

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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| In the Matter of AmerenUE (Callaway Plant Unit 2) |))) | Docket No. 52-037-COL |
| In the Matter of AP1000 Design Certification Amendment 10 CFR Part 52 |))) | NRC-2010-0131 RIN 3150-A18 |
| In the Matter of Calvert Cliffs 3 Nuclear Project, L.L.C. (Calvert Cliffs Nuclear Power Plant, Unit 3) |))) | Docket No. 52-016-COL |
| In the Matter of Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3) |))) | Docket No. 52-033-COL |
| In the Matter of Duke Energy Carolinas, L.L.C. (William States Lee III Nuclear Station, Units 1 and 2) |)))) | Docket Nos. 52-018-COL 52-019-COL |
| In the Matter of Energy Northwest (Columbia Generating Station) |))) | Docket No. 50-397-LR |
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| In the Matter of Florida Power & Light Co. (Turkey Point, Units 6 and 7) |))) | Docket Nos. 52-040-COL 52-041-COL |
| In the Matter of Luminant Generation Co., L.L.C. (Comanche Peak Nuclear Power Plant, Units 3 and 4) |)))) | Docket Nos. 52-034-COL 52-035-COL |
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| In the Matter of PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant) |))) | Docket No. 52-039-COL |
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| In the Matter of Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4) |)))) | Docket Nos. 52-025-COL 52-026-COL |
| In the Matter of Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4) |)))) | Docket Nos. 52-014-COL 52-015-COL |

In the Matter of)
Tennessee Valley Authority) Docket No. 50-0391-OL
(Watts Bar Unit 2))

In the Matter of)
Virginia Electric and Power Co.) Docket No. 52-017-COL
d/b/a Dominion Virginia Power and)
Old Dominion Electric Cooperative)
(North Anna Unit 3))

NRC STAFF ANSWER TO EMERGENCY PETITION TO SUSPEND ALL PENDING
REACTOR LICENSING DECISIONS AND RELATED RULEMAKING DECISIONS PENDING
INVESTIGATION OF LESSONS LEARNED FROM FUKUSHIMA DAIICHI
NUCLEAR POWER STATION ACCIDENT

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May 2, 2011

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(Watts Bar Unit 2))

In the Matter of)
Virginia Electric and Power Co.) Docket No. 52-017-COL
d/b/a Dominion Virginia Power and)
Old Dominion Electric Cooperative)
(North Anna Unit 3))

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

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the April 19, 2011 Commission Order, the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby provides its answer to the "Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station" ("Petition"), served April 14, 2011. The Staff submits that this joint petition should be denied because (1) the requirements to suspend or stay all licensing decisions and related rulemakings have not been met; (2) portions of the relief requested are outside the scope of these proceedings; (3) the issues raised by petitioners in license renewal proceedings are outside the scope of the license renewal hearings; and (4) other more appropriate procedures are already available for raising issues that arise after the original notice of opportunity for hearing, as well as after a licensing decision has been made.

The Petition simply has not provided an adequate basis to support such emergency relief to all pending contested proceedings.

PROCEDURAL BACKGROUND

On April 14, 2011, Petitioners began to file and serve an emergency petition requesting suspension of twenty three reactor licensing and reactor design certification proceedings. Beginning on April 18, 2011, 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” (“Amended Petition”), to make corrections to their original filing, including removing one set of petitioners, Blue Ridge Environmental Defense League, and one proceeding *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-438-CP and 50-439-CP.¹

The Petition and the Amended Petition state that “Petitioners expect to submit additional expert support for the Petition, early next week [week of April 17 – 23, 2011], in the form of a declaration by Dr. Arjun Makhijani” On April 19, 2011, the Office of the Secretary issued an Order setting a deadline of April 21, 2011, for Petitioners to complete service and a deadline of May 2, 2011, for parties and amici to respond to the Petition.²

Subsequent to filing the original petition on April 14, 2011, some of the Petitioners held a joint press conference discussing various aspects of the Petition. During the press conference, counsel for some of the joint Petitioners explained that the Petitioners’ reason for filing the emergency petition was the imminent conclusion in some proceedings.³ However, only the Pilgrim Nuclear Power Station, Vogtle Electric Generating Plant proceedings, and the design

¹ See Amended Petition at 4.

² Order at 1–2.

³ Joint Press Conference at 2:35 – 3:00.

certifications rulemakings for the AP1000 and ESBWR were identified as the basis for the immediate relief sought.⁴

PROCEDURAL STATUS OF PENDING ADJUDICATORY PROCEEDINGS

Because Petitioners contend that the requested emergency relief is necessary in light of alleged immediate NRC licensing actions, the Staff will briefly describe the procedural status of the captioned pending adjudication proceedings.

I. Renewed License Proceedings under 10 C.F.R. Part 54

A Board has not been established for the Columbia license renewal application and the parties have not been served a petition requesting a hearing. The NRC staff intends to publish a safety review of the application with open items in August of 2011 and to complete the safety review in February of 2012. The NRC staff plans to issue a draft supplemental environmental impact statement ("SEIS") in June of 2011 on the application and a final Supplemental Environmental Impact Statement ("SEIS") in December 2011.

In the Pilgrim license renewal proceeding, the Commission remanded Contention 3 (which related to severe accident mitigation alternatives (SAMAs)) to the licensing board. *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (Mar. 26, 2010)(slip op. at 39)(Agencywide Document Access and Management System ("ADAMS") Accession No. ML100880136). The Board held a hearing on that contention and two new contentions on March 9, 2011. See Order (Rescheduling Hearing and Oral Argument), (Jan. 5, 2011) ADAMS Accession No.

⁴ *Id.* To date, service of the petition to the Staff has not been completed by Petitioners in some of the proceedings. In South Texas, Units 3 and 4, and Comanche Peak, Units 3 and 4, the Petition, the Amended Petition, and Dr. Makhijani's Declaration were not served on the parties. In Bellefonte, Units 3 and 4, and Lee, Units 3 and 4, the Petitioners have not served Dr. Makhijani's Declaration.

ML110050353). Currently, the parties await the Board's initial decision on the remanded contention and new contentions.

A Board admitted several contentions in the Indian Point license renewal proceedings. The intervenors must file their initial statements of position on those contentions in June. Scheduling Order, at 13-14 (Jul. 1, 2010) (ADAMS Accession No. ML101820387). It is anticipated that the Board will hold the evidentiary hearing several months later. *Id.* at 14-17.

In the license renewal proceeding for Davis-Besse, four groups submitted a request for hearing that contained four contentions. Notice (Pursuant to 10 C.F.R. § 2.309(i)), at 1 (Mar. 31, 2011) (ADAMS Accession No. ML110900292). The Board issued an order admitting two contentions as limited by the Board on April 26, 2011. *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC __ (Apr. 26, 2011)(slip op.) (ADAMS Accession No. ML111160428). This proceeding is at a very early stage of the adjudication process.

In the Seabrook license renewal proceeding, intervenor groups submitted five contentions, of which the Board admitted four. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-02, 73 NRC __ (Feb. 15, 2011) (slip op. at 63) (ADAMS Accession No. ML110460252). The applicant appealed the Board's order. Initial Scheduling Order, at 3 (Apr. 4, 2011) (ADAMS Accession No. ML110940336). Because the Staff will not complete its safety and environmental reviews of the application until 2012, it is contemplated that the Board will not hold a hearing until 2012, at the earliest. *Id.* at 6-7.

