

September 6, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
CALVERT CLIFFS 3 NUCLEAR)
PROJECT, LLC AND UNISTAR)
NUCLEAR OPERATING SERVICES,) Docket No. 52-016-COL
LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

UNISTAR RESPONSE TO PROPOSED CONTENTION 11

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Dated at Washington, District of Columbia
this 6th day of September 2011

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC (collectively, “UniStar” or “Applicant”) hereby respond to the “Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Daiichi Accident” (“Motion to Admit”) and the “Contention in Support of [the Motion to Admit]” (“New Contention”) filed on August 11, 2011, filed by Nuclear Information and Resource Service (“NIRS”), Beyond Nuclear, Public Citizen Energy Program, and Southern Maryland Citizen’s Alliance for Renewable Solutions, which are intervenors in this combined license (“COL”) proceeding (collectively “Intervenors”). The Motion to Admit was accompanied by the “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,” dated August 8, 2011 (“Makhijani Declaration”). The Intervenors seek admission of

the New Contention (Contention 11) for hearing in this proceeding on the proposed Calvert Cliffs Nuclear Power Plant, Unit 3 (“Calvert Cliffs 3”).¹

For the reasons discussed below, the proposed New Contention should not be admitted for hearing. The New Contention is specifically based on the generic recommendations of the NRC’s Near-Term Task Force as presented in a report issued on July 12, 2011 (“Task Force Report”). The Task Force recommendations are not appropriate for resolution in a site-specific licensing proceeding and do not support admitting the proposed New Contention. NRC regulations provide alternative means for public participation in connection with agency actions, such as any future rulemakings, related to enhancements stemming from the NRC’s reviews of the events at Fukushima. While the New Contention purports to be an environmental contention under the National Environmental Policy Act (“NEPA”), it fails to demonstrate a genuine dispute with the COL application or NRC Staff environmental review documents on a material environmental issue and fails to identify any specific significant new environmental information germane to Calvert Cliffs 3. Likewise, the Intervenor has not satisfied the criteria for granting a hearing on a late-filed contention.

BACKGROUND

On July 13, 2007, and March 14, 2008, UniStar submitted an application for a COL to be located at the Calvert Cliffs site in Calvert County, Maryland. The COL application

¹ Concurrently with the Motion and Contention, the Intervenor filed with the Commission a “Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision,” dated August 11, 2011. UniStar previously filed a response opposing a request to suspend this proceeding. *See* “Opposition To Emergency Petition To Suspend Licensing Decisions And Proceedings,” dated May 2, 2011. The bases for opposing suspension, as described in the May 2nd filing, remain valid and applicable. Regardless, the petition is not before the Licensing Board and is beyond the scope of this proceeding.

references the application for certification of the US EPR design, which was initially submitted on December 11, 2007. The US EPR design is the subject of an ongoing design certification review and rulemaking in accordance with 10 C.F.R. Part 52.

In LBP-09-04, dated March 24, 2009, the Licensing Board admitted three contentions for hearing (Contentions 1, 2, and 7). Contentions 2 and 7 were resolved through motions for summary disposition. *See* Memorandum and Order (Granting Motion for Summary Disposition of Contention 2), LBP-09-15, dated July 30, 2009; Memorandum and Order (Ruling on Joint Intervenors' Proposed New Contentions 8 and 9 and Applicants' Motion for Summary Disposition of Contention 7), dated April 5, 2010 (unpublished). Later, in LBP-10-24, dated December 28, 2010, the Licensing Board admitted another contention for hearing (Contention 10C).

Separately, the Licensing Board has issued a scheduling order establishing certain milestones for hearings on the remaining admitted contentions in this matter. *See* Order (Establishing schedule to govern further proceedings), dated April 22, 2009 (unpublished). The hearings on the admitted contentions were initially linked to the issuance of the NRC Staff review documents — in particular, the Final Environmental Impact Statement (“FEIS”), which was issued in May 2011, and the Final Safety Evaluation Report (“FSER”), which is currently scheduled for completion in January 2013. The Board revised the schedule for the hearing on Contention 10C in an Order (Revising Initial Schedule), dated June 24, 2011. And, at this time, the hearing on Contention 1 is linked to issuance of the Safety Evaluation Report that addresses the foreign ownership issues. *See* Memorandum and Order (Denying Summary Judgment of Contention 10C, Denying Amended Contention 10C, and Deferring Ruling on Contention 1), dated August 26, 2011.

