dynamics. This approach will not withstand technical or regulatory scrutiny. No AMP issuing from analysis known to be inadequate or faulty can provide the necessary assurance of adequate protection of public health and safety; and the CLB into the PEO. The conclusions resulting from such stunted analysis regarding the remaining structural integrity of affected concrete and the rate of degradation (ASR) aging at Seabrook are according to the NRC technical staff (testifying at the July 10, 2012 ACRS Meeting on Seabrook) unsupportable. Friends/NEC relies on the NRC technical opinions expressed in the transcript of this meeting to flesh out the basis of its contention that the ASR monitoring plan/AMP is inadequate. Their testimony and accompanying presentation materials are new material information reflecting NRC Technical Staff's opinions expressed for the first time in an official NRC forum.²²

The Petitioners' motion and proposed contention, the responses by the Applicant and by the NRC Staff,⁶ and Petitioners' reply⁷ (totaling well over 100 pages) are focused on the timeliness and sufficiency of the single proposed contention.

In sum, Petitioners asserted that their proposed new contention was both timely and admissible. The NRC Staff asserted that some portions of the contention would be admissible

if the contention was timely, but that it was not timely. NextEra asserted that the contention was in no part admissible nor was it timely.²

An additional 200 pages in submissions arguing the proposed contention included: (1) Intervenors' supplement to its initial motion and proposed contention; (2) Intervenors' corrected motion; (3) Intervenors' corrected exhibit to their supplement; (4) NextEra's motion to strike Intervenors' corrected motion; (5) Intervenors' opposition to NextEra's motion to strike; (6) NextEra's answer to Intervenors' supplement; (7) the NRC Staff's answer to Intervenors' supplement; (8) Intervenors' reply to NextEra's and the NRC Staff's oppositions to their supplement; and (9) Intervenors' motion for oral argument and a site visit³ As the Board deemed these submissions "not contemplated" by NRC rules, they were (apparently) not considered in formulating the Board's order and memorandum of November 7, 2012 wherein the Board found the proposed new contention, "untimely" because the board found that the primary basis document does not in its view provide "new information" the contention, in its entirety, is untimely and therefore, denied its admission.

III. STANDARD OF REVIEW

The Commission defers to Board rulings on contention admissibility unless it finds clear error or abuse of discretion. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, CLI-10-2, 71 NRC __ (Jan. 7, 2010)

² NextEra's Answer Opposing Admission of Contention Concerning Alkali-Silica Reaction (Sept. 21, 2012) [hereinafter NextEra Answer]; NRC Staff's Answer to Intervenors' Motion for Leave to File New Contention Concerning Safety-Related Concrete Structures (Sept. 21, 2012) [hereinafter Staff Answer].

³ See Intervenors' Sept. 21 Supplement; Intervenors' Sept. 19 Corrected Motion; Letter from Raymond Shadis, Friends of the Coast/New England Coalition, to the Atomic Safety Licensing Board (Sept. 26, 2012); NextEra's Motion to Strike FOTC/NEC's Corrected Contention (Oct. 1, 2012); Friends of the Coast and New England Coalition's Opposition to NextEra's Motion to Strike FOTC/NEC's Corrected Contention (Oct. 9, 2012); NextEra's Answer Opposing FOTC/NEC's Contention Supplement (Oct. 16, 2012); NRC Staff's Answer to Intervenors' Supplement to Motion for Leave to File a New Contention Concerning Safety-Related Concrete Structures (Oct. 16, 2012); Friends of the Coast and New England Coalition's Reply to NRC Staff's and Next Era's Opposition to the Supplement to Friends of the Coast and New England Coalition's Motion for Leave to File a New Contention Concerning NextEra Energy Seabrook's Amendment of its Aging Management Program for Safety-Related Concrete Structures (Oct. 23, 2012) [hereinafter Intervenors' Reply to Oppositions to Supplement]; Argument Motion

(slip op. at 1); *U.S. Department of Energy (High Level Waste Repository)*, CLI-09-14, 69 NRC ____ (Jun 30, 2009) (slip op. at 4); *Crow Butte Resources, Inc. (North Trend Expansion Area)*, CLI-09-12, 69 NRC ____ (Jun. 25, 2009) (slip op. at 8-9).

IV. SUMMARY OF ARGUMENT

In this decision, the Board erred in denying the Friends/ NEC ASR Contention because it failed to distinguish information that was both new and material presented as basis for the contention from information that was old, inadmissible and therefore immaterial; and separable by both content and context⁴.

