

September 6, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FLORIDA POWER AND LIGHT COMPANY) Docket Nos. 52-040-COL and 52-041-COL
)
(Turkey Point Units 6 and 7))
)
)

NRC STAFF ANSWER TO "MOTION TO ADMIT NEW CONTENTION
REGARDING THE SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE
NRC TASK FORCE REPORT ON THE FUKUSHIMA DAI-ICHI ACCIDENT"
FILED BY CITIZENS ALLIED FOR SAFE ENERGY INC. ("CASE")

AND

NRC STAFF ANSWER TO "MOTION TO ADMIT NEW CONTENTION TO
ADDRESS THE SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE
NUCLEAR REGULATORY COMMISSION TASK FORCE REPORT ON THE
FUKUSHIMA DAI-ICHI ACCIDENT" FILED BY JOINT INTERVENORS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h) and the Atomic Safety and Licensing Board ("Board") Order dated March 30, 2011,¹ the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the CASE "Motion to Admit New Contention Regarding The Safety and Environmental Implications of the NRC Task Force Report On The Fukushima Dai-Ichi Accident" ("CASE Motion") and the "Motion to Admit New Contention to Address The Safety And Environmental Implications of the [NRC] Task Force Report On The Fukushima Dai-Ichi Accident" ("Joint Motion") filed by the Southern Alliance for Clean Energy ("SACE"), the National Parks Conservation Association ("NCPA"), Dan Kipnis, and Mark Oncavage (collectively, "Joint Intervenors"). Both motions are dated August 11, 2011. The Staff also hereby answers the two

¹ Order (Initial Scheduling Order And Administrative Directives), at 8 (Mar. 30, 2011) (unpublished) (Initial Scheduling Order) (ADAMS Accession No. ML110890768).

filings entitled “Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report,” dated August 11, 2011 (“CASE Contention” and “Joint Contention”), which accompany the CASE Motion and Joint Motion, respectively, and which set forth the contention they propose for admission into this proceeding.² Since CASE and the Joint Intervenors support the proposed contention with arguments that differ in only minor respects, the Staff is addressing them together in this answer. For the reasons set forth below, the Staff opposes admission of the Proposed Contention.

BACKGROUND

On June 30, 2009, Florida Power and Light Co. (“FPL” or “Applicant”), submitted to the NRC an application for combined licenses (“COLs”) for two AP1000 reactor units to be designated as Turkey Point Units 6 and 7. Application, Rev. 0, Part 1 at 1. As required by 10 C.F.R. § 51.50, the Application included an Environmental Report (“ER”). Application, Rev. 0, Part 3. The Applicant has since updated the ER. See Application, Rev. 1, Part 3 (Sept. 21, 2010) and Rev. 2, Part 3 (Jan. 6, 2011). On August 3, 2009, the Staff published a notice of the receipt and availability of the Application in the *Federal Register*. 74 Fed. Reg. 38,477 (Aug. 3, 2009). The Staff accepted the Application for docketing on September 4, 2009. 74 Fed. Reg. 51,621 (Oct. 7, 2009).

On June 18, 2010, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding. See “Florida Power & Light Company, Combined License Application for the Turkey Point Units 6 & 7, Notice of Hearing, Opportunity to Petition for Leave to Intervene and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation,” 75 Fed. Reg. 34,777 (June 18, 2010). In response to the Notice of

² CASE and the Joint Intervenors propose on identical contention, and the Staff herein refers to it as the “Proposed Contention.” See CASE Contention at 5; Joint Contention at 5.

Hearing, CASE filed a "Petition for Leave to Intervene and Request for a Hearing," dated August 18, 2010, and the Joint Intervenors filed a "Petition for Intervention" dated August 17, 2010. On August 20, 2010, CASE filed a second, modified, version of its petition.

On February 28, 2011, the Licensing Board issued issued a Memorandum and Order admitting both CASE and the Joint Intervenors as parties to this proceeding. *See Florida Power and Light Co.* (Turkey Point, Units 6 and 7), LBP-11-06, 73 NRC __ (2011). Currently, there are three admitted contentions: CASE Contentions 6 and 7, and NEPA Contention 2.1 (propounded by the Joint Intervenors).

On April 14, 2011, CASE and the Joint Intervenors, among others, filed 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") before the Commission. CASE filed a corrected Emergency Petition on April 18, 2011. SACE filed Errata to the Emergency Petition on April 18, 2011. On April 20, 2011, CASE and the Joint Intervenors filed a Declaration of Dr. Arjun Makhijani ("First Makhijani Declaration") in support of the Emergency Petition. The Staff and Applicant filed their respective answers to the Emergency Petition on May 2, 2011. The Commission has not yet ruled on the Emergency Petition.

Additionally, CASE filed a "Motion to Amend Contentions 1, 2, and 5 of the CASE Amended Petition (August 20, 2010)" and "Amended Contentions 1, 2, and 5," in which CASE proposed new contentions, on April 18, 2011. On June 29, 2011, the Board denied these contentions. *See Florida Power and Light Co.* (Turkey Point, Units 6 and 7), LBP-11-15, 73 NRC __ (2011) (slip op.).

