UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	
(WATTS BAR NUCLEAR PLANT UNIT 2)	)	September 6, 2011

TENNESSEE VALLEY AUTHORITY'S ANSWER IN OPPOSITION TO PROPOSED CONTENTION REGARDING FUKUSHIMA TASK FORCE REPORT

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I. INTRODUCTION

On August 11, 2011, Southern Alliance for Clean Energy ("SACE"), filed with the Atomic Safety and Licensing Board ("Board"), a motion to admit a proposed new contention that claims to address the safety and environmental implications of the NRC Task Force Report, "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident" (July 12, 2011) ("Task Force Report").[1] SACE also filed a Rulemaking Petition that includes a request for suspension of this proceeding.[2] The Tennessee Valley Authority ("TVA") is filing this Answer in opposition to the

[1] Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) ("Motion"); Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) ("Contention"); and Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011) ("Makhijani Declaration").

[2] Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Aug. 11, 2011) ("Rulemaking Petition").

Motion pursuant to 10 C.F.R. § 2.309(h)(1) and consideration of the Rulemaking Petition by the Board.

As discussed below, the Motion should be denied because the new contention fails to satisfy either the NRC's timeliness or admissibility requirements. Most fundamentally, the new contention is an impermissible challenge to current NRC regulations and requirements, and seeks to litigate matters that the Commission already is addressing on a generic basis.

Further, SACE mischaracterizes the Task Force Report, and its interpretation of NRC's obligation to consider new and significant information is inconsistent with applicable legal precedents. In particular, SACE fails to demonstrate that anything in the Task Force Report constitutes such information within the meaning of NRC regulations and case law implementing the National Environmental Policy Act ("NEPA"). Furthermore, nothing in the Task Force Report or SACE's supporting declaration challenges any specific information in TVA's application for an Operating License (OL) for Watts Bar Unit 2. For all of these reasons, the Motion and New Contention should be denied.

SACE's Rulemaking Petition, and its request for suspension of this proceeding, are both within the purview of the Commission, and not within the Board's jurisdiction. Furthermore, given the absence of any immediate threat to public health and safety, SACE also failed to demonstrate that taking the drastic action of suspending this proceeding is warranted. Consequently, the Board should disregard the Rulemaking Petition.

II. BACKGROUND

A. The Fukushima Near-Term Task Force and the Status of Efforts to Assess Its Recommendations

In response to the events at the Fukushima Daiichi site in Japan following an earthquake and tsunami, NRC established a Task Force of six senior-level members of the Staff.[3] The objective of the Task Force was to review relevant NRC regulatory requirements, programs, and processes, and recommend whether near-term improvements should be made to NRC's regulatory structure.[4] The Task Force, after an evaluation of the overall regulatory approach for ensuring safety, unequivocally found:

- The current regulatory approach has served the Commission and the public well and allows the Task Force to conclude that a sequence of events like those occurring in the Fukushima accident is unlikely to occur in the United States and could be mitigated, reducing the likelihood of core damage and radiological releases; and
- In light of the low likelihood of an event beyond the design basis of a U.S. nuclear power plant and the current mitigation capabilities at those facilities, continued operation and continued licensing activities do not pose an imminent risk to the public health and safety and are not inimical to the common defense and security.[5]

The Task Force also made recommendations for improving the current NRC regulatory program, including having NRC establish "an enhanced regulatory framework," which would treat beyond-design-basis events and severe accidents more systematically, by developing "extended design-basis" requirements.[6] In addition, the Task Force recommended that NRC place more emphasis on defense-in-depth by initiating a number of rulemakings in areas such as seismic and flooding protection; station blackout; spent fuel pool makeup and instrumentation;

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3 Task Force Report at 82.

4 *Id.* at 80.

5 *Id.* at 18.

6 *Id.* at viii.

and emergency response and preparedness.[7] The Task Force Report does *not*, however, discuss NEPA or the NRC's regulations implementing NEPA (10 C.F.R. Part 51).

The Task Force recommendations are just that—recommendations. They have no force of law or binding effect on this or any other licensing proceeding. The Commission has directed the NRC Staff to review and assess these recommendations.[8] This process will include broader involvement from stakeholders, Staff experts, and the Advisory Committee on Reactor Safeguards ("ACRS"), and will provide the Commission with recommendations regarding whether and when the Task Force recommendations should be implemented. This review and assessment of Task Force recommendations is ongoing, and no rulemakings or orders have been initiated or issued. The current regulations remain in place.

B. Watts Bar Unit 2 Operating License Proceeding and SACE's New Contention

The NRC issued a Construction Permit ("CP") for Watts Bar Unit 2 in 1973.[9] Following TVA's subsequent requests, the latest on May 8, 2008, the NRC extended the CP to March 31, 2013.[10] In response to the Commission's May 1, 2009 Hearing Notice for the Watts Bar Unit 2 Operating License ("OL") proceeding, SACE (along with several other petitioners that were not admitted as parties to the proceeding) filed a petition to intervene.[11] That petition proposed seven contentions, but only two were admitted.[12] One contention remains in litigation, regarding

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7 *See id.* at 30, 38, 46, 50, 56.

8 *See* Commission Staff Requirements Memorandum ("SRM") Regarding SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan at 1 (Aug. 19, 2011), *available at* ADAMS Accession No. ML112310021 ("SRM on SECY-11-0093"). A copy of SRM on SECY-11-0093 is provided as Attachment 2.

9 *See* Watts Bar Nuclear Plant; Notice of Issuance of Construction Permits, 38 Fed. Reg. 3001 (Jan. 31, 1973).

10 *See* In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2); Order, 73 Fed. Reg. 39,995, 39,996 (July 11, 2008).

11 *See Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-09-26, 70 NRC 939, 945-46 (2009).