On April 14, 2011, Intervenors, along with several other petitioners in other proceedings, 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”). The Emergency Petition requested, as relevant to Calvert Cliffs 3, that the Commission (1) “suspend all decisions” regarding the issuance of combined licenses and promulgation of design certification rules, pending completion by the NRC’s near-term and long-term lessons learned investigations of the Fukushima accident and any regulatory actions and/or environmental analyses related to those issues; and (2) establish procedures for raising new issues relevant to the Fukushima accident in pending licensing proceedings, while suspending requirements to justify the late-filing of new issues if their relevance to the Fukushima accident can be demonstrated. Emergency Petition, at 1-3. UniStar and NRC Staff, and other applicants in other proceedings, filed responses opposing the Emergency Petition on May 2, 2011. The Commission has not ruled on the Emergency Petition. Accordingly, no specific procedures are in place for addressing issues related to the Fukushima event in individual licensing cases, and the NRC’s Rules of Practice and related precedent continue to apply.

APPLICABLE LEGAL STANDARDS

A proposed contention must satisfy the standards governing the admissibility of contentions found in 10 C.F.R. Part 2. The New Contention in the present case is based on the Task Force Report rather than any NRC Staff review document. Pursuant to 10 C.F.R. § 2.309(f)(2), a new contention may be considered only if: (1) the information upon which the new contention is based was not previously available; (2) the information upon which the new contention is based is materially different from information previously available; and (3) the new contention has been submitted in a timely fashion based on the availability of subsequent

information. 10 C.F.R. § 2.309(f)(2)(i)-(iii). However, meeting these criteria is not sufficient to warrant admission of a new contention. The petitioner must also address the criteria in 10 C.F.R. § 2.309(c)(1).²

Under Section 2.309(c)(1), the Licensing Board must weigh the following five factors: (1) good cause, if any, for the failure to file on time;³ (2) the availability of other means whereby the requestor's interest will be protected; (3) the extent to which the requestor's interests will be represented by existing parties; (4) the extent to which the requestor's participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record. *See* 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii). The first factor, good cause for lateness, carries the most weight in the balancing test, and the lack thereof requires the petitioner to make a "compelling case" relative to the remaining factors. *See State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted). The late-filed factors in Section 2.309(c)(1) apply fully even in cases where contentions are filed late only because the information on which they are based was not available until after the filing deadline.

Any new or amended contentions must also meet the admissibility standards that apply to all contentions. As set forth in 10 C.F.R. § 2.309(f)(1), a proposed contention must

² The requirement to apply the factors in 10 C.F.R. § 2.309(c) did not change with the promulgation of the revised 10 C.F.R. Part 2, which introduced the "timeliness" factors in 10 C.F.R. § 2.309(f)(2). *See* "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) ("If information in [a new Staff document] bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding.").

³ The criteria in Section 2.309(f)(2), in effect, codify the test for establishing "good cause."

contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

DISCUSSION

A. The Issues Raised by the Motion Impermissibly Challenge NRC Regulations

The issues raised in the New Contention are generic issues challenging the adequacy of the Commission's existing regulations and requirements. Although styled as an environmental contention under NEPA, the primary focus of the New Contention is on the Task Force recommendations for changes to the NRC's regulatory program and to the requirements applicable to the design and operation of operating and new reactors. The supporting Declaration states generally that Dr. Makhijani has read the Task Force Report and agrees with the recommendations. But the New Contention and the Declaration do not offer any evidence to support a conclusion that the lessons learned from the Fukushima event have any unique applicability to the U.S. EPR or to Calvert Cliffs. The Fukushima issues can and will be addressed — to the extent necessary for new plants — through regulatory processes such as rulemakings (including the ongoing U.S. EPR design certification technical review and rulemaking). For this reason, the New Contention should be rejected for consideration in a site-specific hearing.

