

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

NEXTERA ENERGY SEABROOK, LLC

(Seabrook Station, Unit 1)

Docket No. 50-443-LR

ASLBP No. 10-906-02-LR-BD01

October 19, 2011

MEMORANDUM AND ORDER
(Denying Motions to Admit New Contention)

Before the Board are two motions – filed collectively on behalf of the five Interveners – to admit essentially the same new contention.¹ NextEra Energy Seabrook, LLC (NextEra or

¹ Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) [hereinafter Friends/NEC Motion to Admit]; Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) [hereinafter Beyond Nuclear Motion to Admit]; Friends of the Coast and New England Coalition's Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) [hereinafter Friends/NEC Contention]; Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) [hereinafter Beyond Nuclear Contention]. Interveners also submitted replies in support of their motions, pursuant to Section II(c)(2) of the Initial Scheduling Order. Initial Scheduling Order (Apr. 4, 2011) at 4 (unpublished). See Interveners' Reply and Memorandum in Reply to NextEra and NRC Staff Oppositions to Admission of Friends of the Coast and New England Coalition's Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Sept. 13, 2011); Petitioners' Memorandum in Reply to Oppositions to Admission of New

Applicant) and the NRC Staff oppose.² Because the proffered contention is premature and insufficiently focused on the license renewal application (LRA) for Seabrook Station, Unit 1 (Seabrook), we deny the motions.

I. BACKGROUND

This proceeding concerns the application of NextEra to renew the operating license for Seabrook, a nuclear power reactor located in Rockingham County, New Hampshire.³ The proffered new contention challenges the adequacy of the Applicant's environmental report (ER).⁴

Intervenors wish to litigate in this adjudicatory proceeding whether the ER for Seabrook must address a recent report by NRC staff members entitled Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Near-Term Task Force Report).⁵ Intervenors contend:

The ER for Seabrook 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

Contention in the Seabrook Relicensing Proceeding (Sept. 13, 2011); Reply Memorandum Regarding Timelines and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 13, 2011).

² Answer of NextEra Energy Seabrook, LLC Opposing Motions to Admit New Contention (Sept. 6, 2011) [hereinafter NextEra Answer]; NRC Staff's Answer to Contention in Support of 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 Filed by (1) Friends of the Coast and New England Coalition and (2) Beyond Nuclear, Seacoast Anti-Pollution League, and New Hampshire Sierra Club (Sept. 6, 2011) [hereinafter NRC Staff Answer].

³ The background of the proceeding is more fully described in our memorandum and order of February 15, 2011. LBP-11-02, 73 NRC __, __ (slip op. at 2-5) (Feb. 15, 2011).

⁴ Friends/NEC Contention at 4; Beyond Nuclear Contention at 5.

⁵ Dr. Charles Miller et al., Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) (ADAMS Accession No. ML111861807) [hereinafter Near-Term Task Force Report].

required by NEPA and the NRC regulations, these implications must be addressed in the ER.⁶

The contention is similar to other contentions that various interveners have recently proffered in all or nearly all NRC reactor licensing proceedings.⁷ It is based on the fact that, after the events at Japan's Fukushima Dai-ichi site that caused extensive damage in March 2011, the Commission (among other steps taken in response) directed NRC staff to establish a Near-Term Task Force to review the agency's processes and regulations. The Near-Term Task Force was instructed to determine "whether the agency should make additional improvements to its regulatory system and to make recommendations to the Commission for its policy direction."⁸ Rather than addressing the underlying facts regarding the accident in Japan and their possible implications concerning the Seabrook LRA, the proffered contention concerns the recommendations of the Near-Term Task Force – which Interveners claim will require a "massive" re-evaluation and revision of the NRC's fundamental regulatory scheme.⁹

The Near-Term Task Force completed its work and issued its report, for the Commission's consideration, on July 12, 2011.¹⁰ The Commission has determined that any changes it decides to adopt as a result of the Near-Term Task Force recommendations "will be

⁶ Friends/NEC Contention at 4. See also Beyond Nuclear Contention at 5 (identical except for reference to "Seabrook license renewal" rather than "Seabrook"). Although the contention also refers to "findings," the focus of the contention is clearly on the Near-Term Task Force's recommendations. Interveners assert, for example, that "the Commission could moot the contention by adopting all of the Task Force's recommendations." Friends/NEC Contention at 19; Beyond Nuclear Contention at 28.

⁷ See Friends/NEC Contention at 3; Beyond Nuclear Contention at 3-4.

⁸ Friends/NEC Contention at 5 (quoting Near-Term Task Force Report at vii); Beyond Nuclear Contention at 5 (quoting Near-Term Task Force Report at vii).

