UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-12-15

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chair
William J. Froehlich
Nicholas G. Trikouros

In the Matter of	Docket No. 50-483-LR
Union Electric Company	ASLBP No. 12-919-06-LR-BD01
(Callaway Plant, Unit 1)	July 17, 2012

MEMORANDUM AND ORDER
(Ruling on Standing and Hearing Petition Contention Admissibility)

By application dated December 15, 2011, Union Electric Company, d/b/a Ameren Missouri (Ameren), seeks a twenty-year extension of the October 18, 2024 expiration date on the 10 C.F.R. Part 50 operating license for its Callaway Plant, Unit 1, located in Callaway County, Missouri. See Ameren, License Renewal Application, Callaway Plant Unit 1, Facility Operating License No. NPF-30, at 1.1-1 (Dec. 15, 2011) (ADAMS Accession No. ML113530372). Pending with this Licensing Board is a hearing request/intervention petition submitted by petitioner Missouri Coalition for the Environment (MCE) challenging certain aspects of the environmental report (ER) Ameren also submitted in support of its renewal application. Specifically, MCE's petition contests the ER's failure to include (1) information regarding the impacts of, and status of compliance with, a recent agency order outlining required responses to the events at the Fukushima Daiichi facility following the March 2011 earthquake and tsunami in Japan; and (2) an adequate discussion of wind as an alternative energy source. Both Ameren and the Nuclear Regulatory Commission (NRC) staff assert that

none of the three contentions proffered by MCE regarding these subjects is admissible, so that its hearing request should be denied.

For the reasons set forth below, we conclude that although MCE has established its standing as of right to intervene in this proceeding, none of the contentions set forth in its hearing petition is admissible.

I. BACKGROUND

Subsequent to the December 2011 submission of Ameren's license renewal application for Callaway Unit 1 and in response to a February 16, 2012 hearing opportunity notice, see Renewal of Facility Operating License No. NPF-30, Union Electric Company, Callaway Plant, Unit 1, 77 Fed. Reg. 11,173 (Feb. 24, 2012), on April 24, 2012, MCE submitted a hearing request in which MCE maintains that it has standing to intervene in this license renewal proceeding and has provided three admissible National Environmental Policy Act (NEPA)-related contentions. See [MCE] Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant (Apr. 24, 2012) at 1-2 [hereinafter MCE Hearing Request]. Following the NRC Secretary's April 27 referral of the MCE petition, the Atomic Safety and Licensing Board Panel's Chief Administrative Judge established this Licensing Board to rule upon the validity of that hearing request and conduct an adjudicatory proceeding on the merits of any admissible contentions. See Memorandum from Andrew L. Bates, Acting Secretary of the Commission, to E. Roy Hawkens, Chief Administrative Judge (Apr. 27, 2012); Union Electric Company; Establishment of Atomic Safety and Licensing Board, 77 Fed. Reg. 26,792 (May 7, 2012).

By filings dated May 21, 2012, although not contesting MCE's standing as of right to intervene, both Ameren and the staff opposed the grant of the MCE petition for failing to provide

an admissible contention. See Ameren's Answer Opposing the [MCE] Hearing Request and Petition to Intervene (May 21, 2012) at 1-2 & n.3 [hereinafter Ameren Answer]; NRC Staff's Answer to [MCE] Hearing Request and Petition to Intervene (May 21, 2012) at 1 [hereinafter Staff Answer]. In a reply submitted on May 29, 2012, MCE reasserted that all three of its environmental contentions were admissible. See [MCE] Reply to Ameren's and NRC Staff's Oppositions to Hearing Request and Petition to Intervene in License Renewal Proceeding for Callaway Nuclear Power Plant (May 29, 2012) at 1 [hereinafter MCE Reply]. Thereafter, during a half-day initial prehearing conference held in Fulton, Missouri, on June 7, 2012, the Board entertained arguments from the participants regarding the admissibility of the three contentions. See Tr. at 1-171.

II. ANALYSIS

A. MCE's Standing

1. Standards Governing Standing

For an individual or organization to be deemed a "person whose interest may be affected by the proceeding" under Atomic Energy Act (AEA) section 189a, 42 U.S.C. § 2239(a)(1)(A), so as to have standing "as of right" such that party status can be granted in an agency adjudicatory proceeding, the intervention petition must include a statement of (1) the petitioner's name, address, and telephone contact information; (2) the nature of the petitioner's right under the AEA to be made a party; (3) the nature of the petitioner's interest in the proceeding, whether property, financial or otherwise; and (4) the possible effect of any decision or order that might be issued in the proceeding on the petitioner's interest. See 10 C.F.R. § 2.309(d)(1)(i)-(iv). In assessing this information in a section 189a adjudicatory proceeding to determine whether the petitioner has established its standing, the Commission generally applies contemporaneous

judicial standing concepts, inquiring whether the participant has established that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interest arguably protected by the governing statutes (e.g., the AEA, NEPA, 42 U.S.C. § 4321, et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). An entity may seek to demonstrate its standing to intervene on behalf of its members, i.e., representational standing, but that entity must then show it has an individual member who can fulfill all the necessary standing elements and who has authorized the entity to represent his or her interests. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

Finally, in assessing a petition submitted in a 10 C.F.R. Part 54 power reactor license renewal proceeding to determine whether these elements are met, which a licensing board must do even if there are no objections to a petitioner's standing, the board may apply the proximity presumption. Under this presupposition, for an entity seeking representational standing, the standing elements associated with causation are deemed fulfilled if a member of the entity that is seeking representational standing resides or has significant contacts in an area within a fifty-mile radius of the facility in question.[1]

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[1] From the earliest 10 C.F.R. Part 54 contested operating license renewal (OLR) proceedings, licensing boards consistently have applied the same 50-mile proximity presumption that has been employed in Part 50 reactor construction permit and operating license (OL) cases and in Part 52 early site permit and combined license (COL) proceedings. See, e.g., Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 150 (applying proximity presumption in reactor OLR proceeding), aff'd on other grounds, CLI-01-17, 54 NRC 3, 26 n.20 (2001) (Commission need not reach question of whether proximity presumption applies to reactor OLR proceedings). Although the Commission has never explicitly endorsed utilizing this presumption in an OLR proceeding, in the context of a COL hearing it did cite favorably to a licensing board's application of the presumption in a reactor life extension case. See Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 n.15 (2009).