Finally, in the license renewal proceeding for Diablo Canyon, an intervenor group submitted five contentions, of which the Board admitted four. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 70 NRC __ (slip op. at 96) (Aug. 4, 2010) (ADAMS Accession No. ML102160435). Both the NRC Staff and the applicant appealed the Board's ruling. Initial Scheduling Order, at 2 n.2 (Sep. 15, 2010) (ADAMS Accession No.

ML102580745). Because the NRC does not expect to complete its environmental review of the application until early 2012, the earliest date for a hearing in the Diablo Canyon license renewal proceedings would be in the middle part of 2012. *Id.* at 19-21. However, the applicant has requested that the NRC not issue a license until state seismic studies are completed, which could stretch the final staff review process beyond 2012.

II. License Proceeding under 10 C.F.R. Part 50

In the Watts Bar Unit 2 operating license proceeding, the Board stated that it will endeavor to conduct the hearing at the earliest possible date, but that date will be six to eight months after the NRC issues its final supplement to the environmental impact statement for Watts Bar Unit 2. Scheduling Order, at 15 (May 26, 2010) (ADAMS Accession No. ML101460473). Presently, the NRC intends to issue that environmental document in late 2011. Thus, the hearing will probably not occur until 2012, at the earliest.

III. License Proceedings under 10 C.F.R. Part 52

With respect to the captioned combined license ("COL") proceedings, the NRC Staff expects to issue its final environmental and safety review documents for the Summer and Vogtle applications by the summer of 2011.⁵ The Staff intends to issue both final documents for the Fermi, Levy County, and William S. Lee applications by 2012. The Staff plans to issue both final review documents for the Comanche Peak and North Anna applications by 2013, and for the Shearon Harris application by 2014. At the present time, the Staff does not have a final schedule for the issuance of both review documents for the Bell Bend, Bellefonte, Callaway,

⁵ The Summer Final Environmental Impact Statement ("FEIS") and Vogtle Final Supplemental Environmental Impact Statement ("FSEIS") were issued in April 2011 and March 2011, respectively.

Calvert Cliffs, Turkey Point, and South Texas applications;⁶ none of these reviews is expected to have both documents issued in 2011. None of these proposed facilities has been constructed, nor is any currently operating. Mandatory hearings, and in some cases contested hearings, will be conducted following staff reviews and prior to issuance of the COLs.

With respect to the two reactor design certifications identified in the Petition, a proposed rule has been published for the AP1000 design certification amendment but the final rule is not scheduled to be completed until September 2011. The final ESBWR design certification rule is also not scheduled for completion until September 2011.

NRC ACTIONS IN RESPONSE TO THE FUKUSHIMA DAIICHI EVENT

The NRC has undertaken significant actions in the wake of the Fukushima Daiichi event including beginning to review and evaluate the tragic events resulting from one of the largest earthquakes ever recorded, the subsequent tsunami, and the associated impact on the Fukushima Daiichi station. The NRC headquarters operations center has been continuously monitoring the events in Japan, and a team of technical experts was dispatched to Japan to provide on-the-ground support.⁷ Also, the NRC staff took action to inform potentially affected NRC licensees of the ongoing events in Japan through NRC Information Notice 2011-05, "Tohoku-Taiheiyou-Oki Earthquake Effects on Japanese Nuclear Power Plants," (Mar. 18, 2011)(ADAMS Accession No. ML110760432) and enhanced NRC inspection activities at U.S.

⁶ The South Texas FEIS has been issued, but the schedule for issuance of the Final Safety Evaluation Report ("FSER") is still to be determined. For the Calvert Cliffs and Turkey Point applications, the Staff's review schedule has been established only for either the safety review or the environmental review, with the other still to be determined. For the Bell Bend application, both reviews schedules are still to be determined. For both the Bellefonte and Callaway applications, the Staff's review is currently suspended.

⁷ Briefing on NRC Response to Recent Nuclear Events in Japan, Nuclear Regulatory Commission ("Public Briefing"), at 4 (Mar. 21, 2011) (ADAMS Accession No. ML110810254).

operating nuclear reactors through implementation of Temporary Instruction 2515/183, “Followup to Fukushima Daiichi Nuclear Station Fuel Damage Event.”

In addition to the ongoing monitoring, communication, inspection, and aid being provided by the NRC to Japan, the Commission has also established a Task Force to perform a review of the Fukushima Daiichi event.⁸ The Task Force has been charged with conducting a near-term and longer-term review that will “evaluate all technical and policy issues related to the event to identify potential research, generic issues, changes to the reactor oversight process, rulemakings, and adjustments to regulatory framework that should be conducted by the NRC.”⁹

The NRC continues to have confidence that the U.S. nuclear plants are operating safely and will continue to operate safely into the future. It is anticipated that ongoing review and evaluation of the events in Japan by NRC staff and by the Task Force will identify actions to further enhance the safety of U.S. nuclear facilities based on the lessons from the Japanese event. Chairman Jaczko, in testimony, reassured Congress that review of information from Japan thus far, “combined with our ongoing inspection and licensing oversight, gives us confidence that the U.S. plants continue to operate safely.”¹⁰ Similarly, the Executive Director of Operations for NRC, William Borchardt, emphasized that NRC regulations require that “the designs for every single reactor in the country take into account the specific site that the reactor

⁸ SRM-COMGBJ11-0002 (March 21, 2011) (ADAMS Accession No. ML110800456).

⁹ *Id.*

¹⁰ Written Statement by Gregory B Jaczko, Chairman, U.S. Nuclear Regulatory Commission to the Subcomm. On Energy and Water of the Senate Appropriations Comm. at 3 (March 30, 2011) (ADAMS Accession No. ML110890505).

is located and [the licensee] does a detailed evaluation for any natural event such as earthquakes, tornadoes, hurricanes, floods, tsunamis, and many others.”¹¹

In response to a letter from the Third Circuit, requesting counsel “to advise the Court what impact, if any, the damages from the earthquake and tsunami at the Fukushima Daiichi Nuclear Power Station have on the propriety of granting the license renewal application for the Oyster Creek Generating Station,” the NRC explained its response to the Fukushima Daiichi event.¹² The NRC emphasized that “licensed nuclear power reactors in the United States are currently safe, and may continue to operate under NRC’s comprehensive scheme of safety regulations and inspections, pending development of any new safety measures that emerge as NRC’s ‘lessons-learned’ project moves forward.”¹³ In addition, since the Fukushima event, the NRC has issued renewed operating licenses for Vermont Yankee and Palo Verde, which reflects the NRC’s confidence in its licensing procedures.¹⁴

DISCUSSION

I. The Petition Has Not Articulated a Sufficient Legal or Factual Basis for Suspending, Staying, or Modifying the Current Adjudicatory Rules

The Petitioners argue that the Commission should suspend all reactor licensing proceedings, rulemakings, and opportunities for public comment, and should alter the current

¹¹ Public Briefing at 14.

¹² Federal Respondents’ Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station, at 2–3, *New Jersey Environmental Federation v. Nuclear Regulatory Commission*, No. 09-2567 (Apr. 4, 2011).

¹³ *Id.* at 3.

