

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matters of)	
)	
DTE ELECTRIC CO.	)	Docket No. 52-033-COL
(Fermi Nuclear Power Plant, Unit 3))	
)	
DUKE ENERGY CAROLINAS, LLC	)	Docket Nos. 52-018-COL,
(William States Lee III Nuclear Station,	)	52-019-COL
Units 1 and 3))	
)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034-COL,
(Comanche Peak Nuclear Power Plant,	)	52-035-COL
Units 3 and 4))	
)	
NUCLEAR INNOVATION	)	Docket Nos. 52-012-COL,
NORTH AMERICA LLC	)	52-013-COL
(South Texas Project Units 3 and 4))	
)	
PROGRESS ENERGY FLORIDA, INC.	)	Docket Nos. 52-029-COL,
(Levy County Nuclear Power Plant,	)	52-030-COL
Units 1 and 2))	
)	
SOUTH TEXAS PROJECT	)	Docket Nos. 50-498-LR,
NUCLEAR OPERATING CO.	)	50-499-LR
(South Texas Project Units 1 and 2))	
)	
TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
(Watts Bar Nuclear Plant, Units 2))	
)	
VIRGINIA ELECTRIC AND POWER CO.	)	Docket No. 52-017-COL
d/b/a DOMINION VIRGINIA POWER & OLD))	
DOMINION ELECTRIC COOPERATIVE)	
(North Anna Power Station, Unit 3))	
)	

NRC STAFF OPPOSITION TO THE "PETITION TO SUPPLEMENT REACTOR-SPECIFIC
ENVIRONMENTAL IMPACT STATEMENTS TO INCORPORATE BY REFERENCE
THE GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR
CONTINUED SPENT FUEL STORAGE"

Sara B. Kirkwood
Counsel for NRC Staff

February 12, 2015

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
BACKGROUND	2
DISCUSSION.....	4
I. The Petition is Procedurally Improper	4
II. Legal Standards Governing Admission of Contentions.....	6
III. The Petitioners Pleading Does Not Meet the Contention Standards	7
IV. A Motion to Reopen to Raise New Concerns is Necessary for Most of the Proceedings	10
CONCLUSION	12

TABLE OF AUTHORITIES

Page

JUDICIAL DECISIONS

Supreme Court:

Pub. Citizen v. Dep't of Transp., 541 U.S. 752 (2004).....9

U.S. Forest Serv. v. Pac. Rivers Council, 133 S.Ct. 2843, 186 L. Ed. 2d 881 (2013)8

Appellate Courts:

Nat'l Comm. For The New River, Inc. v. FERC, 373 F.3d 1323 (D.C. Cir. 2004)9

New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012)2

Pac. Rivers Council v. U.S. Forest Serv., 689 F.3d 1012 (9th Cir. 2012)8

ADMINISTRATIVE DECISIONS

Commission:

Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7,
69 NRC 235 (2009).....10

Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC
(Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012).....3, 5

Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC
(Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08,
80 NRC 71 (Aug. 26, 2014)3, 4

DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-14-10,
80 NRC __, __ (Dec. 16, 2014) (slip op.).....4

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3),
CLI-01-24, 54 NRC 349 (2001).....7

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5,
69_NRC115 (2009).....6

Luminant Generation Co. LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4),
CLI-12-7, 75 NRC 379 (2012).....8-9

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation),
CLI-99-10, 49 NRC 318 (1999).....7

Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation),
CLI-06-3, 63 NRC 19 (2006).....11, 11-12

Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4,
61 NRC 10 (2005).....9

Union Elec. Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2),
CLI-11-5, 74 NRC 141 (2011).....5

Virginia Elec. & Power Co. (North Anna Power Station, Unit 3), CLI-12-14,
75 NRC 692 (2012)..... 10

Atomic Safety and Licensing Appeal Board:

Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775,
19 NRC 1361 (1984), *modified*, CLI-84-14, 20 NRC 285 (1984) 10, 11

Atomic Safety and Licensing Board:

DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), LBP-14-07, 79 NRC 451 (2014) 4

Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility),
LBP-01-35, 54 NRC 403 (2001), *rev'd in part on other grounds*, CLI-02-24,
56 NRC 335 (2002)..... 7

Nuclear Innovation N. America LLC (South Texas Project Units 3 and 4), LBP-14-14,
80 NRC __, __ (slip op.) (Sept. 19, 2014)..... 4

Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 & 2),
LBP-13-4, 77 NRC 107 (2013)..... 4

Tennessee Valley Auth. (Watts Bar Unit 2), LBP-14-13,
80 NRC __, __ (slip op.) (Sept. 9, 2014).....4

REGULATIONS

10 C.F.R. § 2.309.....5

10 C.F.R. § 2.309(f)(1).....6-7

10 C.F.R. § 2.309(f)(1)(vi).....6

10 C.F.R. § 2.326.....5

10 C.F.R. § 2.326(a) 10

10 C.F.R. § 2.326(b) 10

10 C.F.R. § 2.335.....8

10 C.F.R. § 51.23.....8

10 C.F.R. § 51.75(c)3

10 C.F.R. Part 51, Appendix A, 1.(b) 7

MISCELLANEOUS

Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004) (Final Rule)5

Continued Storage of Spent Nuclear Fuel,
79 Fed. Reg. 56,238 (Sept. 19, 2014) (Final Rule)3, 11

Memorandum and Order (Dismissing Environmental Waste Confidence Contention)
(Oct. 1, 2014) (unpublished Board order) (ADAMS Accession No. ML14274A214)..... 4

Memorandum and Order (Denying Motion to Admit Waste Confidence Contention)
(Oct. 6, 2014) (unpublished)4

NUREG-0498, Supplement 2, Vol. 1 & 2, *Final Environmental Statement Related to the
Operation of Watts Bar Nuclear Plant, Unit 2* (May 2013) (ADAMS Accession Nos.
ML13144A092, ML13144A093)4

NUREG-1437, Final Report, Supplement 48, *Generic Environmental Impact Statement for
License Renewal of Nuclear Plants Supplement 48 Regarding South Texas Project, Units 1
and 2* (Nov. 2013) (ADAMS Accession No. ML13322A890)4

NUREG-1937, Vol. 1 & 2, Final Report, *Environmental Impact Statement for Combined
Licenses (COLs) for South Texas Project Electric Generating Station Units 3 and 4*
(Feb. 28, 2011) (ADAMS Accession Nos. ML11049A000, ML11049A001).....4

NUREG-1941, Vol. 1, 2, & 3, Final Report, *Environmental Impact Statement for Combined
Licenses (COLs) for Levy Nuclear Plant Units 1 and 2* (Apr. 30, 2012)
(ADAMS Accession Nos. ML12100A063, ML12100A068, ML12100A070)4

NUREG-1943, Vol. 1 & 2, Final Report, *Environmental Impact Statement for Combined
Licenses (COLs) for Comanche Peak Nuclear Power Plant Units 3 and 4* (May 31, 2011)
(ADAMS Accession Nos. ML11131A001, ML11131A002)4

NUREG-2111, Vol. 1, 2, & 3, *Final Environmental Impact Statement for Combined Licenses
COLs) for William States Lee III Nuclear Station Units 1 and 2* (Dec. 31, 2013) (ADAMS
Accession Nos. ML13340A005, ML13340A006, ML13340A007)3-4

NUREG-2157, Vol. 1 & 2, Final Report, *Generic Environmental Impact Statement for Continued
Storage of Spent Nuclear Fuel* (Sept. 2014) (ADAMS Accession Nos. ML14196A105,
ML14196A107)3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matters of)	
)	
DTE ELECTRIC CO.	)	Docket No. 52-033-COL
(Fermi Nuclear Power Plant, Unit 3))	
)	
DUKE ENERGY CAROLINAS, LLC	)	Docket Nos. 52-018-COL,
(William States Lee III Nuclear Station,	)	52-019-COL
Units 1 and 3))	
)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034-COL,
(Comanche Peak Nuclear Power Plant,	)	52-035-COL
Units 3 and 4))	
)	
NUCLEAR INNOVATION	)	Docket Nos. 52-012-COL,
NORTH AMERICA LLC	)	52-013-COL
(South Texas Project Units 3 and 4))	
)	
PROGRESS ENERGY FLORIDA, INC.	)	Docket Nos. 52-029-COL,
(Levy County Nuclear Power Plant,	)	52-030-COL
Units 1 and 2))	
)	
SOUTH TEXAS PROJECT	)	Docket Nos. 50-498-LR,
NUCLEAR OPERATING CO.	)	50-499-LR
(South Texas Project Units 1 and 2))	
)	
TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
(Watts Bar Nuclear Plant, Units 2))	
)	
VIRGINIA ELECTRIC AND POWER CO.	)	Docket No. 52-017-COL
d/b/a DOMINION VIRGINIA POWER & OLD))	
DOMINION ELECTRIC COOPERATIVE)	
(North Anna Power Station, Unit 3))	
)	

