

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL**

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**In the Matter of  
South Texas Project Nuclear Operating Co.  
Application for the South Texas Project  
Units 3 and 4  
Combined Operating License**

**Docket Nos. 52-012, 52-013  
August 11, 2011**

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**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**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309, Intervenors hereby move to admit a new contention challenging the adequacy of the STP Units 3 & 4 Combined License Application, Environmental Report (the “ER”) on the basis that it fails to address the extraordinary environmental and safety implications of the findings and recommendations raised by the Nuclear Regulatory Commission’s Fukushima Task Force (the “Task Force”) in its report, “Recommendations for Enhancing Reactor Safety in the 21<sup>st</sup> Century: The Near-Term Task Force Review of Insights From the Fukushima Dai-ichi Accident” (July 12, 2011) (“Task Force Report”). Intervenors respectfully submit that admitting the new contention is necessary to ensure that the Nuclear Regulatory Commission (“NRC” or the “Commission”) fulfills its non-discretionary duty under the National Environmental Policy Act (“NEPA”) to consider the new and significant information set forth in the Task Force Report before it issues a Combined License (“COL”) for STP 3 & 4.

This motion is supported by a Certificate Required by 10 C.F.R. § 2.323(b).

## II. DISCUSSION

To be admitted for hearing, a new contention must satisfy the six general requirements set forth in 10 C.F.R. § 2.309(f)(1), and the timeliness requirements set forth in either 10 C.F.R. § 2.309(f)(2) (governing timely contentions) or 10 C.F.R. § 2.309(c) (governing non-timely contentions). As provided in the accompanying contention, each of the requirements set forth in 10 C.F.R. § 2.309(f)(1) is satisfied. Furthermore, Intervenors maintain that this Motion and accompanying contention are timely, and the requirements of 10 C.F.R. § 2.309(f)(2) are also satisfied. In the event this Board determines that this Motion and the accompanying contention are not timely, however, Intervenors also maintain that the requirements of 10 C.F.R. § 2.309(c) are satisfied.

### A. **This Motion and the Accompanying Contention Satisfy the Requirements for Admission of a Timely Contention Set Forth in 10 C.F.R. § 2.309(f)(2).**

The NRC has adopted a three-part standard for assessing timeliness. *See* 10 C.F.R. § 2.309(f)(2). The Motion and accompanying contention are timely.

#### 1. **The Information Upon Which the Motion and Accompanying Contention are Based was not Previously Available.**

The availability of material information “is a significant factor in a Board’s determination of whether a motion based on such information is timely filed.” Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-85-19, 21 NRC 1707, 1723 (1985) (internal citations omitted). This Motion and the accompanying contention are based upon information contained within the Task Force Report, which was not released until July 12, 2011. Before issuance of the Task Force Report, the information material to the contention was simply unavailable.

**2. The Information Upon Which the Motion and Accompanying Contention are Based is Materially Different than Information Previously Available.**

Only five months ago, a nuclear accident occurred at the Fukushima Dai-ichi Nuclear Power Plant. In the wake of the accident, the Task Force was established and instructed by the NRC to provide:

A systematic and methodical review of [NRC] processes and regulations to determine whether the agency should make additional improvements to its regulatory system and to make recommendations to the Commission for its policy direction, in light of the accident at the Fukushima Dai-ichi Nuclear Power Plant.

Task Force Report at vii. In response to that directive, the Task Force made twelve “overarching” recommendations to “strengthen the regulatory framework for protection against natural disasters, mitigation and emergency preparedness, and to improve the effectiveness of NRC’s programs.” *Id.* at viii. In these recommendations the Task Force, for the first time since the Three Mile Island accident occurred in 1979, fundamentally questioned the adequacy of the current level of safety provided by the NRC’s program for nuclear reactor regulation.

In the ER, FPL assumes that compliance with existing NRC safety regulations is sufficient to ensure that the environmental impacts of accidents are acceptable. The information in the Task Force Report refutes this assumption and is materially different from the information upon which the ER is based. *See* attached contention and Declaration of Dr. Arjun Makhijani.

**3. The Motion and Accompanying Contention are Timely Based on the Availability of the New Information.**

Intervenors have submitted this motion and accompanying contention in a timely fashion. The NRC customarily recognizes as timely contentions that are submitted within thirty (30) days of the occurrence of the triggering event. Shaw Areva MOX Services, Inc. (Mixed Oxide Fuel Fabrication Facility), LBP-08-10, 67 NRC 460, 493 (2008). The Task Force Report, upon which

the contention is based, was published on July 12, 2001. Because they were filed within thirty (30) days of publication of the Task Force Report, this Motion and accompanying contention are timely.

**B. The New Contention Satisfies the Standards For Non-Timely Contentions Set Forth in 10 C.F.R. § 2.309(c).**

Pursuant to § 2.309(c), determination on any “nontimely” filing of a contention must be based on a balancing of eight factors, the most important of which is “good cause, if any, for the failure to file on time.” Crow Butte Res., Inc. (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008). As set forth below, each of the factors favors admission of the accompanying contention.