2. Ruling on Standing

DISCUSSION: MCE Hearing Request at 1-2; Ameren Answer at 2 n.3; Staff Answer at 4-5; MCE Reply at 1; Tr. at 6.

RULING: Based on the showing provided in MCE's petition and the five accompanying affidavits of individuals in which each asserts that he or she (1) resides from between fifteen and thirty-five miles of the Callaway facility; and (2) authorizes MCE to represent his or her interests in challenging the Ameren renewal application because it poses safety or environmental concerns,[2] both applicant Ameren and the staff have indicated that they do not contest MCE's representational standing to intervene in this proceeding. After assessing the petition and these affidavits under the standards set forth in section II.A.1 above, we agree that MCE as an organization has established its representational standing to intervene as of right in accord with 10 C.F.R. § 2.309(d)(1).

B. Admissibility of MCE's Contentions

With MCE having established its standing, we turn to the question of the admissibility of its three proffered contentions.

1. Contention Admissibility Standards

Section 2.309(f)(1) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the

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[2] See MCE Hearing Request, exh. 1A (Declaration of Ruth Schaefer (Apr. 23, 2012)); id. exh. 1B (Declaration of Mary A. Mosley (Apr. 13, 2012)); id. exh. 1C (Declaration of Mark Haim (Apr. 23, 2012)); id. exh. 1D (Declaration of Carla T. Klein (Apr. 23, 2012)); id. exh. 1E (Declaration of Patrick J. Wilson (Apr. 23, 2012)).

petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." Id. § 2.309(f)(1)(iii), (iv). Failure to comply with any of these requirements is grounds for dismissing a contention. See South Carolina Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 & n.33 (2010).

Moreover, as is pertinent to this proceeding, NRC case law has further developed these requirements, as summarized below:

a. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and directive referring the proceeding to the Licensing Board. See 10 C.F.R. § 2.309(f)(1)(iii); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC __, __ (slip op. at 11) (Oct. 12, 2011).

b. Materiality

To be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of

the contention must impact the grant or denial of a pending license application. See 10 C.F.R. § 2.309(f)(1)(iv); see Luminant Generation Co. LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-07, 75 NRC __, __ (slip op. at 10-11) (Mar. 16, 2012). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the public health and safety or the environment. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996); see also Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), petition for review denied, CLI-03-12, 58 NRC 185, 191 (2003).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present the factual allegations and/or expert opinion necessary to support its contention. See 10 C.F.R. § 2.309(f)(1)(v); USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006). While a board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected. See Ariz. Pub. Serv. Co. (Palo Verde Nuclear Stations, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Neither speculation nor conclusory assertions, even by an expert, alleging that a matter fails to satisfy the AEA or NEPA will suffice to allow the admission of a proffered contention. See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC __, __ n.139 (slip op. at 34 n.139) (Oct. 12, 2011); Amer. Centrifuge Plant, CLI-06-10, 63 NRC at 472; Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the board's power to make assumptions or draw inferences that favor the petitioner, nor may the

board supply information that is lacking. See Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009); Palo Verde, CLI-91-12, 34 NRC at 155. Likewise, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention. See Fansteel, CLI-03-13, 58 NRC at 204-05.

d. Insufficient Challenges to the Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of, or alleged omissions from, the application (including the safety analysis report/technical report and the ER) so as to establish there is a genuine dispute with the application on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed. See N. Trend Expansion Project, CLI-09-12, 69 NRC at 557; Amer. Centrifuge Plant, CLI-06-10, 63 NRC at 462-63; see also Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-06, 75 NRC __, __ (slip op. at 25) (Mar. 8, 2012); Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-05, 75 NRC __, __ (slip op. at 54-57) (Mar. 8, 2012), petition for review filed sub nom. Beyond Nuclear v. NRC, No. 12-1561 (1st Cir. May 7, 2012). Similarly, a petitioner that fails to provide sufficient factual or expert support for the claims in its contention in contravention of section 2.309(f)(1)(v), see supra section II.B.1.c, also may have failed to show a genuine dispute with the application as required under section 2.309(f)(1)(vi). See FirstEnergy Nuclear Operating Co., (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 N.R.C. __, __ (slip op. at 15, 16) (Mar. 17, 2012); see also Comanche Peak, CLI-12-07, 75 NRC at __ & n.43 (slip op. at 13 & n.43).

2. MCE's Contentions

a. Contention 1: Environmental Report Lacks Information Regarding Proposed Modifications to Callaway Facility

> CONTENTION: The Environmental Report fails to satisfy 10 C.F.R. § 51.53(c)(2) because it does not include information about Ameren's plans to modify the Callaway facility in response to post-Fukushma enforcement order EA-12-049 (March 12, 2012), Order Modifying Licenses With Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately) ("Order EA-12-049") (ML12056A045). As also required by 10 C.F.R. § 51.53(c)(2), the Environmental Report must include a discussion of a reasonable array of alternative measures for modifying the facility in accordance with Order EA-12-049.

DISCUSSION: MCE Hearing Petition at 2-6; Ameren Answer at 11-17; Staff Answer at 11-19; MCE Reply at 1-5; Tr. at 19-43, 45-82, 83-96.

RULING: Inadmissible, in that with this contention MCE fails to demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the proposed reactor operating license renewal action and that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. §§ 2.309(f)(1)(iv), (vi).

As the principal support for this issue statement, MCE cites 10 C.F.R. § 51.53(c)(2), which provides in pertinent part:

> The [ER] must contain a description of the proposed action, including the applicant's plans to modify the facility or its administrative control procedures as described in accordance with § 54.21 of this chapter. This report must describe in detail the modifications directly affecting the environment or affecting plant effluents that affect the environment. In addition, the applicant shall discuss in this report the environmental impacts of alternatives and any other matters described in § 51.45.

According to MCE, this provision is implicated by the agency's March 12, 2012 immediately effective enforcement order, EA-12-049, that is intended to address the March 2011 events at the Fukushima Daiichi facility. As the order outlines, following an earthquake and an associated

tsunami in Japan, that facility suffered a loss of offsite and onsite power that ultimately resulted in a loss of core, containment, and spent fuel pool cooling capabilities in Units 1, 2, and 3 that, in turn, caused damage to the nuclear fuel in the reactors. In response to this unfortunate circumstance, in EA-12-049 the agency directs the licensee at each operating reactor facility, including Callaway Plant, Unit 1, to take two actions. First, by no later than February 28, 2013, provide the agency with an overall integrated plan (OIP), including a description of how the licensee intends to comply with requirements being imposed to achieve the necessary mitigation strategies for maintaining and restoring core cooling, containment, and spent fuel pool cooling capabilities following a beyond-design-basis external event that might result in an extended loss of power. Thereafter, by no later than December 31, 2016, implement those strategies per the agency-reviewed OIP, including having in place necessary procedures, guidance, and training as well as the acquisition, staging, and installation of any needed equipment. See Order Modifying Licenses With Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately), 77 Fed. Reg. 16,091, 16,093, 16,098 (Mar. 19, 2012) [hereinafter EA-12-049].