NRC STAFF OPPOSITION TO THE "PETITION TO SUPPLEMENT REACTOR-SPECIFIC
ENVIRONMENTAL IMPACT STATEMENTS TO INCORPORATE BY REFERENCE
THE GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR
CONTINUED SPENT FUEL STORAGE"

INTRODUCTION

On January 28, 2015, the "Petition to Supplement Reactor-Specific Environmental
Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement

for Continued Spent Fuel Storage” (Petition) was filed in the above-captioned proceedings. On January 29, 2015, the Commission issued an order directing that any answers to the Petition be filed no later than Thursday, February 12, 2015. Order of the Secretary, Establishing Petition Answer and Response Due Dates (Feb. 29, 2015). For the reasons set forth below, the staff of the U.S. Nuclear Regulatory Commission (NRC Staff) opposes the Petition.

BACKGROUND

The applications at issue in each of the above proceedings were filed at different times over the last several years. Pursuant to the notices published in the *Federal Register*, the Petitioners in the above-captioned proceedings timely filed their initial intervention petitions. On June 8th, 2012, the U.S. Court of Appeals for the District of Columbia Circuit rendered its decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), in which it held, *inter alia*, that the Commission’s 2010 Waste Confidence Decision Update and its revision of 10 C.F.R. § 51.23(a) were invalid. On July 9, 2012, a contention was filed in each of the above-captioned proceedings, alleging that the relevant environmental documents for the associated applications did not satisfy NEPA because they failed to include a discussion of the impacts of storage of spent fuel after cessation of operation.¹ On August 7, 2012, the Commission held these contentions in abeyance pending the Commission’s resolution of the waste confidence issue in

¹ Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Proposed Fermi 3 Nuclear Power Plant (July 9, 2012) (ADAMS Accession No. ML12191A422); Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at William States Lee III Units 1 and 2 (July 9, 2012) (ADAMS Accession No. ML12192A000); Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Comanche Peak Nuclear Power Plant (July 9, 2012) (ADAMS Accession No. ML12191A384); Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Levy Nuclear Power Plant (July 9, 2012) (ADAMS Accession No. ML12191A381); Petition for Intervention to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at STP Units 1 & 2 (July 9, 2012) (ADAMS Accession No. ML12191A392); Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at South Texas Units 3 & 4 (July 9, 2012) (ADAMS Accession No. ML12191A394); Southern Alliance for Clean Energy’s Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2 (July 9, 2012) (ADAMS Accession No. ML12191A383); Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at North Anna Unit 3 (July 9, 2012) (ADAMS Accession No. ML12192A001).

light of the remand in *New York v. NRC. Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63 (2012). The Commission then engaged in a rulemaking proceeding to resolve generically the environmental impacts of continued storage of spent nuclear fuel. As part of the rulemaking, the NRC prepared NUREG-2157, Vol. 1 & 2, Final Report, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel* (GEIS) (Sept. 2014) (ADAMS Accession Nos. ML14196A105, ML14196A107). During the comment period on the rulemaking, the NRC held 13 public meetings to obtain public comment on the proposed rule and the GEIS. *Continued Storage of Spent Nuclear Fuel*, 79 Fed. Reg. 56,238, 56,253 (Sept. 19, 2014) (Final Rule). The NRC received 33,099 comment submissions of which 924 were unique comment submissions. *Id.*

In August 2014, the Commission approved the GEIS and the final rule, which was subsequently published in the *Federal Register* on September 19, 2014. *Id.* The final rule amended Part 51 in several places to state that “the generic impact determinations regarding the continued storage of spent fuel in NUREG-2157 shall be deemed incorporated into the environmental impact statement.” See, e.g., 10 C.F.R. § 51.75(c). On August 26, 2014, the Commission issued an Order dismissing the pending waste confidence contentions that were before the Commission and directing the Boards to dismiss all of the pending waste confidence contentions that were pending before the Boards. *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC 71 (2014).

