UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 52-034-COL
LUMINANT GENERATION COMPANY LLC	)	52-035-COL
	)	
(Comanche Peak Nuclear Power Plant Units 3 and 4)	)	August 22, 2011

LUMINANT GENERATION COMPANY LLC'S ANSWER IN OPPOSITION TO MOTION TO REOPEN THE RECORD, PROPOSED CONTENTION REGARDING FUKUSHIMA TASK FORCE REPORT, AND REQUEST TO SUSPEND PROCEEDING

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I. INTRODUCTION

On August 11, 2011, Public Citizen, the Sustainable Energy and Economic Development Coalition ("SEED Coalition"), and Lon Burnam (collectively, "Intervenors"), filed with the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), a Motion to reopen the record to allow the admission of a proposed New Contention that claims to address the safety and environmental implications of the NRC Task Force Report, "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011) ("Task Force Report").[1] The Intervenors also have filed a related Rulemaking Petition that includes a request for suspension of this

[1] Motion to Reopen the Record and Admit Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) ("Motion"); Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) ("New Contention"); Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011) ("Makhijani Declaration"); Declaration of Standing by Tom Smith (Aug. 11, 2011); Declaration of Standing by Karen Hadden (Aug. 11, 2011); Declaration of Standing by Nita O'Neal (Aug. 11, 2011); Declaration of Standing by Tom Smith (Aug. 11, 2011). *See also* Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011), *available at* ADAMS Accession No. ML111861807 ("Task Force Report").

proceeding.[2] Luminant Generation Company LLC ("Luminant") is filing this Answer in opposition pursuant to 10 C.F.R. §§ 2.323(c), 2.326, and 2.309(h)(1).[3] As discussed below, the Commission should dismiss the Motion and New Contention as untimely and for failure to satisfy the standards for either reopening the record or admitting a new contention. Furthermore, given the absence of any immediate threat to public health and safety, the Intervenors have also failed to demonstrate that taking the drastic action of suspending this proceeding is warranted.

II. BACKGROUND

On September 19, 2008, Luminant submitted an Application to the NRC for combined licenses ("COLs") for Comanche Peak Nuclear Power Plant ("Comanche Peak") Units 3 and 4.[4] A hearing notice, published on February 5, 2009, stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party must file a petition for leave to intervene in accordance with 10 C.F.R. § 2.309.[5] Public Citizen, the SEED Coalition, and several other individuals and organizations timely filed a joint Petition to Intervene, which proposed a number of contentions.[6] Several contentions were admitted for further litigation, but the Atomic Safety and Licensing Board ("Board") subsequently dismissed those contentions and terminated the contested portion of this proceeding.[7] Following the dismissal of the last pending

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2 Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Aug. 11, 2011).

3 Out of an abundance of caution, Luminant is filing this Answer with the ten-day response deadlines applicable to motions generally under 10 C.F.R. § 2.323(c). However, given that Intervenors have proffered a proposed new contention, Luminant notes that, according to 10 C.F.R. § 2.309(h), it appears that Luminant and the NRC Staff should have 25 days to file a response to the proposed New Contention.

4 Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 6177, 6177 (Feb. 5, 2009).

5 *Id.*

6 Petition for Intervention and Request for Hearing (Apr. 6, 2009) ("Petition to Intervene").

7 *See Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), LBP-11-4, 73 NRC __, slip op. at 40 (Feb. 24, 2011) (dismissing Contention 18 and Alternatives Contention A); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 & 4), LBP-10-10, 71 NRC __, slip op. at 86-87 (June 25, 2010) (dismissing Contention 13).

contentions, the Intervenors filed a Petition for Review of an earlier Board decision rejecting two proposed contentions relating to Luminant's Mitigative Strategies Report addressing the requirements of 10 C.F.R. §§ 52.80(d) and 50.54(hh)(2).[8] Both Luminant and the NRC Staff, in their respective answers, opposed the Petition for Review, which is now pending before the Commission.[9]

Subsequently, beginning on April 14, 2011, and continuing through April 21, 2011, several individuals and organizations filed with the Commission, on the dockets of several ongoing licensing proceedings, an Emergency Petition to Suspend Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident ("Suspension Petition").[10] Although the Petition was not filed on the docket of the Comanche Peak COL proceeding, the caption for the Comanche Peak COL proceeding was included in these filings in other proceedings, and two Intervenors in this proceeding, Public Citizen and the SEED Coalition, were among the individuals and organizations signing the Petition. Both Luminant and the NRC Staff, in their respective answers, opposed the Suspension Petition, which too is now pending before the Commission.[11]

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[8] Intervenors' Petition for Review Pursuant to 10 C.F.R. § 2.341 (Mar. 11, 2011) (Sensitive Unclassified Non-Safeguards Information) ("Petition for Review").

[9] Luminant's Answer in Opposition to Intervenors' Petition for Review of LBP-10-5 (Mar. 21, 2011) (Sensitive Unclassified Non-Safeguards Information); NRC Staff Answer to Intervenors' Petition for Review (Mar. 21, 2011) (Sensitive Unclassified Non-Safeguards Information).

[10] *See, e.g.*, Docket Nos. 52-027, 52-028, Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (original version dated Apr. 14-18, 2011; corrected version dated Apr. 18, 2011; served Apr. 14-21, 2011); Decl. of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 19, 2011) ("Makhijani Suspension Petition Declaration"), *available at* ADAMS Accession No. ML111091154. All citations to the "Suspension Petition" in this Answer are to the corrected version of the Suspension Petition served on April 19, 2011, in Docket Nos. 52-027 and 52-028.

[11] Luminant Generation Company LLC's Answer in Opposition to Emergency Petition to Suspend Licensing Proceedings (May 2, 2011); NRC Staff Answer to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from

As noted above, on August 11, 2011, the Intervenors filed a Motion to reopen the record to allow the admission of a New Contention that alleges:

> The [environmental impact statement ("EIS")] for Comanche Peak Units 3 & 4 fails to satisfy the requirements of [the National Environmental Policy Act ("NEPA")] because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by 10 C.F.R. § 51.92(a)(2) and 40 C.F.R. § 1502.9(c), these implications must be addressed in a supplemental Draft EIS.[12]

The Intervenors also filed before the Commission a Rulemaking Petition requesting the rescission of all regulations in 10 C.F.R. Part 51 that make generic conclusions about the environmental impacts of severe reactor and spent fuel pool accidents. That Rulemaking Petition also requests the suspension of all licensing proceedings until NRC considers the environmental impacts of its licensing decisions and of the Task Force Report.[13]

III. LEGAL STANDARDS

Given the timing of their Motion—almost six months after the dismissal of the last pending contentions—the Intervenors face an extremely high standard for reopening the record and admission of a late-filed contention. As discussed below, the Intervenors must satisfy all of the requirements in (1) 10 C.F.R. § 2.326 to reopen the record; (2) 10 C.F.R. § 2.309(c) for non-timely filings; and (3) 10 C.F.R. § 2.309(f)(1) and (2) for contention admissibility. Failure

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Fukushima Daiichi Nuclear Power Station Accident (May 2, 2011); *see also* Petitioners' Motion for Modification of the Commission's April 19, 2011, Order to Permit a Consolidated Reply (May 6-9, 2011); Petitioners' Reply to Responses to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident (May 6-9, 2011); Luminant Generation Company LLC's Answer in Opposition to Petitioners' Motion to Permit a Consolidated Reply (May 16, 2011); NRC Staff's Answer to Petitioners' Motion for Modification of the Commission's April 19, 2011, Order to Permit a Consolidated Reply (May 16, 2011).