Longstanding NRC precedent provides that issues that are or are about to become the subject of general rulemaking should not be accepted in individual licensing matters.⁴ An interested person can seek changes in the regulations by a petition for rulemaking in accordance with 10 C.F.R. § 2.802. Petitioners may not, however, challenge the adequacy of the Commission's existing regulatory scheme through individual adjudications.⁵ Indeed, the Commission's Rules of Practice are specifically designed to preclude consideration of generic issues in individual licensing proceedings. 10 C.F.R. § 2.335(a). The Rules of Practice and agency precedent assure efficiency and consistency in addressing and resolving issues that impact a number of applicants, while preserving ample opportunity for stakeholder participation.

The New Contention is predicated on a perception that the Task Force Report demonstrates the need for changes to NRC regulations governing, among other things, severe accidents, external events (*e.g.*, seismic and flooding), station blackout, hardened vents, enhanced spent fuel pool backup capability and instrumentation, and emergency response procedures. For example, the Intervenor argue that "the NRC's current regulatory scheme requires significant re-evaluation and revision in order to expand or upgrade the design basis for reactor safety as recommended by the Task Force Report." New Contention at 9. The Intervenor also state 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

⁴ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981).

⁵ *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982), *citing Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974) (explaining that a contention must be rejected where it challenges the basic structure of the Commission's regulatory process and is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be).

only on a ‘voluntary’ basis or through a ‘patchwork’ of requirements” and therefore argues that the design basis should be upgraded to include severe accidents.” *Id.* at 7-8. The proposed New Contention also argues 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.” *Id.* at 6. Even assuming that the New Contention presents an accurate characterization of the Task Force Report, the Intervenors are quite clearly attempting to challenge the adequacy of the Commission’s existing regulatory scheme and to raise generic issues in this adjudicatory proceeding. This is not permitted in individual adjudications.⁶

The Task Force recommendations are under active consideration by the NRC Staff and the Commission,⁷ and the Intervenors themselves implicitly recognize that their concerns are best addressed through alternative regulatory processes. For example, the Intervenors already filed an Emergency Petition with the Commission seeking *generic action* regarding lessons learned from Fukushima. And, as part of the proposed New Contention, the Intervenors acknowledge that the issues raised are generic in nature and therefore appropriate for resolution via rulemaking. *See* New Contention at 3 (“[I]ntervenors have joined with other individuals and organizations in a rulemaking petition seeking to suspend any regulations that would preclude full consideration of the environmental implications of the Task Force Report.”);

⁶ *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 387, 395 (finding that a contention presents an impermissible challenge to the Commission’s regulations where it seeks to impose requirements in addition to those set forth in the regulations); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff’d*, CLI-01-17, 54 NRC 3 (2001) (explaining that contentions advocating stricter requirements than agency rules impose are inadmissible).

⁷ *See, e.g.,* Staff Requirements Memorandum, SECY-11-0093, “Near-Term Report and Recommendations for Agency Action Following the Events in Japan,” dated August 19, 2011 (ADAMS Acc. No. ML112310021).

id. at 4 (recognizing 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”). Accordingly, the issues being raised by the Intervenor should be addressed in a generic forum.

Further, the Task Force itself concluded that its various recommendations for rulemaking “would be equally applicable to new reactors.” Task Force Report at 71. The U.S. EPR design certification review is ongoing and the design certification is not yet in the rulemaking process. The design certification process, rather than the COL process, is a more appropriate process to address plant and procedure issues under 10 C.F.R. Part 52.

The Intervenor characterization of the Task Force Report conclusions regarding the adequacy of Commission regulations is, in any event, inaccurate. The Intervenor cite the Task Force Report for the proposition that current regulatory requirements are inadequate and that additional requirements are needed for new reactors such as Calvert Cliffs. Specifically, the Intervenor state that:

In particular, the Task Force found that “the NRC’s safety approach is incomplete without a strong program for dealing with the unexpected, including severe accidents.” [Task Force Report] at 20. Therefore, the Task Force recommended that the NRC incorporate severe accidents into the “design basis” and subject it to mandatory safety regulations.

New Contention at 6. However, in fact, the Task Force discussion cited by Intervenor relates only to operating reactors. The full paragraph in the Task Force Report stated that:

The Task Force concludes that the NRC’s safety approach is incomplete without a strong program for dealing with the unexpected, including severe accidents. Continued reliance on industry initiatives for a fundamental level of defense-in-depth similarly would leave gaps in the NRC regulatory approach. The Commission has clearly established such defense-in-depth severe accident requirements for new reactors (in 10 CFR 52.47(23), 10 CFR 52.79(38), and each design certification rule), thus bringing unity and completeness to the defense-in-depth concept.