12 *See id.* at 946.

aquatic environmental impacts.[13] On September 6, 2011, the NRC Staff stated that it expects to issue the final supplement to NUREG-0498, Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant Units Nos. 1 and 2, (December, 1978), in May 2012, and the final supplement to NUREG-0847, Safety Evaluation Report Related ("SSER") to the Operation of Watts Bar Nuclear Plant, Units 1 and 2, (June 1982) in March 2012.[14] The NRC Staff also stated that it may issue one or more supplements as TVA completes construction, and that it anticipates such supplements will be issued no later than December 2012. Therefore, the Watts Bar Unit 2 OL proceeding is not expected to be completed before late 2012, with operations to commence some time thereafter.[15]

Beginning on April 14, 2011, and continuing through April 21, 2011, several individuals, SACE, and other organizations filed with the Commission, on this docket and the dockets of several other ongoing licensing proceedings, an Emergency Petition to Suspend Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident ("Emergency Petition").[16] Both TVA and

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[13] *See id.* at 988 (admitting aquatic impacts contention); Licensing Board Memorandum and Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) at 2 (June 2, 2010) (unpublished) (holding contention regarding federal and state permits to be moot).

[14] NRC Staff's September 6, 2011 Bimonthly Report Regarding the Schedule for Review of the Watts Bar Number 2 License Application (Sept. 6, 2011).

[15] *See* Memorandum from E. Leeds, Director, Office of Nuclear Reactor Regulation, to the Commission, Fourth Report on the Status of Reactivation of Construction and Licensing For Watts Bar Nuclear Plant, Unit 2, SECY-11-0102 (Jul. 28, 2011), Encl. 2, *available at* ADAMS Accession No. ML111530391.

[16] 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 (original version dated Apr. 14, 2011; corrected version dated Apr. 18, 2011); Declaration of Dr. Arjun Makhijani in Support of 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 (Apr. 19, 2011) ("Makhijani Suspension Petition Declaration"), *available at* ADAMS Accession No. ML111091167.

the NRC Staff, in their respective answers, opposed the Emergency Petition, which is now pending before the Commission.[17]

As noted above, on August 11, 2011, SACE filed a motion to admit a proposed new contention that alleges:

> The [final environmental impact statement ("FEIS")] for Watts Bar Unit 2 fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.[18]

SACE also filed a Rulemaking Petition both with the Secretary and the Board requesting the rescission of all regulations in 10 C.F.R. Part 51 that make generic conclusions about the environmental impacts of severe reactor and spent fuel pool accidents. That Rulemaking Petition also requests the suspension of all licensing proceedings until NRC considers the environmental impacts of its licensing decisions and of the Task Force Report.[19]

III. LEGAL STANDARDS

A. Timeliness

A new contention must meet the requirements of 10 C.F.R. § 2.309(f)(2), which provides that a petitioner may submit a new contention only with leave of the presiding officer upon a showing that:

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[17] *See* Tennessee Valley Authority's Answer in Opposition to Emergency Petition to Suspend Licensing Proceedings (May 2, 2011); NRC Staff Answer to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (May 2, 2011); *see also* Petitioners' Motion For Modification of the Commission's April 19, 2011, Order to Permit a Consolidated Reply (May 6-9, 2011); Petitioners' Reply to Responses To 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 (May 6-9, 2011); Tennessee Valley Authority's Answer Opposing Petitioners' Motion to Permit a Consolidated Reply (May 16, 2011); NRC Staff's Answer to Petitioners' Motion for Modification of the Commission's April 19, 2011, Order to Permit a Consolidated Reply (May 16, 2011).

[18] Contention at 4.

[19] *See* Rulemaking Petition at 3.

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

SACE's Motion also addresses the eight part balancing test under 10 C.F.R. § 2.309(c).[20] Where applicable, 10 C.F.R. § 2.309(c)(1) imposes the following eight-factor balancing test for non-timely filings:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

[20] *See* Motion at 4-6 (citations to the Motion's unnumbered pages are to its PDF pages). The Commission has pointed out that where a party to a proceeding seeks admission of a new contention, "consideration of the contention's admissibility is governed by the provisions of § 2.309(f)(2), as well as the general contention admissibility requirements of § 2.309(f)(1)." *Pa'ina Haw., LLC* (Materials License Application), CLI-10-18, 72 NRC _,, slip op. at 40 n. 171 (July 8, 2010). To be conservative, however, TVA also evaluates the timeliness requirements of both § 2.309(c) and § 2.309(f)(2), as raised by SACE.

Where Section 2.309(c) applies, the burden also is on the petitioner to demonstrate "that a balancing of these factors weighs in favor of granting the petition."[21] The eight factors in Section 2.309(c)(1) are not of equal importance—the first factor, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[22] If good cause is lacking, then a "compelling showing" must be made as to the remaining factors to outweigh the lack of good cause.[23] After good cause, the likelihood of substantial broadening of the issues and delay of the proceeding (factor vii) and the extent to which the petitioner's participation may assist in developing a sound record (factor viii) are the most significant factors.[24] Factors v (availability of other means) and vi (interests represented by other parties) are entitled to the least weight.[25] Accordingly, application of those criteria also is addressed below.

B. Contention Admissibility

Apart from the criteria set forth in 10 C.F.R. §§ 2.309(c) and (f)(2), any new contention also must meet all of the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i) to (vi).[26] These requirements are discussed in detail in TVA's August 7, 2009

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21 *Texas Utils. Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988); *see also Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC __, slip op. at 5 & n.19 (Mar. 10, 2011) (imposing higher standards for new contentions submitted after the regulatory deadline).

22 *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-126 (2009);("[Section 2.309(c)(1)] sets forth eight factors, the most important of which is 'good cause' for the failure to file on time. Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available.") (*citing Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008); *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164-165 (1993)).

23 *Diablo Canyon*, CLI-08-1, 67 NRC at 6; s*ee also Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 244 (1986).

24 *See, e.g.*, *Project Mgmt. Corp.* (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394 (1976).

25 *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-8, 51 NRC 146, 154 (2000) (*citing Braidwood*, CLI-86-8, 23 NRC at 244-45).

26 *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993); *see also Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Neb.), CLI-09-9, 69 NRC 331, 364 (2009) (stating that the timeliness of the late-filed contention did not need to be evaluated because the contention did not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)). That section

Answer opposing the initial Petition to Intervene, and a brief discussion of the key contention admissibility requirements is set forth below.

