UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 52-027-COL
	)	52-028-COL
SOUTH CAROLINA ELECTRIC & GAS COMPANY AND SOUTH CAROLINA PUBLIC SERVICE AUTHORITY (ALSO REFERRED TO AS SANTEE COOPER)	)	
(Virgil C. Summer Nuclear Station Units 2 and 3)	)	
	)	August 22, 2011

SOUTH CAROLINA ELECTRIC & GAS COMPANY'S ANSWER IN OPPOSITION TO SUPPLEMENTAL COMMENTS REGARDING FUKUSHIMA TASK FORCE REPORT

I. INTRODUCTION

On August 10, 2011, the Sierra Club and Friends of the Earth ("Petitioners") filed with the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"), Supplemental Comments addressing the safety and environmental implications of the NRC Task Force Report, "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011) ("Task Force Report").[1] Petitioners assert that these Supplemental Comments are intended to augment the "Emergency Petition to Suspend All Reactor Licensing Decisions and Related Rulemaking Decision Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident," filed in this matter on April 19, 2011 ("Emergency Petition"). Much as they

[1] Supplemental Comments by Friends of the Earth and the South Carolina Chapter of the Sierra Club in Support of Emergency Petition Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 10, 2011) ("Supplemental Comments"); Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011) ("Makhijani Declaration"). Although styled differently, pleadings making essentially identical arguments were filed by various petitioners in numerous ongoing licensing proceedings.

had in their Emergency Petition, Petitioners "request a complete review and hearing on the significant—indeed extraordinary—safety and environmental implications for the COLA and its related environmental documents of the conclusions and recommendations of the U.S. Nuclear Regulatory Commission's Near-Term Task Force (the 'Task Force')."[2]

South Carolina Electric & Gas Co. ("SCE&G"), on behalf of itself and South Carolina Public Service Authority, the applicants in this proceeding, is filing this Answer in opposition within the ten-day response deadline pursuant to 10 C.F.R. § 2.323(c). As discussed below, the Commission should reject the Supplemental Comments as untimely and for failure to satisfy the standards for supplementing their earlier Petition.

II. BACKGROUND

On March 27, 2008, SCE&G submitted an Application to the NRC for combined licenses ("COLs") for Virgil C. Summer Nuclear Station ("Summer") Units 2 and 3.[3] A hearing notice, published in the *Federal Register* on October 10, 2008, stated that any person whose interest may be affected by this proceeding and who may wish to participate as a party had to file a petition for leave to intervene by December 9, 2008, in accordance with 10 C.F.R. § 2.309.[4] Petitioners timely filed a joint Petition to Intervene, which proposed three contentions.[5] Those contentions raised issues concerning the AP1000 design (Contention 1), aircraft impacts (Contention 2), and the need for power and the costs of and alternatives to the proposed action (Contention 3).

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2 Supplemental Comments at 2.

3 Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 60,362, 60,362 (Oct. 10, 2008).

4 *See id.* at 60,363.

5 Petition to Intervene and Request for Hearing by Sierra Club and Friends of the Earth (Dec. 9, 2008) ("Petition to Intervene").

In a February 18, 2009 decision, the Atomic Safety and Licensing Board ("Board") denied the Petition to Intervene because Petitioners failed to submit an admissible contention.[6] Following an appeal of that decision, on January 7, 2010, the Commission issued an Order that affirmed in part, reversed in part, and remanded portions of the Board decision.[7] On remand, the Board followed the Commission's instructions to reassess the admissibility of portions of Contention 3 on the need for power and the costs of and alternatives to the proposed action, and found that contention inadmissible.[8] Subsequently, following a second appeal, on August 27, 2010, the Commission affirmed the Board and terminated the contested portion of this proceeding.[9]

As noted above, on April 19, 2011, Petitioners filed, directly with the Commission, their Emergency Petition requesting that the Commission take the following actions:

(1) suspend all decisions regarding the issuance of various reactor licenses and approvals, including COLs and design certifications, pending completion of the NRC Task Force evaluation of the agency's regulatory requirements, programs, and processes in light of the Fukushima Daiichi accident in Japan, following the March 11 earthquake and tsunami;

(2) suspend all hearings on reactor-related or spent fuel-related issues identified for investigation in the Task Force's charter;

(3) perform a National Environmental Policy Act ("NEPA") analysis of whether the earthquake and Fukushima Daiichi accident constitute new and significant information that must be considered in an environmental impact statement ("EIS");

(4) perform a safety analysis of the regulatory implications of the earthquake and Fukushima Daiichi accident;

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6 *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), LBP-09-2, 69 NRC 87, 113 (2009).

7 *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC __, slip op. at 33 (Jan. 7, 2010).

8 *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), LBP-10-6, 71 NRC __, slip op. at 37 (Mar. 17, 2010).