The licensing proceedings at issue here are all at an advanced stage of the review process. In each proceeding, the Final Environmental Impact Statements (FEISs) have been published.² Notably, for each of the proceedings, with the exception of Levy³ and Fermi,⁴ the

² NUREG-2111, Vol. 1, 2, & 3, *Final Environmental Impact Statement for Combined Licenses COLs for William States Lee III Nuclear Station Units 1 and 2* (Dec. 31, 2013) (ADAMS Accession Nos.

contested proceedings have been terminated.⁵ Thus, motions to reopen are necessary for most of the proceedings.

DISCUSSION

I. The Petition is Procedurally Improper

ML13340A005, ML13340A006, ML13340A007); NUREG-1943, Vol. 1 & 2, Final Report, *Environmental Impact Statement for Combined Licenses (COLs) for Comanche Peak Nuclear Power Plant Units 3 and 4* (May 31, 2011) (ADAMS Accession Nos. ML11131A001, ML11131A002); NUREG-1937, Vol. 1 & 2, Final Report, *Environmental Impact Statement for Combined Licenses (COLs) for South Texas Project Electric Generating Station Units 3 and 4* (Feb. 28, 2011) (ADAMS Accession Nos. ML11049A000, ML11049A001); NUREG-1941, Vol. 1, 2, & 3, Final Report, *Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant Units 1 and 2* (Apr. 30, 2012) (ADAMS Accession Nos. ML12100A063, ML12100A068, ML12100A070); NUREG-1437, Final Report, Supplement 48, *Generic Environmental Impact Statement for License Renewal of Nuclear Plants Supplement 48 Regarding South Texas Project, Units 1 and 2* (Nov. 2013) (ADAMS Accession No. ML13322A890); NUREG-0498, Supplement 2, Vol. 1 & 2, *Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant, Unit 2* (May 2013) (ADAMS Accession Nos. ML13144A092, ML13144A093).

³ In the *Levy* proceeding, an evidentiary hearing was held in October 2012 on the sole remaining admitted contention and the partial initial decision was issued on Mar. 26, 2013. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-13-4, 77 NRC 107 (2013). However, the proceeding was not terminated at that time because of the pending contention on waste confidence held in abeyance by the Commission's Order dated August 7, 2012. The Levy Board did not dismiss the contention until October 1, 2014, by which time the Petitioners had filed a new continued storage contention on September 29, 2014. The Levy Board then dismissed the waste confidence contention that had been held in abeyance, but left the record open in light of the new contention pending before the Commission. Memorandum and Order (Dismissing Environmental Waste Confidence Contention) (Oct. 1, 2014) (unpublished Board order) (ADAMS Accession No. ML14274A214).

⁴ The *Fermi* evidentiary hearing was held in October 2013, and the partial initial decision was issued on May 23, 2014. *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-14-07, 79 NRC 451 (2014). However, the proceeding was not terminated at that time because of the pending contention on waste confidence held in abeyance by the Commission's Order dated August 7, 2012, and because the Board stated it was considering whether or not to request that the Commission authorize it to review an issue *sua sponte*. The Fermi Board did not dismiss the contention until October 6, 2014, by which time the Petitioners had filed a new continued storage contention on September 29, 2014. The Fermi Board then dismissed the waste confidence contention that had been held in abeyance, but left the record open in light of the new contention pending before the Commission and because the Fermi Board had requested Commission permission to review another issue *sua sponte*. Memorandum and Order (Denying Motion to Admit Waste Confidence Contention) (Oct. 6, 2014) (unpublished). The Commission denied the Board's request on December 16, 2014. *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC __, __ (Dec. 16, 2014) (slip op.).

⁵ *Calvert Cliffs 3*, CLI-14-08, 80 NRC at 79 (2014) (terminating *William States Lee III* Units 1 and 2, *South Texas Project* Units 1 and 2, *Comanche Peak Nuclear Power Plant* Units 3 and 4, and *North Anna Power Station* Unit 3); *Nuclear Innovation N. America LLC* (South Texas Project Units 3 and 4), LBP-14-14, 80 NRC __, __ (slip op.) (Dismissing Contention and Terminating Proceeding) (Sept. 19, 2014) (unpublished Licensing Board Order); *Tennessee Valley Auth.* (Watts Bar Unit 2), LBP-14-13, 80 NRC __, __ (slip op.) (Denying Motion to File New Contention and Terminating Proceeding) (Sept. 9, 2014).