The Commission's rules on contention admissibility are "strict by design."[27] The rules were "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[28] "Mere 'notice pleading' is insufficient" under NRC's current contention admissibility rules.[29] As the Commission has stated, "we require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them."[30] Therefore, the failure to comply with any one of the six admissibility criteria is grounds for rejecting a new contention.[31]

The purpose of these six criteria is to focus litigation on concrete issues and result in a clearer and more focused record for decision.[32] The Commission has stated that it should not have to expend resources on the hearing process unless there is an issue that is susceptible to resolution in an NRC hearing.[33] Thus, a licensing proceeding is not the proper forum to attack

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specifies that each contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

27 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

28 *Id.* (*citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

29 *Fansteel, Inc.* (Muskogee, Okla. Site), CLI-03-13, 58 NRC 195, 203 (2003).

30 *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

31 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

32 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

33 *Id.*

applicable statutory requirements or to challenge the basic structure of the Commission's regulatory process.[34] Accordingly, a contention that attacks an NRC rule or regulation must be rejected.[35] Similarly, the Commission will "not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission."[36]

IV. ARGUMENT

A. The Motion Does Not Satisfy the Requirements for New Contentions Under 10 C.F.R. § 2.309(f)(2) or the Requirements for a Nontimely Petition Under 10 C.F.R. § 2.309(c)

As discussed below, SACE has not demonstrated that the proposed new contention has been submitted in a timely fashion based on material information that was not previously available, as required by 10 C.F.R. § 2.309(f)(2). Similarly, SACE has failed to demonstrate the "good cause" that would be required under 10 C.F.R. § 2.309(c)(1)(i), nor has it made a "compelling showing" as to the remaining factors to outweigh the lack of good cause.[37] Accordingly, 10 C.F.R. § 2.309(f)(2) requires rejection of the contention, and application of the factors under 10 C.F.R. § 2.309(c)(1) also should result in rejection of the Motion and new contention.

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[34] *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Unit 2 & 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974); *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-07-11, 65 NRC 41, 57-58 (2007) (*citing Peach Bottom*, ALAB-216, 8 AEC at 20).

[35] *See, e.g., Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 89 (1974); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

[36] *Oconee*, CLI-99-11, 49 NRC at 345 (*quoting Douglas Point*, ALAB-218, 8 AEC at 85).

[37] *See Braidwood*, CLI-86-8, 23 NRC at 244.

1. SACE Has Not Shown the New Contention Has Been Submitted In a Timely Fashion or That There is Good Cause for Failing to File on Time

Coming from an existing party to this proceeding, SACE's Motion falls under 10 C.F.R. § 2.309(f)(2), which governs all new and amended contentions filed after the initial filing.[38] The required showing of timeliness under Section 2.309(f)(2) is similar to the first factor identified in Section 2.309(c)(1), whether "good cause" exists for the failure to file on time. For the following reasons, the instant Motion is untimely and fails to establish that there is good cause.[39]

SACE asserts that its Motion is timely because it was filed within 30 days of the issuance of the Task Force Report, and that "[b]efore issuance of the Task Force Report, the information material to the contention was simply unavailable."[40] SACE does not, however, specify the previously unavailable material information that was allegedly first revealed by the Task Force Report, and was not available when it submitted its Emergency Petition.

The closest SACE comes to specifying such "new information" is its statement that:

> The Task Force, a group of highly qualified and experienced Nuclear Regulatory Commission ("NRC" or the "Commission") staff members selected by the Commission to evaluate the regulatory implications of the Fukushima Dai-ichi accident, has issued a report recommending the NRC strengthen its regulatory scheme for protecting public health and safety by increasing the scope of accidents that fall within the design "basis" and are therefore subject to mandatory safety regulation.[41]

SACE, however, does not claim that any of the facts upon which the Task Force based its recommendations were new or first revealed by the Task Force Report, or even that the Task Force

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38 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *see also Pa'ina Haw.,* CLI-10-18, slip op. at 40 n.171.

39 Some of the other seven factors are related to the nature of their right to participate, and the protection of their interests. In considering such factors, it should be recognized that the issues Petitioners seek to raise apply equally to other NRC proceedings, and are being addressed by the Commission separately from this proceeding. Consequently, SACE's interests will be protected without their participation in this proceeding.

40 Motion at 2.

41 Contention at 2-3; *see also* Motion at 3

Report revealed previously unperceived insights.[42] In particular, SACE does not make any attempt to show that the information that forms the basis for the proposed new contention is materially different from the information that formed the basis for the Emergency Petition that it filed in April 2011.

If any information in the Task Force Report is viewed as providing the basis for a new contention, the timeliness of the new contention must be judged by when the underlying information was first disclosed, not by the timing of the most recent report that discussed that information. The Commission recently explained this principle in *Vermont Yankee,* which was analogous to the instant circumstances.[43] In *Vermont Yankee*, the petitioner argued that a proposed late-filed contention was timely, in part, because it was based on information in an NRC Inspection Report. In finding that the contention was not timely, the Commission pointed out that if the allegation of deficiency in the application was true when the contention was filed, it was equally true when the application was filed, and that the discussion of these matters in a more recent NRC inspection report "does not inform the issue of timeliness."[44] Here too, SACE does not show that there have been any relevant changes in TVA's Application for an OL for Watts Bar Unit 2 ("Application"), or the available information about the construction or proposed operation of the Unit since the accident at Fukushima occurred on March 11, 2011, or since SACE and others filed their Emergency Petition in April 2011.

In addition, statements in SACE's own filings contradict its assertion that the contention is founded on new information. For example, SACE states:

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42 In fact, Petitioners assert that similar recommendations were made 30 years ago following the Three Mile Island accident, and did not result in new regulatory requirements. Contention at 6-7.

43 *Vt. Yankee*, CLI-11-2, slip op. at 8-9; *see also N. States Power Co.*(Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC __, slip op. at 13-18 (Sept. 30, 2010).

