UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-014-COL & 52-015-COL
TENNESSEE VALLEY AUTHORITY	)	
	)	August 25, 2011
(Bellefonte Nuclear Power Plant, Units 3 and 4)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER IN OPPOSITION TO PROPOSED CONTENTION REGARDING FUKUSHIMA TASK FORCE REPORT

Edward J. Vigluicci, Esq.
Scott A. Vance, Esq.
Christopher C. Chandler, Esq.
Office of the General Counsel
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
Fax: 865-632-6147
E-mail: ejvigluicci@tva.gov
E-mail: savance@tva.gov
E-mail: ccchandler0@tva.gov

Counsel for TVA

Steven P. Frantz, Esq.
Stephen J. Burdick, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
E-mail: sburdick@morganlewis.com

Counsel for TVA

Table of Contents

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
TENNESSEE VALLEY AUTHORITY	Docket Nos. 52-014-COL & 52-015-COL
(Bellefonte Nuclear Power Plant, Units 3 and 4)	August 25, 2011

TENNESSEE VALLEY AUTHORITY'S ANSWER IN OPPOSITION TO PROPOSED CONTENTION REGARDING FUKUSHIMA TASK FORCE REPORT

I. INTRODUCTION

On August 11, 2011, the Blue Ridge Environmental Defense League ("BREDL") and the Southern Alliance for Clean Energy ("SACE") (collectively, "Intervenors"), filed with the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), a Motion to admit 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] Tennessee Valley Authority ("TVA") is filing this Answer in opposition pursuant to 10 C.F.R. §§ 2.323(c) and 2.309(h)(1) and the Atomic Safety and

[1] Motion to Admit New 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 Dr. Ross McCluney Regarding Environmental and Safety Issues at Nuclear Power Plants Based on Events at Fukushima and the Findings of the NRC Interim Task Force (Aug. 11, 2011) ("McCluney Declaration"). *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").

Licensing Board's ("Board's") November 10, 2008 Scheduling Order.[2] As discussed below, the Board should reject the new contention as untimely and for failure to satisfy the standards for admitting a new contention.[3]

II. BACKGROUND

The Bellefonte site is located approximately six miles northeast of Scottsboro, Alabama.[4] On October 30, 2007, TVA submitted a combined license ("COL") application for Bellefonte Units 3 and 4. The NRC accepted the Application for docketing and published a Hearing Notice in the *Federal Register* on February 8, 2008.[5] SACE, BREDL, and the Bellefonte Efficiency and Sustainability Team ("BEST") jointly sought to intervene.[6] The Board admitted four contentions, two involving the safety and environmental implications of the closure of the Barnwell, South Carolina low-level radioactive waste disposal facility, one involving the evaluation of aquatic impacts in the submitted Environmental Report ("ER"), and one regarding the projected costs of a new nuclear generation facility.[7] The Board also admitted SACE and BREDL as parties to the proceeding, but not BEST.[8] The two contentions concerning low-level radioactive waste were later dismissed by the Commission.[9] Litigation on the two remaining

---

2 Memorandum and Order (Prehearing Conference and Status of General Schedule) (November 10, 2008) (unpublished).

3 Additionally, the Board has stated that "a motion for admission of a new or amended contention has a ten-page limit (not including any supporting material)." *Id.* at 3 (unpublished). Together the Motion and New Contention are 31 pages long, over three times the limit. Intervenors did not seek preapproval of the presiding officer to exceed the page limit. TVA requested and received approval from the Board to exceed the page limit for its Answer. *See* Order (Granting Motions to Exceed Page Limit and for Extension of Time to File NRC Staff Response), at 1 (Aug. 23, 2011) (unpublished).

4 *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-08-16, 68 NRC 361, 373 (2008).

5 *See id.* at 375.

6 *See id.*

7 *See id.* at 373-74.

