

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:) Docket No. 72-1050-ISFSI
INTERIM STORAGE PARTNERS LLC) ASLBP No. 19-959-01-ISFSI-BD01
(Consolidated Interim Storage Facility)) November 18, 2019
)

**INTERIM STORAGE PARTNERS LLC'S ANSWER OPPOSING
PETITIONER SUSTAINABLE ENERGY AND ECONOMIC DEVELOPMENT
COALITION'S MOTION FOR LEAVE TO SUBMIT LATE-FILED CONTENTION 17**

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(i)(1) and the Atomic Safety and Licensing Board's ("Board") Initial Scheduling Order,¹ Interim Storage Partners LLC ("ISP") submits this Answer opposing Sustainable Energy and Economic Development Coalition's ("Petitioner" or "SEED Coalition") Motion for Leave to File Late-Filed Contention, and Contention 17 ("Motion").² Petitioner claims that its late-filed contention is based on "new information" in a September 23, 2019 report by the U.S. Nuclear Waste Technical Review Board ("NWTRB") titled *Preparing for Nuclear Waste Transportation—Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste* ("NWTRB Report").³ Citing this allegedly new information, Contention 17 claims that ISP's Environmental Report ("ER")⁴ does not satisfy National Environmental Policy Act ("NEPA") requirements.⁵

¹ Board Order (Initial Scheduling Order) at 4 (Oct. 16, 2019) (unpublished) (ML19289B740).

² Motion of Intervenor [SEED] for Leave to File Late-Filed Contention, and Contention 17 (Oct. 23, 2019) (ML19297A226) ("Motion").

³ Motion at 1-2 (citing the NWTRB Report, as attached to Petitioner's Motion).

⁴ WCS Consolidated Interim Spent Fuel Storage Facility Environmental Report, Docket No. 72- 1050, Rev. 2 July 2018) (ML18221A405 (package)).

⁵ Motion at 5.

Petitioner asserts that the ER fails to address issues that the NWTRB identified concerning DOE’s ability to implement a “nationwide” spent nuclear fuel (“SNF”) transportation program, including “unresolved” technical concerns about the integrity of high-burnup fuel during shipment and dry storage of such fuel.⁶ It also claims that the NWTRB Report “requires” consideration of installation of a dry transfer system (“DTS”) at reactor sites and at the ISP’s proposed CISF given the future need to repack SNF for transport and to repack damaged fuel.⁷ Petitioner further contends that ISP improperly segmented the storage and transportation components of the CISF project, and did not adequately consider SNF transportation-related alternatives or the cumulative impacts of transporting SNF.⁸

The Board should reject proposed Contention 17 because it is neither timely under 10 C.F.R. § 2.309(c)(1) nor admissible under 10 C.F.R. § 2.309(f)(1). The proposed contention’s untimeliness is demonstrated by the fact that it repeats issues that Petitioner raised in its petition to intervene, and which the Board rejected in LBP-19-7.⁹ Furthermore, Petitioner’s reliance on purportedly “new information” in the NWTRB Report is nothing more than a pretext for rearguing issues that the Board already has properly rejected. Further, as explained below, the NWTRB Report compiles and discusses a list of “technical issues” related to *DOE*’s ability to implement a nationwide SNF transportation program based on a review of various information sources that, for the most part, have been in the public domain for some time and thus previously available to

⁶ *Id.* Petitioner asserts that “[t]hese unresolved issues must be noticed, analyzed and disclosed in the Environmental Impact Statement (‘EIS’) for the CISF [Consolidated Interim Storage Facility], and the resolutions delineated and implemented within the Safety Analysis Report (‘SAR’) for the CISF proposal.” *Id.* at 1. ISP notes that the NRC Staff has not yet issued its draft EIS for the proposed CISF, so any challenge to the adequacy of the draft EIS *per se* is premature. Furthermore, by its express terms, Contention 17 challenges ISP’s compliance with NEPA, not its compliance with NRC safety regulations or the adequacy of ISP’s SAR. *See id.* at 5.

⁷ *Id.* at 4, 10-11.

⁸ *Id.* at 5.

⁹ *See Interim Storage Partners LLC* (Consol. Interim Storage Facility), LBP-19-7, 90 NRC __, __, slip op. at 67-69, 72-74, 84-88 (Aug. 23, 2019) (ML19235A165).

Petitioner. For that reason, Petitioners fails to explain how the NWTRB Report contains any new and materially different information for purposes of this proceeding and its proposed contention.

Even if the Board finds that the NWTRB Report provides good cause for the late-filing of Contention 17, the contention is inadmissible under Section 2.309(f)(1)(iv)-(vi). As a threshold matter, the contention relies on at least two patently erroneous suppositions: (1) that ISP's CISF License Application ("Application") seeks NRC authorization to receive and store 40,000 metric tons of uranium ("MTUs") of SNF during a 20-year period, and (2) that DOE will necessarily transport that SNF to the proposed CISF. But the Application does not seek NRC approval of either action. And, contrary to Petitioner's claims, neither DOE nor the NWTRB has any role in this licensing action, much less the authority to "require" any technical solutions or "alter" the scope of the proceeding. Thus, Contention 17's core premises are fundamentally flawed.

Contention 17 suffers from numerous other deficiencies that render the contention inadmissible under Section 2.309(f)(1)(iii)-(vi). Overlooking the Board's directly-applicable rulings in LBP-19-7—the law of the case—Petitioner again raises issues that are beyond the scope of the proceeding and improperly challenge NRC regulations. Petitioner also fails to provide adequate factual or legal support for its claims. Insofar as they purport to rely on the NWTRB Report, Petitioner and its consultant, Mr. Robert Alvarez, repeatedly "cherry-pick" statements from the report, taking them out of their proper factual context while simultaneously ignoring other statements in the report that directly contradict their position. Indeed, Mr. Alvarez's declaration contains no independent substantive analysis. Finally, Petitioner makes no effort to controvert relevant discussion in the Application.

