

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

OMAHA PUBLIC POWER DISTRICT

(Fort Calhoun Station, Unit 1)

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Docket No. 50-285

NRC STAFF ANSWER TO SIERRA CLUB
REQUEST FOR A HEARING AND PETITION TO INTERVENE
ASKING THAT A LICENSE AMENDMENT PROCEEDING BE CONVENED

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INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer opposing the hearing and intervention request filed on April 25, 2014, by the Sierra Club (Petitioner).¹

Petitioner asks the Commission “to clarify that the [Confirmatory Action Letter (CAL)] and [Inspection Manual Chapter (IMC)] 0350 processes are license amendment proceedings convened under 10 C.F.R. § 2.309 [and] requiring an adjudicatory hearing,” or in the alternative, “pursuant to 10 C.F.R. § 50.59 and its inherent supervisory authority,” find that instituting an adjudicatory proceeding is in the public interest “to ensure adequate protection of the public health and safety.”²

As discussed below, the Commission should deny both requests. Petitioner is not entitled to an amendment hearing under Section 189a. of the Atomic Energy Act of 1954 (AEA), as amended³ because Petitioner does not identify an actual or *de facto* license amendment

¹ Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (April 23, 2014) (Petition). Because part of the pleading was served on April 24 and the balance not received until April 25, 2014, this Staff answer is being served within 25 days of the latter date.

² Petition at 43.

³ 42 U.S.C. § 2239(a).

proceeding triggering AEA Section 189a. hearing rights. Specifically, Petitioner does not explain why the CAL or IMC 350 processes are “license amendment proceedings,” but, in effect, asks the Commission to convene an adjudicatory, license amendment proceeding to impose by license amendment or order certain licensee § 50.59 modifications (and other modifications, repairs or assessments that Petitioner believes should be done), the Commission should construe both requests as seeking an enforcement proceeding under 10 C.F.R § 2.206.

Second, the Petitioner does not satisfy the required standing, contention admissibility, and timeliness standards in 10 C.F.R. § 2.309, which presume the existence of a proceeding or actual notice of an agency action.⁴ Third, even assuming an amendment proceeding exists, Petitioner does not meet the admissibility or timeliness standards in 10 C.F.R. § 2.309 since its challenges to 10 C.F.R. § 50.59 are not cognizable in a license amendment proceeding, its contentions do not meet 10 C.F.R. § 2.309 admissibility standards, and its petition is not timely.

Furthermore, Petitioner’s alternative request for a discretionary hearing request should be denied because Petitioner has not demonstrated that a discretionary, amendment hearing is warranted. At bottom, Petitioner asks the Commission to apply 10 C.F.R. § 50.59 criteria to institute an amendment proceeding to modify the Fort Calhoun Station (FCS) license to ensure adequate protection of public health and safety by imposing requirements on flooding protection, design basis upgrades, and additional structural assessment or repairs. Thus, Petitioner wants § 50.59 standards imposed through an adjudicatory, amendment proceeding instead of requesting NRC enforcement action via the filing of a 10 C.F.R. § 2.206 petition.

Because Petitioner’s concerns about the safety of current operations fall squarely under 10 C.F.R. § 2.206, the Commission should deny the request for a discretionary hearing as being

⁴ See, e.g., 10 C.F.R. § 2.309(b) (providing filing deadlines from publication of *Federal Register* notices regarding an application); 10 C.F.R. § 2.309(c)(ii) (providing, where no *Federal Register* notice is published, a filing deadline from actual notice of a pending application); 10 C.F.R. § 2.309(f)(1)(vi) (requiring showing of a dispute with the applicant).

contrary to the Commission's regulatory scheme. Petitioner's complaints about the § 2.206 process, complaints about lesser participation opportunities in the IMC 0350 process, avoidance of the § 2.206 process, and speculation about the licensee not submitting future license amendment applications⁵ do not warrant the grant of a discretionary hearing. In addition, to the extent matters in the Petition are currently pending before the Director of the Office of Nuclear Reactor Regulation (NRR) due to Petitioner's previously 10 C.F.R. § 2.206 petition,⁶ or should be raised via a 10 C.F.R. § 2.206 petition, the grant of a discretionary hearing would duplicate and waste agency resources and would not promote the Commission's "dual goals of public safety and timely adjudication."⁷

For these reasons, the Petition should be denied.

BACKGROUND

Pursuant to Renewed Facility Operating License No. DPR-40, which expires in 2033, Omaha Public Power District (OPPD) is authorized to operate Fort Calhoun Station, Unit 1 (FCS), which is located on the Missouri River near Blair, Nebraska and about 20 miles from Omaha, Nebraska. The plant and its equipment are described in the Updated Safety Analysis Report (USAR), as supplemented and amended.⁸

⁵ See, e.g., Petition at 10-12, 18 (stating that a 2.206 petition is not a "meaningful vehicle" for the public to ensure safe operation, expressing dissatisfaction with 2015 date for a Director's Decision, stating concern that future amendment requests will not be submitted, and stating concerns about Staff enforcement of 10 C.F.R. § 50.59 and issuance of exigent amendments).

⁶ See Omaha Public Power District, Fort Calhoun Station, Unit 1, 78 Fed. Reg. 39,019, 30,020 (June 28, 2013) (noticing referral of request for enforcement action to the NRR Director and noting the petition includes a containment internal structure (support beam) concern and concerns about flooding and multiple dam failures).

⁷ See *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC 1, 4 (2011).

⁸ The USAR or Updated Final Safety Analysis Report (UFSAR) includes information that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of its structures, systems, and components and of the facility as a whole. See 10 C.F.R. § 50.34(b). The licensee is required under 10 C.F.R. § 50.71(e) to update the UFSAR to assure that the UFSAR contains the effects of all changes made in the facility or procedures as described in the UFSAR; all safety analyses and evaluations performed by the licensee either in support of approved license

I. FCS Shutdown, Missouri River Flooding and Plant Restart

An April 2011 scheduled refueling outage for FCS was extended due to Missouri River flooding that affected the site from June through September 2011 and to address longstanding deficiencies in overall station performance.⁹ In December, 2011, the Staff implemented the Inspection Manual Chapter (IMC) 0350 process at FCS, establishing a special oversight panel to coordinate the agency's regulatory activities associated with assessing the performance deficiencies at FCS.¹⁰ The Staff also issued Confirmatory Action Letters (CALs) on September 2, 2011 (CAL 4-11-003) (ML112490164), and June 11, 2012 (CAL 4-12-002) (ML12163A287) (which included a Restart Checklist), to confirm various commitments OPPD made related to post-flooding recovery actions and other items important for restart, including licensee activities to resolve underlying performance issues at the facility discovered after the CAL issued on September 2, 2011.

A February 26, 2013 CAL (CAL EA-13-020)¹¹ revised the description of restart items previously identified on June 11, 2012. On December 17, 2013, the Staff issued a letter closing

amendments or in support of conclusions that changes did not require a license amendment in accordance with 10 C.F.R. § 50.59(c)(2).

⁹ See Letter from Elmo Collins, Region IV Administrator, to David Bannister, OPPD, "Notification of Change to Regulatory Oversight" (Dec. 13, 2011) (ML113470721), at 1.

¹⁰ *Id.* ("The IMC 0350 process is implemented at facilities in an extended shutdown with significant performance concerns to: establish a regulatory oversight framework as a result of significant performance problems or where a significant operational event has occurred, ensure the NRC communicates a unified and consistent position in a clear and predictable manner, establish a record of actions taken and technical issues resolved, verify corrective actions are sufficient for restart and to provide assurance that following restart the plant will be operated in a manner that provides adequate protection of public health and safety.").

¹¹ Letter from Elmo Collins, Region IV Administrator, to Lou Cortopassi, OPPD, "Confirmatory Action Letter – [FCS]" (CAL EA-13-020) (Feb. 26, 2013) (ML13057A287). CAL EA-13-020 incorporated all actions confirmed by CAL 4-12-002, added additional items, and confirmed that FCS would not operate above Hot Shutdown Condition (Operating Mode 3), as defined by its Technical Specifications (TSs), until the NRC reviewed OPPD actions, including items related to flooding (e.g., Items 2.a – 2.d of the Restart List).

FCS continues to perform flooding evaluations. FCS has recently asked to submit its flooding hazards reevaluation report (in response to an NRC 10 C.F.R. § 50.54(f) letter) 10 months after the date it receives data from the U.S. Army Corps of Engineers (USACE). See Letter from Louis Cortopassi,

CAL EA-13-20, indicating that the Staff had identified no issues which would preclude restart, that there would be continuous observation during restart of FCS and that enhanced IMC 0350 inspections would continue.¹²

The Staff also issued a CAL confirming FCS post-restart commitments to ensure that improvements realized during the extended outage remain in place and performance improvements continue.¹³ The Post-Restart CAL specifically stated that it did not modify or amend OPPD's license, did not preclude the NRC from issuing an order to formalize the commitments, and did not preclude the NRC from taking enforcement action for any violations that may have prompted the issuance of the letter.¹⁴ Fort Calhoun subsequently commenced power operation in December 2013.¹⁵

NRC inspections at FCS have included evaluations of flooding protection and other plant modifications to determine if FCS properly determined that no license amendment was required.¹⁶

OPPD, to NRC Document Control Desk, "Extension Request – Response to March 12, 2012, Request for Information Enclosure 2, Recommendation 2.1, Flooding Required Response 2, Flooding Hazard Reevaluation Report (Feb. 26, 2014) (LIC-14-0010) (ML14058A225). USACE data was sent to FCS on April 4, 2014. Letter from Joseph Sebrosky, NRC, to Louis Cortopassi, OPPD, "[FCS] Unit 1 – Transmittal of [USACE] Flooding Hazard Reevaluation Information (TAC No. MF3036) (Apr. 4, 2014) (ML14091A345).

