

September 6, 2011

**UNITED STATES OF AMERICA**  
**NUCLEAR REGULATORY COMMISSION**  
Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 52-018-COL
DUKE ENERGY CAROLINAS, LLC	)	52-019-COL
	)	
(William States Lee III Nuclear Station,	)	ASLBP No. 08-865-03-COL
Units 1 and 2)	)	

**DUKE ENERGY’S OPPOSITION TO BREDL’S NEW CONTENTION**

**I. Introduction**

Pursuant to 10 C.F.R. § 2.309(h), Duke Energy Carolinas, LLC (“Duke”) hereby answers and opposes admission of the Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (“Contention”), which the Blue Ridge Environmental Defense League (“BREDL”) filed in this proceeding on August 11, 2011.<sup>1</sup> The contention alleges that the Environmental Report (“ER”) for the William States Lee III Nuclear Station (“WLS”) fails to satisfy the National Environmental Policy Act (“NEPA”) because it does not address the environmental and safety implications of the NRC Task Force’s findings and recommendations. As discussed below, this contention is inadmissible because BREDL fails to address or satisfy the standards for reopening the record of a closed proceeding, and the Contention does not meet admissibility standards of 10 C.F.R. § 2.309(f)(1). The

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<sup>1</sup> BREDL also filed a separate 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), superficially addressing some of the standards for admitting a new contention. Because 10 C.F.R. § 2.309(f) provides that any party may file an answer to proffered contentions within 25 days after service of the contentions, this specific provision governs the timing of responses, rather than the more general period for responding to a motion under 10 C.F.R. § 2.323(c).

proposed Contention is in very large measure an impermissible challenge to NRC rules, and no part of the Contention establishes any genuine material dispute with the ER.

In essence, BREDL's proposed Contention is an impermissible attempt to litigate preliminary recommendations for enhancing 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. BREDL's attempt to circumvent this prohibition by characterizing its issues as environmental concerns is totally lacking in merit. BREDL's arguments that the NRC must determine what constitutes adequate protection in its NEPA review and consider the Task Force recommendations as severe accident mitigation alternatives (“SAMAs”) without regard to cost confuse the NRC's separate safety and environmental reviews and are simply at odds with the NRC's responsibilities under NEPA and its implementing regulations. BREDL does not make even the slightest effort to show that there is some particular SAMA that may be cost beneficial for WLS, does not make any attempt to relate any of the Task Force recommendations to WLS, and does not address or dispute the evaluation of design basis accidents, severe accidents, or SAMAs in the WLS ER. Consequently, BREDL fails to demonstrate that there is any genuine, material dispute with the ER.

## **II. Background**

### **A. 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 on-site and offsite power systems. NRC Information Notice

2011-05, Tohoku-Taiheiyou-Oki Earthquake Effect on Japanese Nuclear Power Plants (Mar. 18, 2011) at 1 (ADAMS Accession No. ML110760432).

Since the event occurred, the Commission has been closely monitoring the activities in Japan and reviewing all available information.<sup>2</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. 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. Among other things, 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

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<sup>2</sup> Statement by Chairman Jaczko to the Senate Environment and Public Works Committee and Clean Air and Nuclear Safety Subcommittee (Apr. 12, 2011) (ADAMS Accession No. ML111020070).

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.

Recommendations for Enhancing Reactor Safety in the 21st Century, The Near Term Task Force Review of Insights from the Fukushima Daiichi Accident (July 12, 2011) at vii (“Task Force Report”). See also id. at 18. As NRC Chairman Jaczko 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 (ADAMS Accession No. ML11213A279).

On August 19, 2011, the Commission directed 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).

B. The WLS Proceeding

On December 12, 2007, Duke applied for a combined construction permit and operating license (“COL”) for two AP1000 units at WLS.<sup>3</sup> The AP1000 is a standardized design certified at 10 C.F.R. Part 52, Appendix D.<sup>4</sup> BREDL petitioned to intervene in the WLS COL proceeding on June 27, 2008.<sup>5</sup> On September 22, 2008, the Atomic Safety and Licensing Board (“Board”) denied BREDL’s hearing request, finding that BREDL had not submitted any admissible contention, but referring one of its rulings to the Commission. Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 N.R.C. 431 (2008). On April 29, 2009, the Board denied a request by BREDL to admit an additional contention, ruling that it had terminated the proceeding and thus no longer had jurisdiction. Memorandum and Order (Regarding BREDL’s New Contention Eleven) (Apr. 29, 2009). BREDL did not appeal any of these rulings, and on November 3, 2009, the Commission declined to review the ruling previously referred to it by the Board. Duke Energy Carolinas, LLC (William States Lee III Nuclear Station, Units 1 and 2), CLI-09-21, 70 N.R.C. 927, 932 (2009).

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<sup>3</sup> See Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 6,218 (Feb. 1, 2008).

<sup>4</sup> The NRC has completed its review of an amendment to the AP1000 standardized design and issued a proposed rule to certify the amended design. 76 Fed. Reg. 10,269 (Feb. 24, 2011). The purpose of the amendment is to replace COL information items and design acceptance criteria with specific design information, address the effects of the impact of a large commercial aircraft, incorporate design improvements, and increase standardization of the design. Id.

Shortly after the Fukushima Daiichi event, BREDL filed with the Commission on the WLS 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 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. Duke and the NRC Staff have opposed this petition<sup>6</sup> and are awaiting the Commission’s decision.