8 *See id.*

9 *See Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), CLI-09-3, 69 NRC 68, 78 (2009).

admitted contentions is ongoing; however, the issuance of the schedule for the proceeding has been deferred pending a TVA decision on whether to pursue Bellefonte Unit 1.[10]

On April 18, 2011, Intervenors submitted 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").[11] Both TVA and the NRC Staff, in their respective answers, opposed the Suspension Petition, which is now pending before the Commission.[12]

As noted above, on August 11, 2011, Intervenors filed a Motion to allow the admission of a new contention (hereinafter, "New Contention") that alleges:

> The ER for Bellefonte 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 NEPA and the NRC regulations, these implications must be addressed in the ER.[13]

---

[10] *See* Memorandum and Order (Procedure for Next Update Regarding Application Review Schedule), at 3 (Oct. 13, 2010) (unpublished). On August 18, 2011, the TVA Board of Directors decided to pursue the completion of Bellefonte Unit 1; TVA intends to inform the Board of the ramifications of this decision on this proceeding in the near future.

[11] 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 (dated Apr. 18, 2011) (corrected version).

[12] Tennessee Valley Authority's Answer Opposing 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 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 12, 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 12, 2011); Tennessee Valley Authority's Answer Opposing 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).

[13] New Contention at 4-5.

III. LEGAL STANDARDS

As discussed below, Intervenors must satisfy all of the requirements in (1) 10 C.F.R. § 2.309(c) for non-timely filings; and (2) 10 C.F.R. § 2.309(f)(1) and (2) for contention admissibility. Failure to satisfy any of these standards warrants rejection of Intervenors' New Contention. As explained below, the Motion and New Contention do not meet these standards.

A. Standards for Non-timely Filings

Intervenors must 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."[14] The eight factors in Section 2.309(c)(1) are not of equal

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

importance—the first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[15] If good cause is lacking, then a "compelling showing" must be made as to the remaining factors to outweigh the lack of good cause.[16] After good cause, the likelihood of substantial broadening of the issues and delay of the proceeding (factor seven) is the most significant factor.[17] Factors five (availability of other means) and six (interests represented by other parties) are entitled to the least weight.[18]

B. 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)

---

[15] *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 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)).

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

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

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

to (vi).[19] These requirements are discussed in detail in TVA's July 1, 2008 Answer opposing the initial Petition to Intervene; 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: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) 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 (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.[20]

The Commission's rules on contention admissibility are "strict by design."[21] 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.'"[22] "Mere 'notice pleading' is insufficient" under NRC's current contention admissibility rules.[23] As the Commission has stated, "we require parties to come forward at the outset with sufficiently

---

19 *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)).

20 10 C.F.R. § 2.309(f)(1)(i)-(vi).

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

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

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

detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them."[24] Therefore, the failure to comply with any one of the six admissibility criteria is grounds for rejecting a new contention.[25]

The purpose of these six criteria is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[26] 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."[27] 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,"[28] and a contention that attacks an NRC rule or regulation must be rejected.[29] 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."[30]

IV. ARGUMENT

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

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 Intervenors made a "compelling

---

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

25 *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).

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

27 *Id.*

28 *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).

29 *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).

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

showing" as to the remaining factors to outweigh the lack of good cause.[31] Accordingly, the balance of the factors under 10 C.F.R. § 2.309(c)(1) warrants rejection of the Motion and New Contention.[32]

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

Intervenors claim to have "good cause" for failing to file on time because the Motion and New Contention are based upon "new information" in the Task Force Report, which was released on July 12, 2011.[33] 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.[34]

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.

Additionally, Intervenors claim that the Task Force 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,

---

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

32 The Commission has indicated that for new contentions filed by an admitted party, the timeliness standard is 10 C.F.R. § 2.309(f)(2), not 10 C.F.R. § 2.309(c). *See Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC __, slip op. at 40 n.171 (July 8, 2010) (discussing the applicability of Section 2.309(f)(2) versus Section 2.309(c), and stating: "To be clear, in the circumstances presented here, where [the intervenor] was admitted to this case as a party at the time it filed [the new contention], consideration of the contention's admissibility is governed by the provisions of § 2.309(f)(2), as well as the general contention admissibility requirements of § 2.309(f)(1)."). To be conservative, however, TVA evaluates the timeliness requirements of both Section 2.309(c) and Section 2.309(f)(2). Additionally, the Board's Initial Prehearing Order discusses late-filed contentions in the context of both Section 2.309(c) and Section 2.309(f)(2). *See* Memorandum and Order (Initial Prehearing Order), at 5 n.2, 6 (June 18, 2008).