The Petitioners are requesting that the Commission order the Staff to supplement each FEIS with an explicit incorporation by reference of the GEIS. See Petition at 2. Fundamentally the Petitioners are requesting that each Final Environmental Impact Statements be altered because of an alleged deficiency in the final EISs. However, it is well established that the way to challenge an NRC environmental document is to file a contention. See 10 C.F.R. § 2.309. The Commission has frequently stated the contention admissibility standards ensures that hearings will address only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues. See, e.g., *Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2189-2190 (Jan. 14, 2004) (Part 2 Final Rule). Moreover, these Petitioners have been repeatedly warned that the Commission expects challenges to applications to be raised as contentions. See, e.g., *Calvert Cliffs*, CLI-12-16, 76 NRC at 69 n.11 (2012) (“[s]hould we determine at a future time that case-specific challenges are appropriate for consideration, our normal procedural rules will apply.”); *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 150, n.19 (2011) (“At bottom, the . . . commenters appear to seek consideration of their concerns in the corresponding proceedings. However, the appropriate vehicle for doing so is not the submission of comments. The proper mechanism for raising application-specific concerns in these . . . cases is to file a new contention.”) Moreover, in the vast majority of the proceedings, the record has been closed, and a motion to reopen is required to litigate the Petitioners’ concerns. See 10 C.F.R. § 2.326. Rather than filing either a motion to admit a new contention or a motion to reopen, the Petitioners have chosen to file a “Petition,” asking the Commission to direct the Staff to correct an alleged deficiency in its FEISs, a filing not contemplated by NRC regulations.⁶ This appears to be an attempt to circumvent the

⁶ Petitioners cite to 10 C.F.R. § 2.323(b) as authority for their filing. However, that provision allows for the filing of motions, it does not provide general authority for filing general petitions.

well-established Part 2 requirements for contentions and motions to reopen, and, therefore the Petition should be summarily dismissed on that basis alone.

Petitioners assert that this Petition is necessary so that they can lodge “placeholder” contentions. See Petition at 2-3. It is not clear what Petitioners mean by “placeholder” contentions. They imply that the relief sought in the Petition is necessary to permit them to challenge the use of the GEIS in individual proceedings. *Id.* at 10. However, to the extent they wish to file such a contention, they could have done so after the GEIS became final. To the extent a petitioner believes an EIS fails to contain required information, contentions of omission can be admissible in NRC proceedings. 10 C.F.R. §2.309(f)(1)(vi). However, it is well established that “placeholder” contentions are not permitted in NRC proceedings. *Cf. Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120 (2009)(“...our regulations do not contemplate such filings, which are tantamount to impermissible ‘notice pleadings.’”)

Even assuming that the Petition could be construed as a motion to admit a new contention and a motion to reopen, for the reasons discussed below it fails to comply with the applicable requirements.

II. Legal Standards Governing Admission of Contentions

The Commission’s contention admissibility requirements are set forth in 10 C.F.R. § 2.309(f)(1). In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised[;]
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions... [including] references to specific sources and documents [that support the petitioner’s position]on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) ...provide sufficient information to show that a genuine dispute with the Applicant exists with regard to a material issue of law or fact, including references to

specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief....

10 C.F.R. § 2.309(f)(1).

The Commission has emphasized that the rules on contention admissibility are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999), *citing Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 – 56 (1991).

III. The Petitioners Pleading Does Not Meet the Contention Standards

Because the Petitioners did not actually file a contention, but instead, a “Petition” asking the Commission to require the NRC to supplement FEISs, it is difficult to assess how the “Petition” could meet the contention admissibility standards. The petitioner has the burden of bringing contentions meeting the pleading requirements, *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001) (*citing Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998), *rev'd in part on other grounds*, CLI-02-24, 56 NRC 335 (2002)), something which they did not do in the instant case.

