September 6, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040-COL
	)	52-041-COL
(Turkey Point Units 6 and 7)	)	
	)	ASLBP No. 10-903-02-COL
(Combined License)	)	

FLORIDA POWER & LIGHT COMPANY'S RESPONSE OPPOSING ADMISSION OF SACE'S AND CASE'S LATE FILED CONTENTIONS

Pursuant to 10 C.F.R. § 2.309(h) and in accordance with the Atomic Safety and Licensing Board ("Board")'s Initial Scheduling Order and Administrative Directives (Prehearing Conference Call Summary, Grant of Joint Motion Regarding Mandatory Disclosures, Initial Scheduling Order, and Administrative Directives) of March 30, 2011 ("Initial Scheduling Order"), Applicant Florida Power & Light Company ("FPL") hereby responds to and opposes the admission of two identical late-filed contentions submitted by (1) intervenors Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association ("Joint Intervenors")[1] and (2) Citizens Allied for Safe Energy, Inc. ("CASE")[2] in this proceeding. Both filings seek admission of the same contention and will be collectively referred to herein as the "Intervenor Motions;" the

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[1] Attachment to Motion to Admit Contention to Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (August 11, 2011) ("SACE Contention").

[2] Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (dated August 11, 2011, actually filed on August 12, 2011) ("CASE Contention").

common contention they proffer will be referred to as "the Contention," and SACE and CASE will collectively be referred to as the "Intervenors."[3]

Intervenors proffer the following Contention:

> The ER for Turkey Point Units 6 & 7 fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.

SACE Contention at 5.

The Intervenor Motions should be denied because they proffer a late–filed contention and fail to meet the requirements for admission of such contentions. In addition, the Contention is inadmissible as a matter of law because it does not satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1), and repeatedly challenges the Commission's regulations.

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 rules. Intervenors' attempt to circumvent this prohibition by characterizing the issues raised in the Contention as "environmental" is totally lacking in merit, for it conflates the NRC's safety and environmental reviews and is at odds with the NRC's responsibilities under the National Environmental Policy Act ("NEPA") and its implementing regulations. Further, the Contention is premature since

[3] The pagination of the Contention, as submitted by each of the Intervenors, is slightly different. In this response, we will cite to the pages of the SACE Contention.

the Commission is in the process of addressing the recommendations in the recent document "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)" (ADAMS Accession No. ML111861807) (the "Task Force Report") and may soon issue new regulations that moot or negate the relief sought by Intervenors.

BACKGROUND

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 then, the Commission has been closely monitoring the activities in Japan in response to the accident and reviewing all available information.[4] Among other steps taken as a result of the event, 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

[4] 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).

> 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 Envtl. Fed'n v. NRC*, No. 09-2567 (3d Cir., Apr. 4, 2011) ("Federal Respondents' Memorandum").

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 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 by the Commission's Chairman 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 to the Senate Committee on Environment and Public Works and the Subcommittee on Clean Air and Nuclear Safety (Aug. 2, 2011) (ADAMS Accession No. ML111213A279) at 2-3.

On August 19, 2011, the Commission issued a directive to the NRC staff ("Staff") to take the following actions:

- 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. The 21-day effort will include a public dialogue on the Staff's proposal. (The Staff conducted a public meeting on August 31, 2011.).

- 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. ML1112310021) ("SRM 11-0093"). While the Commission is taking these actions to assess the implications of the Fukushima accident and take appropriate responsive measures, its informed assessment is that continued operation and continued licensing activities for U.S. plants do not pose an imminent risk to public health and safety (that was also the conclusion of the NRC Task Force; *see* Task Force Report at vii.)

Consistent with that assessment, the Commission has continued its licensing activities, including the completion of several license renewal proceedings, the review of standard design certification applications, and the processing of combined license ("COL") applications. It has scheduled for September 27, 2011 its first mandatory hearing on a COL application (that for the new Vogtle 3 and 4 units), *see* 76 Fed. Reg. 50767 (Aug. 16, 2011), and has completed its technical review for Revision 19 of the Design Certification application for Westinghouse's AP1000 advanced reactor, *see* Final Safety Evaluation

Report Related to Certification of the AP1000 Standard Plant Design, NUREG-1793 Supplement 2 (Aug. 2011), ADAMS Accession No. ML112061231.

In April 2011, shortly after Fukushima Daiichi accident, the Joint Intervenors and CASE filed with the Commission on the Turkey Point Units 6 & 7 COL 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 ("Emergency Petition"). The Emergency Petition, which was also filed by plant 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 time table 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) a request by the NRC for a Presidential investigation. FPL and the NRC Staff opposed the Emergency Petition and are awaiting the Commission's decision.[5]

[5] The pending action before the Commission precludes action by the Board over the Emergency Petition and related filings. Commission Order (Order) (April 19, 2011); *see generally, Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative* (Combined License Application for North Anna Unit 3), LBP-11-22, 74 NRC __ (slip op. at 17) (Sept. 1, 2011) (*discussing* that while the Emergency Petition is not currently before the Boards, it might be in the future depending on the Commission's ruling). An affirmation session by the Commission on the Emergency Petition is tentatively scheduled for September 9, 2011. Commission Meeting Schedule for the Week of September 5, 2011, *available at* http://www.nrc.gov/public-involve/public-meetings/schedule.html.

