

September 6, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of )  
 )  
NextEra Energy Seabrook, LLC ) Docket No. 50-443-LR  
 ) ASLBP No. 10-906-02-LR  
(Seabrook Station, Unit 1) )

**ANSWER OF NEXTERA ENERGY SEABROOK, LLC  
OPPOSING MOTIONS TO ADMIT NEW CONTENTION**

**I. INTRODUCTION**

NextEra Energy Seabrook, LLC (“NextEra”) hereby responds to and opposes the motions (“Motions”) submitted by Beyond Nuclear, the Seacoast Anti-Pollution League, and the New Hampshire Sierra Club (collectively, “BN”),<sup>1</sup> and by the New England Coalition and Friends of the Coast (collectively, “NEC”)<sup>2</sup> seeking admission of an essentially identical new contention (“Contention”) in the Seabrook license renewal proceeding.<sup>3</sup> The proposed Contention alleges that the Environmental Report (“ER”) for the Seabrook license renewal proceeding fails to satisfy the National Environmental Policy Act (“NEPA”) because it does not address the

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<sup>1</sup> Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) (“BN Motion”); Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) (“BN Contention”); 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 (“Makhijani Declaration”) (Aug. 11, 2011).

<sup>2</sup> Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) (“NEC Motion”); Friends of the Coast and New England Coalition’s Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) (“NEC Contention”); Makhijani Declaration.

<sup>3</sup> As provided in the Board’s Initial Scheduling Order (April 4, 2011), and consistent with 10 C.F.R. § 2.309(h)(1), this Answer to both of the Motions and new Contention is filed within 25 days of their service. Because the BN and NEC Motions and Contention are substantially identical, NextEra is providing this consolidated response to both parties’ submissions.

implications of the findings and recommendations of the NRC Task Force on the Fukushima Accident.<sup>4</sup> As discussed below, the Contention filed by BN and NEC (collectively, “Intervenors”) is untimely and fails to satisfy the standards for admissibility. In particular, the Contention constitutes an impermissible collateral attack on Commission rules and regulations and relates to matters that are not within the scope of a license renewal proceeding. Accordingly, the proposed new Contention should be rejected.

In essence, Intervenors’ proposed Contention is an impermissible attempt to litigate preliminary recommendations for strengthening the NRC’s regulatory framework and safety regulations – generic topics that are clearly outside the scope of this proceeding and prohibited as challenges to the NRC’s current rules. Intervenors’ attempt to circumvent this prohibition by characterizing its issues as environmental concerns is totally lacking in merit. Intervenors’ arguments that the NRC must determine what constitutes adequate protection in its NEPA review, or consider the Task Force recommendations as severe accident mitigation alternatives (“SAMAs”) without regard to cost, improperly conflate the NRC’s safety and environmental reviews and are simply at odds with the NRC’s responsibilities under NEPA and its implementing regulations. Moreover, Intervenors do not make even the slightest effort to show that there is some particular SAMA that may be cost beneficial for Seabrook, and thus do not come close to demonstrating that there is any genuine, material dispute with the ER.

## **II. BACKGROUND**

### **A. The Seabrook License Renewal Proceeding**

On May 25, 2010, NextEra submitted its Application requesting renewal of Operating License NPF-86 for Seabrook Station. On February 15, 2011, the Atomic Safety and Licensing

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<sup>4</sup> 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”).

Board granted petitions to intervene by BN and by NEC, and admitted four contentions.

NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-02, 73 N.R.C. \_\_\_, slip op. at 63 (Feb. 15, 2011). NextEra's appeal of these rulings is pending before the Commission.<sup>5</sup>

Shortly after the Fukushima Daiichi accident, BN and NEC each filed with the Commission on this docket an 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 (Corrected April 18, 2011) ("Emergency Petition"). The Emergency Petition, which was also filed by opponents in numerous other proceedings, requested sweeping actions, including: 1) suspension of all decisions pending completion of the NRC's review of the Fukushima Daiichi accident; 2) suspension of all proceedings, hearings or opportunities for public comment on any issue considered in that review; 3) performance of an environmental analysis of the accident; 4) performance of a safety analysis of its regulatory implications; 5) establishment of procedures and a timetable for raising of new issues in pending licensing proceedings; 6) suspension of all decisions and proceedings pending the outcome of any independent Congressional, Presidential or NRC investigations; and 7) for the NRC to request a Presidential investigation.

The draft supplemental environmental impact statement ("DSEIS") in this proceeding was issued in July 2011.<sup>6</sup> The initial safety evaluation report ("SER") is scheduled to be issued

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<sup>5</sup> NextEra Energy Seabrook, LLC's Notice of Appeal of LBP-11-02 as to the New England Coalition and Friends of the Coast (Feb. 25, 2011); NextEra Energy Seabrook, LLC's Notice of Appeal of LBP-11-02 as to Beyond Nuclear, the Seacoast Anti-Pollution League, and the Sierra Club of New Hampshire (Feb. 25, 2011).

<sup>6</sup> "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Seabrook Station – Draft Report for Comment," NUREG-1437, Supplement 46 (July 2011).

in May 2012.<sup>7</sup> The final EIS and final SER are scheduled to be issued in March 2012 and December 2012, respectively.<sup>8</sup> The NRC Staff's schedule states that the timing of a final Commission decision remains to be determined, but in any event will come after the ACRS full committee meeting on the Seabrook License Renewal Application, currently scheduled for January 2013.<sup>9</sup>

On August 11, 2011, following issuance of the Task Force Report, Intervenor filed their currently proposed Contention. Intervenor explain that the Contention "follow[s] up" on the Emergency Petition, and because the Commission has not yet responded to the Emergency Petition, the signatories "now seek consideration of the Task Force's far-reaching conclusions and recommendations in each individual licensing proceeding." BN Contention at 4; NEC Contention at 4. Intervenor recognize "that given the sweeping scope of the Task Force conclusions and recommendations," it may be more appropriate for the NRC to consider them in generic rather than site-specific proceedings, but assert that this is for the NRC to decide. BN Contention at 5; NEC Contention at 4.