⁹ Friends/NEC Contention at 8; Beyond Nuclear Contention at 9.

¹⁰ Friends/NEC Contention at 2; Beyond Nuclear Contention at 2.

implemented through our normal regulatory processes.”¹¹ The Commission has also emphasized that “[o]ur understanding of the details of the failure modes at the Fukushima Daiichi site continues to evolve, and we continue to learn more about the extent of the damage at the site.”¹²

In support of their proffered contention, Interveners submit the Declaration of Dr. Arjun Makhijani, who is troubled by the implications of the Near-Term Task Force Report. He believes “substantial revisions to the very framework of NRC regulations are needed to adequately protect public health and the environment.”¹³ He is “concerned that over the past three decades or more, the NRC has not conducted the type of review of the adequacy of its safety regulations that is necessary to update its requirements so as to ensure that NRC safety requirements will provide the minimum level of protection required by the Atomic Energy Act.”¹⁴ And he considers “the current inadequacies in the NRC’s program for regulation of basic reactor safety to be extraordinarily grave problems.”¹⁵ He does not, however, mention Seabrook or relate the impacts of his concerns to the Seabrook LRA.

II. ANALYSIS

Because we think the proffered contention is plainly not admissible, we need not consider whether it was timely filed.

We also look past the fact that on its face the contention challenges the content of the Applicant’s ER, and mentions only in supporting discussion the NRC Staff’s Draft Supplemental

¹¹ Union Elec. Co. d/b/a Ameren Mo. (Callaway Plant, Unit 2), CLI-11-05, 74 N.R.C. __ , __ n.6 (slip op. at 5 n.6) (Sept. 9, 2011).

¹² Id. at __ (slip op. at 4).

¹³ Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011) at 3.

¹⁴ Id.

¹⁵ Id. at 4.

Environmental Impact Statement (DSEIS).¹⁶ The purpose of an ER is to assist the NRC in preparing the agency's own environmental analysis.¹⁷ Once the NRC performs its own analysis, the ER is no longer important. Alleged defects in an applicant's ER may be mooted by the content of the NRC's environmental impact statement or (as here) supplemental environmental impact statement.¹⁸

The relevant question therefore pertains to whether the DSEIS for Seabrook must address the recommendations of the NRC's Near-Term Task Force review of the Fukushima Dai-ichi accident in Japan. If those recommendations constitute relevant "new" and "significant" information concerning the Seabrook LRA, then the DSEIS must address them.¹⁹ To proffer an admissible contention, moreover, Interveners do not have to prevail on the merits.²⁰ At this stage, they need only demonstrate a genuine dispute on this issue. Interveners' proffered contention, however, fails to raise a genuine dispute that is suitable for an evidentiary hearing before this Board.

The Commission recently addressed a similar issue. Various petitioners (including the Interveners in this case) asked that the NRC conduct "a separate generic NEPA analysis regarding whether the Fukushima events constitute 'new and significant information' under NEPA that must be analyzed as part of the environmental review for new reactor and license

¹⁶ Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 46, Regarding Seabrook Station, Draft Report for Comment, NUREG-1437 (Aug. 2011) (ADAMS Accession No. ML11213A080).

¹⁷ 10 C.F.R. §§ 51.14(a)(3), 51.71(a).

¹⁸ Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002).

¹⁹ 10 C.F.R. § 51.72(a)(2).

²⁰ See LBP-11-02, 73 NRC at ___ (slip op. at 23-24).

renewal decisions.”²¹ The Commission ruled the request premature.²² Although the Near-Term Task Force had by that time completed its review and provided its recommendations (as the Commission expressly noted), the Commission explained that “the agency continues to evaluate the accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear.”²³ The Commission concluded that “we do not know today the full implications of the Japan events for U.S. facilities.”²⁴ Thus, the Commission decided, “any generic NEPA duty – if one were appropriate at all – does not accrue now.”²⁵

Specifically applying the “new” and “significant” information test set forth in 10 C.F.R. § 51.72(a)(2), the Commission found that the current state of available information (including specifically the Near-Term Task Force Report) did not satisfy that standard. As the Commission emphasized, to trigger further environmental analysis, information must be both “new” and “significant” and “it must bear on the proposed action or its impacts.”²⁶ In other words, “the new information must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.”²⁷ The Commission found “[t]hat is not the case here, given the current state of information available to us.”²⁸ Thus, it concluded: “For these reasons, we decline petitioners’ request to commence a generic NEPA review today.”²⁹

²¹ Callaway, CLI-11-05, 74 N.R.C. at __ (slip op. at 30).

