UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 50-443-LA-2
NEXTERA ENERGY SEABROOK, LLC	)	
	)	February 25, 2019
(Seabrook Station Unit 1)	)	

NEXTERA'S ANSWER OPPOSING C-10'S EMERGENCY PETITION

Steven Hamrick, Esq.
NextEra Energy Seabrook, LLC
801 Pennsylvania Ave., NW Suite 220
Washington, D.C. 20004
Phone: (202) 349-3496
Fax: (202) 347-7076
E-mail: steven.hamrick@fpl.com

Paul M. Bessette, Esq.
Ryan K. Lighty, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5796
Fax: (202) 739-3001
E-mail: paul.bessette@morganlewis.com
Email: ryan.lighty@morganlewis.com

Counsel for NextEra Energy Seabrook, LLC

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I. INTRODUCTION

NextEra Energy Seabrook LLC ("NextEra") hereby opposes C-10 Research and Education Foundation's ("C-10") "Emergency Petition for Exercise of Commission's Supervisory Authority to Reverse No Significant Hazards Determination and Immediately Suspend License Amendment and License Renewal Decisions" filed on February 13, 2019 in the captioned proceeding ("Petition").[1] In its Petition, C-10 requests that the Commission reverse the Nuclear Regulatory Commission Staff's ("NRC" or "Staff") not-yet-issued No Significant Hazards Consideration ("NSHC") Determination for NextEra's license amendment request 16-03 ("LAR")[2] and requests immediate suspension of the Staff's proposed LAR decision.[3]

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1 Emergency Petition by C-10 Research and Education Foundation for Exercise of Commission's Supervisory Authority to Reverse No Significant Hazards Determination and Immediately Suspend License Amendment and License Renewal Decisions (Feb. 13, 2019) (ML19044A768) (including Attach. 1 and Exhibits 1-4a thereto).

2 SBK-L-16071, Letter from to R. Dodds to NRC Document Control Desk, "License Amendment Request 16-03 – Revise Current Licensing Basis to Adopt A Methodology for the Analysis of Seismic Category I Structures with Concrete Affected by Alkali-Silica Reaction," (Aug. 1, 2016) (ML16216A240) ("Original LAR"); SBK-L-16153, Letter from to R. Dodds to NRC Document Control Desk, "Supplement to License Amendment Request 16-03 – Revise Current Licensing Basis to Adopt A Methodology for the Analysis of Seismic Category I Structures with Concrete Affected by Alkali-Silica Reaction," (Sept. 30, 2016) (ML16279A048) ("LAR Supplement"). The Original LAR and LAR Supplement, and all enclosures and attachments, are collectively the "LAR."

3 Petition at 1-2.

C-10 also requests immediate suspension of the Staff's proposed license renewal ("LR") decision for Seabrook Station Unit 1 ("Seabrook").[4] C-10 further seeks other direct Commission action related to the Staff's technical review of Alkali-Silica Reaction ("ASR"), although the scope of such action is not entirely clear from the Petition.[5] C-10 cites no procedural basis for the filing of its "kitchen-sink" Petition, which appears to: proffer new or amended late-filed contentions (governed by 10 C.F.R. § 2.309(c)); seek stays of various Staff actions (governed by §§ 2.342 and 2.1213); request the reopening of a terminated proceeding (governed by § 2.326); and demand rulemaking or other generic Commission action (governed by § 2.802). In an abundance of caution, NextEra is responding to the Petition as a general motion brought under the procedural requirements of 10 C.F.R. § 2.323.

For the multiple independent reasons discussed further below, the Commission should immediately reject this Petition. In short, the Petition is procedurally improper; contravenes the Atomic Energy Act of 1954, as amended ("AEA"), NRC regulations, and Commission precedent; and utterly fails to justify any of the extraordinary relief sought.[6]

II. PROCEDURAL BACKGROUND

The procedural histories of the Seabrook license amendment and license renewal applications are well documented and will not be repeated here in any detail.[7] For purposes of this Petition, the Commission should be aware of several relevant facts.

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4 *Id*.

5 *Id*. at 4.

6 The Commission should also preemptively bar any attempt by C-10 to belatedly cure these defects through latter requests to file a reply or other amplifying pleading, as unauthorized—and simply too late.

7 *See, e.g.*, *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-18-4, 87 NRC 89, 90-95 (2018) (discussing the LAR proceeding); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-16-3, 83 NRC 52, 52-54 (2016) (discussing the license renewal proceeding).

First, C-10 is not and has never been a party to the Seabrook license renewal proceeding. In fact, there is no ongoing proceeding. The NRC published the *Federal Register* notice of opportunity to request a hearing on the Seabrook license renewal application in July 2010,[8] but C-10 never filed a petition to intervene in the license renewal proceeding at that time.[9] And, until now, C-10 has never sought to intervene in the Seabrook license renewal proceeding—related to ASR (which was identified at Seabrook in 2010) or any other issue. Therefore, C-10's request to suspend issuance of the Seabrook renewed operating license due to ASR must be considered an unauthorized attempt to reopen the record in the license renewal proceeding. As discussed further below, C-10 has not even attempted to meet (or even discuss) the Commission's reopening standards.