[12] New Contention at 4.

[13] *See* Rulemaking Petition at 3.

to satisfy any of these standards warrants rejection of the Intervenors' New Contention. As explained below, the instant requests meet none of these standards.

A. Standards for Motions to Reopen

The general requirements for a motion to reopen in 10 C.F.R. § 2.326(a) are threefold:

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

Reopening the record is "an extraordinary action."[14] In codifying this standard, the Commission emphasized "the heavy burden involved" and characterized these requirements as "high" and "stringent."[15] As part of this burden, the request to reopen must be accompanied by an affidavit that separately and specifically supports each of the applicable criteria in 10 C.F.R. § 2.326(a).[16]

B. Standards for Non-timely Filings

In addition to the aforementioned three-part test, 10 C.F.R. § 2.326(d) unambiguously requires that "[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c)." This plain language does not apply to all contentions, but only to those which are unrelated to

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[14] *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-34A, 15 NRC 914, 914 (1982).

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

[16] 10 C.F.R. § 2.326(b); *see also AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 670, 674-75 (2008).

the contentions litigated previously between the parties, such as the New Contention the Intervenors now proffer.

Thus, the Intervenors must also satisfy the following eight-factor balancing test set forth in 10 C.F.R. § 2.309(c)(1) for non-timely filings:

> (i) Good cause, if any, for the failure to file on time;
>
> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
>
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
>
> (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
>
> (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
>
> (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
>
> (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
>
> (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

The burden is on the petitioner to demonstrate "that a balancing of these factors weighs in favor of granting the petition."[17] The eight factors in Section 2.309(c)(1) are not of equal importance—the first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[18] If good cause is lacking, then a "compelling showing" must be

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[17] *Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988).

[18] *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-126 (2009) ("[Section 2.309(c)(1)] sets forth eight factors, the most important of which is 'good cause' for the failure to file on time. Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available.") (*citing Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant

made as to the remaining factors to outweigh the lack of good cause.[19] After good cause, the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) is the most significant factor.[20] Factors five (availability of other means) and six (interests represented by other parties) are entitled to the least weight.[21]

C. Standards for New and Amended Contentions

A new contention also must meet the requirements of 10 C.F.R. § 2.309(f)(2)(i) to (iii), which provides that a petitioner may submit a new contention only with leave of the presiding officer upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Apart from the criteria set forth in 10 C.F.R. §§ 2.309(c) and (f)(2), any new contention must also meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[22] These requirements are discussed in detail in Luminant's May 1, 2009 Answer

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Indep. Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008); *Texas Util. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 164-165 (1993)).

19 *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

20 *See, e.g.*, *Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 395 (1976).

21 *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-08, 51 NRC 146, 154 (2000) (*citing Braidwood*, CLI-86-8, 23 NRC at 244-45).

22 *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993); *see also Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Neb.), CLI-09-9, 69 NRC 331, 364 (2009) (stating that the timeliness of the late-filed contention need not be evaluated because the contention did not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)).

opposing the initial Petition to Intervene and a brief discussion of the key contention admissibility requirements is set forth below.

Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." In addition, that section specifies that each contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide 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 petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[23]

The Commission's rules on contention admissibility are "strict by design."[24] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[25] "Mere 'notice pleading' is insufficient" under NRC's current contention admissibility rules.[26] As the Commission has stated, "we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a

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23 10 C.F.R. § 2.309(f)(1)(i)-(vi).

24 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

25 *Id.* (*citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

26 *Fansteel, Inc.* (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 203 (2003).

commitment of adjudicatory resources to resolve them."[27] Therefore, the failure to comply with any one of the six admissibility criteria is grounds for rejecting a new contention.[28]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[29] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[30] Thus, "a licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process,"[31] and a contention that attacks an NRC rule or regulation must be rejected.[32] Similarly, the Commission will "not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[33]

IV. ARGUMENT

A. The Motion Fails to Meet the Standards to Reopen in 10 C.F.R § 2.326

1. The Motion to Reopen Is Not Timely

According to the Intervenors, the Motion is timely because it is based upon information in the Task Force Report, which was not released until July 12, 2011.[34] Intervenors claim that

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27 *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

28 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

29 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

30 *Id.*

31 *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Unit 2 & 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974); *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 66 NRC 41, 57-58 (2007) (*citing Peach Bottom*, ALAB-216, 8 AEC at 20).

32 *See, e.g., Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

33 *Oconee*, CLI-99-11, 49 NRC at 345 (*quoting Douglas Point*, ALAB-218, 8 AEC at 85).

34 Motion at 3.

the Report constitutes new information that is materially different than information previously available because the "recommendations [of] the Task Force, for the first time since the Three Mile Island accident occurred in 1979, fundamentally questioned the adequacy of the current level of safety provided by the NRC's program for nuclear reactor regulation."[35] Putting aside for now that the Task Force did not find that NRC regulations provide an inadequate level of safety, the Motion still should be considered untimely.

The Commission has emphasized that "a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it."[36] Thus, to the extent any information in the Task Force Report is viewed as providing the bases for the New Contention, the timeliness of the Motion must be judged by when that relevant information was disclosed, not by the timing of the most recent report that discussed the information. The Intervenors, however, do not claim that any of the facts upon which the Task Force based its recommendations were new or first revealed by the Task Force Report. In fact, Intervenors assert that similar recommendations were made *30 years ago* following the Three Mile Island accident.[37]

In this respect, the circumstances here are quite similar to those in the *Vermont Yankee* license renewal proceeding, where a petitioner argued that a motion to reopen was timely, in part, because it was based on information in an NRC inspection report. In finding that the motion to reopen was not timely, the Commission pointed out that if the allegation of a deficiency in the application was true when the contention was filed, it was equally true when the application was filed, and that the discussion of these matters in a more recent NRC inspection

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35 *Id.* at 4.