On July 12, 2011, the NRC published "Recommendations for Enhancing Reactor Safety in the 21st Century (The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident)" ("Task Force Report") (ADAMS Acession No. ML111861807). On August 11, 2011, CASE and the Joint Intervenors filed their respective motions and the Proposed Contention, as

described above. Both motions and the contention were accompanied by a declaration of Dr. Arjun Makhijani (“Second Makhijani Declaration”). On August 12, 2011, CASE filed a “Motion for Reconsideration of Amended Contention 1, 2, and 5 and New Contentions Following Fukushima Near-Term Task Force Recommendations,” which the Staff answers separately today. In addition, CASE and the Joint Intervenors filed Rulemaking Petitions on the Rulemaking Docket and before this Board.³

LEGAL STANDARDS

The admissibility of new and amended contentions is governed by 10 C.F.R. § 2.309(f)(2) and 2.309(f)(1). New or amended contentions filed after the initial filing period may be admitted only with leave of the presiding officer if, in accordance with 10 C.F.R. § 2.309(f)(2), the contention meets the following requirements:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (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)(i)-(iii).

Additionally, a new or amended contention must also meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). *Id.* In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

³ The rulemaking petition is not properly before the Board.

- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. . . .

10 C.F.R. § 2.309(f)(1)(i)-(vi). The Commission has emphasized that the rules on contention admissibility are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). “Mere ‘notice pleading’ does not suffice.” *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

Finally, a contention that does not qualify for admission as a new contention under § 2.309(f)(2) may still be admitted if it meets the provisions governing nontimely contentions set forth in 10 C.F.R. § 2.309(c)(1).⁴ Pursuant to 10 C.F.R. § 2.309(c)(2), each of the factors is

⁴ 10 C.F.R. § 2.309(c)(1) requires a balancing of the following factors to the extent that they apply to a 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;

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required to be addressed in the requestor's nontimely filing. The first factor, whether good cause exists for the failure to file on time, is the "most important" and entitled to the most weight. *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 261 (2009). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

DISCUSSION

CASE and the Joint Intervenors propose 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 NRC regulations, these implications must be addressed in the ER.

CASE Contention at 5; Joint Contention at 5. According to the CASE and the Joint Intervenors, the Proposed Contention is based on a conclusion in the Task Force Report that the level of protection currently provided by NRC regulations is inadequate to ensure protection of public health, safety, and the environment. CASE Contention at 2; Joint Contention at 2; *see also* Second Makhijani Declaration ¶ 11. From this starting point, CASE and the Joint Intervenors

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- (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.

argue that “[t]he conclusions and recommendations presented in the Task Force Report constitute ‘new and significant information,’ the environmental implications of which must be considered before the NRC may make a decision that approves operation of Turkey Point 6 & 7.” CASE Contention at 13; Joint Contention at 12. The Joint Intervenors and CASE therefore claim that any conclusions in the Turkey Point ER must be revisited, because compliance with NRC safety regulations is no longer sufficient to ensure that environmental impacts of accidents are acceptable. CASE Contention at 14; Joint Contention at 13; *see also* Second Makhijani Declaration ¶ 11.

The Joint Intervenors and CASE also make several distinct claims regarding both the content of the Task Force Report and the deficiencies they allege in the Turkey Point ER. First, the Joint Intervenors and CASE claim that the ER does not adequately address the environmental analysis of design basis accidents and severe accidents, including severe accident mitigation alternatives (“SAMAs”). CASE Contention at 13-17; Joint Contention at 14-16. Second, the Joint Intervenors and CASE assert that the Task Force Report requires supplementation of the Turkey Point ER to address recommendations related to seismic and flooding events. CASE Contention at 17-18; Joint Contention at 16-17. Finally, the Joint Intervenors and CASE argue that all twelve recommendations in the Task Force Report be considered in the ER. CASE Contention at 18-22; Joint Contention at 17-20.

Staff Response: As further discussed below, the Proposed Contention is barred to the extent that it challenges existing NRC safety regulations, is not supported by the Task Force Report with respect to severe accident analyses under NEPA, and includes several additional claims that are not supported by the Task Force Report. For these reasons and others discussed below, it fails to satisfy the contention pleading rules in 10 C.F.R. §§ 2.309 and 2.335 and should be rejected.

I. TO THE EXTENT THE PROPOSED CONTENTION CHALLENGES EXISTING SAFETY REGULATIONS, IT IS BARRED BY NRC REGULATIONS

The Proposed Contention is styled as a contention regarding both the safety and environmental implications of the Task Force Report. CASE Contention at 1; Joint Contention at 1. According to the Joint Intervenors and CASE, “[t]he 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.” CASE Contention at 10; Joint Contention at 9. The Joint Intervenors and CASE also challenge 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38), apparently on the grounds that these regulations are subject to cost-benefit analysis. CASE Contention at 8-9; Joint Contention at 8.