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id. at __ (slip op. at 31).

²⁷ Id. (quotation marks and footnoted citations omitted).

²⁸ Id.

²⁹ Id.

If – as the Commission has ruled – the available information (including specifically the Near-Term Task Force Report) does not at this time constitute “new” and “significant” information for purposes of generic environmental analysis, it follows that Interveners have failed to show how the report might constitute “new” and “significant” information for purposes of environmental analysis of renewing the license for Seabrook. Neither the Near-Term Task Force Report nor the declaration of Dr. Makhijani says anything at all about Seabrook, much less tries to link specific recommendations in the Near-Term Task Force Report to specific aspects of the Seabrook LRA.

The contention now before us rests on speculation built on speculation. We do not know which, if any, of the Near-Term Task Force recommendations the Commission might ultimately adopt. The Commission has stated only that, after further study, it “may” determine that regulatory or procedural changes are warranted.³⁰ Furthermore, we do not know the implications for the Seabrook LRA of whatever recommendations might be adopted. And Interveners provide no guidance.

Because Interveners fail to show how the Near-Term Task Force Report might potentially affect the DSEIS for Seabrook, they plainly have not demonstrated a genuine dispute as to whether the NRC Staff must address the report in its DSEIS. Their contention therefore does not satisfy 10 C.F.R. § 2.309(f)(1)(vi), and for this reason is not admissible. Although we do not adjudicate the merits at this stage, a contention must be plausible. A requirement to supplement environmental analysis every time any new information (such as recommended but not yet adopted regulatory reform) comes to light “would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.”³¹

³⁰ Id. at ___ (slip op. at 22).

³¹ Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373 (1989) (footnote omitted).

The Board appreciates why Interveners may have felt obligated to proffer their contention at this early date. Invariably applicants – and often the NRC Staff – oppose new contentions on lateness grounds. Indeed, both the Applicant and the NRC Staff have done so here.³² Under our rules, however, a contention must be admissible when it is submitted. We can defer consideration of an admissible contention, where appropriate, but not of an inadmissible one.³³

That Interveners' proffered contention is not admissible does not mean that the issues raised by the Near-Term Task Force Report are unimportant. They have not yet ripened, however, to the point where they can appropriately be litigated in this adjudicatory proceeding concerning the Seabrook LRA. Perhaps they never will. As Interveners acknowledge, "given the sweeping scope of the Task Force conclusions and recommendations, it may be more appropriate for the NRC to consider them in generic rather than site-specific environmental proceedings."³⁴

We recognize that this state of affairs places Interveners in a bind. To avoid the inevitable challenge on lateness grounds, must Interveners regularly resubmit their contention, asking in effect: "Are we there yet?" The Board hopes not. Although it has not seen fit to do so at this time, the Commission has suggested that it may in the future provide further guidance as to when Fukushima-related contentions might be ripe for adjudication in individual reactor cases.³⁵ And certainly this Board intends, whenever possible, to avoid interpreting the agency's regulations concerning timeliness in a way that penalizes reasonable conduct.

³² NextEra Answer at 13-18; NRC Staff Answer at 34-39.

³³ See Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431, 443 (2008).

³⁴ Friends/NEC Contention at 4; Beyond Nuclear Contention at 5.

³⁵ "Although we do not establish a timetable for future adjudicatory pleadings today, we will monitor our ongoing adjudicatory proceedings and will reassess this determination if it becomes

In accordance with the regulations that we are bound to follow, however, and consistent with the ruling of other Licensing Boards that have thus far addressed similar contentions,³⁶ the Board cannot grant Interveners' motions and admit their proffered contention at this time.

III. ORDER

For the foregoing reasons:

A. The Friends/NEC Motion to Admit (filed on behalf of Friends of the Coast and New England Coalition) is denied.

B. The Beyond Nuclear Motion to Admit (filed on behalf of Beyond Nuclear, Seacoast Anti-Pollution League, and Sierra Club of New Hampshire) is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA by A.J. Baratta for:/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 19, 2011

apparent that additional guidance would be appropriate." Callaway, CLI-11-05, 74 N.R.C. at ___ (slip op. at 36).

³⁶ PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant), LBP 11-27, 74 N.R.C. ___ (Oct. 18, 2011).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
NEXTERA ENERGY SEABROOK, LLC) DOCKET NO. 50-443-LR
(Seabrook Station, Unit 1))
)
(License Renewal))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Denying Motions to Admit New Contention) (LBP 11-28), dated October 19, 2011, have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of October, 2011