¹² Letter from Marc Dapas, Region IV Administrator, to Lou Cortopassi, OPPD, "Fort Calhoun Station Closure of Confirmatory Action Letter" (Dec. 17, 2013) (ML13351A423) (CAL Closure Letter) at 2-3.

¹³ Letter from Marc Dapas, Region IV Administrator, to Lou Cortopassi, OPPD, "Confirmatory Action Letter" (Dec. 17, 2013) (ML13351A395) (Post-Restart CAL) at 1. The Post-Restart CAL remains in effect until the NRC verifies implementation of OPPD commitments, inter alia, regarding design and licensing basis control and use, review of the FCS flood design basis, and evaluation of design margin for containment internal structures. *Id.* at 1-2.

¹⁴ *Id.* at 2.

¹⁵ Letter from Michael Hay, NRC RIV, to Louis Cortopassi, NRC Integrated Inspection Report Number 05000285/2013019 (Feb. 10, 2014) (ML14042A238), Enclosure at 4.

¹⁶ See, e.g., Letter from Michael Hay, NRC RIV, to Louis Cortopassi, OPPD "[FCS – NRC Inspection Report Number 05000285/20130311 and Notice of Violation (Mar. 11, 2013) (ML13070A399) at 2 & Enclosure at A-4 to A-5 (identifying two examples of a failure to perform appropriate 10 C.F.R.

II. Sierra Club's § 2.206 Petition

On June 21, 2012, Mr. Wallace Taylor, the counsel that filed the instant intervention petition on behalf of the Sierra Club, submitted a 10 C.F.R. § 2.206 petition on behalf of the Iowa Chapter of the Sierra Club, asking that the license to operate FCS be revoked and, in part, citing issues associated with flooding protection at the site.¹⁷ The Sierra Club provided supplemental written material on August 22, 2012 (ML12240A162) and participated in teleconferences with the Petition Review Board on August 27, 2012, and on November 19, 2012,¹⁸ providing additional or new information.¹⁹ Additional written materials were provided on December 16, 17, and 20, 2012.²⁰

In May 2013, the Director of NRR acknowledged that the NRC was reviewing issues related to containment internal structures and upstream dam failures and that the former had been identified as an issue that must be resolved before restart.²¹ The Petition Review Board accepted those two issues as well as the concern that FCS flooding protection measures are

§ 50.59 evaluations for changes in flooding mitigation strategies as a non-cited violation); Letter from T. Vogel, NRC Region IV, to L. Cortopassi, OPPD, NRC Region IV, "[FCS] – Manual Chapter Inspection Report and Final Significance Determination of White Finding and Notice of Violation; NRC Inspection Report No. 05000285/2013017 (Apr. 25, 2014) (ML14115A411) (includes follow-up on CAL EA-13-20 Restart Checklist (at 7) and non-cited violation of 10 C.F.R. § 50.59 for failure to determine that a departure from a method of evaluation described in the USAR used in establishing the design basis or in the safety analyses required prior NRC approval (at 21-26)).

¹⁷ See 10 CFR 2.206 Petition Requesting the Nuclear Regulatory Commission Revoke Omaha Public Power District's License to Operate the Fort Calhoun Nuclear Power Station (June 21, 2012) (ML12180A124) (2.206 Petition) at 1-7.

¹⁸ *Id.* at 1-5.

¹⁹ See Letter from Eric Leeds, Office of Nuclear Reactor Regulation (NRR) Director, to Wallace Taylor, Iowa Chapter of the Sierra Club (May 23, 2013) (ML13092A248) (Leeds Letter), at 2; Teleconference Transcript (Aug 27, 2012) (ML12250A714); Teleconference Transcript (Nov. 19, 2012) (ML12352A279).

²⁰ See Leeds Letter at 2 (citing ML12352A221 and ML13109A240).

²¹ See Leeds Letter at 3; 78 Fed. Reg. at 39,020.

inadequate to protect public health and safety.²² Noting that natural disasters such as flooding (due to dam failures) were undergoing NRC review as part of lessons learned from the Fukushima Dai-Ichi event in Japan, the Director indicated that the PRB intended to use the results of those reviews to inform its decision on whether to implement the actions requested in the § 2.206 petition.²³

Staff (1) accepted the petition, in part, (2) detailed the reasons for accepting and rejecting particular issues and (3) noted that the results of ongoing inspections, oversight and enforcement activities would be considered in making a final decision on the 2.206 Petition.²⁴ Petitioner has been informed that the estimated date for a decision on its 2.206 Petition is February 28, 2015.²⁵

III. Intervention Petition

The instant petition was filed on April 25, 2014, and was not in response to any published notice of opportunity for hearing in the *Federal Register*.²⁶ Petitioner asserts, however, that its request is timely because “OPPD representatives have stated they do not intend to request a license amendment, or that an amendment request will be made at some unspecified time in the future,” regarding issues presented in their contentions, which present “significant issues that require an amendment.” Petition at 5. Petitioner claims to have standing based on the interests of members who live within 50 miles of Fort Calhoun, *id.* at 4-5, and

²² Leeds Letter at 3. Another concern about containment electrical penetration seals was also accepted. *Id.* at 4

²³ Leeds Letter at 4-5. 78 Fed. Reg. at 39,020.

²⁴ See *generally* Leeds Letter.

²⁵ See Petition at 11. Petitioner complains that this schedule is inconsistent with NRC Management Directive (MD) 8.11, which “requires that a proposed” Director’s Decision be issued within 120 days. MD 8.11, which is Enclosure 2 to the Leeds Letter, at 20, states that 120-period is a goal, not a requirement.

²⁶ See Petition at 5 (“Even though there is no Federal Register notice or any other type of notice described in 10 C.F.R. § 2.309(b) (3) and (4)”).

claims an order granting its petition would require OPPD to amend the license to ensure that issues raised by the contention are addressed. *Id.* at 9.²⁷

In the alternative, Petitioner asserts that the Commission should exercise its inherent supervisory authority and consider what amendments are required by the “changes that have been made or should be made to address issues in” Petitioner’s contentions. *Id.* at 12-13.

Petitioner seeks to litigate four claims it labels as contentions. Specifically, Petitioners claim that (1) past and future licensee modifications for flooding protection (Contention 1) and to repair or replace inadequate structural beams and columns (Contention 3), (2) licensee design basis and licensing basis reconstitution activities (Contention 2), and (3) assessments and modifications Petitioner believes are needed related to the karst terrain beneath FCS (Contention 4), each require license amendments.²⁸

For the reasons discussed below, the Petition should be denied.

DISCUSSION

I. Petitioner’s Request for an AEA § 189a. Hearing Should Be Denied Because Petitioner Does Not Identify An Amendment Proceeding Triggering § 189a. Hearing Rights

Section 189a. of the AEA provides that, in any proceeding under the AEA for the amending of a license, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission should deny the request for an adjudicatory proceeding on a license amendment because Petitioner does not identify an actual or *de facto* license amendment related to the matters raised by its contentions.

²⁷ Petitioner also claims that (1) there are no other means to protect its interest, (2) neither NRC nor OPPD will protect Petitioner’s interests, (3) its participation will not broaden or delay the proceeding because its issues “are already part of the CAL and 0350 process,” and (4) its participation in a hearing would ensure an adequate safety assessment and develop a record. *Id.* at 9-12.

²⁸ See Petition at 16-42.

A. Petitioner Does Not Identify A Noticed License Amendment Proceeding Or Show There Is A De Facto Amendment

Petitioner admits its petition was not filed in response to any *Federal Register* notice of a 10 C.F.R. § 2.309 proceeding concerning a proposed amendment. See Petition at 5. Petitioner states, however, that “there are significant issues that require a license amendment,” but the NRC allowed FCS to restart “without addressing issues with a license amendment.” *Id.* Petitioner also claims its contentions address “significant modifications necessary for FCS to comply with its licensing basis.” See *id.* at 3.

Petitioner does not provide any cogent explanation as to why it believes Staff inspection and CAL activities require amendments. Nor does it state how NRC inspection activities effected an amendment to the license. Rather, Petitioner broadly assert that certain licensee activities that either have been (or will be) done without a license amendment (i.e., flooding protection equipment modifications and procedure revisions, containment internal structural repairs and design basis reconstitution activities) as well as unspecified modifications that Petitioner claims are necessary (including the performance of a geological assessments concerning the karst geology), are significant changes that should be imposed by a license amendment. See, e.g., Petition at 7-9, 16, 18-19, 25-26, 31-35, 42.

Similarly, Petitioner does not demonstrate that there has been an agency action (not formally labeled as such) that has the effect of amending a license (i.e., a *de facto* amendment) or discuss relevant case law.²⁹ Instead, Petitioner makes conclusory assertions that significant changes or modifications have occurred or should occur that “require license amendments.”

²⁹ See, e.g., *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326-328 (1996). The proper question in a *de facto* license amendment case is whether a completed agency action effectively amends a license. If an “NRC approval does not permit the licensee to operate ‘in any greater capacity’ than originally prescribed and all relevant safety regulations and license terms remain applicable, the NRC approval does not ‘amend’ the license.” *Id.* at 327.