33 Motion at 4-5.

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

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. 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 report "does not inform the issue of timeliness."[38] Here too, whatever the merits of Intervenors'

---

35 Motion at 3.

36 *Millstone*, CLI-09-5, 69 NRC at 126.

37 *See, e.g.*, New Contention at 6-7.

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).

assertions that NRC regulations fail to specify adequate design basis 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 New Contention 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, 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.

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.[40] Whatever the merits of Intervenors' assertions that the NRC regulations fail to specify adequate design basis 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

---

[39] New Contention at 4.

[40] *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").

Application was filed or since the accident at Fukushima occurred on March 11, 2011. Therefore, Intervenors have not demonstrated good cause for the untimely contention.

The McCluney Declaration highlights the untimeliness of the New Contention and the lack of good cause to file late by relying upon a March 1964 Alaska earthquake and associated reports to argue that seismic seiches may occur at great distances from the epicenter of the initiating seismic event.[41] Intervenors cannot rely on information from an event over 47 years ago to bring a new contention now. Intervenors have not identified any good cause for not raising these arguments earlier.

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

Having failed to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), Intervenors would need to demonstrate that the remaining factors weigh heavily in their favor for the New Contention to be admitted.[42] They do not. The New Contention, if admitted, would greatly broaden the current proceeding with new issues, 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 Intervenors.

In addition, the Commission has already taken steps to protect Intervenors' interests by planning broader stakeholder involvement, including potential rulemakings, concerning the Task

---

41 *See* McCluney Declaration at 2-4; *see also* New Contention at 16-17.

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

Force recommendations.[43] Accordingly, ongoing Task Force-related activities and proceedings provide Intervenors with adequate means to protect their interests.[44] 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.[45] 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.

The other factors in 10 C.F.R. § 2.309(c)(1) are less important and therefore cannot outweigh Intervenors' failure to demonstrate good cause or meet factors 5, 7, and 8, even if they weighed in the Intervenors' favor.[46] 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 Intervenors. Therefore, Intervenors fail to meet 10 C.F.R. § 2.309(c)(1) and their Motion should be denied.

---

[43] *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.").

[44] *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).

[45] *See, e.g.*, New Contention at 4, 21.

[46] *See, e.g.*, *Diablo Canyon*, CLI-08-1, 67 NRC at 8; *Comanche Peak*, CLI-93-4, 37 NRC at 165.

B. 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).[47] For the same reasons that Intervenors have not demonstrated good cause under 10 C.F.R. § 2.309(c)(1)(i), they also have not satisfied the factors in Section 2.309(f)(2)(i)-(iii).[48] 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 Section IV.A.1, Intervenors have not demonstrated that any of the information in the Task Force Report used to file the New Contention constitutes information that was not previously available. Accordingly, Intervenors have not satisfied the requirements in 10 C.F.R. § 2.309(f)(2).

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

According to Intervenors, the NRC Task Force Report recommends that the Commission establish new safety regulations for severe accidents because the Task Force Report found that

---

47 Motion at 2-4.

48 *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).

"existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment throughout the licensed life of nuclear reactors."[49]

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.[50] In the view of 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 Bellefonte Units 3 and 4.[51] 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 as too costly but may now be required, improving plant safety; and (2) consideration of the economic costs of mandatory mitigation measures could impact the overall cost-benefit analysis.[52]

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).

---

49 New Contention at 2.

50 *Id.* at 11-13.

51 *Id.* at 12.

52 *Id.* at 14-15.

