

September 6, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Progress Energy Florida, Inc.)	Docket Nos. 52-029-COL
)	52-030-COL
(Levy County Nuclear Plant, Units 1 and 2)	
)	ASLBP No. 09-879-04-COL
(Combined License Application))	

**PROGRESS ENERGY FLORIDA, INC.’S ANSWER OPPOSING MOTION
TO ADMIT NEW CONTENTION 13 AND RECONSIDER CONTENTION 5**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h) and in accordance with the Atomic Safety and Licensing Board’s (“Board”) Initial Scheduling Order of August 27, 2009,¹ Applicant Progress Energy Florida, Inc. (“Progress”) hereby responds to and opposes the admission of proposed new Contention 13 and the request to “reconsider” Contention 5 submitted by The Ecology Party of Florida, Nuclear Information and Resource Service, and the Green Party of Florida (“Intervenors”) on August 11, 2011.² This proceeding involves Progress’s July 28, 2008 Combined Operating License and Construction Permit Application (“COLA”) for the proposed Levy County Nuclear Plant, Units 1 and 2 (“Levy”). Proposed Contention 13

¹ Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640 (2009) (“ISO”).

² In particular, this Answer responds to the following three pleadings filed by the Intervenors on August 11, 2011: (1) “Motion to Admit New Contention (13) and Reconsider Contention 5 Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident” (“Motion”); (2) “Contention 13 Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report” (“Proposed Contention 13”); and (3) “Contention 5 on Severe Accident Impact on Multiple Sites – Submitted for Reconsideration by the Ecology Party of Florida, Nuclear Information and Resource Service and the Green Party of Florida” (“Resubmitted Contention 5”). “Contentions” refers to both Proposed Contention 13 and Resubmitted Contention 5.

alleges that the COLA, Part 3, Environmental Report (“ER”) and Levy Draft Environmental Impact Statement (NUREG-1942 (August 2010)) (“DEIS”) fail to satisfy the requirements of the National Environmental Policy Act (“NEPA”) “because the documents do not address the environmental implications of the findings and recommendations raised by the NRC’s Fukushima Task Force Report.”³ Resubmitted Contention 5 asserts that the Levy ER does not assess the proximity of the proposed Levy site to the Crystal River Energy Complex (“CREC”) in its severe accident mitigation alternatives (“SAMA”) analysis. Resubmitted Contention 5 at 2. Having been rejected by this Board previously,⁴ Intervenor now baldly assert that “Contention 5 is squarely within the concerns raised by the Task Force Report and deserves reconsideration.” Id.

As explained in detail below, the Motion should be denied because it is not timely as set forth in 10 C.F.R. § 2.309(f)(2) and fails to satisfy the Commission’s requirements for the admission of non-timely contentions as set forth in 10 C.F.R. § 2.309(c). Furthermore, even if the Contentions are considered, both are inadmissible as a matter of law because they fail to satisfy the Commission’s substantive requirements for contention admissibility as set forth in 10 C.F.R. § 2.309(f)(1).

Also, the Motion and Resubmitted Contention 5 are tardy by two years for a motion for reconsideration. See 10 C.F.R. § 2.323(e). Fatal to their argument, Intervenor do not demonstrate compelling circumstances pursuant to the Commission’s standards for reconsideration. Specifically, the Intervenor do not identify any errors in LBP-09-10; in fact, they do not even reference that decision. As the Board found, the COLA contains a Probabilistic Risk Analysis (“PRA”) and Intervenor provided no reason to assume that in the unlikely event of a severe accident at the CREC there would be any impact at

³ Proposed Contention 13 at 13 (referring to Recommendations for Enhancing Reactor Safety in the 21st Century, The Near Term Task Force Review of Insights from the Fukushima Daiichi Accident (July 12, 2011) (ADAMS Accession No. ML111861807) (“Task Force Report”). Proposed Contention 13 also asserts: “As required by NEPA and the NRC regulations, these implications must be addressed in the ER.” Proposed Contention 13 at 4 – 5.

⁴ Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51 (2009) (“LBP-09-10”).

Levy, let alone any reason warranting consideration of CREC in the Levy SAMA analysis. LBP-09-10 at 110-111. This Board did not make a clear and material error when it did not admit Contention 5.