For all of these reasons, the Board should deny Petitioner's Motion and reject Contention 17 as both untimely and inadmissible under 10 C.F.R. §§ 2.309(c)(1) and § 2.309(f)(1).

II. BACKGROUND

ISP is a joint venture of Waste Control Specialists, LLC (“WCS”) and Orano CIS, LLC. This proceeding stems from ISP’s submittal to the NRC of its revised Application on August 29, 2018, to construct and operate a CISF on a WCS-owned site in Andrews County, Texas.¹⁰ ISP is seeking a 40-year license to possess and store 5,000 metric tons of uranium (“MTUs”) of SNF.¹¹ ISP’s ER analyzes the possibility of seeking license amendments for up to seven 5,000 MTU expansions over the first 20 years of the CISF’s licensed operating life.¹² If sought and granted, those amendments collectively would result in an authorized storage capacity of 40,000 MTUs.¹³

ISP is *not* seeking NRC authorization to repackag SNF at the CISF. In fact, the Application states: “No handling of bare spent nuclear fuel will occur at the CISF since operations will be *restricted to handling of sealed canisters.*”¹⁴ ISP’s proposed license is limited to the *storage* of SNF elements, associated components, and radioactive materials “from commercial nuclear utilities.”¹⁵ Thus, contrary to Petitioners’ assertions, ISP is *not* seeking NRC authorization to transport any SNF to the CISF. The responsibility for transporting the SNF to the CISF lies with the title holder of the commercial SNF, not with ISP. The Application clearly states that SNF Title Holders “will hold title to the SNF during transportation to and from . . . the CISF.”¹⁶ The ER

¹⁰ See Letter from J. Isakson, ISP, to Director, Division of Spent Fuel Management, NRC, “Submittal of License Application Revision 2 and Request to Restart Review of Application for Approval of the WCS CISF, Docket 72-1050” (June 8, 2018) (ML18166A003) (“June 8, 2018 ISP Letter”) (submitting Revision 2 of the Application and requesting that the NRC resume all safety and environmental review activities).

¹¹ ISP, License Application, Rev. 2, Docket No. 72-1050 ((ML18206A595) (package)) (includes SAR, Rev. 2 and ER, Rev. 2).

¹² ER at 1-1.

¹³ *Id.* (“Therefore, this report analyzes the environmental impacts of possession and storage of 40,000 MTUs of SNF and related GTCC waste.”).

¹⁴ Application at 1-2 (emphasis added).

¹⁵ Application, Attach. A at 1.

¹⁶ Application at 1-1 to 1-2.

properly assumes that the transportation of SNF will be conducted in compliance with all applicable NRC and DOT requirements.¹⁷

The Application states that the proposed CISF will receive only specific storage systems approved by the NRC, and the technical specifications of those systems are incorporated by reference into ISP's SAR.¹⁸ Thus, all parts of ISP's storage system will use NRC-approved canisters and casks that have NRC-issued certificates of compliance ("CoCs"). Therefore, NRC approval of the SNF transportation and storage casks is not part of ISP's Application.

III. PROCEDURAL HISTORY

On June 8, 2018, ISP requested that the NRC Staff resume its review of a license application for a CISF in Andrews County, Texas.¹⁹ On November 11, 2018, Petitioner, along with six other groups and one individual (collectively, "Joint Petitioners") filed a Petition to Intervene and Request for Adjudicatory Hearing, proffering 15 separate contentions.²⁰ Petitioner expressly cites two of those contentions—Contention 4 and Contention 11—as relevant to its Motion.²¹ Contention 4 claimed that ISP grossly underestimates the amount of low-level radioactive waste ("LLRW") that will be generated from site activities, specifically including the postulated repackaging of spent fuel.²² Contention 11 claimed that the lack of a DTS at the proposed CISF presents an impermissible risk that is not adequately addressed in ISP's ER.²³

¹⁷ See ER at 3-5 ("SNF would be shipped in transportation packages licensed pursuant to 10 CFR Part 71 and in compliance with requirements established by the U.S. Department of Transportation (DOT).").

¹⁸ See *id.* at 2-1 & tbl. 2-1 (identifying six TN Americas and NAC International cask systems that will be accepted at the CISF); SAR at 1-19 to 1-20.

¹⁹ See June 8, 2018 ISP Letter.

²⁰ Joint Petitioners' Petition and Request for an Adjudicatory Hearing (Nov. 13, 2018) (ML18317A433) ("Petition"). Joint Petitioners included Don't Waste Michigan; Citizens' Environmental Coalition; Citizens for Alternatives to Chemical Contamination; Nuclear Energy Information Service; Public Citizen, Inc.; San Luis Obispo Mothers for Peace; SEED Coalition; and Leona Morgan.

²¹ Petitioner also makes NEPA "segmentation" claims that were previously presented in Contention 1. As discussed below, the Board rejected all of Joint Petitioners' proposed contentions as inadmissible in LBP-19-7.

²² See Petition at 64-76.

²³ See *id.* at 118-27.

Following oral argument in Midland, Texas, on July 10-11, 2019, the Board found that, except for SEED Coalition, none of the Joint Petitioners had established standing to intervene.²⁴ However, the Board also found that SEED Coalition had failed to proffer an admissible contention.²⁵ On September 17, 2019, Joint Petitioners appealed the Board’s adverse standing determinations and rejection of seven of their proposed contentions (including Contentions 1, 4, and 11).²⁶ On October 15, 2019, ISP and the NRC Staff filed answered answers opposing the appeal.²⁷

On October 23, 2019, Petitioner filed its Motion and late-filed Contention 17, to which ISP timely files this Answer. Contention 17 alleges that ISP’s ER does not satisfy NEPA because “[m]itigation plans and the discussion of alternatives to shipment of all SNF within a 20-year period [] have not been sufficiently addressed and disclosed” in light of certain purported findings in the 2019 NWTRB Report.²⁸ According to Petitioner, those findings include the following:

- As many as 50 to 80 years will be necessary for DOE to prepare for and accomplish the transportation of SNF to the proposed ISP CISF in West Texas. The “lead time” needed for resolution of technical issues related to the transport of the vast majority of the SNF alone is “10 years or more.”²⁹
- The NRC lacks data to establish a technical basis for the long-term storage of high-burnup SNF and the reliability of its fuel cladding under high-burnup conditions, and will not have results of an ongoing DOE study for about 7 more years.³⁰

²⁴ ISP, LBP-19-7, slip op. at 17-18. Given the Board’s finding in LBP-19-7 that SEED Coalition had demonstrated standing, ISP, without waiving any previous arguments contesting SEED Coalition’s standing to intervene, does not challenge the Motion on standing grounds for purposes of this answer only. See ISP’s September 17, 2019 Notice of Appeal of the Atomic Safety and Licensing Board’s (“Board’s”) August 23, 2019 Memorandum and Order LBP-19-7, challenging, among other things, the Board’s standing-related rulings.