36 *Millstone*, CLI-09-5, 69 NRC at 126 (emphasis in original).

37 *See, e.g.*, New Contention at 7.

report "does not inform the issue of timeliness."[38] Here too, whatever the merits of Intervenors' assertions that NRC regulations fail to specify adequate design bases requirements, and that the NRC's consideration of severe accident mitigation alternatives ("SAMAs") was not adequate, the relevant regulations and consideration of SAMAs have not changed significantly since the application was filed or since the accident at Fukushima occurred on March 11, 2011.

Furthermore, while Intervenors assert that their Motion is founded on new information that was revealed in the Task Force Report, they also state:

> In the aggregate, these contentions, rulemaking comments, and the rulemaking petition follow-up on the Emergency Petition's demand that the NRC comply with NEPA by addressing the lessons of the Fukushima accident in its environmental analyses for licensing decisions. Having received no response to their Emergency Petition, the signatories to the Emergency Petition now seek consideration of the Task Force's far-reaching conclusions and recommendations in each individual licensing proceeding, including the instant case.[39]

Thus, the Intervenors essentially concede that their New Contention is simply an alternative approach to raise the same issues raised some four months ago in the Emergency Petition filed with the Commission. Consequently, the Motion is not timely.

2. The Motion Fails to Show the Existence of a Significant Environmental Issue

The Intervenors claim that the Motion addresses a significant environmental issue because the Task Force "questions the adequacy of the NRC's current regulatory program to protect public health and safety and makes major recommendations for upgrades to the program."[40] Contrary to the Intervenors' allegations, the Task Force Report did not find that the

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[38] *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC __, slip op. at 9 (Mar. 10, 2011).

[39] New Contention at 4.

[40] Motion at 5.

current regulations fail to provide adequate protection. Instead, the Task Force recommended that adequate protection be redefined to provide an increased level of protection.[41] The Task Force clearly stated that "the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented."[42]

To raise a significant environmental issue for purposes of a motion to reopen the record, "new information must paint a '*seriously* different picture of the environmental landscape.'"[43] In *Private Fuel Storage*, the Commission held that a potential project change does not raise a significant environmental issue requiring the reopening of the record if it involves "environmental effects [that] would be of the type and severity (that is, 'small') originally discussed in the FEIS."[44]

The FEIS found that the environmental risks from severe accidents are already SMALL.[45] The Intervenors fail to point to any potential changes to the proposed action resulting from the Task Force recommendations that would change this conclusion. Further, to the extent that the Task Force Report recommendations become regulatory requirements, those requirements would serve to reduce the environmental impacts and would therefore provide further assurance that the environmental impacts of the project "would be of the type and

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41 Task Force Report at 18.

42 *Id.* at 73.

43 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 27 (2006).

44 *Id.* at 29.

45 NUREG-1943, Final Environmental Impact Statement for Combined Licenses (COLs) for Comanche Peak Nuclear Power Plant Units 3 and 4, Vol. 1, at 5-109 (May 2011) ("FEIS" or "NUREG-1943"), *available at* ADAMS Accession No. ML11131A001.

severity (that is, "small")" currently specified in the FEIS.[46] Accordingly, Intervenors fail to raise a significant environmental issue.

3. The Motion to Reopen Fails to Demonstrate a Materially Different Result is Likely

The Intervenors present three reasons why they claim that a materially different result would be "likely" if the NRC considered the information in the Task Force Report in this proceeding. First, Intervenors claim that consideration of the Task Force Report would have a "major" effect because NRC would find its current safety requirements inadequate to protect public health, safety, and the environment from the impacts of severe accidents.[47] However, nothing in the Task Force Report suggests NRC regulations are inadequate. To the contrary, the Task Force Report states that "the current regulatory approach has served the Commission and the public well."[48] Further, as provided in 10 C.F.R. § 2.335(a), such broad-reaching attacks on NRC's regulatory framework may not be admitted for adjudication in an individual licensing proceeding; therefore, a materially different result is not possible. Thus, Intervenors fail to demonstrate that anything in Task Force Report would lead to a materially different result regarding the severe accident (or any other) evaluation in the FEIS.

Second, the Intervenors speculate that an applicant that is unable to comply with potential new mandatory safety requirements would have its applications denied.[49] This conclusory statement provides no evidence demonstrating that such a result is so likely that it is necessary to reopen the adjudicatory proceeding. The Commission has made clear that a motion to reopen that relies only on "bare assertions and speculation" does not supply the necessary technical

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46 *Private Fuel Storage*, CLI-06-3, 63 NRC at 29.

47 Motion at 5.

48 Task Force Report at 18.

49 Motion at 5.

details or analysis to demonstrate that a materially different result is likely.[50] Given the complete absence of any such information, this argument falls far short of meeting the Intervenors' burden.

Third, the Intervenors claim that the cost of adopting safety improvements is likely to be significant.[51] In *Private Fuel Storage*, the Commission held that, for purposes of a motion to reopen, the prospect of additional project-related costs does not meet the reopening standard.[52] In explaining why purely economic issues are insufficient to warrant reopening of the record, the Commission stated that "[w]hile economic benefits are properly considered in an EIS, NEPA does not transform the financial costs and benefits into environmental costs and benefits."[53] Therefore, the Intervenors have not shown that a materially different result is "likely."

* * * *

In summary, the Intervenors have not satisfied the standards for reopening the record. Accordingly, their Motion should be denied.

B. The Motion Does Not Satisfy the Requirements for Non-timely Filings Under 10 C.F.R. § 2.309(c)(1)

In addition to meeting the standards to reopen the record, Intervenors also must meet the requirements for non-timely filings in 10 C.F.R. § 2.309(c)(1).[54] As discussed below, Intervenors have not demonstrated the necessary "good cause" for not filing on time under 10 C.F.R. § 2.309(c)(1)(i). Nor have the Intervenors made a "compelling showing" as to the

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50 *AmerGen Energy Co., Inc.* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008).

51 Motion at 5.

52 *See Private Fuel Storage*, CLI-06-3, 63 NRC at 25, 29-30.

53 *Id.* at 30.

54 10 C.F.R. § 2.326(d).

remaining factors to outweigh the lack of good cause.[55] Accordingly, the balance of the factors under 10 C.F.R. § 2.309(c)(1) warrants rejection of the Motion and New Contention.