In essence, Intervenors' Motion is an impermissible attempt to litigate preliminary recommendations for strengthening the NRC's regulatory framework and safety regulations – generic topics that are clearly outside both the scope of this proceeding and prohibited as challenges to the NRC's current rules. Intervenors' attempt to circumvent this prohibition by characterizing the Contentions as environmental concerns is totally lacking in merit. Intervenors' arguments that the NRC must both determine what constitutes adequate protection in its NEPA review and consider the Task Force recommendations as part of a SAMA analysis without regard to cost improperly conflate the NRC's safety and environmental reviews and are simply at odds with the NRC's responsibilities under NEPA and its implementing regulations. Intervenors do not make even the slightest effort to show that there is any particular SAMA that may be cost beneficial for Levy, do not make any attempt to relate any of the Task Force recommendations to Levy, and do not address or dispute the evaluation of design basis accidents, severe accidents, or SAMAs in either the ER or DEIS. Consequently, Intervenors do not demonstrate that there is any genuine, material dispute with either the ER or DEIS.

II. BACKGROUND

A. The NRC Response to the Fukushima Daiichi Accident

On March 11, 2011, the Tohoku-Taiheiyou-Oki Earthquake occurred near the east coast of Honshu, Japan. The tsunami generated by this magnitude 9.0 earthquake resulted in a sustained loss of both on-site and offsite power systems leading to significant core damage to at least three of the six units of the Fukushima Daiichi nuclear power station. NRC Information Notice 2011-05, Tohoku-Taiheiyou-Oki Earthquake Effect on Japanese Nuclear Power Plants (Mar. 18, 2011) at 1 (ADAMS Accession No. ML110760432).

Since then, the Commission has been closely monitoring the activities in Japan and reviewing all available information.⁵ Among other steps taken as a result of the incident, the Commission created a Task Force to conduct both short-term and long-term analyses of the lessons that can be learned from the Fukushima Daiichi accident. The Commission has made it clear that it will use the information from these activities to impose any requirements it deems necessary.

NRC has already announced its plan to draw upon “lessons learned” from the Japan events, as the agency has done previously after natural or man-made disasters. As in the past, NRC will conduct rulemaking, or issue orders and other directives, to make upgrades required to implement whatever short-term or longer-term safety improvements emerge from the Task Force directed by the Commission to analyze the Fukushima Daiichi disaster.

Federal Respondents’ Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 21-22, New Jersey Env’tl. Fed’n v. NRC, No. 09-2567 (3d Cir. Apr. 4, 2011) (“Federal Respondents’ Memorandum” or Attachment A). Further, the Commission has explained that it will do so on a generic basis. “As with the post-TMI and post-9/11 regulatory enhancements, any ‘lessons learned’ from the Fukushima Daiichi event will be applied generically to all reactors . . . as appropriate to their location, design, construction, and operation.” Id. at 13.

The Task Force completed its short-term review and issued its report to the Commission on July 12, 2011. Among other things, the Task Force Report concludes:

The current regulatory approach, and more importantly, the resultant plant capabilities allow the Task Force to conclude that a sequence of events like the Fukushima accident is unlikely to occur in the United States and some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological releases. Therefore, continued operation and continued licensing activities do not pose an imminent risk to public health and safety.

Task Force Report at vii. See also Id. at 18. As NRC Chairman Jaczko recently summarized in testimony before Congress:

⁵ Statement by Chairman Jaczko to the Senate Environment and Public Works Committee and Clean Air and Nuclear Safety Subcommittee (Apr. 12, 2011) (ADAMS Accession No. ML111020070).

The Task Force report included a comprehensive set of twelve overarching recommendations. The Task Force recommendations are intended to clarify and strengthen the regulatory framework for nuclear power plants, and are structured around the focus areas of the NRC's defense-in-depth philosophy as applied to protection from natural phenomena; mitigation of prolonged station blackout events; and emergency preparedness. The Task Force also provided recommendations to improve the effectiveness of the NRC's programs.

Statement of NRC Chairman Gregory Jaczko, Before the Senate Committee on Environment and Public Works, Subcommittee on Clean Air and Nuclear Safety (August 2, 2011) at 2-3 (ADAMS Accession No. ML11213A279).