But these claims do not suggest that there has been an actual or *de facto* license amendment. As explained below, a licensee action does not constitute a *de facto* amendment. If a licensee violates § 50.59 requirements, it would be subject to NRC enforcement action. Challenges to § 50.59 analyses and activities are not considered in amendment proceeding.³⁰ By insisting that an amendment proceeding be instituted to consider a challenge to whether § 50.59 activities require an amendment, Petitioner seeks to enforce provisions of § 50.59, challenges the Commission regulatory structure and, ultimately, challenges the wisdom of this Commission's regulation, 10 C.F.R. § 50.59 and case law clarifying that challenges to § 50.59 evaluations are not appropriate for a § 2.309 license amendment proceeding. Therefore, its request for a § 2.309 hearing should be denied.

Moreover, because Petitioner, in effect, seeks to impose other changes or requirements it believes are necessary for adequate protection of the public health and safety, Petitioner's sole remedy is to file a § 2.206 petition asking that such requirement or modifications be imposed by an enforcement order.³¹ The repeated conclusory assertion the subject matter of its contentions (design basis activities and past and future modifications) "require" license amendments³² does not suffice to show that an amendment occurred or that there is a pending amendment proceeding with hearing rights.

In addition, Petitioner is mistaken that OPPD has not submitted a 10 C.F.R. § 50.90 license amendment request associated with changes at FCS. OPPD has sought an amendment related to one of the concerns raised by Contention 1 (raw water flow control). That

³⁰ *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-12-20, 76 NRC 437, 439 (2012) ("public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.") (internal citations and quotations omitted)..

³¹ See *Southern California Edison Co.*, CLI-12-20, 76 NRC at 439.

³² See, e.g., Petition at 3, 16, 19, 25-26, 31, and 34.

amendment was noticed on March 18, 2013, and intervention petitions were due by May 19, 2014.³³ Petitioner also acknowledges that other amendments have been granted.³⁴

In addition, some matters raised in the Petition are also being considered in response to Petitioner's June 21, 2012, § 2.206 Petition, as supplemented on August 27, 2014 and November 19, 2012 (ML12250A714 and ML12352A279, respectively), which asks the NRC to institute a proceeding to modify, suspend, or revoke the FPS license.³⁵ Contention 1 raises concerns about flooding and dam failures and Contention 3 raises concern about containment internal structures (columns and support beams) not meeting design requirements. See Petition at 18-19, 31-32.³⁶ In accepting the § 2.206 Petition, the Staff noted the containment internal structure issue needed resolution before restart and that natural disasters, such as flooding, including the effect of multiple dam failures, are under review as part of the lessons learned from the Fukushima Dai-Ichi event in Japan. *Id.* The PRB stated that the results of these reviews would inform a final decision on whether to implement the requested actions.³⁷

B. Licensee Actions Do Not Constitute Amendments

Licensee actions taken under § 50.59 are not license amendments. Pursuant to 10 C.F.R. § 50.59(c)(1), a licensee may make changes in the facility as described in the UFSAR, make changes in the procedures as described in the UFSAR, and conduct tests or experiments not described in the UFSAR without obtaining a license amendment pursuant to

³³ 79 Fed. Reg. 15149 (Mar.18, 2014)

³⁴ See Petition at 11 (stating that some amendments have been granted on an urgent or exigent basis).

³⁵ See 78 Fed. Reg. at 39,020.

³⁶ Sierra Club's § 2.206 Petition states that a support beam was not within allowable limits and that the flooding hazard greatly exceeds FCS flooding protection measures. *Id.* at 39,020.

³⁷ *Id.*

10 C.F.R. § 50.90 if a change to the technical specifications (TSs)³⁸ is not required, and the change, test, or experiment does not meet any of the eight criteria in 10 C.F.R. § 50.59(c)(2).

Each licensee must maintain records of any such changes, tests, or experiments made without prior NRC approval.³⁹ These records must include a written evaluation which provides the bases for the determination that the change, test, or experiment did not require a license amendment.⁴⁰ Each licensee must also make these records available to the NRC for inspection and periodically submit to the NRC a report containing a brief description of these changes, tests, or experiments including a summary of the evaluation of each.⁴¹

In addition, a licensee may take actions to come into compliance with its design basis or conduct other activities without prior NRC approval if such actions do not meet § 50.59 criteria requiring a license amendment. Similarly, actions taken to address events that are not analyzed in an FSAR (including beyond design basis flooding) can be accomplished without an amendment if § 50.59 amendment criteria are not met.⁴²

To obtain approval of a license amendment, a licensee must first file an application under 10 C.F.R. § 50.90⁴³ with the NRC, and the license is not amended until the NRC

³⁸ TSs are part of the license, and generally are derived from analyses and evaluations included in the licensee's safety analysis report submitted pursuant to 10 C.F.R. § 50.34 (requiring that each application for a construction permit include a preliminary safety analysis report and requiring each application for an operating license to include a final safety analysis report). 10 C.F.R. § 50.36(b).

³⁹ 10 C.F.R. § 50.59(d)(1).

⁴⁰ *Id.*

⁴¹ 10 C.F.R. §§ 50.59(d)(2), 50.70(a) (requiring licensees to permit inspections of records, premises, and activities), 50.71(e) (requiring periodic updates of the UFSAR to include information in support of conclusions by the licensee that changes did not require a license amendment in accordance with 10 C.F.R. § 50.59(c)(2)), 50.71(e)(2) (requiring UFSAR update submittals to identify changes made under the provisions of 10 C.F.R. § 50.59 but not previously submitted to the Commission).

⁴² The Staff could also is an order requiring that certain licensee activities to provide adequate protection.

⁴³ See 10 C.F.R. § 50.90 ("Whenever a holder of a license . . . desires to amend the license . . . application for an amendment must be filed with the Commission . . .").

approves and issues the amendment. The docketing and noticing of an amendment application triggers a license amendment proceeding with associated AEA § 189a. hearing rights.

Accordingly, only a license change authorized or ordered by the NRC constitutes a licensee amendment. If a licensee does not properly perform its 10 C.F.R. § 50.59 analysis and makes a change that requires prior NRC approval of a license amendment application submitted pursuant to § 50.90, the licensee violates the Commission's regulations and is subject to enforcement action.⁴⁴

Thus, an action permissible under 10 C.F.R. § 50.59⁴⁵ is a licensee action, not an agency action and any licensee action permissible under § 50.59 without NRC approval is not a *de facto* license amendment.

C. Absent an Amendment, Petitioner's Remedy Is a § 2.206 Petition

A § 2.206 petition is the proper means to ask the NRC to impose by order certain requirements, modifications, or activities at FCS.⁴⁶ As the Commission noted, "The 2.206 process provides stakeholders a forum to advance their concerns and to obtain full or partial relief, or written reasons why the requested relief is not warranted."⁴⁷ Given that flooding

⁴⁴ See 10 C.F.R. § 50.100. There is no requirement for licensees to individually submit 10 C.F.R. § 50.59 analyses to the NRC although they are maintained onsite available for inspection. Additionally, licensees "shall update periodically . . . the [FSAR] . . . [which] shall include the effects of . . . all safety analyses and evaluations performed by the . . . licensee . . . in support of conclusions that changes did not require a license amendment in accordance with § 50.59(c)(2)" 10 C.F.R. § 50.71(e).

⁴⁵ Under 10 C.F.R. § 50.59, licensees screen out activities which do not change the analysis in the UFSAR before considering those activities under the standards in 10 C.F.R. § 50.59(c)(1) and (c)(2). NEI 96-07, *Nuclear Energy Institute Guidelines for 10 CFR 50.59 Safety Evaluations*, at 29, 30 (25, 26) (July 1996) (ADAMS Accession No. ML060270176). Consequently, the analysis of an activity under the standards in 10 C.F.R. § 50.59(c)(1) and (c)(2) already presupposes that the activity constitutes a change to the licensee's operating authority as described in the UFSAR.

⁴⁶ See *San Onofre*, CLI-12-20, 76 NRC at 439 n.10 (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC at 101 n.7 (1994) ("A member of the public may challenge an action taken under 10 C.F.R. § 50.59 *only by means of a petition under 10 C.F.R. § 2.206.*") (emphasis added)). See *id.* at 440, n.13 (referring challenges to 10 C.F.R. § 50.59 analyses done in support of a steam generator replacement to the EDO for consideration as a 10 C.F.R. § 2.206 petition).

⁴⁷ *San Onofre*, CLI-12-20, 76 NRC at 439-440.

concerns are part of ongoing NRC reviews related to the Fukushima accident, the timing of response to a § 2.206 petition will likely need to await completion of those efforts.⁴⁸ To the extent that Petitioner rejects the § 2.206 process and wants a 10 C.F.R. § 2.309 adjudicatory hearing where no amendment has occurred or application has been submitted, it challenges the Commission's regulatory scheme for handling such matters.

Petitioner recites that an amendment is required if changes to the facility or procedures described in the UFSAR or a test or experiment is not described in the UFSAR requires a TS change or the standards in 10 C.F.R. § 50.59(c)(2) are met. See Petition at 13-15. Petitioner does not, however, explain how matters raised by in its contentions meet the stated criteria for an amendment.⁴⁹ Also, Petitioner does not identify a specific Staff action that "amended" the FCS license or otherwise explain what agency action amended the FCS license. In fact, Petitioner makes conclusory arguments that the license should have been amended. Therefore, the Petition offers no basis which would warrant the conclusion that a *de facto* amendment occurred.

Thus, Petitioner's challenges to 10 C.F.R. § 50.59 activities can only be made via a 10 C.F.R. § 2.206 petition.