On August 11, 2011, following issuance of the Task Force Report, BREDL filed its currently proposed Contention. BREDL explains that the Contention “follow[s] up” on the Emergency Petition, and because the Commission has not yet responded to the Emergency Petition, “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.” Contention at 4. BREDL recognizes “that given the sweeping scope

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<sup>5</sup> Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (June 27, 2008).

<sup>6</sup> Duke Energy’s Answer Opposing Emergency Petition to Suspend All Reactor Licensing Proceedings (May 2, 2011); NRC Staff Answer to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichii Nuclear Power Station Accident (May 2, 2011).

of the Task Force recommendations and conclusions,” it may be more appropriate for the NRC to consider them in generic rather than site-specific proceedings, but asserts that this is for the NRC to decide. Id.

Recognizing that the WLS contested proceeding had been terminated, the Commission has referred the Motion to the Chief Administrative Judge for appropriate action consistent with 10 C.F.R. §§ 2.309 and 2.326. Order (Aug. 18, 2011).

C. Applicable Legal Standards

The NRC does not look with favor on amended or new contentions filed after the initial filing. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 636 (2004). 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).

Where, as here, the adjudicatory record has been closed, the Commission’s rules specify that a motion to reopen that record to consider additional evidence – including evidence on a new contention (see 10 C.F.R. § 2.326(d)) – will not be granted unless the following criteria are satisfied:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a). Further, under the NRC rules,

The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. § 2.326(b) (emphasis added).

The Commission has repeatedly emphasized that “[t]he burden of satisfying the reopening requirements is a heavy one.” Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1, 5 (1986)). “[P]roponents of a reopening motion bear the burden of meeting all of [these] requirements.” Id. (citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-10, 32 N.R.C. 218, 221 (1990)). “Bare assertions and speculation . . . do not supply the requisite support.” Id. (citing AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008)). As discussed later, BREDL has entirely ignored these standards.

Moreover, where as here, a motion to reopen relates to a contention not previously in controversy among the parties, it must also satisfy the requirements for non-timely contentions in § 2.309(c). 10 C.F.R. § 2.326(d).<sup>7</sup> Section 2.309(c) provides that non-timely contentions will

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<sup>7</sup> See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 115, 125 (2009); Oyster Creek, CLI-08-28, 68 N.R.C. at 668.



not be entertained absent a determination by the Board that the contentions should be admitted based upon a balancing of the following factors:

- (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.

10 C.F.R. § 2.309(c)(1).

In keeping with the Commission's disfavor of contentions after the initial filing, these factors are "stringent." Oyster Creek, CLI-09-7, 69 N.R.C. at 260 (citing Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 N.R.C. 30, 33 (2006)). "Late petitioners properly have a substantial burden in justifying their tardiness." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975).

Commission case law places most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing. Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 N.R.C. \_\_\_, slip op at 4 (Mar. 26, 2010) ("CLI-10-12"); Private Fuel

Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 N.R.C. 77, 79 (2000); Millstone, CLI-09-5, 69 N.R.C. at 125. Indeed, failure to demonstrate good cause requires the petitioner to make a “compelling” showing with respect to the other factors. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 N.R.C. 156, 165 (1993). In other words,

A petitioner’s showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.

Watts Bar, CLI-10-12 at 4 (footnote omitted). As discussed later, BREDL has not shown good cause for its filing, and a balancing of the lateness factors weighs against admitting this late-filed Contention.

Finally, any new contention must also satisfy the standards for admissibility in 10 C.F.R. § 2.309(f)(1). These standards too are to be enforced rigorously. “If any one . . . is not met, a contention must be rejected.” Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) (“These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.” (footnotes omitted)). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Palo Verde, CLI-91-12, 34 N.R.C. at 155; Oyster Creek, CLI-09-7, 69 N.R.C. at 260 (the contention admissibility rules “require the petitioner (not the board) to supply all of the required elements for a valid intervention petition” (emphasis added) (footnote omitted)). As discussed below, BREDL also fails to meet these requirements.

### III. ARGUMENT

#### A. BREDL Has Neither Addressed Nor Satisfied the Standards for Reopening a Closed Proceeding

The new Contention must be rejected because BREDL has neither addressed nor satisfied the standards for reopening the record of a closed proceeding. As the Commission has held, where an intervention petition has been denied, “a motion to file new or amended contentions must address the motion to reopen standards.” Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-09-5, 69 N.R.C. at 120 (2009).<sup>8</sup> Here, the Board, having disposed of all contentions, terminated the proceeding. Consequently, BREDL is required to satisfy the standards for reopening a closed proceeding, but has not done so.

BREDL has made no attempt to address the standards for reopening the record. It has provided no affidavit from any competent individual addressing each of the criteria for reopening, as required by 10 C.F.R. § 2.326(b). This failure is sufficient grounds by itself to reject BREDL’s Contention. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989).

Furthermore, none of the assertions in BREDL’s Contention or Motion can be construed as satisfying the criteria in 10 C.F.R. § 2.326(a). As discussed below, BREDL does not demonstrate that its request is timely, as required by 10 C.F.R. § 2.326(a)(1). BREDL does not demonstrate that its request addresses a significant safety or environmental issue, as required by 10 C.F.R. § 2.326(a)(2). Similarly, BREDL provides no information even remotely suggesting

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<sup>8</sup> See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 N.R.C. 32, 37 (2006) (applying the factors in 10 C.F.R. § 2.326(a) when a petitioner sought to introduce new contentions after its initial petition to intervene had been denied),

that a materially different result would be likely. At this late stage of the proceeding, it is not sufficient simply to allege that some issue exists.