Taking a similar action, within reasonable and practical bounds appropriate to operating plants, would do the same for operating reactors.

Task Force Report at 20 (emphasis added). Thus, contrary to Intervenor’s arguments, the Task Force Report actually agrees that the NRC’s severe accident defense-in-depth for new reactors such as Calvert Cliffs is adequate.⁸ *See, e.g.*, Task Force Report at 73-75.

At bottom, the Task Force recommendations — to the extent applicable — should be addressed in issue-specific rulemakings or in the U.S. EPR design certification process.

B. The Proposed New Contention Fails To Demonstrate A Genuine Dispute With The COL Application On A Material Issue

The proposed New Contention is also inadmissible under the criteria for admissibility of contentions in 10 C.F.R. § 2.309(f)(1). The New Contention fails to establish a genuine dispute with the Calvert Cliffs application or Final Environmental Impact Statement (“FEIS”) on a material environmental issue.

1. *The New Contention Lacks Sufficient Factual Support*

The New Contention and Declaration purport to address a significant *environmental* issue. The assertion is made that the Task Force Report recommendations (including the recommendations to incorporate certain severe accidents into the plant design basis) compel additional environmental analyses under NEPA, and that these analyses may lead to a different conclusion with respect to environmental risks and the cost-benefit analysis for the

⁸ With respect to design-basis seismic and flooding analysis issues (Recommendation 2.1), the Task Force concluded that “current COL and design certification applicants are addressing them adequately in the context of the updated state-of-the-art and regulatory guidance used by the staff in reviews.” Task Force Report at 71. In addition, the Task Force concluded that Recommendation 4 (new requirements for prolonged station blackout mitigation) and Recommendation 7 (spent fuel makeup capability and instrumentation) should apply to design certification and COLs under active review prior to licensing. *Id.* There is no suggestion, however, that Calvert Cliffs poses any unique issues or that the generic issues raised by the Task Force Report cannot be addressed before operation of the new plants under review.

project. Specifically, the Intervenor argue that the Task Force Report “raises significant environmental concerns in this proceeding, including that (1) the risks of operating the proposed Calvert Cliffs reactor are higher than estimated in the Final Environmental Impact Statement (“FEIS”) for the proposed reactor and (2) the . . . previous [Calvert Cliffs] 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.” New Contention at 2-3. The New Contention, however, does not challenge any specific portion of the COL application, the FEIS for the Calvert Cliffs COL, or the Design Certification application for the U.S. EPR, which is incorporated by reference into the Calvert Cliffs COL application.

Both the Calvert Cliffs 3 FEIS and the Design Certification ER discuss design basis and severe accident risks and impacts. The severe accident evaluations include evaluations of severe accident mitigation design alternatives (“SAMDAs”) and severe accident mitigation alternatives (“SAMAs”). See FEIS at Section 5.11, *Environmental Impacts of Postulated Accidents*; see also U.S. EPR DC at Chapters 15 and 19; U.S. EPR Environmental Report, ANP-10290, Revision 1 (ADAMS Accession No. ML092650775) (“U.S. EPR ER”).⁹ The Intervenor do not identify any specific dispute with the specific information in the application or the referenced DC application. The text of the New Contention and the bases for it do not contain

⁹ Section 5.11.1 of the FEIS addresses design basis accidents, Section 5.11.2 addresses severe accidents, and Section 5.11.3 addresses severe accident mitigation alternatives. Chapter 15 of the U.S. EPR DC addresses transient and accident analyses, and Chapter 19 includes the probabilistic risk assessment and severe accident evaluation. The U.S. EPR ER addresses SAMDAs. Information on accidents was also included in the Calvert Cliffs 3 ER. Chapter 7 of the ER addressed design basis accidents (Section 7.1), severe accidents (Section 7.2), and severe accident mitigation alternatives (Section 7.3).

any substantive citations to the Calvert Cliffs COL application or the FEIS.¹⁰ Neither the Intervenor nor Dr. Makhijani have pointed to any new or different environmental impact that is unique for the U.S. EPR or to Calvert Cliffs. The Intervenor has not, for example, identified any new seismic or flooding risks at Calvert Cliffs. Nor have they challenged any of the specific SAMDAs or SAMAs in the U.S. EPR design certification application or the Calvert Cliffs COL application. In fact, the Makhijani Declaration on which the Intervenor relies never once mentions Calvert Cliffs or the U.S. EPR. See Makhijani Declaration at ¶¶ 16-18. A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. See *Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2)*, LBP-92-37, 36 NRC 370, 384 (1992).