On August 19, 2011, the Commission issued a Staff Requirements Memorandum ("SRM") directing the Staff to take the following actions:

- Producing within 21 days a paper outlining which of the Task Force's recommendations, either in part or in whole, the Staff believes should be implemented without unnecessary delay. The 21-day effort will include a public dialogue on the staff's proposal, and the staff conducted a public meeting on August 31, 2011.
- Producing by October 3, 2011 a paper which prioritizes Task Force recommendations, other than the one calling for a change to the NRC's overall regulatory approach. This paper is expected to lay out all agency actions to be taken in responding to lessons learned from the Fukushima Daiichi accident. The paper will also lay out a schedule for interacting with the public, other stakeholders and the Advisory Committee on Reactor Safeguards.
- Producing a paper within 18 months to consider the Task Force's call for revising the NRC's regulatory approach. The paper is expected to provide options, including a recommended course of action, in dealing with the Task Force's recommendation.

SRM – SECY-11-0093 – Near-Term Report And Recommendations for Agency Actions Following the Events in Japan (Aug. 19, 2011) (ADAMS Accession No. ML112310021). Indeed, the short- and medium-term steps ordained by the Commission provide assurance that the NRC will, in the reasonably near future, take regulatory actions to address the Task Force Report's recommendations.

While the Commission is taking these actions to assess the implications of the Fukushima accident and take appropriate responsive measures, its informed assessment is that continued operation

and continued licensing activities for U.S. plants do not pose an imminent risk to public health and safety. That was also the conclusion of the Task Force. See Task Force Report at vii. Consistent with that assessment, the Commission has continued its licensing activities, including the completion of several license renewal proceedings, the review of standard design certification applications, and the processing of COLAs. It has scheduled for September 27, 2011 its first mandatory hearing on a COLA (Vogtle Units 3 and 4), see 76 Fed. Reg. 50,767 (Aug. 16, 2011), and has completed its technical review for Revision 19 of the Design Certification for Westinghouse's AP1000 advanced reactor, see Final Safety Evaluation Report Related to Certification of the AP1000 Standard Plant Design, NUREG-1793 Supplement 2 (Aug. 2011) (ADAMS Accession No. ML112061231). The Commission also has not acted on the Emergency Petition filed by Intervenors last April.

Intervenors acknowledge that the relief they seek in the Contentions is best addressed generically by the NRC and not through contentions filed in individual proceedings:

Intervenors recognize that given the sweeping scope of the Task Force conclusions and recommendations, it may be more appropriate for the NRC to consider them in generic rather than site-specific environmental proceedings. That is for the NRC to decide. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 100 (1983). It is the NRC, and not the public, which is responsible for compliance with NEPA. Duke Power Co. et al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

Proposed Contention 13 at 4. In this regard, Intervenors are correct. If Intervenors' Contentions were somehow admitted and litigated, future actions of the Commission would likely render the effort moot and a colossal waste of time and resources by all.

B. The Levy Proceeding

Intervenors filed their "Petition to Intervene and Request for Hearing" ("Petition") in this proceeding on February 6, 2009 alleging several contentions. A prehearing conference was held on April 20-21, 2009. Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear

Power Plant, Units 1 and 2), Official Transcript (Apr. 20-21, 2009) (“Tr.”). On July 8, 2009 the Board admitted parts of three contentions and rejected the original Contention 5. LBP-09-10 at 147.

In April 2011, shortly after Fukushima Daiichi accident, the Intervenors filed with the Commission on the Levy docket an Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (“Emergency Petition”). The Emergency Petition, which was also filed by plant opponents in numerous other proceedings, requested sweeping actions, including: 1) suspension of all decisions pending completion of the NRC’s review of the Fukushima Daiichi accident; 2) suspension of all proceedings, hearings or opportunities for public comment on any issue considered in that review; 3) performance of an environmental analysis of the accident; 4) performance of a safety analysis of its regulatory implications; 5) establishment of procedures and a time table for raising of new issues in pending licensing proceedings; 6) suspension of all decisions and proceedings pending the outcome of any independent Congressional, Presidential or NRC investigations; and 7) a request by the NRC for a Presidential investigation. On May 2, 2011, Progress and the NRC Staff opposed the Emergency Petition and are awaiting the Commission’s decision.⁶

On August 11, 2011, following issuance of the Task Force Report, Intervenors filed their Motion, Proposed Contention 13, and Resubmitted Contention 5.⁷ They explain that the Contentions “follow up”

⁶ The pending action before the Commission precludes action by the Board over the Emergency Petition and related supplements. Commission Order (Order) (April 19, 2011); see generally, Virginia Electric and Power Co. d/b/a Dominion Virginia Power and Old Dominion Electric Cooperative (Combined License Application for North Anna Unit 3), LBP-11-22, 74 NRC __ (slip op. at 17) (Sept. 1, 2011) (discussing that while the Emergency Petition is not currently before the Boards, it might be in the future depending on the Commission’s ruling). An affirmation session by the Commission on the Emergency Petition is tentatively scheduled for September 9, 2011. “Sunshine Meeting Notice for NRC for the Week of September 5, 2011”, 76 Fed. Reg. __ (Sept. __, 2011) (slip op. at 1) (Sept. 2, 2011).