44 CLI-11-2, slip op. at 9.

> In the aggregate, these contentions, rulemaking comments, and the rulemaking petition followup on the Emergency Petition's demand that the NRC comply with NEPA by addressing the lessons of the Fukushima accident in its environmental analyses for licensing decisions. Having received no response to their Emergency Petition, the signatories to the Emergency Petition now seek consideration of the Task Force's far-reaching conclusions and recommendations in each individual licensing proceeding, including the instant case.[45]

Thus, the SACE contention essentially asserts that the issues it seeks to raise with the proposed new contention are simply an alternative approach to raising the same issues it previously raised some four months ago in the Emergency Petition, which is currently pending before the Commission. Similarly, the Makhijani Declaration submitted by SACE with its Motion and contention references the April 11, 2011 Makhijani Suspension Petition Declaration and states that "[t]he purpose of my declaration is to explain why the Task Force Review provides further support for my opinions."[46] In effect, the current Makhijani Declaration asserts that the Task Force Report confirms the opinions expressed in the Makhijani Suspension Petition Declaration. Thus, both SACE's contention and the Makhijani Declaration are based on information that was known to them in April 2011.

Consequently, SACE has not met its burden to show that the proposed new contention was submitted in a timely fashion based on when material new information became available. Similarly, SACE has not shown that there is good cause for its late filing.

2. SACE Has Not Made a Compelling Showing on the Remaining Factors

If all of the factors listed in 10 C.F.R. § 2.309(c)(1) are considered, then because SACE failed to show "good cause" under 10 C.F.R. § 2.309(c)(1)(i), it would need to demonstrate that

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45 Contention at 4.

46 Makhijani Declaration at 2.

the remaining factors weigh heavily in its favor. It does not. For example, although SACE asserts that no other means exist for SACE to protect its interests,[47] it fails to acknowledge that, through submission of the Emergency Petition and the Rulemaking Petition, it already has taken steps outside this proceeding to protect its interest in this proceeding. Contrary to SACE's position, the Commission's consideration of those petitions provides adequate means to protect SACE's interests.[48] Obviously, despite SACE's assertions that judicial review would only be available to it through its litigation of the proposed new contention in this proceeding,[49] judicial review also is available for participants in rulemaking proceedings.[50] Thus, the considerations covered by 10 C.F.R. § 2.309(c)(1)(v) weigh against admitting the proposed contention.

With respect to 10 C.F.R. § 2.309(c)(1)(vii), SACE implicitly concedes that admitting the proposed new contention would broaden the issues and delay the proceeding, but argues that this factor cannot be relied upon to deny its Motion because of NRC's duty to comply with NEPA.[51] Contrary to SACE's position, there is no NEPA exception provided in 10 C.F.R. § 2.309(c)(1)(vii). As SACE recognizes, the proposed new contention is not within the scope of the currently admitted aquatic contention, and would significantly broaden the issues and delay this proceeding. Thus, the considerations covered by 10 C.F.R. § 2.309(c)(1)(vii) also weigh against admitting the proposed new contention.

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47 Motion at 5-6.

48 *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565-66 (2005) (finding that opportunity to petition for rulemaking and opportunity to comment on pending petition for rulemaking provides a means for petitioner to protect its interests).

49 Motion at 5-6 (§ II.B.5).

50 *See* 42 U.S.C. § 2239(b) (2006).

51 Motion at 6 ("While SACE's participation may broaden or delay the proceeding . . . ."). Note that *Marsh v. Or. Nat. Res. Council*, 490 U.S. 460 (1989), which is cited by SACE, addresses agency NEPA duties, but does not discuss the rights of parties to participate in hearings or the scope of hearings conducted by the NRC or any other agency.

Finally, SACE asserts that "SACE will assist in the development of a sound record, as their contention is supported by the expert opinion of a highly qualified expert, Dr. Arjun Makhijani."[52] The Makhijani Declaration, however, only contains generalized assertions about NRC regulatory requirements and processes, and does not even mention Watts Bar Unit 2 or indicate that it was prepared for submission in this proceeding. Accordingly, the Makhijani Declaration does not show that he has any familiarity with Watts Bar Unit 2. Consequently, SACE has not shown that the considerations covered by 10 C.F.R. § 2.309(c)(1)(viii) would weigh in support of admitting the proposed new contention.

The other factors in 10 C.F.R. § 2.309(c)(1) are less important and therefore cannot outweigh SACE's failure to demonstrate good cause or meet factors v, vii, and viii, even if they weighed in SACE's favor.[53] Having failed to establish good cause and make a compelling showing on three of the remaining seven factors, the balance of the untimely factors weighs against SACE. Therefore, SACE does not meet 10 C.F.R. § 2.309(c)(1) and its Motion should be denied.

B. SACE's Proposed New Contention Does Not Satisfy the NRC's Contention Admissibility Requirements in 10 C.F.R. § 2.309(f)(1)

As quoted above, SACE's new contention states:

> The [final environmental impact statement ("FEIS")] for Watts Bar Unit 2 fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.[54]

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52 Motion at 6.

53 *See, e.g.*, *Diablo Canyon*, CLI-08-1, 67 NRC at 8; *Comanche Peak*, CLI-93-4, 37 NRC at 165.

54 Contention at 4. In the contention "the ER" apparently refers to TVA's Final Supplemental Environmental Impact Statement related to the Completion and Operation of Watts Bar Nuclear Plant Unit 2, Tennessee Valley Authority ((June 2007) ("FSEIS"), *available at* ADAMS Accession No. ML11215A100), which is the functional equivalent of an applicant's environmental report for this proceeding. It is not clear, however, whether the contention's reference to FEIS refers to TVA's FSEIS, the NRC's "Final Environmental Statement

According to SACE, the NRC Task Force Report recommends that the Commission establish new safety regulations for severe accidents because the Task Force found that "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment throughout the licensed life of nuclear reactors."[55]

SACE claims this recommendation constitutes "new and significant information" that must be considered in a supplemental EIS.[56] In SACE's view, this information is "new" because the Task Force Report was only released recently and is "significant" because of the "extraordinary level of concern" over the safe operation of the Watts Bar Unit 2.[57] SACE further argues that the imposition of severe accident mitigation measures is "significant" from a NEPA perspective because (1) such measures may have been rejected in the EIS as too costly but may now be required, improving plant safety; and (2) consideration of the economic costs of mandatory mitigation measures could impact the overall cost-benefit analysis in the EIS.[58]

As demonstrated below, this proposed contention also should be dismissed because it challenges the adequacy of NRC's regulatory programs and raises issues that are likely to become the subject of rulemaking, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii); calls for consideration of issues that are not material to NRC's NEPA review, contrary to 10 C.F.R. § 2.309(f)(1)(iv); lacks adequate factual support and mischaracterizes the Task Force Report, contrary to 10 C.F.R. § 2.309(f)(1)(v); and fails to provide sufficient information to demonstrate a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

Related to the Operation of Watts Bar Nuclear Plant, Units 1 and 2" (NUREG-0498, Supp. 1(Apr. 1995)), or some other document.