On August 11, 2011, following issuance of the Task Force Report, Intervenors filed their proposed Contention. They 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 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." SACE Contention at 4. Intervenors acknowledge that the relief they seek in the Contention is best addressed generically and not through contentions filed in individual proceedings:

> Intervenors 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 environmental proceedings. That is for the NRC to decide. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council,* 462 U.S. 87, 100 (1983). It is the NRC, and not the public, which is responsible for compliance with NEPA. *Duke Power Co. et al.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

Id. In this regard, Intervenors are correct. If the Contention were admitted and litigated, future actions of the Commission would likely render the effort moot and result in a significant waste of the time and resources of all parties to this proceeding.

ARGUMENT

I. INTERVENORS' PROPOSED CONTENTION IS INEXCUSABLY LATE

A. Standards for the Admission of New Contentions

The Board has specified, for the benefit of the parties, the requirements for filing new contentions in this proceeding. The Board wrote:

> A party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and the substance of the

> proposed contention simultaneously. The pleading shall include a motion for leave to file a *timely* new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file a *nontimely* new or amended contention under 10 C.F.R. § 2.309(c)(1) (or both), and the explanation for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). A motion and proposed new or amended contention as specified above shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the motion should cover the three criteria of section 2.309(f)(2) and the eight criteria of section 2.309(c)(1) (as well as the six criteria of section 2.309(f)(1)).

Initial Scheduling Order at 8 (emphasis in original); *see also* Memorandum and Order (Denying CASE's Motion to Admit Newly Proffered Contentions), LBP-11-15, 73 NRC ___ (June 29, 2011) ("LBP-11-15"), slip op. at 3-5.

Intervenors acknowledge that the Contention must satisfy the timeliness requirement of 10 C.F.R. § 2.309 (f)(2) or, if those are not met, the requirements for non-timely contentions in 10 C.F.R. § 2.309(c), but maintain that the Contention meets both. *See, e.g.*, Motions at 2-8. That is, however, not the case.

Finally, any new contention must also satisfy the standards for admissibility in 10 C.F.R. § 2.309(f)(1). These standards 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 NRC 149, 155 (1991) (citation omitted); *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006) ("[t]hese 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 NRC at 155; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009) (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, the Contention also fails to meet these requirements.

B. The Contention is not Timely

The NRC regulations establish three requirements that must be met in order for an amended or new contention to be deemed timely:

> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2). The Contention is said to be based on new information contained in the Task Force Report. Motions at 3. However, while Intervenors assert that their Contention is timely because it was submitted within thirty days of the issuance of the Task Force Report (SACE Motion at 5), it is not sufficient to simply point to some new document (such as the Task Force Report) to demonstrate timeliness. 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 NRC 1041, 1043 (1983). An intervenor cannot establish the timeliness of a

new 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 NRC 13, 21 (1986).

Here, the Intervenors' 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. Arjun Makhijani submitted with the Contention characterizes the Task Force report as providing "further support" for his opinion "that the Fukushima accident presents new and significant information."[6] Intervenors too characterize the 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. SACE Contention at 4. Thus, by Intervenors' own admission, the information on which the Contention is based is not new.

Indeed, the Contention does not specify what "new" information is contained in the Task Force Report. This is not surprising, because the only facts contained in the Task Force Report are those presented in Section 2, which in entitled "Summary of Events at Fukushima Dai-Ichi." Task Force Report at 7-14. Intervenors do not claim that Section 2 contains any new facts; as its title indicates, Section 2 simply summarizes the sequence of events at the Fukushima Daiichi plant, a sequence that has been known for several

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[6] 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"), at ¶ 6 ("the Task Force Review provides further support for my opinions that the Fukushima accident presents new and significant information regarding the risks to public health and safety and the environment posed by the operation of nuclear reactors and that the integration of this new information into the NRC's licensing process could affect the outcome of safety and environmental analyses for reactor licensing and relicensing decisions … .")

months.[7] As such, Section 2 provides no new "information" that would render the Contention timely under 10 C.F.R. § 2.309(f)(2).

The rest of the Task Force Report contains (1) a historical description of the NRC regulatory framework for nuclear power plants and recommendations on how this framework could be strengthened (Section 3, Task Force Report at 15-24); (2) recommendations on how to increase plant safety through defense-in-depth methodologies (Section 4, *id.* at 25-62); (3) recommendations for modifications to the internal NRC inspection program, the management of NRC records and information, and NRC participation in international activities (Section 5, *id.* at 63-68); (4) a summary of the Report's overarching recommendations (Section 6, *id.* at 69-70); and (5) a discussion of the implementation strategy for new reactors (Section 7, *id.* at 71-72). No new information that could render the Contention timely is therefore contained in the Task Force Report.

In reality, Intervenors are relying on the recommendations that the Task Force members made, which are based on previously available information. Intervenors had the same "factual predicate" available to them and could have reached the same conclusions months ago. 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

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[7] *See, e.g.,* Transcript of Briefing on NRC Response to Recent Nuclear Events in Japan (March 21, 2011) (ADAMS Accession No. ML110810254); *see also* Transcript of Briefing on the Status of NRC Response to Events in Japan and Briefing on Station Blackout (April 28, 2011) (ADAMS Accession No. ML111390571).

contention." *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC __, slip op. at 17 (Sep. 30, 2010).

Thus, the Contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(2) and is therefore untimely.

C. The Contention does not meet the Requirements for the Consideration of Non-timely Contentions

When a proposed new contention is not timely, as is the case here, the party propounding the contention must address the eight factors set forth in 10 C.F.R. § 2.309(c)(1).[8] The Commission disfavors the submission of contentions after the initial filing.[9] For that reason, these factors are "stringent." *Oyster Creek*, CLI-09-7, 69 NRC at

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[8] 10 C.F.R. § 2.309(c)(1) states:

c) Nontimely filings. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(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).