1. BREDL's Contention is Not Timely

While BREDL asserts that its Contention is timely because it was submitted within thirty days of the Task Force Report (Motion at 5), it is not sufficient to simply point to some new document (such as the Task Force Report). Rather, a proponent of a new contention must show that it could not have raised its contention earlier. “[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).

Here, BREDL's Contention is clearly based on the Fukushima Daiichi accident, which occurred five months ago, and not on the Task Force Report. Indeed, the Declaration of Dr. Makhijani 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>9</sup> BREDL too characterizes its Contention as “follow[ing] up” on the Emergency Petition's demand that the NRC address the lessons of the Fukushima accident

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<sup>9</sup> 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”), ¶ 6.

in its environmental analyses for licensing decisions. Contention at 4. Thus, by BREDL's own admission, the underlying basis of the Contention is not new.

Moreover, BREDL does not identify any new facts in the Task Force Report on which its Contention is based. Instead, BREDL appears to be simply relying on the recommendations that the Task Force members made based on previously available information. BREDL and its experts 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 "new" any of the facts or implications of the Fukushima Daiichi event. 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, 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.") (emphasis added). Accordingly, because this Contention is founded upon the Fukushima earthquake and related events from March 2011, the Contention was not timely filed.

## 2. BREDL's Contention Does Not Address a Significant Safety or Environmental Issue

In addition to being untimely, BREDL's Contention does not address a significant safety or environmental issue. While BREDL argues that the Task Force Report "fundamentally questioned the adequacy of the current level of safety provided by the NRC's program for nuclear reactor regulation" (Motion at 3; Contention at 12), in fact the Task Force concludes "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. Moreover, the Task Force concludes that “all of the current COL and design certification applicants are adequately addressing [its recommendations relating to design basis seismic and flooding analysis] in the context of the updated state-of-the-art and regulatory guidance used by the staff in its reviews.” Id. at 71. Likewise, the Task Force concluded that by nature of its passive design and inherent 72-hour coping capability for core, containment, and spent fuel pool cooling with no operator action required, the AP1000 design proposed for WLS has many of the design features and attributes necessary to address the Task Force Recommendations. Id. And nowhere in the Contention does BREDL make any attempt to show that operation of WLS would raise any significant risk to the public health and safety.

Further, BREDL’s attempt to cast its contention as an environmental concern is baseless. BREDL’s main arguments appear to be that the NRC’s environmental review must consider what design basis accidents should be incorporated into the plant design in order to satisfy the Atomic Energy Act’s adequate protection standard. Contention at 12-13. This argument improperly conflates the separate reviews that the NRC performs under the Atomic Energy Act and under NEPA. The NRC meets its NEPA obligations by providing a detailed statement on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, alternatives to the proposed action, the relationship between short term uses of man’s environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources. 42 U.S.C. § 4332 (c). Nothing in NEPA requires the NRC to make a substantive determination of what constitutes adequate protection,

and indeed, the Courts have held that the NRC may not use its adequate protection findings to satisfy NEPA.<sup>10</sup>

Within the framework of NEPA, the NRC rules require the Staff's environmental impact statement ("EIS") to provide an analysis that "considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects. . . ." (10 C.F.R. § 51.71(d)). Essentially the same information is required in an environmental report (see 10 C.F.R. § 51.45(c)). With respect to the subject matter of the Contention, the WLS ER has met these requirements by presenting the consequences of design basis accidents in Section 7.1.4 and Table 7.1-12, presenting the consequences of severe accidents in Section 7.2, and analyzing the cost and benefits of severe accident mitigation alternatives (design changes or actions beyond those already proposed) in Section 7.3. BREDL does not identify any error in any of these analyses in the WLS ER.

BREDL's argument that the Task Force recommendations must be analyzed as SAMAs without consideration of cost (Contention at 14-15) is equally lacking in merit. Again, BREDL is confusing the separate safety and environmental reviews. Nothing in NEPA requires the NRC to evaluate alternatives without consideration of cost. Moreover, the Commission's regulations implementing NEPA expressly provide that (with certain exceptions not applicable here)<sup>11</sup> 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). Commission case law similarly makes it clear that the goal of

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<sup>10</sup> Limerick Ecology Action v. NRC, 869 F.2d 719, 729-30 (3<sup>rd</sup> Cir. 1989).

<sup>11</sup> The requirement to consider the benefits and costs of the proposed action and alternatives does not apply to applications for early site permits or for license renewal.

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).

On a broader level, BREDL misinterprets “new and significant information” as that term is used in the NEPA context. BREDL is referring to the standard for supplementation of an agency’s EIS (see Contention at 11),<sup>12</sup> but it is well established that such supplementation is only required 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>13</sup> Furthermore, the Commission has adopted this same standard.<sup>14</sup> As the Supreme Court made clear in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989) (footnote omitted), 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.”

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<sup>12</sup> The NRC Staff has not even issued its draft EIS for the WLS COL application, so it is not clear how this standard is even applicable at this point in time. As discussed later, none of the regulations to which BREDL refers (Contention at 12) would require the WLS ER to be supplemented.

<sup>13</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>14</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).



Misinterpreting the standard, BREDL argues that the Task Force Report is significant because “it raised an extraordinary level of concern regarding the manner in which the proposed operation of Lee Units 1 & 2 ‘impacts public health and safety.’” Contention at 12. The pertinent inquiry is not whether the Report is of concern to BREDL, but whether it contains new information showing that some environmental analysis is materially altered. Not only does BREDL fail to demonstrate that the Task Force Report materially alters any particular analysis in the WLS ER, but the Report, in fact, does not make any such suggestion.