²⁵ See generally ISP, LBP-19-7, slip op. at 67-93.

²⁶ Notice of Appeal of LBP-19-07 by [Joint Petitioners], and Brief in Support of Appeal (Sept. 17, 2019) (ML19260J391).

²⁷ ISP’s Answer Opposing the Appeal of LBP-19-7 by [Joint Petitioners] (Oct. 15, 2019) (ML19288A282). In the interim, the NWTRB issued its Report on September 23, 2019. NWTRB Press Release (Sept. 23, 2019), available at <https://www.nwtrb.gov/docs/default-source/press-releases/prl213.pdf?sfvrsn=4>.

²⁸ Motion at 5.

²⁹ Id.

³⁰ Id.

- Current data are inadequate to determine whether high-burnup SNF can withstand the rigors of long-distance transportation.³¹

Petitioner also reasserts its previous claim in Joint Petitioners' Contention 1 that ISP has improperly segmented the SNF storage and transportation components of the CISF project for purposes of its NEPA analysis.³² It then argues, in the alternative, that even if SNF transportation is not part of the proposed action, "the potential for thousands of barge, truck and rail delivery trips comprise cumulative impacts" must be addressed under NEPA.³³

Petitioner seeks to support its contention with a declaration from Robert Alvarez.³⁴ Mr. Alvarez's overarching "conclusions" largely mirror the issues listed above. However, he further asserts that: (1) new transportation casks will need to be developed and licensed; (2) repackaging of SNF for transport and disposal is an "important missing element"; and (3) developing DTS capability at reactor sites will require significant advance planning at great cost and delay.³⁵

IV. CONTENTION 17 DOES NOT SATISFY THE COMMISSION'S "GOOD CAUSE" STANDARD IN 10 C.F.R. § 2.309(c)(1) FOR NEW OR AMENDED CONTENTIONS

A. Petitioner Must Satisfy the Commission's Three-Factor "Good Cause" Standard for Amended and New Contentions in 10 C.F.R. § 2.309(c)(1)

The Commission does not look favorably upon amended or new contentions made after the initial filing deadline.³⁶ Petitioners seeking to amend their original contentions or proffer new ones must meet the "good cause" standard in 10 C.F.R. § 2.309(c)(1). Under that regulation, "good cause" exists only if the petitioner can show: (1) the information upon which the amended or new

³¹ *Id.*

³² Compare *id.* at 11-13 with Petition at 41-49.

³³ *Id.* at 20.

³⁴ See Declaration of Robert Alvarez in Support of Motion of Intervenor [SEED Coalition] for Leave to File Late-Filed Contention (Oct. 23, 2019) ("Alvarez Declaration").

³⁵ See *id.* at 1-2.

³⁶ See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009).

contention is based was not previously available; (2) the information upon which the filing is based is *materially different* from information previously available; and (3) the filing has been submitted in a timely fashion based on the availability of the subsequent information.³⁷

B. The NWTRB Report and Alvarez Declaration Do Not Contain Any New and Materially Different Information, As Required by Section 2.309(c)(1)(ii)

Petitioner devotes little effort to explaining why its new contention meets the good cause standard in 10 C.F.R. § 2.309(c)(1). With regard to the Section 2.309(c)(1)(i) and (iii) criteria, ISP does not dispute that the NWTRB issued its report on September 23, 2019, and that Petitioner filed its proposed new contention within 30 days of that date. However, that is not the end of the Board's inquiry. Section 2.309(c)(1)(ii) requires that a petitioner affirmatively establish that “[t]he information upon which the filing is based is *materially different* from information previously available.”³⁸

This critical element of the good cause standard serves “as a check to prevent petitioners from filing new contentions based on new information that is insignificantly different from previously available information.”³⁹ As such, “[p]reviously available information that is newly acquired by the petitioner does not constitute good cause, as ‘new and amended contentions must be *based on new facts* not previously available.’”⁴⁰ As the Commission put it, to conclude otherwise “would effectively allow a petitioner or intervenor to delay filing a contention until a document

³⁷ 10 C.F.R. § 2.309(c)(1)(i)-(iii) (emphasis added).

³⁸ *Id.* § 2.309(c)(1)(ii) (emphasis added). The term “materially,” as used in Section 2.309(c)(1)(ii), “describes the type or degree of difference between the new information and previously available information that a petitioner must establish, and it is synonymous with, for example, ‘significantly,’ ‘considerably,’ or ‘importantly.’” *Fla. Power & Light Co.* (Turkey Point Units 6 and 7), LBP-17-6, 86 NRC 37, 48 (2017) (citations omitted).

³⁹ *Turkey Point*, LBP-17-6, 86 NRC at 48 n.9.