[9] 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 NRC 631, 636 (2004). As the Commission has repeatedly stressed,

> [o]ur 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

(Footnote continued on next page)

260 (citing *Florida Power & Light Co., et al.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 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 NRC 273, 275 (1975).

In their Motions seeking admission of the Contention, Intervenors discuss these factors (*see* Motions at 4-8), and correctly identify the first factor – whether there is good cause for the failure to file on time – as being the most important one, *id.* at 4-5.[10] "Good cause" has been consistently interpreted to mean that a proposed new contention must be based on information that was not previously available, and was timely submitted in light of that new information. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-09-5, 69 NRC 115, 125-26 (2009) (citing *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008)). For the same reasons that the Contention is not timely, Intervenors have failed to demonstrate good cause for their late-filed Contention. The recommendations in the Task Force Report do not provide good cause for waiting five months after the Fukushima accident to raise a contention alleging that the implications of

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> 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.

Oyster Creek, CLI-09-7, 69 NRC at 271-72 (emphasis added) (citations omitted).

10 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 NRC __, slip op at 4 (Mar. 26, 2010); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000). In other words, "[a] petitioner's showing [of good cause] 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).

the accident need to be considered under NEPA. Indeed, Intervenors made these same claims last April in their Emergency Petition.[11]

Intervenors' explanation as to why there is good cause for the non-timely submittal of the Contention is inadequate:

> As noted above, the information on which this Motion and accompanying contention are based is taken from the Task Force Report, which was issued on July 12, 2011 and analyzes NRC processes and regulations in light of the Fukushima accident, an event that occurred a mere five months ago. This Motion and accompanying contention are being submitted less than thirty (30) days after issuance of the Task Force Report.

Motions at 5. However, since the Task Force Report does not contain any new information, the Contention must be based – if at all – on the events at the Fukushima Daiichi plant, and these events were known five months ago. There is no good cause for the Intervenors' failure to submit a timely contention. *See* LBP-11-15, slip op. at 7-8.

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 NRC 156, 165 (1993). Here, a balance of the other lateness factors weighs against admitting the Contention.

Intervenors' cursory discussion of the remaining factors in 10 C.F.R. § 2.309 (c)(1) is not compelling, and the fifth, seventh and eighth factors all weigh against admitting this late-filed 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

[11] Emergency Petition at 2-3, 26-27.

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.

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 revision" (SACE Contention at 9), whether new design basis accidents are needed to provide an adequate level of safety (*id.* at 13), and whether the Task Force recommendations should be implemented without regard to cost or as SAMAs (*id.* at 14, 18).[12] Indeed, the Contention admits that it seeks to litigate the "Task Force's far-reaching conclusions and recommendations." *Id.* at 4.

While Intervenors concede (as they must) that admission of the Contention may broaden or delay the proceeding, they claim that this factor may not be taken into account because "the NRC has a nondiscretionary duty under NEPA to consider new and significant information that arises before it makes its licensing decision." Motions at 7. This position, even if correct (which as discussed below is not), would go to the admissibility factors in 10 C.F.R. § 2.309 (f)(1), not to whether this non-timely Contention should be admitted.

Concerning the eighth factor, there is no indication that Intervenors will assist in developing a sound record. "[w]hen a petitioner addresses this criterion it should set out

[12] Severe Accident Mitigation Alternatives ("SAMAs") are non-mandatory design or procedural modifications that could mitigate the consequences of a severe accident.

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 NRC 241, 246 (1986). Intervenors have done none of this. Further, the Contention is entirely generic, is apparently "cut and pasted" from documents developed to be filed in multiple proceedings, and makes no effort to identify any specific error in the Turkey Point Units 6 and 7 COL application ("Application").

Thus, the first, fifth, seventh and eighth factors count heavily against admission of the Contention. Moreover, next to good cause, in balancing the remaining late-filed contention factors, the Commission grants considerable weight to factors seven and eight.

> 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 NRC 571, 577 (1982) (citations omitted); *see also Braidwood*, CLI-86-8, 23 NRC at 246-47. The other factors in 10 C.F.R. § 2.309(c)(1) are less important (*see, e.g., Diablo Canyon*, CLI-08-1, 67 NRC 1, 6; *Comanche Peak*, CLI-93-04, 37 NRC at 165), and therefore cannot outweigh Intervenors' failure to demonstrate good cause or meet factors five, seven and eight.

Based on the foregoing, the Contention is inexcusably late and must be rejected.

II. THE CONTENTION DOES NOT MEET THE ADMISSIBILITY STANDARDS IN 10 C.F.R. § 2.309(F)(1)

In addition to its inexcusable lateness, the 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 the Contention challenges NRC rules. Such challenges are impermissible in a licensing proceeding and are outside the scope of the proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). Further, the Contention is not supported by the Task Force Report on which it is allegedly founded, thus failing to satisfy 10 C.F.R. § 2.309(f)(1)(v). Finally, the Contention does not demonstrate any genuine dispute with the Application on any material issue of fact and law, in contravention of 10 C.F.R. § 2.309(f)(1)(vi). The Contention is therefore inadmissible.

While the Contention is ostensibly directed at the alleged non-compliance of the Application's Environmental Report ("Turkey Point ER" or "ER") with the requirements of NEPA, Intervenors' discussion in support of the Contention's admissibility refers to the "safety" implications of the Task Force Report's recommendations (*see* SACE Contention at 1, 2, 6) and urges the overhaul of the NRC's safety regulations and the imposition of backfits in order to enhance protection of the public health and safety. *Id.* at 9. The discussion below addresses the safety and environmental claims raised in the Contention separately, although as will be seen the "environmental" claims rest on the assumption that the NRC safety regulations will be modified to expand the design basis to include severe accidents.