II. Assuming *Arguendo* an Amendment Proceeding Exists, Petitioner Does Not Meet 10 C.F.R. § 2.309 Requirements

Petitioner does not identify a pending licensee application or specific agency action that amended the FCS. Even assuming, *arguendo*, that there was a *de facto* license amendment proceeding, the Petition should be denied because it does not meet the 10 C.F.R. § 2.309

⁴⁸ The NRC's response to another 2.206 petition (filed by Thomas Saporito) that challenges flood protection measures at FCS will also be informed by Fukushima related activities. See "Request for Action Against Omaha Public Power District and Nebraska Public Power District," 77 Fed. Reg. 3515 (Jan. 24, 2012).

⁴⁹ The only contention discussion that refers to 50.59 criteria does so after lengthy quotations from an NRC inspection report, but summarily concludes that "significant deficiencies and required changes to design basis documents" are FSAR procedure changes under 50.59(c)(1). See, e.g., Petition at 28-31. The basis for this conclusion is not transparent.

requirements to demonstrate standing, an admissible contention or the timeliness of its petition. Petitioner does not meet its “burden of setting forth a clear and coherent argument for standing and intervention such that the Commission need not “speculate about what a pleading is supposed to mean.”⁵⁰

A. Petitioner Does Not Demonstrate Standing to Intervene

Section 189a. of the AEA provides a hearing opportunity to any person whose interest may be affected by a license amendment proceeding under the AEA.⁵¹ The purpose of a AEA § 189a. hearing is to allow for meaningful public participation and prompt resolution of issues in controversy in a licensing proceeding.⁵² The Commission has helped serve this purpose by establishing standing⁵³ and contention admissibility requirements⁵⁴ which must be met before an AEA § 189a. hearing will be granted.⁵⁵

⁵⁰ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 194 (1999) (citation and internal quotation marks omitted).

⁵¹ 42 U.S.C. § 2239. Sec. 189.a. does not mandate a hearing on license amendments; rather, a hearing will only be held if a hearing request is submitted and the requestor demonstrates standing and offers at least one admissible contention. *City of West Chicago v. NRC*, 701 F.2d 632, 639 (7th Cir. 1983). See 10 C.F.R. § 2.309 (requestor must demonstrate standing and offer at least one admissible contention before the Commission will grant an AEA § 189a. hearing).

⁵² See *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998) (noting that “the opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.”).

⁵³ 10 C.F.R. § 2.309(a) (providing that any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing).

⁵⁴ To be admissible, a contention must satisfy each of the six basic requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vi). Failure to comply with any of these requirements is grounds for finding a contention inadmissible. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).

⁵⁵ The Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of 10 C.F.R. § 2.309(d) and has proposed at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). 10 C.F.R. § 2.309(a).

Accordingly, 10 C.F.R. § 2.309(a) provides that a presiding officer will grant a request for a hearing and petition for leave to intervene if the officer determines that the petitioner has standing according to 10 C.F.R. § 2.309(d) and has proposed at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f).

Typically, a petitioner can establish standing by providing a “sufficiently particularized”⁵⁶ statement of “(1) an actual or threatened, concrete and particularized injury [(injury-in-fact)], that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . , and (4) is likely to be redressed by a favorable decision.”⁵⁷ The injury-in-fact pleading requirement cannot be satisfied by a “conjectural or hypothetical” injury or “an ingenious academic exercise in the conceivable.”⁵⁸ Thus, “[a] plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency’s action.”⁵⁹ Also, a “generalized grievance shared . . . substantially by . . . a large class of citizens” will not result in the distinct and palpable harm sufficient to support standing.⁶⁰

Thus, to establish standing in a proceeding under 10 C.F.R. § 2.309(d), a petitioner must

⁵⁶ *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-614 (1976). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 322-23 (1999); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

⁵⁷ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001)). See also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995).

⁵⁸ *Sequoyah Fuels Corp. & General Atomics*, (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 566 (1992).

⁵⁹ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, 349 (2001) (citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973)).

⁶⁰ *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 174 (1992) (citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-15, 18 NRC 327, 333 (1983)).

provide a sufficiently particularized⁶¹ pleading of an injury-in-fact that is fairly traceable to the challenged Staff action⁶² and falls among the general interests protected by the AEA and is likely to be redressed by a favorable decision.⁶³

“[A] petitioner seeking to intervene in a license amendment proceeding must assert an injury-in-fact associated with *the challenged license amendment*, not simply a general objection to the facility.”⁶⁴ Because a license amendment involves a facility with ongoing operations, a petitioner's challenge must show that *the amendment* will cause a distinct new harm or threat apart from the activities already licensed. Conclusory allegations about potential radiological harm from the facility in general, *which are not tied to the specific amendment at issue*, are insufficient to establish standing.”⁶⁵

While the Commission has recognized a presumption of injury-in-fact for those individuals that reside within 50 miles of a facility in a construction permit, operating license, or license renewal proceeding,⁶⁶ a petitioner in a license amendment proceeding cannot base standing solely on proximity unless “the proposed action quite obvious[ly] entails an increased

⁶¹ *Portland Gen. Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).

⁶² See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-04-01, 59 NRC 1, 4 (2004) (no injury-in-fact can result where no new activity is proposed).

⁶³ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001)). See also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995).

⁶⁴ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 188 (1999) (emphasis in original).

⁶⁵ *White Mesa*, CLI-01-21, 54 NRC at 251 (citation and internal quotation marks omitted) (emphasis added).

⁶⁶ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75, n.22.

potential for offsite consequences.”⁶⁷ Instead, “[w]here there is no obvious potential for radiological harm at a particular distance frequented by a petitioner, it becomes the petitioner's burden to show a specific and plausible means of how the challenged action may harm him or her.”⁶⁸ Finally, “[a] petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences.”⁶⁹

An organization may establish standing under 10 C.F.R. § 2.309(d) based on its own interests (*i.e.*, a showing of harm to its organizational interest) or based on harm to the interests of its members (*i.e.*, representational standing). When an organization asserts representational standing, it must show that: (1) its member(s) 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 claim asserted nor the relief requested requires an individual member to participate in the organization's lawsuit.⁷⁰ Thus, the organization must demonstrate, in part, “how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member.”⁷¹

The Petition is supported by two declarations, but neither indicates the member's street address or otherwise establishes an injury-in-fact for standing.⁷² Petitioner relies on the 50-mile

⁶⁷ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 191 (1999).

⁶⁸ *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005) (internal quotation marks omitted).

⁶⁹ *Zion*, CLI-99-04, 49 NRC at 192.

⁷⁰ See *Private Fuel Storage*, CLI-99-10, 49 NRC at 323 (*citing Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

⁷¹ *White Mesa*, CLI-01-21, 54 NRC at 250; *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 202 (2000).

⁷² See Petition at 4-5; Declaration of Pamela Mackey Taylor (Apr. 13, 2014); Declaration of Candy Bless (Apr. 18, 2014). Ms. Taylor is the Conservation Chair that requests a hearing on behalf of

geographic proximity presumption and claims its members health, safety and environmental interests, among other things, are threatened by operation of FCS with the “significant modifications that have been made, or should be made,” as described in the contentions. Petition at 6. Petitioner further claims that issues presented in the contentions involve significant safety and environmental issues⁷³

Petitioner claims that it has presumptive standing because its members reside within 50-miles of FCS is not sufficient to establish standing. A presumption of standing based on proximity is only recognized in a license amendment proceeding when the proposed amendment obviously entails an increased potential for offsite consequences.⁷⁴ Because Petitioner relies on this proximity presumption, it does not allege or otherwise show a particularized injury-in-fact traceable to an NRC action. See Petition at 5. Conclusory allegations about potential harm that are not tied to specific amendment are not enough to establish standing.⁷⁵ Similarly, claims about the possible effect any decision or order that may be issued in the proceeding on Petitioner’s interests⁷⁶ are not persuasive if Petitioner cannot identify a pending or *de facto* amendment. Thus, Petitioner fails to establish standing because Petitioner does not show its members will suffer a particularized injury from an agency action

the Iowa Chapter of the Sierra Club. Ms. Bless states she lives within 35 miles of FCS and is concerned about flooding risks.

⁷³ Petitioner cites flooding protection, design basis information gaps, containment internal structural deficiencies (which Staff indicated will probably need to be addressed by an amendment), and a site geology susceptible to ground collapse and groundwater contamination). Petition at 7-9.

⁷⁴ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 191 (1999).

⁷⁵ *White Mesa*, CLI-01-21, 54 NRC at 251 (citation and internal quotation marks omitted).

⁷⁶ See 10 C.F.R. § 2.309(d)(1)(iv); Petition at 7 (granting the petition would require the licensee to amend its license to address Petitioner’s concerns).

that has an obvious potential for offsite consequences.⁷⁷

Thus, the Commission should conclude that Petitioner has not established standing to intervene in an adjudicatory proceeding under 10 C.F.R. § 2.309.

B. Contention Admissibility Requirements

A proffered contention is admissible under 10 C.F.R. § 2.309(f)(1) only if it:

- (i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide[s] a brief explanation of the basis for the contention;
- (iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate[s] 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;
- (v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
- (vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁷⁸ They serve to: (1) assure that the contention raises a matter appropriate for adjudication in a particular proceeding;⁷⁹ (2) establish a sufficient foundation for the contention

⁷⁷ See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 538 (2008).

⁷⁸ Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (final rule).

⁷⁹ *Id.* (stating that “the hearing process [is only intended for] issue[s] that [are] appropriate for, and susceptible to, resolution in an NRC hearing.”).

to warrant further inquiry into the assertion; and (3) put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose.⁸⁰

The Commission “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” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.⁸¹ Thus, the 10 C.F.R. § 2.309(f)(1) requirements are “strict by design.”⁸² Furthermore, failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention⁸³ and attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”⁸⁴

Finally, a contention is inadmissible if (1) it constitutes an attack on applicable statutory requirements; (2) it challenges the basic structure of the Commission’s regulatory process or is an attack on the regulations; (3) it is nothing more than a generalization regarding the petitioner’s view of what applicable policies ought to be; (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or (5) it

⁸⁰ *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974); *Arizona Pub. Service Co.* (Palo Verde Nuclear Station, Units Nos. 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

⁸¹ *Turkey Point*, LBP-08-18, 68 NRC at 540.