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).[53] 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.[54] Thus, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.[55]

Intervenors claim that the Task Force Report found "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[56] The Task Force Report made no such finding.[57] Nonetheless, this claimed inadequacy in NRC's regulatory framework is the central reason Intervenors claim additional NEPA analysis is required.[58] 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."[59] Because this contention essentially advocates stricter requirements than agency rules impose

---

53 *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-09, 71 NRC __, slip op. at 38 (Mar. 11, 2010).

54 *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)).

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

56 New Contention at 2.

57 On the contrary, 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.

58 *See* New Contention at 11-15.

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

(*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).[60]

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.[61] 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.[62]

The NRC Task Force Report consists of recommendations to the Commission—none of which has legal standing or represents the views of the NRC.[63] The Task Force specifically acknowledged that several rulemaking activities would be necessary to implement its recommendations and suggested such a path to the Commission.[64] Intervenors, in turn, agree that the issues raised in the New Contention may be appropriate for generic consideration in a rulemaking.[65] Intervenors may not seek adjudication of issues to be addressed by the

---

60 *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).

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

62 *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, slip op. at 2-3; *Oconee*, CLI-99-11, 49 NRC at 345 (citing *Douglas Point*, ALAB-218, 8 AEC at 85).

63 *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.").

64 Task Force Report at x.

65 *See* New Contention at 3, 18.

Commission generically as part of the rulemaking process resulting from the Task Force Report.[66] Therefore, the New Contention should be rejected because it raises matters that are 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, 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.

As a preliminary matter, Intervenors' arguments regarding the need to supplement an EIS under NEPA due to new and significant information raised by the Task Force Report do not directly apply to the situation here. TVA has submitted an ER for Bellefonte Units 3 and 4, but the NRC has not yet prepared an EIS. Therefore, these arguments focused on supplementing an EIS should be ignored.[67] If Intervenors take issue with a future EIS for Bellefonte Units 3 and 4, they will have an opportunity in the future to comment on or otherwise attempt to challenge the adequacy of the EIS. Nonetheless, as shown below, even if the standard for supplementing an EIS were to be applied in this proceeding, Intervenors still have not raised a material issue of fact or law.

Contrary to Intervenors' claim, an issue is not deemed "significant" for purposes of preparation of a supplemental EIS merely "because it raises an extraordinary level of concern."[68] 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)

---

66 *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).

67 In this regard, the NRC regulations referenced by Intervenors, 10 C.F.R. §§ 51.92(a)(2), 51.50(c)(1)(iii), 51.53(b), 51.53(c)(3)(iv), do not apply to TVA's situation. New Contention at 11.

68 New Contention at 12.

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.'"[69]

Intervenors' definition of "significance" is not compatible with and does not satisfy the definition in 10 C.F.R. § 51.92(a). In particular, Intervenors do not identify any change in the project or the environmental impacts of the project. Intervenors are simply incorrect, as a matter of law, when they state that the NRC is required to revisit any conclusions in the Bellefonte ER[70] because the NRC Task Force recommendations may result in an extraordinary level of public concern.[71]

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. 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.

Although 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

---

69 *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)).

70 New Contention at 12-13.

71 *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). Additionally, because the NRC has not yet issued an EIS for Bellefonte Units 3 and 4, it is incorrect to state that the NRC must "revisit" these conclusions. The NRC has not yet addressed the conclusions in the first instance.

proceeding.[72] 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 ER. The current ER would be conservative if the Commission were to adopt the Task Force recommendations; that is, implementation of the recommendations would lead to increased safety and less risk of environmental harm. 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.[73]

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 SAMA evaluation. Accordingly, 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.

Intervenors' citation to *Calvert Cliffs* and *Limerick Ecology Action* lends no support to their claim that the NRC must consider the Task Force recommendations before reaching a decision in this proceeding.[74] Those cases simply hold that the NRC (and its predecessor

---

72 *See* New Contention at 14-15.

73 *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.").

