

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
ENTERGY NUCLEAR VERMONT YANKEE)
LLC, AND ENTERGY NUCLEAR) Docket No. 50-271-LR
OPERATIONS, INC.)
)
(Vermont Yankee Nuclear Power Station))

NRC STAFF'S ANSWER IN OPPOSITION TO NEW ENGLAND COALITION'S PETITION FOR
REVIEW OF LICENSING BOARD MEMORANDUM AND ORDER LBP-10-19

Lloyd B. Subin
Counsel for NRC Staff

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	2
DISCUSSION.....	4
I. Commission Standard for Review of Board Order	4
II. Standards for Motions to Reopen	6
III. The Board Correctly Ruled on the Reopening Factors	8
A. NEC Shows No Error in the Board’s Analysis of Timeliness	8
B. The Board Correctly Ruled on the "Exceptionally Grave Issue" Exception in 10 C.F.R. § 2.326(a)	12
C. The Board Correctly Assessed the Significance Timeliness Factor in 10 C.F.R. § 2.326(b).....	13
D. The Board Correctly Ruled on the Materially-Different Result Factor in 10 C.F.R. § 2.326(c).....	16
E. Other Claims by NEC Do Not Demonstrate Reversible Board Error.....	18
F. Entergy’s Amendment to Its LRA Does Not Prejudice NEC.....	20
CONCLUSION	23

TABLE OF AUTHORITIES

	<u>Page</u>
<u>JUDICIAL DECISIONS</u>	
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985).....	5
<i>San Luis Obispo Mothers for Peace v. NRC</i> , 751 F.2d 1287 (D.C. Cir. 1984)	7, 17
<i>San Luis Obispo Mothers for Peace v. NRC</i> , 760 F.2d 1320 (D.C. Cir. 1985)	17
<i>San Luis Obispo Mothers for Peace v. NRC</i> , 789 F.2d 26 (D.C. Cir. 1986)	7
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission</u>	
<i>Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 40441)</i> , CLI-94-6, 39 NRC 285 (1994).....	6
<i>AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)</i> , CLI-08-23, 68 NRC 461 (2008).....	22
<i>AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)</i> , CLI-08-28, 68 NRC 461 (2008).....	<i>passim</i>
<i>AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)</i> , CLI-09-07, 69 NRC 235 (2008).....	<i>passim</i>
<i>Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)</i> , CLI-86-7, 23 NRC 233 (1986)	7, 14
<i>Curators of the University of Missouri (TRUMP-S Project)</i> , CLI-95-8, 41 NRC 386 (1995).....	22
<i>Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3)</i> , CLI-09-5, 69 NRC 115 (2009).....	8
<i>Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)</i> , CLI-02-08, 56 NRC 373 (2002)	21
<i>Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)</i> , CLI-02-14, 55 NRC 278 (2002)	20
<i>Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)</i> , CLI-02-17, 56 NRC 1 (2002)	20
<i>Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.</i> (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __ (Jul. 8, 2010)(slip op.).....	2

<i>Florida Power & Light Co.</i> (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3 (2001).....	18
<i>Kenneth G. Pierce</i> (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995).....	5
<i>Louisiana Power and Light Co.</i> (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1 (1986).....	17
<i>Private Fuel Storage, LLC</i> (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11 (2003).....	5
<i>Private Fuel Storage, LLC.</i> (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345 (2005).....	7, 8
<i>Tennessee Valley Authority</i> (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160 (2004)	5, 6
<i>USEC, Inc.</i> (American Centrifuge Plant), CLI-06-9, 63 NRC 433 (2006).....	5
<i>USEC, Inc.</i> (American Centrifuge Plant), CLI-06-10, 63 NRC 451 (2006).....	13
<u>Atomic Safety and Licensing Board</u>	
<i>AmerGen Energy Co., LLC.</i> (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5 (2008).....	7, 17
<i>Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.</i> (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261 (2007).....	22
<i>Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.</i> (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC ____ (Oct. 28, 2010)(slip op.)	<i>passim</i>
<i>Houston Lighting and Power Co.</i> (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707 (1985).....	8
<i>Progress Energy Florida, Inc.</i> (Levy County Nuclear Power Plant, Units 1 and 2) LBP-09-10, 70 NRC 51 (2009).....	22
<u>Atomic Safety and Licensing Appeal Board</u>	
<i>General Public Utilities</i> (Three Mile Island Nuclear Station, Unit No. 1) ALAB-881, 26 NRC 465 (1987).....	5
<i>Metropolitan Edison Co.</i> (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9 (1978).....	8
<i>Pacific Gas and Electric Co.</i> (<i>Diablo Canyon Nuclear Power Plant, Units 1 & 2</i>), ALAB-775, 19 NRC 1361 (1984)	7, 17

Public Service of New Hampshire, et. al. (Seabrook Station, Units 1 and 2), ALAB-886,
27 NRC 74 (1988)..... 13

Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343 (1983)..... 5

REGULATIONS

10 C.F.R. § 2.309(f) 7

10 C.F.R. § 2.309(f)(1)..... 11, 15, 19

10 C.F.R. § 2.309(f)(2)..... 22

10 C.F.R. § 2.326..... 7, 12, 16

10 C.F.R. § 2.326(a) *passim*

10 C.F.R. § 2.326(a)(1)..... 3, 4, 14

10 C.F.R. § 2.326(a)(2)..... 4, 15, 16

10 C.F.R. § 2.326(a)(3)..... 4, 8, 14, 17

10 C.F.R. § 2.326(b) *passim*

10 C.F.R. § 2.326(c) 16

10 C.F.R. § 2.326(d) 8

10 C.F.R. § 2.337(a) 7

10 C.F.R. § 2.341(b)(2)..... 11

10 C.F.R. § 2.341(b)(3)..... 1

10 C.F.R. § 2.341(b)(4) *passim*

10 C.F.R. Part 54 2, 18

10 C.F.R. § 54.21(b) 20, 22

10 C.F.R. § 54.30..... 18

MISCELLANEOUS

Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings,
51 Fed. Reg. 19,535 (May 30, 1986) 8, 17

Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461
(May 8, 1995)..... 20

New England Coalition’s Motion to Reopen the Hearing and for the Admission of New Contentions (ADAMS Accession No. ML102420042).....*passim*

"NRC Generic Letter 2007-01: Inaccessible Or Underground Power Cable Failures That Disable Accident Mitigation Systems Or Cause Plant Transients" (February 7, 2007) (ADAMS Accession No. ML070360665)..... 19

NRC Inspection Report 05000271/2010002 (May 10, 2010) (ADAMS Accession No. ML101300363).....*passim*

Nuclear Power Plant License Renewal, Final Rule, 56 Fed. Reg. 64943 (Dec. 13, 1991) ... 18, 21

September 3, 2010 Supplement to Vermont Yankee License Renewal Application (ADAMS Accession No. ML102500065).....*passim*

Vermont Yankee Nuclear Power Station License Renewal Application (Jan. 25, 2006) (ADAMS Accession No. ML060300085).....*passim*

November 22, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
ENTERGY NUCLEAR VERMONT)
YANKEE LLC)
AND ENTERGY NUCLEAR) Docket No. 50-271-LR
OPERATIONS, INC.)
)
(Vermont Yankee Nuclear Power Station))

NRC STAFF'S ANSWER IN OPPOSITION TO NEW ENGLAND COALITION'S PETITION FOR
REVIEW OF LICENSING BOARD MEMORANDUM AND ORDER LBP-10-19

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to New England Coalition's ("NEC") petition for review¹ of the Atomic Safety and Licensing Board's ("Board") Memorandum and Order which denied NEC's request to reopen the Vermont Yankee License Renewal proceeding.² For the reasons set forth herein, the Petition should be denied on the grounds that NEC has not demonstrated the existence of a substantial question with respect to the considerations in 10 C.F.R. § 2.341(b)(4)(i)-(v).

¹ Petition For Commission Review Of ASLBP Memorandum And Order (Ruling on New England Coalition Motion to Reopen and Proffering New Contention), (November 12, 2010). ("Petition").

² Entergy Nuclear Vermont Yankee, L.C.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC __ (Oct. 28, 2010) (slip op.). ("Order") (Ruling on Motion to Reopen Proffering New Contention).

BACKGROUND

By letter dated January 25, 2006, Entergy submitted to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) an application for license renewal (“LRA”),³ pursuant to 10 C.F.R. Part 54, of Operating License No. DPR-28 for the Vermont Yankee Nuclear Power Station (“VYNPS”). The current operating license expires on March 21, 2012.

The adjudicatory history relevant to NEC's Petition is listed in *Vermont Yankee*, LBP-10-19, 72 NRC at ___ (slip op. at 2-5). Briefly, on July 8, 2010, the Commission issued an Order ruling on two pending appeals in the proceeding. *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC ___ (slip op.) (July 8, 2010)(reversing the Board's ruling in LBP-08-25 on Contentions 2A and 2B, and remanding the case to the Board to consider a revised Contention 2).

In May of 2010, the NRC published NRC Inspection Report 05000271/2010002 (May 10, 2010) (ADAMS Accession No. ML101300363)(“Inspection Report”). The Inspection Report covered a routine three-month period of inspection by the assigned NRC resident inspectors. Inspection Report at 3. The inspectors selected an Entergy-prepared condition report that documented Entergy’s identification on November 28, 2009 of submerged safety-related cables. and the NRC inspectors assessed if Entergy personnel were appropriately identifying, characterizing, and correcting problems associated with the submerged safety-related cables, and if the planned (or completed) corrective actions were appropriate to prevent recurrence. *Id.* The inspectors identified a non-cited violation in Entergy’s current operations. However, the inspectors also found that no actual consequences occurred from the performance issue.

³ Vermont Yankee Nuclear Power Station License Renewal Application (Jan. 25, 2006) (ADAMS Accession No. ML060300085). Entergy has since supplemented and amended its application several times.

On August 20, 2010, NEC filed a motion to reopen the license renewal proceeding to admit a new contention (numbered Contention 7).⁴ The proposed new contention stated:

[The] [a]pplicant has not demonstrated adequate aging management review and/or time-limited aging analysis nor does the applicant have in place an adequate aging management program to address the effects of moist or wet environments on buried, below grade, underground, or hard-to-access safety-related electric cables, thus the applicant does not comply with NRC regulation (10 C.F.R. § 54.21(a) and guidance and/or provide adequate assurance of protection of public health and safety (54.29(a)[]).

Motion at 8.

On September 14, 2010, the Staff and Entergy responded in opposition to NEC's Motion, and NEC filed a timely reply to the Staff's and Entergy's answers.⁵ On October 28, 2010 the Board issued an Order denying NEC's motion to reopen the proceeding to admit new Contention 7. The denial was based upon the Board's determination that NEC's Motion did not meet the timeliness and "materially-different" outcome criteria of 10 C.F.R. §§ 2.326(a)(1) and (3) to reopen the proceeding. Order at 20-21.

Regarding timeliness, the contention was not timely under 10 C.F.R. § 2.326(a)(1). *Id.* at 24. The Board concluded that Contention 7 is based on information that was available since the beginning of the license renewal application proceeding (*e.g.*, the aging management

⁴ New England Coalition's Motion to Reopen the Hearing and for the Admission of New Contentions (ADAMS Accession No. ML102420042) ("Motion") with attached Declaration and Affidavit of Paul Blanch (Aug. 20, 2010) ("Blanch Affidavit").

⁵ Entergy's Answer Opposing New England Coalition's Motion to Reopen (Sept. 14, 2010) ("Entergy Answer") with attached Declaration of Norman L. Rademacher and Roger B. Rucker in Support of Entergy's Answer Opposing New England Coalition's Motion to Reopen (Sept. 14, 2010); NRC Staff's Opposition to the New England Coalition's Motion to Reopen the Hearing and Answer to Proposed New Contention (Sept. 14, 2010) ("Staff Answer") with attached Affidavit of Roy K. Mathew (Sept. 14, 2010) ("Mathew Affidavit"); New England Coalition's Reply to NRC Staff and Entergy Nuclear Vermont Yankee Opposition to New England Coalition's Motion to Reopen the Hearing and Reply to NRC Staff's Answer to Proposed New Contention (Sept. 21, 2010) ("Reply") with attached Declaration of Paul Blanch (Sept. 21, 2010) ("Second Blanch Affidavit").

program (“AMP”) and NRC and Industry concerns associated with the wetting or submergence of safety-related electrical cables). *Id.*

Although the Board recognized that it may dispense with the timeliness factor of 10 C.F.R. § 2.326(a)(1) to address “an exceptionally grave issue,” the Board concluded that NEC failed to show that the issues in Contention 7 are “exceptionally grave.” *Id.* at 24 n.20.