A. The Safety Claims Raised in the Contention are Inadmissible

1. The Request for Modification of the Design Basis of Turkey Point Units 6 and 7 is an Impermissible Challenge to the NRC Regulations

The Contention seeks an overhaul of the NRC's safety regulations in order to provide adequate protection to the public health and safety. *See* SACE 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"). The Contention cites the Task Force Report as concluding that "the regulatory system on which the NRC relies to make the safety findings that the AEA requires for licensing of reactors must be strengthened by raising the level of safety that is minimally required for the protection of public health and safety," and recommending that "the NRC incorporate severe accidents into the 'design basis' and subject it to mandatory safety regulations." *Id.* at 6. It claims that the Task Force Report requires "a major re-evaluation of the NRC's regulatory program." *Id.* at 7. Finally, the Contention goes on to reiterate that "the NRC's current regulatory scheme requires significant re-evaluation and overhaul in order to expand or upgrade the design basis for reactor safety as recommended by the Task Force Report." *Id.* at 9.

Any request for modification of the design basis for nuclear reactors in a proposed contention is outside the scope of licensing proceedings and is thus impermissible under 10 C.F.R. § 2.309(f)(1)(iii). Such a request is also barred by 10 C.F.R. § 2.335(a) as a challenge to the NRC regulations. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or 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 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 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 AEC 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 likewise be rejected. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991).

In addition, Intervenors' assertion that "the design basis for the reactor does not incorporate accidents that should be considered in order to satisfy the adequate protection standard" (SACE Contention at 13) is an impermissible challenge to the Design Certification Rule ("DCR")[13] for the AP1000 reactor that is featured in Turkey Point Units 6 and 7 (the "Turkey Point Units" or the "Units").[14] Chapter 15 of the AP1000 Design Control Document ("DCD") identifies the design basis accidents considered and evaluated for the AP1000. The AP1000 DCR approves the DCD. Under the NRC rules, the Commission treats as resolved those matters addressed in connection with the issuance of a standard design certification. 10 C.F.R. § 52.63(a)(5). The DCR is currently part of the NRC regulations and may not be challenged in a licensing proceeding. 10 C.F.R. § 2.335(a).

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[13] 10 C.F.R. Part 52, App. D (2006).

[14] The current version (Revision 2) of the Application references Revision 17 of the AP1000 DCD. Turkey Point FSAR at 1.1-1. COL Revision 3, planned for December 2011, will reference Revision 19 of the DCD. The NRC recently issued its Final Safety Evaluation Report for the AP1000 DCD up through Revision 19. *See* Letter from David Matthews, Director, Division of New Reactor Licensing, to R.F. Ziesing, Westinghouse, "Final Safety Evaluation Report – NUREG-1793, Supplement 2 – AP1000 Design Certification Amendment" (Aug. 5, 2011) (ADAMS Accession No. ML111920459).

Nor are the specific aspects of the standard design of the AP1000 reactor subject to challenge. The Contention claims that Station Blackout ("SBO") mitigation capability must be strengthened (SACE Contention at 18-19), so that the AP1000 must mitigate an SBO lasting more than 72 hours (*see* Makhijani Declaration at ¶ 17), and also argues that spent fuel pool makeup capability and instrumentation must be enhanced (SACE Contention at 19). These claims are 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.[15] 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.[16] 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.

- Section 9.l.2 of the AP1000 DCD establishes the design of the spent fuel pool. 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

[15] There have been some changes to the text of several of the AP1000 DCD sections referenced in this Response since the DCR based on Revision 15 of the DC application was approved. However, the applicable DCD positions described in Revision 15 remain unchanged from those described herein.

[16] NUREG-1793, Final Safety Evaluation Report Related to Certification of the AP1000 Standard Design (Sept. 2004), § 8.5.2.1.

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.

To summarize, the Contention may not request that the design bases for nuclear power plants be expanded to include severe accidents or to demand specific changes to the standard design of the AP1000 reactor.[17]

2. The Contention Lacks Factual or Expert Support

While the Contention attaches the Makhijani Declaration and claims it provides "additional technical support," *see* SACE Contention at 21, Intervenors state that they chiefly "rely on the facts and opinions of the Task Force members as set forth in their Task Force Report and as summarized above in Section II.2. The high level of technical qualifications of the Task Force members has been recognized by the Commission." *Id.* However, the Task Force Report does not support either the Contention nor the relief Intervenors seek, and does not provide the "expert opinions" required to satisfy 10 C.F.R. § 2.309(f)(1)(v).

First, the Task Force Report does not support the claim that the design of the AP1000 reactors, such those as the Turkey Point Units, must be modified to maintain plant safety.[18] "[I]n light of the low likelihood of an event beyond the design basis of a U.S.

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[17] The Contention also may not assume that such an expansion has been implemented and derive consequences from that implementation for the adequacy of the Turkey Point ER and the NRC Staff's Environmental Impact Statement ("EIS"). As will be seen, that is exactly what the Contention tries to do.

[18] 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 NRC 253, 265 (2004). A document put forth by a petitioner as the

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nuclear power plant and the current mitigation capabilities at those facilities, the Task Force concludes that continued operation and continued licensing activities do not pose an imminent risk to the public health and safety." Task Force Report at 18. The Task Force "conclude[d] 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." *Id.* at 73.

Likewise, the claim that flooding and seismic protection must be reevaluated and upgraded (SACE Contention at 16) is not supported by the Task Force Report, which concluded that all COL 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. The Task Force Report also 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.[19]

Second, the Task Force Report does not support admission of the Contention for litigation in this proceeding, because the Task Force's recommendations applicable to new

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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 NRC 294, 334 n.207 (2008); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 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).