⁷ Also on August 11, 2011, Intervenors filed in the Levy docket a “Rulemaking Petition To Rescind Prohibition Against Consideration Of Environmental Impacts Of Severe Reactor And Spent Fuel Pool Accidents And Request To Suspend Licensing Decision” (“Rulemaking Petition”). Consistent with the
(Footnote continued on next page)

on the Emergency Petition, and because the Commission has not yet responded to the Emergency Petition, “the signatories to the Emergency Petition now seek consideration of the Task Force’s far reaching conclusions and recommendations in each individual licensing proceeding, including the instant case.” Proposed Contention 13 at 4; Resubmitted Contention 5 at 1. Intervenor’s concede “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 proceedings, but assert that this is for the NRC to decide. Id.

C. Applicable Legal Standards

The NRC does not look with favor on amended or new contentions filed after the initial filing. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 636 (2004). As the Commission has repeatedly stressed,

[o]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners “who must examine the publicly available material and set forth their claims and the support for their claims at the outset.” There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (emphasis added) (citations omitted).

A contention is timely upon a showing that:

- (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

Commission Order of April 19, 2011, the Rulemaking Petition is not before the Board. On August 22, 2011, Progress filed a response to the Rulemaking Petition to the Commission and an associated notice to the Board.

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

and may be filed only by leave of the presiding officer. 10 C.F.R. § 2.309(f)(2). As explained below, neither Proposed Contention 13 nor Resubmitted Contention 5 are timely.

The Commission's rules at 10 C.F.R. § 2.309(c) provide that non-timely contentions will not be entertained absent a determination by the Board that the contentions should be admitted based upon a balancing of the following factors:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1).

In keeping with the Commission's disfavor of contentions after the initial filing, these factors are "stringent." Oyster Creek, CLI-09-7, 69 N.R.C. at 260, (citing Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 N.R.C. 30, 33 (2006)). "Late petitioners properly have a substantial burden in justifying their tardiness." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975).

Commission case law places most importance on whether the petitioner has demonstrated sufficient good cause for the untimely filing. Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 N.R.C. ___ (slip op at 4) (Mar. 26, 2010); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 N.R.C. 77, 79 (2000); Millstone, CLI-09-5, 69 N.R.C. at 125. Indeed, failure to demonstrate good cause requires the petitioner to make a “compelling” showing with respect to the other factors. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 N.R.C. 156, 165 (1993). “A petitioner’s showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause.” Watts Bar, CLI-10-12, 71 N.R.C. ___ (slip op at 4) (footnote omitted).

Additionally, any new contention must also satisfy the standards for admissibility in 10 C.F.R. § 2.309(f)(1). These standards are to be enforced rigorously. “If any one . . . is not met, a contention must be rejected.” Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) (“These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.” (footnotes omitted)). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Palo Verde, CLI-91-12, 34 N.R.C. at 155; Oyster Creek, CLI-09-7, 69 N.R.C. at 260 (the contention admissibility rules “require the petitioner (not the board) to supply all of the required elements for a valid intervention petition” (emphasis added) (footnote omitted)).

Finally, the Commission’s rules provide that a party may file a motion for reconsideration only upon leave of the presiding officer or the Commission and upon a showing of compelling circumstances such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid. 10 C.F.R. § 2.323(e).

III. ARGUMENT

A. Proposed Contention 13

1. Proposed Contention 13 Is Inexcusably Untimely

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

A motion and proposed new contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) *and* the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).

ISO at 647 (emphasis in the original).

