UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| TENNESSEE VALLEY AUTHORITY | ) | Docket Nos. 50-391-OL |
| | ) | |
| (Watts Bar Unit 2) | ) | |

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# NRC STAFF'S ANSWER TO MOTION AND CONTENTION REGARDING NEPA REQUIREMENT TO ADDRESS SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE FUKUSHIMA TASK FORCE REPORT

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September 6, 2011

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## INTRODUCTION

On August 11, 2011, Southern Alliance for Clear Energy ("SACE"), a party in this proceeding, filed a motion to admit a new contention regarding the safety and environmental implications of the Nuclear Regulatory Commission ("NRC") Near-term Task Force Report on the Fukushima Dai-Ichi accident,[1] along with an accompanying proffered contention,[2] a combined rulemaking/suspension petition,[3] and an expert declaration.[4] The NRC Task Force

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[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," (August 11, 2011) ("Motion").

[2] "Contention Regarding NEPA Requirement To Address Safety And Environmental Implications Of The Fukushima Task Force Report" (August 11, 2011) ("Contention").

[3] "Rulemaking Petition To Rescind Prohibition Against Consideration Of Environmental Impacts Of Severe Reactor And Spent Fuel Pool Accidents And Request To Suspend Licensing Decision" (August 11, 2011) ("Petition").

[4] "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" (August 8, 2011) ("Makhijani Declaration"); "Curriculum Vita of Arjun Makhijani" October 11, (continued. . .)

Report provided recommendations on the need for orders, rulemaking, and guidance to enhance or improve reactor safety. However, SACE's proffered new contention is on the failure of the Tennessee Valley Authority's ("TVA's") Final Supplemental Environmental Impact Statement ("FSEIS") to address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. Pursuant to 10 C.F.R. § 2.309(h) and the Board's Scheduling Order (May 26, 2010), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its answer opposing admission of SACE's new contention.

As discussed below, SACE's proffered contention does not meet the admissibility requirements for contentions in 10 C.F.R. § 2.309(f) and is inexcusably late. Accordingly, the Board should not admit the new contention.

## BACKGROUND

This proceeding involves the operating license application for Watts Bar Unit 2, a partially-complete facility located near Spring City, Tennessee.

On February 15, 2008, TVA submitted to the NRC its Watts Bar Nuclear ("WBN") Unit 2 "Final Environmental Impact Statement [for the] Completion and Operation of Watts Bar Nuclear Plant Unit 2" dated June of 2007. On January 27, 2009, TVA submitted to the NRC its "Final Watts Bar Unit 2 Severe Accident Mitigation Alternatives (SAMA) analysis."[5] On March 4, 2009, TVA submitted its WBN Unit 2 Operating License Application Update. On May 1, 2009, the Commission published a Notice of Opportunity for Hearing on the operating license

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(. . .continued)

2010) ("CV").

[5] The report and cover letter are available in ADAMS as a "package" at ML090360706.

application of TVA for the Watts Bar Nuclear Plant, Unit 2.[6] On July 13, 2009, SACE (joined by other petitioners[7]) filed a petition alleging seven contentions.[8] Following additional filings, the Board admitted petitioner SACE as a party along with two of SACE's contentions,[9] one of which was subsequently settled.

On February 4, 2010, SACE filed a petition, pursuant to 10 C.F.R. § 2.335(b), requesting waiver of 10 C.F.R. §§ 51.53(b)[10] and 51.95(b)[11] with respect to TVA's application for an operating license for WBN Unit 2. On June 29, 2010, the Board issued LBP-10-12 denying the petition to waive 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c)[12] in the WNB Unit 2 operating licensing proceeding. On July 14, 2010, SACE filed its Petition with the Commission requesting interlocutory review of LBP-10-12 pursuant to 10 C.F.R. §§ 2.341(b) and 2.341(f)(2). On

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[6] Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access, 74 Fed. Reg. 20,350 (May 1, 2009) ("Notice").

[7] The joint petitioners were not admitted by the Board and the Commission affirmed the Board's decision. *See Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319 (2010).

[8] Petition to Intervene and Request for Hearing (July 13, 2009)(ADAMS Accession No. ML091950686)("Petition").

[9] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, (2009).

[10] 10 C.F.R. § 51.53(b) governs the content of the supplemental environmental report submitted by the applicant at the operating license stage. It states in part that "[n]o discussion of need for power, or of alternative energy sources, . . . is required in this report." 10 C.F.R. § 51.53(b).

[11] 10 C.F.R. § 51.95(b) governs the content of the supplement to the final environmental impact statement prepared by NRC Staff in connection with the issuance of an operating license. It states in part that "[u]nless otherwise determined by the Commission, a supplement on the operation of a nuclear power plant will not include a discussion of need for power, or of alternative energy sources, . . . ." 10 C.F.R. § 51.95(b).

[12] 10 C.F.R. § 51.106 states, "The presiding officer in an operating license hearing shall not admit contentions proffered by any party concerning need for power or alternative energy sources or alternative sites for the facility for which an operating license is requested."

November 30, 2010, the Commission denied SACE's petition for interlocutory review of the Board's ruling in LBP-10-12, but nonetheless recognized its obligation under the National Environmental Policy Act of 1969 ("NEPA") to supplement the NRC's environmental review documents if there is relevant new and significant information.[13] Thus the Commission stated its expectation for the Staff to take the requisite "hard look" at new information regarding the need for power and alternative sources of energy, and the Commission authorized the Staff to supplement the Staff's Final Environmental Statement ("FES") [14] on those topics if the Staff determines that the legal threshold for new and significant information has been met.[15]

On March 11, 2011, the "Great East Japan Earthquake" occurred; it produced a deadly tsunami which hit the Fukushima Dai-ichi nuclear power plant site and led to significant damage to the site and resulted in significant releases of radiation that contaminated the surrounding area. This event and its impact on Japan was widely published and immediately covered by the world news media. The event and NRC's response were the topics of several Congressional hearings and testimony by Commissioners and the NRC Executive Director for Operations ("EDO").

The NRC responded to the events, and, as directed in a tasking memorandum dated March 23, 2011, from Chairman Gregory B. Jaczko to the EDO, the Staff of the NRC began work on near-term review of the event. The EDO established an agency Task Force, with a

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[13] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-29, 72 NRC __ (Nov. 30, 2010) (slip op. at 10-11).

[14] Historically, the NEPA document for Watts Bar Nuclear was called "Environmental Statement" rather than "Environmental Impact Statement." *See*, NUREG-0498, "Final Environmental Statement Related to Operation of Watts Bar Nuclear Plant Units Nos. 1 and 2" (NRC, December, 1978). TVA also used this term. *See* "Environmental Statement" (TVA, November 9, 1972).

[15] *Id.* (slip op. at 10).

charter dated March 30, 2011, to, *inter alia*, review relevant NRC regulatory requirements, programs, and processes, and their implementation, and to recommend whether the agency should make near-term improvements to its regulatory system.

On April 14, 2011, SACE, along with multiple other petitioners, filed with the Commission an emergency petition requesting suspension of twenty-three reactor licensing and reactor design certification proceedings. Beginning on April 18, 2011, the petitioners began to serve an amendment to the original Petition, "Amendment and Errata to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigations of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident" ("April Suspension Request") to make corrections to their original filing. Relative to Watts Bar Unit 2, the Staff[16] and the Applicant[17] opposed suspension.

On July 12, 2011, the agency Task Force published its "Recommendations for Enhancing Reactor Safety in the 21st Century[;] The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident." ("TFR"). This report provided five overarching recommendations: 1) Clarifying the Regulatory Framework, 2) Ensuring Protection, 3) Enhancing Mitigation, 4) Strengthening Emergency Preparedness, and 5) Improving the Efficiency of NRC Programs. TFR at ix.

On August 11, 2011, SACE filed the subject motion to admit a new contention alleging that TVA's FSEIS dated June of 2007 was deficient, based in part upon the TFR, along with an

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[16] NRC Staff's Answer To Emergency Petition To Suspend All Pending Reactor Licensing Decisions And Related Rulemakings Decisions Pending Investigation Of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident, May 2, 2011. The answer was filed by the Staff in 22 proceedings, including Watts Bar Unit 2.

[17] Tennessee Valley Authority's Answer In Opposition to Emergency Petition to Suspend Licensing Proceedings, May 2, 2011.

accompanying proffered contention, a combined rulemaking/suspension petition, and a supporting expert declaration.

## DISCUSSION

### I. Legal Standards and Commission Policy

#### A. Admissibility Requirements for Timely-Filed Contentions

The legal requirements governing the admissibility of contentions are well established, and are currently set forth in 10 C.F.R. § 2.309(f). In brief, the regulations require that a contention must satisfy the following requirements in order to be admitted:

> (f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
>
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted, . . . ;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention 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 which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
>
> (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure

and the supporting reasons for the petitioner's belief . . . .

