September 6, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
THE DETROIT EDISON COMPANY	)	Docket No. 52-033-COL
	)	
(Fermi Nuclear Power Plant, Unit 3)	)	

APPLICANT'S RESPONSE TO PROPOSED NEW CONTENTION

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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), The Detroit Edison Company ("Detroit Edison" or "Applicant") hereby responds to the motion to admit a proposed new contention filed by Intervenors on August 12, 2011.[1] The Motion and New Contention were 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 to admit the

[1] *See* "Motion to Admit New Contention Regarding the Safety and Environmental Implications of The Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident," dated August 12, 2011 ("Motion"), and "Contention In Support Of Motion To Admit New Contention Regarding The Safety And Environmental Implications Of The Nuclear Regulatory Commission Task Force Report On The Fukushima Dai-Ichi Accident," dated August 12, 2011 ("New Contention"). The Motion and New Contention were filed by Beyond Nuclear, Citizens Environmental Alliance of Southwestern Ontario, Don't Waste Michigan, Sierra Club, Keith Gunter, Edward McArdle, Henry Newman, Derek Coronado, Sandra Bihn, Harold L. Stokes, Michael J. Keegan, Richard Coronado, George Steinman, Marilyn R. Timmer, Leonard Mandeville, Frank Mantei, Marcee Meyers, and Shirley Steinman, who are currently intervenors in this combined license ("COL") proceeding (collectively, "Intervenors").

New Contention for hearing in this proceeding on the proposed Fermi Nuclear Power Plant, Unit 3 ("Fermi 3").[2]

For the reasons discussed below, the Motion should be denied and the New Contention should not be admitted for hearing. The proposed contention on the Fermi 3 *combined license* docket simply "incorporated by reference" a proposed contention on the Seabrook *license renewal* docket. Moreover, 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 on a material environmental issue and fails to identify any specific significant new environmental information germane to Fermi 3. Likewise, Intervenors have not satisfied the criteria for granting a hearing on a late-filed contention.

BACKGROUND

On September 18, 2008, Detroit Edison filed its application for a COL for Fermi 3, to be located in Monroe County, Michigan. The COL application references the application for certification of the ESBWR design, which was initially submitted on August 24, 2005. The

[2] The Intervenors' proposed contention simply "incorporates by reference" a proposed contention filed on the Seabrook license renewal docket. For the purposes of this filing and for ease of reference, the page numbers used for references to the New Contention match the page numbers of the Seabrook contention filing.

NRC Staff issued the Final Design Approval and Final Safety Evaluation Report ("FSER") for the ESBWR on March 9, 2011. The ESBWR design is the subject of an ongoing design certification review rulemaking in accordance with 10 C.F.R. Part 52. "ESBWR Design Certification; Proposed Rule," 76 Fed. Reg. 16549 (Mar. 24, 2011).

In LBP-09-16, dated July 31, 2009, the Licensing Board admitted four contentions for hearing (Contentions 3, 5, 6, and 8). Later, in LBP-10-09, dated June 15, 2010, the Licensing Board admitted another contention for hearing (Contention 15). Subsequently, two contentions were resolved through motions for summary disposition. *See* Order (Granting Motion for Summary Disposition for Contention 3), dated July 9, 2010 (unpublished); Order (Granting Motion for Summary Disposition of Contention 5), dated March 1, 2011 (unpublished). Motions for summary disposition on two of the remaining three contentions (Contentions 6 and 8) were denied in an Order dated May 20, 2011 (LBP-11-14).

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 and procedures to govern further proceedings), dated September 11, 2009 (unpublished). The hearings on the admitted contentions are linked to the issuance of the NRC Staff review documents — in particular, the Final Environmental Impact Statement ("FEIS"), which is currently scheduled for completion in November 2012, and the FSER for Fermi 3, which is currently scheduled for completion in September 2012.[3]

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

[3] Under the Licensing Board's current schedule, the hearing on Contentions 6 and 8 is linked to issuance of the FEIS, while Contention 15 is linked to issuance of the FSER.

Daiichi Nuclear Power Station Accident" ("Emergency Petition"). The Emergency Petition requested, as relevant to Fermi 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. Detroit Edison 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).[4]

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;[5] (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 contain: (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the

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[4] 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.").

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

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 ESBWR or to Fermi 3. The Fukushima issues can and will be addressed — to the extent necessary for new plants — through regulatory processes such as rulemakings. 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.[6] 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

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

Commission's existing regulatory scheme through individual adjudications.[7] 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 Intervenors 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 Intervenors 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 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 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

[7] *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).