Intervenors are not asked to prove their case at the contention stage, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.. *Louisiana Energy Services, L.P. (National Enrichment Facility)*, CLI-04-35, 60 NRC 619, 623 (2004).

Friends/NEC relied heavily on the testimony of an NRC technical staff expert as recorded in an Advisory Committee on Reactor safeguards [Safety] meeting transcript⁵ to confirm basis for its ASR Contention. identify the information provided by NEC

Specifically, Friends/NEC relied on the factual allegations or expert opinion expressed in the transcript to provide much of the basis required to place the parties on notice⁶ as to what Friends/NEC's position was with respect to the proposed

⁴ Particularly in the context of dealing with pro se petitioners, a finding regarding a contention's specificity should include consideration of the contention's bases. See *Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2)*, ALAB-899, 28 NRC 93, 97 (1988) (both contention and stated bases should be considered when question arises regarding admissibility of contention). *General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station)*, LBP-96-23, 44 NRC 143, 162 (1996).

⁵ ACRS Transcript, July 10, 2012, ADAMS Accession Number ML12207041

⁶ ...as long as parties are sufficiently put on notice as to what has to be defended against or opposed, specificity requirements will generally be considered satisfied. However, that is not to suggest that a sound basis for each contention is not required to assure that the proposed issues are proper for adjudication. *Consolidated Edison Co. of N.Y. (Indian Point Nuclear Generating Unit 2) and Power Authority of the State*

NextEra ASR monitoring program (10 C.F.R. § 2.309 (f)(1)(ii) and to show the existence of a *genuine* dispute with the license renewal applicant⁷. LRA. 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

The Board confused much of the expert testimony upon which Friends/NEC relied with information which was similar by general category (e.g. having to do with ASR), but by no means identical in meaning or materiality. A focal point in the Board's discussion is the Friends/NEC assertion that NRC's Technical Staff expert is stating clearly, publicly, and on the record for the first time that visual inspection alone cannot rule out the presence of ASR.

This is important because NextEra's proposed aging management program ("AMP") relies on visual screening for ASR by entry-level or non-expert employees. NextEra, NRC Staff, and following their lead, the ASLBP, all point to documents,

of N.Y. (Indian Point Nuclear Generating Unit 3), LBP-83-5, 17 NRC 134, 136 (1983). 10 C.F.R. 2.309(f)(1)(ii) a brief explanation of the basis for the contention is a necessary prerequisite of an admissible contention;

The brief explanation of the basis that is required helps define the scope of a contention, the reach of a contention necessarily hinging upon its terms coupled with its stated bases. CLI-08-3, 67 NRC 168 (2008); LBP-08-9, 67 NRC 430 (2008)

The requirement for a brief explanation of the basis for the contention should rarely exceed more than a sentence or two LBP-08-6, 67 NRC 292-93(2008) LBP-08-10, 67 NRC 455 (2008)

Contentions must be supported by a concise statement of the alleged facts or expert opinions that support the requestor's/petitioner's position on the issue together with references to the specific sources and documents on which petitioner intends to rely to support its position 10 C.F.R. 2.309(f)(1)(v) CLI-08-3, 67 NRC 168 (2008); LBP-08-9, 67 NRC 432 (2008); LBP-08-10, 67 NRC 455 (2008)

⁷Under 10 C.F.R. § 2.309 and 10 C.F.R. § 2.309(f) an intervention petition must not only set forth with particularity the interest of the petitioner and how that interest may be affected by the proceeding, but must also include the bases for each contention, sufficiently detailed and specific to demonstrate that the issues raised are admissible and that further inquiry is warranted. Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 206 (1982). See also Philadelphia Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234-35 (2006).

long-known to everyone involved in the Seabrook matter, that explain that the presence of ASR cannot be confirmed by visual examination alone.

The difference is that the AMP relies on visual examination to detect ASR, it cannot, according to NRC Technical Staff be relied on to rule out the presence of ASR in the absence of the visual indicators upon which it relies. The risk is false negatives; a non-conservative outcome. The inability to confirm the presence of ASR by visual examination alone means that the risk of calling “ASR!” on seeing typical cracking patterns and excrescences is that further examination will be called for; a conservative (plus safety) outcome.

The Board and the opposing parties point to a number of NRC Staff Requests for Additional Information that point to concerns with ASR; even to concerns that the presence of ASR cannot be confirmed by visual inspection alone.

Both the Board and the opposing parties suggest that Friends/NEC should have raised the ASR question at the time these documents were made public, some as early as 2010.