Regarding the significance of the proposed new contention, the Board found it unnecessary to rule on this factor in light of its rulings on the other factors, but expressed doubt as to whether the issues in New Contention 7 raised “significant safety” issues as required by 10 C.F.R. § 2.326(a)(2). *Id.* at 26.

Last, regarding whether the proposed new contention would have produced a materially-different outcome, the Board concluded that 10 C.F.R. § 2.326(a)(3) was not met because NEC failed to demonstrate that the likely outcome of the now-closed proceeding would have been different if Contention 7 had been proffered initially. *Id.* at 27.

NEC timely filed the instant Petition for Commission review of the Board’s Order.

DISCUSSION

As explained more fully below, NEC has failed to demonstrate that the Board’s material factual findings are clearly erroneous or that the Board’s legal conclusions depart from or are contrary to established law. Therefore, NEC has not met its burden under 10 C.F.R. § 2.341(b)(4), and its petition for review should be denied.

I. Commission Standard for Review of Board Order

As described in 10 C.F.R. § 2.341(b)(4) the petition for review may be granted in the discretion of the Commission, giving due weight to the *existence of a substantial question* with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.341(b)(4).

The Commission's standard to demonstrate that a finding of a material fact is clearly erroneous is quite high and requires a showing that the Board's findings are "not even plausible in light of the record viewed in its entirety."⁶ The Commission defers to a licensing board's findings of fact as long as the "Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact" and is particularly deferential to a Board's determinations of witness credibility and the weight to be given to witness testimony.⁷ Thus, the Commission will reject or modify a board's findings only if, after accounting for appropriate deference to the "primary fact finder," the Commission is "convinced that the record *compels* a different result."⁸ The Commission will not overturn a board's findings simply because it might have reached a different result or because the record could support a view sharply different from that of the Board.⁹

⁶ *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003) ("PFS") (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)).

⁷ *Id.*; *Union Electric Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 368 (1983).

⁸ *General Public Utilities* (Three Mile Island Nuclear Station, Unit No. 1) ALAB-881, 26 NRC 465, 473 (1987) (emphasis added).

⁹ See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plants, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 190 (2004) ("TVA"); *PFS*, CLI-03-8, 58 NRC at 27 (quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)).

With respect to a Board's conclusions of law, a petitioner must show an "error of law or abuse of discretion" by the Board.¹⁰ The Commission will reverse a Board's legal conclusions only "if they are a departure from or contrary to established law."¹¹ The burden is on NEC, the petitioner, to identify the error in the Board's decision and thereby demonstrate that Commission review is warranted.¹²

II. Standards for Motions to Reopen

Pivotal to NEC's petition for review is whether there is a substantial question that one or more of the considerations set forth in § 2.341(b)(4) are met by virtue of the Board's denial of NEC's motion to reopen the closed record. Pursuant to 10 C.F.R. § 2.326(a), a motion to reopen a closed record to consider additional evidence will not be granted unless all of the following criteria are satisfied:

- (1) The motion must be timely, except that 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 issue.
- (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); *AmerGen Energy Co., LLC*. (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008) ("*Oyster Creek I*"). In addition to the standards of 10 C.F.R. § 2.326(a), the motion must be accompanied by one or more affidavits—given by "competent individuals with knowledge of the facts alleged" or by experts in the appropriate disciplines—

¹⁰ *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006).

¹¹ *TVA*, CLI-04-24, 60 NRC 160, 190 (2004) (internal quotations omitted).

¹² See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 40441), CLI-94-6, 39 NRC 285, 297-98 (1994).

which set forth the factual or technical bases, or both, for the movant's claims. 10 C.F.R. § 2.326(b). See also *AmerGen Energy Co., LLC*. (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 286, 291 (2009) (“*Oyster Creek II*”). The affidavit must address each of the criteria in § 2.326(a) and provide a specific explanation of how each criteria is met. 10 C.F.R. § 2.326(b); *Oyster Creek I*, CLI-08-28, 68 NRC at 672. The moving party bears the heavy burden of demonstrating that it meets all of the requirements of § 2.326. *Id.*

The Commission has stated: "If the Board, after considering the parties' submissions, was not convinced that the motion raised a matter of safety significance, it should have denied the motion to reopen." See *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 234 (1986).

The new material in support of a motion to reopen must be set forth with a degree of particularity that exceeds the basis and specificity requirements contained in 10 C.F.R. § 2.309(f) for admissible contentions. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (1984), *aff'd sub. nom.*; *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff'd on reh'g en banc*, 789 F. 2d 26 (D.C. Cir. 1986). Neither speculation, a showing of a possible violation of a regulatory requirement, nor a showing that a component is safety-related, is enough to demonstrate a significant safety issue. See *Oyster Creek I*, CLI-08-28, 68 NRC at 672. The evidence supporting a motion to reopen must not only be new, it must satisfy the Commission's admissibility standards set forth in 10 C.F.R. § 2.337(a)—it must be "relevant, material, and reliable." *Id.* In other words, for a Board to grant a motion to reopen, "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition." *Private Fuel Storage, LLC*. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005). In determining whether the evidence presented warrants reopening, the Board properly evaluates the evidence submitted by the parties and weighs competing evidence to determine whether reopening of the record is warranted. *AmerGen Energy Co., LLC*. (Oyster Creek

Nuclear Generating Station), LBP-08-12, 68 NRC 5, 16 (2008), *aff'd Oyster Creek I*, CLI-08-28, 68 NRC 658.