1. Intervenors Have Not Shown Good Cause for Failing to File on Time

The Intervenors claim to have "good cause" for failing to file on time because the Motion and New Contention are based upon information in the Task Force Report, which was released on July 12, 2011.[56] In certain instances, the availability of new information may provide good cause for a late filing. The Commission has held:

> [T]he test is when the information became available and when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.[57]

The Intervenors, however, do not claim that any of the facts upon which the Task Force based its recommendations were new or first revealed by the Task Force Report. Thus, even assuming the Fukushima accident could itself be an appropriate trigger date, Intervenors have not demonstrated that any of the information in the Task Force Report discussing that event constitutes "new information."[58]

The fact that the Task Force compiled and evaluated Fukushima-related information in a single document is irrelevant. Commission precedent does not permit a late-filed contention based on a document that merely integrates information that was previously available.[59]

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55 *See Braidwood*, CLI-86-8, 23 NRC at 244.

56 Motion at 7.

57 *Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 70 (1992).

58 As discussed above with respect to the timeliness of the Motion, some of Intervenors' generic concerns relate to recommendations made over 30 years ago. *See* New Contention at 7.

59 *Millstone*, CLI-09-5, 69 NRC at 126 (holding that "a petitioner must show that the information on which the new contention is based was *not reasonably available to the public*, not merely that the petitioner recently found out about it").

Whatever the merits of Intervenors' assertions that the NRC regulations fail to specify adequate design bases requirements, and that the NRC's consideration of SAMAs was not adequate, the relevant regulations and consideration of SAMAs have not changed significantly since the application was filed or since the accident at Fukushima occurred on March 11, 2011. Therefore, the Intervenors have not demonstrated good cause for the same reason their Motion is not timely.

Furthermore, as noted above, the Intervenors essentially concede that their New Contention is simply an alternative approach to raising the same issues previously raised some four months ago in the Emergency Petition filed with the Commission.[60] Therefore, Intervenors have failed to show that there was good cause for their failure to file on time.

2. Intervenors Have Not Made a Compelling Showing on the Remaining Factors

Since Intervenors failed to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), the remaining factors would have to weigh heavily in their favor for the New Contention to be admitted.[61] They do not. The New Contention, if admitted, would essentially require that the contested proceeding begin all over again, with a supplemental environmental report, new mandatory disclosures, and the involvement of different experts and personnel. Expanding the scope of this proceeding to encompass the broad-ranging inquiry into the adequacy of the NRC's severe accident regulatory program could significantly delay this proceeding. Thus, the most important of the remaining factors, the potential for the broadening of issues or delay in the proceeding (factor 7), weighs heavily against the Intervenors.[62]

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60 New Contention at 4.

61 *Braidwood*, CLI-86-8, 23 NRC at 244.

62 *See Comanche Peak*, CLI-93-4, 37 NRC at 167 (holding that "the potential for delay if the petition is granted, weighs heavily against" petitioners because "[g]ranting [the] request will result in the establishment of an entirely new formal proceeding, not just the alteration of an already established hearing schedule"). Intervenors claim that their Motion will not cause unreasonable delay because no construction is currently being conducted at the Comanche Peak Units 3 and 4 site. Motion at 9. Absent approval from NRC, Luminant

In addition, the Commission has already taken steps to protect Intervenors' interests by planning broader stakeholder involvement, including potential rulemakings, concerning the Task Force recommendations.[63] Accordingly, ongoing Task Force-related activities and proceedings (including the potential proceeding concerning Intervenors' own Rulemaking Petition) provide Intervenors with adequate means to protect their interests.[64] As such, factor 5 weighs in favor of denying the Motion.

Furthermore, Intervenors provide no indication that their participation would contribute to the development of a sound record (factor 8). To the contrary, Intervenors essentially state that they do not wish to litigate this issue in this proceeding and instead wish to suspend all licensing proceedings while the Commission performs a generic evaluation.[65] The Commission has already undertaken consideration of the issues in the Task Force Report, so simply admitting these same issues in this proceeding—and potentially holding them in abeyance—will not in any way contribute to the development of a sound record.

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is prohibited from beginning construction on Comanche Peak Units 3 and 4. 10 C.F.R. § 50.10(b). And while preconstruction, site preparation activities have not yet begun, this is irrelevant to factor 7, which is "focused on delay in the *proceeding*." *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-20, 21 NRC 1732, 1748 n.9 (1985). Thus, "the later the petition, the greater the potential that the petitioner's participation will drag out the proceeding." *Detroit Edison Co.* (Greenwood Energy Cent. Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978).

63 *See* Commission Staff Requirements Memorandum ("SRM") Regarding SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan at 1 (Aug. 19, 2011), *available at* ADAMS Accession No. ML112310021 ("SRM on SECY-11-0093") ("The Commission directs the staff to engage promptly with stakeholders to review and assess the recommendations of the Near-Term Task Force in a comprehensive and holistic manner for the purpose of providing the Commission with fully-informed options and recommendations. Staff is instructed to remain open to strategies and proposals presented by stakeholders, expert staff members, and others as it provides its recommendations to the Commission.").

64 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565-66 (2005) (finding that opportunity to petition for rulemaking and opportunity to comment on pending petition for rulemaking provides a means for petitioner to protect its interests).

65 *See, e.g.*, New Contention at 3, 18.

The other factors in 10 C.F.R. § 2.309(c)(1) are less important and therefore do not outweigh Intervenors' failure to demonstrate good cause or meet factors 5, 7, and 8.[66] Having failed to establish good cause and make a compelling showing on three of the remaining seven factors, the balance of the untimely factors weighs against the Intervenors. Therefore, Intervenors fail to meet 10 C.F.R. § 2.326(d) and their Motion should be denied.

C. Intervenors Fail to Meet the Commission's Requirements for a New Contention

1. The New Contention Does Not Satisfy the Timeliness Requirements in 10 C.F.R. § 2.309(f)(2)

Intervenors also claim that their New Contention satisfies the three-part test for new contentions in 10 C.F.R. § 2.309(f)(2).[67] For the same reasons that Intervenors have not demonstrated good cause under 10 C.F.R. § 2.309(c)(1)(i), it also has not satisfied the factors in Section 2.309(f)(2)(i)-(iii).[68] Under Section 2.309(f)(2), new contentions may be filed after the initial filing deadline only upon a showing that: (1) the new contention is based on information not previously available; (2) the new information is "materially different" than previously available information; and (3) the new contention was "submitted in a timely fashion based on the availability of the subsequent information." As shown above in Sections IV.A.1 and B.1, the Intervenors have not demonstrated that any of the information in the Task Force Report needed for them to file the New Contention constitutes information that was not previously available. Accordingly, the Intervenors have not satisfied the requirements in 10 C.F.R. § 2.309(f)(2).