⁴⁰ *Holtec Int'l* (HI-STORE Consol. Interim Storage Facility), LBP-19-4, 89 NRC __, __ (slip op. at 23-24) (May 7, 2019) (citing *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984) and quoting *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis in original)); see also *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7 (2015) (requiring “a material difference between the information on which the contention is based and the information that was previously available”).

becomes available that collects, summarizes and places into context the facts supporting that contention,” and “turn on its head the regulatory requirement that new contentions be based on ‘information . . . not previously available.’”⁴¹ Moreover, it would be “inconsistent with [the Commission’s] longstanding policy that a petitioner has an ‘iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.’”⁴²

Petitioner has not met its well-defined burden here. In claiming to satisfy Section 2.309(c)(1)(ii), Petitioner makes a single, perfunctory statement: “The NWTRB has identified several flaws and/or weaknesses in DOE’s role in the development of the ISP/WCS CISF which change the expected timing and sequencing of SNF storage activity at the facility.”⁴³ Putting aside the obvious fact that DOE does *not* have any role in the development and licensing of the ISP CISF, Petitioner utterly fails to explain how the purported “flaws” and “weaknesses” identified by the NWTRB in its 2019 report constitute new *and* “materially different” information for purposes of this proceeding and its formulation of Contention 17.

A review of the NWTRB Report reveals that the information underpinning Petitioner’s late-field contention is not materially different from information readily available to Petitioner well before the start of this proceeding. This fact is evidenced by statements contained in the NWTRB Report itself and the various source materials upon which the report relies. For example, Section 2.3 of the NWTRB Report explicitly notes that it “compile[s] a list of technical issues” that the NWTRB identified in various documents generally available to Petitioner for some time:

[T]he technical issues that need to be addressed before beginning a major transportation effort for SNF and HLW [high-level radioactive waste] in the

⁴¹ Amendments to Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed. Reg. 46,562, 46,566 (Aug. 3, 2012) (quoting *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010)).

⁴² *Id.*

⁴³ Motion at 20.

U.S. have been identified by the Board during past Board public meetings, technical workshops, and Board reports (NWTRB 2012, 2014, 2015, 2016, 2017f, 2018). Additional relevant technical issues have been identified and documented in reports and presentations by DOE (e.g., Stockman et al. 2014), the U.S. nuclear industry (EPRI 2011), and researchers in other countries. Drawing from these sources, the Board has compiled a list of technical issues to be addressed in preparing for transporting SNF and HLW⁴⁴

Notably, all of the NWTRB materials referenced in the foregoing excerpt are available on the NWTRB's website,⁴⁵ and the EPRI 2011 report is publicly accessible via EPRI's website.⁴⁶

The Alvarez Declaration simply repackages information contained in the NWTRB Report and contains no new and materially different information.⁴⁷ Indeed, the issues addressed in the NWTRB report—and on which Mr. Alvarez purports to base his four principal “conclusions”—have been discussed in numerous earlier studies and publications that have long been in the public domain.⁴⁸ In addition to the NWTRB materials noted above, they include, for example, various DOE and U. S. Government Accountability Office (“GAO”) reports that have been available to the public for several years or more.⁴⁹ This significantly undercuts Petitioner’s claim that Contention 17 is based on new and materially different information.

⁴⁴ NWTRB Report at 23 (emphasis added).

⁴⁵ See NWTRB Correspondence, <https://www.nwtrb.gov/our-work/correspondence>; NWTRB Reports, <https://www.nwtrb.gov/our-work/reports>.

⁴⁶ See Electric Power Research Institute, “Extended Storage Collaboration Program (ESCP),” <https://www.epri.com/#/pages/product/1022914/?lang=en-US>.

⁴⁷ Significantly, the Alvarez Declaration contains no independent substantive analysis or expert opinion. Mr. Alvarez, who has no degree or formal training in nuclear engineering, health physics, or any related technical discipline, simply parrots statements contained in the NWTRB Report, without providing the necessary factual context or acknowledging statements by the NWTRB that directly contradict Petitioner’s and his positions. Cf. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-11-23, 74 NRC 287, 306 (2011) (“The Staff concludes, and we agree, that neither the Gerson Lehrman Group document nor the Chanin Statement provides the requisite support respecting issues of recriticality because neither sets out credentials showing that its author is an expert on nuclear chemistry or criticality.”); see also *id.* at 307 (rejecting proffered expert’s statements because “we cannot accept them as anything more than speculation by a person without relevant expertise”).

⁴⁸ As the Board noted in *Holtec*, “previously available information that is newly interpreted by the petitioner does not constitute good cause to file a new contention.” *Holtec Int’l*, LBP-19-4, slip op. at 87 (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990) (finding no “good cause” existed for late-filed safety concerns when petitioner “had yet to put the pieces of [the] safety puzzle together” despite previous availability of the information)).

⁴⁹ See, e.g., GAO, *Spent Nuclear Fuel Management: Outreach Needed to Help Gain Public Acceptance for Federal Activities That Address Liability* (Oct. 2014), available at <https://www.gao.gov/assets/670/666454.pdf>; GAO, *Spent*

It is telling that throughout its Motion, Petitioner rehashes claims that the Board already considered and rejected in LBP-19-7. In short, Petitioner seeks to reassert its claims that ISP has not: (1) considered SNF transportation-related impacts by virtue of its alleged segmentation of the project’s storage and transportation components; (2) accounted for LLRW volumes resulting from the “mandatory repackaging” of SNF and GTCC waste into DOE-required transportation, aging and disposal (“TAD”) canisters; (3) considered the need for, and related impacts of, installing DTSs at the CISF site and at individual reactor sites; and (4) addressed issues related to high-burnup fuel and damage to fuel during transportation and storage.⁵⁰ As discussed further below, the Board considered—and properly rejected—these issues in ruling on proposed Contentions 1, 4 and 11. Therefore, Petitioner’s discussion of those *same* issues in Contention 17 cannot possibly provide good cause for its late filing of the contention.

Finally, Petitioner’s arguments concerning ISP’s alleged failure to adequately address SNF transportation-related alternatives, mitigation measures, and cumulative impacts also are clearly untimely.⁵¹ Petitioner does not explain why it could not have raised these issues earlier. Moreover, its claims are not based on any new and materially different information; *i.e.*, they purportedly stem from the NWTRB Report and previously-available information sources discussed above.