On August 11, 2011, Intervenor also filed substantially identical rulemaking petitions styled as a Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision ("Petition"). This Petition, although filed by NEC with both the Secretary of the Commission and the Board, asks that the Commission rescind regulations in 10 C.F.R. Part 51 that make generic conclusions about the environmental impacts of severe reactor and spent fuel

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<sup>7</sup> Letter from B. Holian to P. Freeman, Schedule Revision for the Safety Review of the Seabrook Station License Renewal Application (TAC No. ME4028), Enclosure (July 12, 2011) (ADAMS Accession No. ML11178A365) ("July 12, 2011 Letter").

<sup>8</sup> Id.

<sup>9</sup> Id.

pool accidents and also requests that the NRC suspend the Seabrook Station License Renewal Proceeding while the NRC considers the Petition and the environmental issues raised in the Contention. On August 22, 2011, NextEra submitted a response opposing this Petition.<sup>10</sup>

**B. The NRC Response to the Fukushima Daiichi Accident**

On March 11, 2011, the Tohoku-Taiheiyou-Oki Earthquake occurred near the east coast of Honshu, Japan. The tsunami generated by this magnitude 9.0 earthquake caused significant damage to at least four of the six units of the Fukushima Daiichi nuclear power station as the result of a sustained loss of both the offsite and on-site power systems. NRC Information Notice 2011-05, Tohoku-Taiheiyou-oki Earthquake Effects on Japanese Nuclear Power Plants (Mar. 18, 2011) at 1 (ADAMS Accession No. ML110760432) (“NRC Information Notice 2011-05”).

Since then, the Commission has been closely monitoring the activities in Japan and reviewing all available information.<sup>11</sup> Among other steps taken as a result of the incident, the Commission created a Task Force to conduct both short term and long term analyses of the lessons that can be learned from the Fukushima Daiichi accident.<sup>12</sup> In addition, the nuclear power industry has taken a number of actions at each licensed reactor site, including:

- verification of the capability to mitigate conditions that result from severe adverse events, including the loss of significant operational and safety systems due to natural events, fires, aircraft impact and explosions;
- verification of the capability to mitigate a total loss of electric power to a nuclear power plant; and

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<sup>10</sup> NextEra Energy Seabrook, LLC’s Response Opposing Request to Suspend Licensing Proceedings Pending Resolution of Rulemaking Petition (Aug. 22, 2011); NextEra Energy Seabrook, LLC’s Objection to Filing of Rulemaking Petition and Suspension Request Before the Atomic Safety and Licensing Board (Aug. 22, 2011).

<sup>11</sup> Written Statement by Gregory B. Jaczko, Chairman, United States Nuclear Regulatory Commission, to the Senate Environment and Public Works Committee and Clean Air and Nuclear Safety Subcommittee (Apr. 12, 2011) (ADAMS Accession No. ML111020070).

<sup>12</sup> Tasking Memorandum – COMGBJ-11-0002 – NRC Actions Following the Events In Japan (Mar. 23, 2011) at 1 (ADAMS Accession No. ML110950110).

- verification of the capability to mitigate flooding and the impact of floods on systems inside and outside the plant; and identification of the potential for loss of equipment functions during seismic events appropriate for the site and the development of mitigating strategies to address potential vulnerabilities.

The NRC Staff (“Staff”) is also proceeding with independent assessments of nuclear power plant readiness to address beyond design-basis natural phenomena. NRC Information Notice 2011-05 at 4-5.

The Commission has made it clear that it will use the information from these activities to impose any requirements it deems necessary:

NRC has already announced its plan to draw upon “lessons learned” from the Japan events, as the agency has done previously after natural or man-made disasters. As in the past, NRC will conduct rulemaking, or issue orders and other directives, to make upgrades required to implement whatever short-term or longer-term safety improvements emerge from the Task Force directed by the Commission to analyze the Fukushima Daiichi disaster.

Federal Respondents’ Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 21-22, New Jersey Env’tl. Fed’n v. NRC, No. 09-2567 (3d Cir. Apr. 4, 2011) (“Federal Respondents’ Memorandum”). Further, the Commission has explained that it will do so on a generic basis:

As with the post-TMI and post-9/11 regulatory enhancements, any “lessons learned” from the Fukushima Daiichi event will be applied generically to all reactors . . . as appropriate to their location, design, construction, and operation.

Id. at 13.

The Task Force completed its short-term review and issued its report to the Commission on July 12, 2011. The Task Force Report concludes:

The current regulatory approach, and more importantly, the resultant plant capabilities allow the Task Force to conclude that a sequence of events like the Fukushima accident is unlikely to occur in the United States and some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological releases. Therefore, continued operation and continued licensing activities do not pose an imminent risk to public health and safety.

Task Force Report at vii; see also id. at 18. As recently summarized in testimony before Congress,

The Task Force report included a comprehensive set of twelve overarching recommendations. The Task Force recommendations are intended to clarify and strengthen the regulatory framework for nuclear power plants, and are structured around the focus areas of the NRC's defense-in-depth philosophy as applied to protection from natural phenomena; mitigation of prolonged station blackout events; and emergency preparedness. The Task Force also provided recommendations to improve the effectiveness of the NRC's programs.

Statement of NRC Chairman Gregory Jaczko, Before the Senate Committee on Environment and Public Works, Subcommittee on Clean Air and Nuclear Safety (Aug. 2, 2011) at 2-3.

On August 19, 2011, the Commission issued a Staff Requirements Memorandum directing the Staff to take the following actions:

- Engaging 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.
- Producing within 21 days a paper outlining which of the Task Force's recommendations, either in part or in whole, the Staff believes should be implemented without unnecessary delay. This review should include dialogue with external stakeholders.
- Producing by October 3, 2011 a paper which prioritizes Task Force recommendations, other than the one calling for a change to the NRC's overall regulatory approach. This paper is expected to lay out all agency actions to be taken in responding to lessons learned from the Fukushima Daiichi accident. The paper will also lay out a schedule for interacting with the public, other stakeholders and the Advisory Committee on Reactor Safeguards.
- Producing a paper within 18 months to consider the Task Force's call for revising the NRC's regulatory approach. The paper is expected to provide options, including a recommended course of action, in dealing with the Task Force's recommendation.

Staff Requirements – SECY-11-0093 – Near-Term Report And Recommendations for Agency Actions Following the Events in Japan (Aug. 19, 2011) (ADAMS Accession No. ML112310021) (“SECY-11-0093 SRM”).