55 Contention at 2.

56 *Id.* at 11.

57 *Id.* at 10-11.

58 *Id.* at 14.

1. The Proposed Contention Challenges the Adequacy of Existing NRC Regulations, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

The proposed contention should be rejected because it constitutes a challenge to the adequacy of NRC regulations. Such challenges are specifically prohibited by 10 C.F.R. § 2.335(a).[59] SACE claims that the Task Force Report found "existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[60] As discussed below, the Task Force Report made no such finding. Nonetheless, this claimed inadequacy in NRC's regulatory framework is the central reason on which SACE bases its claim that additional NEPA analysis is required.[61] The Commission has held that "compliance with applicable NRC regulations ensures that public health and safety are adequately protected in areas covered by the regulations."[62] Because this contention essentially advocates stricter requirements than agency rules impose (*i.e.*, analyses of additional severe accident mitigation regulations), it should be rejected as outside the scope of this proceeding in accordance with 10 C.F.R. § 2.309(f)(1)(iii).[63]

2. The Proposed Contention Raises Issues That Are Likely to Become the Subject of Rulemaking, Contrary to 10 C.F.R. § 2.309(f)(1)(iii)

The proposed new contention also should be rejected because it attempts to litigate issues that are likely to be part of future NRC rulemaking. Commission precedent dictates that a contention that raises a matter that is, or is about to become, the subject of a rulemaking, is

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59 *See Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC __, slip op. at 38 (Mar. 11, 2010).

60 Contention at 2.

61 *See* Contention at 8, 12.

62 *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-19, 60 NRC 5, 12 (2004).

63 *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

outside the scope of a licensing proceeding and, thus, does not provide the basis for a litigable contention.[64]

The NRC Task Force Report consists of recommendations to the Commission—none of which has been adopted by the NRC as a regulatory requirement.[65] The Task Force specifically acknowledged that several rulemaking activities would be necessary to implement its recommendations and suggested such a path to the Commission.[66] SACE apparently also agrees that the issues raised in the proposed new contention may be appropriate for generic consideration in a rulemaking and has even submitted its own Rulemaking Petition.[67] SACE, however, may not seek to litigate issues that are being addressed by the Commission generically as part of a rulemaking process resulting from the Task Force Report.[68] Therefore, the proposed

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64 *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC __, slip op. at 2-3 (July 8, 2010); *Oconee*, CLI-99-11, 49 NRC at 345 (*citing Douglas Point*, ALAB-218, 8 AEC at 85) (holding that a contention was inadmissible, in part, because the Commission had directed the NRC staff, in a Staff Requirements Memorandum (SRM), to proceed with rulemaking on the topic of the proposed contention).

65 *See, e.g.*, Commissioner Svinicki Notation Votes on SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan, at 1-2 (July 19, 2011), *available at* ADAMS Accession No. ML112010167 ("The SECY paper itself provides no NRC staff view of the Task Force Report. Lacking the NRC technical and programmatic staff's evaluation (beyond that of the six NRC staff members who produced the Task Force Report), I do not have a sufficient basis to accept or reject the recommendations of the Near-Term Task Force. . . . Executive Order 13579, on the topic of 'Regulation and Independent Regulatory Agencies' states that wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. In that vein, the delivery of the Near-Term Task Force Report is not the final step in the process of learning from the events at Fukushima. It is an important, but early step. Now, the conclusions drawn by the six individual members of the Near-Term Task Force must be open to challenge by our many stakeholders and tested by the scrutiny of a wider body of experts, including the [Advisory Committee on Reactor Safeguards], prior to final Commission action."); *see also* SRM-SECY-11-0093 - Near-Term Report and Recommendations for Agency Actions Following the Events in Japan at 1 (Aug. 19, 2011) *available at* ADAMS Accession No. ML112310021 (directing the NRC staff to review and assess the Task Force Report's recommendations for the purpose of providing the Commission with options and recommendations) and SRM-COMWDM-11-0001/COMWCO-11-0001 - Engagement of Stakeholders Regarding the Events in Japan at 1 (Aug. 22, 2011), *available at* ADAMS Accession No. ML112340693 (directing the NRC Staff to obtain stakeholder input on the recommendations provided in the Task Force Report).

66 *See* Task Force Report at x.

67 *See* Contention at 3, 18.

68 *See Minn. v. NRC*, 602 F.2d 412, 419 (D.C. Cir. 1979) (upholding denial of requests for adjudicatory hearings because NRC was addressing Waste Confidence concerns in an ongoing rulemaking).

new contention should be rejected because it raises matters that are likely to be the subject of rulemaking, contrary to 10 C.F.R. § 2.309(f)(iii).