As its primary claim in support of this contention, MCE maintains that the staff anticipates that the response to this order by a licensee such as Ameren will cause the licensee to "'supplement those of the permanently installed plant structures, systems, and components that could become unavailable following beyond-design-basis external events.'" MCE Hearing Request at 3 (quoting EA-12-049, 77 Fed. Reg. at 16,092). That being the case, MCE asserts, regardless of whether they are imposed in the context of a required Part 54 analysis (i.e., as an integrated plant assessment or time-limited aging analysis) or otherwise bear any relationship to age-related degradation or aging management, those measures nonetheless will be causally related to license renewal because they will be safe operation conditions for Callaway Unit 1

during any term of extended operation.[3] See MCE Reply at 3. Further, according to MCE, NEPA consideration of the purported impacts of EA-12-049 clearly is mandated now because the design-associated measures the order will engender are unlikely to be the subject of a NEPA analysis under section 51.53(c)(2) before the final supplemental environmental impact

[3] Although not discussed in this context by any of the participants, it may well be that the best support for this more expansive MCE approach can be found in the agency's inclusion of severe accident mitigation alternatives (SAMAs) as category 2 items under the 10 C.F.R. Part 51, subpart A, app. B generic environmental impact statement (GEIS) for reactor license renewal. In the original proposed rule for the license renewal GEIS, the agency indicated that a NEPA analysis of severe accident mitigation design alternatives (SAMDAs), a predecessor to and close relative of the SAMA, would not be required because "Commission policy is to consider SAMDAs only at the initial construction stage (during which plant design features may be more easily incorporated). Accordingly, SAMDA evaluations at the license renewal stage are not necessary." Environmental Review of Renewal for Operating Licenses, 56 Fed. Reg. 47,016, 47,022 (Sept. 17, 1991). Subsequently, when a final rule was adopted that included SAMDAs as category 2 items requiring a plant-specific analysis if one had not been done previously, the agency made no reference to SAMDAs having any relationship to aging degradation or aging management concerns, but stated:

> Based on an evaluation of the comments, the Commission has reconsidered its previous conclusion in the draft GEIS concerning site-specific consideration of severe accident mitigation. The Commission has determined that a site-specific consideration of alternatives to mitigate severe accidents will be required at the time of license renewal unless a previous consideration of such alternatives regarding plant operation has been included in a final environmental impact statement or a related supplement. Because the third criterion required to make a Category 1 designation for an issue requires a generic consideration of mitigation, the issue of severe accidents must be reclassified as a Category 2 issue that requires a consideration of severe accident mitigation alternatives, provided this consideration has not already been completed. The Commission's reconsideration of the issue of severe accident mitigation for license renewal is based on the Commission's NEPA regulations that require a consideration of mitigation alternatives in its [EISs] and supplements to EISs, as well as a previous court decision that required a review of severe mitigation alternatives (referred to as SAMDAs) at the operating license stage. See, Limerick Ecology Action v. NRC, 869 F.2d 719 (3d Cir. 1989).

Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,480 (June 5, 1996).

statement (SEIS) is issued in this proceeding, which currently is scheduled for September 2013. See MCE Reply at 3; Tr. at 17-19. As a consequence, MCE declares, those impacts must be discussed in the Ameren ER, along with the relative effectiveness and cost of a range of alternatives for meeting the order's requirements. See MCE Hearing Request at 5.

In response to this asserted basis for the admission of contention 1, Ameren and the staff claim that contention 1 is inadmissible under one or more of the requisite elements of 10 C.F.R. § 2.309(f)(1)(ii)-(vi), in that the contention raises issues that are outside the scope of this license renewal proceeding, lacks sufficient basis, is immaterial to this proceeding, lacks adequate factual or expert support, and otherwise fails to demonstrate a genuine dispute with the Ameren application.

In sum, in seeking the admission of contention 1, what MCE essentially requests from us is a declaratory judgment that any EA-12-049-related measures must, by their very nature, have NEPA implications in this license renewal proceeding that must be analyzed by Ameren in its ER. In contrast, the clear implication of the arguments made by Ameren and the staff is that any EA-12-049 measures that might be proposed and ultimately adopted by Ameren are wholly outside the bounds of the matters that are the appropriate subject of consideration in a Part 54 license renewal proceeding.

In the Board's estimation, however, there is a serious question about whether what is lacking or (perhaps better put) what still needs to be become choate relative to this contention is, at a minimum, a showing based on what measures Ameren actually proposes to adopt to address the terms of EA-12-049. Indeed, at this juncture we conclude that the exact nature of the measures that will be proposed by Ameren under the May 2012 enforcement order are simply too uncertain to permit a determination whether one or more of them will require a NEPA

analysis of their environmental impact implications as part of this license renewal proceeding.[4] Rather, in these circumstances, an appropriate challenge and a board determination will need to abide at least the Ameren proposal, now due by the end of February 2013, regarding the particular measures it intends to implement to comply with the requirements of EA-12-049. At that point, which under the current staff review schedule for this proceeding would be roughly contemporaneous with the issuance of the staff's draft SEIS, MCE (or any other interested person) could submit a contention supported by the specific information (not now available) about those measures that might meet the requirements for an admissible contention under section 2.309(f)(1).