In their Motion, Intervenors acknowledge that new contentions must meet the timeliness requirement set forth in 10 C.F.R. § 2.309(f)(2) or, if the Board determines that they are not timely, the contentions must meet the requirements governing non-timely contentions in 10 C.F.R. § 2.309(c). Motion at 3. Intervenors claim that Proposed Contention 13 meets both sets of requirements. See, e.g., Motion at 6. That, however, is not the case.

a. Intervenors Failed to Specify New and Material Information to Support Proposed Contention 13

Intervenors' Motion asserts that Proposed Contention 13 is based on new information contained in the Task Force Report. Motion at 3. Proposed Contention 13 itself, however, does not specify the new information present in the Task Force Report and upon which Intervenors rely. Indeed, the only facts contained in the Task Force Report are those presented in Section 2, which is entitled "Summary of Events at Fukushima Dai-Ichi." Task Force Report at 7-14. Intervenors do not claim that Section 2 contains any new facts; as its title indicates, Section 2 simply summarizes the sequence of events at the Fukushima Daiichi plant, a sequence that has been known for several months. As such, Section 2

provides no new “information” that would render Proposed Contention 13 timely under 10 C.F.R. § 2.309(f)(2).⁸

It is not sufficient to simply point to some new document (such as the Task Force Report) as new information. Rather, a proponent of a new contention must show that it could not have raised its contention earlier. “[T]he unavailability of [a document] does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner.” Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C.1041, 1043 (1983). An intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available “for some time” prior to the filing of the contention. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 N.R.C. 13, 21 (1986).

Here, Proposed Contention 13 is based on the Fukushima Daiichi accident, which occurred five months ago, and not on the Task Force Report. Indeed, the Declaration of Dr. Makhijani submitted as purported support for Proposed Contention 13 characterizes the Task Force report as providing “further support” for his prior opinion “that the Fukushima accident presents new and significant information.”⁹ Yet, neither Dr. Makhijani nor Intervenors describe one new fact relevant to the assertions in Proposed

⁸ The rest of the Task Force Report contains (1) a historical description of the NRC regulatory framework for nuclear power plants and recommendations on how this framework could be strengthened (Section 3, Task Force Report at 15-24); (2) recommendations on how to increase plant safety through defense-in-depth methodologies (Section 4, id. at 25-62); (3) recommendations for modifications to the internal NRC inspection program, the management of NRC records and information, and NRC participation in international activities (Section 5, id. at 63-68); (4) a summary of the Task Force Report’s overarching recommendations (Section 6, id. at 69-70); and (5) a discussion of the implementation strategy for new reactors (Section 7, id. at 71-72). No new information that could render Contention 13 timely is therefore contained in the Task Force Report.

⁹ 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 Decl.”), ¶ 6 (referencing 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 (April 19, 2011)) (emphasis added).

Contention 13 – no facts related to a particular SAMA and its cost benefits and no facts related to a particular design basis accident’s or severe accident’s environmental impacts not being considered in the ER or DEIS.

Indeed, Intervenors do not identify any new facts in the Task Force Report on which their Contentions are based. Instead, Intervenors appear to be simply relying on the recommendations that the Task Force members made based on previously available information. Intervenors and their experts had the same “factual predicate” available to them and could have reached the same conclusions. That the Task Force members have made recommendations for regulatory improvements does not make any of the facts or implications of the Fukushima Daiichi accident new. A petitioner may not “delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention.” Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 N.R.C. __ (slip op. at 17) (Sept. 30, 2010).

Because Intervenors fail to specify the information present in the Task Force Report upon which they based their Proposed Contention 13, that proposed contention fails to satisfy any element of the Commission’s rules at 10 C.F.R. § 2.309(f)(2), and is therefore untimely.

b. Intervenors Failed to Demonstrate a Balancing of the Eight Factors of 10 C.F.R. § 2.309(c)(1) That Would Justify Admission of Untimely Proposed Contention 13

As addressed above, when a proposed new contention is not timely, as is the case here, the party propounding the contention must address the eight factors set forth in 10 C.F.R. § 2.309(c)(1) (quoted above). In their Motion, Intervenors discuss these factors (see Motion at 4-8), and correctly identify the first factor – whether there is good cause for the failure to file on time – as being the most important.¹⁰ Id. at 4-5. “Good cause” has been consistently interpreted to mean that a proposed new contention was based

¹⁰ See Watts Bar, CLI-10-12, 71 N.R.C. __ (slip op at 4); Private Fuel Storage, CLI-00-02, 51 N.R.C. at 79.

on information that was not previously available, and was timely submitted in light of that new information. Millstone, CLI-09-5, 69 N.R.C. at 125-26 (citing Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 N.R.C. 1, 6 (2008)). The Intervenor's explanation, however, in support of their claim that good cause exists for the non-timely submittal of the contentions is inadequate. Intervenor's argue:

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

Motion at 5.