9 *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-21, 72 NRC __, slip op. at 6 (Aug. 27, 2010).

(5) establish procedures and a timetable for raising new issues relevant to the Fukushima Daiichi accident in pending licensing proceedings;

(6) suspend all decisions and proceedings pending the outcome of any independent investigation of the Fukushima Daiichi accident; and

(7) request that the President establish an independent investigation of the Fukushima Daiichi accident.[10]

On May 2, 2011, SCE&G filed its answer in opposition to the Emergency Petition, demonstrating that it failed to satisfy applicable Commission requirements and, accordingly, should be denied.[11]

On August 10, 2011, Petitioners filed the Supplemental Comments which, they contend, "supplement" and lend additional support to their April Emergency Petition.[12] Conspicuously absent from their Supplemental Comments, however, is any authority which might permit such augmentation of their earlier filing.

III. LEGAL STANDARDS

The legal standards governing suspension of a proceeding and the other relief sought were previously addressed in SCE&G's May 2, 2011 Answer to the Petitioners' Emergency Petition, and are incorporated by reference herein.[13] As the Petitioners acknowledge, their Supplemental Comments are intended to augment their Emergency Petition and no more.[14] Thus, the Supplemental Comments are most appropriately considered as a supplement to the

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10 *See* Emergency Petition at 1-3, 28-29.

11 *See* South Carolina Electric & Gas Company's Answer in Opposition to Emergency Petition to Suspend Licensing Proceedings (May 2, 2011). *See also* South Carolina Electric & Gas Company's Answer in Opposition to Petitioners' Motion to Permit A Consolidated Reply (May 16, 2011).

12 Supplemental Comments at 1.

13 *See* South Carolina Electric & Gas Company's Answer in Opposition to Emergency Petition to Suspend Licensing Proceedings at 4-6 (May 2, 2011) ("SCE&G Answer to Emergency Petition").

14 *See* Supplemental Comments at 1.

Emergency Petition and treated as a motion pursuant to 10 C.F.R. § 2.323.[15] Briefly stated, the legal and substantive deficiencies previously identified are not remedied by Petitioners' Supplemental Comments. In any event, the Supplemental Comments are not authorized by the Commission's Rules of Practice, and Petitioners have made no showing which would permit their consideration here.

IV. ARGUMENT

A. The Supplemental Comments Should Be Summarily Rejected on Procedural Grounds

Turning first to procedural matters, the Commission should dismiss the Petition because Petitioners failed to comply with several applicable requirements, each of which constitutes an adequate independent reason for dismissal.

First, a motion must be rejected if it does not include a certification by the moving party that it has made a sincere effort to contact the other parties and resolve the issues raised in the motion.[16] The Supplemental Comments were filed without first seeking leave of the Commission to do so and without first consulting with SCE&G, as required by 10 C.F.R. §2.323(b). For these reasons alone, the Supplemental Comments should be summarily rejected.

Second, a motion must be made no later than 10 days after the occurrence or circumstance from which the motion arises.[17] The Task Force Report was released on July 12, 2011—well more than 10 days before the filing of the Supplemental Comments on August 10, 2011. For this reason alone the Supplemental Comments are untimely and should be rejected.

Furthermore, the new information that the Petitioners state was revealed by the Task Force Report is that:

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[15] *See* SCE&G Answer to Emergency Petition at 4-6.

[16] 10 C.F.R. § 2.323(b). *See also* SCE&G Answer to Emergency Petition at 7.

[17] 10 C.F.R. § 2.323(a). *See also* SCE&G Answer to Emergency Petition at 6-7.

> The Task Force, a group of highly qualified and experienced Nuclear Regulatory Commission ('NRC' or the 'Commission') staff members selected by the Commission to evaluate the regulatory implications of the Fukushima Dai-ichi accident, has issued a report recommending the NRC strengthen its regulatory scheme for protecting public health and safety by increasing the scope of accidents that fall within the 'design basis' and are therefore subject to mandatory safety regulation.[18]

The Petitioners do not claim that any of the facts upon which the Task Force based its recommendations were new or first revealed by the Task Force Report.[19] If any information in the Task Force Report is viewed as providing the bases for the Supplemental Comments, then the timeliness of these Comments must be judged by when the relevant information was disclosed, not by the timing of the most recent report that discussed the information.

This precept was recently emphasized by the Commission in *Vermont Yankee,* which addressed circumstances that were quite similar to the instant circumstances. In *Vermont Yankee*, the petitioner argued that a proposed late-filed contention was timely, in part, because it was based on information in an NRC inspection report. In finding that the contention was not timely, the Commission pointed out that if the allegation of a deficiency in the application was true when the contention was filed, it was equally true when the application was filed, and that the discussion of these matters in a more recent NRC inspection report "does not inform the issue of timeliness."[20] Here too, whatever the merits of Petitioners' assertions that the NRC regulations fail to specify adequate design bases requirements, and that the NRC's consideration of severe accident mitigation alternatives ("SAMAs") is not adequate, the relevant regulations

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[18] Supplemental Comments at 2.