To the extent the Proposed Contention is intended to challenge existing NRC safety regulations, it is barred from consideration in adjudicatory proceedings by 10 C.F.R. § 2.335(a). Pursuant to this regulation, “no rule or regulation of the Commission, or any provision thereof . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.” 10 C.F.R. § 2.335(a). Petitioners seeking a waiver of this rule in a particular proceeding must meet the standards set forth in 10 C.F.R. § 2.335(b), something the Joint Intervenors and CASE have not attempted here. For this reason, to the extent the Proposed Contention is meant as a challenge to the adequacy of current NRC safety regulations, it is not adjudicable in this proceeding and must be rejected.⁵

⁵ The NRC Staff notes that a Petition for Rulemaking under 10 C.F.R. § 2.802 has also been submitted in response to the Task Force Report. To the extent any interested person desires a specific change to NRC regulations, this is the correct procedural approach. CASE and the Joint Intervenors themselves recognize that some of the issues they raise may be more appropriate for generic resolution by rulemaking. CASE Contention at 4-5; Joint Contention at 4. The Petition for Rulemaking provides further indication that the Proposed Contention is intended in part to challenge Commission rules.

II. THE PROPOSED CONTENTION IS NOT SUPPORTED BY THE TASK FORCE REPORT WITH RESPECT TO SEVERE ACCIDENTS

As described in detail below, the Joint Intervenor's and CASE's overarching argument, that the Task Force Report demonstrates the inadequacy of current NRC safety regulations and therefore of all related environmental reviews, is not supported by the Task Force Report itself. The Joint Intervenors and CASE assert that the Proposed Contention is based on a conclusion in the Task Force Report that would not be logical to make unless the level of protection currently provided by NRC regulations is inadequate to ensure protection of public health, safety, and the environment, and that the environmental implications of the report's recommendations must be considered before any new reactor licensing decision. CASE Contention at 2, 3; Joint Contention at 2, 3; see *also* Second Makhijani Declaration ¶¶ 11. The Task Force does not make this conclusion; rather, it states that "continued operation and continued licensing activities do not pose an imminent risk to the public health and safety and are not inimical to the common defense and security." Task Force Report at 18. The Task Force notes that the level of safety associated with adequate protection of public health and safety has improved over time and should continue to improve "supported by new scientific information, technologies, methods, and operating experience," but does not state that the current level of protection is inadequate. *Id.* Furthermore, the Task Force Report does not take any position on NRC's environmental reviews.

It is well established that a document cited by a petitioner as the supporting basis for a contention is subject to scrutiny, both as to what it does and does not say. When a report is the central support for a contention, the contents of that report in its entirety are before the Board and subject to the Board's scrutiny. See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996); *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). See *also* *Southern Nuclear Operating Co.* (Early Site Permit for the Vogtle ESP Site), LBP-07-3, 65 NRC 237, 254 (2007) ("the material provided in support of a contention

will be carefully examined by the Board to confirm that on its face it does supply an adequate basis for the contention”). Because this central element of the Joint Intervenor’s and CASE’s argument is not supported by the document that serves as the grounds for filing the Proposed Contention, the Joint Intervenor and CASE have not provided a sufficient basis for the contention or sufficient information to show that a genuine dispute with the Applicant exists. One of the most important claims made in the asserted bases for the Proposed Contention therefore fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(ii) and (vi).

The Joint Intervenor and CASE appear to believe that the Task Force Report calls for a change to the way accidents are treated in environmental documents. See CASE Contention at 14-16; Joint Contention at 13-15. The Task Force does discuss the distinction between design basis accidents and severe or beyond design basis accidents. Task Force Report at 17-22. It suggests creating a new category of events designated as “extended design-basis” and including a number of existing regulatory requirements under this heading. *Id.* at 20.

The Joint Intervenor and CASE appear to have interpreted this section of the Task Force Report as support for a claim either that severe accidents are not currently addressed in NRC environmental reviews, or that the way they are addressed must be changed. See CASE Contention at 15-16; Joint Contention at 14-15. To the extent that the Joint Intervenor and CASE intend the former interpretation, they are simply incorrect. The Environmental Standard Review Plan (“ESRP”), which provides guidance for all NRC COL reviews, includes instructions for NRC staff reviewers to consider the environmental impacts of both design-basis accidents and severe accidents. See generally NUREG-1555, *Environmental Standard Review Plan*, Chapter 7 (Oct. 1999). The ER, which is Part 3 of the Turkey Point Application, addresses the environmental impacts of design basis accidents (ER at 7.1-1 to 7.1-20) and severe accidents (ER at 7.2-1 to 7.2-9). A petitioner’s imprecise reading of a reference document does not create a contention suitable for litigation. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995). This portion of the contention, like

the previous one, therefore fails to demonstrate the existence of a genuine dispute with the Applicant, and is therefore inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

A. The Challenge to the Adequacy of the Turkey Point Severe Accident Review is Unsupported by the Task Force Report and Therefore Untimely