Second, C-10 is a party to the Seabrook license amendment proceeding, but the scope of its involvement in that proceeding is restricted to its admitted contention.[10] As summarized by the Commission, C-10's "core challenge to the license amendment request is that results from the large-scale test are not representative of conditions at Seabrook and therefore the proposed methodology is not adequate."[11] But C-10's Petition raises several new issues—including issues related to finite element analysis[12]—that were never raised by C-10 in its original petition, never

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8 Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. NPF-86 for an Additional 20-Year Period; NextEra Energy Seabrook, LLC; Seabrook Station, Unit 1, 75 Fed. Reg. 42,462, 42,462-63 (July 21, 2010).

9 *See NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-2, 73 NRC 28, 28 (2011) (noting only "[t]wo groups petitioned to intervene and requested a hearing: (1) Beyond Nuclear, the Seacoast Anti-Pollution League, and the New Hampshire Sierra Club; and (2) Friends of the Coast and the New England Coalition")..

10 *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-17-7, 86 NRC 59, 127 (2017), *aff'd*, Seabrook, CLI-18-4, 87 NRC 89.

11 *Seabrook*, CLI-18-4, 87 NRC at 94.

12 *E.g.*, Petition at 2-3 (citing "Declaration of Victor E. Saouma (Feb. 12, 2019) ("Saouma Declaration") (Attachment 1); Concerns Regarding Structural Evaluation of Seabrook Nuclear Power Plant (Feb. 12, 2019) ("Saouma Report")").

responded to by NextEra or NRC, and never addressed (or admitted) by the Atomic Safety and Licensing Board ("ASLB" or "Board"). C-10 is now attempting to file new or amended late-filed contentions on these issues, more than the prescribed 30-days after issuance of the draft Safety Evaluation ("SE").[13] This is despite the ASLB's warning that petitioners "who choose to wait to raise contentions that could have been raised earlier do so at their own peril."[14]

Therefore, many of the issues that C-10 claims must be addressed by the Commission before issuing the license amendment are in fact not pending before the Board. Accordingly, C-10's Petition and supporting report by its new expert, Professor Saouma,—a report never seen or reviewed by NextEra or the NRC prior to the filing of the Petition and certainly never reviewed by the ASLB—must be considered an unauthorized attempt by C-10's brand new counsel to circumvent these defects by filing new or amended late-filed contentions directly with the Commission.[15] As discussed further below, such obvious maneuverings must be rejected. Filing new or amended late-filed contentions directly with the Commission is not authorized by the Commission's regulations and even if they were, C-10 has again not attempted to meet (or even discuss) the late filing criteria for new or amended contentions.

Further, C-10's request for the Commission to directly weigh-in on numerous technical aspects of the license amendment, and bypassing the ASLB, is directly contrary to the agency's regulations. As SECY recently noted, "Under agency regulations, the Commission has an

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13 *See* NRC Staff Hearing File Update, Enclosure 1, NRC Staff Draft Safety Evaluation (Non-Proprietary) (Sept. 28, 2018) (ML18271A069) ("Draft SE").

14 ASLB Memorandum and Order (Revised Scheduling Order) (unpublished) at 2 (Feb. 15, 2018) (ML18046A985) ("RSO").

15 As a party to the LA proceeding, C-10 is subject to the mandatory disclosure requirements of 10 C.F.R. § 2.336. Contrary to these regulatory requirements, C-10 failed to disclose the vast majority of the nearly 90 references included in Professor Saouma's report. NextEra is reviewing this issue further and reserves the right to take further action pertaining to C-10's breach of its disclosure requirements, including pursuit of sanctions.

appellate role in adjudications pending before the Board. Because the license amendment application for the Seabrook Station is the subject of a current adjudication, the Commission must remain impartial during the pendency of the proceeding."[16] C-10's current efforts are, if anything, clearly intended to do the exact opposite.

Finally, per the ASLB's Revised Scheduling Order, preparations for and conduct of the hearing on the admitted contention cannot begin until issuance of the final SER.[17] Both C-10 and NextEra appear to be in agreement that the parties should proceed expeditiously toward hearing on the admitted contention in accordance with the Revised Scheduling Order. But C-10's recent actions, including solicitation of Congressional letters to the Commission related to this matter[18] and the filing of this Petition, have only served to delay issuance of the SER and ultimately the conduct of the requested hearing.

III. ARGUMENT

As an initial matter, the Petition is remarkable for the complete absence of any supporting legal bases for the Petition. In fact, other than a single reference to 10 C.F.R. § 2.323(b) on the last page of the Petition, discussing the consultation process, there is not a single reference to any regulation authorizing this Petition.[19] There is also no reference to any Commission decision authorizing or granting the filing of petitions related to NSHC determinations, much less in a separate license renewal proceeding. And there is certainly no reference to any legal standards or regulations governing stays of licensing proceedings, reopening of the record, or the

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16 *See, e.g.*, Letter from A. Vietti-Cook, NRC Secretary, to Sen. E. Markey *et al.* (Jan. 22, 2019) (ML19022A394) ("SECY Letter").