¹⁴ Issuance of Renewed Facility Operating Licenses for Palo Verde Nuclear Generating Station (TAC Nos. ME0254, ME0255, and ME0256) (Apr. 21, 2011) (ADAMS Accession No. ML110800455); Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) Renewed Facility Operating License (March 21, 2011) (ADAMS Accession No. ML092110054),

adjudicatory process to provide for intervention opportunities by right for information that may be developed as a result of the NRC Task Force's review of the Fukushima Daiichi event.¹⁵ As discussed below, the Petition provides no legal or factual support that would warrant such drastic and premature actions.

A. Petitioners Have Not Established a Proper Legal Basis for Suspending All Reactor Licensing Proceedings

When determining whether to suspend a proceeding, the Commission considers “whether moving forward with the adjudication will 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.” *Duke Energy Corp.*, (McGuire Nuclear Station Units 1 & 2; Catawba Nuclear Station, Units 1 & 2) (“McGuire-Catawba”), CLI-01-27, 54 NRC 385, 389-90 (2001); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation) (“PFS”), CLI-01-26, 54 NRC 376, 380 (2001).

1. The Petition Did Not Establish that an Immediate Threat to Public Health and Safety Exists

The Commission considers suspension of proceedings a “drastic action” that is not warranted in the absence of “immediate threats to public health and safety.” *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008) (refusing to suspend license renewal proceedings) (*quoting Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-174 (2000) (refusing to suspend license transfer proceeding)).

Absent some immediate threat to public health and safety, the Commission is reluctant to suspend proceedings in light of the “substantial public interest in efficient and expeditious

¹⁵ Petition at 2–3.

administrative proceedings.” *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 339 (1999). Petitioners have not shown that moving forward with reactor licensing proceedings will jeopardize the public health and safety. Petitioners’ request relies, primarily, on the establishment of the Task Force to review the potential impact, if any, of the Fukushima Daiichi event on the NRC’s current regulatory scheme and the Task Force’s charter identifying areas that it intends to review.¹⁶ Following two other events in the United States with potential implications for reactor licensing, namely the Three Mile Island (“TMI”) accident and the terrorist attacks on September 11, 2001, the Commission declined to suspend pending adjudications. See *McGuire-Catawba*, CLI-01-27, 54 NRC at 390; *PFS*, CLI-01-26, 54 NRC at 381-82. Given that the Commission did not consider such a remedy to be justified even following those two events, nothing in the Petition or Dr. Mahkijani’s Declaration¹⁷ justifies suspending all reactor licensing and adjudications during the near-term review phase of the Task Force’s work.

2. The Commission Did Not Suspend Licensing Proceedings in the Wake of the Three Mile Island Accident

Petitioners claim that “[s]uspension of licensing decisions pending investigations of lessons learned also would be consistent with the course followed by the Commission following the TMI accident, when the Commission delayed new licensing actions for a year and a half.” Petition at 4 (*citing Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses*, CLI-80-42, 12 NRC 654 (1980) (“TMI Policy Statement”). Later, the

¹⁶ See Petition at 2.

¹⁷ Declaration of Dr. Arjun Makhijani in Support of Emergency 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) (“Makhijani Declaration”).

Petitioners assert that after the TMI accident, the Commission “suspended all licensing decisions until conclusion of the lessons learned process.” *Id.* at 22.

But, a closer look at the agency’s records does not support Petitioners’ description of the Commission’s response to the TMI accident. In fact, the Commission did not suspend its licensing proceedings and issued several licenses while it continued to study that accident.¹⁸ In October of 1979, the Commission issued an interim policy statement on the conduct of adjudication after the TMI accident. Statement of Policy, 44 Fed. Reg. 58,559 (Oct. 10, 1979). In that document, the Commission recognized that its TMI reviews “may result in significant changes in the Commission’s regulatory policy.” *Id.* Thus, the Commission chose to issue new reactor licenses and permits “only after action of the Commission itself.” *Id.* But the Commission authorized the Staff “to proceed with licensing reviews and present evidence on the implications of the [TMI] accident for resolution of proceedings now before Atomic Safety and Licensing Boards.” *Id.* The Commission later formalized these procedures by amending Part 2 to temporarily provide for Commission review of all licensing decisions. Domestic Licensing Proceedings; Modified Adjudicatory Process, 44 Fed. Reg. 65,049, 65,550-51 (Nov. 9, 1979). In so doing, the Commission cautioned the Boards, “as a result of analyses still under way the Commission may change its present regulations and regulatory policies in important respects and thus compliance with existing regulations may turn out to no longer warrant approval of a license application.” *Id.* at 65,550.

¹⁸ After the Chernobyl accident on April 26, 1986, the NRC did not suspend licensing proceedings or decisions. Shortly after the accident, the NRC issued two full power licenses: Perry (1986) and Shearon Harris (1987). See *Cleveland Electric Illuminating Co., et al.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-22, 24 NRC 685 (1986); *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), CLI-87-1, 25 NRC 1 (1987). Prior to issuing the full power license to Shearon Harris, the low power license was authorized by the NRC in 1986.

According to the TMI Policy Statement, after February 7, 1980, the Commission granted four authorizations for fuel loading and low power testing and two operating licenses. *TMI Policy Statement*, CLI-80-42, 12 NRC at 658. In addition, the Commission provided guidance on what standards reactor applications should meet from a licensing standpoint in light of the NRC's study of the TMI accident. Specifically, the Commission stated, "[b]ased upon its extensive review and consideration of the issues arising as a result of the Three Mile Island accident – a review that is still continuing – the Commission has concluded that the list of TMI-related requirements for new operating licenses found in NUREG-0737 can provide a basis for responding to the TMI-2 accident." *Id.* at 659.¹⁹

Therefore, contrary to Petitioners' claims, the Commission did not suspend its licensing proceedings or final licensing decisions "until conclusion of the lessons learned process" or for a year and a half. The Commission issued some licenses during the TMI accident assessment, within a year of the TMI accident, and it directed licensing boards to continue to hear cases during that assessment. *Id.* at 658. At a public meeting, Commissioner Bradford specifically disclaimed any intent to suspend licensing proceedings: "I think there are extreme ways to state both sides on the one hand, we're not talking about plowing full speed ahead as if Three Mile Island hadn't happened; on the other hand, nobody is talking about laying down the tools and taking 120 days off." Public Meeting Discussion of Options Regarding Deferral of Licenses,

¹⁹ The TMI policy statement does indicate that the Commission initially "decided that power reactor licensing should not continue until the assessment of the TMI accident has been substantially completed." *Id.* at 656. But, the rest of the TMI policy statement describes Commission licensing decisions undertaken before the completion of the TMI accident assessment and directs Boards to rule on licensing applications during that assessment. *Id.* at 658, 659. Consequently, at most, the above quote indicates that the Commission viewed the TMI assessment as substantially completed at an early stage. Moreover, the quote does not indicate that the Commission ever suspended license proceedings. It certainly does not indicate that the Commission stayed licensing decisions for a year and a half or until the *completion* of the TMI accident assessment.

at 49 (May 30, 1979) (ADAMS Legacy Accession No. 7907090011). Consequently, suspending or staying NRC licensing proceedings until the completion of the Fukushima lessons learned process would not be consistent with the Commission's response to the TMI accident. Rather, it would represent a departure from that precedent.