10 C.F.R. § 2.309(f)(1)(i) – (vi).

The purpose of the contention admissibility rule § 2.309(f)(1) is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." *Calvert Cliffs 3 Nuclear Project, LLC, And Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-09-04, 69 NRC 170, 189 (2009) (*quoting Changes to Adjudicatory Process*, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004)). The Commission has written 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." *Id.* The contention admissibility rules are strict by design. *Id.*

Conclusory assertions and speculation in pleadings are insufficient to support the admission of a contention. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 200 (2008) and cases cited therein. The Commission has stated that "[m]ere 'notice pleading' is insufficient under these standards." *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). A petitioner meets its pleading burden by providing "plausible and adequately supported claims." *Id*. While the Commission does not "expect a petitioner to prove its contention at the pleading stage," the Commission does require a petitioner to "show a genuine dispute warranting a hearing." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004). Thus, a petitioner, and its expert, must demonstrate how the relied-upon facts support its contention. *See id*; *see also USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 442-43 (2006) (dismissing as inadequate support expert testimony that merely outlined future research and did not describe any facts on a project's impacts to support an "impacts" contention); *S. Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, 71 NRC 1, 18 (Jan. 7, 2010) (finding an expert opinion offering "unsupported assertions" and failing to

provide a specific challenge to the applicant's analysis insufficient for admissibility purposes).

Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Florida Power & Light Company* (St. Lucie Nuclear Power Plant, Units 1 and 2), LBP-08-14, 68 NRC 279, 288 (2008) (*citing* 69 Fed. Reg. at 2221); *see also Private Fuel Storage, LLC.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

B. Additional Requirements for the Admission of Non-Timely and Late-Filed Contentions.

The standards governing the admissibility of contentions filed after the initial deadline for filing (*i.e.,* "late-filed contentions") are well established. In brief, the admissibility of late-filed contentions in NRC adjudicatory proceedings is governed by three regulations. These are: (a) 10 C.F.R. § 2.309(f)(2), concerning late-filed contentions, (b) 10 C.F.R. § 2.309(c), concerning non-timely contentions, and (c) 10 C.F.R. § 2.309(f)(1), establishing the general admissibility requirements for contentions. *See Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 259-261 (2009); *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006).

First, a late-filed contention may be admitted as a timely new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial filing period may be admitted with leave if it meets the following requirements:

> (2) . . . The petitioner may amend those [timely filed] contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing 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.

10 C.F.R. § 2.309(f)(2).

Second, a contention that does not qualify for admission as a new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provisions governing nontimely contentions, set forth in 10 C.F.R. § 2.309(c)(1). As stated therein, nontimely contentions "will not be entertained absent a determination by the . . . presiding officer . . . that the . . . contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:"

> (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.

10 C.F.R. § 2.309(c)(1); *Oyster Creek*, CLI-09-07, 69 NRC at 260; *Amergen Energy Co., LLC*

(Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 n.7 (2006). To show good cause for late filing under 10 C.F.R. § 2.309(c)(1), "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." *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), CLI-09-05, 69 NRC 115, 126 (2009); emphasis in original.

As the Commission has recognized, the requirements governing late-filed contentions and untimely filings, set forth in 10 C.F.R. §§ 2.309(c)(2) and 2.309(f)(2), "are stringent." *Oyster Creek*, CLI-09-07, 69 NRC at 260. Further, each of the factors set forth in the regulations is required to be addressed in a requestor's nontimely filing. *Id.* at 260-61. Indeed, under NRC case law, a petitioner's failure to address the late-filing criteria in 10 C.F.R. § 2.309(c) or 10 C.F.R. § 2.309(f)(2) "is reason enough" to reject the proposed new contention. *Millstone*, CLI-09-05, 69 NRC at 126.

Pursuant to 10 C.F.R. § 2.335(a), contentions challenging the adequacy of the Commission's regulations are beyond the scope of individual adjudicatory proceedings unless a waiver is requested and granted. "[A] petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999).

C. Policy on Consideration of Environmental Impacts of Accidents at the Operating License Stage

A brief history of consideration of accidents in environmental documents may be helpful in addressing the rulemaking/suspension request to suspend generic determinations regarding accidents, including fuel pool accidents.

In 1971 the Atomic Energy Commission ("AEC") published a proposed Annex to Appendix D of 10 C.F.R. Part 50 containing certain standardized assumptions to be used by

applicants in discussing accidents in environmental reports. Proposed Rule, Consideration of Accidents in Implementation of the National Environmental Policy Act of 1969, 36 Fed. Reg. 22851 (Dec. 1, 1971). The 1971 proposed rule included discussion on various classes and types of accidents, including spent fuel handling accidents and "Class 9" accidents; "Class 9" accidents involve "sequences of postulated successive failures more severe than those postulated for the design basis for protective systems and engineered safety features." 36 Fed Reg. at 22852. While noting that the consequences could be severe, the proposal also stated that defense-in-depth, quality assurance for design, manufacture, and operation, continued surveillance and testing, and conservative design made Class 9 accidents sufficiently remote, thus it would be unnecessary to discuss such events in Environmental Reports. *Id.* This proposed rulemaking and associated generic treatment of beyond design basis accidents was not finalized. Instead, the AEC, and its successor the NRC, continued to evaluate how the environmental consequences of accidents should be considered, in particular in light of work in risk assessment. Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352, 9356 (March 12, 1984).

The March 28, 1979 accident at Three Mile Island, Unit 2, emphasized the need to for a change of policy on how to analyze and evaluate the environmental consequences of accidents. *Id.* Thus, on June 13, 1980, the Commission published its Statement of Interim Policy, Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40101 (June 13, 1980). The Interim Policy withdrew the proposed Annex to Appendix D, along with the generic treatment of "Class 9" accidents,[18] and stated the

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[18] In fact, the Interim Policy statement determined that all of the classifications of accidents (continued. . .)

Commission's position that Environmental Impact Statements shall include considerations of the site-specific environmental impacts attributable to accident sequences that lead to releases of radiation and radioactive materials. 45 Fed. Reg. at 40102 - 40103. In 1984, the Commission stated its expectation that the Interim Policy guidance will remain in effect until such time as the Commission is able to continue the rulemaking proceeding initiated December 1, 1971, for the purpose of codifying the Commission's treatment of accident risks under NEPA, but noted that many ongoing activities in that area made it premature to complete the rulemaking at that time. 49 Fed. Reg. at 9356 - 9357.

The Commission's Interim Policy for the operating license remains in place today. Thus, the Commission requires, *inter alia*,

> Events or accident sequences that lead to releases shall include but not be limited to those that can reasonably be expected to occur. In-plant accident sequences that can lead to a spectrum of releases shall be discussed and shall include sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core. The extent to which events arising from causes external to the plant which are considered possible contributors to the risk associated with the particular plant shall also be discussed. Detailed quantitative considerations that form the basis of probabilistic estimates of releases need not be incorporated in the Environmental Impact Statements but shall be referenced therein.

45 Fed. Reg. at 40103.

With respect to spent fuel pool accidents in particular, the Staff has considered beyond design basis accidents.[19]

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(. . .continued)

proposed in the Annex shall no longer be used. 45 Fed. Reg. at 40103.

[19] As part of an environmental assessment for Watts Bar Unit 1 associated with increasing the storage capacity of the pool, the Staff wrote:

(continued. . .)

D. Regulatory Requirement for NEPA Document at The Time of Initial Licensing

As specified in 10 C.F.R. § 51.53(b), an applicant's environmental submittal shall discuss the same matters described in §§ 51.45 (general requirements of environmental report), 51.51 (uranium fuel cycle environmental data), and 51.52 (environmental effects of transportation of fuel and waste), but only to the extent that they differ from those discussed or reflect new information in addition to that discussed in the final environmental impact statement prepared by the Commission in connection with the construction permit. No discussion of need for power, or of alternative energy sources, or of alternative sites for the facility, or of any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b) is required in this report.

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(. . .continued)

> In its application, the licensee evaluated the possible consequences of postulated accidents and described the means for mitigating these consequences should they occur. This evaluation included spent fuel handling accidents. A fuel handling accident may be viewed as a reasonably foreseeable design basis event which the pool and associated structure, systems, and components are designed and constructed to prevent. On the basis of its analysis, the licensee concluded that the effects of the proposed TS changes are small and that the calculated consequences are within regulatory requirements and staff guideline dose values.
>
> ...
>
> The staff has considered accidents whose consequences might exceed a fuel handling accident that is beyond design basis events. The licensee and staff, as part of the operating license review, performed an analysis of installation of severe accident mitigation design alternatives (SAMDAs) in the environmental impact review. The staff concluded that none of the five design improvements warranted implementation at WBN.