3. The Proposed Contention Misinterprets the NEPA "New and Significant" Standard for a Supplemental EIS, Failing to Raise a Material Issue of Fact or Law, Contrary to 10 C.F.R. § 2.309(f)(1)(iv)

The proposed new contention also is not admissible because it raises issues that, as a matter of law, are not material to the NRC Staff's environmental findings in this proceeding.[69] Contrary to SACE's claim, an issue is not deemed "significant" for purposes of determining the need for preparation of a supplemental EIS merely "because it raises an extraordinary level of concern."[70] Instead, pursuant to 10 C.F.R. § 51.92(a), NRC must supplement an EIS 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. In order to be significant, "new information must present 'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'"[71] SACE's definition of "significance" is not compatible with and does not satisfy the definition in 10 C.F.R. § 51.92(a). SACE, therefore, is simply

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69 The uncertainty about which document SACE intended as the FEIS in the contention is relevant here, since arguments regarding the need to supplement an EIS under NEPA due to new and significant information would apply only where an agency has issued its FES for an action. Here, although NRC issued an FEIS in 1995 that covered operation of Watts Bar Units 1 and 2, NRC already has stated that it is planning to issue a supplement related to the proposed operation of Unit 2. *See* Staff Bimonthly Report at 1. This is another reason why the issue raised by SACE's proposed new contention is not material.

70 Contention at 10-11.

71 *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, N.M. 87120), CLI-99-22, 50 NRC 3, 14 (1999) (*citing Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); *accord Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).

incorrect as a matter of law in stating that the NRC is required to supplement the EIS because the NRC Task Force recommendations may result in an extraordinary level of public concern.[72]

Nor does the proposed new contention identify any other new information that is "significant" as that term is defined pursuant to NEPA case law and NRC regulations. SACE does not point to any substantial changes relevant to environmental impacts of the proposed action that might result from the Task Force recommendations.

Although SACE argues that the assumed imposition of severe accident mitigation measures recommended in the Task Force Report would be "significant" because such measures would improve plant safety, this not a material issue.[73] To the extent that the Task Force Report recommendations become regulatory requirements, those requirements would serve to reduce the risks of environmental impacts of the project below the level currently specified in the Application. In other words, the current FSEIS would be conservative if the Commission were to adopt the Task Force recommendations; that is, implementation of the recommendations would presumably lead to increased safety and less risk of environmental harm. NEPA case law is clear—an agency need not prepare a supplemental EIS when a change will cause less environmental harm than the original project.[74]

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[72] *See Sierra Club v. Wagner*, 555 F.3d 21, 30-31 (1st Cir. 2009) (holding that potentially controversial nature of a project is not sufficient to require preparation of an EIS); *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 233-234 (5th Cir. 2006) (holding that general public opposition is insufficient to require preparation of an EIS).

[73] *See* Contention at 11.

[74] *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1221-22 (11th Cir. 2002); *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); *Township of Springfield v. Lewis*, 702 F.2d 426, 436 (3d Cir.1983) (acknowledging that changes which "unquestionably mitigate adverse environmental effects of the project do not require a supplemental EIS"); *Concerned Citizens on I-190 v. Sec'y of Transp.,* 641 F.2d 1, 6 (1st Cir. 1981) (holding that adoption of 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 England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (holding that NRC need not supplement an EIS even though the EIS did not discuss the new cooling intake location that "would have a smaller impact on the aquatic environment than would the original location"); *Alliance to Save the Mattaponi*

Furthermore, even if the Commission were to require plants to make certain design modifications, then those design modifications would no longer be mitigation alternatives but would be actual elements of the plant's design. As a result, such design provisions would not need to be considered as part of the NRC's SAMA evaluation. Accordingly, SACE's allegations regarding consideration of the potential environmental benefits of implementing the Task Force recommendations is not material to the findings that must be made in this proceeding.

SACE's citation to *Calvert Cliffs* and *Limerick Ecology Action* lends no support to its claim that the NRC must consider the Task Force recommendations in an EIS before reaching a decision in this proceeding.[75] Those cases simply hold that the NRC (and its predecessor agency, the Atomic Energy Commission) cannot avoid performing a NEPA evaluation because it has overlapping safety responsibilities under the Atomic Energy Act.[76] But here, the Application addresses the very issues SACE claims should be reevaluated in light of the Task Force Report (*i.e.*, severe accidents and SAMAs) and SACE does not identify any new information in the Task Force Report that suggests there are any deficiencies in the site-specific evaluations described in the Application in this proceeding.

In addition, SACE argues that the potential imposition of severe accident mitigation measures is "significant" from a NEPA perspective because consideration of the economic costs of mandatory mitigation measures could impact the overall cost-benefit analysis in the EIS.[77] As support for this claim, SACE references the Makhijani Declaration, which summarizes a number

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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.")

75 *See* Contention at 3 (*citing Calvert Cliffs Coordinating Comm. v, AEC*, 449 F.2d 1109, 1115 (D.C. Cir. 1971); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3d Cir. 1989)).

76 *See, e.g.*, *Limerick Ecology Action*, 869 F.2d at 730-731 (holding that the NRC cannot avoid performing a SAMDA evaluation by simply relying on its obligations under the Atomic Energy Act).

77 *See* Contention at 14.

of potential plant changes related to implementation of the Task Force's recommendations and notes that such changes *may* involve significant costs, and then argues that these costs "[show] that other alternatives such as the no action alternative and other alternative electricity production sources may be more attractive."[78] However, the Makhijani Declaration does not provide any estimate of the costs. It has long been held that a conclusory statement, even by an expert, is not a sufficient basis for a contention.[79]

In any event, these allegations regarding the economic costs of potential new regulatory requirements stemming from the Task Force Report are, as a matter of law, not material. As SACE indicated, the only reason there might be for considering these costs would be as a factor in weighing alternative means of generating baseload power.[80] As the Board already has ruled, this subject is not within the scope of this proceeding.[81] NRC regulations state that "[t]he presiding officer in an operating license hearing shall not admit contentions proffered by any party concerning need for power or alternative energy sources."[82] Moreover, the regulations also state that for operating license-stage environmental reports "[n]o discussion of need for power, or of alternative energy sources . . . is required in this report."[83] Accordingly, SACE's allegations related to economic costs raise an issue that is not legally material to this proceeding and these allegations should be rejected in accordance with 10 C.F.R. § 2.309(f)(1)(iv).

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78 *See id.* (*citing* Makhijani Declaration).

79 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

80 *See* Contention at 14.

81 *See Watts Bar*, LBP-09-26, 70 NRC at 977**.** Subsequently, the Board denied SACE's petition seeking a waiver or exemption from the relevant NRC regulations in LBP-10-12 (71 NRC __, slip op. (June 29, 2010)), and the Commission denied SACE's request for interlocutory review of the Board's ruling in CLI-10-29 (72 NRC __, slip op. (Nov. 30, 2010)).