⁸² *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

⁸³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁸⁴ *AmerGen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

seeks to raise an issue which is not concrete or litigable.⁸⁵ Thus, bare or conclusory assertions are not sufficient to support a contention.⁸⁶

C. The Contentions Are Inadmissible

Moreover, assuming, *arguendo*, that there was a *de facto* license amendment proceeding, the contentions do not meet 10 C.F.R. § 2.309(f)(1) and should be denied.⁸⁷ Importantly, Commission contention admissibility requirements presume that a licensing proceeding exists.⁸⁸ Indeed, all proffered contentions must be within the scope of the proceeding.⁸⁹ Any contention that falls outside the specified scope of the proceeding must be rejected.⁹⁰

Petitioner does not demonstrate that it raises a genuine material dispute with any amendment application or that it raises issues material to any findings the Staff must make under 10 C.F.R. § 2.309(f)(1)(iv) or and (vi).⁹¹ If an issue is not within the scope of a

⁸⁵ *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

⁸⁶ See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000) (A petitioner's issue will be ruled inadmissible if the petitioner has offered . . . only bare assertions and speculation.") (internal quotation marks omitted).

⁸⁷ *Millstone*, CLI-04-36, 60 NRC at 636 (failure to comply with any of the six basic requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vi) is grounds for finding a contention inadmissible).

⁸⁸ See, e.g., 10 C.F.R. § 2.309(a) ("Any person whose interest may be affected by a *proceeding* . . ."), 10 C.F.R. § 2.309(b)(4) ("In *proceedings* . . ."), 10 C.F.R. § 2.309(d)(1)(ii) ("The nature of the requestor's/petitioner's right under the [AEA] to be made a party to the *proceeding*). It is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 239-40 (2004) .

⁸⁹ See 10 C.F.R. § 2.309(f)(1)(iii); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

⁹⁰ See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-1-11, 74 NRC 427, 435-36 (2011).

⁹¹ See 10 C.F.R. § 2.309(f)(1)(iii) (all proffered contentions must be within the scope of the proceeding).

proceeding, a petitioner cannot show the contention is material to a finding in the proceeding or that there is a genuine material dispute with the licensee on an application. Thus, Petitioner's contentions are inadmissible and should be rejected. The discussion below addresses each of the proffered contentions.

1. Contention 1

Modifications for flood protection, including for protection of severe flooding in the event of upstream dam failures, require a license amendment. [Petition at 16]

In support of this contention, Petitioner cites NRC findings about deficiencies in FCS flood protection for a design basis flood, argues that FCS claims to have made significant modifications in flood protection equipment and procedures, discusses NRC reports about the risk of flooding damage from upstream dam failures, and cites a USAR change to the circulating water system for a raw water flow path and flooding mitigation modification (that a March 2013 NRC inspection found should have been evaluated under 50.59 as requiring license amendments).⁹² Petitioner quotes and NRC meeting summary⁹³ and argues that "adequate flood protect at [FCS] require significant modifications and therefore a license amendment." See Petition at 25.

While the information cited in support of the contention shows flooding protection is a concern at FCS, the contention is not admissible because it challenges § 50.59 activities, a matter outside the scope of the amendment proceeding, lacks specificity about why certain past and future changes are "required", and does not raise an issue material to a required finding in a licensing proceeding or a genuine material dispute with an application.

⁹² Petition at 16-18 (citing Inspection Report [IR] 05000285/1010007 (Oct. 6, 2010) (ML102800342); IR 05000285/2013011 and Notice of Violation (Mar. 11, 2013) (ML13070A399)). Petitioner claims that instead of submitting an amendment, FCS decided to install new throttle valves and rely on manual controls. *Id.* at 18.

⁹³ See Petition at 19 (citing Meeting Summary (Apr. 25, 2013) (ML13114A881)).

Petitioner claims OPPD's revised flooding mitigation strategy involves "significant" changes that "require" a license amendment, but other than citing an NRC inspection report finding about two changes, does not explain why other past changes (e.g., using sand bags and temporary barriers) and future modifications trip 10 C.F.R. § 50.59 criteria that requires an amendment. See Petition at 17-19. Underlying this contention is Petitioner's concern that the licensee will conduct activities and modifications under § 50.59 instead of requesting approval of a license amendment.⁹⁴ Because a concern about the licensee improperly applying 10 C.F.R. § 50.59 criteria is an enforcement issue and not a matter appropriate for a license amendment proceeding, the contention is not admissible under 10 C.F.R. 2.309(f)(1)(iii). Given that Petitioner does not identify an amendment application or proceeding, Petitioner does not raise an issue that is within the scope of the proceeding.

Petitioner's concerns about anticipated beyond-design-basis flood protection activities are also not appropriate subject matters for consideration in individual adjudicatory licensing proceedings. See Petition at 16-17, 20-22. As Petitioner was informed in connection with its § 2.206 petition, agency reviews of external hazards such as flooding are ongoing as a result of the Fukushima Dai-Ichi event.⁹⁵ Determinations regarding what changes, if any, should be required by the NRC have not yet been determined.

To the extent the contention makes conclusory assertions that changes or modifications in licensee's flood mitigation strategy are significant, see Petition at 19, Contention 1 is vague and not supported.⁹⁶ While Petitioner does identify a particular "modification" (e.g., sand bags, floodgates, raw water circulation, throttle valves, and manual controls), it does not identify a

⁹⁴ See Petition at 18.

⁹⁵ See 78 Fed. Reg. at 39,020.

⁹⁶ NRC adjudicatory boards are not obliged to decipher or discern a basis in the absence of cogent arguments. See *Zion*, CLI-99-04, 49 NRC at 194.

license application seeking approval of that change, and thus, contrary to 10 C.F.R.

§ 2.309(f)(1)(iii), challenges licensee § 50.59 determinations, does raises a matter material to an required finding in a licensing proceeding.⁹⁷ The bare assertion that it “requires a license amendment,” does not identify an admissible contention in a license amendment proceeding.⁹⁸

In addition, because no amendment is identified and the concerns raised are not within the scope of an amendment proceeding, Petitioner does not show a genuine material dispute with the licensee. Thus, contrary to 10 C.F.R. § 2.309(f)(1)(ii), (iii), (iv), and (vi), the contention is not supported by an adequate basis, does not show the matter is material to a finding the NRC must make to support an action that is involved in the proceeding, or provide sufficient information to show a genuine dispute with the licensee on a material issue of law or fact.

Thus, if Petitioner would like to participate in an amendment proceeding concerning an application related to its contention, it should respond to the publication of a *Federal Register* notice that provides the opportunity to do so. Petitioner has an obligation to examine publicly available information, including the *Federal Register*, to frame its participation in NRC proceedings.⁹⁹

2. Contention 2

Reconstituting the design basis and licensing basis documents
require a license amendment. [Petition at 25]

⁹⁷ See Petition at 5 (“OPPD representatives have stated that they do not intend to request a license amendment”) and 18 (“[I]nstead of requesting an amendment, OPPD changed its approach....”).

⁹⁸ See *Fansteel*, CLI-03-13, 58 NRC at 203.

⁹⁹ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002) (noting that intervenors “have an ‘ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the intervenor to uncover any information that could serve as the foundation for a specific contention.’”) (quoting Final Rule, “Rules for Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)).

In support of Contention 2, Petitioner notes the importance of maintaining a plant's design basis,¹⁰⁰ states that OPPD has been reconstituting its design basis documents for many years and argues that "OPPD must be required to obtain a license amendment to comply with its duty to update and maintain accurate design basis documents." Petition at 26.

Contention 2 does not demonstrate a claim suitable for adjudication. The licensee has not requested any agency action associated with Contention 2, thus there's no proceeding giving rise to any hearing rights under the AEA.

In addition, Petitioner does not explain why an amendment is needed for a licensee to reconstitute its licensing basis. Petitioner does not point to any provision in the renewed FCS operating license that prohibits reconstituting design and licensing documents. Petitioner does not explain how, for example, assembling design basis documentation meets 10 C.F.R. § 50.59 criteria that requires an amendment.

Petitioner lists 10 C.F.R. § 50.59 criteria used to determine when an amendment request is required, quotes from a December 12, 2012, NRC Inspection Report, then asserts, without explanation in Contention 2, that "significant" design basis document "deficiencies and required changes to design basis documents" are changes in the procedures as described in the final safety analysis report."¹⁰¹

The basis for the contention is conclusory and merely repeats that OPPD must be required to obtain an amendment without any discussion of regulatory support for the assertion. Consequently, Petitioner does not satisfy the requirement of 10 C.F.R. § 2.309(f)(1)(ii). Petitioner also does not show that its contention is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). There is no scope of a proceeding because there is no proceeding.

¹⁰⁰ 10 C.F.R. § 50.2 defines what constitutes the design basis.

¹⁰¹ See Petition at 5-6, 31.

Even assuming a proceeding existed, challenges to § 50.59 are not within the scope of a § 2.309 hearing.¹⁰²

Further, these challenges do not raise a genuine material dispute because they are not material to any finding the NRC must make regarding a license application. Because Contention 2 basically challenges whether the licensee has the flexibility to perform the activities under 10 C.F.R. § 50.59 without an amendment, such challenges are not material to any findings the NRC must make regarding a license application and thus, is outside the scope of the proceeding and does not meet 10 C.F.R. § 2.309(f)(1)(iv).