[19] In fact, Petitioners assert that similar recommendations were made 30 years ago following the Three Mile Island accident. *Id.* at 3.

[20] *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC __, slip op. at 9 (Mar. 10, 2011).

and consideration of SAMAs have not changed significantly since the application was filed or since the accident at Fukushima occurred on March 11, 2011.

Furthermore, while Petitioners assert that their Supplemental Comments are founded on new information that was revealed in the Task Force Report, they also state:

> In the aggregate, these contentions, rulemaking comments, and the rulemaking petition follow-up on the Emergency Petition's demand that the NRC comply with NEPA by addressing the lessons of the Fukushima accident in its environmental analyses for licensing decisions. Having received no response to their Emergency Petition, many of the signatories to the Emergency Petition now seek consideration of the Task Force's far-reaching conclusions and recommendations in each individual licensing proceeding, including the instant case.[21]

Thus, the Petitioners essentially concede that their Supplemental Comments are simply an alternative approach to raise the same issues they previously raised some four months ago in the Emergency Petition they filed with the Commission. Consequently, the Supplemental Comments are not timely.

Third, an organization does not have the requisite status to file a petition to suspend a proceeding unless it has gained formal "party" status or has at least filed a timely petition to intervene.[22] Petitioners' previous Petition to Intervene was rejected by the Board, that decision was upheld by the Commission, and the proceeding was terminated.[23] Thus, as noted in SCE&G's Answer to Emergency Petition, Petitioners were obligated, but failed to demonstrate that they had standing to request the relief being sought in the Emergency Petition.[24] Likewise in their Supplemental Comments, Petitioners have not proffered any facts to demonstrate that they

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21 Supplemental Comments at 4-5.

22 *See* SCE&G Answer to Emergency Petition at 8 (*citing Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 235 n.6 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001)).

23 *See Summer*, CLI-10-21, 72 NRC __, slip op. at 6.

24 *See* SCE&G Answer to Emergency Petition at 8.

have standing to participate in this proceeding.[25] Therefore, Petitioners also do not have the requisite status to request the relief being sought in the Supplemental Comments.[26]

B. The Petitioners' Supplemental Comments Do Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

As explained above, despite the unambiguous and fundamental requirement to do so, Petitioners have not proffered any contention suggesting a basis to believe that the Summer COL Application is inadequate.[27] Nor have they put forward any reason to believe that the outcome of the Commission's ongoing deliberations on how to proceed might warrant interruption of this ongoing proceeding or might foreclose meaningful consideration of any new requirements that the Commission may, in the end, determine necessary for any facility, including Summer Units 2 and 3.

Although the Petitioners have not proffered a contention, even if their Supplement Comments and request for a "hearing" was somehow read as a proposing a contention, it should nonetheless be rejected for failing to satisfy the Commission's admissibility requirements in 10 C.F.R. § 2.309(f)(1).[28]

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[25] Although Petitioners may have intended to rely on the earlier determination that they had standing to intervene at that earlier stage in the proceeding, they fail to provide any information suggesting that their earlier filings, including previously submitted declarations, remain accurate. *See Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-4, 37 NRC 156, 163 (1993) (explaining that a petitioner may rely on prior determinations of standing if the petitioner shows that its prior standing determinations correctly reflect the current status of its standing).

[26] *See Diablo Canyon*, CLI-02-23, 56 NRC at 235 n.6; *Savannah River*, CLI-01-28, 54 NRC at 398; *see also Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 330 (1983) (untimely intervention petitioner has no status to file second motion, concurrently, to disqualify commissioner).

[27] *See* 10 C.F.R. § 2.309(f). Petitioners' decision to style their submission as "Supplemental Comments" does not allow them to evade reply by SCE&G.

[28] *See* Supplemental Comments at 2.

1. The Supplemental Comments Challenge the Adequacy of Existing NRC Regulations

The Supplemental Comments should be rejected because they constitute a challenge to the adequacy of NRC regulations. Such challenges are specifically prohibited by 10 C.F.R. § 2.335(a).[29] NRC case law makes clear that such collateral attacks on the basic structure of the NRC regulatory process should be rejected as outside the scope of the proceeding.[30] Thus, an assertion that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue.[31]

The Petitioners assert that the Task Force Report found "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[32] As discussed below, the Task Force Report made no such finding. Nonetheless, this claimed inadequacy in NRC's regulatory framework is the central reason the Petitioners argue additional NEPA analysis is required.[33] In other words, the Supplemental Comments, much like the Emergency Petition itself, constitute a broadside challenge to the Commission's regulatory program, with virtually no nexus to this specific proceeding. The Commission has held that "compliance with applicable NRC regulations ensures that public health and safety are adequately protected in areas covered by the regulations."[34] Because the Supplemental Comments essentially advocate stricter requirements than agency rules impose (*i.e.*, additional

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29 *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, slip op. at 38 (Mar. 11, 2010).