[19] 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 in not supported by the Task Force Report. In any event, the AP1000 DCD 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 fails to demonstrate any genuine dispute with the Application, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

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 NRC __, slip op. at 2-3 (July 8, 2010); *Oconee*, CLI-99-11, 49 NRC at 345 (*citing Douglas Point*, ALAB-218, 8 A.E.C. at 85). The Contention is squarely within that class of contentions which are prohibited as challenges to NRC rulemakings and which attempt to litigate in a particular adjudicatory proceeding a matter already being or soon to be addressed in an NRC rulemaking proceeding.[20] Such challenges cannot meet the general admissibility requirements under § 2.309(f)(1).

Third, the Task Force Report makes no mention of any environmental reviews, either by applicants or by the Staff. Therefore, it can provide no support for the Contention, which seeks to raise environmental claims against the ER.

In short, the Task Force Report does not state that regulations applicable to new reactors are inadequate to assure adequate protection of the public health and safety, and – contrary to the claims in the Contention – concludes that the current regulatory regime provides reasonable assurance of adequate protection of public health and safety, and that any changes to be made to new reactors should be developed through rulemaking, not

[20] As noted above, the Commission has already begun the process of considering the Task Force Report in the context of a rulemaking. *See* SRM-0093 at 1 ("direct[ing] 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").

plant-specific adjudication. The Task Force Report, therefore, does not provide the expert opinion support required by 10 C.F.R. § 2.309(f)(1)(v).

3. The Contention Fails to show that a Genuine Dispute Exists with the Application on a Material Issue of law or fact

Intervenors makes no attempt to relate any of the Task Force Report's recommendations to Turkey Point Units 6 and 7 or the AP1000, and as noted above their claims are simply not supported by the Task Force Report. Thus, the Contention fails to demonstrate the existence of a genuine dispute with the Application, and does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).[21]

For example, Intervenors' references to tsunami risks and their generalized claims about seismic seiches do not discuss Turkey Point or demonstrate any genuine dispute with the Application. Section 2.4.6 of the Final Safety Analysis Report for the Turkey Point Units ("Turkey Point FSAR" or "FSAR") demonstrates that the Units are not vulnerable to tsunamis.[22] Nor are the Units vulnerable to the risk of seismic seiches, as demonstrated in Section 2.4.5 of the FSAR.[23] The Contention does not address, let alone dispute, the

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[21] 10 C.F.R. § 2.309(f)(1)(vi) states that an admissible contention must "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."

[22] Section 2.4.6.7 of the Turkey Point FSAR concludes: "A conservative estimate of the PMT [probable maximum tsunami] still water level near Units 6 & 7 is approximately 16.7 feet NAVD 88 [North American Vertical Datum of 1988]. This PMT water level along with coincidental wind-wave run-up, as presented in Subsection 2.4.5, would be lower than the design plant grade elevation of 26 feet NAVD 88 for the safety-related facilities. Therefore, the postulated PMT event does not affect the safety functions of Units 6 & 7. Because the PMT water level is lower than the design plant grade, debris, waterborne projectiles, sediment erosion, and deposits are not a concern to the functioning of the safety-related SSCs of Units 6 & 7." FSAR at 2.4.6-26.

[23] Section 2.4.5.5 of the FSAR states: "The PMSS [probably maximum storm surge] still water level at Units 6 & 7, along with coincidental wind-wave runup, is conservatively estimated to be approximately 24.8 feet NAVD 88. This estimated maximum PMH [probable maximum hurricane]-induced water level is lower

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FSAR's analyses or its conclusions. Thus, the references to the recommendations concerning flooding and seismic protection (SACE Contention at 16) do not raise any dispute on a significant issue with the Application; also, as discussed above, the Task Force concluded that all COL 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.

For the same reasons, Intervenors' references to the Task Force's recommendations concerning SBO and spent fuel pool capabilities do not raise any genuine, material dispute with the Application. Intervenors provide no basis for claiming that the AP1000 SBO mitigation capability needs to be strengthened, and no information demonstrating a genuine material dispute with the 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

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than the design plant grade elevation of 26 feet NAVD 88 for safety-related facilities. Therefore, the postulated PMH event does not affect the safety functions of the plant. Because the maximum PMH-induced water level is lower than the plant grade elevation, debris, waterborne projectiles, and sediment erosion and deposition are not of concern to the safety-related facilities of Units 6 & 7." FSAR at 2.4.5-12.

cooling system, which includes safety related instrumentation that alerts control operators to low water levels. Intervenors do not address or dispute any of this information. The Contention once more fails to demonstrate any genuine dispute with the Application, and provides no 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 the Turkey Point Units. For example, Intervenors refer to the recommendation for hardened vent in BWR facilities, SACE Contention at 18. Since the AP1000 is a PWR, this recommendation is obviously inapplicable to Turkey Point and provides no basis for admitting the Contention.

Finally, the reference in the Contention to recommendations concerning Emergency Operating Procedures ("EOPs"), Severe Accident Management Guidelines ("SAMGs"), and Extreme Damage Mitigating Guidelines ("EDMGs") (CASE Contention at 19) does not raise any issue with the Application. These Task Force recommendations go only to regulatory oversight of these commitments (i.e., whether they should be controlled in the Technical Specifications),[24] and do not propose any new measures. Moreover, the Task Force Report does not recommend addressing these issues before COL issuance. Task Force Report at 71. In any case, the Application already addresses these procedures.[25]

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[24] *See* Task Force Report at 50, 71.