The Intervenor bears the burden to present adequate factual information or expert opinions necessary to support a contention and must also explain the significance of any factual information upon which they rely. 10 C.F.R. § 2.309(f)(1)(v); *Fansteel, Inc. (Muskogee, Oklahoma, Site)*, CLI-03-13, 58 NRC 195, 204-05 (2003). Here, the Intervenor simply cut and paste statements from the Task Force Report, but never explain how that report would lead to different conclusions than those presented in the FEIS. The Intervenor's generalized assertions that the Task Force Report raises a "concern" regarding the manner in which the proposed operation of Calvert Cliffs impacts public health and safety (New Contention at 11) is too vague and insufficient to support an admissible contention. The proposed New Contention is therefore

¹⁰ The Contention simply restates the conclusions in FEIS Sections 5.11.1.1 and 5.11.4 that the radiological impacts of a design basis accident would be "SMALL" and notes that the SAMA evaluation is contained in FEIS Section 5.11.3. New Contention at 11-12. The Intervenor does not challenge any specific portion of the FEIS or identify any specific aspect of the analysis in the FEIS that is deficient.

inadmissible for failing to demonstrate a genuine dispute with the FEIS on a material issue. 10 C.F.R. § 2.309(f)(1)(vi).

As a SAMA contention, the New Contention is also unsupported. The Commission has previously observed that, for any severe accident concern, there are likely to be numerous conceivable SAMAs and thus it will always be possible to come up with some type of mitigation alternative that has not been addressed. *Duke Energy*, CLI-02-17, 56 NRC at 11-12. In the end, however, whether a SAMA is worthy of more detailed analysis in an ER or an FEIS hinges upon whether it may be cost-beneficial to implement. *Id.* Under the rule of reason governing NEPA, “[t]o make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.” *Id. citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). It would be unreasonable to trigger a full adjudicatory proceeding where a proposed contention does nothing to identify a SAMA or indicate the approximate relative cost and benefit of the SAMA. A conclusory statement, based on NRC Staff work in a different context, that additional SAMAs “should be considered” is insufficient.¹¹ And, any regulatory

¹¹ The Intervenor wants UniStar (or the NRC Staff) to “do more” without providing any information to suggest that “more” is needed or would lead to different results. According to the Commission, a petitioner must approximate the relative cost and benefit of a challenged SAMA in order to get an adjudicatory hearing. *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 11-12 (2002). A petitioner must at least present some notion of a difference in the results and provide at least some ballpark consequence and implementation costs should the SAMA be performed. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Units 2 and 3), LBP-08-13, 68 NRC __ (slip op. July 30, 2008) at 67-68; *see id.* at 74-75 (rejecting a proposed contention, in part, because the Petitioner failed to explain why the allegedly new information was sufficiently different from the earlier data to make a material change in the conclusions of the SAMA, failed to suggest feasible alternatives to address risks posed by the new data, and failed to estimate the cost of the increased margin of safety that would result from any severe accident mitigation action).

actions that result from the Task Force recommendations will address not only the safety concerns identified by the Task Force, but also any related environmental impact concerns.¹² Accordingly, there is no showing of a genuine dispute with the COL application or the FEIS on a material environmental issue.

2. *There is No Demonstration of Significant New Environmental Information*

The New Contention also asserts that the FEIS must be supplemented in light of the significant new environmental information inherent in the Task Force Report recommendations. Under 10 C.F.R. § 51.92(a), supplementation is necessary only if there are (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. To be significant, “new information must present ‘a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.’” *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999). The Intervenor’s argue that the Task Force Report’s findings point to a need for a reevaluation of the environmental consequences of severe accidents. However, the New Contention and the Makhijani Declaration do not establish that the assessments of environmental impacts will change in any adverse way. Intervenor’s generalized assertions that the Task Force Report raises a “concern” regarding environmental impacts (New Contention at 11) and that the cost-benefit analysis of SAMAs must be re-evaluated (*id.* at 12) do not present a

¹² The NRC can meet any NEPA obligation in promulgating any new regulations or taking other regulatory actions. Generic analysis “is clearly an appropriate method of conducting the hard look required by NEPA.” *Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 101 (1983) (internal quotation marks omitted); *see also Public Citizen, et al. v. Nuclear Regulatory Commission*, 573 F.3d 916, 928-29 (9th Cir. 2009) (concluding that the NRC met its NEPA obligations in connection with the risk of air-based terrorist threats in promulgating the design basis threat rule).

different picture of the environmental impacts of the proposed Calvert Cliffs 3. In fact, the Task Force Report does not discuss environmental impacts at all.