There are a number of practical and legal problems with what they suggest as the proper approach. (1). Until May of 2012, NextEra (Seabrook) did not have an ASR AMP with which to take issue⁸. (2). Most if not all documents suggested as

⁸ See, e.g., GALL Report at 6 and SRP-LR at A. 1-9, Table A. 1-1 (identifying the ten program elements of an aging management program, including: “Scope of the Program – The scope of the program should include the specific structures and components subject to an AMR”; “Parameters Monitored or Inspected - Parameters monitored or inspected should be linked to the effects of aging on the intended functions of the particular structure and component”; “Monitoring and Trending - Monitoring and trending should provide for prediction of the extent of the effects of aging and timely corrective or mitigative actions”; and “Acceptance Criteria - Acceptance criteria, against which the need for corrective action will be evaluated, should ensure that the particular structure and component’s intended functions are maintained under all current licensing basis (CLB) design conditions during the period of extended operation”).

providing primary basis so far predated the roll-out of the ASR AMP that they would be deemed untimely, at least at the contention filing stage. (3) Many of the documents cited by the Board and the opposing parties are NRC Staff RAI's and responses which are not deemed admissible as basis documents by NRC⁹.

The Board suggests, for example, a federal highway document, upon which NRC Staff to some extent may rely, as having discussed all of the ASR inspection and growth phenomena long ago. In fact, Friends/NEC found the document interesting as a general discussion of ASR, but not particularly a good source for investigating ASR at Seabrook, The federal highway document deals primarily with road and bridge surfaces that unlike most nuclear plant surfaces are subjected to highway design requirements, heavy dynamic loads, abrasion, wash-overs, and de-icing salts that can radically alter the ASR equation.

Friends/NEC, as the Board recounts, did not file excuses for a late-filing.¹⁰

This is because Friends/NEC filed in a timely manner upon ascertaining that sufficient new material information had become available to form adequate basis to (1) put the parties on notice as to what issues Friends/NEC intended to litigate, and (2) establish a significant and credible dispute with the licensee.

An Atomic Safety and Licensing Board has held that:

⁹ Questions by the NRC regulatory staff simply indicate that the staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility. The staff assuredly will not grant the renewal application if the responses to the RAIs suggest unresolved safety concerns." *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 349-50 (1998). The Commission allows litigation of issues raised in RAIs only if they contain "genuinely new and material safety or environmental issues." *Oconee*, 49 N.R.C. at 338

¹⁰ Petitioner's' Motion for Leave at 8.

generally a "good cause" finding based on "new information" can be resolved by a straightforward inquiry into when the information at issue was available to the petitioner. In some instances, however, the answer to the "good cause" factor may involve more than looking 'at the dates on the various documents submitted by the petitioners. Instead, the inquiry turns on a more complex determination about when, as a cumulative matter, the separate pieces of the new information "puzzle" were sufficiently in place to make the particular concerns espoused reasonably apparent.

Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-15,44
NRC 8, 26 (1996).

Of necessity, this ASR contention could not be filed until the license proposed an ASR AMP. In the view of Friends/NEC, no admissible documents that could form the foundation of basis for an ASR AMP contention became public before the ACRS transcript that was referenced in the petition.

As Friends/NEC stated in its Petition for Leave to Intervene the information provided in the ACRS transcript upon which the petitioners rely is not by-and-large a summary, but rather carves out clear and un-ambiguous differences between the ASR assessments of NRC technical staff and the licensee which Friends/NEC has incorporated in its Petition for leave to Intervene by lengthy citation and reference.

The statements in the transcript, on fair reading, are status reports rather than summations and material because they expound on the condition of ASR applied science at the time that NextEra filed its proposed ASR AMP.

Thus the information upon which NEC relies is unique, timely, and material to any decision regarding adequacy of the ASR AMP that NRC may be compelled to make.

IV. CONCLUSION

For all of the foregoing good and sound reasons, Friends of the Coast and New England Coalition, Petitioners respectfully request that this matter be returned to the Atomic Safety and Licensing Board for adjudication on the merits,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2012, a copy of New England Coalition and Friends Of The Coast’s Notice of Appeal of ASLBP No. 10-906-02-LR-BD01 To NextEra Energy Seabrook, LLC; and a Brief in Support of the New England Coalition and Friends of the Coast Appeal of ASLBP No. 10-906-02-Lr-Bd01 (Denying Motion for Leave to File New Contention) in the above captioned proceeding was filed by electronic filing and provided to the persons and parties identified for service in this matter by NRC’s electronic filing system.

Signed electronically,

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