3. BREDL’s Motion Does Not Demonstrate that a Materially Different Result Be Likely

Finally, BREDL fails to satisfy the “deliberatively heavy” burden that 10 C.F.R. § 2.326(a)(3) places on a petitioner seeking reopening to demonstrate that a materially different result would be likely. Oyster Creek, CLI-08-28, 68 N.R.C. at 674; Oyster Creek, CLI-09-7, 69 N.R.C. at 287. BREDL makes no attempt to identify any error in the WLS ER, or to show that any particular conclusions in the ER would change as a result of new information, but instead (as just discussed) relies on arguments that are at odds with NEPA and the NRC rules.

In particular, BREDL provides no information demonstrating that any particular SAMA is cost beneficial for WLS, 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). BREDL does not make the

slightest effort to show that any of the Task Force recommendations that may be applicable to WLS would likely be cost beneficial.

Likewise, BREDL's suggestion that the overall cost-benefit analysis of the reactor or comparison with alternative energy sources could be affected (Contention at 15) is at this juncture nothing more than unsupported speculation. Currently, the NRC has not required any changes to the AP1000 design in response to the Fukushima accident, and BREDL has not provided any information showing that any design change should be imposed as a cost-beneficial mitigation alternative. The Commission has held that "conclusory assumptions and predictions" and "bare assertions and speculation . . . do not supply the requisite support" to satisfy the Section 2.326 standards. Vermont Yankee, CLI-11-02, slip op. at 16; Oyster Creek, CLI-09-7, 69 N.R.C. at 287 (citing Oyster Creek, CLI-08-28, 68 N.R.C. at 674). Further, in Vermont Yankee, the Commission made it very clear that generic statements making no mention of the plant at issue or the application in particular are too general to demonstrate a likelihood of prevailing. Vermont Yankee, CLI-11-02, slip op. at 17. In addition, the cost of the plant is not even a relevant consideration unless an environmentally superior alternative has been identified,<sup>15</sup> which is not the case here.

#### 4. BREDL Does Not Meet the Standards for Late Intervention

As previously stated, where a motion to reopen relates to a contention not previously in controversy among the parties, it must also satisfy the requirements for non-timely contentions in

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<sup>15</sup> Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-09, 71 N.R.C. \_\_\_, slip op. at 26 (Mar. 11, 2010); South Carolina Elec. And Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 N.R.C. \_\_\_, slip op. at 30-31 (Jan. 7, 2010); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 N.R.C. 155, 162 (1978).

§ 2.309(c). 10 C.F.R. § 2.326(d). BREDL must also meet these standards because it has not been admitted as a party to this proceeding.<sup>16</sup> Millstone, CLI-09-5, 69 N.R.C. at 124.

With respect to the factors in § 2.309(c), the Commission places most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing.<sup>17</sup> “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. Millstone, CLI-09-5, 69 N.R.C. at 125-26 (citing Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 N.R.C. 1, 6 (2008)). Consequently, for the same reasons that the Contention is not timely under Sections 2.326(a)(1) , BREDL has failed to demonstrate good cause for its late-filed Contention. The recommendations in the Task Force Report do not provide good cause for waiting five months to raise a contention alleging that the implications of the Fukushima Daiichi accident need to be considered under NEPA. Indeed, BREDL made these same claims in the Emergency Petition.<sup>18</sup> Thus, BREDL has been sitting on this claim for months.

Because it has failed to demonstrate good cause, BREDL must make a “compelling” showing with respect to the other factors. Comanche Peak, CLI-93-4, 37 N.R.C. at 165. In other words,

A petitioner’s showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.

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<sup>16</sup> BREDL’s statements that it was previously admitted as a party and continues to have a right to be a party to this proceeding (Motion at 5) are inaccurate. Duke acknowledges that because the Licensing Board previously found that BREDL has standing, BREDL is not required to demonstrate standing anew. See Millstone, CLI-09-5, 69 N.R.C. at 124 n.45. However, BREDL must still meet all other requirements for late intervention.

<sup>17</sup> Watts Bar, CLI-10-12 at 4; Private Fuel Storage, CLI-00-02, 51 N.R.C. at 79.

<sup>18</sup> Emergency Petition at 2-3, 24, 26-27.

Watts Bar, CLI-10-12, at 4 (footnote omitted). BREDL's cursory discussion of the factors is not compelling; and the fifth, seventh, and eighth factors all weigh against admitting BREDL's late contention.

With respect to the fifth factor, other means whereby the petitioner's interest will be protected are clearly available. The Commission is already evaluating the Task Force recommendations and has stated, "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." Federal Respondents' Memorandum at 13. In addition, the Commission has already taken significant steps to protect BREDL's interests by planning broader stakeholder involvement in the potential development of new regulatory standards, including potential rulemakings, concerning the Task Force's recommendations.<sup>19</sup> As a result, ongoing Commission activities relating to the Task Force's recommendations provide BREDL 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).

With respect to the seventh factor, the proposed Contention would obviously broaden the proceeding enormously and threaten significant delay. The Contention seeks to litigate in this proceeding whether "NRC's current regulatory scheme requires significant re-evaluation and

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<sup>19</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.").

revision” (Contention at 9), whether new design basis accidents are needed to provide an adequate level of protection (Contention at 13), and whether the Task Force recommendations should be implemented without regard to cost-benefit analysis or as SAMAs (Contention at 14, 18). Indeed, the Contention acknowledges the “sweeping scope of the Task Force conclusions and recommendations.” Contention at 4.