The proposed contention simply presumes, without demonstrating it to be the case, that Fukushima-type releases could occur at Calvert Cliffs, and that the environmental consequences would be worse than previously analyzed for severe accidents.¹³ In particular, the New Contention does not present any new information regarding flooding or seismic risk at Calvert Cliffs. Nor does it discuss any specific environmental consequences at the Calvert Cliffs site.¹⁴ Again, there is neither factual information nor expert support to suggest that risks of a design basis accident or severe accident at Calvert Cliffs would differ from those described in the FEIS, based on any insights from Japan.¹⁵

¹³ Similar issues regarding the need for supplementation were raised following Three Mile Island. The D.C. Circuit explained that “the fact that the accident occurred does not establish that accidents with significant environmental impacts will have significant probabilities of occurrence.” *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1301 (D.C. Cir. 1984), *aff’d en banc*, 789 F.2d 252 (D.C. Cir. 1986).

¹⁴ As noted above, the issues raised in the proposed new contention and supporting declaration are generic issues that are not specific to either Calvert Cliffs or the U.S. EPR. A contention stating a generic issue cannot be admitted absent a specific nexus between the contention and the specific facility that is the subject of the proceeding. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-15, 15 NRC 555, 558-59 (1982).

¹⁵ In essence, the New Contention and supporting Declaration simply “piggy-back” the Fukushima Task Force Report. In this regard, they are an attempt to leverage the NRC Staff’s generic reviews into the site-specific adjudicatory process. This is akin to basing a contention on the mere fact that the NRC Staff has issued a Request for Additional Information (“RAI”) during its license application review, which has been held to be insufficient for an admissible contention. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999) (rejecting contention based solely on the existence of NRC Staff RAIs). The Fukushima Task Force review, analogous to the Staff’s application review, is part of the ongoing review of Fukushima lessons learned. But, the existence of recommendations for future actions, without more, does not support admitting a new contention.

The Task Force Report recommendations are not, in and of themselves, “new and significant information” that warrant NEPA supplementation. Simply because an event is newsworthy, does not mean it is substantively significant for NEPA purposes. The Commission is still assessing the lessons from Fukushima and has, to date, made no determination that Fukushima constitutes new or significant environmental information regarding the environmental impacts associated with a new reactor. The Intervenor argues that the FEIS must be supplemented to address the Task Force’s recommendation to incorporate severe accidents into the design basis. But, as discussed above, the FEIS already considers both design basis and “beyond-design-basis” (*i.e.*, severe) accidents. *See* FEIS at Section 5.11; *see also* U.S. EPR DC at Chapters 15 and 19; U.S. EPR ER. And, as also noted above, the Intervenor has not demonstrated that any information is missing from the FEIS (or from the U.S. EPR DC). In the absence of any specific alleged omission or inaccuracy in the FEIS, supplementation is not warranted.

The New Contention also argues that Task Force Report suggests the need for additional severe accident mitigation measures, including measures to strengthen station blackout mitigation capability for design basis and beyond-design-basis external events, require hardened vent designs (applicable only to BWR facilities with Mark I and Mark II containments), enhance spent fuel pool makeup capability and instrumentation, and strengthen and integrate onsite emergency response capabilities. New Contention at 15. As already discussed, the Intervenor makes no attempt to show that these issues have not been considered in the U.S. EPR design or in the Calvert Cliffs COL or FEIS, or even to detail what additional specific mitigation measures might be available. The U.S. EPR design certification ER includes

an evaluation of a number of mitigation measures related to loss of power and station blackout.¹⁶ The COL application also addresses the Emergency Operating Procedures (“EOPs”), Severe Accident Management Guidelines (“SAMGs”), and Extensive Damage Mitigation Guidelines (“EDMGs”) mentioned in the New Contention.¹⁷ And, the FEIS addresses both SAMAs and SAMDAs.¹⁸ The Intervenors have not raised any specific dispute with these portions of the application or NRC Staff review documents that would warrant supplementation of the FEIS.