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[4] In its May 31, 2012 draft interim guidance regarding compliance with EA-12-049, the staff provides a general outline of the approach a licensee is expected to consider in attempting to mitigate beyond-design-basis external events (such as seismic activity, external flooding, high winds, snow/ice/extreme cold, or extreme high temperatures) so as to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities following such events. According to that guidance, this would entail three phases: an initial response phase using installed equipment and resources; a transition phase using portable equipment and consumables; and a third phase of indefinite sustainment using off-site resources. See Japan Lessons-Learned Project Directorate, NRC, Compliance with Order EA-12-049, Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events, JLD-ISG-2012-01, at 2 (rev. 0 May 31, 2012) (draft issued for public comment) (ADAMS Accession No. ML12146A014) [hereinafter Draft Interim Staff Guidance Memorandum]. Relative to these phases, the staff also provides guidance on various strategy elements that must be considered, including evaluating external hazards; command, control, and communications; operations actions; damage assessment; core cooling strategies; decay heat removal; engineering basis for flow; cool down/depressurization rate control; reactor coolant system inventory management; fuel condition monitoring; human factors; spent fuel pool and containment functions strategies; equipment quality, protection, storage, and deployment; off-site resources; strategy maintenance; and reporting requirements. See id. attach. 1, at 1-12 (Guidance for Developing, Implementing and Maintaining Mitigation Strategies). While the staff indicates that it is endorsing, with some exceptions, the methodologies developed by the Nuclear Energy Institute (NEI) for satisfying these various strategies, see Draft Interim Staff Guidance Memorandum at 1 (citing NEI, Diverse and Flexible Coping Strategies (FLEX) Implementation Guide, NEI 12-06 (rev. B1 May 2012) (ADAMS Accession No. ML12143A232)), in our estimation neither of these guidance documents provides the specific information necessary to assess whether the measures taken by Ameren to comply with EA-12-049 require the NEPA assessment requested under MCE's contention 1.

But with regard to contention 1 as it is now before us, that issue statement lacks the necessary materiality and fails to frame a genuine dispute with the requisite licensing document, missing elements that render contention 1 inadmissible under section 2.309(f)(1)(iv), (vi).

b. Contention 2: Environmental Report Lacks Information on Status of Compliance With Federal Requirements and Approvals

> CONTENTION: In violation of 10 C.F.R. § 51.45(d), the Environmental Report fails to describe the status of Ameren's compliance with NRC post-Fukushima orders and requests for additional information relevant to the environmental impacts of the Callaway nuclear power plant during the license renewal term. These requests for information and orders for actions originate with both the NRC and the U.S. Congress. See Order EA-12-049 at 4-7; Requirements of Request for Information Pursuant to Title 10 of the Code of Federal Regulations, 50.54(f) Regarding Recommendations 21.1, 2.3, and 9.3 of the Near-Term Task Force Review of Insights From the Fukushima Dai-ichi Accident at 2 (March 12, 2012) ("3/12/12 Information Request") (ML12053A340).
>
> The Environmental Report for renewal of the Callaway operating license is inadequate to comply with NEPA and NRC implementing regulations because it lacks the following information regarding Ameren's compliance with NRC requirements and approvals:
>
> (a) Requirement of Order EA-12-049 to: "develop, implement and maintain guidance and strategies to restore or maintain core cooling, containment, and SFP [spent fuel pool] cooling capabilities in the event of a beyond-design-basis external event." Id. at 6.
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> (b) The following requirements of the 3/12/12 Information Request:
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> (i) "Requested Information" regarding Seismic Hazard Evaluation and Seismic Risk Evaluation. Id., Enclosure 1 at 7-8.
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> (ii) "Required Response" related to item (i) above. Id., Enclosure 1 at 9. Details of these requirements are provided in Attachment 1 to Enclosure 1.
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> (iii) "Requested Information" regarding Hazard Evaluation Report and Integrated Assessment Report. 3/12/12 Information Request, Enclosure 2 at 7-8.
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> (iv) "Required Response" related to item (iii) above. 3/12/12 Information Request, Enclosure 2 at 9-10. Details of these requirements are provided in Attachment 1 Enclosure 2.

> (v) "Requested Actions," "Requested Information," and "Requested Response" regarding communication systems and equipment used during an emergency event, assuming that (a) the potential onsite and offsite damage is a result of a large scale natural event resulting in the loss of all alternating current (ac) power and (b) the large scale natural event causes extensive damage to normal and emergency communications systems both onsite and in the area surrounding the site. 3/12/12 Information Request, Enclosure 5 at 2-3.
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> Moreover, to the extent that Ameren proposes modifications to the Callaway facility in response to the 3/12/12 Request for Information, NEPA also requires the consideration of the effectiveness and relative costs of a range of alternatives for satisfying the NRC's concerns. See 10 C.F.R. § 51.53(c)(2) and [Exelon Generation Co., LLC (Limerick Generating Stations, Units 1 and 2), LBP-12-08, __ NRC __ (April 4, 2012).]

DISCUSSION: MCE Hearing Petition at 7-10; Ameren Answer at 17-20; Staff Answer at 20-25; MCE Reply at 5-7; Tr. at 43-45, 82-83.

RULING: Inadmissible, in that this contention is outside the scope of this proceeding and with this contention MCE fails to show that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi).

As was the case with contention 1, MCE's contention 2 focuses on a single regulatory provision. In this instance, the provision in question is section 51.45(d) of the agency's rules, which provides in pertinent part that an applicant's ER "shall list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action and shall describe the status of compliance with these requirements." With this contention, MCE claims that, notwithstanding the requirements of section 51.45(d), Ameren has not set forth in its ER any information regarding its status of compliance with either EA-12-049 or a same-day staff request for information directed to all power reactor construction permit and operating license holders, including Ameren. See MCE Hearing Petition at 9. In that regard, the March 12, 2012 information request is described as intended to gather information to

support the evaluation of the staff's recommendations for the Near-Term Task Force review of the Fukushima Daiichi nuclear facility accident to enable the staff to determine whether nuclear plant licenses should be modified, suspended, or revoked. See Letter from Eric J. Leeds, Director, NRC Office of Nuclear Reactor Regulation & Michael R. Johnson, Director, NRC Office of New Reactors, to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status at 1 (Mar. 12, 2012) (ADAMS Accession No. ML12053A340) [hereinafter Staff Information Request]. Further, that information request asks that each permit or license holder re-evaluate the seismic and flooding hazards at its site using updated seismic and flooding hazard information and present-day regulatory guidance and methodologies and, if necessary, perform a risk evaluation. See id. at 4.

Ameren and the staff both oppose the admission of contention 2. Ameren argues that "[n]one of the post-Fukushima orders or information requests can be characterized as approvals that must be obtained 'in connection with the proposed action,'" which in this case is the renewal of the Callaway operating license. Ameren Answer at 18 (quoting 10 C.F.R. § 51.45(d)). The staff agrees, claiming that "Ameren's compliance with the Order and the [information request] is unrelated to license renewal." Staff Answer at 22. The staff also asserts that EA-12-049 and the March 2012 information request are not "approvals" under section 51.45(d), noting that this regulation "has only been applied to approvals needed from Federal, State, and local agencies other than the NRC such as permits issued by the U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service." Id. at 21. As such, the staff contends contention 2 is outside the scope of this proceeding. See id.