### III. LEGAL STANDARDS

#### A. The Scope of License Renewal Proceedings

The Commission has specifically limited the safety review in license renewal proceedings to the matters specified in 10 C.F.R. §§ 54.21 and 54.29(a),<sup>13</sup> which focus on managing the aging of certain systems, structures, and components, and the review of time-limited aging analyses. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7-8 (2001); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 N.R.C. 358, 363-64 (2002). Thus, the potential effect of aging is the issue that essentially defines the scope of license renewal proceedings. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004).

This scope is based on the principle, established in the 10 C.F.R. Part 54 rulemaking proceedings, that with the exception of the detrimental effects of aging, the existing regulatory processes are adequate to ensure that the current licensing bases (“CLB”) of operating plants provide and maintain an adequate level of safety. Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,464, 22,481-82 (May 8, 1995). A plant’s CLB is not static, but rather is an “evolving set of requirements and commitments for a specific plant that [is] modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.” Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 N.R.C. \_\_\_, slip op. at 4 (June 17, 2010) (quoting 60 Fed. Reg. at 22,473). Therefore,

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<sup>13</sup> The Commission has stated that the scope of review under its rules determines the scope of admissible issues in a renewal hearing. Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,482 n.2 (May 8, 1995). “Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff’s review) necessarily examines only the questions our safety rules make pertinent.” Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 10 (2001).

[i]n developing the renewal regulations, the Commission concluded that the “only issue” where the regulatory process may not adequately maintain a plant’s current licensing basis involves the potential “detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operations.”

Id. at 5 (footnote omitted). Consequently, license renewal does not focus on operational issues or on the adequacy of a plant’s CLB (other than with respect to aging), because these issues “are effectively addressed and maintained by ongoing agency oversight, review, and enforcement.”

Millstone, CLI-04-36, 60 N.R.C. at 638 (footnote omitted).<sup>14</sup> Aside from the issue of aging management, the adequacy of a plant’s CLB is not within the scope of license renewal review.

Turkey Point, CLI-01-17, 54 N.R.C. at 23 (affirming rejection of a contention alleging spent fuel pool vulnerability to external hazards).

The rules in 10 C.F.R. Part 54 are intended to make license renewal a stable and predictable process. 60 Fed. Reg. at 22,461, 22,462, 22,463, 22,485. As the Commission has explained, “[w]e sought to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term.” Turkey Point, CLI-01-17, 54 N.R.C. at 7. “License renewal reviews are not intended to ‘duplicate the Commission’s ongoing reviews of operating reactors.’” Id. (citation omitted).

The NRC rules governing environmental matters – which are contained in 10 C.F.R. §§ 51.53(c), 51.95(c), and Appendix B to Part 51 – are similarly intended to produce a more focused and, therefore, more effective review of license renewal applications. Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg.

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<sup>14</sup> See also Federal Respondents’ Memorandum at 18 (“[t]he license renewal hearing process . . . focuse[s] strictly on contentions relating to the ‘potential detrimental effects of aging that are not routinely addressed by ongoing regulatory programs’ . . . ; the license renewal process [is] ‘not intended to duplicate the Commission’s ongoing review of operating reactors.’”).

28,467, 28,467 (June 5, 1996); Turkey Point, CLI-01-17, 54 N.R.C. at 11. To accomplish this objective, the NRC prepared a comprehensive Generic Environmental Impact Statement for License Renewal of Nuclear Plants (1996), NUREG-1437 (“GEIS”), and made generic findings in the GEIS, which it then codified in Appendix B to 10 C.F.R. Part 51. Those issues that could be resolved generically for all plants are designated as Category 1 issues and are not evaluated further in a license renewal proceeding (absent waiver or suspension of the rule by the Commission based on new and significant information). 61 Fed. Reg. at 28,468, 28,470, 28,474; Turkey Point, CLI-01-17, 54 N.R.C. at 11. The remaining (i.e., Category 2) issues that must be addressed in an applicant’s environmental report are defined specifically in 10 C.F.R. § 51.53(c). See generally Turkey Point, CLI-01-17, 54 N.R.C. at 11-12.

**B. Standards for Late-Filed Contentions**

The NRC does not look with favor on amended or new contentions filed after the initial filing. Millstone, CLI-04-36, 60 N.R.C. at 636. As the Commission has repeatedly stressed,

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

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (emphasis added) (citations omitted).

With respect to environmental contentions, “[t]he petitioner may amend [its] contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ

significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2).

Absent such circumstances, an intervenor may file new contentions only with leave of the presiding officer upon a showing that the new contention is based on information that "was not previously available" and is "materially different than information previously available," and that the contention "has been submitted in a timely fashion." Id. This Board has specified that an amended or new environmental contention will be considered "timely" if it is filed within 30 days after "the new and material information on which it is based first becomes available."

Initial Scheduling Order at 4 (Apr. 4, 2011) ("ISO"). Therefore, a two-step inquiry is required:

- (1) What is the new and material information that is the basis of the new or amended contention?
- (2) When did that information become available?

If an intervenor cannot satisfy the criteria of 10 C.F.R. § 2.309(f)(2), then a contention is considered non-timely, and the intervenor must successfully address the late-filing criteria in 10 C.F.R. § 2.309(c). Id. at 4. These criteria require satisfaction of the following eight-factor balancing test:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

The burden is on the petitioner to demonstrate “that a balancing of these factors weighs in favor of granting the petition.” Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 N.R.C. 605, 609 (1988). The first such factor, whether “good cause” exists for the failure to file on time, is entitled to the most weight. Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 115, 125-126 (2009) (citing Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 N.R.C. 1, 6 (2008)). Without good cause, a “petitioner’s demonstration on the other factors must be particularly strong.” Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 73 (1992) (quoting Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 N.R.C. 460, 462 (1977)).

**C. Standards for New and Amended Contentions**

Even if a proponent of a new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), it must also demonstrate that its new contention satisfies the standards for admissibility set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 N.R.C. 355, 362-63 (1993). 10 C.F.R. § 2.309(f)(1) requires that the request for hearing must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in connection is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

NextEra's Answer Opposing the Petition to Intervene and Request for Hearing of [BN] (Nov. 15, 2010) provides a further discussion of these standards, which will not be repeated here.

#### **IV. ARGUMENT**

##### **A. The Contention Fails to Meet Requirements for Non-Timely Filings**

Intervenors' Contention does not satisfy the Commission's standards for non-timely filings set forth in 10 C.F.R. §§ 2.309(f)(2) and 2.309(c)(1). Intervenors have not demonstrated the necessary "good cause" for non-timely filing, and a balancing of the remaining factors weighs in favor of rejection of the Motions and Contention.