82 10 C.F.R § 51.106(c).

83 *Id.* § 51.53(b).

4. The Proposed New Contention Lacks Adequate Factual Support and Mischaracterizes the Task Force Report and TVA's OL Application, Contrary to 10 C.F.R. § 2.309(f)(1)(v)

The proposed new contention also should be dismissed because it fails to meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v). The central premise of SACE's proposed new contention is that additional NEPA evaluations are necessary because current NRC regulations do not provide adequate protection. According to SACE, the Task Force Report supports such a view because it recommends the promulgation of "mandatory safety regulations for severe accidents"—something that "would not be logical or necessary to recommend . . . unless [the] existing regulations were insufficient to ensure adequate protection of public health, safety, and the environment."[84]

Contrary to SACE's allegations, the Task Force Report did not find that the current regulations fail to provide adequate protection. Importantly, the Task Force clearly stated that "the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented."[85] Accordingly, the Task Force Report provides no support for SACE's assertion that NRC regulations are currently somehow inadequate.[86]

SACE also incorrectly claims that the Task Force Report recommended that features to protect against severe accidents be made part of the "design basis" and that NRC regulations do not currently include severe accident mitigation requirements.[87] The Task Force actually recommended that the Commission create a new regulatory framework referred to as "extended"

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84 Contention at 2.

85 Task Force Report at 73.

86 *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995) (holding that a petitioner's imprecise reading of a document cannot be the basis for a litigable contention).

87 Contention at 6, 8.

design basis requirements.[88] Most of the elements of these "extended" design basis requirements are already contained in existing regulations (*e.g.*, 10 C.F.R. §§ 50.54(hh), 50.62, 50.63, 50.65, 50.150). As the Task Force noted, under a new framework, "current design-basis requirements . . . would remain largely unchanged" and, "by itself, would not create new requirements nor eliminate any current requirements."[89] Thus, the Task Force did not recommend significant changes to NRC's design basis requirements, and it recognized that the current regulations already include most of the elements that would be part of the recommended "extended" design basis requirements.

SACE also asserts that a few sentences from TVA's FSEIS show that:

> TVA bases its environmental analysis on the assumption that compliance with the NRC's regulatory program for protection against design basis accidents is sufficient to maintain environmental impacts from design basis accidents at an acceptable or insignificant level, and that severe accidents are too unlikely to merit inclusion in the design basis.[90]

According to SACE, the findings of the Task Force call these assumptions into question.[91] In reality, however, the sentences SACE cites merely explain the terms "design basis accidents" and "severe accidents," and do not discuss whether any severe accidents should be considered design basis accidents. In any event, the same section of the FSEIS discusses severe accident mitigation alternatives (SAMAs) and the environmental impact of accidents (including severe accidents) during operation of Watts Bar Unit 2 and, as described below, SACE does not challenge any of this specific information.

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88 Task Force Report at 22.

89 Task Force Report at 20-21.

90 Contention at 12-13.

91 *Id.* at 13.

In summary, SACE's flawed and imprecise reading of the Task Force Report and TVA's Application does not provide adequate factual support for the proposed new contention.[92]

5. The Proposed Contention Does Not Provide Sufficient Information to Show That a Genuine Dispute Exists with Respect to the Evaluation of Severe Accidents or SAMAs, Contrary to 10 C.F.R. § 2.309(f)(1)(vi)

The proposed new contention should be rejected for failing to adequately controvert relevant information in the Application. Specifically, Section 3.12.1 of TVA's FSEIS provides an updated evaluation of severe accidents. SACE does not identify any statement in the Task Force Report (or relating more generally to the Fukushima accident) suggesting there is an inaccuracy or other deficiency in these evaluations. Neither the Task Force Report nor any other information identified by SACE relating to the accident at Fukushima establishes that the risk of a severe accident with significant environmental consequences during the operation of Watts Bar Unit 2 is anything but SMALL. In fact, there is nothing in the Task Force Report that evaluates the environmental risk posed by any existing or new reactors—it provides no indication that there is or should be any change to in the core damage frequency or large release frequency for any plant.[93] As the D.C. Circuit explained in rejecting a similar argument by a petitioner regarding the need to supplement an EIS following the TMI accident, "the fact that the accident occurred does not establish that accidents with significant environmental impacts will have significant probabilities of occurrence."[94] Similarly, here, SACE fails to provide sufficient information to establish a genuine dispute with the evaluation of severe accidents in the Application.

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92 *See Ga. Tech*, LBP-95-6, 41 NRC at 300.

93 To the contrary, if the Task Force recommendations are adopted, that would have the effect of further reducing the risk of impacts discussed in the EIS.

94 *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).

Further, while the Makhijani Declaration highlights Task Force recommendations relating to station blackout, hydrogen control and mitigation, spent fuel instrumentation and makeup, emergency operating procedures, severe accident management guidelines, and extensive damage mitigation guidelines,[95] he does not take issue with how these issues are addressed in the Application.[96] Again, SACE identifies no errors in the analyses presented in the Application.

SACE also claims that the Task Force Report recommendation regarding reevaluation of seismic and flooding hazards also constitutes new and significant information relevant to environmental concerns. The adequacy of the plant to withstand extreme seismic events and flooding is demonstrated in the Application.[97] SACE presents nothing to suggest there is any deficiency in the evaluation of seismic events or flooding in the Application.

Accordingly, for the above reasons, the proposed new contention should be rejected as containing insufficient information to demonstrate the existence of genuine dispute on a material fact.

C. The Rulemaking Petition Is Not Within the Board's Jurisdiction and Fails to Demonstrate That Suspension of the Proceeding is Warranted

At the same time that SACE filed its Motion and proposed new contention, it filed a Rulemaking Petition that includes a request for suspension of this proceeding under 10 C.F.R.

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95 *See* Makhijani Declaration ¶¶ 13-24. The Makhijani Declaration's paragraph 21 also addresses issues relating to Mark I and II containments, issues that are not relevant to Watts Bar Unit 2.