3. The Commission Did Not Suspend Licensing Proceedings Following the Terrorist Attacks on September 11, 2001

More recently, the Commission refused requests to suspend licensing proceedings pending review of security requirements following the terrorist attacks of September 11, 2001. *See, e.g., Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Installation), CLI-02-23, 56 NRC 230, 240 (2002); *PFS*, CLI-01-26, 54 NRC 376, 380; *McGuire-Catawba*, CLI-01-27, 54 NRC at 389-90; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399, *reconsid. denied*, CLI-02-2, 55 NRC 5 (2002).²⁰

Petitioners' speculation regarding the Task Force's review and recommendations simply does not justify a blanket suspension of all reactor licensing proceedings, and so their request to suspend these proceedings should be denied. Petitioners also assert that, pending the results of the Task Force's review, the Staff's safety review of applications is inadequate. Petition at 25-30. But under the Commission's established case law, the adequacy of the applicant's

²⁰ In one instance the Commission held its decision on appeal in abeyance as to one issue pending completion of a rulemaking that could assist the Commission in dispositioning the appeal. *See Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 2), *Public Serv. Elec. & Gas Co.* (Hope Creek Generating Station, Units 1 & 2), CLI-83-14, 17 NRC 745 (1983). In so doing, however, the Commission "concluded that the licenses can be issued and remain in effect" pending final Commission resolution. *Id.* at 751. In addition, 10 C.F.R. § 2.802(d), which governs petitions for rulemaking, provides that a rulemaking petitioner "may request that the Commission suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking." However, since the Petition does not indicate that Petitioners seek a rulemaking, that provision is inapplicable.

license application, not the NRC staff's safety evaluation report, is the safety issue in any licensing proceeding; and under longstanding decisions of the Commission, contentions on the adequacy of the Staff's review as documented in a Safety Evaluation Report ("SER") are not cognizable in a licensing proceeding. See *Changes to Adjudicatory Process*, Final Rule, 69 Fed Reg. 2,182, 2,202 (Jan. 14, 2004) (citing Commission case law). The adjudicatory process is not directed at supervising the NRC Staff's independent safety review. *Id.* Further, the Commission has stated that requiring that "the hearing process await completion of NRC Staff review would turn our adjudicatory process on its head" because "a petitioner has an 'ironclad obligation' to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention." *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2, & 3), CLI-99-11, 49 NRC at 338 (refusing a request to stay license renewal proceeding to allow petitioners time to review all requests for additional information ("RAI") issued by the Staff and all licensee responses to RAIs). Likewise, requiring reactor licensing proceedings to await the Task Force's long term report, which the Petitioners simply speculate might lead to information that could support new or amended contentions, would be inconsistent with the Commission's adjudicatory process. Therefore, suspending reactor licensing proceedings would prove an obstacle to the fair and efficient decision making associated with the existing adjudicatory process. Moreover, the operating reactors would continue to operate under their current licenses.

Consequently, Petitioners have not justified a suspension of proceedings under Commission precedent, because they have not identified any "immediate threats to public health and safety." *Oyster Creek*, CLI-08-23, 68 NRC at 484. Rather, Petitioners simply speculate that additional Staff analysis of the Fukushima event may result in changes to the NRC's requirements, analyses or licensing process. Yet, the Commission declined to suspend licensing proceedings after other events with similar implications, such as the terrorist attacks

on September 11, 2001, and the TMI accident. Moreover, as discussed in greater detail below, the NRC's regulatory process already contains ample mechanisms to incorporate any safety-significant lessons learned from the Fukushima event into reactors' licensing bases and the Commission's ongoing licensing proceedings. Thus, the Petitioners have not provided sufficient basis to support their request to suspend NRC licensing proceedings.

B. Petitioners Did Not Satisfy the Requirements for Staying All Reactor Licensing Decisions

While the Petition is framed in terms of a request for suspension of NRC licensing proceedings, it might also be understood as a request for the stay of decisions in those proceedings. To the extent the Petition constitutes a stay request, it does not meet the well-established criteria for justifying a stay.

Under 10 C.F.R. § 2.342(e), the factors used to analyze whether a stay is appropriate are (1) whether the moving party has made a strong showing that it is likely to prevail on the merits, (2) whether the party would be irreparably injured absent the stay, (3) whether the granting of the stay would harm other parties, and (4) where the public interest lies. The most important factor is irreparable harm.²¹ The Commission stated that "'raising the specter of a nuclear accident' does not demonstrate irreparable harm."²² A party urging a stay must show that any irreparable harm is imminent, certain, and great.²³ Absent any showing of irreparable

²¹ *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

²² *Entergy Nuclear Vermont Yankee LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237-38 (2006) (*quoting Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency*, 649 F.2d 71, 75 (1st Cir. 1981)).

²³ *Id.*

harm, the moving party must make an overwhelming showing of the likelihood of success on the merits.²⁴

Petitioners have not addressed the four stay factors, which is reason enough to deny the Petition.²⁵ Moreover, Petitioners have not demonstrated that they are entitled to a stay. First, Petitioners have not shown that they are likely to prevail on the merits in any particular case because they merely speculate on broad issues they may eventually pursue based on the results of the Task Force's review. Notwithstanding that the lessons learned have yet to be developed, Petitioners speculate that the lessons learned from the Fukushima Daiichi site might impact a "wide range of important safety issues, including the safety of spent fuel storage, seismic and flooding risks, station blackout, emergency planning, and severe accident management guidelines."²⁶ At no point do the Petitioners tie the tragic events in Japan to a specific reason or explanation as to why the NRC could not make the appropriate findings regarding reasonable assurance of adequate protection or compliance with NEPA with respect to a particular license or license application.²⁷

Petitioners have not shown any harm, much less irreparable harm, in the absence of a stay in any particular proceeding. Refusing to grant the stay here will not harm Petitioners because other avenues exist for Petitioners to advance their concerns whenever relevant and material information becomes available. These avenues include petitions for rulemaking,

²⁴ *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 6.

²⁵ *AmerGen Energy Co., LLC*, (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008).

²⁶ Petition at 26.

²⁷ *See infra* Sec. II.

section 2.206 petitions, and asserting additional new contentions, among others.²⁸ The adjudicatory rules already provide standards by which intervenors may file contentions after the originally noticed date, raise issues after the close of an adjudicatory record, and request a stay of a presiding officer's decision based on the specific circumstances related to the specific proceeding.²⁹

For example, Pilgrim Watch, the intervenor in the Pilgrim license renewal proceedings, has already submitted two filings to the Board based on the Fukushima Daiichi event. In Pilgrim Watch's March 28, 2011 Post-Hearing Memorandum, it requested substantially the same relief requested in the current Joint Emergency Petition to the Commission.³⁰ The Post-Hearing Memorandum is still pending before the Board in Pilgrim. Accordingly, with respect to Pilgrim Watch, the Petition is premature as the Board has not yet acted on the request before it.

Further, Petitioners' filing with the Commission deprives the Commission of the benefit of the Board's familiarity with the issues and specific circumstances in each proceeding. In *Oyster Creek*, the Commission stated that "participants in adjudications [should not bypass] the Board by filing motions directly with [the Commission]."³¹

The other two factors — harm to other parties and consideration of the public interest — also do not favor Petitioners. The request for a stay or suspension would harm the other

²⁸ For the majority of proceedings, there is no decision imminent that would result in some final action precluding a petitioner from raising new supported issues related to the Fukushima Daiichi event in their proceeding. During Petitioners' press conference, they identified only four proceedings—Pilgrim, Vogtle, and the two design certifications—as the basis of their concern that the NRC might act and foreclose raising issues related to Fukushima. This limited concern relating to a few proceedings hardly justifies staying or suspending all proceedings.