74 New Contention at 20 (citing *Calvert Cliffs Coordinating Comm.*, 449 F.2d at 1115; *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3d Cir. 1989)).

agency, the Atomic Energy Commission) cannot avoid performing a NEPA evaluation because it has overlapping safety responsibilities under the Atomic Energy Act ("AEA").[75] But here, TVA has already prepared an ER that addresses the very issues Intervenors claim should be considered in light of the Task Force Report (*i.e.*, severe accidents and SAMAs) and 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, 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 ER.[76] As support for this claim, 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.[77] 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.[78]

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 demonstrated in Section 9.2 of the ER, there are no alternatives to nuclear power that are both feasible for generating baseload power and that are environmentally preferable.[79] In the absence of a feasible and environmentally preferable alternative, there is no requirement under NEPA for

---

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

76 New Contention at 14-15.

77 *See id.* at 15; Makhijani Declaration ¶¶ 13-24.

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

79 Bellefonte Nuclear Plant, Units 3 & 4, COL Application, Part 3, Environmental Report, Rev. 1, § 9.2 (Oct. 10, 2008), *available at* ADAMS Accession No. ML083100537.

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*.[80]

Thus, according to NRC practice following applicable precedent, "NEPA requires [the NRC] to look for environmentally preferable alternatives, not cheaper ones."[81] This principle has been applied in numerous other proceedings[82] and was recently reaffirmed by the Commission in the *Summer* COL proceeding.[83] Accordingly, 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).

---

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

81 *Id.* at 168.

82 *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).

83 *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 Intervenors' New Contention is that additional NEPA evaluations are necessary because current NRC regulations do not provide adequate protection. According to 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."[84]

This claim falls far short of meeting the requirements in 10 C.F.R. § 2.309(f)(1)(v). Contrary to 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.[85] 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."[86] Accordingly, the Task Force Report provides no support for Intervenors' assertion that NRC regulations are currently somehow inadequate.[87]

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

---

84 New Contention at 2.

85 Task Force Report at 18.

86 *Id.* at 73.

87 *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).

regulations do not currently include severe accident mitigation requirements.[88] The Task Force recommended that the Commission create a new regulatory framework referred to as "extended" design basis requirements.[89] 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."[90]

Additionally, notwithstanding 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. Intervenors' reference to the rulemaking record for the design certification proceeding for the AP1000 is inapposite. 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.[91]

In summary, 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.[92]

---

88 *See* New Contention at 2, 6, 8.

89 Task Force Report at 22.

90 *Id.* at 20-21.

91 *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").

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

e. The New Contention Does Not Provide Sufficient Information to Show that a Genuine Dispute Exists with the 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 ER. Specifically, Section 7.2 of the ER contains a detailed evaluation of the environmental impacts of severe accidents. 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 Intervenors relating to the accident at Fukushima establishes that the risk of a severe accident with significant environmental 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.[93] 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."[94] Similarly, here, Intervenors fail to provide sufficient information to establish a genuine dispute with the ER evaluation of the severe accidents.

Additionally, Section 7.3 of the ER contains an analysis of SAMAs. Again, Intervenors fail to identify anything in the Task Force Report (or relating more generally to the Fukushima

---

[93] To the contrary, if the Task Force recommendations are adopted, that would have the effect of further reducing the impacts discussed in the ER.

[94] *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).

accident) that indicates there is any inaccuracy or other deficiency in the SAMA analysis.[95] 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]."[96] That is precisely the situation here, where neither the Task Force Report nor any other information identified by Intervenors relating to the accident at Fukushima provides any reason to question the analysis already contained in the ER. Intervenors make no attempt to demonstrate that the Task Force recommendations should be evaluated in the SAMA analysis, and the Task Force 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"),[97] these issues are already addressed in the COL Application.[98] Intervenors identify no errors in these analyses. Instead, they are claiming

---

95 To the extent that 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 AP1000 Design Control Document ("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).

96 *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)).

97 *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 Bellefonte Units 3 and 4.