To the extent that the Joint Intervenors and CASE intend instead to question the adequacy of the Turkey Point ER with respect to its analysis of the environmental consequences of accidents, the Joint Intervenors and CASE have not cited any part of the Task Force Report in support of their claims. See CASE Contention at 14-15; Joint Contention at 13-14. Rather, this portion of their argument is based on assertions by the Petitioner's expert, Dr. Arjun Makhijani, that

a major overarching step that needs to be taken is to integrate into the design basis for NRC safety requirements an expanded list of severe accidents and events, based on current scientific understanding and evaluations. This would ensure that potential mitigation measures are evaluated on the basis of whether they are needed for safety and not whether they are merely desirable. Should the NRC fail to incorporate an expanded list of severe accident requirements in the design basis of reactors, then a conclusion that the design provides for adequate protection to the public against severe accident risks could not be justified.

Second Makhijani Declaration ¶ 7. The Joint Intervenors and CASE rephrase Dr. Makhijani's assertions as a claim that the Task Force recommends "the incorporation of accidents formerly classified as 'severe' or 'beyond design basis' into the design basis." CASE Contention at 15; Joint Contention at 13-14. According to the Joint Intervenors and CASE, this purported recommendation requires that "the values assigned to the cost-benefit analysis for Turkey Point 6 & 7 SAMAs, as described in Section 7.3 of the ER, must be re-evaluated." CASE Contention at 15; Joint Contention at 13-14.

Neither Dr. Makhijani's Declaration nor the Proposed Contention cites to the Task Force Report in support of this proposition. Indeed, both ignore contrary statements within the Task Force Report itself, including the statement that "[t]he Task Force envisions a framework in which the current design-basis requirements (i.e., for anticipated operational occurrences and

postulated accidents) would remain largely unchanged” and the proposal to establish a new “extended design-basis” category for both current beyond design-basis regulatory requirements and any future rules that may be added. Task Force Report at 21. Both also disregard the Task Force’s conclusion that “the ESBWR and AP1000 designs have many of the design features and attributes necessary to address the Task Force recommendations” and recommendation that design certification rulemakings for those designs be completed “without delay.” *Id.* at 71-72.

With respect to this portion of the Proposed Contention, the Joint Intervenor’s and CASE’S assertions are untimely in that they are not based on any new information contained in the Task Force Report and could have been filed on a number of occasions prior to that report’s publication. Related claims were, in fact, made in Dr. Makhijani’s April 2011 declaration accompanying the Emergency Petition currently pending before the Commission. See First Makhijani Declaration ¶¶ 16, 33-35. Any specific challenges to the Applicant’s ER could have been raised at any time following submission of the Application, or at least when the first Makhijani declaration was filed. NRC regulations permit the filing of new or amended contentions

only with leave of the presiding officer upon a showing that (i) [t]he information upon which the amended or new contention is based was not previously available; (ii) [t]he information upon which the amended or new contention is based is materially different than information previously available; and (iii) [t]he 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 Joint Intervenors and CASE have not cited to any allegedly new information in the Task Force Report that supports their argument regarding “the incorporation of accidents formerly classified as ‘severe’ or ‘beyond design basis’ into the design basis,” and this portion is therefore untimely.⁶

⁶ Neither CASE nor the Joint Intervenors offer additional argument regarding timeliness in their respect motions. See Joint Motion at 3-5; CASE Motion at 3-5. (The CASE Motion is unnumbered, and Continued...

For the same reasons in the preceding paragraph, the Joint Intervenors and CASE have also failed to show good cause for untimely filing, as required by 10 C.F.R. § 2.309(c)(1)(i). Good cause for late filing is the most important factor to consider when evaluating whether an untimely filing will be accepted, and failure to meet this factor requires a compelling showing regarding the other factors. See *Commonwealth Edison Co.* (Braidwood Nuclear Plant, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (1983). Of the remaining factors in 10 C.F.R. § 2.309(c)(1), (vii) and (viii) also disfavor the Joint Intervenors and CASE, as the issues they raise would broaden the proceeding, and they would not likely contribute to a sound record on this subject, given their misunderstanding of how the NRC treats severe accidents, as demonstrated herein. The other factors favor the Joint Intervenors and CASE or are neutral. However, given the importance of 10 C.F.R. § 2.309(c)(1)(i), (vii), and (viii), this untimely portion of the Proposed Contention should not be entertained.

Like those before it, the portion of the Proposed Contention also fails to supply an adequate basis or demonstrate the existence of a genuine dispute with the Applicant on a material issue of law or fact. In part, this failure may be related to the Joint Intervenor's and CASE's assumption, evident throughout their pleadings that only design-basis accidents and not severe accidents are associated with mandatory safety regulations. See CASE Contention at 2, 6-8, 9, 15-16; Joint Contention at 2, 6-8, 9, 14; see also *infra* n. 8.⁷ The Task Force Report itself notes the potential for confusion associated with this issue, and observes that

the Staff refers to it by the pages assigned by Adobe Acrobat.) Rather, for the purposes of satisfying 10 C.F.R. §§ 2.309(f)(2) and 2.309(c), they rely on the purportedly new information they assert is in the Task Force Report. Joint Motion at 3-5; CASE Motion at 3-5.