* * *

Nuclear Fuel: Legislative, Technical, and Societal Challenges to Its Transportation (Oct. 1, 2015), available at <https://www.gao.gov/assets/680/672889.pdf>; DOE, *A Project Concept for Nuclear Fuels Storage and Transportation – Fuel Cycle Research and Development* (June 15, 2013), available at <https://www.hssl.org/?view&did=739345>; DOE, *Nuclear Fuels Storage and Transportation Requirements Document – Fuel Cycle Research and Development*, (Feb. 16, 2016), available at (<https://www.energy.gov/sites/prod/files/2016/10/f3/FCRD-NFST-2013-000330%20-%20Rev2%20with%20attachments.pdf>); DOE, *Transportation Issues and Resolutions – Compilation of Laboratory Transportation Work Package Reports* (Sept. 30, 2012), available at https://www.energy.gov/sites/prod/files/2013/10/f3/TransportatIssuesResolutCompilLabWkPackfy12_0.pdf.

⁵⁰ See generally Motion at 9-20.

⁵¹ See generally *id.* at 5, 17-20.

In conclusion, the Board should reject Contention 17 as untimely under 10 C.F.R. § 2.309(c)(1)(ii) because Petitioner has not satisfied the NRC’s good cause standard by demonstrating that the proposed contention is based on new and materially different information.

V. AMENDED CONTENTION 17 IS INADMISSIBLE BECAUSE IT FAILS TO MEET THE CONTENTION ADMISSIBILITY STANDARDS IN 10 C.F.R. § 2.309(f)(1)

As discussed below, even if the Board concludes that Petitioner has satisfied Section 2.309(c)(1)’s requirements, Contention 17 nevertheless is inadmissible under Section 2.309(f)(1).⁵²

A. Petitioner’s Arguments Concerning the Technical Feasibility and Timing of DOE’s Implementation of a “National SNF Transportation Program” Are Outside the Scope of the Proceeding, Immaterial to the NRC’s Findings, and Factually Misleading

Petitioner’s own summary of its “new” contention confirms that the contention raises issues that are outside the scope of this proceeding. According to Petitioner, Contention 17 “alleges unaddressed technical and integration issues that the [DOE] must resolve to ensure that [SNF] can be transported to the [ISP proposed CISF].”⁵³ Petitioner claims that the NWTRB Report identifies “several flaws and/or weaknesses in DOE’s role in the development of the ISP/WCS CISF” that could “change the expected timing and sequencing of SNF storage activity at the facility.”⁵⁴ It further suggests that “[t]he NWTRB has effectively revised the scope of the project to include transportation preparations as integral to the operation of the CISFs.”⁵⁵ As noted earlier (see Section III, *supra*), based on these claims, Petitioner posits that *DOE* will need 50 to 80 years “to prepare for and accomplish the transportation of [SNF] to the ISP/WCS facility in west Texas,”⁵⁶

⁵² Section III (pages 20-25) of LBP-19-7, which ISP incorporates by reference, summarizes the governing contention admissibility and NEPA legal standards as well as the NRC’s Continued Storage Rule. Furthermore, the Motion is silent as to standing. Thus, to the extent SEED (which was previously denied party status) is required to reestablish (or affirm continued) standing under 10 C.F.R. § 2.309(c), it has not done so. *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993).

⁵³ Motion at 1.

⁵⁴ *Id.* at 20.

⁵⁵ *Id.*

⁵⁶ *Id.* at 5.

and that “the new information provided by the NWTRB significantly alters the nature of the scope of this proceeding.”⁵⁷

Petitioner’s assertions, and Contention 17 more broadly, are based on a fundamental misunderstanding of the purpose and scope of ISP’s Application. ISP, a private applicant, is seeking NRC authorization to possess and store 5,000 MTUs of SNF. The DOE and NWTRB have no role in the CISF licensing process, and certainly cannot “alter” the scope of this proceeding. And, contrary to Petitioner’s belief, ISP is not seeking authorization on behalf of itself, DOE, or any other entity to transport any SNF—much less 40,000 MTUs in a 20-year time frame—to the CISF.⁵⁸ Thus, neither Petitioner’s concerns nor the NWTRB’s findings and recommendations relative to DOE’s future implementation of a “national transportation program for nuclear waste”⁵⁹ are within the scope of this proceeding or material to the NRC Staff’s findings on the Application.⁶⁰ Furthermore, the Commission’s licensing and adjudicatory responsibilities “do[] not require [it] to go beyond the application itself and inquire broadly into DOE’s institutional honesty and capability,”⁶¹ including, in this case, DOE’s SNF transportation plans.

Petitioner also misrepresents the contents of the NWTRB Report, frequently omitting statements that undermine its arguments in Contention 17. In particular, Petitioner asserts that the near-term and safe transport of SNF to the ISP CISF is a commercial and technological

⁵⁷ *Id.* at 4.

⁵⁸ It bears emphasis that ISP’s Application does not propose or require that SNF be shipped to the CISF within a 20-year period. The only time limit is the term of the initial license itself; *i.e.*, 40 years. ISP analyzed the environmental impacts of storing up to 40,000 MTU of SNF and related GTCC waste at the CISF in the ER only for purposes of its NEPA assessment.

⁵⁹ NWTRB Report at 3.