Contention 2 does not identify any omission or dispute associated with an application or associated environmental document submitted by the licensee. Thus, it does not meet 10 C.F.R. § 2.309(f)(1)(vi). In sum, Contention 2 fails to meet the requirements of 10 C.F.R. § 2.309(f).¹⁰³

3. Contention 3

Modifications to repair or replace the inadequate columns require a license amendment. [Petition at 31]

In support of its contention, Petitioner states that in response to the CAL and 0350 review process at Fort Calhoun, it was discovered that 47 of 135 concrete support beams and 5 of 14 concrete support columns in the containment structure do not meet acceptance criteria for

¹⁰² See *San Onofre*, CLI-12-20, 76 NRC at 439 n.10 (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC at 101 n.7 (1994) (“A member of the public may challenge an action taken under 10 C.F.R. § 50.59 only by means of a petition under 10 C.F.R. § 2.206.”)).

¹⁰³ Petitioner notes that the NRC enforces requirements to maintain records. See Petition at 28 (discussing an NRC-identified non-cited violation for failure to update and maintain design basis documents). The Commission’s regulations contain requirements to maintain design bases records. An operating license application includes a final safety analysis report that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole. 10 C.F.R. § 50.34(b). The FSAR must be updated periodically to reflect changes in the facility and safety analyses. 10 C.F.R. 50.71(e).

working stress and/or ultimate strength.¹⁰⁴ Petitioner asserts that OPPD found that these support structures cannot support the loads for which they were designed. Petition at 32. Based on a presentation by OPPD at a public meeting in December 2012, Petitioner contends that OPPD plans to cast new concrete structures in the same locations as the current support structures and that this is a significant modification to the structure of FCS and will require a license amendment.¹⁰⁵

For the reasons discussed below, Contention 3 is inadmissible because it raises out of scope issues, impermissibly challenges the basic structure of the Commission's regulatory process, is unsupported, and fails to raise a genuine material dispute with any application.

Contention 3 impermissibly challenges the basic structure of the Commission's regulatory process and raises out of scope issues. To the extent that Petitioner claims containment internal structures do not conform to OPPD's license or that significant modifications are required, Petitioner challenges the existing ongoing operations or license at FCS. Such challenges must be raised in a 10 C.F.R. § 2.206 proceeding, not a 10 C.F.R. § 2.309 hearing. Indeed, the Commission has held that challenges that a licensee is not meeting its license requirements should be submitted through the 10 C.F.R. § 2.206 process.¹⁰⁶

In fact, as Petitioner notes, it has already submitted a petition through the 10 C.F.R. § 2.206 process and one of the issues accepted was regarding "a support beam . . . that was

¹⁰⁴ Petition at 31-33 (citing Licensee Slides from 12/12/2012 Public Meeting with Omaha Public Power District to Discuss Containment Internal Structures Issues to Support Restart of Fort Calhoun Station, Unit 1, at 27 (ADAMS Accession No. ML12349A151) (OPPD CIS Slides)).

¹⁰⁵ Petition at 32 (citing OPPD CIS Slides at 43).

¹⁰⁶ See, e.g., *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 483 (2012) (noting that the 10 C.F.R. § 2.206 petition process can respond to claims of regulatory violations).

not within allowable limits for stress and loading.”¹⁰⁷ A concern about a support beam not being within allowable limits for stress and loading is one of the same issues Petitioner attempts to raise in Contention 3.¹⁰⁸ Petitioner asserts that the procedure authorized by 10 C.F.R. § 2.206 does not “provide a meaningful vehicle for the public to ensure that Fort Calhoun will be operated safely with protection for the environment.”¹⁰⁹ Petition at 10. Thus, in the instant request, Petitioner essentially challenges established Commission process by attempting to bypass the 10 C.F.R. § 2.206 process by requesting a 10 C.F.R. § 2.309 hearing.

To the extent that Contention 3 is concerned about the adequacy of § 50.59 evaluations or Staff regulatory oversight concerning FCS, and wants to require enforcement of the license or additional plant modifications in an amendment proceeding (where no application is pending), these are impermissible challenges to the basic structure of the Commission’s regulatory process. The appropriate vehicle under the Commission’s regulations is through the 10 C.F.R. § 2.206 process, not a 10 C.F.R. § 2.309 hearing.¹¹⁰ Accordingly, Contention 3 raises out of scope issues and is not admissible under 10 C.F.R. § 2.309(f)(1)(iii).

Petitioner’s assertion that a license amendment is necessary is unsupported. Petitioner contends that based on an OPPD presentation OPPD plans to address the inadequate support structures by casting new concrete structures in the same locations as the current structures

¹⁰⁷ Petition at 10-11; Omaha Public Power District, Fort Calhoun Station, Unit 1, Request for Action, 78 FR 39019, 39020 (June 28, 2013); Letter from Eric J. Leeds, Director, Office of Nuclear Reactor Regulation to Mr. Wallace Taylor (May 23, 2013) (ADAMS Accession No. ML13092A248).

¹⁰⁸ Because Petitioner’s 2.206 Petition only addresses support beams in the containment structure, Petition would need to amend its 2.206 petition to raise a challenge regarding the concrete support columns in the containment structure. See Leeds Letter (accepting the support beam issue from Petitioner’s 2.206 petition).

¹⁰⁹ *San Onofre*, CLI-12-20, 76 NRC at 439-440 (“The 2.206 process provides stakeholders a forum to advance their concerns and to obtain full or partial relief, or written reasons why the requested relief is not warranted.”).

¹¹⁰ *Peach Bottom*, ALAB-216, 8 AEC at 20-21 (finding that a contention is inadmissible if it “it challenges the basic structure of the Commission’s regulatory process.”). See also *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 and 7), LBP-11-6, 73 NRC 149, 253 n.16 (2011).

and that this will be a significant modification “to the structure of the Fort Calhoun reactor” that will require a license amendment. Petition at 32. However, Petitioner’s claims that a license amendment is necessary are vague and speculative. The cited presentation given at a December 2012 public meeting describes “design options” for possible modifications.¹¹¹ However, Petitioner provides no support or documentation indicating that “modifications” have been or will be implemented by OPPD nor has Petitioner described any discrete change at FCS that necessitates a license amendment. Notably, Petitioner does not show that any OPPD action under 10 C.F.R. § 50.59 was not permissible under those criteria. However, the Commission’s regulations contemplate that such challenges should be raised using the 2.206 process, not an amendment proceeding.¹¹²

In addition, Petitioner argues that the structures are operable in an outage condition, but are inadequate during normal operation and that FCS should not have been allowed to restart until the problem was solved and a license amendment is obtained.¹¹³ However, containment internal structures were an operating issue to be resolved before the restart of FCS and were added to the CAL Restart Checklist.¹¹⁴ The containment internal structures issues identified as

¹¹¹ OPPD CIS Slides at 43 (describing three “design options” with the “Cast-in-Place Concrete” option designated as being the “current preferred option”).

¹¹² *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (internal quotations omitted) (noting that a petitioner’s issue will be “ruled inadmissible if the petitioner has offered no tangible information, no experts, [or] no substantive affidavits but instead only bare assertions and speculation.”).

¹¹³ Petition at 33-34 (citing OPPD CIS Slides at 37).

¹¹⁴ Letter from Elmo E. Collins, Regional Administrator, Region IV, USNRC to Mr. Louis Cortopassi, Site Vice President and Chief Nuclear Officer, Omaha Public Power District, Fort Calhoun Station, subject: *Confirmatory Action Letter – Fort Calhoun Station* (Feb. 26, 2013), (ADAMS Accession No. ML13057A287). See also Omaha Public Power District, Fort Calhoun Station, Unit 1, Request for Action, 78 FR 39019, 39020 (June 28, 2013) (“The NRC is currently reviewing the issues above related to containment internal structures, electrical penetrations, and upstream dam failures. Both the containment internal structures and electrical penetrations issues have been identified as issues that must be resolved before restart of the facility and have been added to the confirmatory action letter.”).

needing to be resolved prior to restart of the facility were closed out before restart of the facility.¹¹⁵

Additionally, as discussed previously, there is currently no application to amend OPPD's license to make modifications to address the structural beams and columns in the containment internal structure. Thus, Contention 3 is inadmissible because it does not raise a genuine material dispute with any application or raise issues material to any findings the Staff must make. 10 C.F.R. § 2.309(f)(1)(vi).

Accordingly, Contention 3 is inadmissible because it impermissibly challenges the basic structure of the Commission's regulatory process, is unsupported, and fails to raise a genuine material dispute with any application.

4. Contention 4

Modifications necessary to address the problem that the Fort Calhoun reactor was built above karst terrain require a license amendment. [Petition at 34]

In support of its contention, Petitioner asserts that a geotechnical study at FCS conducted after the June 2011 flood made reference to a 1968 study which stated that the Fort Calhoun reactor was constructed above karst geological formations." Petition at 34-35. Petitioner asserts that karst is composed of a soft rock "with fissures and fractures that make the formation unstable and allow liquids, such as tritium leaking from the Fort Calhoun reactor,

¹¹⁵ CAL Closure Letter, Enclosure 1 at 9-10. The letter states as follows:

OPPD was able to demonstrate the structure was operable and fully capable of performing its function under all design basis accident loading conditions. The NRC determined that OPPD appropriately evaluated the cause and extent-of-condition for this issue and independently verified that OPPD has actions in place via the corrective action process to restore the containment internal structure to its design criteria in a timely manner. Following completion of NRC inspection activities, on November 7, 2013, the IMC 0350 Panel and NRC staff involved in reviewing Restart Checklist Item 2.d conducted discussions and determined this item had been adequately addressed by OPPD and therefore closed it.

to seep into the groundwater.” Petition at 35. Petitioner also claims that there has been no serious effort to determine the nature and extent of the problem, or to address the problem, and that addressing this issue will require major modifications and a corresponding license amendment. Petition at 36.