A motion to reopen must, in part, show that a materially different result would be likely if the hearing was reopened and the evidence heard. 10 C.F.R. § 2.326(a)(3); *see, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125 (2009).

The standard for admitting a new contention after the record is closed “is higher than the standard for ordinary late-filed contentions.” *Oyster Creek I*, CLI-08-28, 68 NRC at 668. Section 2.326(d) expressly requires that any motion to reopen that addresses a new contention “must satisfy the requirements for nontimely contentions in § 2.309(c).” This “heavy burden” created by the regulations is intentional. *See* Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).¹³

As a result, even if a contention meets the ordinary requirements for contention admissibility, that contention will be inadmissible if the proponent fails to satisfy the stricter requirements for admission of new contentions after the record has closed. *Private Fuel Storage*, CLI-05-12, 61 NRC at 350.

III. The Board Correctly Ruled on the Reopening Factors

A. NEC Shows No Error in the Board's Analysis of Timeliness

NEC argued that its Motion to Reopen was timely, but the Board found it was not. Motion at 22; Order at 24. NEC's argument appears to be premised on the assumption that the

¹³ The Board and the Atomic Safety and Licensing Appeal Board (“Appeal Board”) have also noted that the reopening requirements apply to all issues for which reopening is sought, meaning that the reopened record is open solely to those matters which have been found to satisfy the § 2.326 reopening requirements. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-85-19, 21 NRC 1707, 1720 (1985) (*citing Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 2), ALAB-486, 8 NRC 9, 22 (1978)). Thus, if the Board grants this motion, the record would only be reopened to allow additional evidence on the issue raised by NEC's Motion. If NEC sought to raise any other issues, it would have to satisfy § 2.326 as to those issues as well.

Inspection Report provides details of the actual execution of the aging management program. Motion at 22. Further, NEC stated it was surprised to learn that VY was addressing the cables in a manner that did not include flood prevention, "in place" sump pumps, or monitors. *Id.* NEC also stated the LRA lacked "important and telling detail" and is not accurate and complete. Motion at 22.

In its September 20, 2010 Reply, NEC downplayed the information in the Inspection Report, stating, "[w]hile the NRC Inspection Report was significant new information regarding a safety issue within the scope of LRA review, NEC's assessment of the report was that, while the implications of the report were alarming, alone it did not provide adequate basis to meet NRC's stringent standards for a new contention." Reply at 8. NEC then described how it tried to find, but did not find, additional new documents¹⁴ to support its filing. *Id.* NEC instead continued to rely on the assertion that the Inspection Report was *missing* information; for example, NEC stated "[i]t was startling to discover from the inspection report that Entergy had no technical basis for establishing two years intervals of inspection" Reply at 9. Thus, in its motion to reopen and subsequent reply, NEC did not present any new information other than the Inspection Report to support the timeliness of the new contention. Noteworthy, NEC acknowledged that the Inspection Report did not contain sufficient information to justify the filing of a new contention. Reply at 8 ("While the NRC Inspection Report was significant new information regarding a safety issue within the scope of LRA review, NEC's assessment of the report was that, while the implications of the report were alarming, alone it did not provide adequate basis to meet NRC's stringent standards for a new contention."). NEC stated that it found no additional relevant documents despite a search for documents regarding Vermont

¹⁴ NEC mentions a newspaper article dated August 27, 2010 (Reply at 11 n.10), and a September 3, 2010 Supplement to the LRA (*id.* at 10) but does not use them to support its filing.

Yankee and cables between May 10, 2010 and August 20, 2010. *Id.*

The Board concluded that NEC's Motion was not timely because the issue raised – failing to address wet or submerged cables – could have been raised at a prior time in the proceeding. Order at 21-24. NEC asserted that the Motion was timely because of information in the Inspection Report. *Id.* at 22 (citing Motion at 11). The Board found that the issue should have been identified by NEC and asserted long ago. See *id.* at 23. The Board observed that the applicant's LRA as originally submitted acknowledged the need to address wet or submerged cables. *Id.* at 23. Further, the September 2005 GALL Report, and documents from more than twenty years ago, recognized the possibility of long-term submergence. *Id.* The Board observed that NEC's motion itself acknowledged that EPRI and the NRC provided Entergy with ample notice of the issue, and the Board properly imputed that knowledge to NEC as well. *Id.* at 23-24.

NEC was required in its petition for review to provide a “concise statement why in the petitioner's view the [Board's] decision or action is erroneous.” 10 C.F.R. § 2.341(b)(2)(iii). NEC asserts the Board committed error by basing its rulings “on something other than an intelligent reading” of NEC's pleadings and declaration. Petition at 17. However, NEC does not explain how the Board's interpretation of its pleading was deficient with respect to determining whether its motion to reopen was timely. See *id.* In fact, NEC explicitly disavows claiming that (1) the possibility of submerged and wet electrical cables was new (*id.* at 13 and 17) or (2) anything in the LRA was new (*id.* at 13). Further, NEC agrees with the Board that, if the LRA's AMP is now inadequate, it has been inadequate from the beginning. *Id.* at 16. Thus, taken together, the information highlighted by NEC shows no factual dispute with the Board. Because NEC finds no error with the Board's determination on the newness of the issue, there is no dispute for the Commission to resolve, and the Board's undisputed conclusion that the issue is not new should stand.

In an effort to show some disagreement with the Board on whether the proposed

contention is based on new information, NEC asserts that new information is found not from the cable-submergence issue itself, but from Entergy's responses to the discovery of water in the manholes, as documented in the inspection report. Petition at 13. NEC argues, "[i]n the Inspection Report, NRC showed NEC what Entergy did not clearly state or clearly did not state about an AMP for the subject cables in the LRA. That's new." Petition at 14. In other words, NEC claims it now fully comprehends where Entergy's AMP is vague and/or silent. But, to the extent Entergy's AMP is silent or vague on these matters, it has been so from the time Entergy filed the LRA. NEC has not demonstrated how the inspection report renders this alleged silence or vagueness "new." NEC provides no basis for its view that silence or "not stat[ing]" information equates to new information.¹⁵ Moreover, NEC has not justified why it needed to wait for the inspection report, or why the inspection report would be required to contain the information, or why NEC would reasonably expect the report to provide details of the LRA AMP.