In its reply, MCE argues that EA-12-049 and the March 2012 information request constitute "approvals" under section 51.45(d) "because they must be complied with in order for Ameren to continue operating Callaway." MCE Reply at 7. In addition, MCE states:

> The approvals have a "connection with the proposed action" because (a) any modifications that result from Ameren's compliance with the orders will apply during Callaway's license renewal term, (b) the requirement has arisen while Ameren's license renewal application is pending and will be resolved before issuance of the EIS, and (c) neither Ameren nor the NRC has previously analyzed the environmental implications of the modifications that may be imposed as a result of Ameren's compliance with the orders.

Id.

As noted above, section 51.45(d) requires that an applicant provide in its ER information regarding its status of compliance with "Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action." The language of this regulation, in turn, presents two separate questions: first, whether EA-12-049 and/or the March 2012 information request constitute a federal permit, license, approval, or other entitlement within the meaning of this section; and second, if so, whether either EA-12-049 or the March 2012 information request must be "obtained in connection with the proposed action," i.e., the Callaway Unit 1 operating license renewal.

Regarding the first question, as we observed above, MCE contends the March 2012 enforcement order and information request are "approvals" under section 51.45(d) "because they must be complied with in order for Ameren to continue operating Callaway." MCE Reply at 7. But the implication of MCE's argument, which is that any agency prerequisite with which Ameren must comply to operate the Callaway plant during an extended term constitutes an "approval" under section 51.45(d), would entail an unreasonably strained definition of "approval." Ameren must comply with any number of NRC regulations to continue operating Callaway, but those regulations cannot be considered "approvals" such that an applicant would be required to describe its compliance with each provision in its ER. This is clearly not the intent of section 51.45(d). Moreover, the plain meaning of the word "approval," which requires

an affirmative action on the part of an approver, clearly establishes that requiring compliance is different from granting an approval. See Webster's Third New International Dictionary 106 (Philip B. Gove ed. in chief, unabr. 1976) (defining "approval" as "the act of approving" and "certification as to acceptability").

This analysis does not, however, necessarily determine whether either EA-12-049 or the March 2012 information request constitutes an "approval." Nonetheless, we find they do not. With regard to the March 2012 information request, as the name implies, that information directive simply requires that licensees provide certain information to the agency. See Staff Information Request at 3. While the information request does explain that the NRC will evaluate the information provided by licensees to determine whether further regulatory actions are required, see id. at 1, 5, it does not state that the information is required for the NRC to grant (or deny) a permit, license, approval, or other entitlement. As such, the staff's March 2012 information request is not an "approval" under section 51.45(d).[5] And because section 51.45(d) does not obligate Ameren to list its compliance with the March 2012 information request in its ER, this portion of contention 2 is inadmissible as outside the scope of this proceeding and because it does not raise a genuine dispute with Ameren's application. See 10 C.F.R. § 2.309(f)(1)(iii), (vi).

Similarly, we conclude that EA-12-049 does not constitute an "approval" for the purpose of section 51.45(d). By its terms, EA-12-049 requires that all licensees "develop, implement and maintain guidance and strategies to restore or maintain core cooling, containment, and SFP

[5] In addition, as staff counsel noted at the prehearing conference, "requests for information are not terribly unusual, and . . . it would [be] a quite extensive list if applicants are required to include in their [ER] a list of their compliance with the various generic letters, bulletins, [and] information requests[] that have been issued over the years." Tr. at 83. In our view, to consider any or all of these staff documents as "approvals" by reason of the fact that they request information that will be used to assess compliance with agency requirements would impose a reporting encumbrance that section 51.45(d) was not intended to levy.

cooling capabilities in the event of a beyond-design-basis external event." EA-12-049, 77 Fed. Reg. at 10,692. These strategies and guidance are to be submitted to the NRC in an OIP by no later than February 28, 2013. See id. at 10,693. Because the NRC will then review the OIP provided by Ameren and decide whether that plan satisfies EA-12-049, it might appear that this constitutes an "approval" under section 51.45(d) (i.e., the NRC must "approve" Ameren's OIP). EA-12-049, however, is essentially a directive to all licensees to achieve compliance with the order's requirements by a certain date. That EA-12-049 has the unique feature of allowing licensees to propose their own strategies for coming into compliance, rather than mandating a certain set of plant alterations, does not change the fundamental character of EA-12-049 and transform it into an "approval." We thus treat EA-12-049 as we would any other enforcement order and hold that it does not establish an "approval" process under section 51.45(d). Ameren, therefore, is not required to list that order, or Ameren's compliance with the order's terms, in its ER. Consequently, with regard to EA-12-049, contention 2 is not admissible because it is outside of the scope of this proceeding and MCE has not raised a genuine dispute with Ameren's application.[6] See 10 C.F.R. § 2.309(f)(1)(iii), (vi).

[6] We would add that even if compliance with the March 2012 information request and/or EA-12-049 were deemed to be a prerequisite for license renewal, Ameren arguably would have already satisfied its duty under section 51.45(d). In its ER, Ameren notes that one of the "Federal permits, licenses, approvals [or] other entitlements" that it must receive is a license renewal from the NRC. See Ameren, Callaway Plant Unit 1, Applicant's Environmental Report; Operating License Renewal Stage, Final § 9.3, at 6 (tbl. 9-2) [hereinafter Ameren ER]. By noting that it must receive a license renewal from the NRC, Ameren necessarily implies that it must satisfy all of the requirements established by the NRC to receive that renewal. Section 51.45(d) surely does not require that an applicant explain every aspect of the process it must pursue in the course of obtaining a federal permit, license, or approval. See Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC __, __ (slip op. at 27) (June 21, 2012). Accordingly, Ameren would not have to list either of these items as a required permit, license, or approval given that Ameren already has listed its NRC license renewal generally as a federal permit, license, or approval.

c. Contention 3: Inadequate Discussion of Wind Energy Alternative

> CONTENTION: The Environmental Report is inadequate to satisfy NEPA or 10 C.F.R. § 51.53(c)(2) because it dismisses and refuses to consider the relative merits of the reasonable energy alternative of wind energy operating in the Midwest Independent Transmission System Operator ("MISO") grid. Wind energy operating in the MISO grid warrants serious consideration as an alternative because it is currently available and sufficient to entirely replace the energy to be generated by Callaway during the license renewal term. Wind energy also has the relative benefits that it is less dangerous than renewed operation of Callaway, depends on a renewable energy source and would save millions of gallons of water now used by Callaway every day.