Concerning the eighth factor, it cannot be reasonably expected that BREDL will assist in developing a sound record. “[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.” Watts Bar, CLI-10-12, slip op. at 10-11 (footnote omitted); see also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2) CLI-86-8, 23 N.R.C. 241, 246 (1986). BREDL has not attempted to satisfy any of the Commission’s requirements. Further, its Contention is entirely generic and makes no effort to identify any specific error in the WLS ER.

Thus, the first, fifth, seventh and eighth factors count heavily against BREDL. Moreover, the Commission grants considerable weight to factors seven and eight when balancing the remaining late-filed contention factors.

We regard as highly important the intervenor’s ability to contribute to the development of a sound record on a particular contention. We also are giving significant weight to the potential delay, if any, which might ensue from admitting a particular contention.

Consumers Power Co. (Midland Plant, Units 1 and 2) LBP-82-63, 16 N.R.C. 571, 577 (1982) (citations omitted) (citations omitted); see also Braidwood, CLI-86-8, 23 N.R.C. at 246-47. The other factors in 10 C.F.R. § 2.309(c)(1), even if demonstrated, are less important (see, e.g., Diablo Canyon, CLI-08-1, 67 N.R.C. at 6; Comanche Peak, CLI-93-04, 37 N.R.C. at 165), and

therefore cannot outweigh BREDL's failure to demonstrate good cause or meet factors five, seven, and eight.

B. BREDL's Proposed New Contention Does Not Meet NRC Standards for Admissibility

Aside from BREDL's failure to address or satisfy the standard for reopening a closed record, BREDL's Contention should also be rejected because it does not meet the admissibility standards in 10 C.F.R. § 2.309(f)(1). In particular, much of BREDL's Contention challenges the NRC rules. Such challenges are impermissible in litigation and therefore are outside the scope of the proceeding. Further, BREDL's Contention lacks basis and fails to demonstrate any genuine dispute with the WLS application on any material issue.

1. BREDL's Proposed New Contention is Outside the Scope of the Proceeding

BREDL's Contention is inadmissible for failing to meet 10 C.F.R. § 2.309(f)(1)(iii), which requires a demonstration that the issue raised is within the scope of the proceeding. As addressed below, the Commission's rules provide that no rule or regulation of the Commission concerning *inter alia* the licensing of nuclear generating stations is subject to attack in any adjudicatory proceeding. 10 C.F.R. § 2.335(a). Much of BREDL's contention is a direct challenge to the Commission's rules, and therefore not permissible in this proceeding.

In particular, although BREDL attempts to cast its Contention as a NEPA concern, its Contention is clearly advocating an overhaul of the NRC's safety regulations in order to provide adequate protection to the public health and safety. See Contention at 2 (asserting "the time has come to make fundamental changes to the NRC's program for establishing minimum safety requirements for nuclear reactors[.]"); Contention at 7 (stating that the Task Force Report requires "a major re-evaluation and overhaul of the NRC's regulatory program"); Contention at 9

(“. . . 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.”).

It is well established that a petitioner is not entitled to an adjudicatory hearing to attack NRC regulations. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). “[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). Similarly, 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).

In addition, the suggestion that “the design basis for the reactor does not incorporate accidents that should be considered in order to satisfy the adequate protection standard” (Contention at 13) is an impermissible challenge to the Design Certification Rule (“DCR”)<sup>20</sup> for the AP1000. Chapter 15 of the AP1000 Design Control Document (“DCD”) identifies the design basis accidents considered and evaluated for the AP1000, and the AP1000 DCR approves the DCD. Under the NRC rules, the Commission treats as resolved those matters resolved in connection with the issuance of a design certification. 10 C.F.R. § 52.63(a)(5). Further, while

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<sup>20</sup> 10 C.F.R. Part 52, App. D.

the AP1000 DCR is being amended (see supra note 4), the amendments do not alter the list of design basis accidents considered in the design. Compare Chapter 15 of DCD Rev. 15 (referenced in § II.A of the DCR) with Chapter 15 of DCD Rev. 19 (referenced in proposed DCR for the AP1000 Amendment).<sup>21</sup> Further, any matters addressed by DCD amendments are also beyond the scope of this proceeding. As the Commission has stated,

We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding.

Statement of Policy on Conduct of New Reactor Licensing Proceedings, CLI-08-07, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

The Contention's claims that Station Blackout ("SBO") mitigation capability must be strengthened (Contention at 18-19), that the AP1000 must mitigate an SBO lasting more than 72 hours (Makhijani Declaration at ¶ 17), and that spent fuel pool makeup capability and instrumentation must be enhanced (Contention at 19) are likewise all beyond the scope of this proceeding, because they are all impermissible challenges to the AP1000 DCR.

- The compliance of the AP1000 with the station blackout rule is established in DCD § 1.9.5.1.5. As reflected in the NRC Safety Evaluation Report for the AP1000, the passive safety-related systems of this design can maintain safe-shutdown conditions after design basis events for 72 hours, without operator action, following a loss of both onsite and offsite ac power sources.<sup>22</sup> Further, DCD § 1.9.5.4 addresses the potential for loss of ac power extending beyond 72 hours and identifies the actions required to address this scenario.

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<sup>21</sup> DCD Rev. 15 and DCD Rev. 19 can be accessed at <http://www.nrc.gov/reactors/new-reactors/design-cert.html>.

<sup>22</sup> NUREG-1793, Final Safety Evaluation Report Related to Certification of the AP1000 Standard Design (Sept. 2004), § 8.5.2.1.