Under 10 C.F.R. § 2.309(f)(1)(vi), a petitioner may allege that an application fails to contain information on a relevant matter, but petitioners have a regulatory obligation to challenge deficiencies in applications through their original petitions to intervene, not years later. *C.f. AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 274 (2009) (finding logical the concept that if an enhanced program is inadequate, then the original program was also inadequate). It is particularly difficult to justify a late contention of omission unless the lack of information is somehow tied to a recent event, such as an amendment to the LRA that improperly reduced the scope of an AMP and thus only recently created the omission. NEC points to no recent LRA amendment that created an omission, but

¹⁵ NEC elsewhere argued that silence in the LRA equated to new information, stating "This information [the non-cited violation] is new. Nowhere in the LRA does its state that AMPs are in place to handle cables that remain in place in violation of Appendix B." Petition at 16. However, this argument is based upon an incorrect assumption that an ongoing Appendix B violation will exist, and cannot be reconciled with NEC's acknowledgement that the licensee took corrective actions. See Motion at 11 (quoting section of inspection report that described corrective actions).

instead, cites the Inspection Report, not for what it contains, but for what it lacks. See Petition at 13. In short, NEC believes that the AMP has always been inadequate. Petition at 16. Thus, while the date of the Inspection Report could be a starting point for a contention prompted by new information within the report, there simply is no valid reason why the date of a report is the fair starting point for a contention that is premised on an alleged absence identified by the report that would have always existed in the LRA.

In sum, NEC has not met its burden to show an error in the Board's decision that NEC's motion to reopen the record was untimely.

B. The Board Correctly Ruled on the "Exceptionally Grave Issue" Exception in 10 C.F.R. § 2.326(a)

In its Motion, NEC correctly repeated 10 C.F.R. § 2.326, including the "exceptionally grave" factor (Motion at 4), but did not further address the exception to the timeliness requirement¹⁶ relying instead on its argument that the motion was timely. See Motion at 4-6. In its Reply, NEC asserted for the first time that the issue it sought to raise was not just significant but grave. See e.g., Reply at 3 ("NEC raises an aging management issue with grave safety implications"). Notably, NEC provided no argument that its issue was "exceptionally grave." Instead, NEC simply concluded that the issue was "one of the gravest of nuclear safety concerns." See Reply at 16.

The Board's brief discussion of NEC's conclusion was sufficient to rebut NEC's bare

¹⁶ Section 2.326(a)(1) provides that "an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented."

The Commission discussed this exception in rulemaking, stating in part

"The Commission believes that the public interest is better served if this narrow exception is retained. **It must be understood that the Commission anticipates that this exception will be granted rarely and only in truly extraordinary circumstances.**

Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986) (emphasis added).

assertion:

While the Board declines to determine whether NEC has established that the issues raised in Contention 7 are “significant,” . . . , exceptional gravity is a much higher threshold. We have no doubt in concluding that NEC has failed to show that the issues raised in Contention 7 are “exceptionally grave.”

Order at 24 n.20.

The proponent of a non-timely motion to reopen faces a considerable burden: "it must establish that the issue it would now add to the proceeding is not merely ["]significant["] but ["]exceptionally grave.["]" *Public Service of New Hampshire, et. al.* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 78 (1988). The proponent is obligated to establish affirmatively the existence of an exceptionally grave safety issue. *Id.* at 79. In this case, NEC did not address this burden before the Board, and the simple assertions made by NEC certainly do not affirmatively establish the existence of an exceptionally grave safety issue at this point. Petition at 18.¹⁷ Thus, the Commission should not disturb the Board's correct finding that "exceptionally grave" circumstances are not met.

C. The Board Correctly Assessed the Significance Factor in 10 C.F.R. § 2.326(b)

NEC asserts that it provided sufficient information to show that its Motion raised a significant safety issue. Petition at 18. According to NEC, the Board's analysis of the information it presented is unsupported and the Board's conclusion erroneous. *Id.* The Board declined to rule, finding it was “less clear” that NEC's Motion to Reopen raised a significant safety issue. Order at 25. While the Board stated that the *general* topic of wetting and submergence of electric cables is safety significant, it found that NEC had provided “little or

¹⁷ In its Petition, NEC candidly admits that it "failed to make this [exceptionally grave] argument to the Board." Petition at 18. Thus, where it now argues in this topic, it is impermissibly late. See e.g. *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, n.104 (2006) (declining to address a new argument raised in appeal).

nothing” to support a conclusion that the alleged deficiencies in Entergy’s AMP for electric cables are safety significant. *Id.* The Board properly denied NEC’s Motion because it was unclear that it raised a significant safety issue and did not satisfy either 10 C.F.R. §§ 2.326(a)(1) and (3), that the motion to reopen was timely and that the proffered contention would have produced a materially different result. See *Perry*, CLI-86-7, 23 NRC at 234 (“If the Board, after considering the parties’ submissions, was not convinced that the motion raised a matter of safety significance, it should have denied the motion to reopen.”).

In support of its Petition, NEC argues that an NRC study, NUREG/CR-7000, two major EPRI Reports, and a 2009 NRC working group meeting demonstrate that submerged unqualified safety-related cables is a very significant issue. Petition at 17. Specifically, NEC quotes from NUREG/CR-7000 for the proposition that electric cables are important components of a reactor because they provide power needed to operate safety-related equipment. But NEC fails to explain how this is safety significant. Petition at 17. As the Staff explained in its Answer, these documents do not support the factual and/or technical bases for NEC’s claim. Staff Answer at 7. Moreover, the document NEC primarily relied upon, the Inspection Report, does not support NEC’s claim. NEC claims that this Inspection Report stands for what it reveals about Entergy’s approach to the issue and not the regulatory and safety significance of the issue itself. Motion at 17; Petition at 17. This is consistent with the Inspection Report’s conclusion that its finding with respect to the cables was of “very low safety significance,” and no loss of operability or functionality was found. Inspection Report at 4. Thus, the Board correctly concluded, “even acknowledging the general significance of managing the aging of safety related electrical cables, it is unclear, based on NEC’s pleadings, how or why these specific complaints are significant.” Order at 25.