98 *See, e.g.*, Bellefonte Units 3 and 4, COL Application, Part 2, Final Safety Analysis Report ("FSAR"), Rev. 1, §§ 6.2 (incorporating by reference DCD § 6.2.4 addressing hydrogen monitoring and ignition system), Table 8.1-201 (stating that station blackout was considered in the DCD), 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), 19.16 (incorporating by reference DCD § 19.16 addressing the hydrogen control system), and 19.59 (incorporating by reference DCD § 19.59 addressing SAMGs); *see* Letter from A. Sterdis,

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.

Furthermore, with respect to the AP1000 design that is being used for Bellefonte Units 3 and 4, the Task Force Report states:

> By nature of their passive designs and inherent 72-hour coping capability for core, containment, and spent fuel pool cooling with no operator action required, the ESBWR and AP1000 designs have many of the design features and attributes necessary to address the Task Force recommendations. The Task Force supports completing those design certification rulemaking activities without delay.[99]

Thus, according to the Task Force itself, the design-related recommendations in the Task Force Report are already adequately addressed by the AP1000 at Bellefonte Units 3 and 4.

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.[100] Intervenors reference the Declaration of Ross McCluney (who is not qualified),[101] who claims that seimic seiches may occur at great distances from the epicenter of the initiating seismic event.[102] The adequacy of the plant to withstand extreme seismic events and flooding is demonstrated in the FSAR.[103] Intervenors present nothing to

---

TVA, to NRC, Bellefonte Combined License Application – Loss of Large Areas of the Plant Due to Explosions or Fire – Mitigative Strategies Description and Plans (June 1, 2009) (EDMGs) (non-public). In most cases, the FSAR addresses these issues by incorporating by reference relevant sections of the AP1000 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).

99 Task Force Report at 71-72.

100 New Contention at 16.

101 According to his Curriculum Vitae, Ross McCluney is an optical physicist. He has no apparent experience, education, or training related to seismic and flooding hazards.

102 New Contention at 16; McCluney Declaration at 2-3.

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 hazards.[104] Accordingly, the New Contention should be rejected as containing insufficient information to demonstrate the existence of a genuine dispute on a material fact.

---

[103] *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).

[104] Task Force Report at 71.

V. CONCLUSION

As discussed above, Intervenors' Motion does not satisfy the standards for non-timely contentions in 10 C.F.R. § 2.309(c) and (f)(2). Additionally, 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,

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

Steven P. Frantz, Esq.
Stephen J. Burdick, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com
E-mail: sburdick@morganlewis.com

Edward J. Vigluicci, Esq.
Scott A. Vance, Esq.
Christopher C. Chandler, Esq.
Office of the General Counsel
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
Fax: 865-632-6147
E-mail: ejvigluicci@tva.gov
E-mail: savance@tva.gov
E-mail: ccchandler0@tva.gov

Counsel for TVA

Dated in Washington, DC
this 25th day of August 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-014-COL & 52-015-COL
TENNESSEE VALLEY AUTHORITY	)	
	)	August 25, 2011
(Bellefonte Nuclear Power Plant, Units 3 and 4)	)	

CERTIFICATE OF SERVICE

I certify that, on August 25, 2011, a copy of "Tennessee Valley Authority's Answer in Opposition to Proposed Contention Regarding Fukushima Task Force Report" was served electronically with the Electronic Information Exchange on the following recipients:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ajb5@nrc.gov

Administrative Judge
Dr. William W. Sager
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wws1@nrc.gov

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

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Ann P. Hodgdon
Patrick A. Moulding
Jody C. Martin
E-mail: Ann.Hodgdon@nrc.gov;
Patrick.Moulding@nrc.gov;
Jody.Martin@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
E-mail: bredl@skybest.com

Sara Barczak
Southern Alliance for Clean Energy
428 Bull Street, Suite 201
Savannah, GA 31401
E-mail: sara@cleanenergy.org

Signed (electronically) by Stephen J. Burdick
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sburdick@morganlewis.com

Counsel for TVA