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66 *See, e.g.*, *Diablo Canyon*, CLI-08-1, 67 NRC at 3; *Comanche Peak*, CLI-93-4, 37 NRC at 165.

67 Motion at 10.

68 *See Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163 (2005) (finding that the requirements for a good cause showing under 10 C.F.R. § 2.309(c)(1)(i) "are analogous to the requirements of Sections 2.309(f)(2)(i) (information not previously available) and (f)(2)(iii) (submitted in a timely fashion)"), *review denied*, CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676 (2006).

2. The New Contention Does Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

As noted above, the Intervenors' New Contention states:

> The EIS for Comanche Peak Units 3 & 4 fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by 10 C.F.R. § 51.92(a)(2) and 40 C.F.R. § 1502.9(c), these implications must be addressed in a supplemental Draft EIS.[69]

According to the Intervenors, the NRC Task Force Report recommends that the Commission establish new safety regulations for severe accidents because it found that "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment throughout the licensed life of nuclear reactors."[70]

The Intervenors claim this recommendation concerning the imposition of severe accident mitigation measures as design basis requirements constitutes "new and significant information" that must be considered in a supplemental EIS.[71] In the view of the Intervenors, this information is "new" because the Task Force Report was released only recently and is "significant" because of the "extraordinary level of concern" over the safe operation of Comanche Peak Units 3 and 4.[72] The Intervenors further argue that the imposition of severe accident mitigation measures is "significant" from a NEPA perspective because: (1) such measures may have been rejected in the EIS as too costly but may now be required, improving plant safety; and (2) consideration of

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69 New Contention at 4.

70 *Id.* at 2.

71 *Id.* at 10.

72 *Id.* at 10-11.

the economic costs of mandatory mitigation measures could impact the overall cost-benefit analysis in the EIS.[73]

As demonstrated below, this New Contention should be dismissed because it challenges the adequacy of NRC's regulatory programs and raises issues that are likely to become the subject of rulemaking, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a); calls for consideration of issues that are not material to NRC's NEPA review, contrary to 10 C.F.R. § 2.309(f)(1)(iv); lacks adequate factual support and mischaracterizes the Task Force Report, contrary to 10 C.F.R. § 2.309(f)(1)(v); and fails to provide sufficient information to demonstrate a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

a. The New Contention Challenges the Adequacy of Existing NRC Regulations, Contrary to 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a)

The New Contention should be rejected because it constitutes a challenge to the adequacy of NRC regulations. Such challenges are specifically prohibited by 10 C.F.R. § 2.335(a).[74] NRC case law makes clear that any contention that collaterally attacks the basic structure of the NRC regulatory process must be rejected as outside the scope of the proceeding.[75] Thus, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.[76]

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73 *Id.* at 12.

74 *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, slip op. at 38 (Mar. 11, 2010).

75 *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 65 NRC 41, 57-58 (2007) (*citing Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974)).

76 *See Peach Bottom*, ALAB-216, 8 AEC at 20-21.

The Intervenors claim that the Task Force Report found "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[77] As discussed previously, the Task Force Report made no such finding.[78] Nonetheless, this claimed inadequacy in NRC's regulatory framework is the central reason the Intervenors claim additional NEPA analysis is required.[79] The Commission has held that "compliance with applicable NRC regulations ensures that public health and safety are adequately protected in areas covered by the regulations."[80] Because this contention essentially advocates stricter requirements than agency rules impose (*i.e.*, additional severe accident mitigation regulations), it should be rejected as outside the scope of this proceeding in accordance with 10 C.F.R. § 2.309(f)(1)(iii).[81]

b. The New Contention Raises Issues That Are Likely to Become the Subject of Rulemaking, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

The New Contention also should be rejected because it attempts to litigate issues that are likely to be part of future NRC rulemaking.[82] Commission precedent dictates that a contention that raises a matter that is, or is about to become, the subject of a rulemaking, is outside the scope of a licensing proceeding and, thus, does not provide the basis for a litigable contention.[83]

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77 New Contention at 2.

78 Rather the Task Force stated that "the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented." Task Force Report at 73. In addition, the Task Force Report also stated that "the current regulatory approach has served the Commission and the public well." *Id.* at 18.

79 New Contention at 8, 12.

80 *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-19, 60 NRC 5, 12 (2004).

81 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

82 *See* SRM on SECY-11-0093 at 1-2.

83 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, slip op. at 2-3; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 345 (*citing Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2*), ALAB-218, 8 AEC 79, 85 (1974)).

The NRC Task Force Report consists of recommendations to the Commission—none of which has legal standing or represents the views of the NRC.[84] The Task Force specifically acknowledged that several rulemaking activities would be necessary to implement its recommendations and suggested such a path to the Commission.[85] The Intervenors in turn agree that the issues raised in the New Contention may be appropriate for generic consideration in a rulemaking and have even submitted their own rulemaking petition.[86] The Intervenors may not seek adjudication of issues to be addressed by the Commission generically as part of the rulemaking process resulting from the Task Force Report.[87] Therefore, the New Contention should be rejected because it raises matters that are the likely to be the subject of rulemaking, contrary to 10 C.F.R. § 2.309(f)(iii).

c. The New Contention Improperly Interprets the NEPA "New and Significant" Standard for a Supplemental EIS, Failing to Raise a Material Issue of Fact or Law, Contrary to 10 C.F.R. § 2.309(f)(1)(iv)

The New Contention also is not admissible because it raises issues that, as a matter of law, are not material to the NRC Staff's environmental findings in this proceeding. Contrary to the Intervenors' claim, an issue is not deemed "significant" for purposes of preparation of a

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84 *See, e.g.*, Comm'r Svinicki Notation Votes on SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan, at 1-2 (July 19, 2011) , *available at* ADAMS Accession No. ML112010167 ("The SECY paper itself provides no NRC staff view of the Task Force Report. Lacking the NRC technical and programmatic staff's evaluation (beyond that of the six NRC staff members who produced the Task Force Report), I do not have a sufficient basis to accept or reject the recommendations of the Near-Term Task Force. . . . Executive Order 13579, on the topic of 'Regulation and Independent Regulatory Agencies' states that wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. In that vein, the delivery of the Near-Term Task Force report is not the final step in the process of learning from the events at Fukushima. It is an important, but early step. Now, the conclusions drawn by the six individual members of the Near-Term Task Force must be open to challenge by our many stakeholders and tested by the scrutiny of a wider body of experts, including the [Advisory Committee on Reactor Safeguards], prior to final Commission action.").

85 Task Force Report at x.

86 *See* New Contention at 3, 18.