Tennessee Valley Authority; Watts Bar Nuclear Plant, Unit 1; Environmental Assessment and Finding of No Significant Impact, 62 Fed. Reg. 18,371 (April 15, 1997).

II. Proffered New Contention

A. Statement of Contention

> The FSEIS for Watts Bar Unit 2 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 NEPA and the NRC regulations, these implications must be addressed in the ER.

Contention at 4.

B. SACE's Proffered Bases

As a basis for its claim, SACE discusses its opinions about the TFR (Contention at 5-8) and the requirements for an applicant to submit environmental information to assist the NRC in its NEPA duties (*id.* at 8-10). SACE then proffers that the applicant's FSEIS must be supplemented with new and significant information to meet NEPA. *Id.* at 10. Specifically, SACE believes that the "conclusions and recommendations" presented in the TFR constitute "new and significant" information for NEPA purposes. *Id.* at 11. SACE first observes that the accident at Fukushima occurred just five months ago, and is thus "new" information. *Id.* The specific "new" information that SACE describes is that, for the first time since 1979, a group of NRC Staff has questioned the adequacy of the NRC's safety regulations, and thus the NRC must revisit any conclusions in TVA's FSEIS based upon regulatory compliance. *Id.* at 12.

SACE quotes TVA for a definition of severe accidents as being accidents too unlikely for design controls and then argues that, based upon the TFR, design changes are needed to protect against severe accidents. *Id.* at 11-12. Thus, SACE argues that TVA's FSEIS must be supplemented in light of the TFR's recommendation that certain accidents formerly classified as

severe should be incorporated into the design basis.[20] *Id.* at 13.

SACE asserts that, based upon the Task Force recommendation, all severe accident mitigation alternatives should be adopted regardless of cost. *Id.* at 14. SACE says that the cost-benefit analysis for WBN Unit 2 must be re-evaluated. *Id.* SACE sees improved safety as a benefit of adopting all SAMAs. *Id.* SACE opines that "consideration of the costs of mandatory measures could affect the overall cost-benefit analysis for the reactor." *Id.*

SACE asserts that TVA's FSEIS must be supplemented to include a discussion of the TFR's recommended measures to ensure the plant's protection from seismic and flooding events. *Id.* at 15-16. SACE also asserts that the FSEIS must be supplemented to include a discussion of the additional mitigation measures recommended by the task force report. *Id.* at 16-17.

C. SACE's Asserted Claims of Timeliness and Good Cause for Lateness

SACE asserts it is timely because it submitted its Motion and Petition within 30 days of the TFR. Motion at 3, 4 (unnumbered). SACE argues that it also meets the non-timely standards of 10 C.F.R. § 2.309(c) because, *inter alia,* it has "good cause" because it acted promptly upon learning of new information, and no other means are available to protect its interests. *Id.* at 4, 6 (unnumbered).

III. The Staff Opposes Admission of the Contention

The Staff opposes admission of the contention because, *inter alia,* SACE fails to show that its proffered contention is within the scope of the proceeding (10 C.F.R. 2.309(f)(1)(iii)), and

[20] Actually, for NEPA purposes, this recommendation is moot, in that since 1980 the Commission's policy has been to address all accidents, and not to exclude a class of "severe" or "beyond design basis" from review. 45 Fed. Reg. at 40101. Thus, SACE is mistaken that a "complete overhaul" is needed to enable the FSEIS to address severe accidents. To the contrary, the Commission's policy does not limit consideration to accidents that "can reasonably be expected to occur" but instead includes a "spectrum of releases." 45 Fed. Reg. at 40103.

fails to show that TVA's environmental documents do not meet a statutory or regulatory requirement. 10 C.F.R. 2.309(f)(1)(vi). In addition, the contention does not meet the timeliness requirements of 10 C.F.R. § 2.309(c). Last, the petition impermissibly re-argues SACE's denied waiver request.

A. The Contention Does Not Meet Required Elements of 10 C.F.R. § 2.309(f)(1)

Failure to comply with any of the requirements of 10 C.F.R. § 2.309(f)(1) is grounds for the dismissal of a contention. *St. Lucie*, LBP-08-14, 68 NRC at 288 (*citing* 69 Fed. Reg. at 2221; *see also Private Fuel Storage, LLC.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)). As explained below, the new contention fails to meet many of these factors, including § 2.309(f)(1)(iii)(scope), § 2.309(f)(1)(iv)(materiality), § 2.309(f)(1)(v)(support), and § 2.309(f)(1)(vi)(genuine dispute). Thus the contention should be denied.

1. The Contention Is Not Within The Scope Of The Proceeding

To be admissible, 10 C.F.R. § 2.309(f)(1)(iii) requires SACE to demonstrate that the issue raised in the contention is within the scope of the proceeding. SACE provides a one-sentence argument stating: "The contention is within the scope of the proceeding because it seeks compliance with NEPA and NRC-implementing regulations, which must be complied with before Watts Bar Unit 2 may be licensed." Contention at 19.

However, this brief argument is unpersuasive, and the proffered contention is beyond the scope of the licensing action, and is instead inseparably linked to rulemaking and broad generic changes sought by SACE. Specifically, the Contention seeks (a) to litigate in an individual proceeding the TFR's recommendations, which are being addressed by the Commission generically; (b) impermissibly to challenge the Commission's regulations including 10 C.F.R. § 51.53(b); and (c) to make a generalized attack on the Commission's safety regulations. None of those items are part of the NEPA review for the operating license

proceeding for WBN Unit 2. Consequently, the Contention is inadmissible. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005) (Contentions outside the scope of the proceeding must be rejected).

a. The Contention Impermissibly Seeks Individual Litigation of Generic Issues

SACE asserts that its Contention is based upon the TFR's findings and recommendations and concedes that the new contention would be moot if the Commission adopted all of the TFR's recommendations.[21] Contention at 5, 19. SACE does not, however, assert that these recommendations must be resolved in individual proceedings and, in fact, acknowledges that generic resolution may be more appropriate. *See* Contention at 4.

By their terms, the TFR's recommendations are intended to apply to all existing plants. TFR at ix. Only recommendation 5 is limited to plants with specific containment types – BWR Mark I and Mark II containments,[22] but even then there are multiple plants with those containment types. *Id.* The TFR also outlines a suggested approach to implement its recommendations. TFR at Appendix A. The TFR envisions that many of its recommendations will ultimately be implemented via the rulemaking process using orders to implement new requirements while the rulemaking process is ongoing. *Compare* TFR Appendix A at 73 "Recommended Rulemaking Activities" *with* TFR Appendix A at 74-75 "Recommended Orders." Currently, the TFR's recommendations are being considered by the Commission for application to all operating plants. *See* Staff Requirements Memorandum SECY-11-0093, Near-Term

[21] This is a curious position and further enforces that the contention is not truly about TVA's documents, and thus is inadmissible, inasmuch as the contention alleges an omission from TVA's documents, but, logically, such omission is not changed through the NRC's adoption of the TFR recommendations.

[22] WBN Unit 2 is a pressurized water reactor thus does not have a BWR Mark I or Mark II containment.

Report and Recommendations for Agency Actions Following the Events in Japan (Aug. 18, 2011) (ADAMS Accession No. ML112310021).

In accordance with long-standing NRC policy, licensing boards are not to entertain contentions on topics that are or are likely to become the subject of general rulemaking. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, 72 NRC__ (Jul. 8, 2010)(slip op. at 2-3) (ADAMS Accession No. ML101890873). Further, if a party is not satisfied with the Commission's generic resolution of an issue, the remedy lies in the rulemaking process, not in an individual adjudicatory proceeding. *Id.* at 3.

Because the TFR recommendations are generic in nature and, if adopted by the Commission will likely become the topic of orders and general rulemaking, the Contention is not within the scope of any individual proceeding.

b. The Contention Impermissibly Challenges The Commission's Regulations

As discussed in the background section above, SACE previously, but unsuccessfully,[23] sought to challenge the discussion of need for power and of alternative energy sources in the TVA's environmental document by requesting a waiver of 10 C.F.R. § 51.53(b)[24]. Because SACE was not successful in its request to waive 10 C.F.R. § 51.53(b), TVA was not required to discuss need for power, or of alternative energy sources, although the Commission authorized the Staff to include such discussions if the Staff found information meeting the legal threshold of new and significant information. *Watts Bar*, CLI-10-29, 72 NRC __ (slip op. at 10.).