17 *See* RSO at 3.

18 *See, e.g.*, SECY Letter.

19 There are several references in the Petition to 10 C.F.R. § 51.91(a)(4) in support of C-10's position that "[o]nly the Commission has the authority to reverse the Staff's NHS Determination" but the cited regulation does not even exist. *See* Petition at 6, 8.

submission of late-filed contentions—all of which are implicated by the Petition. Instead, C-10 uses vague language, hyperbole, and the entirely-unsupported specter of a nuclear accident in order to convince the Commission to exercise its inherent supervisory authority.

A. C-10's Challenge to the NSHC Determination is Barred by Commission Regulations

C-10's Petition is peculiar in that it asks the Commission to overturn a NSHC Determination that has not yet been issued by the NRC—and therefore not reviewed by C-10–at the time of the Petition. As a result, there are no specific challenges to the contents of the NSHC determination in the Petition itself, let alone some explanation as to how the Staff's (yet-to-be-issued) evaluation of those criteria is somehow deficient and thereby necessitates Commission intervention. Instead, there is only speculation.[20] For this reason alone, the Petition should be rejected.[21]

Even assuming the Staff had (or has since) issued the NSHC determination, it goes without saying that they were legally authorized to do so. AEA Section 189a(2)(A) authorizes the NRC to grant license amendments, and to make them "immediately effective in advance of the holding and completion of any required hearing," so long as the NRC determines that the amendment involves "no significant hazards consideration."[22] And as equally important, NRC's regulations provide that "[n]o petition or other request for review of or hearing on the staff's no

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20 *See* Petition at 13.

21 And as discussed further below, because C-10 is not a party to the license renewal proceeding and because the Petition contains substantial new arguments from a new witness, it effectively amounts to (1) a motion to reopen the license renewal proceeding to challenge the merits of issuing the renewed license, and (2) a motion for a new proposed contention(s) in the license amendment proceeding.

22 AEA § 189a(2)(A) (codified at 42 U.S.C. § 2239(a)(2)(A)).

significant hazards consideration determination will be entertained by the Commission."[23] The regulations could not be more clear in this regard.[24]

Further, the Commission – in another case challenging the Staff's authority to issue a license amendment after making a final NSHC determination but while the administrative review process was ongoing – stated that "[NRC] regulations expressly instruct the Staff not to let pending hearings delay licensing decisions: the Staff is 'to issue its approval or denial of the application promptly' once it completes its own review of the application, notwithstanding the 'pendency of any hearing.'"[25] Therefore, C-10's "expectation" that the Staff would not approve license renewal until its concerns were resolved in the license amendment proceeding are not based on any regulation or regulatory precedent—and C-10 cites none.[26] Its statement that "ordinarily" adjudicatory hearings must be completed before licensing action is taken[27] is inconsistent with decades of license amendment precedent. Again, C-10 cites no precedent in its favor.

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23 *See* 10 C.F.R. § 50.58(b)(6). NRC does offer the public the opportunity to comment on the draft NSHC determination. As it relates to Seabrook, C-10 filed comments on the draft NSHC determination but failed to raise many of the issues included in the Petition. *See* C-10 comments on NRC-2017-0003-0001, Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information, filed on March 9, 2017 (ML17081A015).

24 *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001) (directly rejecting a petition for review and request for immediate suspension and stay of the staff's NSHC determination and issuance of a license amendment for spent fuel pool expansion, based on 50.58(b)(6)).

25 *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006).

26 Petition at 6.

27 *Id*. at 7.

B. C-10's Plea for the Commission to Exercise Its Inherent Supervisory Authority is Both Contrary to Commission Regulations and Unsupported

Per the Commission's regulations, the Staff's determination on the NSHC is final, "subject only to the Commission's discretion, *on its own initiative*, to review the determination."[28] The regulation is clear in this regard – such discretion is solely on the Commission's own initiative.[29] Therefore, C-10's attempt to prompt the Commission to exercise its "supervisory authority" has no basis in the regulations.

In one of the only sections of the Petition with citations to any legal authority, C-10 references Commission decisions issued several decades ago purporting to support its argument that the Commission should ignore AEA Section 189a(2)(A) and 10 C.F.R. § 50.58(b)(6) and instead invoke its inherent supervisory authority to suspend the license amendment and license renewal decisions. But none of the cases cited by C-10 involve a third-party challenge to a NSHC Determination. And C-10 inexplicably ignored a much more recent Commission decision rejecting a very similar NSHC challenge.[30] This obfuscation is "inexcusable" because "[c]ounsel appearing before . . . NRC adjudicatory tribunals[] have a manifest and iron-clad obligation of candor," which is "hardly fulfilled when, as here, there is a failure to call attention to facts of record which, at the very least, cast a quite different light upon the substance of arguments being advanced by counsel."[31]

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28 10 C.F.R. § 50.58(b)(6) (emphasis added).

29 Notably, in several recent proceedings, the Commission has emphatically rejected similar requests for the Commission to exercise its inherent supervisory authority, noting that "[t]he parties should limit their requests for our review to those set forth in our rules." *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 NRC 801, 813 n.67 (2011).