87 *See Minnesota v. NRC*, 602 F.2d 412, 419 (D.C. Cir. 1979) (upholding denial of requests for adjudicatory hearings because NRC was addressing Waste Confidence concerns in an ongoing rulemaking).

supplemental EIS merely "because it raises an extraordinary level of concern."[88] Instead, pursuant to 10 C.F.R. § 51.92(a), NRC must only supplement an EIS if there are (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. In order to be significant, "new information must present 'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'"[89]

The Intervenors' definition of "significance" is not compatible with and does not satisfy the definition in 10 C.F.R. § 51.92(a). In particular, the Intervenors do not identify any change in the project or the environmental impacts of the project. The Intervenors are simply incorrect, as a matter of law, when they state that NRC is required to supplement the FEIS because the NRC Task Force recommendations may result in an extraordinary level of public concern.[90]

Nor does the New Contention identify any other new information that is "significant" as that term is defined pursuant to NEPA case law and NRC regulations. The Intervenors do not point to any substantial changes in the proposed action that might result from the Task Force recommendations that are relevant to environmental impacts. This is not surprising given that the Task Force Report does not bear on or discuss the environmental impacts from this proposed licensing action. In fact, the Task Force Report does not discuss NEPA issues at all.

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88 New Contention at 10-11.

89 *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-99-22, 50 NRC 3, 14 (1999) (*citing Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); *accord Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).

90 *See Sierra Club v. Wagner*, 555 F.3d 21, 30-31 (1st Cir. 2009) (holding that potentially controversial nature of a project is not sufficient to require preparation of an EIS); *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 233-234 (5th Cir. 2006) (holding that general public opposition is insufficient to require preparation of an EIS).

Although the Intervenors argue that the imposition of severe accident mitigation measures recommended in the Task Force Report would be "significant" because such measures would improve plant safety, that issue is not material in the context of the environmental analysis in this proceeding.[91] To the extent that the Task Force Report recommendations become regulatory requirements, those requirements would serve to reduce the environmental impacts of the project below the level currently specified in the FEIS. The current FEIS would be conservative if the Commission were to adopt the Task Force recommendations. NEPA case law is clear—an agency need not prepare a supplemental EIS when a change will cause less environmental harm than the original project.[92]

Furthermore, if the Commission were to require plants to make design modifications, those design modifications would no longer be mitigation alternatives but would be actual elements of the plant's design. As a result, such design provisions would not need to be considered as part of the NRC's severe accident mitigation alternative ("SAMA") evaluation. Accordingly, the Intervenors' allegations regarding consideration of the potential environmental benefits of implementing the Task Force recommendations are not material to the findings that must be made in this proceeding.

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91 *See* New Contention at 12-13.

92 *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1221-22 (11th Cir. 2002); *So. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663-668 (3d Cir. 1999) (holding that design changes that cause less environmental harm do not require a supplemental EIS); *Township of Springfield v. Lewis*, 702 F.2d 426, 436 (3d Cir. 1983) (acknowledging that changes which "unquestionably mitigate adverse environmental effects of the project do not require a supplemental EIS"); *Concerned Citizens on I-190 v. Sec'y of Transp.,* 641 F.2d 1, 6 (1st Cir. 1981) (holding that adoption of a new environmental protection "statute or regulation clearly does not constitute a change in the proposed action or any 'information' in the relevant sense"); *New Eng. Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (holding that NRC need not supplement an EIS even though the EIS did not discuss the new cooling intake location that "would have a smaller impact on the aquatic environment than would the original location"); *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 137-138 (D.D.C. 2009) ("When a change reduces the environmental effects of an action, a supplemental EIS is not required.").

The Intervenors citation to *Calvert Cliffs* and *Limerick Ecology Action* lends no support to their claim that NRC must consider the Task Force recommendations in an EIS before reaching a decision in this proceeding.[93] Those cases simply hold that NRC (and its predecessor agency, the Atomic Energy Commission) cannot avoid performing a NEPA evaluation because it has overlapping safety responsibilities under the Atomic Energy Act ("AEA").[94] But here, the NRC has already prepared an FEIS that addresses the very issues the Intervenors claim should be considered in light of the Task Force Report (*i.e.*, severe accidents and SAMAs) and the Intervenors fail to identify any new information in the Task Force Report that suggests there are deficiencies in the site-specific evaluations that were already performed in this proceeding.

In addition, the Intervenors argue that the potential imposition of severe accident mitigation measures is "significant" from a NEPA perspective because consideration of the economic costs of mandatory mitigation measures could impact the overall cost-benefit analysis in the EIS.[95] As support for this claim, the Intervenors reference the Makhijani Declaration, which summarizes a number of potential plant changes related to implementation of the Task Force's recommendations and notes that such changes may involve significant costs.[96] However, the Makhijani Declaration does not provide any estimate of those costs. It has long been held that a conclusory statement, even by an expert, is not a sufficient basis for a contention.[97]

In any event, these allegations regarding the economic costs of potential new regulatory requirements stemming from the Task Force Report are, as a matter of law, not material. As

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93 New Contention at 16 (*citing Calvert Cliffs Coordinating Committee*, 449 F.2d at 1115; *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989).

94 *See, e.g.*, *Limerick Ecology Action*, 869 F.2d at 730-31 (holding that NRC cannot avoid performing a severe accident design mitigation alternative evaluation by simply relying on its obligations under the AEA).

95 New Contention at 12.

96 *See id.* at 12; Makhijani Declaration ¶¶ 13-24.

97 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

demonstrated in Section 9.2 of the FEIS, there are no alternatives to nuclear power that are both feasible for generating baseload power and that are environmentally preferable.[98] In the absence of a feasible and environmentally preferable alternative, there is no requirement under NEPA for a comparison of the economic costs of the proposed project and alternatives. As stated by the Appeal Board in *Midland*:

> The passage of the National Environmental Policy Act increased our concern with the economics of nuclear power plants, but only in a limited way. That Act requires us to consider whether there are *environmentally* preferable alternatives to the proposal before us. If there are, we must take the steps we can to see that they are implemented if that can be accomplished at a reasonable cost; i.e., one not out of proportion to the environmental advantages to be gained. But *if there are no preferable environmental alternatives, such cost benefit balancing does not take place*.[99]

Thus, "NEPA requires [the NRC] to look for environmentally preferable alternatives, not cheaper ones."[100] This principle has been applied in numerous other proceedings[101] and was recently reaffirmed by the Commission in the *Summer* COL proceeding.[102] Accordingly, the Intervenors' allegations related to economic costs raise an issue that is not legally material to this proceeding and should be rejected in accordance with 10 C.F.R. § 2.309(f)(1)(iv).