[25] *See, e.g.,* 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).

In sum, Intervenors' Contention totally fails to address or demonstrate any genuine material dispute with the Application.

B. The Environmental Claims Asserted in the Contention do not raise a Genuine Dispute of Material fact or law with the ER

Intervenors raise two environmental claims, which are summarized at the outset of the Contention:

> (1) the risks of operating the proposed Turkey Point reactors are higher than estimated in the Environmental Report (the "ER") for proposed Turkey Point Units 6 & 7, and (2) Florida Power & Light Co.'s ("FPL") previous environmental analysis of the relative costs and benefits of severe accident mitigation alternatives ("SAMAs") is fundamentally inadequate because those measures are, in fact, necessary to assure adequate protection of the public health and safety and, therefore, should be imposed without regard to their cost.

SACE Contention at 3. Stated differently, Intervenors claim: (1) that the environmental analysis in the Turkey Point ER must be revised to incorporate consideration of severe accidents that the Task Force Report recommends be included in the design basis of new reactors, and (2) that the cost-benefit analysis included in the Turkey Point ER must be revised because certain SAMAs should be removed from the category of potential mitigation measures and be implemented regardless of their cost, and this change could alter the cost-benefit analysis for the Turkey Point Units. Neither argument is valid.

1. No Revision to the Environmental Analyses in the Application is Warranted by the Task Force Report's Recommendations

Intervenors assert that "[a]s a result [of the need to incorporate severe accidents in a reactor's design bases], the NRC and FPL must revisit any conclusions in the Turkey Point ER based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable." SACE Contention at 13.

This claim does not constitute an admissible contention, as it does not does not raise a genuine dispute of material fact or law with the ER as required by 10 C.F.R. § 2.309(f)(1)(vi) because: (1) no such conclusions are expressed in the Turkey Point ER; (2) it assumes that there will be changes to the safety regulations that will affect the evaluation of the environmental impacts of accidents, which is not necessarily the case; and (3) to the extent it refers to the "NRC's" review of the ER, such review – in the form of an EIS – has not taken place yet, so it cannot be "revisited."

Intervenors' argument appears 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 *safety* standards. SACE Contention at 12-13. This argument improperly conflates the separate reviews that the NRC performs under the Atomic Energy Act and under NEPA.

Apart from being an impermissible challenge to the designation of design basis accidents in the DCR (as previously discussed), this claim does not raise a dispute with the Application on a material issue. The Turkey Point ER analyzes both design basis accidents and severe accidents; hence, how particular accident scenarios are labeled would not alter the overall accident risk presented in the ER. Further, Intervenors' argument rests on the false premise that the ER must "reach a conclusion that the design of the reactor adequately protects accident risks." SACE Contention at 14. That, however, is the purpose of the AP1000 DCR and the NRC safety requirements on which it is 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 fails to present a genuine dispute with the Application.

Intervenors argue that "the NRC must revisit any conclusions in the ER based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable" (SACE Contention at 13), but make no showing that any portion of the Turkey Point ER relies on such an assumption. Again, the ER estimates the consequences of design basis accidents and the risk of severe accidents, and Intervenors do not dispute any of these estimates.[26]

The Turkey Point ER provides 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, all as required by NEPA. 42 U.S.C. § 4332 (c). Nothing in NEPA requires that an applicant or the NRC 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.[27]

Within the framework of NEPA, the NRC rules require the Staff's EIS to consider and weigh the environmental effects of the proposed action; the environmental effects of alternatives to the proposed action; and alternatives available for avoiding adverse environmental effects. . . . (10 C.F.R. § 51.71(d)). Essentially the same information is

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[26] 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 (Turkey Point ER at Table 7.1-12), but specifically states that "[w]here applied, the more restrictive dose limit is either 10 percent or 25 percent of the 10 CFR 50.34 limit of 25 rem TEDE. Although conformance to these more restrictive dose limits is not required for an environmental report, they are included in the tables for comparison purposes, and shown to result in doses that meet the more restrictive limits." ER at 7.1-3. Intervenors do not claim or provide any information to suggest that any of the projected consequences of these design basis accidents is unacceptable.

[27] *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729-30 (3rd Cir. 1989).

required in an ER (*see* 10 C.F.R. § 51.45(c)). With respect to the subject matter of the Contention, the Turkey Point 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. Intervenors do not identify any error in any of these analyses.

Intervenors' sole claim seems to be that some accident scenarios evaluated as severe accidents should instead be considered design basis accidents (SACE Contention at 13). This claim would not alter the overall accident risk presented in the Turkey Point ER. Also, the designation of design basis accidents is a matter resolved in the AP1000 standard design and approved in the DCR. Any challenge to the sufficiency of those design basis accidents represents an impermissible challenge to the AP1000 DCR and is a matter outside the scope of this proceeding. 10 C.F.R. § 2.335(a).

2. The Task Force's Recommendations are not "New and Significant Information" Warranting Revision of the ER

The Contention's claims under NEPA are based on the argument that the Task Force Report's recommendations constitute "new and significant information," and as such they must be addressed in the NEPA documentation (in this case the Turkey Point ER and the yet to be issued Staff EIS). Intervenors do not provide any support for their assertion that the Turkey Point ER is required to address "new and significant information" concerning the implications of the Fukushima Daiichi accident or the Task Force Report. Intervenors refer to the CEQ regulations at 40 C.F.R. § 1502.9(c)(1)(ii) (SACE Contention

at 11),[28] but that regulation refers to the agency's obligation to prepare a supplement to a draft or final EIS. It imposes no duty on an applicant.