For the reasons discussed below, Contention 4 is inadmissible because it raises out of scope issues, impermissibly challenges the basic structure of the Commission’s regulatory process, is unsupported, and fails to raise a genuine material dispute with any applications.

Contention 4 does not raise any issues within the scope of a proceeding because there currently is no license amendment proceeding regarding karst formations. 10 C.F.R. § 2.309(f)(1)(iii).¹¹⁶ Contentions claiming that the Staff has not performed an adequate analysis fall outside the scope of licensing proceedings.¹¹⁷ Accordingly, Contention 4 is inadmissible because it is out of scope. 10 C.F.R. § 2.309(f)(1)(iii).

Moreover, to the extent that Petitioner claims that addressing the karst geology at FCS requires major modifications, it challenges the existing license and must raise its concerns by asking that a 10 C.F.R. § 2.206 proceeding be instituted, not a 10 C.F.R. § 2.309 hearing.¹¹⁸ Thus, to the extent that Contention 4 challenges the Staff inspection, enforcement, or regulatory

¹¹⁶ See 10 C.F.R. § 2.309(f)(1)(iii); *Turkey Point*, CLI-00-23, 52 NRC at 329; *Catawba*, ALAB-825, 22 NRC at 790-91.

¹¹⁷ See e.g., *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 37 (2002) (“It is a well-established principle of NRC adjudication that ‘contentions must rest on the *license application*, not on NRC Staff reviews.’ As the Commission stated when it amended the contentions rule, ‘a contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis’ because ‘the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than adequacy of the NRC Staff performance.’”) (internal citations omitted) (emphasis in original).

¹¹⁸ See, e.g., *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 483 (2012) (noting that the 10 C.F.R. § 2.206 petition process can respond to claims of regulatory violations).

oversight activities, it impermissibly challenges the basic structure of the Commission's regulatory process and should be submitted through the 10 C.F.R. § 2.206 process.¹¹⁹

Additionally, Petition does not provide adequate facts or expert opinion in support of Contention 4. Petitioner asserts the karst terrain "creates a danger of collapse of the underlying support of the reactor" at FCS that could damage the containment vessel or the spent fuel pools. Petition at 9. Petitioner asserts that a license amendment is necessary to ensure that these issues are adequately addressed. *Id.* However, Petitioner's claims are vague and speculative because Petitioner provides no factual support or expert opinion to support its claims. Additionally, Petitioner states that FCS "will require major modifications and a corresponding license amendment," but does not specify what discrete changes would be necessary to address the karst formations and why those changes would require a license amendment. Petitioner does not address the 10 C.F.R. § 50.59 criteria that require a licensee to seek a license amendment. In the absence of an amendment, any challenges to 50.59 analyses or current plant safety (and request to impose requirements) must be pursued via the 10 C.F.R. § 2.206 petition process.

Petitioner also asserts that a geotechnical study at FCS conducted after the June 2011 flood referenced a 1968 study which stated that FCS was constructed above karst geological formations. Petition at 34-35. However, Petitioner does not identify this document. Petitioner also indicates that it intends to rely on two reports prepared in 1967 and 1968 at the Fort Calhoun site by the consulting firm, Dames and Moore, prior to construction of the Fort Calhoun reactor. Petition at 35-38. Petitioner relies on the 1968 study to assert that "there is no question that there is karst terrain directly beneath the Fort Calhoun reactor." Petition at 37. However, Petitioner fails to demonstrate that these reports show that the karst formations pose

¹¹⁹ *Peach Bottom*, ALAB-216, 8 AEC at 20-21 (finding that a contention is inadmissible if it "it challenges the basic structure of the Commission's regulatory process."). *See also Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 and 7), LBP-11-6, 73 NRC 149, 253 n.16 (2011).

a significant safety issue. Also, Petitioner references a 1981 guidance document and argues that there is no indication that any of the siting considerations or evaluations outlined in this document were done prior to the construction of the Fort Calhoun reactor. Petition at 38-41. However, this guidance document, published more than a decade after FCS had been constructed, does not support Petitioner's assertion that the karst formations currently pose a safety issue and/or that evaluation in a license amendment proceeding is necessary. Without such factual support, these remaining claims constitute the type of speculation and bare assertion that the Commission has previously found inadmissible.¹²⁰

In addition, Petitioner claims that the fractures in the karst geology make it vulnerable to groundwater contamination because collapse of the supports underlying the reactor could cause leakage of radioactive substances into the groundwater and into the Missouri River. Petition at 9, 35, 41. Petitioner also asserts that given the history of tritium leaks reactors operated by Exelon, the prior leaks at Fort Calhoun, and the existence of karst geology under the Fort Calhoun reactor, it is imperative that this issue be examined through a license amendment proceeding. Petition at 41-42. However, Petitioner's claims are vague and speculative because it provides no support or expert opinion to support its assertions that the karst formations could make FCS vulnerable to tritium leaks or cause contamination of the groundwater or river, nor does Petitioner provide factual support for its assertions regarding purported leaks at FCS. Accordingly, Contention 4 is inadmissible because it does not provide sufficient facts or expert opinion. 10 C.F.R. § 2.309(f)(1)(v).

Moreover, Contention 4 does not raise a genuine dispute on a material issue of law or fact. Because there is no application to amend the FCS license to make modifications to address the karst geology at Fort Calhoun, Petitioner cannot directly controvert any license

¹²⁰ *Fansteel*, CLI-03-13, 58 NRC at 203.

amendment application. In addition, Petitioner identifies no NRC Staff action, decision, or approval related to the karst formations at FCS that constitute an amendment. Essentially, Petitioner seeks to raise a concern about whether requirements should be imposed to provide for the protection of public health. To the extent Contention 4 challenges the Staff's actions or inactions regarding the evaluation of karst formations at Fort Calhoun,¹²¹ these claims do not raise a genuine material dispute under 10 C.F.R. § 2.309(f)(1)(vi).¹²² Thus, Contention 4 is inadmissible because it does not raise a genuine material dispute with any application or raise issues material to any findings the Staff must make under 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

For the reasons discussed above, Contention 4 is inadmissible because it raises out of scope issues, impermissibly challenges the basic structure of the Commission's regulatory process, is unsupported, and fails to raise a genuine material dispute with any applications, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).

D. The Petition Does Not Meet Timeliness Standards

Under 10 C.F.R. § 2.309(b), petitioners are provided a 60-day opportunity to seek a hearing on an agency action through a *Federal Register* notice. Sixty day period also applies to actions on applications for which the NRC does not issue a notice, but hinges, in part, on whether there is a pending application.¹²³ A petition is timely if filed within this period.

¹²¹ Petition at 38.

¹²² The plain reading of 10 C.F.R. § 2.309(f)(1)(vi) suggests that the petitioner must identify a genuine dispute with the *applicant/licensee*, not with the Staff. Thus, these challenges do not raise a genuine material dispute.

¹²³ 10 C.F.R. § 2.309(b)(4) (providing that, if no *Federal Register* notice of an agency action has been published, a petition must be filed within 60 days after receiving actual notice of an agency action, but not later than the latest of 60 days after publication of a notice on the NRC's Web site or 60 days after the petitioner receives *actual notice of a pending application*).

Contrary to its assertion,¹²⁴ Petitioner does not meet the Commission's timeliness requirements in 10 C.F.R. § 2.309(b) and (c). Timeliness requirements are typically provided in the *Federal Register* notice associated with a given licensing action.¹²⁵ As discussed above, Petitioner fails to identify any actual or *de facto* licensing action associated with FCS. Thus, if no amendment application has been filed, an intervention petition would be premature. Also, to the extent Petitioner challenges a Staff decision not to require an amendment prior to the FCS restart that occurred in December 2013, the Petition would be untimely.

Petitioner has not shown that its challenges to licensee 10 C.F.R. § 50.59 evaluations and activities are timely under 10 C.F.R. § 2.309. Such claims are not cognizable in a 10 C.F.R. § 2.309 hearing.¹²⁶ Thus, the Commission should find the request untimely.

Inasmuch as Petitioner does not identify a published notice of an amendment application or agency action, does not identify a discrete *de facto* agency action that amended the license, and otherwise fails to show that its concerns are being raised within 60-day period identified in the regulations, Petitioner has not shown that it meets the timeliness standard in 10 C.F.R. § 2.309(b).

Good cause for filing after the deadline can be demonstrated by showing that information upon which its filing relies was not previously available, information upon which its filing is based is materially different from information previously available, and the filing has been submitted in a timely fashion based on the availability of subsequent information.

¹²⁴ See Petition at 5-6. Petitioner discusses the balancing test prior to the 2012 revision of 10 C.F.R. Part 2. See Petition at 6-7.

¹²⁵ 10 C.F.R. § 2.309(b).

¹²⁶ See *Yankee*, CLI-94-3, 39 NRC at n.10; *San Onofre*, CLI-12-20 76 NRC at 440, n.13 (referring challenges to 10 C.F.R. § 50.59 analyses to the EDO for consideration as a 10 C.F.R. § 2.206 petition); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-13-11, 78 NRC 177, 180 (2013) (holding that "a challenge to FirstEnergy's analysis under 10 C.F.R. § 50.59 of its proposed steam generator replacement is not the proper subject of an adjudicatory hearing" and that "the Commission has prohibited Licensing Boards from hearing challenges to actions taken under 10 C.F.R. § 50.59).