30 *Vt. Yankee*, CLI-06-8, 63 NRC at 236-38.

31 *Pub. Serv. Co. of Okla., et al.* (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 532 (1978).

C-10 asserts that the circumstances in this proceeding are comparable to the issues addressed in *Yankee Atomic Electric Co*.—a case in which the Commission exercised its inherent supervisory authority over a petition for emergency enforcement action regarding compliance with NRC pressure vessel requirements.[32] The circumstances in that case, however, are clearly distinguishable. In *Yankee Atomic Electric Co.,* there was no ongoing pending matter before a Board already addressing the issue. As noted in another decision where the Commission exercised its authority to review a 10 C.F.R. § 2.206 Director's decision, Commission review "is particularly important in cases [where]…absent review, there will be no further proceedings within the Commission."[33]

That is clearly not the case here, where there is already a proceeding pending before the Board involving the same parties addressing ASR at Seabrook. Therefore, unlike *Yankee Atomic Electric Co.,* there can be no argument that Commission review now is somehow necessary to avoid inaction on the issue. And as the Commission itself cautioned in *Consolidated Edison Company of New York, Inc.*, a case cited by C-10, "Commission review of competing factual contentions…poses difficulties for any subsequent Commission review of the outcome of resulting hearings. Premature commitment on factual issues *is especially to be avoided*."[34] This same point was emphasized in very recent SECY correspondence in this proceeding to Senator Markey, Senator Warren, and Congressman Moulton, noting that "[u]nder agency regulations, the Commission has an appellate role in adjudications pending before the Board. Because the license amendment application for the Seabrook Station is the subject of a current adjudication,

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32 Petition at 4-5 (citing *Yankee Atomic Elec. Co.* (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3 (1991)).

33 *Consol. Edison Co. of N.Y., Inc.* (Indian Point, Units 1, 2, & 3), CLI-75-8, 2 NRC 173, 175 (1975).

34 *Id*. (emphasis added).

the Commission must remain impartial during the pendency of the proceeding."[35] Therefore, contrary to C-10's arguments, Commission review is not only unnecessary and unwarranted, it should be avoided to preclude prejudicing the Commission regarding the facts and issues to be addressed in the ASLB hearing—the same hearing requested by C-10.

C-10 also attempts to invoke Commission authority over this matter by alleging "unique circumstances." Specifically, C-10 first points to the fact that NRC's original regulatory scheme did not include provisions for ASR.[36] While this may be true, the Commission has already delegated consideration of that issue to the ASLB, and C-10 has chosen to participate in that process.[37] And there is certainly nothing unique about the NRC's authority to grant license amendments, and to make them immediately effective in advance of the holding and completion of any required hearing. What is unique is that C-10 now wants the Commission to ignore the AEA and its regulations and instead bypass Staff and ASLB authority over this matter because it is apparently not satisfied with established regulatory processes.[38]

C-10 further cites to the relationship between the LAR and LR proceedings as another alleged unique circumstance presented by this case. But the sequencing of the license amendment and license renewal (*i.e.*, license renewal will not be issued until the license amendment is approved) is an administrative matter within the jurisdiction of the Staff. And as

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35 *See* SECY Letter at 1.

36 Petition at 5.

37 Memorandum from A. Vietti-Cook, Secretary of the Commission, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, "Request for Hearing in the Matter of NextEra Energy Seabrook LLC, Seabrook Station, Unit 1, Docket No. 50-443-LA-2 (Apr. 12, 2017) (ML17102B570).

38 On rare occasions, the Commission has decided, due to "special circumstances," to exercise, on its own initiative, its supervisory authority to review Staff NSHC findings. In those cases, however, the "special circumstances" related to Congress's special concerns about significant hazards posed by spent fuel license amendments. *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 4-5 (1986); *Shearon Harris*, CLI-01-7, 53 NRC at 118. Such circumstances are clearly not present here.

noted above, C-10 has long ago waived any right to participate in the license renewal proceeding. In any event, as discussed below, any changes resulting from NRC's review of the LAR will be reflected in the Seabrook license renewal aging management programs.

Finally—and perhaps not surprisingly—C-10 invokes the purported public risk posed by operation of Seabrook "in the absence of an adequate analysis of the containment's ability to withstand a design basis earthquake" as a reason for the Commission to exercise its jurisdiction here and now.[39] Again, C-10's assertions are entirely unsupported. C-10 itself is not pursuing any enforcement or other regulatory action regarding the continued operation of Seabrook. Further, without diving into the merits of the issue, even C-10 acknowledges the decade of work undertaken by the NRC Staff and NextEra to study and address ASR at Seabrook, and the detailed review and approval of those efforts by NRC's Advisory Committee on Reactor Safeguards ("ACRS").[40] And while C-10 may not fully agree with the extensive monitoring and remedial actions being taken by NextEra to address ASR at Seabrook or would prefer different solutions, such actions are already in place at Seabrook to ensure the continued safe operation of Seabrook and will remain so pending review by the ASLB of the admitted contention. So while C-10's new expert may have certain opinions about those efforts and actions—untested opinions presented to the Commission for the first time in this proceeding—they certainly do not provide any legitimate or fair basis for the extraordinary relief sought by C-10. In fact, any consideration of "fairness" in this proceeding must consider the fairness to NextEra and its expectation that the

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39 Petition at 6.