- Section 9.1.2 of the DCD establishes the design of the spent fuel pool. DCD Section 9.1.3.4.3.4 provides that spent fuel pool makeup for long-term station blackout can be provided through seismically qualified safety-related makeup connections from the passive containment cooling systems. These connections are located in an area of the auxiliary building that can be accessed without exposing operating personnel to excessive levels of radiation or adverse environmental conditions. DCD Section 9.1.3.7 identifies the instrumentation provided for the spent fuel pool cooling system, which includes safety-related instrumentation that alerts control operators to low water levels.

BREDL's assertion that the Task Force recommendations must be evaluated as SAMAs without consideration of cost (Contention at 14) is also an impermissible challenge to the NRC rules. As previously discussed, the Commission's regulations implementing NEPA expressly provide that (with certain exceptions not applicable here – see supra note 11) 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. §§ 51.49(c), 51.71(d). Any suggestion to the contrary in an impermissible challenge to the NRC rules, barred by 10 C.F.R. § 2.335(a).

BREDL's Contention is also outside the scope of this proceeding because the Task Force recommendations applicable to new plants are recommendations for rulemaking. See Task Force Report at 71 (stating that recommended orders are inapplicable to new reactors, but rulemaking recommendations have been assessed as applicable). It is well established that issues being considered for rulemaking should not be admitted as contentions. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 N.R.C. \_\_\_, slip

op. at 2-3 (July 8, 2010); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 N.R.C. 328, 345 (citing Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 A.E.C. 79, 85 (1974)).

2. BREDL's Proposed New Contention Lacks Basis, Fails to Demonstrate Issues Material to the Findings that the NRC Must Make, and Fails to Establish Any Genuine Dispute with the ER

In addition to impermissibly challenging the NRC rules, BREDL's proposed contention is also inadmissible because it lacks basis (required by 10 C.F.R. 2.309(f)(1)(ii)), fails to demonstrate the existence of issues material to the findings that the NRC must make (required by (required by 10 C.F.R. 2.309(f)(1)(iii)), and fails to demonstrate the existence of a genuine dispute with the WLS application on a material issue of law or fact (required by 10 C.F.R. 2.309(f)(1)(iv)).

As a threshold matter, BREDL does not provide any support for its assertion that the WLS ER is required to address "new and significant information" concerning the implications of the Fukushima Daiichi accident or Task Force Report. BREDL refers to the CEQ regulations at 40 C.F.R. § 1502.9(c)(1)(ii) (Contention at 11),<sup>23</sup> but this rule refers to the agency's obligation to prepare a supplement to a draft or final EIS. It imposes no duty on an applicant. Here, the NRC Staff has not even issued its draft EIS yet. BREDL also points to a number of NRC regulations (Contention at 12), but none that would require the WLS ER to be supplemented. 10 C.F.R. § 51.50(c)(iii) applies only if the application references an early site permit, which the WLS application does not. 10 C.F.R. § 51.53(b) applies when an applicant is using the two-step Part 50 licensing process, and 51.53(c)(iv) applies only to license renewal proceedings. Moreover, while 10 C.F.R. § 50.71(e) requires a COL applicant to update its final safety analysis report

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<sup>23</sup> BREDL incorrectly cites this as 40 C.F.R. § 1509(c)(1)(ii). Contention at 11.

(“FSAR”) annually, the NRC rules contain no such requirement regarding the ER. In sum, BREDL does not identify any legal basis for the proposition that an applicant’s ER needs to be supplemented.

Even if one were to assume some requirement to supplement an ER to address new and significant information, BREDL fails to provide any meaningful support for its claim that the Task Force Report constitutes new and significant information as that phrase is used in the NEPA context. As previously discussed, for new information to be considered significant in the NEPA context, that information must materially alter some environmental finding or conclusion. Here, Section 7.1.4 and Table 7.1-12 of the WLS ER present the consequences of design basis accidents, Section 7.2 presents the consequences of severe accidents, and Section 7.3 analyzes the cost and benefits of severe accident mitigation alternatives. BREDL does not identify any error in any of this analysis. It does not provide any information indicating that the probability or consequences of any accident scenario is greater than as assessed in the ER, or that any SAMA is cost beneficial. BREDL thus fails to address or demonstrate any genuine dispute with the ER.

BREDL argues that “the NRC must revisit any conclusions in the Lee ER based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable” (Contention at 13), but makes no showing that any portion of the ER relies on such an assumption. Again, the WLS ER estimates the consequences of design basis accidents and the risk of severe accidents, and BREDL does not dispute any of these estimates. The ER does compare the estimated consequences of design basis accidents with regulatory dose limits to show that projected doses are small fractions of permissible limits (WLS ER at Table 7.1-12), but specifically states that “conformance to these

dose limits is not required for this environmental impact analysis.” ER at 7.1-3. Further, BREDL does not claim or provide any information to suggest that any of the projected consequences of these design basis accidents is unacceptable.<sup>24</sup>

Instead, BREDL’s principal argument seems to boil down to the claim that some accident scenarios evaluated as severe accidents should instead be considered design basis accidents. Contention at 13. Apart from being an impermissible challenge to the designation of design basis accidents in the DCR as previously argued, this claim does not present any material issue. Because the WLS ER analyzes both design basis accidents and severe accidents, the manner in which particular accident scenarios are labeled would not alter the overall accident risk presented in the ER. Further, BREDL’s argument rests on the false premise that the ER must “reach a conclusion that the design of the reactor adequately protects accident risks.” Contention at 13. That is the purpose of the AP1000 DCD, WLS FSAR, and NRC safety requirements on which they are based, not the ER. The purpose of the ER is to analyze environmental impacts of the proposed action and alternatives to mitigate those impacts. Consequently, this argument lacks any legal basis and fails to present any genuine dispute with the WLS application.