10 C.F.R. § 2.309(c). But Petitioner does not make this showing with respect to any of its contentions.

For example, in Contention 1, Petitioner's claims regarding flood protection are not timely because Petitioner does not identify any licensing action associated with these claims. Additionally, the most recent document Petitioner references with respect to Contention 1 is dated April 2013, see Petition at 18-19. Petitioner does not show that its concerns about past licensee changes being significant enough to require a license amendment are timely submitted. Petitioner does not explain how any NRC action amended the license. Thus, Contention 1 does not meet the timeliness requirements in 10 C.F.R. § 2.309 (b) or (c).

Petitioner's claims regarding reconstituting the design basis and licensing basis documents are not timely because Petitioner does not identify any specific licensing or other action associated with these claims. Thus, Contention 2 is not admissible under 10 C.F.R. § 2.309(b) and (c).

Additionally, there is no actual licensing action or amendment on the structural beams and columns in the containment internal structure. Petitioner relies on a presentation from 2012, Petition at 32, but does not show that this issue is timely submitted. Accordingly, Contention 3 is not admissible because Petition does not meet the Commission's timeliness requirements in 10 C.F.R. § 2.309(b) or (c).

Concerns raised about the karst formation (Contention 4) are not timely, because Petitioner identifies no pending or actual licensing action associated with the karst formations at FCS. Thus, it does not establish that its request is timely.

Moreover, Petitioner relies on two reports prepared in 1967 and 1968, and a 1981 guidance document. Petition at 38-41. The most recent document Petitioner mentions with respect to Contention 4 is "a geotechnical study at Fort Calhoun conducted after the June 2011 flood." Petition at 34-35. However, Petitioner does not otherwise identify this document. Nevertheless, Petitioner indicates that this study "made reference to a 1968 study" regarding

karst formations at Fort Calhoun thereby suggesting that any relevant information regarding karst formations in the geotechnical study is not based on new or previously unavailable information. Therefore, Contention 4 does not meet the Commission's timeliness requirements in 10 C.F.R. § 2.309(b) or (c).

III. Petitioner Does Not Show that the Exercise of the Commission's Inherent Supervisory Authority to Require License Amendments and Grant A Hearing Is Warranted

In the alternative, Petitioner requests that the Commission exercise its inherent supervisory authority to convene an adjudicatory proceeding, apart from 10 C.F.R. § 2.309.¹²⁷ Petitioner argues that, to assure adequate protection of public health and safety, "the Commission must consider what amendment(s) to the license is/are required by the cumulative changes that have been made or should be made to address the issues" in the Petition.¹²⁸

The request should be denied. The Commission has indicated that it disfavors requests to invoke its inherent supervisory authority over adjudications,¹²⁹ and the Petition presents no compelling reasons to grant its request.

To the extent Petitioner seeks discretionary intervention under 10 C.F.R. § 2.309(e), the request should be denied. A prerequisite to discretionary intervention under 10 C.F.R. § 2.309(e) is that another party has successfully established standing and provided an admissible contention in a proceeding. In this instance, there is neither a proceeding or party that has plead an admissible contention. Therefore, the Commission should also deny the request as failing to meet this threshold requirement of 10 C.F.R. § 2.309(e).

¹²⁷ See Petition at 12-13.

¹²⁸ *Id.* at 13.

¹²⁹ U.S. Department of Energy (High-Level Waste Repository), CLI-11-13, 74 NRC 635, 637 n.11 (citing U.S. Department of Energy (High-Level Waste Repository), CLI-10-13, 71 NRC 387, 388 n.6 (2010) (citing Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009))).

Further, Petitioner has not identified information that would warrant granting its request. Petitioner has not shown a significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented. Nor has petitioner sets forth its contentions with the requisite specificity to allow evaluation, and demonstrated their importance and immediacy, justifying the time necessary to consider them.¹³⁰ Rather, it seeks to litigate whether FCS changes made without license amendments or current plant conditions are safe, matters the Commission has indicated should be raised and presented via a § 2.206 petition. Moreover, Petitioner's (1) vague references to changes at the facility, (2) impatience about the schedule for the decision on flooding protection and structural matters, (3) failure to file a § 2.206 petition on any contention issues not previously raised in its petition, and (4) disinclination to await noticed hearing opportunities on specific license amendment applications, should persuade the Commission to reject the Petition. Challenges to § 50.59 activities or plant conditions are appropriately raised under 10 C.F.R. § 2.206, not an amendment proceeding.

An amendment proceeding requires an applicant that seeks NRC approval of a particular change or discrete changes to its TSs, license or USAR, properly focusing the proceeding on whether the specific request should be granted under NRC regulations and applicable statutory requirements. The agency's regulations contemplate that such proceeding will await licensee determinations as to specific change(s) it would like to pursue.

Further, Petitioner would have the Commission commence a proceeding, before the completion of Staff 10 C.F.R. § 50.59 inspection efforts, and Fukushima accident-related recommendations, to consider whether changes to the FCS license are "required.

Instituting a proceeding under these circumstances would be contrary to Commission case law that provides that concerns about the adequacy of 50.59 analyses must be raised by

¹³⁰ *Pebble Springs*, 4 NRC at 617.

means of a § 2.206 petition. It would also waste agency resources to address matters that should properly await the filing of an amendment application or a § 2.206 petition, or the completion of NRC inspection efforts¹³¹ and generic agency activities. Granting the request could also lead to public confusion about when a license is amended and the opportunity to participate in an adjudicatory proceeding is afforded, opening the flood gates to unwarranted hearing requests.

The Commission should reject Petitioner's argument that the 2.206 process does not provide a meaningful opportunity to pursue its concerns. See Petition at 10-11 (arguing that a § 2.206 does not ensure that FCS "will be operated safely with protection for the environment," given that few petitions are granted and estimated February 2015 issuance date for a Directors decision). As the Commission has stated:¹³²

The 2.206 process provides stakeholders a forum to advance their concerns and to obtain full or partial relief, or written reasons why the requested relief is not warranted. We may then review the NRC Staff's findings on our own motion. If [the petitioner] prevails on its 2.206 argument that [the licensee] needed a license amendment to replace the [facility] steam generators, then it may be able to obtain the adjudicatory hearing it seeks. Section 189a of the [AEA] grants an opportunity for a hearing on (among other things) license amendments We therefore deny [the petitioner's] request and refer this portion of [the] petition to the EDO for consideration as a petition under 10 C.F.R. § 2.206.

Applying the wisdom reflected in the *San Onofre* decision, the Commission should similarly reject Petitioner's attempts to challenge 10 C.F.R. § 50.59 activities or analyses and Staff regulatory oversight and enforcement activities in a license amendment proceeding.

¹³¹ Petitioner argues that CALs, the Restart Checklist Basis Documents, and the 0350 process are not adequate to protect its interests because it cannot present evidence on its concerns or "effectively question the positions taken by OPPD and the NRC." Petition at 10. While Staff disputes the suggestion that it has not performed its responsibilities consistent with the public interest, Petitioners should feel to provide NRC personnel information about Petitioner's concerns. Staff has held public meetings concerning IMC 0350 activities and answered questions. In addition, consideration of the 2.206 Petition also involved multiple interactions with Petitioner. See discussion at page 6, *supra*.

¹³² *San Onofre*, CLI-12-20, 76 NRC at 439-40.

Petitioner's challenge to these regulatory processes should be reserved for a § 2.206 petition or § 2.802 petition (rulemaking), but not a § 2.309 proceeding.¹³³

In short, the Commission should reject Petitioner's attempt to have the Commission consider concerns that either have been or should be raised in a 10 C.F.R. § 2.206 petition. While referral (to the EDO) of any safety concerns that were not previously included in Sierra Club's 2.206 petition may be appropriate,¹³⁴ these issues are not material to licensing decisions or adjudicatory proceedings.¹³⁵ Thus, no exercise of the Commission's supervisory authority to grant a discretionary hearing is not warranted.

CONCLUSION

The Petition should be denied. Petitioner fails to demonstrate that the Commission should clarify that the CAL and IMC 0350 processes, or changes made via 10 C.F.R. § 50.59 are *de facto* license amendment proceedings with hearing rights or exercise its inherent supervisory authority to institute an adjudicatory proceeding as a matter of discretion. Petitioner has not identified an actual license amendment proceeding and otherwise does not meet the 10 C.F.R. § 2.309 timelines, standing and contention admissibility requirements.

¹³³ *Peach Bottom*, ALAB-216, 8 AEC at 20-21

¹³⁴ See e.g., *San Onofre*, CLI-12-20, 76 NRC at 440 n. 13.

¹³⁵ See *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 57-58 (2012).

Further, Petitioner has not raised a significant safety issue or other basis to warrant instituting a discretionary adjudicatory proceeding, particularly since similar issues raised are pending in its 10 C.F.R. § 2.206 Petition, the appropriate forum for a petitioner seeking to impose requirements.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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Dated at Rockville, Maryland
this 20th day of May, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
OMAHA PUBLIC POWER DISTRICT)	Docket No. 50-285
)	
(Fort Calhoun Station, Unit 1))	
)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF ANSWER TO SIERRA CLUB REQUEST FOR A HEARING AND PETITION TO INTERVENE ASKING THAT A LICENSE AMENDMENT PROCEEDING BE CONVENED," dated May 20, 2014, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 28th day of April, 2014.

/Signed (electronically) by/

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