²⁹ See 10 C.F.R. §§ 2.309(c), (f)(2), 2.326, 2.342.

³⁰ Pilgrim Watch Post-Hearing Memorandum (March 28, 2011).

³¹ *Oyster Creek*, CLI-08-23, 68 NRC at 476 n. 63 (acknowledging that under certain circumstances a motion filed directly with the Commission might be warranted).

parties' and the public's interest in efficient and expeditious administrative proceedings. The request for a stay based on speculation regarding the outcome of the Task Force's review is premature and would result in unwarranted delay. As such a stay is inappropriate at this time and the Petition should be denied.

C. The Petitioners' Other Procedural Relief is Unsupported

In addition to requesting that the Commission suspend all reactor licensing decisions and asserting that the AEA and NEPA preclude any decisions, Petitioners have asked that the Commission establish new procedures for petitioners to raise issues related to the Fukushima Daiichi event and suspend all opportunities for public comment on any issue currently related to the Task Force's review.³²

The Commission's regulations already contain procedures for petitioners to raise new supported issues related to Fukushima Daiichi.³³ Some of the Petitioners, namely Pilgrim Watch, have already made substantially similar requests of the Board's in their proceedings. The Boards, however, have not been given the opportunity to act on the requests. Since many of the proceedings are unlikely to have any substantive hearings or final licensing decisions for a significant period of time, there is no need to seek the drastic relief requested by Petitioners. Even Petitioners have acknowledged that the only proceedings that they believed might have imminent licensing decisions were Pilgrim, Vogtle, and the design certification rulemakings for the AP1000 and ESBWR.³⁴

³² Petition at 2–3. In addition, Petitioners also requested that an independent Commission be established by the President and Congress to review the Fukushima Daiichi event. *Id.*

³³ See, e.g., 10 C.F.R. § 2.309(c) and (f)(2).

³⁴ Joint Press Conference at 2:35 – 3:00.

The Boards are better positioned to craft any necessary relief based on the unique circumstances of each specific proceeding, including the scope of the proceeding and any admitted contentions, the proceeding's schedule, and the specific needs of each of the parties.

The Petitioners request two specific changes to the normal procedures for adjudications. First, they request a guaranteed window of opportunity — following any suspension of the proceedings — to reopen the records in proceedings for which contested hearings have ended. The regulations provide for reopening the record of a proceeding to submit additional evidence only when the motion to reopen is timely, the motion addresses a significant safety or environmental issue, and a materially different result is likely if the additional evidence is considered. 10 C.F.R. § 2.326. Reopening the record is a remedy normally reserved for situations in which new information becomes available, *see Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 285 n.3 (1985), and specific intervenors may wish to pursue such remedies in specific proceedings in the future. The Petition currently under consideration is not a motion under 10 C.F.R. § 2.326, however, and it does not indicate what any such future motion might contain. In the absence of a specific motion to reopen, directed at the record of a particular proceeding, it is speculative to determine whether the standards of section 2.326 are or will be met.

Second, the Petitioners argue for establishment of a common schedule for filing new contentions in all proceedings – again, following any suspension that may be granted. As the Petitioners note, it is common practice for Licensing Boards to establish a 30-day deadline for filing new or amended contentions based on new information. Petition at 23. Because this is common practice, there is already a predictable regime for timely filing any future contentions based on newly available information to the extent such information indeed emerges in regard to the Fukushima event. If 30 days are not sufficient in a given case based on the nature of the

new information, case-specific motions for extensions of time to file (or to file out of time) are commonly requested and granted in NRC practice.

The Petitioners' argument regarding new contentions does not seem to be limited to the issue of deadlines, however, but instead relates to the burden of following the Fukushima event as it unfolds and determining what contentions to file based on the information currently available. The Petitioners specifically request that they not be required to file contentions until the NRC has completed its review of information about the event. Petition at 24. Similar arguments have been made in other proceedings with respect to requests to delay contention filing until after NRC staff reviews are complete, and such contentions have routinely been denied. *See, e.g., Oconee*, CLI-99-11, 49 NRC at 338-39 (*citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1048 (1983)). As the Commission has stated, "[t]he burden of participating in a proceeding is not a harm that can form the basis for holding a proceeding in abeyance. '[I]t has long been a basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation.'" *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 329 (2009), *citing Oconee*, CLI-99-11, 49 NRC at 338-39 (internal citation omitted).

The Petitioners argue that there is "extremely little in the way of official documentation from any source upon which Petitioners can rely in order to make a case before an individual Board that the unfolding events at Fukushima are relevant to individual licensing ... proceedings." Petition at 24. However, assembling information to support a contention, and making the case that a contention represents a genuine dispute with a specific application before the NRC, are at the core of any petitioner's responsibilities when filing contentions under 10 C.F.R. § 2.309(f)(1). Although the Petitioners argue that they have not yet been able to assemble enough information to support contentions, they identify several sources they may

wish to use in the future. The Petitioners have offered no explanation of why they will not be able to use these information sources to file new contentions pursuant to well-established Commission practices, without the establishment of special procedures. For this reason, the Petition does not demonstrate why ordinary NRC contention filing procedures would be insufficient in most cases, or why any exceptions could not be adequately addressed under the case management authority of the Boards in individual cases.

Finally, the Petitioners' request to suspend all opportunities for public comment on issues related the Task Force's review is counter-productive and unnecessarily limits the public's opportunity to fully participate in agency decisions.

Thus, the Petition should be dismissed.

II. The Atomic Energy Act Does Not Preclude Licensing Decisions Prior to Analyzing Information from the Fukushima Daiichi Event

Petitioners assert that the current uncertainty surrounding the Fukushima Daiichi event makes it impossible for the NRC to make a finding regarding adequate protection.³⁵ Petitioners allege that continuing with adjudications would be "grossly inconsistent" with the Commission's actions after the Three Mile Accident.³⁶ However, the Petitioners' characterization of the requirements of the Atomic Energy Act ("AEA") is contrary to long-standing Commission and court precedent.

As discussed above, the Commission decided to continue licensing adjudications in the aftermath of the TMI accident, even while it continued to study and assess the implications from that accident on existing reactors. Moreover, the AEA provides broad discretion to the

³⁵ Petition at 26.

³⁶ Petition at 26. The Petitioners' characterization of the Commission's actions after Three Mile Island is mistaken. The Commission's actions in the wake of Three Mile Island are discussed in Sec. I.A.2 *supra*.

Commission in making its reasonable assurance finding. The Petitioners have simply not produced sufficient information to explain why the Commission would be categorically restrained from finding adequate protection under the AEA after the Fukushima event. The AEA at section 182a requires that the Commission find that the application or license will “be in accord with the common defense and security and will provide adequate protection to the health and safety of the public.” 42 U.S.C. § 2232. This requirement is reflected in the Commission’s regulations.

For example, the regulations governing the issuing of an operating license state that:

(a) Pursuant to § 50.56, an operating license may be issued by the Commission, up to the full term authorized by § 50.51, upon finding that:

...

(3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public,

....