¹⁶ For example, the U.S. EPR ER includes SAMDA AC/DC-01, which would ensure longer battery life during a station blackout (“SBO”) and consequently reduce the plant exposure to long term SBO sequences. The ER also considered AC/DC-02 (Replace lead-acid batteries with fuel cells), AC/DC-04 (Improve DC bus load shedding), AC/DC-09 (Provide an additional diesel generator), AC/DC-13 (Install an additional, buried off-site power source), AC/DC-14 (Install a gas turbine generator), AC/DC-22 (In training, emphasize steps in recovery of off-site power after an SBO), AC/DC-24 (Bury off-site power lines), CC-02 (Provide an additional high pressure injection pump with independent diesel), CC-16 (Provide capability for remote, manual operation of secondary side pilot-operated relief valves in an SBO), CW-13 (Install an independent RCP seal injection system, with dedicated diesel), EPR-07 (Provide operator training to cross-tie Division 1 to Division 2 or Division 4 to Division 3 during both an SBO and non-SBO event), FW-03 (Install an independent diesel for the condensate storage tank makeup pumps), FW-08 (Modify the turbine-driven auxiliary feedwater pump to be self-cooled), FW-09 (Proceduralize local manual operation of auxiliary feedwater system when control power path is lost), FW-14 (Modify the startup feedwater pump so that it can be used as a backup to the emergency feedwater system (EFWS), including during an SBO scenario), HV-05 (Create ability to switch emergency feedwater (EFW) room fan power supply to station batteries in an SBO), and IA-04 (Install nitrogen bottles as backup gas supply for safety relief valves (SRV)).

¹⁷ *See, e.g.*, FSAR §§ 6.2 (incorporating U.S. EPR DCD § 6.2.5 addressing combustible gas control in containment), 8.4 (incorporating DCD § 8.4 addressing station blackout), 9.1 (incorporating DCD § 9.1 addressing spent fuel storage), 13.5 (incorporating DCD § 13.5.2.1 addressing emergency operating procedures), 19.2 (incorporating DCD § 19.2.3 addressing SAMGs); *see also* “Guidance and Strategies for the Loss of Large Areas per 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d) Calvert Cliffs Nuclear Power Plant, Unit 3,” UN#11-101, dated March 23, 2011 (ADAMS Acc. No. ML110900471).

¹⁸ *See* FEIS at Section 5.11.3. The FEIS explains that AREVA considered 167 design alternatives for a U.S. EPR at a generic site and that UniStar assessed those alternatives using Calvert Cliffs site-specific information. The FEIS also considered SAMAs based on training or procedures. *Id.*

Moreover, additional mitigation measures that may result from the Fukushima review process would not materially impact the environmental analysis in the FEIS. If the Task Force Report recommendations become regulatory requirements, the environmental impacts would necessarily be less than the impacts described currently. Thus, the current environmental analysis is conservative. A supplemental NEPA document is not necessary where a change will result in less environmental impact.¹⁹ Likewise, severe accident mitigation measures would no longer be “alternatives” requiring consideration under NEPA if the NRC changed its regulations to mandate implementation of design or procedural modifications that mitigate severe accidents.

For all of these reasons, the New Contention does not satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).

C. The Proposed New Contention Is Untimely And Does Not Satisfy The Factors For Consideration of New or Amended Contentions

The only basis offered for filing the New Contention at this time is the issuance of the Task Force Report. However, contentions related to the adequacy of the FEIS discussions of design basis accidents or severe accidents, or the adequacy of SAMDAs considered in the U.S. EPR design, could (and should) have been submitted as part of an initial petition to intervene or following issuance of the DEIS and FEIS. In order for a proposed contention to be timely, the