The Contention does not meet the three-part test for timeliness under Section 2.309(f)(2), which requires that new contentions may be filed after the initial filing deadline only upon a showing that: (1) the new contention is based on information not previously available; (2) the new information is "materially different" from previously available information; and (3) the new contention was "submitted in a timely fashion." As discussed below, the Task Force Report makes certain recommendations for long-term enhancement of safety but does not base these

recommendations on facts previously unavailable in a manner that supports Intervenors' Contention. Indeed, Intervenors acknowledge that similar generic recommendations were made 30 years ago following the Three Mile Island accident (BN Contention at 8; NEC Contention at 7), and that this Contention is being employed as an alternative approach to raise the same issues previously raised four months ago in the Emergency Petition filed with the Commission in various proceedings (BN Contention at 4; NEC Contention at 4). Moreover, the Commission's regulations and consideration of severe accident scenarios have not changed significantly since the application was filed or since the accident at Fukushima occurred on March 11, 2011.

Here, Intervenors assert that their Motions and Contention are timely because "they were filed within thirty (30) days of publication of the Task Force Report." BN Motion at 4; NEC Motion at 4. However, under Commission standards, "a petitioner must show that the information on which the new contention is based was not reasonably available to the public, not merely that the petitioner recently found out about it." Millstone, CLI-09-5, 69 N.R.C. at 126 (emphasis in original). It is not sufficient to simply point to some new document (such as the Task Force Report) that discusses information that was previously available. "[T]he unavailability of [a document] does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C.1041, 1043 (1983). An intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available "for some time" prior to the filing of the contention. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 N.R.C. 13, 21 (1986).

Thus, the timeliness of a new contention is judged not by the publication date of a report discussing certain information, but rather by the date on which such information became publicly available. Here, Intervenors' Contention is clearly based on the Fukushima Daiichi accident, which occurred five months prior to the date of Intervenors' filings, and not on the Task Force Report. Indeed, the Makhijani Declaration submitted as purported support for the new Contention characterizes the Task Force report as providing "further support" for his prior opinion "that the Fukushima accident presents new and significant information."<sup>15</sup> Intervenors too characterize their Contention as "follow[ing] up" on the Emergency Petition's demand that the NRC address the lessons of the Fukushima accident in its environmental analyses for licensing decisions. BN Contention at 4; NEC Contention at 4. Thus, by Intervenors' own admission, the basic demand in the Contention is not new.

Moreover, Intervenors do not identify any new facts in the Task Force Report on which its Contention is based. Instead, Intervenors appear to be simply relying on the recommendations that the Task Force members made based on previously available information. Intervenors and Dr. Makhijani had the same "factual predicate" available to them and could have reached the same conclusions. That the Task Force members have made recommendations for regulatory improvements does not make any of the facts or implications of the Fukushima Daiichi accident new. A petitioner may not "delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. \_\_\_, slip op. at 17 (Sept. 30, 2010). See also Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-11-02, 73 N.R.C. \_\_\_, slip op. at 13 (Mar. 10,

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<sup>15</sup> Makhijani Declaration ¶ 6.

2011) (“The tardy filing of a contention may be excusable only where the facts upon which the amended or new contention is based were previously unavailable.”). Accordingly, because this Contention is founded upon the Fukushima earthquake and related events from March 2011, the Contention was not timely filed.

Because the Contention is not timely under 10 C.F.R. § 2.309(f)(2), Intervenors are required to show that a balancing of the factors in 10 C.F.R. § 2.309(c) supports the admissibility of the proposed contention. With respect to the factors in § 2.309(c), the Commission places the most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing. Millstone, CLI-09-5, 69 N.R.C. at 125-126. “Good cause” has been consistently interpreted to mean that a proposed new contention be based on information that was not previously available, and was timely submitted in light of that new information. Id. at 125-26 (citing Diablo Canyon, CLI-08-1, 67 N.R.C. at 6). Consequently, because Intervenors’ Contention is not timely, Intervenors have also not met the good cause standard under 10 C.F.R. § 2.309(c)(i). In the absence of “good cause” for late filing, the remaining factors would have to weigh heavily in Intervenors’ favor for the Contention to be admissible. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 N.R.C. 241, 244 (1986). However, in this case, the remaining factors also weigh against admissibility.

The next most important factor, the potential for the broadening of issues or delay in the proceeding, similarly weighs against the Intervenors, since the Contention would essentially require proceedings to re-commence with a significantly broader scope than that currently required in license renewal proceedings.<sup>16</sup> The Contention seeks to litigate in this proceeding whether “NRC’s current regulatory scheme requires significant re-evaluation and revision” (BN

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<sup>16</sup> See Texas Utilities. Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 167 (1993).

Contention at 9; NEC Contention at 8), whether new design basis accidents are needed to provide an adequate level of protection (BN Contention at 14; NEC Contention at 12-13), and whether the Task Force recommendations should be implemented without cost or as SAMAs (BN Contention at 15; NEC Contention at 13-14). Such issues would obviously broaden the proceeding enormously and threaten significant delay. Indeed, Intervenors propose to litigate the “sweeping scope of the Task Force conclusions and recommendations.” BN Contention at 5; NEC Contention at 4.

In addition, the Commission has already taken significant steps to protect Intervenors’ interests by planning broader stakeholder involvement in the potential development of new regulatory standards, including potential rulemakings, concerning the Task Force’s recommendations.<sup>17</sup> As a result, ongoing Commission activities relating to the Task Force’s recommendations (including a potential proceeding concerning Intervenors’ own rulemaking petition) provide Intervenors with adequate means to protect their interests. See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 N.R.C. 551, 565-66 (2005) (finding that opportunity to petition for rulemaking and opportunity to comment on a pending petition for rulemaking provides a means for petitioner to protect its interests).

Furthermore, Intervenors offer no evidence that their participation would contribute to the development of a sound record. Indeed, Intervenors acknowledge that their concerns may be more appropriately resolved in a generic proceeding and that they are pursuing this Contention as a backup measure in case their petition for rulemaking and petition for suspension of proceedings

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<sup>17</sup> See SECY-11-0093 SRM 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 instructed to remain open to strategies and proposals presented by stakeholders, expert staff members, and others as it provides its recommendations to the Commission.”).

are denied. BN Contention at 4; NEC Contention at 4. Further, “[w]hen a petitioner addresses this ... criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.”

Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 N.R.C. \_\_\_, slip op. at 10-11 (Mar. 26, 2010) (footnote omitted); see also Braidwood, CLI-86-8, 23 N.R.C. at 246. Intervenor’s have done none of this.

The other factors in 10 C.F.R. § 2.309(c)(1) are less important and therefore do not outweigh Intervenor’s failure to demonstrate good cause or meet the three factors discussed above. See, e.g., Diablo Canyon, CLI-08-1, 67 N.R.C. at 3; Comanche Peak, CLI-93-4, 37 N.R.C. at 165. Because Intervenor’s have failed to demonstrate good cause for non-timely filing and have not made a compelling showing on the remaining factors, Intervenor’s Motions and Contention do not meet the Commission’s standards for non-timely filing.

## **B. The Contention Fails to Meet Admissibility Standards**

### **1. The Contention Raises Issues Outside the Scope of This Proceeding and Impermissibly Seeks to Challenge NRC Rules**

Aside from Intervenor’s failure to satisfy the Commission’s timeliness standards, the Contention is inadmissible because it is outside the scope of this adjudicatory proceeding, contrary to the requirement of 10 C.F.R. § 2.309(f)(1)(iii). This result occurs regardless of whether the Contention is treated as raising safety or environmental issues.

#### **a. To the Extent Intervenor’s are Seeking to Raise a Safety Contention, Their Contention Is Barred as an Impermissible Challenge to the NRC’s Rules**

Although Intervenor’s statement of contention purports to challenge the ER as not satisfying NEPA (BN Contention at 5; NEC Contention at 4), Intervenor’s ask for a hearing on

both the safety and environmental implications of the Task Force Report (BN Contention at 1; NEC Contention at 1), and their Contention is clearly advocating an overhaul of the NRC's safety regulations and imposition of backfits in order to provide adequate protection to the public health and safety. See BN Contention at 9; NEC Contention at 8 (“Therefore, the NRC’s current regulatory scheme requires significant re-evaluation and revision in order to expand or upgrade the design basis for reactor safety as recommended by the Task Force Report.”). Indeed, Intervenor’s attempt to cast its contention as an NEPA concern appears largely pretextual.

It is well established that a petitioner is not entitled to an adjudicatory hearing to attack generic NRC requirements or regulations. 10 C.F.R. § 2.335(a) provides that “no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material, is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.” Further, the Commission has long held that “a licensing proceeding . . . is plainly not the proper forum for . . . challenges to the basic structure of the Commission’s regulatory process.” Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff’d in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnote omitted). Thus, a contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974). A contention which “advocate[s] stricter requirements than those imposed by the regulations” is “an impermissible collateral attack on the Commission’s rules” and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear

Generating Station, Units 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 N.R.C. 149 (1991). Likewise, a contention that seeks to litigate a generic determination established by Commission rulemaking is “barred as a matter of law.” Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 29-30 (1993).

Further, the scope of the safety-related review in a license renewal proceeding is limited to managing the effects of aging. Issues concerning the adequacy of the CLB are beyond this limited scope, and a contention seeking to raise such issues is an impermissible challenge to the license renewal regulations in 10 CFR Part 54. See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 N.R.C. \_\_\_, slip op at 5 (June 17, 2010) (“In developing the renewal regulations, the Commission concluded that the ‘only issue’ where the regulatory process may not adequately maintain a plant’s current licensing basis involves the potential ‘detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operations.’”) (quoting 60 Fed. Reg. at 22,464); see also Turkey Point, CLI-01-17, 54 N.R.C. at 23 (affirming rejection of a contention alleging spent fuel pool vulnerability to external hazards).

Finally, many of the relevant Task Force Report recommendations to which Intervenors refer – such enhancing the regulatory framework (Recommendation 1.1) and enhancing station blackout mitigation (Recommendation 4) – are recommendations for rulemaking.<sup>18</sup> It is well established that issues raising matters that are, or are about to become, the subject of a rulemaking, are outside the scope of a licensing proceeding and, thus, do not provide the basis for a litigable contention. See Sacramento Municipal Utility District (Rancho Seco Nuclear

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<sup>18</sup> See Task Force Report, App. A at 73-74.

Generating Station), ALAB-655, 14 N.R.C. 799, 816 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 N.R.C. 59, 86 (1985); Oconee, CLI-99-11, 49 N.R.C. at 345 (citing Douglas Point, ALAB-218, 8 A.E.C. at 85). While The Task Force Report's reactor safety recommendations on which the Intervenor's base their Contention have not been approved by the Commission and are still under Commission consideration,<sup>19</sup> the Commission has stated that it will proceed generically in implementing any appropriate lessons learned.<sup>20</sup> Indeed, Intervenor's acknowledge that, "given the sweeping scope of the Task Force conclusions and recommendations, it may be more appropriate for the NRC to consider them in generic rather than site-specific environmental proceedings." BN Contention at 5; NEC Contention at 4. Because the Commission has stated that it intends to proceed in this manner, consideration of these recommendations would not be appropriate in any individual licensing proceeding, let alone a license renewal proceeding where the scope of the safety review is limited to aging management.

b. To the Extent Intervenor's are Seeking to Raise an Environmental Issue, Their Contention Is Still Barred as an Impermissible Challenge to the NRC's Rules

Intervenor's attempt to dress up the Task Force recommendations as a NEPA issue does not make the Contention any less of an impermissible challenge to the NRC rules. The issues that Intervenor's seek to raise far exceed the scope of the Category 2 issues that may be litigated

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<sup>19</sup> See, e.g., Comm'r Svinicki Notation Comments on SECY-11-0093, "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan," at 2 (July 19, 2011) (ADAMS Accession No. ML112010167) ("[T]he 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.").

<sup>20</sup> See Federal Respondents' Memorandum at 13 ("As with the post-TMI and post-9/11 regulatory enhancements, any 'lessons learned' from the Fukushima Daiichi event will be applied generically to all reactors . . . as appropriate to their location, design, construction, and operation.") (emphasis added).

in a license renewal proceeding (absent a waiver, which Intervenors have not pursued).