The Petitioners’ assert that NEPA requires an explicit statement of incorporation and a summary of the incorporated material. However, NEPA contains no such requirement. Petitioners point to NRC regulations implementing NEPA in 10 C.F.R. Part 51, Appendix A as support for their assertion regarding supplementation. However, that provision states that incorporation “*may be used as appropriate* to aid in the presentation of issues, eliminate repetition or reduce the size of an [EIS.]” 10 C.F.R. Part 51, Appendix A, Section 1.(b). (emphasis added). Because the Commission has incorporated these impacts by rule, Appendix

A does not require that a supplement to the FEISs be issued solely in order to summarize or restate the information from the GEIS. Crucially, as provided in 10 C.F.R. § 51.23, “The impact determinations in NUREG-2157 regarding continued storage shall be deemed incorporated into the environmental impact statements described in §§ 51.75, 51.80(b), 51.95, and 51.97(a).” Consequently, Petitioners’ challenge is not truly to the FEISs, but rather to the rule that deems the impact determinations in the GEIS incorporated. As a challenge to a rule, it is inadmissible absent a supported waiver request, which the Petitioners have not provided. See 10 C.F.R. § 2.335.

Petitioners also cite to a Ninth Circuit decision, *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012 (9th Cir. 2012), for their assertion that a brief summary and an explicit statement of incorporation is required. However, that decision was vacated by the U.S. Supreme Court. *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S.Ct. 2843, 186 L. Ed. 2d 881 (2013). Moreover, even assuming *Pac. Rivers Council* has any persuasive value, it dealt with a situation where the Forest Service incorporated by reference an EIS prepared for a prior project, and a new biological assessment as the entire discussion of impacts on aquatic species. The Forest Service made no effort to explain how changes in the project, which triggered the need for a new EIS, altered the impacts on aquatic species. In contrast, the Continued Storage GEIS was completed just months ago and was explicitly intended to generically analyze continued storage impacts and obviate the need to repeatedly determine these impacts in each reactor licensing proceeding, including the instant proceedings. Furthermore, the GEIS and final rule had an extensive public participation process in which all of the Petitioners participated.

Furthermore, Petitioners fail to demonstrate that the issue raised is material to the findings the NRC must make. As acknowledged by the Petitioners, see Petition at 4, in all of these proceedings the final EIS has been issued. Thus, the relevant legal standard is whether the issue raised requires supplementation of an EIS. To warrant supplementation, “new

information” must paint a “seriously different picture of the environmental landscape.” See *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-7, 75 NRC 379, 388-89 (2012); *Nat’l Comm. For The New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004). Rather than asserting that there is any new information about impacts that is seriously different from the impacts described in the FEISs, the Petitioners’ only claim is that the Staff must supplement the EIS’s to explicitly incorporate the GEIS, and provide a brief summary thereof. They make no effort to explain how this paperwork exercise would address a seriously different picture of the environmental landscape with respect to any of the issued FEISs. They state only that because the GEIS impacts are incorporated, supplementation is required by NEPA.

NEPA's EIS requirement has two purposes, namely to ensure the agency has available to it, and is able to consider information concerning significant environmental impacts, and that the relevant information is available to the public. *Pub. Citizen v. Dep’t of Transp.*, 541 U.S. 752, 768 (2004). Clearly, with respect to the potential impacts of continued storage, these goals have been met through the extensive and high-profile public process surrounding the GEIS and the final Continued Storage rulemaking, by which the evaluation of continued storage impacts are deemed incorporated by rule into the EISs prepared for individual licensing actions. Contentions that seek to “flyspeck” environmental documents or to add details or nuances are not admissible. *Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005), (citing *Hydro Res., Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 33 (2001)). In the instant case, Petitioners seek supplementation of an FEIS to summarize the GEIS. Because this NEPA objective of transparency is already fully achieved by the Continued Storage rule itself, the requested relief is not necessary to inform the agency or

the public about the environmental effects of the project. As such Petitioners concern is not material to the findings the Commission must make, and is inadmissible.⁷

IV. A Motion to Reopen to Raise New Concerns is Necessary for
Most of the Proceedings

The Petition also fails to meet the NRC's standards for reopening a closed record. It is well established that the only way to raise a new concern once the record of a proceeding has been closed is to file a motion to reopen. See *Virginia Elec. & Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 700 (2012). A motion to reopen will not be granted unless the following criteria set forth in 10 C.F.R. § 2.326(a) are satisfied:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a).

Additionally, one or more affidavits showing that the motion to reopen meets the above criteria must accompany the motion under 10 C.F.R. § 2.326(b). Each affidavit must contain statements from competent individuals with knowledge of the facts alleged or experts in disciplines appropriate to the issues raised. See 10 C.F.R. § 2.326(b). See also *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 291-293 (2009). The supporting information must be more than mere allegations; it must be tantamount to evidence that would materially affect the previous decision. *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (1984), modified, CLI-84-14, 20 NRC 285 (1984).