As addressed above, Intervenor's have failed to demonstrate good cause for their Proposed Contention 13. The recommendations in the Task Force Report do not provide good cause for waiting five months to raise a contention alleging that the implications the Fukushima Daiichi accident need to be considered under NEPA. Intervenor's made these same claims in the Emergency Petition,¹¹ and have, thus, been sitting on these claims for months.

Because Intervenor's have failed to demonstrate good cause, they must make a "compelling" showing with respect to the other factors. Comanche Peak, CLI-93-4, 37 N.R.C. at 165. "A petitioner's showing must be highly persuasive; it would be a rare case where [the Commission] would excuse a non-timely petition absent good cause." Watts Bar, CLI-10-12, 71 N.R.C. __ (slip op at 4) (footnote omitted). Intervenor's cursory discussion of the other factors is not compelling, and the Intervenor's are incorrect in their analysis because the fifth, seventh, and eighth factors all weigh against admitting the untimely contention.

¹¹ Emergency Petition at 2-3, 26-28.

With respect to the fifth factor, other means are clearly available whereby Intervenors' interest will be protected. The Commission is already evaluating the Task Force recommendations and has stated, "As with the post-TMI and post-9/11 regulatory enhancements, any 'lessons learned' from the Fukushima Daiichi event will be applied generically to all reactors . . . as appropriate to their location, design, construction, and operation." Federal Respondents' Memorandum at 13. Consequently, to the extent the recommendations will become integrated into the NRC's regulatory framework, such integration will occur as the result of a thorough review by the NRC and at the conclusion of an approved and vetted NRC process. As addressed above, this review is ongoing, and affords Intervenors a means by which their interests will be protected.

With respect to the seventh factor, Intervenors concede (as they must) that admission of Proposed Contention 13 may broaden or delay the proceeding. Intervenors claim, however, that this factor should not be taken into account because "the NRC has a nondiscretionary duty under NEPA to consider new and significant information that arises before it makes its licensing decision." Motion at 8. This position, even if correct (which as discussed below is not the case), implicates the admissibility factors in 10 C.F.R. § 2.309(f)(1), and not, as Intervenors' suggest, whether the non-timely contentions should be admitted. Proposed Contention 13 will undoubtedly broaden and delay this proceeding as it seeks to litigate whether the "ER and subsequent DEIS for Levy County Units 1 & 2 fails [sic] to satisfy the requirements of NEPA because the documents do not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report." Proposed Contention 13 at 4 – 5. Indeed, Intervenors concede that Proposed Contention 13 necessarily includes a discussion of the Three Mile Island accident, the recommendations adopted or not adopted thereafter, as well as the Task Force Report. Id. at 6 – 7. Intervenors seek to litigate whether the ER and DEIS must be supplemented to consider additional design basis accidents, (id. at 13 – 16), recommended measures to ensure the plant's protection from seismic and flooding events (id. at 16 – 17), and additional mitigation measures recommended by the Task Force Report (id. at 17 – 18). Proposed Contention 13

admits that it seeks to litigate the “Task Force’s far-reaching conclusions and recommendations.” Id. at 4. Consequently, Proposed Contention 13 would broaden and delay the proceeding considerably.

With respect to the eighth factor, it cannot reasonably be expected that Intervenors will assist in developing a sound record. “When a petitioner addresses this . . . criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.” Watts Bar, CLI-10-12, 71 N.R.C. __ (slip op. at 10-11 (footnote omitted)); Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2) CLI-86-8, 23 N.R.C. 241, 246 (1986). Intervenors have done none of this and have instead submitted a generic declaration and apparently relied on the expertise of the NRC staff. Motion at 8-9. Further, the Proposed Contention is entirely generic, copied directly from documents developed to be filed in multiple proceedings, and makes no effort to identify any specific error in the Levy COLA or DEIS.