Moreover, Intervenor's meritless attempt to argue that the Task Force recommendations must be analyzed as SAMAs without regard to cost is also an impermissible challenge to NRC rules.

Intervenors' assertion that the full spectrum of design basis accidents has not been assessed and the ER must be supplemented to consider additional design basis accidents is barred as an impermissible challenge to a Category 1 finding. The NRC has generically determined that the environmental impacts from design basis accidents are small for all plants, and has designated this as a Category 1 Issue. See 10 C.F.R. Part 51, App. B, Table B-1. Consequently, the NRC rules do not require a license renewal applicant to assess design basis accidents in its ER. See id. § 51.53(c)(3)(i).

Intervenors' assertion that the ER should consider enhancing spent fuel pool makeup capability and instrumentation for the spent fuel pool (BN Contention at 26; NEC Contention at 17-18) is also an impermissible challenge to a Category 1 issue. The NRC has evaluated and determined generically that the environmental impacts of spent fuel storage, including accident risk, are small for all plants. 10 C.F.R. Part 51, App. B, Table B-1; GEIS at 6-72 to 6-75 and 6-91 to 6-92; Pilgrim, CLI-10-14, slip op. at 31-35; Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 19-21, reconsideration denied, CLI-07-13, 65 N.R.C. 211 (2007), aff'd sub nom, Massachusetts v. United States, 522 F.3d 115 (1st Cir. 2008). See also Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204 (Aug. 8, 2008), aff'd, New York v. NRC, 589 F.3d 551 (2d Cir. 2009) (per curiam).

While Intervenors claim that the Task Force Report constitutes new and significant information and refer to 10 C.F.R. § 51.53(c)(iv) (BN Contention at 12; NEC Contention at 11), that claim is not sufficient to allow litigation of Category 1 issues. A petitioner who believes that

new and significant information alters a generic finding must seek a waiver from the Commission. “The NRC's procedural rules are clear: generic Category 1 issues cannot be litigated in individual licensing adjudications without a waiver.” Massachusetts v. United States, 522 F.3d at 127. Intervenors have not sought such a waiver. As the Commission has held, “[a]djudicating Category 1 issues site by site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.” Vermont Yankee and Pilgrim, CLI-07-03, 65 N.R.C. at 21.

Moreover, Intervenors do not allege that there are any “special circumstances with respect to the subject matter of the particular proceeding” that would warrant a waiver. 10 C.F.R. § 2.335(b) (emphasis added). The Contention, which Intervenors admit is essentially the same as that being filed in multiple proceedings, makes no attempt to show that Seabrook presents any unique issue that would make the NRC’s Category 1 finding inapplicable. The Petition for Rulemaking that the Intervenors have filed further reflects the absence of any site specific concern that could form the basis for a waiver. If there were a need to change GEIS conclusions on any Category 1 issues for all plants, as this Petition contends, contentions in individual proceedings would be inappropriate.

Finally, Intervenors’ assertion that the Task Force recommendations must be evaluated as SAMAs without consideration of cost (BN Contention at 15; NEC Contention at 13-14) is also an impermissible challenge to the NRC rules. The Commission’s regulations implementing NEPA expressly provide that (with certain exceptions not applicable here) an applicant’s environmental report and the NRC Staff’s EIS should include consideration of the economic, technical and other benefits and costs of the proposed action and alternatives. 10 C.F.R. §§

51.45(c), 51.71(d). Any suggestion to the contrary is an impermissible challenge to the NRC rules, barred by 10 C.F.R. § 2.335(a).

**2. The Contention Fails to Demonstrate a Genuine Dispute with the ER on a Material Issue of Fact or Law**

Intervenors' Contention fails to demonstrate a genuine dispute with the Environmental Report ("ER"), as required by 10 C.F.R. § 2.309(f)(1)(vi). Even if intervenors were permitted to challenge Category 1 issues by merely alleging that something constitutes new and significant information (which the Commission has held they may not), Intervenors' characterization of the Task Force Report as "new and significant information" (BN Contention at 12; NEC Contention at 11) is unfounded and based on a misinterpretation of "new and significant information" as that term is used in the NRC regulations and under NEPA.

The issuance of the Task Force Report does not meet the standard of new and significant information as that phrase is used in the NEPA context. In the context of 10 C.F.R. § 51.53(c)(3)(iv) requiring a license renewal ER to contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware, new information is to be considered significant only if it materially alters some environmental finding or conclusion in the GEIS. See Regulatory Guide 4.2S1 – Supplement 1 to Regulatory Guide 4.2, Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses (Sept. 2000) ("RG 4.2S1") at 4.2-S-4 ("New and significant information is . . . information that was not considered in the analyses summarized in NUREG-1437 and that leads to an impact finding different from that codified in 10 CFR Part 51") (emphasis added). This standard is consistent with judicial and NRC precedent that an EIS need be supplemented only where new information "provides a seriously different picture of the environmental landscape." Nat'l Comm. for the New River v. FERC, 373 F.3d 1323, 1330 (D.C.

Cir. 2004) (emphasis in original) (quoting City of Olmsted Falls v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002)). Numerous courts have so ruled.<sup>21</sup> Furthermore, the Commission has adopted this same standard.<sup>22</sup> As the Supreme Court made clear in Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) (cited in the Petition), a requirement to supplement an EIS every time new information comes to light “would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made” Marsh, 490 U.S. at 373 (footnote omitted).

Intervenors argue that the Task Force Report is significant because “it raises an extraordinary level of concern regarding the manner in which the proposed renewed operation of Seabrook ‘impacts public health and safety.’” BN Contention at 13; NEC Contention at 11. The pertinent inquiry is not whether the Report is of concern to Intervenors but whether it contains new information showing that some environmental analysis is materially altered. Intervenors also assert that “the NRC must revisit any conclusions in the Seabrook ER based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable.” BN Contention at 13-14; NEC Contention at 12. The analyses in the ER do not rest on such an assumption. Indeed, Intervenors do not identify any portion of the ER that relies upon such an assumption to quantify environmental impacts. Thus, Intervenors’ argument presents no genuine dispute with the application.