As further support that its Motion raised a significant safety issue, NEC refers to the Blanch Affidavit to argue that the licensee does not fully characterize the condition of the cable insulation or provide information on the extent of aging and degradation mechanisms leading to

cable failure. Petition at 17. As the Staff stated in its Answer, there is nothing in the Blanch Affidavit to support NEC's claim that its motion raises a significant safety issue. Staff Answer at 6. The Blanch Affidavit does not state or explain the factual/technical bases for NEC's claim in its Motion that the alleged deficiencies in Entergy's AMP are safety significant as required by 10 C.F.R. 2.326(a)(2). See *AmerGen Energy Company (Oyster Creek Nuclear Generating Station)*, CLI-08-28, 68 NRC 658, 670 (2008) ("Section 2.326(b) requires motions to reopen to be accompanied by affidavits of qualified experts presenting the factual and/or technical bases for the claim that there is a significant safety issue, together with evidence that satisfies our admissibility standards."). Instead, the Blanch Affidavit focuses on the requirements of 10 C.F.R. § 2.309(f)(1) which relate to scope and contention admissibility in that the cables play a vital role in the operation of a plant. See Blanch Affidavit at 4. Again, the Board correctly decided that the integrity of safety-related wetted submerged electrical cables is a safety issue but that the specific issues raised in Contention 7 do not meet the requirements of § 2.326(a)(2). See Order at 25.

Next, NEC argues that it should have had the opportunity to review the AMP that the Applicant submitted regarding the low-voltage cables. However, the Board correctly determined that even if the AMP did not cover the low-voltage cables, and even if this issue were significant, it has been rendered moot by Entergy's September 3, 2010 supplement to its AMP¹⁸ expanding the AMP to cover low-voltage safety related cables. This conclusion is consistent with the Commission's approval of another licensing board's ruling that a contention of omission was moot. See *Oyster Creek I*, CLI-08-28, 68 NRC 658. In CLI-08-28, the contention of omission insisted that the applicant perform a confirmatory analysis using a conservative methodology,

¹⁸ September 3, 2010 Supplement to Vermont Yankee License Renewal Application (ADAMS Accession No. ML102500065).

but the board found it to be moot because the applicant submitted a confirmatory analysis using the methodology called for in the regulations. *Id.* at 676 n.72.¹⁹

In conclusion, although the Board did not base its holding on the “significant safety issue” prong of 10 C.F.R. § 2.326, NEC’s Motion did not meet this standard because, while it identified a safety issue, it did not show that this issue was significant within the meaning of 10 C.F.R. § 2.326(a)(2). This failure alone would have justified the Board’s decision to reject NEC’s motion to reopen the record.

D. The Board Correctly Ruled on the Materially-Different Result Factor in 10 C.F.R. § 2.326(c)

To address this factor, NEC asserted that it is reasonable to assume that, based on the weight of the evidence and safety significance of the issue, the Board would have required Entergy to submit and demonstrate and adequate AMP or TLAA for electrical cables that might be wet or submerged. Motion at 7. The Board, noting that NEC devoted just two sentences to this topic, found that NEC did not demonstrate NEC was likely to succeed on the merits and, consequently, cause a materially different outcome (*e.g.* a change in testing frequency). Order at 27.

In its Petition for Review, NEC does not specifically address any of the factors in 10 C.F.R. § 2.341(b)(4), nor does NEC point to any specific error by the Board but instead views the regulation as too strict, saying:

NEC has presented the testimony of a credentialed electrical engineer with more than 40 years of experience in nuclear power generation, and cited in support of its pleadings numerous authorities, including NRC’s own technical studies, all of it more than sufficient to show that its proposed contention has merit sufficient to be heard and at some level to raise issues requiring, if nothing more, additional analysis and/or improvements to the cable amps. *NEC cannot be expected to prove its case at this*

¹⁹As discussed in Section F, *infra*, NEC was not prejudiced by Entergy’s September 3, 2010 Amendment to the LRA.

point for that would be an impossibly high standard; one negating the basic purpose of the hearing for which NEC is asking.

Petition at 19 (emphasis added).

While a petitioner seeking to reopen a closed record does have a heavy burden,²⁰ the regulation clearly articulates the standard as “demonstrat[ing] 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)(3). The support for a motion to reopen must exceed what would be sufficient to admit a contention, and must be more than mere allegations. See *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 3 (1986) (citing *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366 (1984), *aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *vacated in part and reh'g en banc granted on other grounds*, 760 F.2d 1320 (1985)). The proponent of the motion to reopen must do more than present bare assertions and speculation, even if offered by an expert. See *Oyster I*, CLI-08-28, 68 NRC at 674.

NEC's new contention must show a likelihood that the contention would be resolved in its favor such that Vermont Yankee's LRA would be conditioned or denied. See *Oyster Creek*, LBP-08-12, 68 NRC at 22, *aff'd Oyster Creek I*, CLI-08-28, 68 NRC at 658.

The Board properly found that neither NEC's Motion nor Mr. Blanch's affidavit explained how NEC's evidence demonstrates that NEC would likely prevail on its new proposed contention. As the Board correctly found, NEC failed to meet the regulatory standard in its Motion.

NEC does not show that the Board's ruling was inconsistent with the case law, or that

²⁰ See Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

the Board applied an impossible standard. Where the petitioner has not identified a clear factual or legal error but instead is essentially disputing the licensing board's weighing of the evidence, the Commission should not reopen the record. See *Oyster I*, CLI-08-28, 68 NRC at 675-76. Since NEC identified no clear factual or legal error, the Commission should affirm the Board's ruling.

E. Other Claims by NEC Do Not Demonstrate Reversible Board Error

In its Petition, NEC discussed some issues beyond the Board's ruling not previously raised by NEC which, for clarity, the Staff wishes to address.