40 Petition at 8-9 (citing Letter from M. Corradini, Chairman, Advisory Committee on Reactor Safeguards, to K. Svinicki, Chairman, Nuclear Regulatory Commission, "Seabrook Station Unit 1 License Renewal Application: Review of Licensee Program Addressing Alkali-Silica Reaction" (Dec. 14, 2018) (ML18348A951) ("ACRS Letter")).

NRC will comply with the AEA, follow its regulations, issue the license amendment and license renewal, and move forward promptly with an impartial hearing on the admitted contention.

C. C-10 Waived Its Right to Participate in the Seabrook License Renewal Proceeding

As noted above, C-10 never sought to intervene in the Seabrook license renewal proceeding, and there is no ongoing license renewal intervention involving any other party. Indeed, the contested license renewal adjudicatory proceeding was terminated in 2015.[41] Therefore, C-10's request for an "immediate suspension" of the Staff's proposed license renewal decision effectively amounts to a motion to reopen the license renewal proceeding in order to challenge the merits of that decision.

The Commission considers reopening of the record for any reason to be an "extraordinary" action.[42] The Commission therefore imposes "a 'deliberately heavy' burden upon an intervenor who seeks to supplement the evidentiary record after it has been closed…."[43] The Commission "likewise frown[s] on intervenors seeking to introduce a new contention later than the deadline established by [NRC] regulations, and [] accordingly hold[s] them to a higher standard for the admission of such contentions."[44] To meet this burden, 10 C.F.R. § 2.326(a) requires a party to show that its motion (1) was timely filed, (2) concerns a significant safety issue or environmental matter, and (3) demonstrates that a materially different result would be, or would have been likely, had the newly proffered evidence been considered initially.

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41 *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-15-22, 82 NRC 49, 50 (2015).

42 *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (citing Final Rule; Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

43 *Id*. (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008)).

44 *Id*.

C-10 never cites 10 C.F.R. § 2.326(a) and never mentions any reopening standards. C-10, therefore, has not even come close to meeting its burden to have any say or role in the Seabrook license renewal proceeding. And while C-10 may argue that it does not need or want to reopen the license renewal proceeding, it provides no legal authority for its ability to seek the immediate suspension of the issuance of the Seabrook renewed operating license without some formal admitted role in that proceeding. Simply put, C-10 waived its opportunity to participate in license renewal years ago, and its very-untimely last-minute request for the Commission to suspend the license renewal decision must fail for multiple legal and equitable reasons.

D. C-10's New Arguments Are Outside the Scope of the Admitted Contention and C-10 has Failed to Address, and Cannot Satisfy, the Standards for Late-Filed Contentions

As noted above, the scope of C-10's involvement in the LAR proceeding is restricted to its admitted contention, which reads as follows:

> The large-scale test program, undertaken for NextEra at the FSEL, has yielded data that are not "representative" of the progression of ASR at Seabrook. As a result, the proposed monitoring, acceptance criteria, and inspection intervals are not adequate.[45]

C-10's Petition, however, raises several new issues that are far beyond the scope of the admitted contention. For example, C-10's Petition purports to challenge the "finite element assessment performed by NextEra's contractor SGH."[46] However, this topic was never raised by C-10 in its original petition to intervene. Indeed, the ASLB correctly observed that the LAR has two separate and distinct components: (1) ASR Expansion Monitoring, and (2) Structure

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45 *See Seabrook*, LBP-17-7, 86 NRC at 127.

46 Petition at 2, 14.

Deformation Monitoring.[47] In admitting C-10's contention, the ASLB explicitly noted that C-10 challenged *only* the ASR Expansion Monitoring portion of the LAR.[48] By contrast, the "finite element analysis" and documents prepared by SGH pertain to the Structure Deformation Monitoring component of the LAR. Thus, C-10's eleventh-hour arguments in the Petition regarding the "finite element assessment" and any aspect of the Structure Deformation Monitoring component of the LAR are unquestionably outside the scope of the C-10 contention presently pending before the ASLB.

Accordingly, C-10's Petition is appropriately viewed as requesting leave improperly from the Commission to file new or amended late-filed contentions under 10 C.F.R. § 2.309(c). As explained in that regulation, such requests:

> will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:
>
> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The Petition, however, is utterly silent as to the requirements in 10 C.F.R. § 2.309(c), which is understandable given that C-10 would be unable to satisfy any of the applicable criteria. For example, C-10 and its new expert, Dr. Saouma, lodge new criticisms of the "test program and analysis" presented in the LAR.[49] However, this information has been available for well

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47 *Seabrook*, LBP-17-7, 86 NRC at 124 (distinguishing between monitoring intervals in Table 6, "Structure Deformation Monitoring Requirements," and Table 5, "ASR Expansion Acceptance Criteria and Monitoring Frequencies").

48 *Id.* (noting C-10 "does not challenge" the Structure Deformation Monitoring portion of the LAR).