Commission's existing regulatory scheme and to raise generic issues in this adjudicatory proceeding. This is not permitted in individual adjudications.[8]

The Task Force recommendations are under active consideration by the NRC Staff and the Commission,[9] 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 3-4 ("[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."); *id*. at 5 (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 Intervenors 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

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8 *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).

9 *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).

ESBWR design certification rulemaking is ongoing. 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 Intervenors characterization of the Task Force Report conclusions regarding the adequacy of Commission regulations is, in any event, inaccurate. The Intervenors 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 Fermi 3. Specifically, the Intervenors 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 7. However, in fact, 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 Intervenors' arguments, the Task Force Report actually agrees that the NRC's severe accident defense-in-depth for new reactors such as Fermi 3 is adequate.[10] *See, e.g.*, Task Force Report at 73-75. Indeed, the Task Force

[10] 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

Report states that the design certification rulemaking for the ESBWR should be completed "without delay." *Id*. at 71-72.

At bottom, the Task Force recommendations — to the extent applicable — should be addressed in issue-specific rulemakings or in the ESBWR 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 Fermi 3 application on a material environmental issue.

1. The New Contention Does Not Address COL Requirements or the Fermi 3 COL Application

Although incorporation by reference may be appropriate in some circumstances, such an approach is wholly inadequate in the context of an application-specific contention. As noted above, the Intervenors are relying on a proposed contention filed in a license renewal proceeding for a reactor of a completely different design that received its operating license in 1990 and that is located more than 700 miles from the Fermi site. NRC regulations governing license renewal are found in 10 C.F.R. Part 54, while COL applications are governed by Part 52. The Intervenors have made no effort to link the two different regulatory schemes. The New Contention also does not explain how an alleged deficiency for an operating plant (Seabrook) has any relevance for a combined license application at Fermi 3. Nor does the New Contention explain how requirements related to a pressurized water reactor (again, Seabrook) have any

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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 Fermi 3 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.

bearing on a boiling water reactor such as the ESBWR proposed for Fermi 3. The applicants for the Seabrook license renewal and the Fermi 3 COL are also different. In short, the Intervenors have completely failed to allege any application-specific deficiency relating to the Fermi 3 COL. A contention that does not directly controvert a position taken by the applicant in the application should be dismissed. *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. The New Contention Lacks Sufficient Factual Support

Assuming *arguendo* that the New Contention can be extended to Fermi 3, 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 project. The Intervenors argue that the Task Force Report "raises significant environmental concerns in this proceeding, including that (1) the risks of operating [Fermi 3] under a [combined] license are higher than estimated in the ER and (2) [Detroit Edison's] previous environmental analysis of the relative costs and benefits of severe accident mitigation alternatives ("SAMAs") is fundamentally inadequate because those measures are, in fact, necessary to assure adequate protection of the public health and safety and, therefore, should be imposed without regard to their cost."[11] New Contention at 3. The New Contention, however, does not challenge any specific portion of the Fermi 3 COL application, including the Environmental Report ("ER"), or the Design

[11] For the purposes of this response, we have replaced references to Seabrook with references to Fermi 3. However, as noted above, the Intervenors' failure to specifically link the Seabrook contention to the Fermi 3 application renders the contention inadmissible.

Certification application for the ESBWR, which is incorporated by reference into the Fermi 3 COL application.

Both the Fermi 3 ER and the ESBWR Design Certification 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* ER at Chapter 7; *see also* ESBWR DC at Chapters 15 and 19; "Licensing Topical Report ESBWR Severe Accident Mitigation Design Alternatives," NEDO-33306, Revision 4, dated October 25, 2010 (ADAMS Accession No. ML102990433) ("ESBWR SAMDA Topical Report").[12] The Intervenors 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 any substantive citations to the Fermi 3 COL application. Neither the Intervenors nor Dr. Makhijani have specifically pointed to any new environmental impact that is unique for the ESBWR or to Fermi 3. The Intervenors have not, for example, identified any new seismic or flooding risks at Fermi 3. Nor have they challenged any of the specific SAMDAs or SAMAs in the ESBWR design certification application or the Fermi 3 COL application. In fact, the Makhijani Declaration on which the Intervenors rely never once mentions Fermi 3. 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).

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[12] 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). Chapter 15 of the ESBWR DC addresses transient and accident analyses, and Chapter 19 includes the probabilistic risk assessment and severe accident evaluation. The ESBWR SAMDA Topical Report addresses SAMDAs for the ESBWR design.