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98 NUREG-1943, Vol. 1, at 9-33.

99 *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-458, 7 NRC 155, 162 (1978) (citation omitted).

100 *Id.* at 168.

101 *See, e.g., Rochester Gas & Elec. Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 395 n.25 (1978); *Clinton*, LBP-05-19, 62 NRC at 178-79; *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-82-117A, 16 NRC 1964, 1993 (1982) ("With the passage of NEPA, cost-benefit balancing is now required, but only if the proposed nuclear plant has environmental disadvantages in comparison to possible alternatives."); *Dairyland Power Coop.* (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982) ("[U]nless a nuclear plant has environmental disadvantages in comparison to reasonable alternatives, differences in financial cost do not enter into the NEPA process and, hence, into NRC's cost-benefit balance."); *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 161-62 (1978), *aff'd*, ALAB-573, 10 NRC 775 (1979) (holding that the economic costs of a coal plant are not relevant given that the environmental impacts of a nuclear plant are less than that of a coal plant).

102 *See S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC __, slip op. at 30-31 (Jan. 7, 2010); *see also Midland*, ALAB-458, 7 NRC at 162-63.

d. The New Contention Lacks Adequate Factual Support and Mischaracterizes the Task Force Report, Contrary to 10 C.F.R. § 2.309(f)(1)(v)

The New Contention also should be dismissed because it fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v). The central premise of the Intervenors' New Contention is that additional NEPA evaluations are necessary because current NRC regulations do not provide adequate protection. According to the Intervenors, the Task Force Report supports such a view because it recommends the promulgation of "mandatory safety regulations for severe accidents"—something that "would not be logical or necessary to recommend . . . unless [the] existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[103]

This claim falls far short of meeting the requirements in 10 C.F.R. § 2.309(f)(1)(v). Contrary to the Intervenors' allegations, the Task Force Report did not find that the current regulations fail to provide adequate protection. Instead, the Task Force recommended that adequate protection be redefined to provide an increased level of protection.[104] The Task Force clearly stated that "the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented."[105] Accordingly, the Task Force Report provides no support for the Intervenors' assertion that NRC regulations are currently somehow inadequate.[106]

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103 New Contention at 2.

104 Task Force Report at 18.

105 *Id.* at 73.

106 *See Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995) (holding that a petitioner's imprecise reading of a document cannot be the basis for a litigable contention).

Intervenors also incorrectly claim that the Task Force Report recommended that features to protect against severe accidents be made part of a plant's "design basis" and that NRC regulations do not currently include severe accident mitigation requirements.[107] The Task Force recommended that the Commission create a new regulatory framework referred to as "extended" design basis requirements.[108] Most of the elements of these "extended" design basis requirements are already contained in existing regulations (*e.g.*, 10 C.F.R. §§ 50.54(hh), 50.62, 50.63, 50.65, 50.150). As the Task Force noted, under a new framework, "current design-basis requirements . . . would remain largely unchanged" and the new framework, "by itself, would not create new requirements nor eliminate any current requirements."[109]

Additionally, notwithstanding the Intervenors' suggestion to the contrary, 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38) already establish severe accident mitigation feature requirements for new plants. The Intervenors' reference to the rulemaking record for the design certification proceeding for the AP1000 is inapposite. The Intervenors' reference pertains to the analysis of severe accident design mitigation alternatives ("SAMDAs") for the AP1000 performed pursuant to 10 C.F.R. Part 51 in 2006, not to 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38), which did not even exist at the time of design certification of the AP1000 and were not issued until 2007.[110]

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107 *See* New Contention at 6, 8.

108 Task Force Report at 22.

109 *Id.* at 20-21.

110 *See* Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,443 (Aug. 28, 2007) (explaining that "the Commission approved NRC staff recommendations for selected preventative and mitigative design features for future light-water reactor designs," that 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38) "require[] the applicant to provide a description and analysis of those design features," and that such "severe accident design features are part of a plant's design bases information").

In summary, the Intervenors' flawed and imprecise reading of the Task Force Report, and their incorrect understanding of the regulations and the AP1000 design certification proceeding, cannot provide adequate factual support for a litigable contention.[111]

e. The New Contention Does Not Provide Sufficient Information to Show That a Genuine Dispute Exists with the FEIS Evaluation of Severe Accidents or SAMAs, Contrary to 10 C.F.R. § 2.309(f)(1)(vi)

The New Contention should be rejected for failing to adequately controvert relevant information in the FEIS. Specifically, Section 5.11.2 of the FEIS contains a detailed evaluation of the environmental impacts of severe accidents. The Intervenors identify nothing in the Task Force Report (or relating more generally to the Fukushima accident) suggesting there is an inaccuracy or other deficiency in this evaluation. Neither the Task Force Report nor any other information identified by the Intervenors relating to the accident at Fukushima establishes that the risk of a severe accident with significant environment consequences is anything but SMALL. In fact, there is nothing in the Task Force Report that evaluates the environmental risk posed by existing or new reactors—it provides no indication that there is or should be any change to the core damage frequency or large release frequency for any plant, let alone new plants.[112] As the D.C. Circuit explained in rejecting a similar argument by a petitioner regarding the need to supplement an EIS following the Three Mile Island accident, "the fact that the accident occurred does not establish that accidents with significant environmental impacts will have significant probabilities of occurrence."[113] Similarly, here, the Intervenors fail to provide sufficient information to establish a genuine dispute with the FEIS evaluation of the severe accidents.

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111 *See Ga. Tech*, LBP-95-6, 41 NRC at 300.

112 To the contrary, if the Task Force recommendations are adopted, that would have the effect of further reducing the impacts discussed in the EIS.

113 *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1301 (D.C. Cir. 1984), *aff'd en banc,* 789 F.2d 252 (D.C. Cir. 1986).

Additionally, Section 5.11.3 of the FEIS contains an analysis of SAMAs. Again, the Intervenors fail to identify anything in the Task Force Report (or relating more generally to the Fukushima accident) that indicates there is any inaccuracy or other deficiency in the SAMA analysis.[114] As the Commission has noted, "[i]t would be unreasonable to trigger full adjudicatory proceedings . . . under circumstances in which the Petitioners have done nothing to indicate the approximate relative cost and benefit of [any proposed SAMA]."[115] That is precisely the situation here, where neither the Task Force Report nor any other information identified by the Intervenors relating to the accident at Fukushima provides any reason to question the analysis already contained in the FEIS. The Intervenors make no attempt to demonstrate that the Task Force recommendations should be evaluated in the SAMA analysis, and the Report itself makes clear that the recommendations are being made for policy reasons rather than based on cost-benefit considerations.