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<sup>21</sup> See also In re Operation of the Missouri River Sys. Litig., 516 F.3d 688, 693 (8th Cir. 2008) (“seriously different picture of the environmental impact”); Town of Winthrop v. FAA, 535 F.3d 1, 9 (1st Cir. 2008) (substantial change in conditions since the data used in the EIS were gathered); Sierra Club v. U.S. Army Corps of Eng’rs, 295 F.3d 1209, 1215-16 (11th Cir. 2002) (significant impact not previously covered); S. Trenton Residents Against 29 v. FHA, 176 F.3d 658, 663 (3d Cir. 1999) (“seriously different picture of the environmental impact”); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (same); Village of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991) (significant impact not previously covered); Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987) (“seriously different picture of the environmental impact”); Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir. 1984) (same).

<sup>22</sup> Hydro Resources, Inc., CLI-01-04, 53 N.R.C. 31, 52 (2001) (“The new circumstance must reveal a seriously different picture of the environmental impact of the proposed project.”) (internal quotes and citations omitted).

Instead, Intervenors' principal claim seems to be that some accident scenarios evaluated as severe accidents should instead be considered design basis accidents ("DBAs"). Aside from being an impermissible challenge to the NRC rules, as discussed above, this cannot materially alter any conclusions in the ER. The GEIS has generically concluded that the risk of both design basis accidents and severe accidents are small for all plants.<sup>23</sup> How any particular accident scenario is classified in the GEIS, therefore, cannot alter the overall assessment of risk. If any severe accident scenarios were reclassified as design basis accidents, such reclassification would only remove such scenarios from consideration in the SAMA analysis, thereby reducing the severe accident risk presented in the SAMA analysis. Moreover, if the NRC imposed a SAMA as a design basis requirement, it would no longer qualify as a SAMA and so would not be material to the SAMA analysis. Consequently, the reclassification could not make any additional SAMAs cost beneficial.

Intervenors also argue that the values assigned to the cost-benefit analysis for the Seabrook SAMAs must be re-evaluated in light of the Task Force's conclusions that the value of the SAMAs is so high that they should be elected as a matter of course. BN Contention at 15; NEC Contention at 13-14. However, the Task Force Report provides no conclusions on the value of any particular SAMAs, so this argument lacks any basis or support. In addition, nothing in NEPA requires the NRC to consider mitigation alternatives without regard to cost, and the Commission has made it clear that the goal of SAMA analysis "is only to determine what safety enhancements are cost effective to implement." Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. \_\_\_, slip op. at 39 (Mar. 26, 2010).

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<sup>23</sup> As discussed in the draft EIS, NRC has determined that the environmental impacts of DBAs are of SMALL significance for all plants because the plants were designed to successfully withstand these accidents. DSEIS at 5-2. Further, the NRC has evaluated the consequences of these events for the hypothetical maximum exposed individual, and environmental impacts, as calculated for DBAs, should not differ significantly from initial licensing assessments over the life of the plant, including the license renewal period. Id.

Further, Intervenors provide no information indicating that the quantitative assessment of SAMAs (i.e., the estimated risk that could be averted or cost) is incorrect. In addition, Intervenors provide no information demonstrating that any particular SAMA is cost beneficial, as required by Commission case law. The NRC has held that, because there are numerous conceivable SAMAs and thus it will always be possible to come up with some mitigation alternative that has not been addressed by a licensee, it would be unreasonable to undertake full adjudicatory proceedings based merely upon a suggested SAMA where the petitioners have done nothing to indicate the approximate relative cost and benefit of the SAMA. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 N.R.C. 1, 11-12 (2002).

Likewise, Intervenors' suggestion that the overall cost-benefit analysis of the reactor or comparison with alternative energy sources could be affected (BN Contention at 23; NEC Contention at 15) fails to present any genuine material dispute with the Application. In license renewal proceedings, the ER is not required to include discussion of need for power or the economic costs and economic benefits of the proposed action or of alternatives except insofar as such costs and benefits are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation alternatives. 10 C.F.R. § 51.53(c)(2). See also id. §§ 51.71(d), 51.95(c)(2). The analysis of alternatives is limited to the environmental impact of such alternatives, id. § 51.95(c)(2), and the pertinent inquiry is limited to whether or not the adverse environmental effects of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable. Id. § 51.95(c)(4). Under this standard, license renewal would only be denied if the expected environmental effects of license renewal significantly exceed all or almost all

alternatives. 61 Fed. Reg. at 28,472. Thus, there is no requirement to present an overall cost-benefit analysis for the plant. Further, Table 8.0-1 of the ER shows that the impacts of license renewal do not exceed the evaluated alternatives. Finally, Intervenors make no showing that the cost of license renewal would make any additional alternative reasonable.

Further, Intervenors' suggestion that cost somehow associated with license renewal may increase (BN Contention at 22-23; NEC Contention at 14-15) is, at this juncture, nothing more than unsupported speculation. Currently, the NRC has not required any changes to the Seabrook design in response to the Fukushima accident, and Intervenors have not provided any information showing that any design change should be imposed as a cost-beneficial mitigation alternative. Nor do Intervenors provide any basis to suppose that significant design changes will be required. Intervenors refer to the Task Force recommendations concerning flooding and seismic protection (BN Contention at 24; NEC Contention at 16), but provide no information suggesting that there is any need for corresponding Seabrook modifications.

Intervenors neither address nor dispute the Seabrook SAMA analysis, which is based on a probabilistic risk assessment ("PRA") that expressly includes consideration of both flooding and seismic events. "The Seabrook PRA model is an integrated internal and external events model that has integrated seismic-initiated, fire-initiated, and external flooding-initiated events with internal events since the initial 1983 PRA." DSEIS at 5-7 The seismic PRA was updated as recently as 2006 and includes expanding fragility analysis, with additional components; using the more current EPRI uniform hazard spectrum; and improving modeling and documentation of credited operator actions. Id. at 5-9. Further, during the NRC Staff's review, NextEra assessed the impact on the SAMA evaluation of updated seismic hazard curves developed by the U.S. Geological Survey in 2008. Id. The NRC Staff has concluded that

[T]he seismic PRA model in combination with the use of a seismic events multiplier provides an acceptable basis for identifying and evaluating the benefits of SAMAs. This conclusion is based on the fact that the Seabrook seismic PRA model is integrated with the internal events PRA, the seismic PRA has been updated to include additional components and to extend the fragility screening threshold, the SAMA evaluation was updated using a multiplier to account for a potentially higher seismic [core damage frequency (CDF)], and NextEra has satisfactorily addressed NRC staff RAIs regarding the seismic PRA.