The Makhijani Declaration does mention the ESBWR. *See* Makhijani Declaration at ¶¶ 17-21. The Declaration asserts that "ESBWR need[s] to be reviewed in the context of [its] ability to mitigate the environmental impacts of station blackout lasting more than 72 hours" and that the NRC must revisit the ESBWR design because it has a "buffer spent fuel pool in roughly the same position relative to the reactor as the Mark I design reactors." *Id*. at ¶¶ 17-18. However, Detroit Edison has addressed mitigation of severe accidents as required by 10 C.F.R. §§ 52.47(a)(23) and 52.79(a)(38). *See, e.g.*, NRC 3-09-0046, "Detroit Edison Company Submittal of Fermi 3 Mitigative Strategies Description and Plans for Loss of Large Areas (LOLA) of the Plant Due to Explosions or Fire," dated December 21, 2009; NRC 3-11-0024, "Detroit Edison Company Response to NRC Request for Additional Information Letter No. 60," dated July 12, 2011 (revised LOLA plan). The LOLA submittals address, for example, pre-staging of equipment to address station blackouts that exceed 72 hours. The Declaration does not acknowledge these existing requirements, much less explain how the Detroit Edison submittals are inadequate. Moreover, issues regarding the buffer spent fuel pool design are within the scope of the ESBWR design certification. As discussed above, issues that are the subject of an ongoing rulemaking cannot be challenged in individual proceedings.

Ultimately, the Intervenors bear 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 Intervenors (and the Makhijani Declaration) 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 ER or the ESBWR DC. The Intervenors' generalized assertions that the Task

Force Report raises a "concern" regarding the manner in which the operation of Fermi 3 impacts public health and safety (New Contention at 13) is too vague and insufficient to support an admissible contention. Likewise, the Declaration fails to dispute the Fermi 3 COL application or identify a genuine issue with the ESBWR design certification. The proposed New Contention is therefore inadmissible for failing to demonstrate a genuine dispute with the COL application 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 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.[13] And, any regulatory actions that

[13] The Intervenors want Detroit Edison 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

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.[14] Accordingly, there is no showing of a genuine dispute with the Fermi 3 COL application on a material environmental issue.

3. There is No Demonstration of Significant New Environmental Information

The New Contention also asserts that the ER 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 Intervenors argue that the Task Force Report's findings point to a need for a reevaluation of the environmental consequences of severe accidents. However, the

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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).

[14] 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).

New Contention and the Makhijani Declaration do not establish that the assessments of environmental impacts will change in any adverse way. Intervenors' 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 15) do not present a different picture of the environmental impacts of the proposed Fermi 3. In fact, the Task Force Report does not discuss environmental impacts at all.

The New Contention simply presumes, without demonstrating it to be the case, that Fukushima-type releases could occur at Fermi 3, and that the environmental consequences would be worse than previously analyzed for severe accidents.[15] In particular, the New Contention does not present any new information regarding flooding or seismic risk at Fermi 3. Nor does it discuss any specific environmental consequences at the Fermi 3 site.[16] Again, there is neither factual information nor expert support to suggest that risks of a design basis accident or severe accident at Fermi 3 would differ from those described in the ER, based on any insights from Japan.[17]

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[15] 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).

[16] As noted above, the issues raised in the proposed new contention and supporting declaration are generic issues that are not specific to either Fermi 3 or the ESBWR. 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).

[17] 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

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 Intervenors argue that the ER must be supplemented to address the Task Force's recommendation to incorporate severe accidents into the design basis. But, as discussed above, the ER already considers both design basis and "beyond-design-basis" (*i.e.*, severe) accidents. *See* ER at Chapter 7; *see also* ESBWR DC at Chapters 15 and 19; ESBWR SAMDA Topical Report. And, as also noted above, the Intervenors have not demonstrated that any required information is missing from the ER (or from the ESBWR DC). In the absence of any specific alleged omission or inaccuracy in the ER, 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 (not applicable to ESBWRs), enhance spent fuel pool makeup capability and instrumentation, and strengthen and integrate onsite emergency response capabilities. New Contention at 26. As already discussed, the Intervenors make no attempt to show that these issues have not been considered in the ESBWR design or in the Fermi 3 COL, or even to detail

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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.