Although the Makhijani Declaration highlights Task Force recommendations relating to station blackout, hydrogen control and mitigation, spent fuel instrumentation and makeup, emergency operating procedures, severe accident management guidelines ("SAMGs"), and extensive damage mitigation guidelines ("EDMGs"),[116] these issues are already addressed in the

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[114] To the extent that the Intervenors are attempting to challenge SAMDAs, all environmental issues relating to SAMDAs are addressed in the design certification rulemaking. *See, e.g.,* 10 C.F.R. Part 52, App. D, § VI.B.1, B.7. Any challenges to such design certification information are outside the scope of this proceeding. Therefore, information contained or referenced in the DCD is not subject to challenge in this COL proceeding. *See* Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

[115] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 11-12 (2002) (*quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc*., 435 U.S. 519, 551 (1978) (*citing Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).

[116] *See* Makhijani Declaration ¶¶ 13-24. The Makhijani Declaration ¶ 21 also addresses issues relating to Mark I and II containments, issues that are not relevant to Comanche Peak Units 3 and 4.

COL application.[117] The Intervenors identify no errors in these analyses. Instead, they are claiming that the regulations should be modified to provide more stringent requirements in these areas. However, by their nature, such claims are barred by 10 C.F.R. § 2.335(a), as discussed above.

The Intervenors also claim that the Task Force Report recommendation regarding reevaluation of seismic and flooding hazards also constitutes new and significant information relevant to environmental concerns. The adequacy of the plant to withstand extreme seismic events and flooding is demonstrated in the Final Safety Analysis Report ("FSAR").[118] The Intervenors present nothing to suggest there is any deficiency in the evaluation of seismic events or flooding in the FSAR. Moreover, the Task Force Report states that such issues are not a concern for new plants, which are already evaluated to the most recent NRC standards for seismic and flooding.[119] Accordingly, the New Contention should be rejected as containing insufficient information to demonstrate the existence of genuine dispute on a material fact.

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117 *See, e.g.*, Comanche Peak Units 3 and 4, COL Application, Part 2, Final Safety Analysis Report ("FSAR"), Rev. 1, §§ 6.2 (incorporating by reference Design Control Document for the US-APWR ("DCD") §6.2.5 addressing hydrogen monitoring and ignition system, *available at* ADAMS Accession No. ML110980231), 8.4 (incorporating by reference DCD § 8.4 addressing station blackout), 9.1 (incorporating by reference DCD § 9.1 addressing spent fuel storage), 13.5 (incorporating by reference DCD § 13.5.2.1 addressing emergency operating procedures), 19.2 (incorporating by reference DCD § 19.2.5 addressing SAMGs) (Mar. 10, 2010), *available at* ADAMS Accession No. ML100082110; *id.*, Pt. 11, Enclosures, Mitigative Strategies Report for Comanche Peak Units 3 & 4 in Accordance with 10 CFR 52.80(d), Rev. 1 (Oct. 2010) (Sensitive Unclassified Non-Safeguards Information) (EDMGs). In most cases, the FSAR addresses these issues by incorporating by reference relevant sections of the US-APWR DCD. As provided in the Commission's Policy Statement, matters within the scope of a design certification application referenced by a COL application are not to be litigated in the COL proceeding. *See* Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

118 *See, e.g.*, FSAR §§ 2.4 (addressing hydrologic engineering; incorporating by reference DCD § 2.4), 2.5 (addressing seismology and geotechnical engineering; incorporating by reference DCD § 2.5), 3.4 (addressing flood design; incorporating by reference DCD § 3.4), 3.7 (addressing seismic design; incorporating by reference DCD § 3.7).

119 Task Force Report at 71.

D. The Rulemaking Petition Fails to Demonstrate That Suspension of the Proceeding is Warranted

At the same time that the Intervenors filed their New Contention, they filed a Rulemaking Petition that includes a request for suspension of this proceeding. Pursuant to 10 C.F.R. § 2.802(d), a rulemaking petitioner may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking. Suspension requests, however, are granted only in extraordinary cases. The Commission has recently reiterated that it "consider[s] 'suspension of licensing proceedings a 'drastic' action that is not warranted absent 'immediate threats to public health and safety.'"[120] The Intervenors do not make any effort to demonstrate that there is any immediate threat to public health and safety in this proceeding. The Rulemaking Petition is essentially identical to petitions that have been filed in other proceedings that are not related to this proceeding,[121] and does not mention any specifics about this proceeding that would justify the extraordinary relief they seek. As noted above, even the Task Force Report that the Intervenors rely upon as the basis for their filings makes clear that "the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented."[122]

Moreover, the Rulemaking Petition requests that the regulations in 10 C.F.R. Part 51 that pertain to severe accidents and spent fuel pool accidents be rescinded, and that this licensing proceeding be suspended pending completion of that rulemaking. However, the only regulations in Part 51 that contain generic conclusions regarding accidents in nuclear power plants are the

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120 *Pet. for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC _ (Jan. 24, 2011), slip op. at 3.

121 Essentially identical petitions include the following ADAMS Accession Numbers: ML11223A465; ML11223A472; ML11223A345; ML11223A465; ML11223A372; ML11223A477; ML11223A472; ML11224A074; ML11224A234.

122 Task Force Report at 73.

regulations in Appendix B to Part 51, which pertains to license renewal, not to licensing of new plants. Therefore, the Rulemaking Petition does not pertain to the application for a license for a new plant, and does not constitute a sufficient basis for suspending this licensing proceeding.

In summary, the request for suspension of this proceeding should be summarily dismissed.

V. CONCLUSION

As discussed above, Intervenors' Motion fails to satisfy any of the standards for reopening a proceeding to admit the New Contention. Furthermore, the Motion does not satisfy the standards for non-timely contentions in 10 C.F.R. § 2.309(c) and (f)(2), especially the standards related to timeliness. Finally, Intervenors fail to meet the standards in Section 2.309(f)(1) for admitting a contention. For all of the reasons stated above, the Motion and New Contention should be denied.

Respectfully submitted,

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Dated in Washington, DC
this 22nd day of August 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 52-034-COL
LUMINANT GENERATION COMPANY LLC	)	52-035-COL
	)	
(Comanche Peak Nuclear Power Plant Units 3 and 4)	)	August 22, 2011

CERTIFICATION OF SERVICE

I certify that, on August 22, 2011, a copy of "Luminant Generation Company LLC's Answer in Opposition to Motion to Reopen the Record, Proposed Contention Regarding Fukushima Task Force Report, and Request to Suspend Proceeding," was served electronically with the Electronic Information Exchange on the following recipients:

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