⁷ Both CASE and the Joint Intervenors quote the Task Force Report to the effect that "the great majority of the NRC's current regulations do not impose mandatory safety requirements on severe accidents, and severe accident measures are adopted only on a 'voluntary' basis or through a 'patchwork' of requirements." CASE Contention at 8; Joint Contention at 7-8 (both quoting the Task Force Report at 18). Thus, both CASE and the Joint Intervenors acknowledge that NRC requirements mandate the
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the phrase “beyond design basis” is vague, sometimes misused, and often misunderstood. Several elements of the phrase contribute to these misunderstandings. *First, some beyond-design-basis considerations have been incorporated into the requirements and therefore directly affect reactor designs.* The phrase is therefore inconsistent with the normal meaning of the words. In addition, there are many other beyond-design-basis considerations that are not requirements. The phrase therefore fails to convey the importance of the requirements to which it refers.

Task Force Report at 19 (emphasis added). The Task Force Report makes recommendations regarding a new regulatory framework for mandatory requirements related to beyond design-basis considerations, including a terminology change intended to clarify the nature of these requirements, but does not propose changes to current design-basis requirements. *Id.* at 20-21. As noted above, a petitioner’s imprecise reading of a reference document does not create a contention suitable for litigation. *Georgia Tech*, LBP-95-6, 41 NRC at 300. Accordingly, the Joint Intervenor’s and CASE’s arguments related to this issue fail to provide an adequate basis for an admissible contention, contrary to 10 C.F.R. § 2.309(f)(1)(ii), nor do they demonstrate the existence of a material dispute as required by 10 C.F.R. § 2.309(f)(1)(vi).

B. The Discussion of SAMAs is Not Supported by the Task Force Report

The Proposed Contention also includes an argument related to SAMAs, which are considered in NRC environmental reviews. *See, e.g.*, ER at 7.3-1 to 7.3-6. According to the Joint Intervenors and CASE, the Task Force Report includes a recommendation that all SAMAs be incorporated into the set of features required in all nuclear power plants “*without regard to their cost* as fundamentally required for all NRC standards that set requirements for adequate protection of health and safety.” CASE Contention at 15-16 (emphasis supplied); Joint Contention at 14 (emphasis in original). Neither the Task Force Report nor the declaration submitted in support of the Proposed Contention contains any statement to that effect; further, as noted in Section II above, the Task Force Report makes no reference to SAMAs or any other

inclusion of certain design features to mitigate severe accidents. Nonetheless, as discussed herein, neither CASE nor the Joint Intervenors consider or acknowledge these requirements for beyond design basis mitigation features in making their arguments.

portion of NRC's environmental reviews. Because neither the Task Force Report nor the declaration submitted with the contention contains such a statement, this portion of the Proposed Contention fails to satisfy the requirements of both 10 C.F.R. § 2.309(f)(1)(v), which requires factual or expert support for a contention.

The recommendations in the Task Force Report, were they to be adopted, would have no impact on the nature of SAMA analysis. SAMA analyses, which are related to the probabilistic risk assessment ("PRA") requirement of 10 C.F.R. § 50.34(f)(1)(i) and include cost-benefit analysis by definition, are intended "to review and evaluate plant-design alternatives that could significantly reduce the radiological risk from a severe accident." See ESRP at 7.3-1 to 7.3-5. As the Commission has stated, SAMAs are safety enhancements intended to reduce the risk of severe accidents. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __, __ (Mar. 26, 2010) (slip op. at 3). A SAMA analysis examines the extent to which implementation of the SAMA would decrease the probability-weighted consequences of the analyzed severe accident sequences. *Id.* "Significantly, NRC SAMA analyses are not a substitute for, and do not represent, the NRC NEPA analysis of potential impacts of severe accidents." *Id.* at __ (slip op. at 37). Rather, SAMA analyses are rooted in a cost-beneficial assessment:

SAMA analysis is used for determining whether particular SAMAs would sufficiently reduce risk – e.g., by reducing frequency of core damage or frequency of containment failure – for the SAMA to be cost-effective to implement. The SAMA analysis therefore is a [PRA] analysis. If the cost of implementing a particular SAMA is greater than its estimated benefit, the SAMA is not considered cost-beneficial to implement.

Id. at __ (slip op. at 3). For a SAMA analysis, the "goal is *only* to determine what safety enhancements are cost-effective to implement." *Id.* at __ (slip op. at 39) (emphasis added). A SAMA analysis, including cost-benefit considerations, is specifically required by NRC regulations governing the environmental review of standard design certification applications. See 10 C.F.R. § 51.55(a). Design features required by safety regulations are not subject to SAMA analysis in

the environmental review, even if they are related to severe accidents, because the SAMA analysis only considers mitigation *alternatives*, that is, features that are not already incorporated into the design.