30 *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 66 NRC 41, 57-58 (2007) (*citing Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974)).

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

32 Supplemental Comments at 3.

33 *See id.* at 8, 12.

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

severe accident mitigation regulations), they should be rejected as outside the scope of this proceeding in accordance with 10 C.F.R. § 2.309(f)(1)(iii).[35]

2. The Supplemental Comments Raise Issues That Are Likely to Become the Subject of Rulemaking

The Supplemental Comments also should be rejected because they suggest the need to litigate issues that are likely to be part of future NRC rulemaking.[36] Commission precedent dictates that a contention that raises a matter that is, or is about to become, the subject of a rulemaking, is outside the scope of a licensing proceeding and, thus, does not provide the basis for a litigable contention.[37]

The NRC Task Force Report consists of recommendations to the Commission—none of which has legal standing or represents the views of the NRC.[38] The Commission is well aware of these recommendations and is requiring broader stakeholder involvement, including potential rulemakings, concerning the Task Force recommendations.[39] The Task Force specifically

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35 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

36 *See* Commission Staff Requirements Memorandum ("SRM") Regarding SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan, at 1-2 (Aug. 19, 2011) ("SRM on SECY-11-0093")

37 *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 345 (*citing Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)).

38 *See, e.g.*, Comm'r Svinicki Notation Votes on SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan, at 1-2 (July 19, 2011) ("The SECY paper itself provides no NRC staff view of the Task Force Report. Lacking the NRC technical and programmatic staff's evaluation (beyond that of the six NRC staff members who produced the Task Force Report), I do not have a sufficient basis to accept or reject the recommendations of the Near-Term Task Force. . . . Executive Order 13579, on the topic of 'Regulation and Independent Regulatory Agencies,' states that wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. In that vein, the delivery of the Near-Term Task Force Report is not the final step in the process of learning from the events at Fukushima. It is an important, but early step. Now, the conclusions drawn by the six individual members of the Near-Term Task Force must be open to challenge by our many stakeholders and tested by the scrutiny of a wider body of experts, including the [Advisory Committee on Reactor Safeguards], prior to final Commission action.").

39 *See* SRM on SECY-11-0093 at 1 ("The Commission directs the staff to engage promptly with stakeholders to review and assess the recommendations of the Near-Term Task Force in a comprehensive and holistic manner for the purpose of providing the Commission with fully-informed options and recommendations. Staff is

acknowledged that several rulemaking activities would be necessary to implement its recommendations and suggested such a path to the Commission.[40] The Petitioners in turn agree that the issues raised in their Supplemental Comments may be appropriate for generic consideration in a rulemaking and have even submitted their own rulemaking petition.[41] Indeed, Petitioners themselves aptly recognize that "it may be more appropriate for the NRC to consider . . . [the Task Force's conclusions and recommendations] in generic rather than site-specific environmental proceedings."[42] And that is precisely what the Commission is already in the process of doing. In response to SECY-11-0093, "Near Term Report and Recommendations for Agency Actions Following the Events in Japan" (July 12, 2011), the Commission has determined how best to move forward with the Task Force's recommendations with due regard for all operating reactors as well as near-term licensing actions.[43] The Petitioners may not seek adjudication of issues to be addressed by the Commission generically as part of the rulemaking process resulting from the Task Force Report.[44] Therefore, the Supplemental Comments should be rejected because they raises matters that are the likely to be the subject of rulemaking, contrary to 10 C.F.R. § 2.309(f)(iii).

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instructed to remain open to strategies and proposals presented by stakeholders, expert staff members, and others as it provides its recommendations to the Commission.").

40 Task Force Report at x.

41 *See* Supplemental Comments at 3, 18.

42 Supplemental Comments at 5. Not surprisingly, though, Petitioners selectively dispute the Task Force's favorable views on the AP1000 reactor, which has been selected by SCE&G for use at Summer Units 2 and 3. *See* Supplemental Comments at 18-20.

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

44 *See Minnesota v. NRC*, 602 F.2d 412, 419 (D.C. Cir. 1979) (upholding denial of requests for adjudicatory hearings because NRC was addressing Waste Confidence concerns in an ongoing rulemaking). If and when the Commission proposes any new or amended regulations, then the Petitioners may participate in that rulemaking. And to the extent the Commission decides to issue any orders implementing Task Force Report recommendations, Petitioners likewise would have an opportunity to request participation in such proceedings. *See, e.g.*, *Sequoyah Fuels Corp.* (Gore, Ok. Site Decontamination & Decommissioning Fund), LBP-94-5, 39 NRC 54 (1994) (granting motion to intervene in proceeding involving an NRC enforcement order).