49 Petition at 3.

over two years.[50] C-10 could make no colorable argument that this information was "not previously available," as required by 10 C.F.R. § 2.309(c)(1)(i). Likewise, to the extent C-10 and Dr. Saouma attempt to challenge information in the draft SE, their opportunity to do so expired months ago—in October 2018.[51] The ASLB explicitly cautioned C-10 about this deadline and noted that new or amended contentions filed after this deadline simply would not be entertained.[52] Given the explicit deadline established by the ASLB, C-10 could make no colorable argument that their new or amended contentions based on the draft SE were "submitted in a timely fashion," as required by 10 C.F.R. § 2.309(c)(1)(iii).

In summary, the Petition seeks to introduce new or amended contentions into the existing LAR proceeding without requesting leave to do so, without presenting such a request to the appropriate presiding officer (*i.e.*, the ASLB), without addressing the late-filing standards in 10 C.F.R. § 2.309(c), and without any colorable basis to assert that the applicable criteria somehow could be satisfied—because they could not be. Accordingly, C-10's belated attempt to inject new issues into the proceeding must be rejected.

E. C-10's Requested Actions Are *De Facto* Requests for a Stay, and C-10 Has Failed to Address, and Cannot Satisfy, the Standards for a Stay

Despite counsel's wordsmithing, C-10's demands—that the Commission "review and reverse" the Staff's (not-yet-issued) NSHC determination and "suspend" the License Amendment and License Renewal decisions—amount to requests to stay Staff actions. Accordingly, the Commission must reject C-10's transparent attempt to avoid the stringent

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50 *See supra* note 2 (the Original LAR was filed on Aug. 1, 2016, and the LAR Supplement on Sept. 30, 2016).

51 *See* RSO at 3 (noting the deadline for new or amended contentions based on the Draft SE was 30 days after issuance of the Draft SE); Draft SE (issued Sept. 28, 2018). Thus, the timely filing deadline for new or amended contentions was Oct. 29, 2018.

52 RSO at 2 (noting petitioners "who choose to wait to raise contentions that could have been raised earlier do so at their own peril").

standards applicable to such requests. At bottom, C-10 has failed to address, and could not satisfy, the requisite preconditions for a stay.

As a preliminary matter, requests for stays of Staff NSHC determinations are impermissible under NRC regulations. Although 10 C.F.R. § 2.1213(a) authorizes requests to stay the effectiveness of the NRC Staff's action on a matter involved in a hearing under 10 C.F.R. Part 2, Subpart L—such as the present matter[53]—it contains one critical exception. Specifically, Section 2.1213(f) states that "[s]tays are *not* available on matters limited to whether a no significant hazards consideration [("NSHC")] determination was proper in proceedings on power reactor license amendments."[54] Therefore, C-10 may not seek "indirect review" of the Staff's NSHC determination "through the guise of an application for a stay of the Staff's finding."[55] Thus, C-10's *de facto* request for a stay of the NSHC determination must be summarily rejected pursuant to the plain text of codified NRC regulations.

As to C-10's other requests, the Commission applies the factors in 10 C.F.R. § 2.342(e) to requests to stay issuance of a license or license amendment.[56] In essence, these are the same factors considered by courts in granting emergency injunctive relief,[57] and C-10 must "meet the four familiar standards [for a stay]: likelihood of success on the merits, irreparable harm,

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53 Licensing Board Order (identifying hearing procedures, requesting information related to scheduling, and deferring deadlines for production of initial disclosures and the hearing file) (Oct. 26, 2017) (unpublished) (ML17299A530).

54 *Id.* § 2.1213(f) (emphasis added); *see also* Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,580, 46,585 (Aug. 3, 2012).

55 *Diablo Canyon*, CLI-86-12, 24 NRC at 4, rev'd and remanded on other grounds, *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986).

56 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008); *Vt. Yankee*, CLI-06-8, 63 NRC at 237.

57 *Oyster Creek*, CLI-08-13, 67 NRC at 399.

absence of harm to others, and the public interest."[58] "Irreparable harm is the most important of the four standards—the *sine qua non* of obtaining a stay."[59] Absent a showing of irreparable injury, a movant must make "an overwhelming showing" that it is likely to prevail on the merits.[60] A movant's failure to make the requisite showing on the first two factors renders consideration of the other two factors unnecessary.[61] As explained below, C-10 has not done so here and, in fact, has failed to meet any of the four stay criteria.

1. C-10 Has Not Shown Irreparable Harm

For a potential injury to be irreparable, it must be shown to be "imminent" or "certain and great."[62] C-10's Petition fails to show any harm related to the administrative acts of issuing the license amendment and the renewed operating license, much less imminent, irreparable harm. C-10 asserts that a pre-issuance hearing in the LAR proceeding is "essential to maintain the integrity and accountability of the NRC's regulatory scheme for license renewal, and to be fair to C-10 as an interested member of the public."[63] However, C-10's vague assertion has no legal or factual merit, much less does it suffice to support a finding of certain and irreparable harm.