Intervenors also point to a number of NRC regulations (SACE Contention at 12) that allegedly require revising the Turkey Point ER, but none of these would require the Turkey Point ER to be supplemented. 10 C.F.R. § 51.50(c)(iii) applies only if the application references an early site permit, which the Application does not. 10 C.F.R. § 51.53(b) applies when an applicant is using the old two-step Part 50 licensing process, and 51.53(c)(iv) applies only to license renewal proceedings. And, while 10 C.F.R. § 50.71(e) requires a COL applicant to update its FSAR annually, the NRC rules contain no such requirement regarding the Turkey Point ER. In sum, Intervenors do not identify any legal basis for the proposition that an applicant's ER needs to be supplemented.

Even if one were to assume there is a requirement to supplement an ER to address new and significant information, Intervenors fail 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.

a. The Recommendations in the Task Force Report are not "New" Information

As discussed above, there is no "new information" in the Task Force Report, only recommendations for future action by the Commission and the NRC Staff. Intervenors fail to identify any reasons as to why the Task Force Report amounts to "new" information. In fact, the Task Force Report's recommendations are based upon previously available

[28] Intervenors incorrectly cite this regulation as 40 C.F.R. § 1509(c)(1)(ii). SACE Contention at 11.

information regarding the accident at Fukushima. Thus, the Task Force Report does not meet the regulatory definition of "new" information, and revisiting of the analyses in the Turkey Point ER is neither required nor warranted.

b. The Recommendations in the Task Force Report are not "Significant" Information

In addition to not being "new," the recommendations by the Task Force are not "significant," so as to warrant supplementation of the environmental analyses, because they do not present a "seriously different picture" of the likely environmental consequences associated with the proposed action that were not already envisioned by the original analyses. Intervenors are apparently referring to the standard for supplementation of an agency's EIS (*see* SACE Contention at 11),[29] 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.[30] Furthermore, the Commission has adopted this same standard.[31] As the Supreme Court made clear in

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[29] Since the NRC Staff has not even issued its draft EIS for the Turkey Point COL application, it is not clear how this standard is even applicable.

[30] *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).

[31] *Hydro Resources, Inc.,* CLI-01-04, 53 NRC 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).

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989), 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." 490 U.S. at 373 (footnote omitted).[32]

The Task Force Report suggests no changes that would result in any material alteration of the environmental analyses in the Turkey Point ER. Section 7.1.4 and Table 7.1-12 of the ER present the radiological consequences of design basis accidents, and show that projected doses are small fractions of permissible limits. Intervenors present no information challenging these projections and thus do not demonstrate a genuine dispute with 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. Intervenors do not identify any error in any of these analyses, and provide no information indicating that the probability or consequences of any accident scenario is greater than as assessed in the ER. The Contention fails to address or demonstrate any significant changes to the information in the ER.

Intervenors' attempt to cast the Task Force Report's recommendations as new and significant information that must be addressed in the Turkey Point ER is without any factual or regulatory basis, and is nothing more than a pretext to litigate preliminary

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[32] Misinterpreting the standard for "significant," Intervenors argue that the Task Force Report is significant because "it raises an extraordinary level of concern regarding the manner in which the proposed operation of Turkey Point Units 6 & 7 'impacts public health and safety.'" SACE Contention at 12, *citing* 40 C.F.R. § 1508.27(b)(2). The pertinent inquiry is not whether the Report is of concern to Intervenors, but whether it contains new information showing that the information in an existing environmental analysis has been materially altered. Not only do Intervenors fail to assert that the Task Report contains such an analysis, but the Report does not make any such suggestion.

proposals to make improvements to the NRC's safety regulations – proposals that are clearly outside the scope of this proceeding.

3. No Potential Changes to the Cost-Benefit Analyses in the Turkey Point ER are Raised by the Contention

The second aspect of the Contention's environmental claims is the argument that, should the NRC regulations be amended to include severe accidents in the design basis of Turkey Point Units 6 and 7, the SAMA analysis in the Turkey Point ER would have to be modified (to remove the now mandatory severe accident protection measures from the set of potential SAMAs), and the cost-benefit analysis for the Turkey Point Units would have to be modified.

Neither the SAMA analysis nor the cost-benefit analysis for the Turkey Point Units requires modification, and the claims raised by the Contention must be rejected as speculative and contrary to the NRC regulations.

a. The Turkey Point SAMA Analyses need not be Modified

The Contention argues:

> The Task Force Report makes several significant findings when it comes to increasing and improving mitigation measures at new reactors and recommends a number of specific steps licensees could take in this regard. These recommendations include strengthening station blackout ("SBO") mitigation capability at all operating and new reactors for design-basis and beyond-design-basis external events (Section 4.2.1), requiring reliable hardened vent designs in BWR facilities with Mark I and Mark II containments (Section 4.2.2), enhancing spent fuel pool makeup capability and instrumentation for the spent fuel pool (Section 4.2.4), strengthening and integrating onsite emergency response capabilities such as EOPs, SAMGs, and EDMGs (Section 4.2.5), and addressing multi-unit accidents. *See also* Makhijani Declaration, paras. 15-24. Accordingly, the ER must be supplemented to consider the use of these additional mitigation measures to reduce the project's environmental impacts.

SACE Contention at 17-18. As discussed earlier, implementation of these recommendations is prohibited by the NRC regulations and is not needed. Those are recommendations by the Task Force, and unless and until they become new regulatory requirements, they have no binding effect. Moreover, the Task Force Report does not address SAMAs at all and does not support Intervenors' arguments.