⁷ The contention also would not be timely, pursuant to 10 C.F.R. § 2.309(c). The timeliness of the petition is further discussed below in the context of the reopening standards.

The Petition does not satisfy the reopening standards. With the exception of the *Levy* and *Fermi* proceedings, all of these proceedings are closed and must be reopened to litigate new concerns. The Petition does not even mention the reopening standards, much less meet them. The Petition does not contain the affidavits that are required for reopening. Petitioners are all experienced litigants in NRC proceedings who are very familiar with the requirements for a motion to reopen. Indeed, all of these Petitioners filed reopening motions in these same proceedings in the past.⁸ However, even setting aside the procedural failings, the Petition, as further explained below, does not comply with the substantive reopening standards.

For a reopening motion to be timely presented, the movant must show that the issue sought to be raised could not have been raised earlier. *Diablo Canyon*, ALAB-775, 19 NRC at 1366. The gravamen of Petitioners argument is that the Final EIS's should be supplemented to include an explicit statement that the GEIS is incorporated by reference. Petition at 2. Such a claim could have been raised when the GEIS and the Final Rule were published in the *Federal Register* on September 19, 2014.⁹ Rather than filing a new contention promptly in the fall, Petitioners waited more than four months to file their claim. This untimeliness alone should lead to the dismissal of the Petition.

For an environmental issue to meet the reopening standards, it must meet a standard analogous to the standard for supplementing an EIS. See *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 29 (2006). Any, "new

⁸ See Motion to Reopen the Record for William States Lee III Nuclear Power Plant (Sept. 29, 2014) (ADAMS Accession No. ML14272A636); Motion to Reopen the Record for Comanche Peak Units 3 & 4 Nuclear Power Plant (Sept. 29, 2014) (ML14272A600); Motion to Reopen the Record for South Texas Project 3 & 4 Nuclear Power Plant (Sept. 29, 2014) (ADAMS Accession No. ML14272A618); Ecology Party of Florida and Nuclear Information and Resource Services' Motion to Reopen the Record (Sept. 29, 2014) (ADAMS Accession No. ML14272A522); Motion to Reopen the Record for South Texas Project Units 1 & 2 Nuclear Power Plant (Sept. 29, 2014) (ADAMS Accession No. ML14272A609); Southern Alliance for Clean Energy's Motion to Reopen the Record (Sept. 29, 2014) (ADAMS Accession No. ML14272A579); Motion to Reopen the Record for North Anna Nuclear Power Plant (Sept. 29, 2014) (ADAMS Accession No. ML14272A638).

⁹ Alternatively, the Petitioners could have filed when the rule became effective on October 20, 2014. 79 Fed. Reg. at 56,238.

information must paint a ‘*seriously* different picture of the environmental landscape.’” *Id.* at 28 (quoting *Nat’l Comm. For the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004)) (emphasis in original). For the same reasons that Petitioners’ argument for supplementation does not state a valid contention, it also does not meet the reopening standards.

CONCLUSION

The Petition is not authorized by NRC regulations. As such, it should be summarily dismissed. Even if the Petition is construed generously to state a contention and/or a motion to reopen, it should be dismissed for failure to comply with the applicable standards. Thus, the Petition should be dismissed by the Commission.

Respectfully submitted,

/Signed (electronically) by/

Sara B. Kirkwood
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-8393
E-mail: Sara.Kirkwood@nrc.gov

Dated at Rockville, Maryland
this 12 day of February, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
LUMINANT GENERATION CO. LLC	)	Docket Nos. 52-034-COL,
(Comanche Peak Nuclear Power Plant,	)	52-035-COL
Units 3 and 4))	
)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF OPPOSITION TO THE 'PETITION TO SUPPLEMENT REACTOR-SPECIFIC ENVIRONMENTAL IMPACT STATEMENTS TO INCORPORATE BY REFERENCE THE GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR CONTINUED SPENT FUEL STORAGE'," dated February 12, 2015, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 12th day of February, 2015.

/Signed (electronically) by/

Sara B. Kirkwood
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15-D21
Washington, DC 20555-0001
Telephone: (301) 415-8393
E-mail: Sara.Kirkwood@nrc.gov