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[23] In CLI-10-29, the Commission upheld the Board's determination in LBP-10-12, that SACE failed to make a *prima facie* case for waiving 10 C.F.R. § 51.53(b).

[24] 10 C.F.R. § 51.53(b) governs the content of the supplemental environmental report submitted by the applicant at the operating license stage. It states in part that "[n]o discussion of need for power, or of alternative energy sources . . . is required in this report." 10 C.F.R. § 51.53(b).

Now, without a waiver request, SACE attempts to re-argue these topics, stating, "[C]osts may be significant, showing that other alternatives such as the no-action alternative and other alternative electricity production sources may be more attractive." Contention at 14. Similarly, SACE's expert, Dr. Makhijani, expresses concern that adoption of the TFR's recommendations "will affect the overall cost-benefit analysis for reactors, especially the comparisons of nuclear power with alternative sources of electricity." Makhijani Declaration at 5.

By proffering a contention alleging that costs have changed and other energy sources are better, SACE is improperly attempting to revisit the waiver request without addressing any of the factors of 10 C.F.R. § 2.335(b). This is an improper challenge to the Commission's rules. Thus, in the absence of a waiver, the Board should deny the proffered contention as out of scope, against 10 C.F.R. § 51.53(b), and remains barred by 10 C.F.R. § 51.106.

Further, even assuming SACE had been successful in its waiver of 10 C.F.R. § 51.53(b), along with other relevant regulations (e.g. 10 C.F.R. § 51.106(c)) and could then dispute the cost-benefits, Dr. Makhijani's discussion puts the cart before the horse—no design requirements have changed, thus there are no changes to cost-benefit analyses.

Thus, this re-challenge to the Commission's regulations is beyond the scope of the proceeding and should not be admitted. 10 C.F.R. § 2.309(f)(1)(iii).

c. The Contention Is a Generalized Attack on the Commission's Safety Regulations

Although the Contention focuses on compliance with NEPA (i.e., it claims an omission from TVA's environmental document), there are a number of assertions in the Contention generally challenging the adequacy of the Commission's safety regulations. These matters are beyond the scope of this proceeding. SACE asserts, based upon its reading of the TFR and the TRF's recommendations, that the Commission's current regulatory requirements do not provide reasonable assurance of adequate protection because the Commission's regulations do not

include mandatory requirements on severe accidents. Contention at 7.[25] SACE asserts that the Commission's "current regulatory scheme requires significant re-evaluation and revision in order to expand or upgrade the design basis for reactor safety recommended by the Task Force Report." Contention at 8. SACE's assertion that the contention would be moot if the Commission were to adopt all of the TFR's recommendations (Contention at 19) further indicates that SACE is, nevertheless, challenging the general adequacy of the Commission's safety regulations, and not simply seeking compliance with NEPA's procedural requirements.

2. The Contention Is Not Material To the Environmental Review of WBN Unit 2

To be admissible, a petitioner must demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding. 10 C.F.R. § 2.309(f)(1)(iv).

SACE's discussion on materiality is brief, basically asserting that because compliance with NEPA is material, SACE's proffered contention is material. Contention at 20. However, as discussed below, this logic fails because (a) the TFR is not material to the review of Watts Bar Unit 2, which had been ongoing long before the TFR's existence and (b) the desired additional alternatives analyses are not material. Thus the contention should be denied. 10 C.F.R. § 2.309(f)(1)(iv).

a. The TFR Is Not Material

The Contention does not raise a material dispute with the environmental portions of the

[25] This statement is not accurate. As the TFR states, the Commission has regulatory requirements for some beyond-design basis accidents in 10 C.F.R. § 50.63, Loss of All Alternating Current Power," 10 C.F.R. § 50.62 "Requirements for Reducing the Risk from Anticipated Transients without Scram (ATWS) for Light-Water-Cooled Nuclear Power Plants," and 50.54(hh), requiring procedures for mitigating beyond-design basis fires and explosions. *See* TFR at 16-17.

application because it relies on the TFR, which makes safety recommendations to the Commission. While the recommendations in the TFR represent a step in the NRC's response to the Fukushima accident, the Task Force was tasked with the assessment of safety issues, and its recommendations do not have any particular relevance to the Staff's environmental review. The Atomic Energy Act of 1954 ("AEA") requires the NRC to ensure the safe operation of nuclear power plants. *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 109 (D.C. Cir. 1987). Under Section 182.a of the AEA, the Commission must ensure that "'the utilization or production of special nuclear material will . . . provide adequate protection to the health and safety of the public.'" *Id*. (quoting 42 U.S.C. § 2232(a)) (alterations in original). In contrast, NEPA requires that "agencies take a hard look at environmental consequences" of major federal actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotations omitted). While the NRC may review similar topics under the two acts, the NRC's reviews under the two acts are distinct from each other. *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 730-31 (3d Cir. 1989). Thus, the NRC's evaluation of an issue under one act will not necessarily impact the agency's consideration of the issue under the other. *Id*.

The Commission established the Task Force following the Fukushima Dai-ichi accident to "conduct a methodical and systematic review of the NRC's process and regulations to determine whether the agency should make additional improvements to its regulatory system and to make recommendations to the Commission for its policy direction." TFR at 1. The TFR first concluded that "a sequence of events like the Fukushima accident is unlikely to occur in the United States[.] Therefore, continued operation and continued licensing activities do not pose an imminent risk to public health and safety." TFR at vii. Nonetheless, the TFR chose to recommend "significant reinforcements to NRC requirements and programs." *Id*. at 5. Consequently, the TFR proposed to "redefine <u>what level of protection of the public health should be regarded as adequate</u>." *Id*. at 4 (emphasis added). In short, the Task Force addressed

safety issues, rather than the environmental consequences of agency actions. In line with this focus, the TFR proposed a list of safety enhancements to reinforce the NRC's existing regulatory structure. *Id*. at ix. Therefore, while the TFR made extensive recommendations under the AEA, it did not find that the Fukushima accident would have a direct impact on the NRC's environmental reviews of current licensing activities under NEPA or recommend that the NRC alter those reviews to account for an event like the Fukushima accident.

Thus, the TFR's findings are directed towards improving the NRC's regulatory framework for providing reasonable assurance that existing reactors will operate safely under the AEA. But NEPA, the statute governing the Staff's environmental licensing review, contains a very different standard: it only requires agencies to take a "hard look" at the environmental consequences of their actions. *Methow Valley*, 490 U.S. at 350. The TFR's recommendations leave in place the agency's existing regulatory requirements; the Task Force's recommendation that the NRC take additional steps to ensure adequate protection do not point to any inadequacy in the NRC's consideration of environmental impacts in this proceeding. As a result, the conclusions in the TFR are immaterial to the NRC Staff's environmental review, and therefore the Board should deny admission of this contention, which is based exclusively on those findings. 10 C.F.R. § 2.309(f)(1)(iv).

Moreover, to the extent the TFR considers environmental consequences, that consideration supports the reasonableness of existing environmental reviews. The TFR states, "The current NRC approach to land contamination relies on preventing the release of radioactive material through the first two levels of defense-in-depth, namely protection and mitigation." TFR at 21. The TFR observes that land contamination cannot occur in the absence of a release of radioactive materials and concludes that "the NRC's current approach to the issue of land contamination from reactor accidents is sound." *Id*. Additionally, the TFR concludes that the defense-in-depth philosophy should occupy a central place in the future

regulatory framework. *Id*. at 20. The TFR makes no recommendations, no suggestions, and no changes to the NRC's longstanding Statement of Interim Policy, Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40101 (June 13, 1980).

SACE has not demonstrated how its proffered contention based upon the TFR is material to any findings the NRC must make. 10 C.F.R. § 2.309(f)(1)(iv)

b. Additional Alternatives Analyses Are Not Material

Next, the Petition asserts that the analysis should consider "what, if any, design measures could be implemented (i.e. through NEPA's requisite 'alternatives' analysis) to ensure that the public is adequately protected from" seismic and flooding risks. Contention at 16. Additionally, the Contention asserts that the alternatives analysis should consider additional mitigation measures discussed by the TFR. *Id*. at 17-18. These mitigation measures include "strengthening SBO mitigation capability," installing hardened vent designs at facilities with BWR Mark I and Mark II containments,[26] "enhancing spent fuel pool makeup capability and instrumentation for the spent fuel pool," improving emergency response capabilities, and "addressing multi-unit accidents." *Id*. at 17.

But, the SACE has failed to show that the existing SAMA analysis is inadequate. In this regard, Commission has stressed, the "ultimate concern" for a SAMA analysis "is whether any additional SAMA should have been identified as potentially cost beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis." *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529,

[26] This claim is obviously immaterial to this proceeding because Watts Bar Unit 2 is a pressurized water reactor.