DISCUSSION: MCE Hearing Petition at 10-12; Errata to Hearing Request and Petition to Intervene (May 7, 2012) at 1; Ameren Answer at 20-39; Staff Answer at 25-37; MCE Reply at 7-15; Tr. at 96-165.

RULING: Inadmissible, in that this contention lacks adequate factual or expert support and with this contention MCE fails to demonstrate that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(v)-(vi).

In support of its contention 3 challenge to the discussion of alternative energy sources in the Ameren ER, MCE states that Ameren's ER provides only a brief discussion of the wind alternative and dismisses the wind alternative as "'not reasonable.'" MCE Hearing Petition at 10 (quoting Ameren ER § 7.2.1.5, at 15). Further, MCE proffers the declaration of Dr. Arjun Makhijani in which he declares that "Ameren should have examined wind energy operating in the MISO grid and compared it to nuclear operating in the grid, taking into account the specific patterns of unavailability of each, including unplanned outages." MCE Hearing Petition, attach. 2, at 3 (Declaration of Dr. Arjun Makhijani in Support of [MCE's] Hearing Request Regarding Callaway License Renewal Application) [hereinafter Makhijani Declaration]. More specifically in this regard, Dr. Makhijani asserts that energy generation from Callaway will not be constantly available during the license term due to planned and unplanned outages, so that a

proper "apples-to-apples comparison" requires that Ameren analyze the patterns of unavailability of nuclear and wind and how the regional MISO grid would compensate for each during such outages. Id. at 4. Dr. Makhijani also states that electrical storage or full standby fossil fuel replacement capacity would not be needed because wind energy "is currently available and sufficient to entirely replace the energy generated by Callaway during the license renewal term." Id. at 3.

Ameren and the staff oppose contention 3, stating that it fails to raise a genuine dispute with the application, is unsupported, is immaterial, and raises issues that are beyond the scope of the proceeding in contravention of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi). See Ameren Answer at 1; Staff Answer at 2.

In implementing NEPA section 102, 42 U.S.C. § 4332(2)(C)(i)-(iii), section 51.53(c)(2) of the Commission's regulations requires that an ER submitted by a license renewal applicant address the environmental impacts of the proposed action and compare those impacts to the impacts of alternative actions. But the Commission has held repeatedly that an applicant need only consider those alternatives that are reasonable. See, e.g., Seabrook, CLI-12-05, 75 NRC at __ (slip op. at 52). Ameren claims it has provided such an analysis in section 7 of its ER. See Ameren Answer at 23. Specifically, in ER section 7 Ameren analyzed several potential electrical supply alternatives to determine which were reasonable alternatives to replace Callaway Unit 1 and hence merited a full impacts critique. In addition to evaluating power supply strategies that would not involve additional Ameren generation, see Ameren ER § 7.2.1.3, at 12-13 (purchased power); id. § 7.2.1.4, at 13-14 (demand side management), Ameren also considered wind and solar power, both alone and in combination with fossil-fueled generation or energy storage facilities, see id. § 7.2.1, at 6-7; id. § 7.2.1.5, at 15-18. But because Ameren defined the proposed action as the replacement of the existing Callaway unit's

generation capacity of 1190 megawatts electric (MWe) of "baseload power," the applicant determined that an in-depth alternatives analysis was only merited for those supply alternatives capable of producing 1190 MWe of baseload power.[7] See id. § 7.2.1, at 6.

In that regard, before us Ameren references a definition of "baseload power" utilized by the United States Court of Appeals for the Seventh Circuit, and quoted by the Commission in its recent Seabrook decision, that declares "baseload power" as power generating "'"energy intended to continuously produce electricity at or near full capacity, with high availability."'" Ameren Answer at 26 (quoting Seabrook, CLI-12-05, 75 NRC at __ n.223 (slip op. at 50 n.223) (quoting Envtl. Law & Policy Ctr. v. NRC, 470 F.3d 676, 679 (7th Cir. 2006))). Further, in this instance our consideration of MCE's wind power contention is governed by that same Seabrook decision. Considering the admissibility of a contention claiming that an applicant's license renewal ER had inadequately evaluated offshore wind farms as an electrical generation alternative, in Seabrook the Commission declared:

> In sum, to submit an admissible contention on energy alternatives in a license renewal proceeding, a petitioner ordinarily must provide "alleged facts or expert opinion" sufficient to raise a genuine dispute as to whether the best information available today suggests that commercially viable alternate technology (or combination of technologies) is available now, or will become so in the near future, to supply baseload power. As a general matter, a "reasonable" energy alternative—one that must be assessed in the environmental review associated with a license renewal application—is one that is currently commercially viable, or will become so in the near term.

CLI-12-05, 75 NRC at __ (slip op. at 53-54) (footnote omitted). Here, the proposed action (i.e., license renewal for Callaway) involves the continued production of 1190 MWe of baseload

[7] As a consequence, Ameren provided a full impacts analysis of the power supply alternatives of pulverized coal-fired generation, gas-fired generation, construction and operation of new nuclear generation, and purchased power. See Ameren ER § 7.2.2, at 21.

power during the license renewal term.[8] As such, for an electrical generation alternative to qualify for the kind of in-depth review that MCE seeks here, the alternative must be able to provide 1190 MWe of baseload power during the license renewal term. See Seabrook, CLI-12-05, 75 NRC at __ (slip op. at 48-55); see also Davis-Besse, CLI-12-08, 75 NRC at __ (slip op. at 11-12) (rejecting admissibility of contention seeking full impacts generation alternative analysis of wind, either alone or in combination with solar and storage, as failing adequately to demonstrate the capacity to produce baseload power).

Apparently cognizant of the Seabrook and Davis-Besse decisions cited above, see Makhijani Declaration at 4, seeking to level the "baseload" playing field, MCE attempts to demonstrate that nuclear, like wind, is an intermittent generation source to the degree that nuclear plants like Callaway Unit 1 experience outages for which the surrounding MISO grid compensates, just as the grid will do for wind generation facilities that might be implemented as an alternative. As a consequence, according to MCE, if sufficient wind generation capacity is developed by Ameren, wind generation is just as capable of providing the necessary 1190 MWe as a renewed Callaway facility, and hence effectively should be considered as adequate to replace such a "baseload" source so as to merit a full alternatives analysis. See MCE Reply at 9-10.