Thus, the first, fifth, seventh and eighth factors count heavily against Intervenors. Moreover, next to good cause, in balancing the remaining late-filed contention factors, the Commission grants considerable weight to factors seven and eight. “We regard as highly important the intervenor’s ability to contribute to the development of a sound record on a particular contention. We also are giving significant weight to the potential delay, if any, which might ensue from admitting a particular contention.” Consumers Power Co. (Midland Plant, Units 1 and 2) LBP-82-63, 16 N.R.C. 571, 577 (1982) (citations omitted); see also Braidwood, CLI-86-8, 23 N.R.C. at 246-47. The other factors in 10 C.F.R. § 2.309(c)(1) are less important (see, e.g., Diablo Canyon, CLI-08-1, 67 N.R.C. at 6; Comanche Peak, CLI-93-04, 37 N.R.C. at 165), and therefore cannot outweigh the Intervenors’ failure to demonstrate good cause or meet factors five, seven, and eight.

For these reasons, Proposed Contention 13 proffered by Intervenors is inexcusably non-timely and must be rejected.

2. The Safety Claims Asserted in Proposed Contention 13 Do Not Meet NRC Standards for Admissibility

While Proposed Contention 13 is ostensibly directed at the alleged non-compliance of the Levy ER and the NRC Staff's DEIS with the requirements of NEPA, Intervenors' discussion in support of Proposed Contention 13's admissibility repeatedly refers to the "safety" implications of the Task Force Report's recommendations (see, e.g., Proposed Contention 13 at 6, 7, 9, 12, 16-17) and urges the overhaul of the NRC's safety regulations and the imposition of backfits in order to provide adequate protection to the public health and safety. Id. at 9. Much of Proposed Contention 13 is a direct challenge to the Commission's rules, and therefore not permissible as outside the scope of this proceeding. For that reason, the discussion below addresses separately the safety and environmental claims raised in the Proposed Contention 13.

a. The Safety Claims Embedded in the Proposed Contention Are Inadmissible as Outside the Scope of this Proceeding

Proposed Contention 13 cites the Task Force Report as concluding that "the regulatory system on which the NRC relies to make the safety findings that the AEA requires for licensing of reactors must be strengthened by raising the level of safety that is minimally required for the protection of public health and safety," and recommending that "the NRC incorporate severe accidents into the 'design basis' and subject it to mandatory safety regulations." Proposed Contention 13 at 6. Proposed Contention 13 similarly asserts 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." Id. at 9.¹² While Intervenors attempt to cast their concerns as relating to NEPA, their arguments seek an overhaul of the NRC's safety regulations in order to provide increased protection to the public health and safety.

¹² As will be seen below, the environmental arguments in Proposed Contention 13 rest in part on the assumption that the NRC safety regulations are modified to expand the design basis to include severe accidents, a challenge that is not within the scope of this proceeding.

Any request for modification of the design basis for nuclear reactors is outside the scope of licensing proceedings and is barred by 10 C.F.R. § 2.335 as a challenge to the NRC regulations. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). “[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.” Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff’d in part on other grounds, CLI-74-32, 8 AEC 217 (1974) (footnote omitted). Thus, a contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974). A contention which “advocate[s] stricter requirements than those imposed by the regulations” is “an impermissible collateral attack on the Commission’s rules” and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, aff’d in part and rev’d in part on other grounds, CLI-91-12, 34 N.R.C.149 (1991).

b. Certain Task Force Report Recommendations Cited by Intervenors Are Not Applicable to the Levy COLA and Thus Do Not Raise a Genuine Dispute on a Material Issue of Fact or Law

Proposed Contention 13 also cites several improved mitigation measures recommended in the Task Force Report and argues that “the ER must be supplemented to consider the use of these additional mitigation measures to reduce the project’s environmental impacts.” Proposed Contention 13 at 18. However, none of the Task Force Report recommendations regarding specific design modifications support admission of Proposed Contention 13. The recommendations concerning flooding and seismic protection (Proposed Contention 13 at 16-17) do not raise any significant genuine, material issue with the Levy ER because the Task Force Report concludes that current COL applicants are already using updated regulatory guidance to evaluate seismic and flooding hazards and establish appropriate design bases. Task Force Report at 71. Other hazards (tsunamis, wind) are addressed in the Final Safety Analysis

Report (“FSAR”) for Levy Units 1 and 2 (COLA, Part 2 FSAR Sections 2.4.5 and 2.4.6), and Proposed Contention 13 fails to challenge the adequacy of that FSAR. Accordingly, no portion of the Task Force Report’s recommendations support a genuine dispute with the COLA on a material issue of fact or law as required under 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).