Similarly, there is no basis for BREDL’s argument that “the values assigned to the cost-benefit analysis for Lee 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.” Contention at 14. Again, in addition to being an impermissible challenge to the NRC rules, any suggestion that SAMAs must be evaluated without consideration of cost is simply at odds with the purpose of SAMA analysis. See Pilgrim, CLI-10-11, slip op. at 39 (the goal of

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<sup>24</sup> BREDL claims that section 7.1.4 of the ER concludes that the health effects resulting from design basis accidents are negligible. Contention at 13. This language does not appear in the WLS ER. Thus, it appears that the

SAMA analysis “is only to determine what safety enhancements are cost-effective to implement”). Nothing in NEPA requires the NRC to consider mitigation alternatives without regard to cost.

Further, the Task Force Report provides no conclusions on the value of any particular SAMAs. Moreover, BREDL provides no information indicating that the quantitative assessment of SAMAs (i.e. the estimated risk that could be averted or cost) in the WLS ER is incorrect. BREDL provides no information demonstrating that any particular SAMA is cost beneficial, as required to raise an admissible SAMA contention. 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. McGuire, CLI-02-17, 56 N.R.C. at 11-12.

Likewise, BREDL’s suggestion that the overall cost-benefit analysis of the reactor or comparison with alternative energy sources could be affected (Contention at 15) is at this juncture nothing more than unsupported speculation. Currently, the NRC has not required any changes to the AP1000 design in response to the Fukushima accident, and BREDL has not provided any information showing that any design change should be imposed as a cost-beneficial mitigation alternative. Moreover, as already discussed, the issue of cost is irrelevant in the absence of any environmentally superior alternative. See supra note 15 and accompanying text. Thus, this claim fails to raise any issue material to the findings that the NRC must make.

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references in the Contention are not even to the WLS application. Duke believes that these references pertain to the ER for the Summer COL, which apparently BREDL has copied without bothering to check their applicability.

In addition, BREDL makes no meaningful attempt to relate any of the Task Force recommendations to WLS or the AP1000, and many of its claims are simply not supported by the Task Force Report.<sup>25</sup> For example, the references to the recommendations concerning flooding and seismic protection (Contention at 16) do not raise any significant issue for WLS, because the Task Force concluded that all COL and DC applicants are already using updated, state-of-the-art methodology and regulatory guidance to evaluate seismic and flooding hazards and establish appropriate design bases. Task Force Report at 71. Thus, there is no basis or support for asserting that the ER must be supplemented to address these recommendations, and no information demonstrating any genuine dispute with the WLS ER.

Similarly, BREDL's references to tsunami risk and the generalized claims about seismic seiches in the accompanying declaration of Ross McCluney<sup>26</sup> do not address WLS or demonstrate any genuine dispute with the WLS application. Section 2.4.6 of the WLS FSAR demonstrates that WLS, which is an inland site 175 miles from the coast, is not vulnerable to tsunamis.

The U.S. Army Corps of Engineers has developed a general tsunami risk map (Figure 2.4.6-201) (Reference 281). The East Coast is located in Zone 1, which corresponds to a wave height of 5 ft. According to the National Oceanic & Atmospheric Administration (NOAA) tsunami database (Reference 228), the maximum recorded tsunami wave height along the East Coast is about 20 ft. This

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<sup>25</sup> It is well established that, in determining the admissibility of a contention, licensing boards are to “carefully examine[]” documents provided in support of a contention to determine whether they “supply an adequate basis for the contention.” See, e.g., Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 265 (2004). A document put forth by a petitioner as the basis for a contention is subject to Board scrutiny, both as to the portions that support the petitioners’ assertions and those that do not. See, e.g., Virginia Electric & Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 N.R.C. 294, 334 n.207 (Aug. 15, 2008); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 N.R.C. 61, 90 and n.30 (1996). See also id. at 88-89 (rejecting a contention where the document referenced by petitioner on its face failed to establish a disputed material issue).

<sup>26</sup> Declaration of Dr. Ross McCluney Regarding Environmental and Safety Issues at Nuclear Power Plants Based on Events at Fukushima and the Findings of the NRC Interim Task Force (Aug. 11, 2011) (“McCluney Declaration”). This declaration does not discuss WLS. Further, it does not appear that Dr. McCluney possesses any qualifications to provide expert opinion on seismic seiches.

was recorded at Daytona Beach, Florida, on July 3, 1992. The database notes that the wave was probably meteorologically induced.

The Lee Nuclear Station is located approximately 175 mi. inland from the Atlantic Coast. The safety-related plant elevation is 590 ft. Based on data provided above, and site location and elevation characteristics, the station's safety-related facilities are not considered at risk from tsunami flooding.

FSAR at 2.4-57. BREDL does not address or dispute this information and thus does not present any genuine dispute with the application regarding tsunami risk.

The WLS FSAR demonstrates that WLS is not vulnerable to seismic seiches. Section 2.4.5 of the FSAR states:

The U.S. Army Corps of Engineers guideline procedures for geologic hazard evaluations consider seiche waves greater than 7 ft. to be rare (Reference 281). According to U.S. Army Corps of Engineers guidance, the seiche hazard can be screened out for sites located more than 7 ft. above the adjacent water body. . . . The safety-related plant elevation is 590 ft. The normal maximum water surface elevation of the Broad River is 511.1 ft.