3. The Supplemental Comments Incorrectly Interpret the NEPA "New and Significant" Standard for a Supplemental EIS, Failing to Raise a Material Issue of Fact or Law

The Supplemental Comments raise issues that, as a matter of law, are not material to the NRC Staff's environmental findings in this proceeding. Contrary to the Petitioners' claim, an issue is not deemed "significant" for purposes of preparation of a supplemental EIS merely "because it raises an extraordinary level of concern."[45] Instead, pursuant to 10 C.F.R. § 51.92(a), NRC must only supplement an EIS if there are (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. In order to be significant, "new information must present 'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'"[46]

The Petitioners' definition of "significance" is not compatible with and does not satisfy the definition in Section 51.92(a). In particular, the Petitioners do not identify any change in the project or the environmental impacts of the project. Thus, the Petitioners are incorrect, as a matter of law, when they state that NRC is required to supplement the EIS simply because of the level of public concern regarding the NRC Task Force recommendations.[47]

Nor do the Supplemental Comments identify any other new information that is "significant" as that term is defined pursuant to NEPA case law and NRC regulations. The Petitioners do not point to any substantial changes in the proposed action that might result from

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45 Supplemental Comments at 12.

46 *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-99-22, 50 NRC 3, 14 (1999) (*citing Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); *accord Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).

47 *See Sierra Club v. Wagner*, 555 F.3d 21, 30-31 (1st Cir. 2009) (holding that potentially controversial nature of a project is not sufficient to require preparation of an EIS); *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 233-234 (5th Cir. 2006) (holding that general public opposition is insufficient to require preparation of an EIS).

the Task Force recommendations that are relevant to environmental impacts. This is not surprising given that the Task Force Report does not bear on or discuss the environmental impacts from this proposed licensing action. In fact, the Task Force Report does not discuss NEPA issues at all.

Although the Petitioners argue that the imposition of severe accident mitigation measures recommended in the Task Force Report would be "significant" because such measures would improve plant safety, that issue is not material in the context of the environmental analysis in this proceeding.[48] To the extent that the Task Force Report recommendations become regulatory requirements, those requirements would serve to reduce the environmental impacts of the project below the level currently specified in the EIS. The current EIS would be conservative if the Commission were to adopt the Task Force recommendations. NEPA case law is clear—an agency need not prepare a supplemental EIS when a change will cause *less* environmental harm than the original project.[49]

Furthermore, if the Commission were to require plants to make design modifications, those design modifications would no longer be mitigation alternatives but would be actual elements of the plant's design. As a result, such design provisions would not need to be

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48 Supplemental Comments at 12.

49 *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1221-22 (11th Cir. 2002); *So. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663-668 (3d Cir. 1999) (holding that high design changes that cause less environmental harm do not require a supplemental EIS); *Township of Springfield v. Lewis*, 702 F.2d 426, 436 (3d Cir. 1983) (acknowledging that changes which "unquestionably mitigate adverse environmental effects of the project do not require a supplemental EIS"); *Concerned Citizens on I-190 v. Sec'y of Transp.,* 641 F.2d 1, 6 (1st Cir. 1981) (holding that adoption of a new environmental protection "statute or regulation clearly does not constitute a change in the proposed action or any 'information' in the relevant sense"); *New Eng. Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (holding that NRC need not supplement an EIS even though the EIS did not discuss the new cooling intake location that "would have a smaller impact on the aquatic environment than would the original location"); *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 137-138 (D.D.C. 2009) ("When a change reduces the environmental effects of an action, a supplemental EIS is not required."). *See also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 27-29 (2006) (holding that a potential project change does not require a supplemental EIS if it involves "environmental effects [that] would be of the type and severity (that is, 'small') originally discussed in the FEIS").

considered as part of the NRC's SAMA evaluation. Accordingly, the Petitioners' allegations regarding consideration of the potential environmental benefits of implementing the Task Force recommendations are not material to the findings that must be made in this proceeding.

The Petitioners citation to *Calvert Cliffs* and *Limerick Ecology Action* lends no support to their argument that NRC must consider the Task Force recommendations in an EIS before reaching a decision in this proceeding.[50] Those cases simply hold that NRC (and its predecessor agency, the Atomic Energy Commission) cannot avoid performing a NEPA evaluation because it has overlapping safety responsibilities under the Atomic Energy Act ("AEA").[51] But here, the NRC has already prepared an EIS that addresses the very issues the Petitioners claim should be considered in light of the Task Force Report (*i.e.*, severe accidents and SAMAs) and the Petitioners fail to identify any new information in the Task Force Report that suggests that there are deficiencies in the site-specific evaluations that were already performed in this proceeding.