Id. at 5-9 to 5-10. Intervenors ignore this information and thus fail to provide any genuine dispute with the Application.

Intervenors suggest that tsunami hazards have not been considered in the design basis for operating plants on the Atlantic ocean (BN Contention at 24; NEC Contention at 16), but do not discuss the probable maximum flood established for Seabrook and provide no information suggesting that it is inadequate. Intervenors make no attempt to discuss NUREG/CR-6966, Tsunami Hazard Assessment at Nuclear Power Plant Sites in the United States of America (March 2009). Similarly, while Intervenors refer to other Task Force recommendations (BN Contention at 26; NEC Contention at 18), they again make no effort to relate any of these recommendations to Seabrook. Indeed, Intervenors' reference to requiring hardened vent designs in BWR facilities and addressing multi-unit accidents (see BN Contention at 26; NEC Contention at 17) have no bearing whatsoever to Seabrook – a single unit PWR.

Further, as previously discussed, the assertion that the ER should consider recommendations to modify the spent fuel pool is an impermissible attack on a generic Category 1 finding. Finally, Intervenors make no effort to discuss the design of the Seabrook spent fuel pool, or any of the specific extreme damage mitigation guidelines (“EDMGs”) that have been implemented at Seabrook. Recommendations concerning emergency operating procedures, severe accident management guidelines, and EDMGs (see BN Contention at 26; NEC Contention at 17) do not raise any SAMA issue. The Task Force Report's recommendation goes

only to regulatory oversight of these commitments (i.e., whether they should be controlled in the Technical Specifications), and does not propose any new measures.

### **3. The Contention Lacks Adequate Factual Support**

The Contention's principal claims are not in fact supported by the Task Force Report, but rather on Intervenors' mischaracterization of it. Because the Task Force Report does not in fact support these claims, the Contention is also inadmissible for failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v).

Intervenors assert that the Task Force Report concluded that the current regulations do not provide adequate protection. BN Contention at 2; NEC Contention at 2. However, this allegation is based on an assumption that the Report's recommendations on strengthened safety regulations for severe accidents "would not be logical or necessary to recommend . . . unless those existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment." *Id.* In fact, contrary to Intervenors' interpretation, the Task Force Report expressly found 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." Task Force Report at 73. The Task Force's recommendation that the adequate protection standard be redefined to provide an even stronger level of protection does not equate with a purported finding that the current regulations fail to provide adequate protection. *See id.* at 18. Thus, the Task Force Report does not support Intervenors' assertion that current Commission regulations are somehow inadequate. *See Ga. Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 300 (1995) (holding that a petitioner's imprecise reading of a document cannot be the basis for a litigable contention).

Intervenors also incorrectly claim that the Task Force Report recommended that features to protect against severe accidents be made a part of the plant's "design basis" and that NRC regulations do not currently include severe accident mitigation requirements. BN Contention at 7-8; NEC Contention at 6-7. In fact, the Task Force recommended that the Commission create a new regulatory framework known as "extended design basis requirements." Task Force Report at 22. 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." Id. at 20-21.

## **V. CONCLUSION**

The Motions and Contention were untimely filed and do not meet the criteria for admitting a new contention. The Contention instead constitutes an impermissible collateral attack on Commission rules and regulations and raises issues that are already being sought in the context of other petitions pending before the Commission. Further, the Contention relates to matters that are not within the scope of a license renewal proceeding. For all of the above stated reasons, the Motions should be denied and the Contention should not be admitted.

Respectfully submitted,

/Signed electronically by/

Mitchell S. Ross  
James M. Petro  
NextEra Energy Seabrook, LLC  
700 Universe Blvd.  
Juno Beach, FL 33408  
Telephone: 561-691-7126  
E-mail: mitch.ross@fpl.com

Steven C. Hamrick  
NextEra Energy Seabrook, LLC  
801 Pennsylvania Avenue, NW, Suite 220  
Washington, DC 20004  
Telephone: 202-349-3496  
E-mail: steven.hamrick@fpl.com

Dated: September 6, 2011

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David R. Lewis  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, NW  
Washington, DC 20037-1122  
Tel. (202) 663-8474  
Email: david.lewis@pillsburylaw.com

Counsel for NextEra Energy Seabrook, LLC

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
NextEra Energy Seabrook, LLC	)	Docket No. 50-443-LR
	)	ASLBP No. 10-906-02-LR
(Seabrook Station, Unit 1)	)	

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of “Answer of NextEra Energy Seabrook, LLC Opposing Motions to Admit New Contention,” dated September 6, 2011, was provided to the Electronic Information Exchange for service on the individuals listed below, this 6th day of September, 2011.

Secretary  
Att’n: Rulemakings and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
hearingdocket@nrc.gov

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: OCAAMAIL@nrc.gov

Administrative Judge  
Paul S. Ryerson, Esq., Chair  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Email: psr1@nrc.gov

Administrative Judge  
Dr. Richard E. Wardwell  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Email: richard.wardwell@nrc.gov

Administrative Judge  
Dr. Michael Kennedy  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Email: michael.kennedy@nrc.gov

Mary Spencer, Esq.  
Maxwell C. Smith, Esq.  
Emily L. Monteith, Esq.  
Megan Wright, Esq.  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail:  
mary.spencer@nrc.gov;maxwell.smith@nrc.  
gov; emily.monteith@nrc.gov;  
megan.wright@nrc.gov

Raymond Shadis  
New England Coalition  
Post Office Box 98  
Edgecomb, Maine 04556  
E-mail: shadis@prexar.com

Paul Gunter  
Beyond Nuclear  
6930 Carroll Avenue, Suite 400  
Takoma Park, MD 20912  
E-mail: paul@beyondnuclear.com

Matthew Brock, Esq.  
Assistant Attorney General  
Environmental Protection Division  
Office of the Attorney General  
One Ashburton Place, 18th Floor  
Boston, Massachusetts 02108  
matthew.brock@state.ma.us

Kurt Ehrenberg  
New Hampshire Sierra Club  
40 N. Main Street  
Concord, NH 03301  
E-mail: Kurt.Ehrenberg@sierraclub.org

Doug Bogen  
Executive Director  
Seacoast Anti-Pollution League  
PO Box 1136  
Portsmouth, NH 03802  
E-mail: dbogen@metrocast.net

/Signed electronically by/

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David R. Lewis