10 C.F.R. § 50.57(a)(3)(i) (emphasis added). The Commission recently addressed the concept of reasonable assurance during the Oyster Creek license renewal proceeding. In *Oyster Creek*, the Commission in affirming the Board’s decision stated that:

[Intervenor] impermissibly attempts to add an additional requirement to our well-established legal standards —correctly stated by the Board — that is not supported by Commission case law and regulations. “Reasonable assurance” is not quantified as equivalent to a 95% (or any other percent) confidence level, but is based on sound technical judgment of the particulars of a case and on compliance with our regulations.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 263 (2009). In *Oyster Creek*, the Commission approved of the Board’s restatement of the law regarding reasonable assurance. In the Board’s restatement,

“[r]easonable assurance,” ... is not susceptible to formalistic quantification or mechanistic application. Rather, whether the

reasonable assurance standard is satisfied is based on sound technical judgment applied on a case-by-case basis.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327, 340 (2007).

Courts have reviewed and accepted the “reasonable assurance” standard advanced by the Commission. In *Union of Concerned Scientists v. NRC*, the D.C. Circuit agreed that the Commission needed the discretion to look at reasonable assurance on a case-by-case basis.

The court stated that:

We also agree with the Commission that the “adequate protection” standard may be given content through case-by-case applications of its technical judgment rather than by a mechanical verbal formula or set of objective standards, as urged by petitioner. Due to changes in technology and variations in circumstances, “[t]here does not exist, and cannot exist, at least not yet, a generally applicable definition of ‘adequate protection’ which would guard against every possible misuse of the phrase. ... Congress did not define ‘adequate protection,’ nor did it command the Commission to define it.” Indeed, petitioner concedes that “[t]he concept of what constitutes adequate protection is an evolving standard that must keep pace with developing information and with improvements in nuclear power technology over time.” We elect not to second-guess the Commission's discretion in “mak[ing] sound judgments about what ‘adequate protection’ requires, by relying on expert engineering and scientific judgment, acting in light of all relevant and material information.”

Union of Concerned Scientists v. NRC, 880 F.2d 552, 558 (D.C. Cir. 1989) (internal citations omitted). The AEA granted the Commission wide discretion to weigh the information available, and utilize its expert engineering and scientific judgment to make the necessary determination of whether a particular application satisfied the requirements for reasonable assurance of adequate protection.

Contrary to Petitioners’ assertions, the AEA does not preclude the NRC from making findings regarding adequate protection pending consideration of potential lessons learned from the Fukushima event. Rather, as discussed above, the AEA requires the Commission to make

an adequate protection determination based on the specific set of facts before it in a given licensing action and its technical expertise. Moreover, as discussed above, the NRC's standard for reasonable assurance is ongoing and accounts for evolving scientific understanding. As it did in response to the TMI accident, the Commission may continue its licensing activities under the AEA, even while it studies the results of a severe accident. Should those studies uncover additional mitigation measures necessary to maintain adequate protection, the NRC has ample means of implementing those measures into its regulatory structure.³⁷ Nor would the NRC wait to exercise its adequate protection authority to address an immediate safety issue in a future or pending licensing process. Rather, the NRC would act in the context of current operating status to address any immediate safety issue. As such, a suspension or stay of all reactor licensing proceedings is inappropriate and the Petition should be denied.

III. The National Environmental Policy Act Does Not Preclude Licensing Decisions Prior to Analyzing Information from the Fukushima Daiichi Event

Petitioners have not shown that, in light of the Fukushima event, the NRC's environmental reviews will be inadequate under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331. Under NEPA, the NRC must "ensure that the [environmental impact] statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors, and to make a reasoned decision." *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 294, (D.C. Cir.1988). As the Commission has stated, "while there 'will always be more data that could be gathered,' agencies 'must have some discretion to draw the line and move forward with decisionmaking.'" *Entergy Nuclear Generation Company and Entergy Nuclear Operations*,

³⁷ See 10 C.F.R. § 51.109 (allowing the Commission to backfit regulatory provisions on licensees); 10 C.F.R. § 2.202 (authorizing the NRC to issue immediately effective orders to licensees when proper).

Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010) (slip op. at 37) (quoting *Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1185 (9th Cir.2000)) (ADAMS Accession No. ML100880136). The vast majority of the NRC's environmental review considers impacts from normal operations and facility construction. See, e.g., 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1 (identifying 92 environmental issues related to license renewal, one of which addresses severe accidents); 10 C.F.R. §§ 51.45(c), 51.75(d). Petitioners have not discussed how their concerns would materially impact these issues.

Instead, Petitioners appear to assert that any future NEPA analyses the agency may develop will not adequately address the Fukushima event. NEPA requires the NRC to prepare a detailed statement on the environmental impacts of major Federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). However, NEPA imposes no obligation on the NRC, or any other agency, to generically study the environmental impacts of reactors located in Japan. The NRC did not and is not undertaking a major federal licensing action for reactors in Japan. Rather, the NRC must take the requisite "hard look" at the environmental impacts of the applications before it. *Natural Resources Defense Council*, 865 F.2d at 294. Petitioners speculate that the discussion of severe accidents in future NRC NEPA analyses regarding individual reactor licensing proceedings will be inadequate to provide the necessary "hard look."³⁸ But, whether those analyses ultimately satisfy NEPA will be a case-specific determination. Consequently, Petitioners' generic claims do not provide sufficient information to warrant suspension of all of the captioned proceedings on the basis of alleged NEPA inadequacies.

³⁸ Petition at 27.

Moreover, in the context of license renewal reviews, with respect to severe accidents, from a NEPA perspective, the environmental impacts of severe accidents are small, in part because the risk of a severe accident has been determined to be small. *E.g.*, NUREG-1437, Vol. 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, at 5-11, 5-12, 5-114 (May 1996) (ADAMS Accession No. ML040690705) (“GEIS”). As discussed above, should the Task Force’s review uncover additional plant vulnerabilities, the NRC can and will take appropriate measures to address those vulnerabilities and maintain the level of safety afforded the public through its regulations and current operating oversight. Thus, the NRC will ensure that plants’ licensing bases adequately account for any new information that exposes plant vulnerabilities. Consequently, Petitioners have not identified information - other than speculation – to support a claim that the impacts of severe accidents would not remain small consistent with the NRC’s GEIS determination.³⁹

IV. Dr. Makhijani’s Declaration Does Not Provide Support to Warrant Granting the Petition

The Petitioners rely on a declaration from Dr. Makhijani to support their request for extraordinary relief, suspension of all reactor licensing proceedings. But Dr. Makhijani’s declaration, dated April 19, 2011, by itself is unremarkable. He “agree[s] with the Commission’s approach of conducting a long-term review of the regulatory implications of the Fukushima [Daiichi’s] accident”⁴⁰ Dr. Makhijani acknowledges that “the causes, evolution, and

³⁹ The staff’s environmental reviews of some recent new reactor applications have considered information from the GEIS, as well as safety enhancements in new reactor designs that bear on the risk of severe accidents relative to operating units, in finding severe accident impacts to be small. *See, e.g.*, NUREG-1872, Vol. 1, Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant Site, at 5-80 to 5-89 (Aug. 2008) (ADAMS Accession No. ML072410045).