In addition, the Petitioners argue that the potential imposition of severe accident mitigation measures is "significant" from a NEPA perspective because consideration of the economic costs of mandatory mitigation measures could impact the overall the cost-benefit analysis in the EIS.[52] As support for this assertion, the Petitioners reference the Makhijani Declaration, which summarizes a number of potential plant changes related to implementation of the Task Force's recommendations and notes that such changes may involve significant costs.[53] However, the Makhijani Declaration does not provide any estimate of those costs. It has long

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50 Supplemental Comments at 20 (*citing Calvert Cliffs' Coordinating Committee v. AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989).

51 *See, e.g.*, *Limerick Ecology Action*, 869 F.2d at 730-731 (holding that the NRC cannot avoid performing a SAMDA evaluation by simply relying on its obligations under the AEA).

52 *See* Supplemental Comments at 12.

53 *See id.* at 17 (citing Makhijani Declaration ¶¶ 13-17).

been held that a conclusory statement, even by an expert, is not a sufficient basis for a contention.[54]

In any event, these allegations regarding the economic costs of potential new regulatory requirements stemming from the Task Force Report are, as a matter of law, not material. As demonstrated in Section 10.5 of the FEIS, there are no alternatives to nuclear power that are both feasible for generating baseload power and that are environmentally preferable.[55] In the absence of a feasible and environmentally preferable alternative, there is no requirement under NEPA for a comparison of the economic costs of the proposed project and alternatives. As stated by the Appeal Board in *Midland*:

> The passage of the National Environmental Policy Act increased our concern with the economics of nuclear power plants, but only in a limited way. That Act requires us to consider whether there are *environmentally* preferable alternatives to the proposal before us. If there are, we must take the steps we can to see that they are implemented if that can be accomplished at a reasonable cost; i.e., one not out of proportion to the environmental advantages to be gained. But *if there are no preferable environmental alternatives, such cost benefit balancing does not take place*.[56]

Thus, "NEPA requires [the NRC] to look for environmentally preferable alternatives, not cheaper ones."[57] This principle has been applied in numerous other proceedings[58] and was

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

55 NUREG-1939, Final Environmental Impact Statement for Combined Licenses for Virgil C. Summer Nuclear Station, Units 2 and 3, Vol. 1, at 10-15 (Apr. 2011) ("NUREG-1939" or "FEIS").

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

57 *Id.* at 168. *See also Private Fuel Storage*, CLI-06-3, 63 NRC at 30 (holding that a supplemental EIS is not needed due to the prospect of additional project-related costs because, "[w]hile economic benefits are properly considered in an EIS, NEPA does not transform the financial costs and benefits into environmental costs and benefits").

58 *See, e.g., Rochester Gas & Elec. Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 395 n.25 (1978); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 178-79, *review denied*, CLI-05-29, 62 NRC 801 (2005), *aff'd sub nom. Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676 (2006); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-82-117A, 16 NRC 1964, 1993 (1982) ("With the passage of NEPA, cost-benefit balancing is now required, but only if the proposed nuclear plant has environmental disadvantages in comparison to possible alternatives.");

recently reaffirmed by the Commission in this very proceeding.[59] Accordingly, the Petitioners' allegations related to economic costs raise an issue that is not legally material to this proceeding and these allegations should be rejected in accordance with 10 C.F.R. § 2.309(f)(1)(iv).

4. The Supplemental Comments Mischaracterize the Task Force Report and the Report Does Not Support the Petitioners' Claims

The central premise of the Petitioners' Supplemental Comments is that additional NEPA evaluations are necessary because current NRC regulations do not provide adequate protection. According to the Petitioners, the Task Force Report supports such a view because it recommends the promulgation of "mandatory safety regulations for severe accidents"—something that "would not be logical or necessary to recommend . . . unless [the] existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[60]

This claim falls far short of meeting the requirements in 10 C.F.R. 2.309(f)(1)(v). Contrary to the Petitioners' allegations, the Task Force Report did not find that the current regulations fail to provide adequate protection. Instead, the Task Force recommended that adequate protection be redefined to provide an increased level of protection.[61] The Task Force clearly stated that "the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented."[62] Accordingly, the Task Force Report provides

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Dairyland Power Coop. (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 527 (1982) ("[U]nless a nuclear plant has environmental disadvantages in comparison to reasonable alternatives, differences in financial cost do not enter into the NEPA process and, hence, into NRC's cost-benefit balance."); *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 & 2), LBP-78-26, 8 NRC 102, 161-62 (1978), *aff'd*, ALAB-573, 10 NRC 775 (1979) (holding that the economic costs of a coal plant are not relevant given that the environmental impacts of a nuclear plant are less than that of a coal plant).