In making their argument, the Joint Intervenors and CASE appear to merge concepts related to mandatory safety regulations under 10 C.F.R. Parts 50 and 52 with the SAMA analysis process. As noted above, The Joint Intervenors and CASE incorrectly assert that 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38) are subject to cost-benefit analysis, a proposition they support with citations to discussions related to the SAMA analysis for the AP1000 design certification rule and not with any references to NRC safety regulations or the Task Force Report. CASE Contention at 8-9; Joint Contention at 8-9. Furthermore, the Joint Intervenors and CASE assert that “the Task Force effectively recommends a complete overhaul of the NRC’s system for mitigating severe accidents through consideration of SAMAs. CASE Contention at 15; Joint Contention at 14. According to the Joint Intervenors and CASE, the NRC’s current strategy related to severe accidents is limited to the SAMA analysis prepared as part of the environmental review and any voluntary measures adopted at a specific facility. CASE Contention at 15; Joint Contention at 14.

In so arguing, the Joint Intervenors and CASE ignore those regulations mentioned in the Task Force Report that do impose mandatory safety requirements related to severe accidents, and which the Task Force identifies as elements to be incorporated into their proposed “extended design-basis” regulatory framework. Task Force Report at 20-21. These include the station blackout rule in 10 C.F.R. § 50.63, the rules governing anticipated transient without scram in 10 C.F.R. § 50.62, the maintenance rule in 10 C.F.R. § 50.65, the aircraft impact rule in 10 C.F.R. § 50.150, the rule for protection against beyond design-basis fires and explosions in 10 C.F.R. § 50.54(hh), and others. *Id.* at 20. Furthermore, the Joint Intervenors and CASE ignore the Task Force’s observation that 10 C.F.R. §§ 52.47(a)(23), which applies to design certifications, and 52.79(a)(38), which applies to COLs, have “clearly established . . . defense-

defense-in-depth requirements for new reactors, . . . thus bringing unity and completeness to the defense-in-depth concept.” *Id.* By disregarding these regulatory requirements and focusing on the cost-benefit analysis conducted as part of the SAMA review in the EIS, the Joint Intervenors and CASE misunderstand the NRC’s current approach to severe accidents, as well as the Task Force’s recommendations.

To the extent Joint Intervenors and CASE are using the term “SAMA” as shorthand for new design features they wish to see implemented at nuclear facilities, the correct procedural option is to file a Petition for Rulemaking under 10 C.F.R. § 2.802 rather than contentions in individual proceedings. The Joint Intervenors and CASE themselves concede that some of the issues they raise may be resolved more appropriately by rulemaking than in site-specific proceedings. CASE Contention at 4; Joint Contention at 3-4. The Joint Intervenors and CASE have not identified any such feature or features here.

The possibility that the Joint Intervenors and CASE are using the term “SAMA” outside its usual NEPA context may be responsible for the assertion that certain mandatory safety regulations are “subject to cost-benefit analysis.” See CASE Contention at 8-9; Joint Contention at 8. As stated above, SAMA analyses conducted pursuant to NEPA use cost-benefit analyses to evaluate potential design alternatives for use at specific facilities. As discussed in Section II.A, safety regulations in 10 C.F.R. Parts 50 and 52 do not use cost-benefit analyses, regardless of whether they apply to design-basis or severe accident phenomena.⁸ Whatever the Joint

⁸ It appears that the Joint Intervenors and CASE have drawn incorrect inferences from *Union of Concerned Scientists v. NRC*, which they cite in their pleading. CASE Contention at 10 and Joint Contention at 9, citing 824 F.2d 108, 120 (D.C. Cir., 1987). As stated in this case, the AEA

prohibits the Commission from considering costs in setting the level of adequate protection and requires the Commission to impose backfits, regardless of cost, on any plant that fails to meet this level. The Act allows the Commission to consider costs only in deciding whether to establish or whether to enforce through backfitting safety requirements that are not necessary to provide adequate protection.

824 F.2d at 119-20. This distinction, which relates to NRC decisions about making new regulations and applying them to existing licensees by imposing a backfit, does not open the door to the use of cost-
Continued...

Intervenor's and CASE's intent in using the "SAMA" terminology, however, nothing in this portion of their argument amounts to a contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).

C. Assertions Related to the Alternatives Analysis in the EIS are Also Unsupported by the Task Force Report and Do Not Include an Admissible Contention

The Joint Intervenor's and CASE's final NEPA-related claim is that making SAMAs mandatory would affect the outcome of NRC's environmental reviews in two ways. First, the Joint Intervenor and CASE argue that making SAMAs mandatory would improve plant safety. CASE Contention at 16; Joint Contention at 15. Second, the Joint Intervenor and CASE assert that imposing new mandatory safety features would raise the cost of new reactors and could affect the alternatives analysis in the FEIS. CASE Contention at 16; Joint Contention at 15; see *also* Second Makhijani Declaration ¶¶ 13-24. According to the Joint Intervenor and CASE, "these costs may be significant, showing that other alternatives such as the no-action alternative and other alternative electricity production sources may be more attractive." CASE Contention at 16; Joint Contention at 15.