**1. Good Cause.**

Good cause for the late filing is the first, and most important element of 10 C.F.R. § 2.309(c)(1). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000). Newly arising information has long been recognized as providing the requisite “good cause.” See Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-82-63, 16 NRC 571, 577 (1982), *citing* Indiana & Michigan Elec. Co. (Donald C. Cook Nuclear Plant, Units 1 & 2), CLI-72-75, 5 AEC 13, 14 (1972). Thus, the NRC has previously found good cause where (1) a contention is based on new information and, therefore, could not have been presented earlier, and (2) the intervenor acted promptly after learning of the new information. Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 69-73 (1992).

As noted above, the information on which this Motion and accompanying contention are based is taken from the Task Force Report, which was issued on July 12, 2011 and analyzes NRC processes and regulations in light of the Fukushima accident, an event that occurred a mere

five months ago. This Motion and accompanying contention are being submitted less than thirty (30) days after issuance of the Task Force Report.

Accordingly, the Intervenors have good cause to submit this Motion and the accompanying contention now.

## **2. Nature of the Intervenors' Right to be Advance the Contention.**

Accordingly, Intervenors have the right to advance the subject Fukushima contention. 10 C.F.R. § 2.309(f)(2), *In the Matter of Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.*, 70 N.R.C. 41, 2009 WL 6700324.

## **3. Nature of Intervenors' Interest in the Proceeding.**

The organizational Intervenors seek to protect their members' health, safety, and lives; individual Intervenors seek to protect their own health, safety, and lives; and each Intervenor seeks to protect the health and safety of the general public and the environment by ensuring that the NRC fulfills its non-discretionary duty under NEPA to consider the new and significant information set forth in the Task Force Report before it issues a COL for STP 3 & 4. Moreover, as each of the members represented by SEED Coalition and Public Citizen in this proceeding, and individual Intervenors live within fifty (50) miles of Turkey Point, Intervenors have an interest in this proceeding because of the "obvious potential for offsite consequences" to their own or their members' health and safety. Diablo Canyon, 56 NRC at 426-27, citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

## **4. Possible Effect of an Order on Intervenors' Interest in the Proceeding.**

As noted above, Intervenors' interest in a safe, clean, and healthful environment would be served by the issuance of an order requiring the NRC to fulfill its non-discretionary duty under

NEPA to consider new and significant information before making a licensing decision. *See* Silva v. Romney, 473 F.2d 287, 292 1st Cir. 1973). Compliance with NEPA ensures that environmental issues are given full consideration in “the ongoing programs and actions of the Federal Government.” Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 n.14 (1989).

**5. Availability of Other Means to Protect the Intervenor’s Interests.**

With regard to this factor, the question is not whether other parties may protect Intervenor’s interests, but rather whether there are other means by which Intervenor may protect their own interests. Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631 (1975). Quite simply, no other means exist. Only through this hearing do Intervenor have a right that is judicially enforceable to seek compliance by NRC with NEPA before the COL for STP Units 3 & 4 is issued, permitting these new reactors to operate and impose severe accident risks on Intervenor and the individuals they represent.

**6. Extent the Intervenor’s Interests are Represented by Other Parties.**

No other party can represent Intervenor’s interests in protecting the health, safety, and environment of themselves and their members. **Extent That Participation Will Broaden the Issues.**

While Intervenor’s participation may broaden or delay the proceeding, this factor may not be relied upon to deny this Motion or exclude the contention because the NRC has a non-discretionary duty under NEPA to consider new and significant information that arises before it makes its licensing decision. Marsh, 490 U.S. at 373-4. Admission of the Fukushima contention will not delay the arguments and hearing set for this matter on August 17-19, 2011.

**7. Extent to which Intervenors Will Assist in the Development of a Sound Record.**

Intervenors will assist in the development of a sound record, as their contention is supported by the expert opinion of a highly qualified expert, Dr. Arjun Makhijani. *See* attached Makhijani Declaration. *See also* Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 6 (2008) (finding that, when assisted by experienced counsel and experts, participation of a petitioner may be reasonably expected to contribute to the development of a sound record). Furthermore, as a matter of law, NEPA requires consideration of the new and significant information set forth in the Task Force Report. *See* 10 C.F.R. § 51.92(a)(2). A sound record cannot be developed without such consideration.

**C. The New Contention Satisfies the Standards For Admission of Contentions Set Forth in 10 C.F.R. § 2.309(f)(1).**

As discussed in the accompanying contention, the standards for admission of a contention set forth in 10 C.F.R. § 2.309(f)(1) are satisfied.

**III. CONCLUSION**

For the foregoing reasons, this Motion should be granted and the accompanying contention admitted.

Respectfully submitted this 11<sup>th</sup> day of August 2011.

*Electronically signed by*

s/ Robert V. Eye  
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**CERTIFICATE REQUIRED BY 10 C.F.R. § 2.323(b)**

I certify that on August 11, 2011, I contacted counsel for the applicant and the NRC Staff in an attempt to obtain their consent to this motion. Applicant opposes such. Staff indicated that until a review of the motion a position would not be taken. Staff expressed that they reserved the right to respond to the motion.

*Electronically signed by*

s/

Robert V. Eye



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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2011 a copy of the above and foregoing was served by the Electronic Information Exchange on the following recipients:

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