⁴⁰ Makhijani Declaration at ¶ 16.

consequences of the Fukushima accident are not yet fully clear⁴¹ In supporting the Petition, he identifies eight areas that require additional analysis including: (1) effects of simultaneous accidents at multiple unit sites, (2) spent fuel pool accidents, (3) frequency of severe accidents, (4) safety-system response to long duration accidents, (5) loss of control room habitability, (6) impacts of emergency measures, (7) consequences of a severe accident, and (8) the relationship between hydrogen explosions and aircraft impact analysis.⁴² The declaration then suggests based on this “not yet fully clear” information that it is “reasonable and necessary for the NRC to suspend licensing and re-licensing decisions and standardized design certification” until the review is completed. In sum, Dr. Makhijani’s conclusions rely on the speculative premise that additional facts, once they are clear, will likely show that analyses as currently contemplated would be fundamentally altered.⁴³

Dr. Makhijani’s declaration essentially endorses the Commission’s decision to establish a Task Force to review how the event at Fukushima Daiichi impacts the current NRC regulatory environment and whether new or modified regulations might be necessary.⁴⁴ He agrees with the Commission’s approach to conduct a “short-term investigation of whether immediate actions are needed.”⁴⁵

Without explanation, he departs from his endorsement of the approach advanced by the Commission to an unsupported conclusory approach requiring the Commission to take actions

⁴¹ *Id.* at ¶ 5. *See also Id.* at ¶ 6 (“[M]any details about the Fukushima reactor accident remain unclear”).

⁴² *Id.* at ¶ 16.

⁴³ *See, e.g., id.* at ¶ 34.

⁴⁴ *Id.* at ¶ 16.

⁴⁵ *Id.* at ¶ 16.

to suspend all proceedings. As previously discussed, suspension is only warranted when there is an immediate threat to public safety. Yet, Dr. Makhijani urges the Commission to take this course prior to completing a thorough and meaningful analysis of the Fukushima Daiichi event.⁴⁶ Dr. Makhijani would appear to be prejudging the results of the Task Force's review. Dr. Makhijani has not articulated a supported reason for bypassing the near-term review by the Task Force based on the information currently available. Dr. Makhijani's analysis certainly does not demonstrate the immediate threat to public safety required to suspend licensing proceedings. Moreover, as discussed above, the NRC's regulatory process already provides sufficient ways to address any new information that the NRC's Task Force review of the Fukushima events may uncover. Thus, Dr. Makhijani's affidavit does not provide adequate support to the Petition and the Petition should be denied.

V. Suspension of Licensing Proceedings Under 10 C.F.R. Part 52 is Not Warranted

Essentially, the Petitioners' claim that NEPA and the AEA require the specific forms of relief requested in the Petition, in particular suspension of licensing proceedings and new procedures for filing contentions and petitions to reopen the record. Petition at 25-28. The Staff acknowledges that the Commission must make findings prior to issuing an ESP or COL pursuant to 10 C.F.R. §§ 52.24 and 52.97, respectively, and that the Commission must also make the relevant findings under the NRC's regulations that implement the AEA and NEPA. However, the Petitioners' assertion that either NEPA or the AEA require the specific forms of relief they seek, such as suspension of an ongoing adjudication, is mistaken.

Petitioners also note that the staff review includes consideration of severe accident scenarios, *id.* at 27, pursuant to 10 C.F.R. § 52.79(a)(38). Consistent with the applicable

⁴⁶ *Id.* at ¶ 5, 37.

statutes and regulations, the NRC staff documents its evaluation and findings in its FSER and FEIS for each ESP or COL application. Pursuant to the AEA, the NRC must hold a mandatory hearing on any ESP or COL application, even if there is no contested hearing on that application. See 42 U.S.C. § 2239. Accordingly, the Commission has the opportunity to examine the Staff's safety and environmental findings in its mandatory hearings regardless of whether any intervention petitions are granted in a given proceeding. This conforms with the approach the Commission took in the wake of the TMI accident, when it examined each application itself before taking licensing actions.⁴⁷ Statement of Policy, 44 Fed. Reg. 58,559 (Oct. 10, 1979). Moreover, if Petitioners identify materially new information, they already have various procedures available to pursue timely challenges to new reactor applications in contested proceedings before the Board.

Although the Petitioners refer to the standards the NRC must meet prior to issuing a license, the Petition does not demonstrate that these standards support the forms of relief that Petitioners seek. As discussed above, even assuming that new information related to the Fukushima incident would be material to a particular licensing action, the majority of new reactor licensing cases under 10 C.F.R. Part 52 are not scheduled for completion within the current calendar year, and the Petitioners have not offered a compelling argument as to why any change in the usual procedures related to contentions and motions is needed in those cases. Likewise, even for those few license reviews that are closer to completion, the Petitioners have not explained why case-by-case accommodations under the ordinary case management authority of the presiding officers would be insufficient to address their concerns. The NRC

⁴⁷ As discussed previously in Sec. I.A.3, the Staff's review is not open to challenge in contested adjudicatory proceedings.

Task Force's report on lessons learned from the Fukushima event is scheduled for completion in the near term. Therefore, the Petition does not demonstrate that this timeline would be likely to preclude appropriate consideration of material new information in any of the captioned proceedings even if the report were to contain a recommendation that would be applicable to the facility in question.⁴⁸ For these reasons, the relief requested by the Petitioners should be denied.

The Petition appears to state that the NRC must prepare an environmental assessment of the Fukushima event itself, in addition to the reports and recommendations the Task Force produces. Petition at 27. The NRC's NEPA responsibilities do not extend to the environmental effects of events outside the United States, at facilities operating under the regulatory regimes of other countries.⁴⁹ Moreover, the Petition does not explain why new information related to the Fukushima incident presently provides any basis to conclude that the environmental review in any particular new reactor proceeding has not complied (or will not comply) with NEPA.

The Petition also mentions ongoing design certification rulemakings, and requests that the Commission prevent issuance of the design certifications for the AP-1000 and ESBWR reactor designs. No adjudicatory proceedings are underway in connection with these rulemakings. The Commission designed the rulemaking process to be a separate, generic, process and not within the scope of its case-by-case adjudicatory process. The Commission's regulations related to rulemaking are in 10 C.F.R. Part 2, Subpart H, and documents or comments related to ongoing rulemakings should be filed under the provisions of that subpart rather than as adjudicatory filings.

⁴⁸ SRM-COMGBJ11-0002.

⁴⁹ See *supra* Sec. III.

VI. Operating Issues Raised by the Fukushima Daiichi Event Are Beyond the Scope of License Renewal Process

With respect to license renewal proceedings, the Petition does not provide a sufficient basis to justify suspending or staying those adjudications.⁵⁰ The Petition raises issues that are outside the narrow scope of the NRC's safety review for license renewal, which is limited to managing the effects of aging on certain passive structures, systems, and components. Moreover, even if the NRC's subsequent review yields insights into aging management, the NRC's licensing process already contains sufficient mechanisms for incorporating those insights into the licensing bases of all reactors regardless of whether a renewal application is currently pending before the NRC. From a NEPA perspective, the Petition's concerns related to the environmental impacts of severe accidents are outside the scope of the NRC's license renewal review. The NRC has already generically assessed the environmental impacts of severe

⁵⁰ Although not relevant to the current issues, the Petition misstates a number of important features of on-going license renewal cases. First, the Petitioners claim that one contention in the Diablo Canyon proceeding rests on "a footnote in the 2009 Draft Revised Generic Environmental Impact Statement for Nuclear Power Plant License Renewal which excludes Diablo Canyon and other western reactors from the NRC's finding that pool storage of spent fuel does not pose significant environmental risks with respect to earthquake vulnerability." Petition at 10. In fact, that footnote states that a study relied on by the NRC excluded those reactors, but overall, the NRC document finds that the spent fuel pools at Diablo Canyon and other western reactors will have a small environmental impact during the term of a renewed license. NUREG-1437, Vol. 2, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Draft Report for Comment, Rev. 1, at E-33 n.1, E-37 (July 2009) (ADAMS Accession No. ML091770048). With regard to the Pilgrim proceeding, Petitioners claim that "the buried pipe contention was dismissed on summary disposition." Petition at 11. In fact, it went to hearing. *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-14, 71 NRC __ (Jun. 17, 2010) (slip op. at 2). Petitioners also assert that the "SAMA contention is still before the board," but the Commission limited that contention on remand. Petition at 3.