The first of these claims does nothing to invalidate the analysis in the Turkey Point ER. If additional safety measures were to be imposed on reactors for any reason, the result would likely be to lower accident risks and therefore reduce accident impacts below those stated in the ER. Any environmental analysis carried out under the current regulations would therefore be conservative.

The second claim states what appears to be the essence of the Petitioner's NEPA contention, namely that the alternatives analysis in the Turkey Point ER is inadequate. If this is intended as the core of the Proposed Contention, then the Proposed Contention as a whole is

benefit analysis by license applicants with respect to safety features required by current mandatory safety rules. The distinction between design-basis and beyond design-basis phenomena, which the Petitioners consider central to their argument, therefore has no connection to the question of whether a given safety feature is mandatory or not.

untimely for the reasons discussed in Section II.A above. As stated in that section, the argument that increased costs for nuclear facilities will alter the alternatives analysis in environmental reviews for new reactors has been submitted previously in connection with the Emergency Petition currently pending before the Commission. See First Makhijani Declaration ¶¶ 35. Additionally, contentions challenging the alternatives analysis in the Turkey Point COL application could have been filed at any time since the application became available. This portion of the Proposed Contention should therefore be rejected for timeliness reasons alone.

In addition to the timeliness issue, the Proposed Contention also fails to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1). The Proposed Contention and its bases do not mention the specific recommendations in the Task Force Report or raise a challenge to any portion of the Turkey Point COL application. The accompanying declaration does list a number of specific items that, according to Dr. Makhijani, are likely to substantially increase the cost of nuclear reactors in general. Second Makhijani Declaration ¶¶ 13-24. Many of these are clearly inapplicable to the Turkey Point proceeding in that they recommend specific upgrades to the existing reactor fleet rather than any changes related to new reactors. See *id.* ¶¶ 15, 19, 21, 22, & 23. Others, such as a recommendation to review design certifications with respect to station blackout and spent fuel pool issues, are not drawn from the Task Force Report directly, but rather represent Dr. Makhijani's inferences. See *id.* ¶ 20. Even with respect to the others, however, Dr. Makhijani makes no attempt to relate his assertions to the Turkey Point alternatives analysis, and merely asserts that significantly increased costs are likely. The Joint Intervenors and CASE make no attempt to focus the claims made in Dr. Makhijani's declaration, which is extremely broad and has been filed in multiple proceedings, to anything specific to the Turkey Point COL application. For these reasons, this portion of the Proposed Contention fails to meet the basis requirement of 10 C.F.R. § 2.309(f)(1)(ii), or the requirements in 10 C.F.R. § 2.309(f)(1)(v)-(vi) that petitioners provided supporting information to show a genuine dispute with the applicant.

In addition, the Joint Intervenor's and CASE's assertions regarding the proposed reactors' costs fail to meet the materiality requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi) because reactor costs are not material to the Turkey Point environmental review. In the *Summer* COL proceeding, the Commission held that contentions related to reactor costs "were potentially relevant only if an environmentally preferable alternative had been identified." See *South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-21, 72 NRC ___, ___ (Aug. 27, 2010) (slip op. at 4). The Commission provided the basis for this holding in a previous decision in the same proceeding:

[N]either NEPA nor any other statute gives us the authority to reject an applicant's proposal solely because an alternative might prove less costly financially. Monetary considerations come into play in only the opposite fashion — i.e., if an alternative to the applicant's proposal is environmentally preferable, then we must determine whether the environmental benefits conferred by that alternative are worthwhile enough to outweigh any additional cost needed to achieve them.

South Carolina Electric & Gas Co. & South Carolina Public Service Authority (Also Referred to as Santee Cooper) (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 23-24 (2010) (quoting *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-458, 7 NRC 155, 162 (1978)). In *Summer*, the possibility of an environmentally preferable alternative remained only if the petitioners' alternatives contention was admissible, and the Commission therefore stated that should the licensing board reject this alternatives contention, then it must also reject the petitioners' cost-related contentions. *Summer*, CLI-10-21, 72 NRC at ___ (slip op. at 4). In the instant proceeding, the ER analyzes alternatives and concludes that none of them are environmentally preferable. See ER §§ 9.2.4, 9.3.4, 9.4.1.3, 9.4.2.1.5, 9.4.2.2.3, 9.4.2.3.8, and 9.4.2.4. In addition, there are no pending or admitted alternatives contentions in this proceeding. Therefore, the Joint Intervenor's and CASE's assertions regarding reactor costs are not material to this proceeding and do not form an admissible basis for the Proposed Contention. See 10 C.F.R. § 2.309(f)(1)(iv), (vi).