From an environmental standpoint, Intervenors provide no information demonstrating that any one of the SAMAs whose implementation is sought is cost beneficial for the Turkey Point Units, 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, and 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 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 11-12 (2002). Intervenors do not make even the slightest effort to show that any of the Task Force's recommendations that may be applicable to Turkey Point would likely be cost beneficial.

Intervenors also argue that the Task Force Report "recommends that severe accident mitigation measures should be adopted into the design basis, *i.e.,* the set of regulations adopted *without regard to their cost* as fundamentally required for all NRC standards that set requirements for adequate protection of health and safety. . . . Thus, the values assigned to the cost-benefit analysis for Turkey Point SAMAs, as described in Section 7.3 of the ER, must be re-evaluated… ." SACE Contention at 14, emphasis in

original.[33] Again, this argument assumes that the Task Force Report's recommendations will be adopted as a change to the NRC regulations, and will result in a change to the number of SAMAs and their value. As discussed above, such an assumption does not raise a genuine dispute on a material issue of fact or law with the Application.

In addition, nothing in NEPA requires the NRC to evaluate alternatives without consideration of cost. 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. §§ 51.49(c), 51.71(d). Commission case law too makes 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 NRC __, slip op. at 39 (Mar. 26, 2010). Any suggestion to the contrary in an impermissible challenge to the NRC rules, barred by 10 C.F.R. § 2.335(a).

Intervenors also argue that the values assigned to the cost-benefit analysis for the Turkey Point SAMAs must be re-evaluated in light of the Task Force's conclusions that the value of some SAMAs is so high that they should be implemented as a matter of course. SACE Contention at 14. However, the NRC has held that it would be

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[33] The procedure for indentifying and evaluating potential SAMAs for Turkey Point is described in Section 7.3.1 of the ER. It includes (1) defining a base case that provides the dose-risk and cost-risk of a severe accident before implementation of any SAMAs; (2) identifying potential SAMAs and assigning each a conservatively low implementation value to compare it against that of the base case; (3) for those SAMAs with apparently lower implementation costs than the base case, performing a detailed engineering cost and value analysis; and (4) determining the benefit associated with each SAMA that passes the screening test, computing its cost-benefit ratio, and choosing for potential implementation those SAMAs with reasonable cost-benefit ratios. The Contention fails to challenge this procedure or the application of the procedure to any of the identified SAMAs in the Turkey Point Application.

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 and Catawba*, CLI-02-17, 56 NRC at 11-12. 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. Nothing in NEPA requires the NRC to consider mitigation alternatives without regard to cost.

b. The Contention Provides no Evidence that the Cost-Benefit Analysis for Turkey Point Units 6 and 7 will be Affected by Implementation of the Task Force Recommendations

Intervenors suggest that the overall cost-benefit analysis of the Turkey Point Units or their comparison with alternative energy sources could be affected by the implementation of the Task Force design change recommendations (SACE Contention at 15). This suggestion is only unsupported speculation. Currently, the NRC has not required any changes to the AP1000 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.

In addition, as Intervenors recognize, *see* SACE Contention at 14-15, were the Commission to adopt the Task Force Report recommendations as requirements, the recommended plant modifications would have to be excluded from the SAMA analysis because they would no longer be potential mitigation alternatives. The implementation of these measures would reduce the risk posed by severe accidents, thereby reducing the environmental impacts of plant accidents. In other words, the environmental impact of

plant operation would be *reduced* and operation of the Turkey Point Units would remain preferable to other power generation alternatives.

Intervenors speculate that the cost of implementing the new safety measures "may be significant." SACE Contention at 15. However, in the absence of any environmentally superior alternative, the issue of cost is irrelevant. *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC __, slip op. at 30-31 (Jan. 7, 2010); *Consumers Power Company* (Midland Plant, Units 1 and 2), ALAB–458, 7 NRC 155, 162 (1978).

For these reasons, the cost-benefit analysis for Turkey Point Units 6 and 7 would not be affected by the changes to the design postulated in the Contention.

CONCLUSION

While invoking a number of the recommendations in the Task Force Report, the Contention fails to demonstrate that the recommendations evidence any shortcomings in the Application. The Contention is also non-timely without adequate justification for its lateness, and at the same time is premature in light of the impending generic actions announced in SRM 11-0093. The short- and medium- term steps ordained by the Commission in the SRM provide assurance that the NRC will, in the reasonably near future, address the Task Force Report's recommendations.

Any potential contentions in individual proceedings relating to those recommendations should therefore await the Commission's actions. As the Board

recently wrote when it rejected CASE's attempt to file amended contentions that were said to be based on the Task Force Report:

> If the Task Force's recommendations result in changes to regulations that are relevant to Florida Power & Light Company's (FPL's) Combined License (COL) application, FPL's compliance with those regulations would become part of the NRC Staff's technical review. See [NRC Actions Following the Events in Japan, COMGBJ11-0002 (Mar. 21, 2011) at 2]. Additionally, such changes, or any other new and material information that emerges from the Fukushima event and its aftermath, might give rise to an opportunity to proffer new contentions in this proceeding.
>
> At this juncture and on these pleadings, however, CASE's attempt to admit new contentions based on the events at Fukushima is unavailing.

LBP-11-15, slip op. at 2.

Accordingly, the Contention must be rejected.

Respectfully submitted,

/Signed electronically by Matias F. Travieso-Diaz/

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September 6, 2011

Counsel for FLORIDA POWER & LIGHT COMPANY

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040-COL
	)	52-041-COL
(Turkey Point Units 6 and 7)	)	
	)	ASLBP No. 10-903-02-COL
(Combined License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Florida Power & Light Company's Response Opposing Admission of SACE's and CASE's Late Filed Contentions" were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, this 6th day of September, 2011.

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