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58 *Vt. Yankee*, CLI-06-8, 63 NRC at 237. As the Commission explained in CLI-06-8, "[w]hile technically not applicable to a request for a stay of NRC Staff action, the section 2.342(e) standards [for a stay of a presiding officer's decision] simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief." *Id.* n.4 (citation omitted). *See also* 10 C.F.R. § 2.1213(d)(1)-(4) (listing the same four criteria or standards for a stay).

59 *Id.* at 237 (citing *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1295 (2d Cir. 1995); *U.S. Dep't of Energy*, CLI-05-27, 62 NRC 715, 718) (2005).

60 *S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012) (citations omitted).

61 *See id.* ("And if a movant makes neither of these first two showings, then we need not consider the remaining factors."); *see also Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, N.J. Site), CLI- 10-8, 71 NRC 142, 163 (2010).

62 *Vogtle*, CLI-12-11, 75 NRC at 529 (quoting *Vt. Yankee*, CLI-06-8, 63 NRC at 237).

63 Petition at 15.

The NRC Staff's issuance of the license amendment would not curtail real and meaningful consideration of C-10's admitted contention.[64] The parties are on the verge of filing pre-hearing expert testimony and proceeding to a hearing on the merits. There is no reason—and C-10 offers none—to conclude that the ASLB will not fully and fairly consider the parties' respective arguments. Moreover, the NRC Staff's issuance of the license amendment would not leave C-10 without potential recourse. If C-10 is dissatisfied with the ASLB's decision on the merits of its admitted contention, it may seek Commission review.[65] This is hardly a situation where there is lack of fairness to C-10, as the organization has had the opportunity to participate in the ASR license amendment proceeding.

Furthermore, issuance of the license amendment and renewed operating license would entail *no irreversible actions*. Even assuming *arguendo* C-10 prevailed on its contention, the challenged monitoring activities, acceptance criteria, and inspection intervals can be adjusted at any point. Indeed, as noted in the license renewal Safety Evaluation Report, "any changes resulting from NRC's review of the LAR w[ill] be reflected in the [license renewal aging management programs]."[66] Thus, issuance of the renewed operating license would in no way foreclose changes to the license necessitated by the outcome of the LAR proceeding. Again, a party seeking a stay must show that it faces imminent, irreparable harm that is both "certain and great."[67] C-10 has not remotely done so here.

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64 Motion at 8.

65 *See Vt. Yankee*, CLI-06-8, 63 NRC at 238; *see also Crow Butte Res., Inc.* (License Renewal for the *In Situ* Leach Facility, Crawford, Neb.), CLI-15-17, 82 NRC 33, 40 n.47 (2015) (citing *Vt. Yankee*, CLI-06-8, 63 NRC at 236-38 and noting that license amendment issuance does not deprive an intervenor of hearing rights because the amendment may be revoked or conditioned after a hearing).

66 Safety Evaluation Report Related to the License Renewal of Seabrook Station at 3-228 (Jan. 2019) (ML18362A370).

67 *Vt. Yankee*, CLI-06-8, 63 NRC at 237 (citing *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985), quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

2. C-10 Has Not Shown That It Is Likely to Prevail on the Merits

Given its clear failure to establish that it will be irreparably injured unless a stay is granted, C-10 bears a heavier burden to show that it is likely to prevail on the merits: it must demonstrate that denial of the license amendment and renewed operating license are a "virtual certainty."[68] C-10 falls far short of meeting that substantial burden.

The Staff performed a detailed technical and safety review of the LAR, which included the issuance of multiple requests for additional information, review of NextEra's responses thereto, and the preparation of its draft SE. Based on its detailed evaluation, the Staff concluded that there is reasonable assurance that the activities authorized by the amendment can be conducted without endangering the health and safety of the public. More importantly, the ACRS conducted its own *independent review* of the LAR and concluded that it "establishes a robust analytical methodology, supported by a comprehensive large scale test program, for the treatment and monitoring of alkali-silica reaction-affected Seismic Category I structures at Seabrook."[69] Following this independent review, the ACRS agreed with Staff's conclusion that NextEra's methodology and programs were acceptable.[70] Even assuming *arguendo* C-10 has *some* possibility of prevailing on the merits, this independent affirmation of Staff's conclusions casts, at a minimum, serious doubt on any claim that such an outcome is a "virtual certainty."[71]

Finally, as noted in Section III.D, above, several of the issues raised in the Petition are entirely new arguments. Thus, it would be impossible for C-10 to prevail on the merits of such

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68 *Shieldalloy,* CLI-10-8, 71 NRC at 154 (citations omitted).

69 ACRS Letter at 1.

70 *Id*. at 2.

71 *Shieldalloy,* CLI-10-8, 71 NRC at 154 (citations omitted).

arguments, which are not even pending (or likely to be pending given their obvious lateness) before the Board.