First, NEC discussed that the corrective actions program at the site was not available to the public and therefore NEC had to gather other information from other sources. Petition at 14. The purpose of the corrective actions program is to restore compliance with the current licensing basis. However, corrective actions are taken to address current violations and are not within the scope of the license renewal review. See 10 C.F.R. § 54.30 (where Part 54 reviews show potential current non-compliance, licensee must address the issue under the current license, and those actions are not with the scope of license renewal). The license renewal rules are premised on maintaining the current licensing basis. The review for renewal is not intended to "duplicate the Commission's ongoing review of operating reactors." *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001) (*quoting* Final Rule; Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991)). Further, "the decision to issue a renewed operating license need not involve a licensing review of the adequacy of or compliance with a plant's" current licensing basis ("CLB"). Nuclear Power Plant License Renewal, Final Rule, 56 Fed. Reg. 64943, 64960 (Dec. 13, 1991). Thus, even if NEC had accessed the corrective actions to the violation, the corrective actions likely would not be within the scope of license renewal, nor be material to the findings the NRC staff must make, and therefore would not have supported a new contention under 10 C.F.R. § 2.309(f)(1)(iii & iv).

Second, NEC highlights what NEC believes to be inconsistent statements by NRC Staff expert Roy K. Mathew regarding the seriousness of the issue of water on cables and the Inspection Report's finding. Petition at 14. In fact, the statements by Mr. Mathew are not inconsistent; the issue of water on cables is a serious issue industry-wide. The NRC is concerned about the issue for all operating plants. See e.g., Generic Letter 2007-01, "NRC Generic Letter 2007-01: Inaccessible Or Underground Power Cable Failures That Disable Accident Mitigation Systems Or Cause Plant Transients" (February 7, 2007)(ADAMS Accession No. ML070360665) (discussing, at 3-4, multiple equipment failures associated with cable insulation that shows signs of degradation from moisture, as documented in a 2005 inspection report). However, as Mr. Mathew stated, the event discussed in the Inspection Report was not a significant safety issue (*i.e.* no equipment failure occurred). It is unsurprising that, while individual findings may not have resulted in significant safety issues, the NRC nonetheless is concerned about the potential seriousness of the general issue. This concern is in part evidenced by the fact that the NRC's inspectors described the finding and took appropriate enforcement action.

Third, NEC accuses the Staff of being mean-spirited, supporting the licensee's position, not forthcoming in discovery or disclosure issues, and withholding documents as subject to 'deliberative process' until they were useless to the intervenors. Petition at 4. However, NEC did not challenge the Staff's invocation of the deliberative process privilege at any prior point in this proceeding. Nothing in the record would indicate that the Staff had done anything improper. Rather, the Staff's position in this proceeding has been repeatedly upheld in Board or Commission rulings.

Last, NEC's suggestion that the Inspection Report demonstrated to NEC that Entergy did not implement cable relocation, cable replacement, or installation of moisture alarms

(Petition at 13) does not support its late filing in as much as the items NEC discusses appear to be changes to the plant's design,²¹ beyond the limited scope of license renewal review, which is premised on maintaining safety through continuation of the current licensing basis. See Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,464 (May 8, 1995). The Commission's regulations recognize that a licensee may propose changes to its CLB if the licensee believes such changes are necessary to satisfy the standards of issuance of a renewed license, i.e. if required to manage the effects of aging. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278 (2002) *affected by* CLI-02-17, 56 NRC 1 (2002). Also, under the Commission's rules, if Entergy were to modify the CLB, Entergy is already required by 10 C.F.R. § 54.21(b) to submit LRA updates that describe the modifications which materially affect the contents of the LRA. Thus, NEC could have reviewed the CLB change submittals to learn what Entergy planned to do.²² Likewise, in the absence of LRA updates describing changes to the CLB, NEC could have concluded long ago that no redesign, relocation, or replacement was planned. Therefore, although the Board did not explicitly discuss CLB changes in the LRA, the Board was correct in finding the potential for submergence of cables to be a known issue, discussed in numerous industry and NRC documents, as well as part of the AMP, and thus the actual submergence neither surprising nor sufficient to support a timely new contention. Order at 23-24.

F. Entergy's Amendment to Its LRA Does Not Prejudice NEC

At the outset, NEC complains that Entergy's September 3, 2010 amendment to the LRA,

²¹ NEC states that after filing its contention, it learned that Entergy had undertaken installation of automatic sump pumps and high water alarms. Reply at 11. NEC applauds that effort, which NEC states it recommended in June 2010, but nonetheless expresses that these changes should have been made much sooner. *Id.*

²² In addition, to the extent that NEC is alleging the LRA is inadequate without these design changes, it is raising a new issue impermissibly on appeal.

which enhanced its AMP for inaccessible electrical cables, amounted to a “sordid little attempt to bypass the LRA review process and the citizen’s hearing rights.”²³ Petition at 8. Specifically, NEC alleges that it “can find no regulation that allows filing a ‘supplement’ or amendment to an LRA before a renewed license is issued and after the record in an LRA hearing is closed.” *Id.* NEC concludes, “It is clear that before this Board licensees get to back-and-fill and polish the application endless[ly], irrespective of where we are in the process but the citizen intervenor must get it right the first time; one strike, you’re out.” *Id.* at 11.²⁴

But, the Commission has clearly permitted LRA applicants to amend their applications in the past. *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-08, 56 NRC 373, 383 (2002) (“Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot.”). Moreover, the Commission has noted that its regulations specifically require LRA applicants to amend their applications periodically. “The application must be periodically amended to reflect any changes to the plant’s current licensing basis made after the license renewal application

²³ NEC also argues that license renewal entails “lesser level of protection of public health and safety” because it allows plants licensed to obsolete and/or superseded designs to continue to operation. Petition at 3. The Commission addressed this argument in the statements of consideration of the 1991 license renewal rule: “It is not necessary for the Commission to review each renewal application against standards and criteria that apply to newer plants or future plants in order to ensure that operation during the period of extended operation is not inimical to the public health and safety.” Nuclear Power Plant License Renewal, Final Rule, 56 Fed. Reg. 64943, 64945 (Dec. 13, 1991). The Commission explained that since existing plants were originally licensed each “has continually been inspected and reviewed as a result of new information gained from operating experience.” *Id.* Thus, the “[o]ngoing regulatory processes provide reasonable assurance that, as new issues and concerns arise, measures needed to ensure that operation is not inimical to the public health and safety and common defense and security are “backfitted” onto the plants.” *Id.* Therefore, NEC’s argument that older plants provide inadequate protection of public health and safety lacks merit.