96 *See* NUREG-0498, Supp. 1, Final Environmental Statement Related to the Operation of Watts Bar Nuclear Plant, Units 1 and 2, at 7-9 to 7-10 (Apr. 1995), *available at* ADAMS at Accession No. ML081430592 (Tbl. 7-4, Summary of Value/Impact Study Results (providing an overview of the SAMDA assessments of both TVA and NRC)).

97 *See* TVA, Final Supplemental Environmental Impact Statement, Completion and Operation of Watts Bar Nuclear Plant Unit 2, §§ 3.9 (Floodplains and Flood Risk), 3.10 (Seismic Effects) at 69-72 (Feb. 15, 2008) *available at* ADAMS at ML080510469.

§ 2.802.[98] Although 10 C.F.R. § 2.802(a) specifies that such petitions should be addressed to the Secretary, and SACE did so, SACE also addressed its Rulemaking Petition to the Board. The provisions of 10 C.F.R. § 2.802 delegate responsibilities for handling aspects of such petitions to various NRC officials, including the Chief, Rulemaking, Directives, and Editing Branch (§ 2.802(b)), the Director, Division of Administrative Services (§ 2.802(e) and (g)), and the Executive Director for Operations (§ 2.802(f)), it does not delegate any such responsibilities to presiding officers or Atomic Safety and Licensing Boards.

Pursuant to 10 C.F.R. § 2.802(d), a rulemaking petitioner may request *the Commission* to suspend all or any part of any licensing proceeding to which the petitioner is a party pending disposition of the petition for rulemaking. Unlike 10 C.F.R. § 2.335, which provides for the presiding officer to determine if the petitioner has met a specified standard for a waiver or exception, 10 C.F.R. § 2.802(d) contains no such delegation and does not specify such a standard. Clearly, the Commission has retained responsibility for considering suspension requests under 10 C.F.R. § 2.802(d). Consequently, the Board does not have any responsibility or jurisdiction to consider SACE's suspension request.

Finally, the Commission has made clear that it "consider[s] 'suspension of licensing proceedings a 'drastic' action that is not warranted absent 'immediate threats to public health and safety.'"[99] SACE did not demonstrate that there would be any immediate threat to public health and safety if this proceeding is allowed to proceed. The Rulemaking Petition is essentially identical to petitions that have been filed in other proceedings that are not related to this

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98 *See* Rulemaking Petition at 1.

99 *Pet. for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-1, 73 NRC __, slip op. at 3 (Jan. 24, 2011).

proceeding,[100] and does not mention any specifics about this proceeding that would justify the extraordinary relief they seek. Additionally, the Task Force Report, which serves as the sole basis for the Rulemaking Petition, specifically states that "the current regulatory approach and regulatory requirements continue to serve as a basis for the reasonable assurance of adequate protection of public health and safety until the actions set forth below have been implemented."[101] This supports the position that the NRC recently took before the United States Court of Appeals that:

> NRC's comprehensive and ongoing oversight of licensed facilities will assure that useful data and "lessons learned" from Fukushima Daiichi disaster will be absorbed by changes in NRC rules, orders, and license amendments as needed, accompanied by the public participation required by statute and regulation. This process is distinct, however, from the disposition of specific contentions admitted for hearing (or proposed for admission) in a license renewal adjudication.[102]

This statement is equally true for this OL proceeding.

Furthermore, the only change to the regulations proposed by Rulemaking Petition is that the NRC should "rescind [the] regulations in 10 C.F.R. Part 51 that make generic conclusions about the environmental impacts of severe reactor and spent fuel pool accidents and that preclude consideration of those issues in individual licensing proceedings."[103] This request cannot provide any basis to suspend this proceeding because there are no such regulations that apply to this proceeding. The only regulations in Part 51 that contain generic conclusions regarding

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100 Essentially identical petitions include the following ADAMS accession numbers: ML11223A465; ML11223A472; ML11223A345; ML11223A465; ML11223A372; ML11223A477; ML11223A472; ML11224A074; and ML11224A234; and ML11234A528.

101 Task Force Report at 73.

102 Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 17-18, *N.J. Envtl. Fed'n v. NRC*, No. 09-2567 (3d Cir. Apr. 4, 2011), *available at* ADAMS Accession No. ML110950095.

103 Rulemaking Petition at 1.

accidents in nuclear power plants are the regulations in Appendix B to Part 51, which pertains to license renewal, not to the initial issuance of OLs. Therefore, the Rulemaking Petition does not pertain to the Application for an OL for Watts Bar Unit 2, and does not constitute a sufficient basis for suspending this licensing proceeding.

Consequently, the request for suspension of this proceeding should be disregarded by the Board and summarily dismissed by the Commission.

V. CONCLUSION

As discussed above, SACE's Motion fails to satisfy any of the standards for admitting a new contention. The Motion does not satisfy the standards for new or amended contentions in 10 C.F.R. § 2.309(f)(2) or for untimely petitions under 10 C.F.R. § 2.309(c), especially the standards related to timeliness. Furthermore, SACE's proposed new contention does not meet the standards in Section 2.309(f)(1) for admitting a contention. Finally, SACE's Rulemaking Petition does not identify any matters that are within the Board's jurisdiction, and does not provide justification for suspension of this proceeding. For all of the reasons stated above, the Motion and proposed new contention should be rejected, and the Board should disregard the Rulemaking Petition.

Respectfully submitted,

Signed (electronically) by Paul M. Bessette

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Dated in Washington, DC
this 6th day of September 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	September 6, 2011
(Watts Bar Nuclear Plant Unit 2)	)	

ANSWER CERTIFICATION

Counsel for TVA certifies that he has made a sincere effort to make himself available to listen and respond to the moving parties, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Signed (electronically) by Paul M. Bessette

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	September 6, 2011
(Watts Bar Nuclear Plant Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that, on September 6, 2011, a copy of "Tennessee Valley Authority's Answer in Opposition to Proposed Contention Regarding Fukushima Task Force Report" was served by the Electronic Information Exchange on the following recipients:

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