⁶⁰ See 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

⁶¹ *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 607 (2009); *see also id.* at 606 (“The [DOE] is subject to the continuing oversight of Congress, constrained to comply with various statutes that address the integrity and accountability of federal programs, and is subject to the audit and investigatory powers of an Inspector General.”).

impossibility.⁶² But the NWTRB Report indicates quite the opposite. It notes that NWTRB agrees with the National Academy of Sciences' 2006 finding that there are “no fundamental technical barriers” to the safe transport of SNF and HLW in the U.S.,⁶³ and that the transportation of certain commercial SNF could begin fairly expeditiously:

For a small portion of the existing packaged waste (*e.g.*, certain commercial SNF in NRC-approved, dual-purpose [storage and transportation] canisters), *few technical issues remain unresolved*. For example, barring unforeseen problems, certain types of commercial SNF likely could be shipped *within a year or two* of resolving institutional issues, such as determining a destination and obtaining funding.⁶⁴

The NWTRB further noted that, “at the 15 commercial nuclear sites considered to be shutdown sites as of April 2019, all dry-storage canister types in use are welded canister types that are approved by the NRC for both storage and transportation,” such that “these canisters could be ready to be transported by DOE [or a private entity] early . . .”⁶⁵ Thus, while such issues are not within the scope of the proceeding, the NWTRB Report flatly contradicts Petitioner’s claims that “core problems” will “significantly expand” the time needed to transport SNF to the facility.⁶⁶

B. Petitioner’s Claims Regarding High-Burnup Fuel Storage and Transportation Issues Are Outside the Scope of This Proceeding, Improperly Challenge NRC Regulations, Lack Adequate Support, and Fail to Raise a Genuine Material Dispute

In Contention 17, Petitioner yet again asserts that purportedly unresolved concerns related to the integrity of high-burnup SNF in dry storage may prolong at-reactor storage by several decades, and that current data regarding potential damage to SNF during transport are insufficient.⁶⁷ As a

⁶² See, *e.g.*, Motion at 8 (emphasis added) (“Hence if an NRC license were issued to ISP/WCS in 2021, as the company expects, there is *no scenario* under which the waste destined for west Texas could be transported to the facility in the 20-year time frame proposed by ISP/WCS, or possibly even within the initial 40-year licensing period.”).

⁶³ NWTRB Report at 3 (quoting *National Academies of Science, Going the Distance? The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States* (2006)).

⁶⁴ *Id.* at 27 (emphasis added).

⁶⁵ *Id.* at 73.

⁶⁶ Motion at 5, 2.

⁶⁷ See Motion at 1, 5, 8-11; Alvarez Declaration.

result, Petitioner claims that inspection equipment and procedures will need to be developed to inspect the containers presently holding SNF in dry storage, and that “transportation arrangements cannot be made until the implications of possible damage to the SNF during transit are adequately understood.”⁶⁸ The Board rejected essentially identical claims by Petitioner in Contention 11, and also by the Sierra Club in several of its proposed contentions (Contentions 10, 12 and 16), for multiple reasons—all of which apply to Contention 17. To summarize, the Board rejected those contentions because:

- The Application provides that only storage systems approved by the NRC in the license will be received at the ISP facility, and incorporates those technical specifications by reference into the SAR.⁶⁹ NRC regulations bar the admission of any contention that challenges an NRC-approved cask design incorporated by reference in a dry storage facility application.⁷⁰
- ISP’s SAR allows for the storage of high-burnup fuel only with additional limitations; *viz.*, the high-burnup fuel must be canned within the canister.⁷¹ Petitioner did not dispute any portions of ISP’s Application that address the proposed CISF’s safety analyses, aging management plans, or quality assurance (“QA”) programs, or how ISP proposes to address the challenges posed by high-burnup fuel.⁷²
- ISP’s ER addresses the possibility of high-burnup SFP being sent to the CISF and analyzes the impacts of both transportation and storage of such fuel. Petitioner did not challenge the adequacy of those analyses.⁷³
- Petitioner’s speculative assertion that damaged containers might arrive at the proposed CISF in violation of NRC regulations and, in the absence of repackaging capability, create various dangers, “fails to raise a plausible scenario.”⁷⁴ The Commission affirmed a licensing board’s decision to reject a similar contention proffered by the State of Utah in the *Private*

⁶⁸ Motion at 9, 11.

⁶⁹ ISP, LBP-19-7, slip op. at 65 (citing SAR at 1-6 to -10). As the Board noted, the Application states that ISP will accept only six types of cask systems that already have been individually certified and issued CoCs by the NRC to safely store spent fuel, including high burnup fuel. *Id.* at 48. These canisters also have been analyzed to withstand credible events. *Id.*

⁷⁰ *Id.* at 53 (citing 10 C.F.R. §§ 2.335 and 72.46(e)).

⁷¹ *Id.* at 64-65 (citing ISP License Application, Attach. A, Proposed License Conditions at unnumbered A-3 (Proposed License No. SNM-1050) at § 9).

⁷² *Id.* at 85-86 (citing ISP License Application, Chapter 13 at Attach. A, Proposed License Conditions).

⁷³ *Id.* at 65-66 (citing ER at 4-12 to -16, 4-55 to -59). ER Section 3.2 describes the transportation of SNF to the facility. ER at 3-5 to 3-7. ER Section 4.2 discusses the environmental impacts of transportation activities during facility construction and operation, and the radiological impacts from the transportation of SNF and GTCC waste to the proposed CISF.

⁷⁴ ISP, LBP-19-7, slip op. at 86.

Fuel Storage proceeding because the NRC has generically determined that an accidental canister breach is not credible.⁷⁵ The Commission ruled that Utah—like Petitioner in this proceeding—failed to challenge the implementation of NRC-approved QA programs, which serve to ensure that a transportation accident or canister breach is not credible.⁷⁶

In view of the foregoing Board rulings, there is no basis for Petitioner’s claim that ISP has not adequately considered potential issues related to the storage of high-burnup fuel. Nor is there is any basis for its claim that the Application improperly excludes consideration of the “travel-worthiness of high burnup SNF,” including loading curves, burnup credits, thermal limitations during transport, or in-transit SNF vibrations and impulse loads, as alleged in Contention 17.⁷⁷ Nothing in Petitioner’s Motion, the Alvarez Declaration, or the NWTRB Report compels a different result here. Accordingly, insofar as Contention 17 raises issues related to the safety or environmental impacts of prolonged storage and transportation of high-burnup SNF, it raises issues that are outside the scope of the proceeding, improperly challenges NRC regulations in Parts 51 and 71, lacks adequate support, and fails to raise a genuine dispute on a material issue of law or fact, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

C. Petitioner’s Arguments Concerning Repackaging of SNF and Related LLRW Volume Concerns Are Outside the Scope of The Proceeding, Improperly Challenge NRC Regulations, Lack Adequate Support, and Fail to Raise a Genuine Material Dispute

Petitioner and Mr. Alvarez also argue that repackaging SNF for transport and disposal is a “missing element” that substantially affects “the timing and implementation of a *national* SNF transportation program.”⁷⁸ They contend that “[t]he additional cost and delay to accommodate repackaging would not allow the waste to be transported to the CISF in line with ISP/WCS’s schedule.”⁷⁹ According to Petitioner, even two consecutive 40-year license periods may not suffice

⁷⁵ *Id.* (citing *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 136-37 (2004)).