Given the Commission's recent Seabrook and Davis-Besse holdings, we see this proffer as deficient in several respects. In those reactor license renewal rulings on wind-related NEPA alternatives contentions, the Commission was very clear that petitioners must demonstrate that

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[8] The Commission has also held that the staff's EIS "need only discuss those alternatives that . . . 'will bring about the ends' of the proposed action," Hydro Res., Inc. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (quoting Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991)), a principle equally applicable to an ER, see Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 263, aff'd, CLI-09-22, 70 NRC 932 (2009).

wind generation can provide sufficient baseload power to replace the nuclear plant at issue by showing that such wind power is both technically feasible and commercially viable in the near future.[9] See Davis-Besse, CLI-12-08, 75 NRC at __ (slip op. at 12); Seabrook, CLI-12-05, 75 NRC at __ (slip op. at 53-54). Dr. Makhijani does claim that "Callaway can be replaced with wind energy with technology that is commercially available now." Makhijani Declaration at 15. Yet, assuming arguendo this is sufficient to meet the technical feasibility prerequisite of the Seabrook and Davis-Besse decisions, nothing provided by Dr. Makhijani or MCE provides information to support an adequate showing that such technology is capable of providing 1190 MWe baseload power that is commercially viable in the relatively near term.[10]

Indeed, instead of demonstrating how Ameren can, in a commercially viable way, obtain 1190 MWe of continuously produced, high availability electricity via wind generation in the near future, MCE simply places reliance on "the grid" to compensate for what, as the Commission has recognized, see Seabrook, CLI-12-05, 75 NRC at __ (slip op. at 55), is the intermittent, non-baseload nature of wind power in its near term state of development. But the grid in and of itself is not, as MCE's argument seems to suggest, the continuously produced, highly available

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[9] As was noted above, the showing needed under the Commission's Seabrook and Davis-Besse cases relates to the discussion necessary to support a NEPA alternatives contention in a 10 C.F.R. Part 54 reactor license renewal proceeding, which involves the replacement of an existing electrical generation source with an alternative source that likely has yet to be constructed, rather than in a Part 52 combined license proceeding, in which the proposed construction of an entirely new generation source seemingly would involve a different, and likely broader, set of considerations.

[10] Per the Commission's Seabrook decision, see CLI-12-05, 75 NRC at __, __ (slip op. at 53, 55), the use of the terms "in the relatively near term" and "in the near future" describe the period within which an otherwise technically feasible generation alternative would become commercially viable. These terms clearly denote temporal proximity to the present rather than measuring possible feasibility nearer to the extended term of the subject reactor, at least absent a showing that the technology "while not commercially viable at the time of the application, is under development for large-scale use and is 'likely to' be available during the period of extended operation," id. at __ & n.245 (slip op. at 53-54 & n.245), a demonstration that has not been made in this instance.

source of electricity that will counterbalance the intermittent nature of wind generation.[11] Rather, the grid is the sum of its parts, with some generation elements being recognized as more reliable than others as the source of the continuous power that is necessary to provide uninterrupted electrical service. Hence the distinction between "baseload" and other generation sources and the root of an electric utility's constant concern that, with its baseload and other generation sources, it has enough margin to provide electricity on an uninterrupted basis.[12] And while, as Dr. Makhijani's declaration suggests, any of the parts of the grid, baseload or otherwise, can at any given time be unavailable, voluntarily or involuntarily, that is really beside the point. MCE and its supporting affiant Dr. Makhijani have not shown that the grid has any particular impact in determining whether nuclear or wind generation provides the requisite

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[11] Although MCE relies upon the capacity of the "MISO grid" to replace the output of the Callaway plant, it is apparent that the MISO is not a generation source. See Tr. at 140-41. Rather, it is a privately owned, federally regulated transmission network. On December 20, 2001, MISO became the first Federal Energy Regulatory Commission (FERC)-approved regional transmission organization (RTO) in the nation. See Midwest Indep. Transmission Sys. Operator, Inc., 97 FERC ¶ 61,326 (2001). FERC granted MISO RTO status to provide open access to MISO's electricity transmission system to all member utilities in 15 Midwestern states, including Missouri, and one Canadian province. See Midwest Indep. Transmission Sys. Operator, Inc., 122 FERC ¶ 61,283, ¶ 57 (2008). Accordingly, MISO provides transmission service under the terms and conditions of a single open access transmission tariff, the Open Access Transmission and Energy Markets Tariff (TEMT), approved in an August 2004 FERC order. See Midwest Indep. Transmission Sys. Operator, Inc., 108 FERC ¶ 61,163 (2004). MISO's member transmission providers, including Ameren, see Ameren Answer at 33-34, are the owners of transmission facilities, with MISO exercising functional control over those facilities, calculating available transmission capability, and receiving, approving, and scheduling transmission service. See Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361, 1365 (D.C. Cir. 2004).

[12] And relative to the MISO grid margin, MCE acknowledges that the capacity value assigned by MISO to wind generation in 2012 is 15 percent or less. See Tr. at 100-01; see also Makhijani Declaration at 10. In contrast, although MISO apparently does not designate such a value for the Callaway facility, the MISO-assigned capacity credit for that unit, a figure based on the facility's unforced capacity (or U-Cap) that does not incorporate any planned outages, runs at about 95 percent, with the unit's 2002 through 2011 actual capacity factor, which takes into account both forced and unforced plant outages, being as low as 76 percent (in 2004) and as high was 95 percent (in 2009). See Tr. at 143-44.

baseload power for the purpose of a NEPA alternatives analysis. Instead, in the context of a license renewal proceeding, such a determination rests on whether the power generation source is, as a matter of technical feasibility and commercially viable implementation, one that in the near term can produce electricity continuously with high availability.[13]

Finally, in terms of providing the requisite support for the commercial viability of wind generation as an alternative to an existing generation asset like the Callaway facility, to the degree MCE's assertions about the availability of wind power as a viable alternative generation source to the Callaway facility depend on the construction by Ameren or others of new wind capacity, see Makhijani Declaration at 15, MCE has failed to offer any specific information about the possible location of any proposed wind generation facilities or about the availability of sufficient transmission capacity to deliver the output of any wind generation facilities to Ameren's service area, including what would be involved in providing new power transmission

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[13] The concern about outages at Callaway Unit 1 (and other reactor facilities) highlighted by Dr. Makhijani, see Makhijani Declaration at 4-8, appears to go more to a consideration of how much margin Ameren (and other utilities with nuclear power plants) should plan to provide in meeting service area needs than to the general status of nuclear generation as baseload power.