III. The Joint Intervenor's and CASE's Further Assertions Related to Environmental Implications of the Task Force Report are Unsupported and Inadmissible

The Joint Intervenor's and CASE's further assertion that the Task Force Report requires supplementation of the ER to address recommendations related to seismic and flooding events also does not accurately reflect the report's contents. The Joint Intervenor and CASE cite portions of the Task Force Report that recommend existing licensees reevaluate seismic and flooding hazards at their sites and make any necessary changes to structures, systems, and components that are important to safety. CASE Contention at 17-18; Joint Contention at 16-17, citing Task Force Report at 30. The Joint Intervenor and CASE conclude that, as a consequence of this recommendation, the ER is incomplete and requires supplementation. CASE Contention at 18. Joint Contention at 17. However, the Task Force Report states clearly that all current design certification and COL applicants address seismic and flooding issues adequately under existing regulations and guidance. Task Force Report at 71. As noted in Section II above, a referenced document may be scrutinized both for what it does and what it does not say. *Yankee Atomic*, LBP-96-2, 43 NRC at 90. Thus, this portion of the contention is not supported by fact or expert opinion and fails to demonstrate the existence of a genuine dispute, in contravention of the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

Finally, the assertion that all twelve of the task force's recommendations must be addressed in environmental documents prior to COL issuance is not supported by the report itself. As stated previously, the Task Force Report makes no mention of environmental reviews. It also recommends specific strategies for addressing its recommendations in the safety reviews of design certification and COL applications. Task Force Report at 71-72. The Joint Intervenor and CASE do not address this portion of the report, which specifically states that not all recommendations related to the existing reactor fleet apply to new reactors. This portion of the Proposed Contention, like the previous one, therefore fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

CONCLUSION

For the reasons set forth above, the Proposed Contention should be rejected.

Respectfully submitted,

/Signed (electronically) by/

Robert M. Weisman
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1696
Robert.Weisman@nrc.gov

Dated at Rockville, Maryland
this 6th day of September, 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 & 52-041
)
(Turkey Point Units 6 and 7))

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO "MOTION TO ADMIT NEW CONTENTION REGARDING THE SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE NRC TASK FORCE REPORT ON THE FUKUSHIMA DAI-ICHI ACCIDENT" FILED BY CITIZENS ALLIED FOR SAFE ENERGY INC. ("CASE") AND NRC STAFF ANSWER TO "MOTION TO ADMIT NEW CONTENTION TO ADDRESS THE SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE NUCLEAR REGULATORY COMMISSION TASK FORCE REPORT ON THE FUKUSHIMA DAI-ICHI ACCIDENT" FILED BY JOINT INTERVENORS have been served upon the following persons by Electronic Information Exchange this 6th day of September, 2011:

Administrative Judge, Chairman E. Roy Hawkens Atomic Safety and Licensing Board Panel Mail Stop – T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: Roy.Hawkens@nrc.gov	Office of Commission Appellate Adjudication Mail Stop O-16C1 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: OCAAmail@nrc.gov
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Administrative Judge Dr. Michael F. Kennedy Atomic Safety and Licensing Board Panel Mail Stop – T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: Michael.Kennedy@nrc.gov	Office of the Secretary ATTN: Docketing and Service Mail Stop: O-16C1 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: HEARINGDOCKET@nrc.gov
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Administrative Judge Dr. William C. Burnett Atomic Safety and Licensing Board Panel Mail Stop – T-3 F23 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: William.Burnett2@nrc.gov	William C. Garner Gregory T. Stewart Nabors, Giblin & Nickerson, P.A. 1500 Mahan Dr., Suite 200 Tallahassee, FL 32308 Email: bgarner@ngnlaw.com; gstewart@ngnlaw.com
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Lawrence D. Sanders
Mindy Goldstein
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Rd.
Atlanta, GA 30322
Email: Lawrence.Sanders@emory.edu;
magolds@emory.edu

Richard Grosso
Everglades Law Center, Inc.
3305 College Ave.
Ft. Lauderdale, FL 33314
Email: Richard@evergladeslaw.org

Mitchell S. Ross
James M. Petro, Jr.
Counsel for the Applicant
Florida Power & Light Co.
Mail Stop LAW/JB
700 Universe Blvd.
Juno Beach, FL 33408
E-mail: Mitch.Ross@fpl.com
james.petro@fpl.com

John H. O'Neill, Jr.
Matias F. Travieso-Diaz
Stefanie Nelson George
Counsel for the Applicant
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1128
E-mail: John.O'Neill@pillsburylaw.com;
Matias.Travieso-Diaz@pillsburylaw.com;
Stefanie.George@pillsburylaw.com

Steven C. Hamrick
Counsel for the Applicant
Florida Power & Light Co.
801 Pennsylvania Ave., Ste. 220
Washington, D.C. 20004
Email: Steven.Hamrick@fpl.com

Barry White
Citizens Allied for Safe Energy
10001 S.W. 129th Terr.
Miami, FL 33176
Email: bwtamia@bellsouth.net

/Signed (electronically) by/

Robert M. Weisman
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, D.C. 20555-0001
(301) 415-1696
(301) 415-3725 fax
Robert.Weisman@nrc.gov

Dated at Rockville, Maryland
this 6th day of September, 2011