²⁴ NEC also alleges, “In any case, the ‘Supplement’ is an open admission by Entergy that its original cables AMP was deficient and if need be it provides additional ‘new’ information to support admission of NEC’s proposed Contention 7.” Petition at 8. But this argument is a non sequitur. Entergy’s decision to file an enhanced AMP to supplement its original one does not necessarily indicate that the first AMP was deficient.

was submitted.” *AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)*, CLI-08-23, 68 NRC 461, 466 n. 7 (2008) (*citing* 10 C.F.R. § 54.21(b)). These precedents do not limit the time in which the applicant may amend the LRA to the period before the record closes.

Moreover, restricting an applicant from filing an amendment to an LRA after the record closes would have “the perverse effect of discouraging applicants from enhancing safety, health, and environmental programs on a voluntary basis.” *Oyster Creek*, CLI-09-07, 69 NRC at 274. Such a result would contravene the Commission observation in *Oyster Creek* that “[a]ll things being equal, we ought not establish disincentives to improvements.” *Id.* Consequently, Commission precedent suggests that applicants should be able to amend their applications at any point. This conclusion complements the Commission policy of encouraging applicants to file the highest quality applications possible.

Contrary to NEC’s assertion, this result does not work any procedural unfairness on intervenors in NRC proceedings. NRC proceedings are a “dynamic licensing process.” *Curators of the University of Missouri (TRUMP-S Project)*, CLI-95-8, 41 NRC 386, 395 (1995). As the Board previously observed, “Normally a great deal of new and material information becomes available to the public after the docketing, as for example when the applicant amends its license application.” *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, LBP-07-15, 66 NRC 261, 273 (2007). But, “The necessary corollary to NRC’s dynamic licensing process is that, if and when the [application] is amended, petitioners must be given a fair opportunity to file new or amended contentions challenging these changes.” *Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2)* LBP-09-10, 70 NRC 51, 77 (2009). Thus, in the event an applicant amends an LRA, the intervenors have an opportunity to respond by filing new or amended contentions, whatever the procedural posture of the case. 10 C.F.R. §§ 2.309(f)(2), 2.326. NEC had such an opportunity here. But, the Commission has cautioned that an LRA amendment that improves a previous AMP will not necessarily support a new or amended contention. “[A]s a

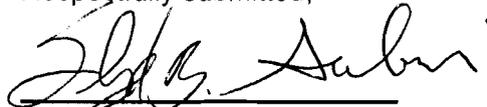
matter of law and logic, if [an] *enhanced* monitoring program is inadequate, then [the] *unenhanced* monitoring program embodied in its [license renewal application] was *a fortiori* inadequate, and [petitioners] had a regulatory obligation to challenge it in their original Petition [t]o Intervene." *Oyster Creek*, CLI-09-07, 69 NRC at 274 (quotations omitted) (first, fourth, and sixth alterations in original).

Consequently, the LRA amendment has not prejudiced petitioners. Commission precedent permits applicants to amend applications and does not specify that amendments are only permitted at certain points during hearings. This comports with the Commission policy of encouraging amendments that enhance the LRA. Moreover, to the extent that the LRA addresses NEC's concerns, then NEC cannot reasonably challenge it. To the extent that the LRA does not, NEC is free to file new or amended contentions and argue that they meet the pertinent regulatory requirements for consideration. As always, those contentions must demonstrate a basis that is "new" and not rehash issues that were contained in earlier drafts of the AMPs. While those contentions would need to meet the heightened standards of § 2.326, any contention NEC sought to file at this point in the proceeding would need to meet those requirements. Thus, NEC has not demonstrated how the Board erred in relying on the LRA amendment in its Order.

CONCLUSION

For the reasons articulated by the Board's rulings and decisions and, as set forth above, the Commission should deny NEC's Petition for Review.

Respectfully submitted,



Lloyd B. Subin
Counsel for NRC Staff

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
ENTERGY NUCLEAR VERMONT YANKEE,) Docket No. 50-271-LR
LLC, and ENTERGY NUCLEAR)
OPERATIONS, INC.)
)
(Vermont Yankee Nuclear Power Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER IN OPPOSITION TO NEW ENGLAND COALITION'S PETITION FOR REVIEW OF LICENSING BOARD MEMORANDUM AND ORDER LBP-10-19" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 22nd day of November, 2010.

Alex S. Karlin, Chair
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ask2@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

William H. Reed*
Administrative Judge
Atomic Safety and Licensing Board
1819 Edgewood Lane
Charlottesville, VA 22902
E-mail: whrcville@embarqmail.com

Ann Hove, Law Clerk
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ann.hove@nrc.gov

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: rew@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAEmail@nrc.gov

Raymond Shadis*
37 Shadis Road
PO Box 98
Edgecomb, ME 04556
E-mail: shadis@prexar.com

David R. Lewis, Esq.*
Matias F. Travieso-Diaz, Esq
Elina Teplinsky, Esq
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128
E-mail: david.lewis@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com
elina.teplinsky@pillsburylaw.com

Matthew Brock*
Assistant Attorney General, Chief
Environmental Protection Division
Office of the Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
E-mail: matthew.brock@state.ma.us

Peter C.L. Roth, Esq*
Office of the Attorney General
33 Capitol Street
Concord, NH 3301
E-mail: peter.roth@doj.nh.gov

Anthony Z. Roisman, Esq.*
National Legal Scholars Law Firm
84 East Thetford Rd.
Lyme, NH 03768
E-mail: aroisman@nationallegalscholars.com

Sarah Hofmann, Esq.*
Director of Public Advocacy
Department of Public Service
112 State Street - Drawer 20
Montpelier, VT 05620-2601
E-mail: sarah.hofmann@state.vt.us


Lloyd B. Subin
Counsel for NRC Staff