533 (2009). "Unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is only to determine what safety enhancements are cost-effective to implement." *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Station), CLI-10-11, 71 NRC 287, 317 (2010).

When petitioners propose consideration of an additional mitigation measure, the Commission has required the petitioners to provide a "ballpark figure for what the cost of implementing this SAMA might be." *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 12 (2002). The Commission is unwilling "to throw open its hearing doors to Petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions about the ease and viability of their proposed SAMA." *Id*. Thus, the Commission has found that a "conclusory statement that an envisioned SAMA 'would not pose a great challenge' is insufficient." *Id*. Such a statement provides no indication of "what logistical or technical concerns might be involved in implementing" the proposed SAMA. *Id*. In light of this holding, the Board in the *Indian Point* license renewal proceeding denied admission of a contention requesting consideration of a fire protection SAMA because the petitioner had not "provided any information indicating the potential costs associated with the upgrade in fire protection." *Indian Point*, LBP-08-13, 68 NRC at 104.

In this case, the Contention relies on the Makhijani Declaration to support its request that the TVA FSEIS must be supplemented to consider the use of these additional mitigation measures to reduce the project's environmental impacts. Contention at 17. But, the Makhijani Declaration only provides vague estimates on the cost of these potential SAMAs. With respect to seismic and flooding issues at operating reactors, the Makhijani Declaration states that a

reassessment of those concerns "may also involve increased costs due to required backfits." Makhijani Declaration at ¶ 19. Next, the Makhijani Declaration concludes that the TFR's recommendation to further analyze station blackout events for new reactor design certifications "could result in the imposition of costly prevention or mitigation measures." *Id*. at ¶ 20. With regard to hardened vents for the BWR Mark I and II reactors, the declaration speculates that the cost of such improvements is "likely to be substantial." *Id*. at ¶ 21. Last, the declaration finds that implementing mitigation measures for multi-unit accidents "could be significant." *Id*. at ¶ 24.

Notwithstanding these generalized assertions, the Contention and Makhijani Declaration do not raise a material SAMA contention, because the SACE asks the NRC to consider additional SAMAs without providing an adequate indication of what the additional SAMAs are and may cost. Rather, the Makhijani Declaration relies on vague assertions that the cost of certain mitigation measures may be significant. But, such conclusory statements do not amount to a "ballpark figure" for what the proposed SAMAs may cost. *McGuire/Catawba*, CLI-02-17, 56 NRC at 12. Rather, they are akin to the claims that a given SAMA "would not pose a great challenge," which the Commission explicitly rejected. *Id*. Consequently, the statements do not provide sufficient support to show that the SAMA claim raises a material issue because they do not provide an adequate indication of what the cost of the mitigation measures may be. Without a quantitative estimate of the costs of a given SAMA, conducting a meaningful cost-benefit analysis of the SAMA under NEPA is impossible. Moreover, the claims in the Contention and Makhijani Declaration do not specifically address any current SAMAs described in the applicant's submittal, let alone explain how the information in the TFR could lead to one of them becoming cost-beneficial. Because these claims do not provide sufficient information to demonstrate materiality, they should be rejected. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

Possible changes to mitigation measures are not a material issue. If the NRC concludes that proposed mitigation measures in the TFR are necessary to provide a reasonable assurance

of adequate protection, the NRC will require licensees and applicants to implement them as part of its ongoing oversight processes and licensing requirements. These measures will apply to all facilities. As a result, the costs associated with complying with any TFR recommendations are immaterial to the decision issuing an operating license.

As discussed above, the TFR includes several recommendations to enhance safety at existing and proposed nuclear reactors that relate to redefining the level of adequate protection. *See supra*, Discussion Section II.A.1.a (*citing* TFR at ix). Consequently, to the extent the NRC ultimately adopts any specific recommendations from the TFR, it will do so under its on-going reactor regulatory oversight and rulemaking processes.

Therefore, in addition to the prohibition in 10 C.F.R. §§ 51.53(b) and 51.106(c), the Contention's claim that compliance with the TFR recommendations could change the cost-benefit analysis underlying the need for power analysis is not material to this proceeding. NEPA does require agencies to consider the "costs and benefits of a particular action." *Sierra Club v. Sigler*, 695 F.2d 957, 978 (5th Cir. 1983). But, the costs of complying with the TFR recommendations will not be attributable to the current licensing process under the existing regulations. As discussed above, the NRC must have reasonable assurance of adequate protection for existing reactors. 42 U.S.C. § 2232(a). If the NRC changes the regulatory process to redefine the level of adequate protection, then TVA's design of WBN Unit 2, as well as WBN Unit 1, may be required to change. But currently, without any new rules in effect, the costs of complying with any proposal in the TFR are irrelevant to the decision to renew the license. Therefore, even if this claim were within scope of this proceeding, it is immaterial. The Board should reject it. 10 C.F.R. § 2.309(f)(1)(iv)(vi).

3. The Contention Is Inadequately Supported

Under 10 C.F.R. § 2.309(f)(1)(v), SACE must provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on

which it intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue. SACE offers the contents of the TFR and the Declaration of Dr. Arjun Makhijani to address C.F.R. § 2.309(f)(1)(v) and to support its claim that TVA's EIS must be supplemented. Contention at 20-21.

However, SACE's new contention is inadmissible because it lacks an adequate factual basis. SACE misinterprets numerous parts of the TFR, including, *inter alia*, (a) implying that the TFR questions whether the NRC can conduct reactor licensing activities in a manner that maintains public health and safety, (b) claiming that the TFR effectively recommends that the process for considering SAMAs be overhauled, (c) and asserting that all SAMAs be incorporated regardless of cost. Additionally, (d) although the Contention frequently refers to the accompanying Makhijani Declaration, that document does not provide sufficient information to support the Petition's claims against TVA's documents.[27] Finally, the Contention also misstates the standard for examining new information under the Supreme Court ruling in *Marsh v. Oregon*.

a. The TFR Does Not Question Whether the NRC Can Continue to License Reactors

The TFR provided a summary of the recommended near-term actions. TFR at 74-75. Review of these near-term recommended orders, changes to staff guidance, and training

[27] A number of intervenors in other cases filed requests containing "substantially similar" claims to those in the Petition. Contention at 3. The filing of substantially similar contentions in numerous proceedings does not satisfy an intervenor's obligation to comply with the Commission's strict requirement for specificity in pleading. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989) ("The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point. The Commission cannot be faulted for not having searched for a needle that may be in a haystack.").

reveals no recommendations related to NEPA and the contents of documents prepared for an operating license request. Thus, the TFR does not support the proffered NEPA contention.

Regarding Watts Bar Unit 2, the TFR had a single paragraph, saying:

> the Task Force recommends that operating license reviews and the licensing itself include all of the near-term actions and any of the recommended rule changes *that have been completed at the time of licensing*. Any additional rule changes would be imposed on the plants in the same manner as for other operating reactors.

TFR at 72 (emphasis added).

Thus, with respect to Watts Bar Unit 2, the TFR itself inherently recognized that if a rule or a near-term action is completed, then the licensing process should address it. The TFR could have recommended that all licensing review stop, or that the WBN Unit 2 license be withheld or conditioned, but the TFR did not.

SACE states, as general support for its contention, that TFR does not "report a conclusion that licensing of reactors would not be 'inimical to public health and safety.'" Contention at 5. But, SACE also notes that the TFR makes a finding that continued license activities "are not inimical to the common defense and safety." *Id*. at 5 (quoting TFR at 18). On this issue, SACE is mistaken. The TFR explicitly states "the Task Force concludes that continued operation and continued licensing activities do not pose an imminent risk to the public health and safety and are not inimical to the common defense and security." TFR at 18. SACE bases its argument on the TFR's use of the term "imminent risk" as opposed to "not inimical." However, there is nothing in the report that implies anything other than the intent that continued operation and continued licensing activities are not inimical to the public health and safety. Therefore, SACE's argument that the TFR did not make the requisite finding of "not inimical to the public health and safety" is inconsistent with the findings of the TFR.

b. The TFR Does Not Recommend Overhauling SAMA

SACE claims that the TFR effectively recommends overhauling how the NRC considers

SAMAs. Contention at 13. However, the TFR makes no reference whatsoever to SAMAs. The TFR does make reference to probable risk assessments ("PRA"), but that discussion does not reference PRA levels in the SAMA context. TFR at 21-22. As NRC Staff experts have explained in license renewal proceedings, PRAs have traditionally been divided into three levels: level 1 is the evaluation of the combinations of plant failures that can lead to core damage; level 2 is the evaluation of core damage progression and possible containment failure resulting in an environmental release for each core-damage sequence identified in level 1; and level 3 is the evaluation of the consequences that would result from the set of environmental releases identified in level 2.[28] All three levels of the PRA are required to perform a SAMA analysis. Bixler and Ghosh Testimony at 8. The TFR states that its framework of recommendations "could be implemented on the basis of full-scope Level 1 core damage assessment PRAs and Level 2 containment performance assessment PRAs." TFR at 21. However, the TFR "has not recommended including Level 3 PRA as a part of a regulatory framework." *Id.* at 22. Moreover, the Task Force specifically disclaimed any intent to require a Level 3 PRA as part of its recommendations at a subsequent public meeting with the Commission. Briefings on the Task Force Review of NRC Processes and Regulations Following the Events in Japan at 48 (Jul. 19, 2011) (ADAMS Accession No. ML112020051). Because the TFR does not recommend a Level 3 PRA analysis and the Task Force specifically rejected the idea during its presentation to the Commission, the conduct of a Level 3 PRA is not part of its recommendations.