59 *See Summer*, CLI-10-1, slip op. at 30-31; *see also Midland*, ALAB-458, 7 NRC at 162-63.

60 Supplemental Comments at 2.

61 *See* Task Force Report at 18.

62 *Id.* at 73. In addition, the Task Force Report also stated that "the current regulatory approach has served the Commission and the public well." *Id.* at 18.

no support for the Petitioners' assertion that NRC regulations are currently somehow inadequate.[63]

Petitioners also incorrectly assert that the Task Force Report recommended that features to protect against severe accidents be made part of a plant's "design basis" and that NRC regulations do not currently include severe accident mitigation requirements.[64] The Task Force recommended that the Commission create a new regulatory framework referred to as "extended" design basis requirements.[65] Most of the elements of these "extended" design basis requirements are already contained in existing regulations (*e.g.*, 10 C.F.R. §§ 50.54(hh), 50.62, 50.63, 50.65, 50.150). As the Task Force noted, under a new framework, "current design-basis requirements . . . would remain largely unchanged" and the new framework, "by itself, would not create new requirements nor eliminate any current requirements."[66]

Additionally, notwithstanding the Petitioners' suggestion to the contrary, 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38) already establish severe accident mitigation feature requirements for new plants. Contrary to the Petitioners' arguments, these requirements are mandatory and are not subject a cost-benefit analysis. The Petitioners' reference to the rulemaking record for the design certification proceeding for the AP1000 is inapposite. The Petitioners' reference pertains to the analysis of severe accident design mitigation alternatives ("SAMDAs") for the AP1000 performed pursuant to 10 C.F.R. Part 51 in 2006, not to 10 C.F.R.

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63 *See Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995) (holding that a petitioner's imprecise reading of a document cannot be the basis for a litigable contention).

64 Supplemental Comments at 7, 8.

65 Task Force Report at 22.

66 *Id.* at 20-21.

§§ 52.47(a)(23) and 52.79(a)(38), which did not even exist at the time of design certification of the AP1000 and were not issued until 2007.[67]

In summary, the Petitioners flawed and imprecise reading of the Task Force report, and their incorrect understanding of the regulations and the AP1000 design certification proceeding, cannot provide adequate factual support for a litigable contention.[68]

5. The Supplemental Comments Do Not Provide Sufficient Information to Show That a Genuine Dispute Existing with the FEIS Evaluation of Severe Accidents or SAMAs

The Supplemental Comments should be rejected for failing to adequately controvert relevant information in the FEIS. Specifically, Section 5.11.2 of the FEIS contains a detailed evaluation of the environmental impacts of severe accidents.[69] The Petitioners identify nothing in the Task Force Report (or relating more generally to the Fukushima accident) suggesting there is an inaccuracy or other deficiency in this evaluation. Neither the Task Force Report nor any other information identified by the Petitioners relating to the accident at Fukushima establishes that the risk of a severe accident with significant environment consequences is anything but SMALL.[70] In fact, there is nothing in the Task Force Report that evaluates the environmental risk posed by existing or new reactors—it provides no indication that there is or should be any change to the core damage frequency or large release frequency for any plant, let alone new plants.[71] As the D.C. Circuit explained in rejecting a similar argument by a petitioner regarding

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67 *See* Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49,352, 49,443 (Aug. 28, 2007) (explaining that "the Commission approved NRC staff recommendations for selected preventative and mitigative design features for future light-water reactor designs," that 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38) "require[] the applicant to provide a description and analysis of those design features," and that such "severe accident design features are part of a plant's design bases information").

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

69 *See* NUREG-1939, Vol. I, at 5-83 to 5-91.

70 *Id.* at 5-92.

71 To the contrary, if the Task Force recommendations are adopted, that would have the effect of further reducing the impacts discussed in the EIS.

the need to supplement an EIS following the Three Mile Island accident, "the fact that the accident occurred does not establish that accidents with significant environmental impacts will have significant probabilities of occurrence."[72] Similarly, here, the Petitioners fail to provide sufficient information to establish a genuine dispute with the FEIS evaluation of the severe accidents.

Additionally, Section 5.11.4 of the FEIS contains an analysis of SAMAs.[73] Again, the Petitioners fail to identify anything in the Task Force Report (or relating more generally to the Fukushima accident) that indicates there is any inaccuracy or other deficiency in the SAMA analysis.[74] As the Commission has noted, "[i]t would be unreasonable to trigger full adjudicatory proceedings . . . under circumstances in which the Petitioners have done nothing to indicate the approximate relative cost and benefit of [any proposed SAMA]."[75] That is precisely the situation here, where neither the Task Force Report nor any other information identified by the Petitioners relating to the accident at Fukushima provides any reason to question the analysis already contained in the FEIS. The Petitioners make no attempt to demonstrate that the Task Force recommendations should be evaluated in the SAMA analysis and the Report itself makes clear that the recommendations are being made for policy reasons rather than based on cost-benefit considerations.