The Petitioners also characterize the procedural status of the captioned new reactor licensing proceedings, including the subject matter of certain proposed or admitted contentions. Because the Petition should be denied for the various reasons already explained above, the staff does not herein address the accuracy of those characterizations. However, the staff notes that in a number of the captioned new reactor licensing proceedings, either no intervention petition was granted or the contested proceeding was terminated following the dismissal of all previously admitted contentions, such that the proceedings are currently uncontested (e.g., Bell Bend, Comanche Peak, Shearon Harris, Summer, Vogtle, and William S. Lee).

accidents, and the Petition does not contain sufficient information to challenge that assessment. Even if the Commission grants the Petition's sought relief, the result in the license renewal proceedings would be a continuation in operation under the current operating license. As a result of timely renewal, the plants requesting renewed licenses would continue to operate under their current license until the delayed proceedings concluded at some unknown future date. 10 C.F.R. § 2.109. If a plant can operate safely under its current operating license, it would be logical to conclude that once the license renewal process was completed, it would continue to be operated safely.

A. Safety Review

For purposes of license renewal, the Commission has found a review of safety issues already monitored by the ongoing regulatory oversight process unnecessary. *Florida Power & Light Company* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8-10 (2001). As a result, the license renewal safety review narrowly focuses on "plant systems, structures, and components for which current [regulatory] activities and requirements *may* not be sufficient to manage the effects of aging in the period of extended operation." *Id.* at 10. "For each structure or component requiring an aging management review [under § 54.21(a)(1)(i)] the license renewal application must demonstrate that the 'effects of aging will be adequately managed so that the *intended function(s)* [as defined in § 54.4(a)(1)-(3)] will be maintained" *Pilgrim*, CLI-10-14, 71 NRC__ (slip op. at 8). Petitioners state that the Fukushima Daiichi event raises "a wide range of important safety issues, including the safety of spent fuel storage, seismic and flooding risks, station blackout, emergency planning, and severe accident management guidelines" as well as "questions about the effectiveness of GE Mark 1 containment." Petition at 26. But, the Petitioners have not shown how these generalized safety concerns impact aging management of passive systems, structures, and components. Consequently, the Petitioners have not demonstrated that their concerns are within the scope of

license renewal proceedings or that the AEA mandates a suspension or stay of the license renewal proceedings.

Moreover, even if the NRC's review of the Fukushima Daiichi event reveals additional aging management techniques, the NRC's regulatory process already allows the NRC to incorporate these insights into the licensing bases of plants with renewed operating licenses through existing aging management plans, backfitting, or inspection. First, to meet the NRC's requirements for license renewal, licensees primarily rely on aging management programs (AMPs) that are consistent with the model AMPs in the NRC's Generic Aging Lessons Learned ("GALL") Report. NUREG-1801, Rev. 2, GALL Report (Dec. 2010) (ADAMS Accession No. ML103490041). The Commission has stated, "the license renewal applicant's use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period." *Oyster Creek*, CLI-08-23, 68 NRC at 468. One element of an AMP in the GALL Report is Operating Experience, under which an applicant "should commit to a future review of plant-specific and industry operating experience to confirm the effectiveness of its aging management programs or indicate a need to develop new aging management programs." NUREG-1800, Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants, Rev. 2, at A.1-7 (Dec. 2010) (ADAMS Accession No. ML103490036). Additionally, the NRC may require licensees to adopt safety measures under the backfit rule. 10 C.F.R. § 50.109. Finally, if future studies demonstrate that the NRC does not have reasonable assurance that plants with renewed licenses will operate safely, the NRC may order those plants to shut down under its inspection procedures and require the plants to implement additional safety measures before resuming operation. NRC Inspection Manual, Manual Chapter 0305, at 24 (Aug. 2009) (ADAMS Accession No. ML091490387).

Therefore, should the NRC's future research indicate that plants with renewed licenses must take additional measures to safely manage the effects of aging, or otherwise operate safely, the NRC's regulatory process already contains sufficient means to ensure that licensees do so. The NRC may require licensees to incorporate such lessons into their AMPs, backfit additional requirements onto the licensees, and order operating plants to shut down if the NRC lacks reasonable assurance. Moreover, these regulatory provisions apply whether or not the NRC is presently holding a hearing on a renewal application. As a result, halting license renewal proceedings would not provide any additional benefit or protection to the public and may inhibit fair and efficient case-by-case adjudication.

B. NEPA Review

Likewise, NEPA does not require the NRC to suspend or stay its license renewal proceedings because the issues raised by the Petition are not within the scope of the NRC's environmental review in those proceedings. With respect to license renewal, the NRC has already considered the environmental impacts of severe accidents generically and found them to be small. GEIS at 5-114. This conclusion is contained in the NRC's regulations. 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1. As a result, parties seeking to challenge the NRC's determination of the impacts of severe accidents in a license renewal proceeding must petition for a waiver of those regulations. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005). To successfully petition for waiver of a regulation, a party must show circumstances that "are unique to the facility rather than common to a large class of facilities." *Id.* (quotations omitted). But, the Petition's justifications for suspending NRC proceedings clearly apply to a large class of facilities and

therefore could not meet the Commission's waiver standard.⁵¹ Moreover, as discussed above, the Petition does not provide sufficient information to undermine the NRC's conclusion regarding the environmental impacts of severe accidents in the GEIS. As a result, the concerns raised in the Petition are not within scope of the NRC's NEPA review for individual license renewal proceedings and therefore should not form the basis for a suspension of all those proceedings.⁵²

⁵¹ Generic challenges to rules are appropriately made by petitions for rulemaking rather than site specific challenges in adjudication. See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Station & Vermont Yankee Nuclear Power Station), CLI-07-3, 65 NRC 13, 20-21 (2007) (stating that the proper approach for pursuing a claim of new and significant information regarding a generic issue previously addressed by rulemaking is a petition for rulemaking); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 186 (2008).

⁵² As part of its individual environmental reviews for license renewal, the NRC must consider severe accident mitigation alternatives (SAMAs). These plant-specific determinations require the NRC to determine "whether particular SAMAs would sufficiently reduce risk – e.g., by reducing frequency of core damage or frequency of containment failure – for the SAMA to be cost-effective to implement." *Pilgrim*, CLI-10-11, 71 NRC ___ (Mar. 26, 2010) (slip op. at 3). But, should the NRC's future studies uncover cost-beneficial mitigation measures, then the NRC will have the option of imposing any necessary measures on licensees. Moreover, to the extent Petitioners speculate that future NRC SAMA analyses will be inadequate, that claim is premature and better considered in individual licensing proceedings. As a result, the Petitioners have not shown why the NRC's NEPA reviews for license renewal will be deficient in individual license renewal proceedings.

CONCLUSION

For the reasons set forth above, the Commission should deny the Petition.

Respectfully submitted,

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