⁷⁶ *Id.* (citing *Private Fuel Storage*, CLI-04-22, 60 NRC at 138).

⁷⁷ Motion at 10, 16.

⁷⁸ *Id.* at 9 (emphasis added).

⁷⁹ *Id.* at 10.

to “accomplish all SNF transport,” particularly in light of the postulated need to reload “*all existing SNF wastes* from existing at-reactor dry storage and transport canisters into 80,000 smaller, standardized canisters for efficient *disposal in a permanent repository*.⁸⁰

This argument, on its face, is outside the scope of the proceeding. This Part 72 proceeding involves the licensing of a 5,000 MTU spent fuel storage facility for a 40-year term—not DOE’s implementation of a “nationwide campaign” to transport “the nation’s entire inventory of waste” (which is the focus of the NWTRB Report, not this proceeding).⁸¹ Nor does it set a specific timetable for the receipt of SNF at the proposed CISF. If ISP cannot reasonably expect to receive sufficient SNF for storage to make the project commercially viable, then it presumably will not build and operate the CISF. However, the commercial viability of the project “is not an issue before the Board,” because “the NRC is not in the business of regulating the market strategies of licensees or determining whether market strategies warrant commencing operations.”⁸² Finally, ISP is not seeking NRC authorization to repack SNF prior to its transportation to a permanent repository for disposal. The Application is clear on this point: “No handling of bare spent nuclear fuel will occur at the CISF since operations will be restricted to handling of sealed canisters.”⁸³

Petitioner’s arguments also fail to support the admission of Contention 17 for the same reasons stated by the Board in its ruling on Joint Petitioners’ Contention 4, which raised indistinguishable claims regarding “mandatory repackaging” of SNF into DOE TAD canisters and

⁸⁰ *Id.* at 3, 10 (emphasis added).

⁸¹ NWTRB Report at 3, 94. *See also* Motion at 3 (referring to “massive transportation campaign”).

⁸² ISP, LBP-19-7, slip op. at 27 (quoting *La. Energy Servs.* (Nat’l Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005)).

⁸³ Application at 1-2.

“unconsidered management difficulties, increased [LLRW] waste generation, and unforeseen and undisclosed costs.”⁸⁴ The Board found none of those issues to be admissible for adjudication:

. . . ISP’s application is for a 40-year license. Its Environmental Report relies on the Continued Storage Rule and Continued Storage [Generic Environmental Impact Statement (“GEIS”)]. ISP’s application does not set forth any intent to repackage spent fuel or any analysis of the costs of repackaging the fuel, and the Continued Storage Rule does not require a spent fuel storage facility applicant under Part 72 to include such an analysis beyond the license term. Thus, this claim is outside the scope of this proceeding. And, to the extent Joint Petitioners assert that ISP must discuss waste generated by repackaging fuel canisters into DOE transportation, aging and disposal casks, this claim is necessarily outside the scope of this proceeding as well.⁸⁵

The Board further concluded that the claim that ISP has significantly underestimated LLRW volumes and the costs of constructing, operating and decommissioning the CISF also impermissibly challenges the Continued Storage Rule and associated GEIS in violation of Section 2.335.⁸⁶ As the Board explained, those claims are “based solely on the [ER’s] omission of repackaging spent fuel canisters—an analysis ISP is not required to include in its initial 40-year application under the Continued Storage Rule.”⁸⁷ As the Board also noted, the NRC has generically considered and addressed this issue.⁸⁸

Finally, for reasons explained by ISP in its answer to Contention 4, the Application and ER fully comply with NRC regulations and guidance in discussing the amount of LLRW that would be created by the construction, operation, and decommissioning of the CISF.⁸⁹ Petitioner again fails to

⁸⁴ ISP, LBP-19-7, slip op at 72-73 (citing Petition at 64, 66-76). Notably, in advancing those claims in Contention 4, Joint Petitioners relied on a report by Mr. Alvarez, a fact that further underscores Petitioner’s failure to demonstrate good cause for the late filing of Contention 17, which, quite clearly, rehashes previously-rejected claims.

⁸⁵ *Id.* at 73.

⁸⁶ *Id.* at 73-74.

⁸⁷ *Id.* at 74.

⁸⁸ *Id.* (quoting Continued Storage GEIS at 5-48).

⁸⁹ See Interim Storage Partners LLC’s Answer Opposing Hearing Request and Petition to Intervene Filed by Don’t Waste Michigan et al. at 49-53 (Dec. 10, 2018) (“ISP Answer to Petition”) (ML18344A685).

present any specific, adequately-supported challenges to the pertinent portions of the Application and ER, in contravention of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

D. Petitioner’s Claim That a DTS Will Be Required During the CISF License Term Is Outside the Scope of This Proceeding, Improperly Challenges NRC Regulations, Lacks Adequate Support, and Fails to Raise a Genuine Material Dispute

Petitioner recycles another rejected argument—this time from Contention 11—in asserting that the NWTRB Report alters the scope of the proceeding by requiring “consideration of canister loading and installation of a [DTS] at reactor sites as well as at the west Texas CISF.”⁹⁰ As explained above, ISP is not seeking a license for a repository or NRC approval to conduct repackaging operations at the proposed CISF. Thus, Petitioner’s concerns relating to the alleged need for repackaging of SNF to accommodate disposal in a repository are outside the scope of this proceeding and immaterial to the NRC Staff’s licensing review.⁹¹ And so, too, is Petitioner’s directly-related argument that a DTS is necessary to support such repackaging of SNF.