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72 *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1301 (D.C. Cir. 1984), *aff'd en banc*, 789 F.2d 252 (D.C. Cir 1986).

73 *See* NUREG-1939, Vol. I, at 5-92 to 5-96.

74 To the extent that the Petitioners are attempting to challenge SAMDAs, all environmental issues relating to SAMDAs are addressed in the design certification rulemaking. *See, e.g.,* 10 C.F.R. Part 52, App. D, § VI.B.1, B.7. Any challenges to such design certification information are outside the scope of this proceeding. Therefore, information contained or referenced in the DCD is not subject to challenge in this COL proceeding. *See* Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008)

75 *Duke Energy Corp.*, (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 11-12 (2002) (*quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978) (*citing Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991)).

Although the Makhijani Declaration highlights Task Force recommendations relating to station blackout, hydrogen control and mitigation, spent fuel instrumentation and makeup, emergency operating procedures, severe accident management guidelines ("SAMGs"), and extensive damage mitigation guidelines ("EDMGs"),[76] these issues are already addressed in the application.[77] The Petitioners identify no errors in these analyses. Instead, they are arguing that the regulations should be modified to provide more stringent requirements in these areas. However, by their nature, such claims are barred by 10 C.F.R. § 2.335(a), as discussed above.

The Petitioners also maintain that the Task Force Report recommendation regarding reevaluation of seismic and flooding hazards also constitutes new and significant information relevant to environmental concerns. The adequacy of the plant to withstand extreme seismic events and flooding is demonstrated in the Final Safety Analysis Report ("FSAR").[78] The Petitioners present nothing to suggest there is any deficiency in the evaluation of seismic events or flooding in the FSAR. Moreover, the Task Force Report states that such issues are not a concern for new plants, which are already evaluated to the most recent NRC standards for seismic and flooding.[79] Accordingly, the Supplemental Comments add nothing and should be

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[76] *See* Makhijani Declaration ¶¶ 13-24. The Makhijani Declaration ¶ 21 also addresses issues relating to Mark I and II containments, issues that are not relevant to Summer Units 2 and 3.

[77] *See, e.g.*, Summer, Units 2 and 3, COL Application, Part 2, FSAR, Rev. 5, §§ 1.9.5.1.5 (station blackout); 9.1 (spent fuel storage); 13.5.2.1 (emergency operating procedures); 19.16 (hydrogen control system); 19.41 (hydrogen mixing and combustion analysis); 19.59.10.5 (SAMGs); (June 28, 2011); *id.*, Part 5, Emergency Plan, Rev. 4, at B-1, B-5 (SAMGs) (June 28, 2011); *id.*, Part 14, Mitigative Strategies Description and Plans (EDMGs) (non-public). In most cases, the COL application addresses these issues by incorporating by reference relevant sections of the AP1000 Design Control Document ("DCD"). Any challenges to such design certification information are outside the scope of this proceeding. Therefore, information contained or referenced in the DCD is not subject to challenge in this COL proceeding. *See* Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

[78] *See, e.g.*, Summer, Units 2 and 3, COL Application, Part 2, FSAR, Rev. 5, §§ 2.4 (hydrologic engineering); 2.5 (seismology and geotechnical engineering); 3.4 (flood design); 3.7 (seismic design); 19.55 (seismic margin); 19.58 (floods and other external events) (June 28, 2011).

[79] *See* Task Force Report at 71.

rejected as containing insufficient information to demonstrate the existence of genuine dispute on a material fact.

V. CONCLUSION

As discussed above, Petitioners' Supplemental Comments fail to satisfy any of the standards for granting the previously filed Emergency Petition. Furthermore, despite the clear requirement to do so, Petitioners failed to proffer any contention suggesting a basis to believe that the Summer COL Application is inadequate. Even if the Commission were to construe the Supplemental Comments as a newly proffered contention, it should nonetheless be rejected for failing to meet the Commission's admissibility requirements in 10 C.F.R. § 2.309(f)(1). For all of the reasons stated above, the Supplemental Comments should be rejected.

Respectfully submitted,

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COUNSEL FOR SCE&G

Dated in Washington, DC
this 22nd day of August 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 52-027-COL
SOUTH CAROLINA ELECTRIC & GAS COMPANY AND SOUTH CAROLINA PUBLIC SERVICE AUTHORITY (ALSO REFERRED TO AS SANTEE COOPER)	)	52-028-COL
	)	August 22, 2011
(Virgil C. Summer Nuclear Station Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that, on August 22, 2011, a copy of "South Carolina Electric & Gas Company's Answer in Opposition to Supplemental Comments Regarding Fukushima Task Force Report" was served electronically with the Electronic Information Exchange on the following recipients:

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