¹⁹ See, e.g., *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F.Supp.2d 121, 137-138 (D.D.C. 2009) (“When a change reduces the environmental effects of an action, a supplemental EIS is not required.”); *Concerned Citizens on I-190 v. Sec’y of Transp.*, 641 F.2d 1, 6 (1st Cir. 1981) (adopting a new environmental protection “statute or regulation clearly does not constitute a change in the proposed action or any ‘information’ in the relevant sense”); *New Eng. Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (concluding that a supplemental EIS is not needed, even though the EIS did not discuss the new cooling intake location, because the change “would have a smaller impact on the aquatic environment than would the original location”); *So. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663-668 (3d Cir. 1999) (holding that design changes that cause less environmental harm do not require a supplemental EIS).

information upon which the new contention is based must be materially different from information previously available. 10 C.F.R. § 2.309(f)(2)(ii). As noted above, the Task Force Report does not directly contradict the conclusions in the Calvert Cliffs COL FEIS or the U.S. EPR design certification ER — it does not provide any new or materially different information on environmental issues. The New Contention is based only on speculation regarding the outcome of the NRC’s ongoing reviews of the Fukushima accident and supposition regarding the impacts of those reviews on the Calvert Cliffs application (and the U.S. EPR design certification).²⁰ Moreover, the applicable regulations and approach to treatment of design basis accidents, severe accidents, and SAMAs has not changed in a material way since the Calvert Cliffs application was filed or since the Fukushima accident. Thus, to the extent the New Contention is predicated on alleged inadequacies in the NRC’s regulations governing consideration of design basis or severe accidents and SAMAs, it could have been raised at the outset of the proceeding (if accompanied by a satisfactory request for a waiver under 10 C.F.R. § 2.335(b)). This further demonstrates that the New Contention is untimely.

The proposed New Contention also fails to satisfy the late-filed factors in 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii). As discussed above, a contention challenging the discussion of accidents or SAMAs in the U.S. EPR design certification application or in the FEIS, could have been raised at the outset of the proceeding or following issuance of the DEIS/FEIS. The proposed New Contention has not linked the Task Force Report recommendations to any specific

²⁰ If a petitioner files a contention at the outset of a proceeding, based solely on guesswork regarding possible future changes to NRC regulations, the contention would be inadmissible. *See, e.g., AmerGen Energy Co., Inc.* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 22 *aff’d* CLI-08-28, 68 NRC 658 (2008) (concluding that affidavits containing bare assertions or speculation and lacking technical details or analysis are insufficient to demonstrate that a materially different result is likely). The outcome should be the same for a late-filed contention.

deficiency in the Calvert Cliffs COL application, the U.S. EPR design certification application, or the FEIS.

As also discussed above, there are other, more appropriate forums for Intervenors to address their concerns. The generic safety and environmental issues raised in the proposed contention are being addressed in conjunction with the Commission's ongoing Fukushima lessons learned reviews. The NRC will provide for appropriate public participation (*e.g.*, notice and comment rulemaking) in connection with those reviews.

The Intervenors' proposed New Contention would also broaden this proceeding. The proceeding would be expanded to encompass generic concerns with the NRC's overall regulatory program — issues that are best addressed in alternative regulatory processes, such as rulemaking.

Finally, there is no basis for concluding that Intervenors will assist in developing a sound record. The Intervenors have not demonstrated an ability to provide independent technical expertise on design basis and severe accidents, or on the resulting environmental impacts. Although the proposed New Contention was accompanied by Dr. Makhijani's declaration, that declaration did not mention Calvert Cliffs or the U.S. EPR. Thus, there is no basis for concluding that the Intervenors can assist in developing a site-specific sound record.

CONCLUSION

For the foregoing reasons, the Licensing Board should deny the proposed New Contention. The issues raised in the New Contention and supporting materials are generic in nature and will be addressed by rulemaking, design certification review, or other regulatory processes outside individual licensing proceedings — all with opportunities for public participation. The New Contention also does not satisfy the Commission’s criteria for consideration of late-filed contentions.

Respectfully submitted,

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UNISTAR NUCLEAR OPERATING
SERVICES, LLC

Dated at Washington, District of Columbia
this 6th day of September 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
CALVERT CLIFFS 3 NUCLEAR)
PROJECT, LLC AND UNISTAR)
NUCLEAR OPERATING SERVICES,) Docket No. 52-016-COL
LLC)
)
(Calvert Cliffs Nuclear Power Plant, Unit 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of “UNISTAR RESPONSE TO PROPOSED CONTENTION 11” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 6th day of September 2011, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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