what additional specific mitigation measures might be available. The ESBWR design certification application and the draft Environmental Assessment include an evaluation of a number of mitigation measures for the ESBWR design.[18] The COL application also addresses the Emergency Plan, Emergency Operating Procedures ("EOPs"), Severe Accident Management Guidelines ("SAMGs"), and Extensive Damage Mitigation Guidelines ("EDMGs") mentioned in the New Contention.[19] And, other issues raised in the Contention are already incorporated into the ESBWR design. For example, the ESBWR design explicitly addresses actions and equipment to address station blackouts and other events that exceed 72 hours.[20] The Intervenors

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18 *See* ESBWR SAMDA Topical Report. In total, the ESBWR DC considered 177 candidate design alternatives based on a review of design alternatives for other plant designs, including the license renewal environmental reports and the GEH Advanced Boiling-Water Reactor ("ABWR") SAMDA study.

19 *See, e.g.*, Fermi 3 Emergency Plan (COLA Part 5) which describes the infrastructure for marshalling additional resources from offsite agencies (*e.g.*, portable pumps and generators); NRC3-09-0046, "Detroit Edison Company Submittal of Fermi 3 Mitigative Strategies Description and Plans for Loss of Large Areas (LOLA) of the Plant Due to Explosions or Fire," dated December 21, 2009 (SAMGs and EDMGs); NRC3-11-0024, "Detroit Edison Company Response to NRC Request for Additional Information Letter No. 60," dated July 12, 2011 (including revised LOLA plan). The LOLA submittals address, for example, pre-staging of equipment (*e.g.*, portable generator and pumper truck) to provide external makeup water and energize electrical busses as described above to address station blackouts that exceed 72 hours, consistent with the recommendations of the Task Force Report. *See* Task Force Report at 71-72.

20 *See* ESBWR DCD Section 19A. A station blackout is resolved by restoring any one offsite AC power source or by starting any of the four diesel generators (two ancillary and two plant investment protection diesel generators) described in the DCD. These diesels are protected from external events (*e.g.*, seismic, flooding, tornadoes) as described for Regulatory Treatment of Non-Safety System ("RTNSS") equipment. Fuel supplies are sized for seven days post event. Restoration of any of the sources restores the ability to makeup water to the ultimate heat sink and spent fuel pools, and continues to power instrumentation beyond the minimum of 72 hours battery capability. This includes power for the safety-related spent fuel pool level monitoring instrumentation. In the event that power cannot be restored using these diesel generators, the dedicated RTNSS diesel fire pump and fire water source is designed to provide makeup water to the ultimate heat sink and spent fuel pool. As described in the DCD, these portions of the fire protection system are protected from natural phenomena and the diesel fire pump does not rely on

have not raised any specific dispute with these portions of the application that would warrant supplementation of the ER.

Moreover, additional mitigation measures that may result from the Fukushima review process would not materially impact the environmental analysis in the ER. 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.[21] 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).

AC electric power. If the diesel fire pump is not available, the design includes external connections for a small portable pump which is sufficient to provide makeup to the ultimate heat sink and spent fuel pool.

[21] *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).

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 ER discussions of design basis accidents or severe accidents, or the adequacy of SAMDAs considered in the ESBWR design, could (and should) have been submitted as part of an initial petition to intervene. In order for a proposed contention to be timely, the 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 Fermi 3 ER or the ESBWR 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 Fermi 3 application (and the ESBWR design certification).[22] Moreover, the applicable regulations and approach to treatment of design basis accidents, severe accidents, and SAMAs also has not changed in a material way since the Fermi 3 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.

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[22] 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.

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 ESBWR design certification application or in the ER, could have been raised at the outset of the proceeding. The proposed New Contention has not linked the Task Force Report recommendations to any specific deficiency in the Fermi 3 COL application or the ESBWR design certification application.

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 New 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. The New Contention was not even tailored to the Fermi 3 application, incorporating instead a proposed Seabrook license renewal contention. Although the New Contention was accompanied by Dr. Makhijani's declaration, that declaration did not mention Fermi 3 or suggest any potentially cost-beneficial SAMAs that should be considered. 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 reject 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. Further, the New Contention does not satisfy the Commission's criteria for consideration or admission of late-filed contentions in 10 C.F.R. § 2.309(c)(1), (f)(1), or (f)(2).

Respectfully submitted,

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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:	)	
	)	
THE DETROIT EDISON COMPANY	)	Docket No. 52-033-COL
	)	
(Fermi Nuclear Power Plant, Unit 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO PROPOSED NEW CONTENTION" 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 the following persons.

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