SACE also claims, based on the TFR, that all SAMAs should be implemented regardless

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[28] NRC Staff Testimony of Nathan E. Bixler and S. Tina Ghosh Concerning the Impact of Alternative Meteorological Models on the Severe Accident Mitigation Alternatives Analysis at 78 (Jan. 3, 2011) (ADAMS Accession No. ML110030966) ("Bixler and Ghosh Testimony").

of cost. Contention at 14. The TFR does make some discrete recommendations, but none of those come close to recommending that SAMAs be implemented regardless of cost. SACE supports its claim by stating that implementation of SAMAs would be required to meet adequate health and safety requirements under the AEA. Contention at 14. As discussed above, this justification is inaccurate because the requirements for meeting the AEA's requirements for health and safety are distinct from NEPA's hard look requirements. *See supra,* Discussion Section III.A.2.a.

c. The TFR Does Not Recommend That Mitigation Measures Be Implemented Regardless Of Cost

Next, the Contention claims that the TFR "recommends that severe accident mitigation measures should be adopted into the design basis . . . *without regard to their cost*." Contention at 14 (emphasis in original). SACE concludes that the values assigned to the cost-benefit analysis for Watts Bar Unit 2, as described in TVA's SAMA analysis, "must be re-evaluated in light of the Task Force's conclusion that the value of SAMAs is so high that they should be elected as a matter of course." *Id*. SACE appears to assert that SAMAs should be "imposed as mandatory measures." *Id*.

As discussed above, the Staff does not concur with the Petition's assessment that the TFR actually recommends that the Commission should require licensees to implement all SAMAs, regardless of cost-benefit.[29] *See supra*, Discussion, Section III.A.3.b. While the TFR reached conclusions regarding additional steps the NRC can undertake to improve safety, these conclusions were part of the TFR's safety evaluation. Thus, the TFR based its proposals on redefining "what level of protection of the public health is regarded as adequate." 10 C.F.R. §

[29] In fact, the TFR does not mention SAMAs.

50.109(a)(4)(iii)(describing requirements for backfitting under the AEA).

To be sure, in the event that the Commission should determine to expand the scope of design basis accidents to provide reasonable assurance of adequate protection, it would do so without regard to cost considerations. SAMAs, however, are different. The NRC conducts the SAMA analysis to satisfy the requirements of NEPA, not the AEA. 10 C.F.R. § 51.53(c)(3)(ii)(L); *Limerick*, 869 F.2d at 730-31.[30] In contrast to "adequate protection" requirements, an analysis of costs and benefits is an integral part of a SAMA evaluation. Nonetheless, the outcome of a SAMA cost-benefit analysis does not mandate the adoption of a SAMA. The Supreme Court directly considered whether NEPA requires mitigation in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). The Court noted that while NEPA announced sweeping policy goals, "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Id.* at 350 (ci*ting Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28(1980) and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978)). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.'" *Id.* (*citing Stryker's Bay Neighborhood Council*, 444 U.S. at 227-28, (*quoting Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21 (1976))). In light of these principles, the Court found a

> fundamental distinction … between a requirement that mitigation be discussed in sufficient detail to ensure that environmental

[30] Prior to TVA's SAMA submittal of January 2009, SAMDAs had already been reviewed by the NRC. Specifically, in 1995, in support of the operating license for Unit 1, the NRC issued a Supplement (NUREG-0498, Supplement 1) to the Final Environmental Statement related to the operation of Watts Bar Nuclear Plant Units 1 and 2 (issued in December 1978). It included analysis of plant operation SAMDAs and concluded that none of the SAMDAs, beyond three procedural changes that the applicant committed to implement, would be cost-beneficial for further mitigating environmental impacts. See Notice of Availability, Supplemental Environmental Statement [for Watts Bar], 60 Fed. Reg. 21,225 (May 1, 1995).

> consequences have been fairly evaluated on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted on the other.

*Id*. at 352. Thus, the Court concluded that the lower court erred in "in assuming that NEPA requires that action be taken to mitigate the adverse effects of major federal actions." *Id*. at 353 (internal quotations omitted). As a result, contrary to the Contention's assertions, NEPA imposes no obligation on the NRC to require mitigation.

Consequently, to the extent the Contention claims that the current SAMA analysis is inadequate because it does not require the TVA to implement all of the identified mitigation measures regardless of cost, the Contention does not raise a material dispute. The claim that the SAMA analysis must require mitigation of all identified SAMAs is not material to the NRC's review under NEPA, because NEPA contains no requirement that the agency impose mitigation.

d. Dr. Makhijani's Declaration Does Not Support the New Contention For WBN Unit 2

In addition to relying on the TFR, the Contention also makes several references to a declaration from Dr. Makhijani. However, Dr. Makhijani's declaration provides no support for the Contention apart from its discussion of the TFR, and it provides no discussion of TVA's environmental information, including the construction permit environmental impact statement and the supplements and additional environmental reviews performed subsequently. Instead, Dr. Makhijani offers his opinions on general topics regarding BWR containments, station blackouts, floods, and new reactor design, but nothing to show that he's familiar with the specific TVA documents.

Dr. Makhijani expresses his agreement with the TFR's conclusions regarding the need to expand the design basis accident requirements for reactors. Makhijani Declaration at 3, 4. He sees the NRC's regulations as inadequate. *Id.* But, his concerns with the NRC's safety rules and his desire that the safety rules be changed are too far removed from the content of TVA's

environmental information to support an admissible contention. Rather, Dr. Makhijani provides a generalized opinion about the potential effects of the TFR's recommendations upon environmental analyses for new reactors, existing reactor license renewal, and standardized design certification. Makhijani Declaration at 4. He claims that if the TFR's recommendations became requirements, then reactor designs would change and environmental analyses would change. *Id.* However, these statements are irrelevant to the proffered contention. Stating that under a different regulatory scheme, a different NEPA result may occur simply does not provide support for a claim that the environmental review at hand is deficient under the existing regulatory scheme.

Dr. Makhijani also states that the TFR finds that earthquake and flood risks might be greater than previously thought. Makhijani Declaration at 4. From this, he concludes that if the risks are found to be different, then the environmental documents must change. *Id.* But, this assertion amounts to speculation. The assertion is too far removed from the environmental documents at issue to provide support for the Petition. Moreover, even if the TFR's safety recommendations did affect the analysis in the environmental documents, nothing in the declaration suggests that change would be large enough to alter any of the existing conclusions on the environmental impacts of relicensing.

Dr. Makhijani asserts that in the event the Commission adopts the recommendations in the TFR, reactor site selection and cost-benefit analysis could be affected. *Id.* at 4-5. Again, these forward looking statements are irrelevant to the proffered environmental contention; there are no new requirements that would impact site selection at this time. *See supra*, Discussion Section III.A.1.a. Further, consideration of alternative sites is not required in the environmental documents for an operating license. 10 C.F.R. § 51.53(b).

Finally, in some instances, Dr. Makhijani appears unfamiliar with the NRC's environmental review policy. For example, where Dr. Makhijani states that the NRC effectively

disregarded a 1980 recommendation to modify the NRC's philosophy about reactor design and "Class Nine Accidents" (*id*. at 3-4), the declaration appears unaware that of the fact that later that same year NRC explicitly withdrew the "Class Nine Accident" philosophy for environmental reviews,[31] and announced that the agency's environmental assessments would include consideration of both the probability and consequences of radioactive releases associated with severe accidents. Interim Policy Statement, 45 Fed. Reg. at 40101, 40102.. The Interim Policy Statement withdrew the proposed generic treatment (by omission) of "Class Nine" accidents in NRC environmental impact statements. *Id.* at 40103.