3. C-10 Has Not Shown the Absence of Harm to Other Parties

Delaying the issuance of the license amendment and renewed operating license would have the immediate and unavoidable effect of denying NextEra the benefits of its duly authorized renewed operating license. Such a result would be particularly burdensome. The Commission has recognized that delays such as the one sought by C-10 here are "an obstacle to fair and efficient decisionmaking."[72] In addition, uncertainty in issuance of the renewed operating license for Seabrook adversely impacts NextEra in recruiting and retaining employee talent and limits long term options in the energy market. And prolonged regulatory uncertainty further exacerbates the already-challenging economic environment faced by the domestic nuclear power industry. Thus, this prong of the stay criteria does not tip the balance in favor of granting a stay.

4. C-10 Has Not Shown That a Stay Is in the Public Interest

With respect to the fourth stay factor, the NRC fully recognizes the public's interest in the proper and safe regulation of nuclear activities and provides ample opportunities for all stakeholders, including members of the public, to be heard. Those opportunities are provided through 10 C.F.R. § 2.206 petitions for enforcement, opportunities to submit comments on the docket prior to Staff action on licensing requests, and hearing opportunities on licensing actions, such as those offered on the license amendment and license renewal applications. C-10's own extensive participation in the license amendment proceeding is testament to this fact and undermines any assertion that further delaying the issuance of the license amendment and renewed operating license would produce any tangible benefit to the public interest.

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[72] *Pac. Gas & Elec. Co.* (Diablo Canyon Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 232 (2002).

Additionally, the regulatory process has been implemented and functioned as intended in this case. Both the AEA and NRC regulations direct the NRC Staff to promptly issue a license amendment upon completing its safety evaluation and making its final NSHC determination, "notwithstanding the pendency before it of a request for a hearing from any person."[73] NRC regulations further exclude NSHC determinations from the stay provisions.[74] Any argument that this scheme somehow usurps the Commission's authority, corrupts the regulatory process, or violates due process is thus specious. Indeed, allowing C-10—through a last-minute general motion with no regulatory basis— to circumvent longstanding and carefully-crafted Congressional policy enacted by the *Sholly* amendments to the AEA "would violate the integrity of the statutory and regulatory scheme whereby the Commission may act expeditiously on a license amendment"[75] and thus run *counter* to the public interest.

* * *

Because a stay of the Staff's (not-yet-issued) NSHC determination is explicitly prohibited by 10 C.F.R. § 2.1213(f), and C-10 has failed to satisfy any of the four stay criteria, as to the imminent issuance of the license amendment and renewed operating license, its *de facto* request for stays of these actions must be summarily denied.

F. C-10's Demand for Additional "Study" of ASR and "Establishment" of ASR-Related "Criteria" Seeks Generic, Not Site-Specific, Action More Appropriate for a Generic Rulemaking Petition

In addition to C-10's demands discussed above, it additionally requests the Commission to take two generic actions:

- Give due recognition to the significance, complexity, and lack of adequately rigorous study of ASR by opening an in-depth inquiry into best practices for assessing ASR,

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73 10 C.F.R. § 50.58(b)(5).

74 *Id.* § 2.1213(f).

75 *Miss. Power & Light Co.* (Grand Gulf Nuclear Station, Unit 1), LBP-84-19, 19 NRC 1076, 1084 (1984).

including consideration of all relevant research and use of peer review by an internationally recognized independent panel; and

- Provide guidance and instruction to the Staff for establishment of significantly more rigorous and sophisticated state-of-the-art methods and criteria for evaluating safety risks posed by ASR at Seabrook and other reactors.

Given that C-10's demands, however vague, are generic, rather than site-specific, they are more appropriate for a rulemaking petition. As the Commission has explained, the appropriate remedy for petitioners dissatisfied with the Commission's generic approach to a technical issue lies in the rulemaking process, not in specific adjudications.[76] Accordingly, this portion of C-10's Petition also should be summarily dismissed as procedurally improper.

IV. CONCLUSION

For the multiple independent reasons discussed above, the Commission should immediately reject this Petition. In summary, the Petition is procedurally improper; contravenes Congressional intent embedded in the AEA; is inconsistent with NRC regulations and Commission precedent; and utterly fails to justify any of the extraordinary relief sought.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

Steven Hamrick, Esq.
NextEra Energy Seabrook, LLC
801 Pennsylvania Ave., NW Suite 220
Washington, D.C. 20004
Phone: (202) 349-3496
Fax: (202) 347-7076
E-mail: steven.hamrick@fpl.com

Signed (electronically) by Paul M. Bessette

Paul M. Bessette, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5796
Fax: (202) 739-3001
E-mail: paul.bessette@morganlewis.com

[76] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 345-46 (1999).

Executed in Accord with 10 C.F.R. § 2.304(d)

Ryan K. Lighty, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5274
Fax: (202) 739-3001
E-mail: ryan.lighty@morganlewis.com

Counsel for NextEra Energy Seabrook, LLC

Dated in Washington, DC
this 25th day of February 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 50-443-LA-2
NEXTERA ENERGY SEABROOK, LLC	)	
	)	February 25, 2019
(Seabrook Station Unit 1)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, the foregoing "NextEra's Answer Opposing C-10's Emergency Petition" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Paul M. Bessette

Paul M. Bessette, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5796
Fax: (202) 739-3001
E-mail: paul.bessette@morganlewis.com

Counsel for NextEra Energy Seabrook, LLC