Indeed, the MCE claim that existing excess capacity in the MISO grid is sufficient to establish the viability of wind generation as a replacement for Callaway Unit 1 seems to emphasize this point given that assertion apparently rests on the supposition that natural gas reserve margin available to Ameren via the MISO grid currently can be utilized, in conjunction with wind generation, to replace the Callaway facility. See MCE Reply at 14 (citing Makhijani Declaration at 14). And relative to MCE's assertion regarding existing excess capacity, we would add that, even assuming this claim is not an otherwise improper attempt to raise (1) a "need for power" issue in this license renewal proceeding; or (2) a new issue regarding the adequacy of the purchased power alternatives analysis in the Ameren ER, see Ameren Answer at 34-35, in the context of the commercial viability showing mandated by the Commission's recent Seabrook and Davis-Besse decisions, see supra p. 24, this concern likewise lacks any discussion regarding the transmission aspects of such an alternative. See infra text accompanying note 14.

lines to connect any proposed wind generation facilities into the existing MISO grid, a likely critical component for determining the near term commercial viability of wind power.[14]

Contention 3 thus is inadmissible because it (1) lacks adequate factual or expert support to demonstrate that wind power is capable of providing baseload power to replace Callaway; and (2) fails to raise a genuine dispute with Ameren's discussion of power generation alternatives in its license renewal application. See 10 C.F.R. § 2.309(f)(1)(v)-(vi).

III. CONCLUSION

For the reasons set forth above, the Board concludes that although petitioner MCE has established its standing as of right to intervene in this proceeding, the three contentions MCE has proffered cannot be accepted for litigation in this proceeding because each fails to meet one or more of the admissibility requirements of section 2.309(f)(1).

For the foregoing reasons, it is this seventeenth day of July 2012, ORDERED, that:

1. Although MCE has established its representational standing, its request to admit the

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[14] To be sure, MCE declares that this contention is intended to present wind power as a stand-alone substitute for the Callaway facility without the need for additional replacement generation or an electrical storage source (or the need to consider the environmental impacts of such backup resources). See MCE Reply at 14. It is apparent, however, that the viability of this approach also relies on the supposed ubiquitous nature of the current and future MISO grid. See MCE Hearing Request at 11; MCE Reply at 13-14; Tr. at 113-14. Nonetheless, in the face of the Commission's recent Seabrook and Davis-Besse decisions, this is a supposition we cannot indulge, at least given the MCE information now before us.

three contentions proffered with its April 24, 2012 hearing request as litigable issues in this proceeding is denied.[15]

[15] Although this ruling is dispositive of the three contentions MCE submitted in support of its April 24, 2012 intervention petition, it does not conclude this proceeding at this juncture because on July 9, 2012, MCE filed with the Board a motion to admit a new environmental contention. In that new issue statement, MCE asserts that the Ameren ER is deficient because it fails to include a discussion of the environmental impacts of SFP leakage, SFP fires, and the lack of a spent fuel repository, as required by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in New York v. NRC, No. 11-1045 (D.C. Cir. June 8, 2012). See [MCE's] Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Callaway Nuclear Power Plant (July 9, 2012) at 4 [hereinafter Callaway New Contention Motion]. Similar motions to admit a new contention were also filed that day, and are pending, in other ongoing reactor OL, COL, and OLR proceedings. See, e.g., Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2 (July 9, 2012) [hereinafter Watts Bar New Contention Motion]; Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Bellefonte (July 9, 2012) [hereinafter Bellefonte New Contention Motion]; Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Davis-Besse Nuclear Power Station (July 9, 2012) [hereinafter Davis-Besse New Contention Motion].

This Board will proceed with having the new contention motion briefed and is fully prepared, in due course, to rule on the admissibility of the new contention (as undoubtedly is the case with other licensing boards before which similar contentions are pending). We note, however, that there is a June 18, 2012 petition before the Commission that (1) was filed by MCE and other petitioners/intervenors associated with nineteen reactor OL, COL, and OLR proceedings pending with the agency; and (2) appears to raise the same issues as MCE's July 9 new contention, as well as the other new contentions filed that date. Compare Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012) at 8-12, with Callaway New Contention Motion at 2-7, and Watts Bar New Contention Motion at 2-6, and Bellefonte New Contention Motion at 2-6, and Davis-Besse New Contention Motion at 2-7. As a consequence, this could be an instance in which the goal of efficient judicial administration would be well served by any guidance/direction that the Commission might wish to provide relative to the June 18 petition.

2. As it rules upon a hearing request/intervention petition, under the provisions of 10 C.F.R. § 2.311 any appeal to the Commission from this memorandum and order that may be appropriate must be taken within ten (10) days after this issuance is served.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

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CHAIR

/RA/

William J. Froehlich
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 17, 2012

CONCURRING OPINION BY TRIKOUROS, A.J.,

I write separately to note that, although I concur fully with the reasons provided in this Licensing Board's decision as to why petitioner Missouri Coalition for the Environment's contentions 1 and 2 are inadmissible as failing to meet one or more of the requirements of 10 C.F.R. § 2.309(f)(1), another basis for rejecting those contentions, albeit one not specifically championed by the applicant or the NRC staff here, see Tr. at 64, 73-74, is set forth in the recent determination of the Licensing Board in the Diablo Canyon license renewal proceeding. In its decision deeming inadmissible two contentions that were essentially identical to contentions 1 and 2 before this Board, the Diablo Canyon Board concluded that the applicant had no legal duty to update its environmental report to encompass matters that occurred after that report was filed with the agency. See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-12-13, 75 NRC __, __ (slip op. at 3) (June 27, 2012). The situation here is the same as the one extant there. Consequently, contentions 1 and 2 also could be dismissed on this basis for failing to raise a genuine dispute with the applicant and as not material to the compliance status of the ER. See 10 C.F.R. § 2.309(f)(1)(iv), (vi).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
UNION ELECTRIC COMPANY D/B/A AmerenUE	)	
	)	
	)	Docket No. 50-483-LR
(Callaway Power Plant, Unit 1)	)	
	)	
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Standing and Hearing Petition Contention Admissibility)** have been served upon the following persons by Electronic Information Exchange.

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Callaway Power Plant, Unit 1, Docket No. 50-483-LR
MEMORANDUM AND ORDER (Ruling on Standing and Hearing Petition Contention Admissibility)

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

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