Consequently, the Makhijani declaration does not form a sufficient basis for the Petition's claims.

e. *Marsh v. Oregon* Does Not Support the Contention

Finally, SACE's reliance on *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) to justify admission of their new contention is misplaced. While the Supreme Court in *Marsh* established that an agency must take a "hard look" at significant new information, the Court also stated that "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh*, 490 U.S. at 392. Such a requirement "would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Id.* at 373.

Specific to Watts Bar Unit 2, the Commission has recognized that there is a legal threshold for new and significant information which must be met before a discussion in the

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[31] As discussed in the Commission's Interim Policy Statement, a proposed Annex to 10 C.F.R. Part 50 Appendix D, published for comment on December 1, 1971, would have included consideration of Class 8 (design basis) accidents, and omitted consideration of Class 9 accidents in NRC environmental assessments. *See* Interim Policy Statement, 45 Fed. Reg. at 40102.

Watts Bar Unit 2 supplemental environmental impact statement is needed. *Watts Bar,* CLI-10-29, 72 NRC __ (slip op. at 10.).

The D.C. Circuit has explained that "if new information shows that the remaining action will affect the quality of the environment in a significant manner or to a significant extent *not already considered*, a supplemental EIS must be prepared." *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis added) (internal quotes and citations omitted). However, a supplemental EIS is only required where new information "provides a seriously different picture of the environmental landscape." *Id.* (quoting *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002)). The Commission additionally adopted this standard in *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 52 (2001), stating "[t]he new circumstance must reveal a seriously different picture of the environmental impact of the proposed project.''

In attempting to use *Marsh* to justify admission of its contention, SACE is in effect claiming that the contention involves information that has not already been considered and provides a seriously different picture of the environmental landscape. As discussed above, the TFR is in essence a safety report, and does not deal with environmental recommendations. *See supra*, Discussion Section III.A.2.a. Since the TFR doesn't purport to make environmental recommendations, the TFR does not change the environmental landscape. Therefore, the information does not satisfy the standard under *Marsh*. Nor does SACE present facts or expert opinion that a Fukushima-type of event will occur at the licensing site or whether its impact will be the same or greater than that already considered.

Thus, as discussed above, the quotations from the TFR and Makhijani Declaration do not provide sufficient support for the claims in the Contention. The recommendations in the TFR do not relate to the NRC's environmental reviews in general or SAMA analyses in particular. Moreover, the Makhijani Declaration is too speculative and general to provide a

sufficient factual basis for the proffered contention.

As a result, the Board should find the proposed contention unsupported and thus inadmissible. 10 C.F.R. § 2.309(f)(1)(v).

4. The Contention Does Not Demonstrate a Genuine Dispute With the Application

Pursuant to 10 C.F.R. § 2.309(f)(vi), a proffered contention must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes" or reasons to show that the application omitted required information. "On environmental matters this showing must include a reference to the specific portion of the applicant's environmental report that the petitioner believes inadequate." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). If the Staff has published its own environmental documents, and the data and conclusions in those documents significantly differ from the information in the environmental report, then the Petitioner may also base a contention on errors or omissions in the Staff's environmental documents. *Id*. One purpose of these strict admissibility rules is to "put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose." *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974).

As explained below, SACE neither demonstrates (a) a dispute with the contents of the application, nor (b) an omission of required information.

a. SACE Fails To Dispute What Is In The Application

SACE's support on this section is very brief -- SACE points to the TFR and the Makhijani Declaration. Contention at 21. Those references are insufficient. As discussed above, those documents are unrelated to the contents of TVA's application for an operating license for Watts

Bar Unit 2. Therefore the Contention does not satisfy the requirement to refer to the specific portions of the documents it disputes. In its arguments, SACE quotes part of TVA's EIS, but rather than disputing, it holds up the TVA EIS for a definition of "accident." Contention at 12-13 (quoting FSEIS at 73).

Simply put, there is no place where SACE identifies what TVA wrote, then explains why SACE disagrees. Thus, SACE has failed to identify a genuine dispute with the application, and it is inadmissible. 10 C.F.R. § 2.309(f)(1)(vi).

b. SACE Fails to Identify an Omission of Required Information

Analyzing the contention as a contention of omission under 10 C.F.R. § 2.309(f)(1)(vi) shows it to be inadmissible because SACE failed to show what legally-required item was missing. SACE paints its omission claim with a broad NEPA brush, but never addresses what is required in a manner sufficient to identify an omission.

As specified in 10 C.F.R. § 51.53(b), an applicant's environmental submittal shall discuss the same matters described in §§ 51.45 (general requirements of environmental report), 51.51 (uranium fuel cycle environmental data), and 51.52 (environmental effects of transportation of fuel and waste), but only to the extent that they differ from those discussed or reflect new information in addition to that discussed in the final environmental impact statement prepared by the Commission in connection with the construction permit. No discussion of need for power, alternative energy sources, alternative sites for the facility, or of any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b) is required in this report. SACE is, of course, well aware of the requirements of 10 C.F.R. § 51.53(b), having previously submitted a waiver request of parts of regulation. *See Watts Bar*, CLI-10-29, 72 NRC __ (slip op.). But SACE fails to frame its arguments for a new contention of omission against the very regulation which controls the contents of the incoming NEPA report. SACE makes no effort to analyze the claimed omission

under the standards of 10 C.F.R. § 51.53(b), instead shifting the burden to the other parties to determine what was missing. SACE also does not explain what is missing under the Commission's Statement of Interim Policy, Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40101 (June 13, 1980), thereby failing to support an omission of information expected by the Commission. ,

Instead, SACE's arguments are essentially that TVA's FSEIS fails to address rulemaking, orders, and design changes that have not yet taken place. SACE would force the FSEIS to address the Task Force's recommendations notwithstanding that none of the recommendations are legal requirements. SACE cites no regulation or legal authority to support this novel approach.

Thus, SACE fails to identify a genuine dispute warranting a hearing. *Private Fuel Storage,* CLI-04022, 60 NRC at 139.

B. The Contention Fails to Meet the Timeliness Requirements

In its motion, SACE addressed both the non-timely and the late-filed standards. However, under either analysis, the contention is impermissibly late.

1. The Contention Is Not Based Upon New Information Under § 2.309(f)(2)

SACE asserts it is timely because it submitted its Motion and Petition within 30 days of the TFR. Motion at 3, 4 (unnumbered). However, the TFR is not an appropriate trigger date, as explained below.

The Commission has repeatedly addressed the issue of intervenors essentially waiting for the Staff to summarize the information into a convenient form to serve as the basis of a contention. Most recently in *Prairie Island*, the Commission stated that "[b]y permitting [intervenors] to wait for the Staff to compile all relevant information in a single document, the

Board improperly ignored [intervenors'] obligation to conduct its own due diligence."[32] The Commission emphasized in *Oyster Creek* that

> [O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.[33]

Finally, the Commission stressed that an intervenor has an "iron-clad obligation to examine the publicly available documentary material … with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[34] In this case, SACE asserts that the late-filed contention is timely because it is "based upon information contained within the Task Force Report, which was not released until July 12, 2011."[35] The Motion claims that "[b]efore issuance of the Task Force Report, the information material to the contention was simply unavailable." Nonetheless, SACE's own declarant, Dr. Makhijani, contradicts this argument by stating that the Task Force Report "provides further

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[32] *See, e.g., Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC __ (Sep. 30, 2010)(slip op. at 18).

[33] *Oyster Creek*, CLI-09-07, 69 NRC at 271-72 (footnotes and internal quotation marks omitted).

[34] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993) (internal quotation marks and footnote omitted). *Accord Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001).

[35] Motion at 3 (unnumbered).

support for my opinions …."[36] Dr. Makhijani has previously provided his opinions to the Commission in support of multiple petitioners' requests to suspend licensing proceedings on April 19, 2011, more than four months prior to his most recent declaration.[37]

The Contention asserts that the TFR refutes the concept that "compliance with existing NRC safety regulations is sufficient to ensure that the environmental impacts of accidents are acceptable," and "fundamentally question[s] the adequacy of the current level of safety provided by the NRC's program for nuclear reactor regulation."[38] Dr. Makhijani's Declaration focused on these issues over four months ago.[39] Dr. Makhijani stated that "integration of the Fukushima data into NRC analyses of risks could lead to significant changes in design of new reactors and … modifications at existing reactors as would be required for protection of public health and safety …."[40] Dr. Makhijani concluded that "[i]n the environmental and health arenas, consideration of this significant new information is likely to result in higher accident probability estimates, new accident mechanisms for spent fuel pools, higher accident costs estimates, and higher estimates of the health risk posed by light water reactor accidents."[41] Thus, the issues presented here in the proffered contention were readily available and discussed by SACE's expert more than four months ago. At that time, SACE chose to forgo filing contentions. As

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[36] Makhijani Declaration at ¶ 6.