Similar to Contention 11, Petitioner’s late-filed contention raises concerns about canister compatibility with future transport and repository requirements for disposal. As the Board explained in rejecting Contention 11, the Continued Storage GEIS assumes that a DTS could be built, if necessary, during long-term storage (*i.e.*, within 160 years after the licensed operating life of a reactor).⁹² However, neither NRC regulations nor the GEIS require ISP to construct a DTS during the initial 40-year operating period for its proposed facility.⁹³ The Continued Storage Rule, moreover, makes clear that ISP’s ER need not evaluate the impacts of storage beyond the 40-year

⁹⁰ Motion at 4.

⁹¹ See 10 C.F.R. § 2.309(f)(1)(iii) and (iv).

⁹² The Continued Storage GEIS recognizes that a “separate licensing action would be necessary before a licensee may construct and operate a site-specific DTS.” Continued Storage GEIS at 2-23. The NRC nevertheless included the environmental impacts of constructing a reference DTS “to provide a complete picture of the environmental impacts of continued storage.” *Id.*

⁹³ ISP, LBP-19-7, slip op. at 87.

license term sought in the Application.⁹⁴ Thus, contrary to Petitioner’s claim, nothing in the NWTRB Report can or does redefine the nature or scope of this proceeding, or otherwise require ISP to evaluate the installation of a DTS as part of *this* licensing action.

E. Petitioner’s Claims that ISP Has “Segmented” the Project and Inadequately Considered SNF Transportation-Related Alternatives, Mitigation Measures, and Cumulative Impacts Raise Issues That Are Outside the Scope of the Proceeding, Lack Adequate Support, and Fail to Establish a Genuine Material Dispute

Turning yet again to its prior arguments, Petitioner alleges various NEPA infractions, principally including its earlier claim that ISP has improperly segmented the SNF storage and transportation “components” of the CISF project.⁹⁵ The Board considered and rejected Petitioner’s “unlawful segmentation” argument in rejecting Joint Petitioners’ proposed Contention 1.⁹⁶ As the Board explained, instead of disputing the sections of ISP’s ER that discuss SNF transportation impacts, Petitioner “challenges the NRC’s Part 72 and NEPA-implementing regulations under Part 51 in violation of 10 C.F.R. § 2.335.”⁹⁷ Consequently, its unlawful segmentation argument is outside the scope of this proceeding, in contravention of 10 C.F.R. § 2.309(f)(1)(iii).

Regardless, for reasons previously explained by ISP, Petitioner’s argument is groundless.⁹⁸ Segmentation occurs when an agency (or applicant in this case) “avoid[s] the [NEPA] requirement that [an EIS] be prepared for all major federal actions with significant environmental impacts by segmenting an overall plan into smaller parts involving action with less significant environmental effects.”⁹⁹ That is not the case here. The ER addresses radioactive material transportation impacts as a “connected action” under NEPA.¹⁰⁰ Petitioner has failed to dispute any specific portion of the

⁹⁴ *Id.* (citing 10 C.F.R. § 51.23(b)).

⁹⁵ Motion at 11-12.

⁹⁶ See ISP, LBP-19-7, slip op. at 67-69.

⁹⁷ *Id.* at 69 (citing ER at 3-5 to -7, 4-3 to -28).

⁹⁸ See ISP Answer to Petition at 24-33.

⁹⁹ *City of West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983) (citation omitted).

¹⁰⁰ See ER at 3-5 to 3-6, 4-9 to 4-22.

relevant analyses and, therefore, failed to establish a genuine material dispute with the ER, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)iv) and (vi).

Petitioner’s allegations concerning SNF transportation alternatives and mitigation measures also are legally and factually baseless. As explained above, Petitioner’s claim that ISP must analyze TAD canisters and DTSS as SNF transportation design alternatives or mitigation measures under NEPA is unfounded. Neither the NWTRB Report nor the DOE Yucca Mountain-related documents¹⁰¹ cited in the Motion require ISP or its prospective utility customers to repackag SNF into TAD canisters or to construct DTSS to transport and store CISF-destined spent fuel. In addition, because ISP has not proposed to undertake such actions in its Application, Petitioner’s arguments are outside the scope of this proceeding. Insofar as such actions may occur during the long-term storage period following the proposed CISF’s operating life, the Continued Storage Rule addresses the related environmental impacts generically.¹⁰² ISP need not address them in the ER.

Finally, inasmuch as Petitioner claims that ISP has not considered the cumulative impacts of “thousands of barge, truck and rail delivery trips,”¹⁰³ it fails to adequately support its contention or dispute with particularity any portion of the ER. The ER considers the cumulative impacts of past, present, and reasonably foreseeable future actions in the environs of the proposed facility, as well as the non-local cumulative impact of “cumulative dose to the public associated with transporting radioactive materials in commerce.”¹⁰⁴ Petitioner has not provided any information or analysis in Contention 17 to contest the relevant ER discussion, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

¹⁰¹ See Motion at 6-7.

¹⁰² See ISP, LBP-19-7, slip op. at 87; Continued Storage GEIS at 2-23.

¹⁰³ Motion at 20.

¹⁰⁴ ER at 2-67.

VI. CONCLUSION

For the foregoing reasons, the Board should deny Petitioner's Motion and deny the admission of Contention 17. Petitioner has failed to meet the late-filing requirements in 10 C.F.R. § 2.309(c)(1) and the contention admissibility standards in 10 C.F.R. § 2.309(f)(1).

Respectfully submitted,

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Dated in Washington, D.C.
this 18th day of November 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
INTERIM STORAGE PARTNERS LLC) Docket No. 72-1050
(Consolidated Interim Storage Facility)) November 18, 2019
)
)

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “Interim Storage Partners LLC’s Answer Opposing Petitioner Sustainable Energy And Economic Development Coalition’s Motion For Leave To Submit Late-Filed Contention 17” was filed through the E-Filing system.

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