Id. at 2.4-54. This FSAR section also demonstrates that the adjacent makeup ponds are not susceptible to meteorologically-induced seiche waves. Id. at 2.4-57. In addition, FSAR Section 2.4.6 shows that there is no potential hazard from seismically-induced seiche in these makeup ponds:

Any seismic event that could occur would generate potential waves that would be insignificant compared to the available freeboard of the on-site make-up ponds.

As shown in Figure 2.4.1-209, Make-Up Pond A and Make-Up Pond B have normal pool elevations of 547 ft. msl and 570 ft. msl, respectively. Safety-related facilities are located at an elevation of 590 ft. Therefore, Make-Up Pond A has an available freeboard of 43 ft. and Make-Up Pond B has an available freeboard 20 ft.

Id. at 2.4-58. Again, BREDL does not address this information or demonstrate a genuine dispute with any of it.

For the same reasons, BREDL's references to the Task Force recommendations concerning Station Blackout ("SBO") and spent fuel pool capabilities do not raise any genuine, material dispute with the WLS design or application. The Task Force Report specifically concludes that by nature of its passive design and inherent 72-hour coping capability for core, containment, and spent fuel pool cooling with no operator action required, the AP1000 design already has many of the design features and attributes necessary to address the Task Force SBO recommendations. Task Force Report at 71. Dr. Makhijani argues that the design of the AP1000 needs to be reviewed in the context of its ability to mitigate an SBO lasting more than 72 hours (Makhijani ¶ 17), but this claim is not supported by the Task Force Report. In any event, the AP1000 specifically addresses the potential for loss of ac power extending beyond 72 hours and identifies the actions required to address this scenario (AP1000 DCD § 1.9.5.4), so this claim too fails to demonstrate any genuine dispute with the application. In sum, BREDL provides no basis for claiming that the AP1000 SBO mitigation capability needs to be strengthened, and no information demonstrating a genuine material dispute with the WLS application.

With respect to spent fuel pool cooling, the passive design of the AP1000 is sufficient to provide spent fuel pool cooling for at least 7 days using on-site water sources and for the initial 72 hours using only gravity-driven flow. AP1000 DCD at § 9.1.3.4.3. Further, as described in Section 9.1.3.4.3.4 of the DCD, spent fuel pool makeup for long term station blackout can be provided through seismically qualified safety-related makeup connections from the passive containment cooling systems. These connections are located in an area of the auxiliary building that can be accessed without exposing operating personnel to excessive levels of radiation or adverse environmental conditions. Id. Section 9.1.3.7 of the DCD identifies the instrumentation provided for the spent fuel pool cooling system, which includes safety related instrumentation



that alerts control operators to low water levels. BREDL does not address or dispute any of this information. It thus once more fails to demonstrate any genuine dispute with the application, or provide any basis for suggesting that the AP1000 spent fuel pool makeup capability and instrumentation need to be strengthened.

Other recommendations to which the Contention refers are not even applicable to WLS. For example, BREDL refers to the recommendation for hardened vents in boiling water reactors. Contention at 18. Since the AP1000 is a pressurized water reactor, this recommendation is obviously inapplicable to WLS and provides no basis for claiming that the ER needs to be supplemented.

Finally, the reference in the Contentions to recommendations concerning Emergency Operating Procedures, Severe Accident Management Guidelines, and Extensive Damage Mitigation Guidelines (Contention at 19) do not raise any SAMA issue. These Task Force recommendations address only regulatory oversight of these commitments (i.e. whether they should be controlled in the Technical Specifications),<sup>27</sup> do not propose any new measures, and do not recommend addressing this issue before COL issuance. Task Force Report at 71. Moreover, the WLS application already addresses these procedures.<sup>28</sup>

In sum, BREDL's Contention totally fails to address or demonstrate any genuine material dispute with the WLS Application. Its attempt to cast the Task Force's recommendations as new and significant information that must be addressed in the ER is without any factual or regulatory

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<sup>27</sup> See Task Force Report at 50, 71.

<sup>28</sup> FSAR § 13.5.2.1 (incorporating by reference DCD § 13.5.2.1 addressing emergency operating procedures); FSAR § 19.59 (implementing the AP1000 Severe Accident Management Guidance on a plant specific basis. EDMGs are addressed in Part 11B of the COL Application, Loss of Large Areas of the Plant Due to Explosions or Fire – Mitigative Strategies Description and Plans, as required by 10 C.F.R. 52.80(d), which is withheld from public disclosure as security-related information. EDMGs are addressed as commitments in the Mitigative Strategies Table.

basis, and is clearly nothing more than a pretext to litigate preliminary proposals to make improvements to the NRC's safety regulations – proposals that are clearly outside the scope of this proceeding.

#### **IV. Conclusion**

For all of the above stated reasons, BREDL's Contention should be rejected.

Respectfully submitted

/Signed electronically by/

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September 6, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 52-018-COL
DUKE ENERGY CAROLINAS, LLC	)	52-019-COL
	)	
(William States Lee III Nuclear Station, Units 1 and 2)	)	ASLBP No. 08-865-03-COL

**CERTIFICATE OF SERVICE**

I hereby certify that the “Duke Energy’s Opposition to BREDL’s New Contention,” dated September 6, 2011, was provided to the Electronic Information Exchange for service on the individuals listed below, this 6<sup>th</sup> day of September, 2011.

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