[37] Declaration 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 (April 19, 2011) ("April Makhijani Declaration").

[38] Motion at 3 (unnumbered).

[39] *See* April Makhijani Declaration at ¶ 24.

[40] *Id.*

[41] *Id.* at ¶ 35. *See also Id.* at ¶¶ 29, 34, and 36.

such, the late-filed contention is not timely and should be denied.

In addition, even putting aside Dr. Makhijani's previous declaration, the Commonwealth of Massachusetts filed a report in support of its June 1, 2011 request for the admission of a new contention in the *Pilgrim* License Renewal Proceeding based on the Fukushima Daiichi event on June 1, 2011, 42 days prior to the publication of TFR.[42] The Commonwealth's declarant, Dr. Gordon Thompson, questioned the adequacy of the NRC's current regulations.[43] Dr. Thompson asserted that the "NRC has been obliged to extend the regulatory arena beyond the plant's design basis."[44] He made this assertion based on the fact that "core melt is a forseeable event"[45] and the likelihood of core melts has been significantly underestimated by current probabilistic risk assessment.[46] Dr. Thompson's June 1, 2011 declaration challenged the environmental analysis of environmental impacts under the current regulations.[47] Specifically,

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[42] "New and Significant Information From the Fukushima Daiichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant," ("Thompson Report") (June 1, 2011) (ADAMS Accession No. ML111530339). In the response to "Commonwealth of Massachusetts' Contention Regarding New and Significant Information Revealed by the Fukushima Radiological Accident," the Staff's answer observed that the petition was likely premature because the Commonwealth had stated that its information was incomplete. In this regard, the reopening standard imposes significantly higher burden on the proponent to the contention than the late-filed contention requirements. In order to overcome the strict re-opening requirements, the Commonwealth needed to provide "more than mere allegations; it must be tantamount to evidence," *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984), to overcome the strict requirements for reopening a closed record. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005). The reopening standard, of course, does not apply to the current stage of the *Watts Bar Unit 2* proceeding.

[43] Thompson Report at 11.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 14 – 17.

[47] Declaration of Dr. Gordon R. Thompson in Support of Commonwealth of Massachusetts' Contention and Related Petitions and Motions, at ¶ 16 (June 1, 2011).

Dr. Thompson asserted that "any accident-mitigation measure or SAMA … should be incorporated in the plant's design basis."[48] Since the issues asserted by SACE as new were available as least as early as the report filed by the Commonwealth's expert, the late-filed contention should be dismissed as untimely, especially in light of the Commission's holding that Staff's documents which summarize information that has been previously disclosed elsewhere cannot serve as the basis for new information to support a late-filed contention.

2. The Balancing of the Factors of 10 C.F.R. § 2.309(c) Weighs Against Admission

A contention that does not qualify as a timely new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provision governing nontimely contentions. 10 C.F.R. § 2.309(c). Nontimely filings may only be entertained following a determination by the Board that a balancing of the eight factors in 10 C.F.R. § 2.309(c) weigh in favor of admission.

The requirements for untimely filings and late-filed contentions are "stringent."[49] All eight factors must be addressed by the petitioner.[50] Failure to comply with the pleading requirements is sufficient grounds for denial of the motion to amend or admit a new contention.[51] Of all the eight factors, the first, good cause for failure to file on time, is most important.[52]

SACE argues that it also meets non-timely standards of in 10 C.F.R. § 2.309(c)

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[48] "New and Significant Information From the Fukushima Daiichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant," at 17 – 18 (June 1, 2011) (ADAMS Accession No. ML111530339).

[49] *Oyster Creek,* CLI-09-7, 69 NRC at 260. *See also Nuclear Management Co., LLC.* (Palisades Nuclear Power Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[50] *Oyster Creek*, CLI-09-07, 63 NRC at 260.

[51] *Id*. at 260-61.

[52] *Id.* at 261.

because, *inter alia,* it has "good cause" based upon acting promptly upon learning of new information, and no other means is available to protect its interests. Motion at 4,6 (unnumbered).

But SACE's simple statement offers no insight into why it could not file earlier. There is no showing of good cause for delaying until the TFR was complete to make a claim that regulations must be changed and new reviews done. Thus, good cause, the most important factor, weighs heavily against admission.

SACE argues that it can assist in developing a sound record. Motion at 6 (unnumbered). However, as discussed above, the proffered contention is beyond the scope of the proceeding, not material, unsupported, and fails to show a genuine dispute. Thus SACE has not shown how its expert's generic concerns will assist in developing a sound record in this proceeding.

Additionally, other factors in 10 C.F.R. § 2.309(c) go against SACE. SACE will remain a party to the proceeding. Its environmental interests will not be adversely affected, and it need not rely upon anyone else to represent it. For example, although SACE believes this is the only opportunity to protect its interests (Motion at 5, 6 (unnumbered)), this is not correct. SACE will have multiple additional opportunities, both in this *Watts Bar Unit 2* proceeding and generically, as the TFR recommendations are addressed, to timely raise its concerns.

For example, even if the Board concludes not to admit this contention, SACE will have opportunity to review the Staff's draft SFES, to comment on the draft, and to have its comments addressed in the final version, and, of course, to proffer timely new contentions. Thus, SACE will not be adversely affected if the Board concludes the 10 C.F.R. § 2.309(c) standards weigh against SACE.

Generically, for example, as noted above, the TFR contains a series of recommendations including proposed rulemakings and orders, which could in turn lead to license amendments. TFR at Appendix A. Therefore, many of these recommendations would

require the NRC to conduct a NEPA review before implementing them. 10 C.F.R. §§ 51.25, 51.85. Consequently, in the event the Commission ultimately adopts any of the recommendations in the TFR, the agency will have an opportunity to fully consider the environmental impacts of those actions at that time.

Thus, SACE's claim that the late contention factors of 10 C.F.R. § 2.309(c) fall in its favor should be admitted because it's SACE's only opportunity should be given little weight.

C. The Suspension Request Is Not Before The Board

Additionally, the Contention notes that SACE also filed a rulemaking petition "seeking to suspend any regulations that would preclude full consideration of the environmental implications of the Task Force Report." Contention at 3. The rulemaking petition states that the NRC has a non-discretionary duty to suspend the licensing proceeding while it considers the environmental impacts of that decision, including the environmental implications of the Task Force report with respect to severe reactor and spent fuel pool accidents. Petition at 3, 4. Petitioners filed the rulemaking petition before the Board and the Commission. *Id.* at 1. *Id*.

The rulemaking petition and the corresponding suspension request are not properly before the Board. Rather, they are currently before the Commission as part of a regulatory process that is distinct from this operating license proceeding. Under 10 C.F.R. § 2.802(a), "Any interested person may petition the Commission to issue, amend or rescind any regulation." Section 2.802(d) states that the "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." 10 C.F.R. § 2.802(d). Under the regulation's clear terms, only the Commission may grant a suspension request under 10 C.F.R. § 2.802(d).

Moreover, the Commission has set a high standard for suspending a proceeding under section 2.802(d). In considering a previous request to suspend under section 2.802(d), the Commission found "suspension of licensing proceedings a 'drastic' action that is not warranted

absent 'immediate threats to public health and safety.'" In the Matter of Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c), CLI-11-01, 73 NRC __ (Jan. 24, 2011) (slip op. at 3) ("Seabrook Order") (*quoting AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008)). The Commission explained,

> [O]ur "longstanding practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication. Absent extraordinary cause, however, seldom do we interrupt licensing reviews or our adjudications — particularly by an indefinite or very lengthy stay as contemplated here — on the mere possibility of change. Otherwise, the licensing process would face endless gridlock.

*Id*. at 2-3. The Commission concluded that because ample time existed before it would issue a renewed license for Seabrook,[53] the requestors had not shown that proceeding with the adjudication would "jeopardize the public health and safety, prove an obstacle to fair and efficient decision-making, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation." *Id*. at 4.

CONCLUSION

For the reasons set forth above, the Board should find the contention inadmissible.

Respectfully Submitted,

***Signed (electronically) by***

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[53] A licensing decision for Watts Bar Unit 2 is not imminent.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE BOARD

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| TENNESSEE VALLEY AUTHORITY | ) | Docket No. 50-391-OL |
| | ) | |
| (Watts Bar Unit 2) | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO MOTION AND CONTENTION REGARDING NEPA REQUIREMENT TO ADDRESS SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE FUKUSHIMA TASK FORCE REPORT", September 6, 2011, have been served upon the following by the Electronic Information Exchange, this 6th day of September, 2011:

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