Similarly, the Task Force’s recommendations concerning station blackout and spent fuel pool capabilities (Recommendations 4 and 7.5) do not raise any genuine, material dispute with the Levy COLA.¹³ Indeed, the Task Force Report itself acknowledges that, by the nature of its passive designs and inherent 72-hour coping capability for core, containment, and spent fuel pool cooling with no operator action required, the AP1000 design to be utilized for Levy has many of the design features and attributes necessary to address the Task Force recommendations. Task Force Report at 71.¹⁴

c. Intervenor’s Arguments Regarding the Design Basis of the AP1000 and Accident Mitigation Are Impermissible Challenges to the AP1000 Design Certification Rule

In addition, the suggestion that “the design basis for the reactor does not incorporate the accidents that should be considered in order to satisfy the adequate protection standard” (Proposed Contention 13 at

¹³ Also, Recommendations 4 and 7.5 are recommendations for rulemaking. It is well established that issues being considered for rulemaking should not be admitted as part of contentions as they are outside the scope of an adjudicatory proceeding. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 N.R.C. ___, slip op. at 2-3 (July 8, 2010); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 N.R.C. 328, 345 (citing Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 A.E.C. 79, 85 (1974)).

¹⁴ The Task Force Report’s recommendations concerning emergency response provisions (EOPs, SAMGs, and EDMGs) (Proposed Contention 13 at 18) do not raise any cognizable issue for the Levy COLA because the Task Force’s recommendations implicate only regulatory oversight of these activities and do not propose any new measures. Task Force Report at 71. Moreover, the Levy COLA already addresses these measures. FSAR § 13.5.2.1 (incorporating by reference DCD § 13.5.2.1 addressing emergency operating procedures); FSAR § 19.59 (implementing the AP1000 Severe Accident Management Guidance on a plant specific basis. See generally, Levy COLA, Part 8. Finally, the Task Force Report’s recommendation for hardened vents in BWR facilities (Proposed Contention 13 at 18) is inapplicable to Levy’s PWR design; therefore the recommendation is not material to the decision on the Levy COLA.

13) is an impermissible challenge to the Design Certification Rule (“DCR”)¹⁵ for the AP1000. Chapter 15 of the AP1000 Design Control Document (“DCD”) identifies the design basis accidents considered and evaluated for the AP1000, and the AP1000 DCR approves the DCD. Under the NRC rules, the Commission treats as resolved those matters resolved in connection with the issuance of a design certification. 10 C.F.R. § 52.63(a)(5). Further, while the AP1000 DCR is being amended, the amendments do not alter the list of design basis accidents considered in the design. Compare Chapter 15 of DCD Rev. 15 (referenced in § II.A of the DCR) with Chapter 15 of DCD Rev. 19 (referenced in proposed DCR for the AP1000 Amendment).¹⁶ Further, any matters addressed by DCD amendments are also beyond the scope of this proceeding. As the Commission has stated, “We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding.” Statement of Policy on Conduct of New Reactor Licensing Proceedings, CLI-08-07, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008).

Further, Intervenors’ claims that Station Blackout (“SBO”) mitigation capability must be strengthened (Proposed Contention 13 at 18-19) (including Dr. Makhijani’s assertion that the AP1000 must mitigate an SBO lasting more than 72 hours (Makhijani Declaration at ¶ 17)), and that spent fuel pool makeup capability and instrumentation must be enhanced (Proposed Contention 13 at 19) are all beyond the scope of this proceeding because they are all impermissible challenges to the AP1000 DCR.

- The compliance of the AP1000 with the station blackout rule is established in DCD § 1.9.5.1.5. As reflected in the NRC Safety Evaluation Report for the AP1000, the passive safety related systems of this design can maintain safe-shutdown conditions after design basis events for 72 hours, without operator action, following a loss of both onsite and offsite AC

¹⁵ 10 C.F.R. Part 52, App. D.

¹⁶ Available at <http://www.nrc.gov/reactors/new-reactors/design-cert.html>.

power sources.¹⁷ Further, DCD § 1.9.5.4 addresses the potential for loss of AC power extending beyond 72 hours and identifies the actions required to address this scenario.

- Section 9.1.2 of the DCD establishes the design of the spent fuel pool. Section 9.1.3.4.3.4 provides that spent fuel pool makeup for long term station blackout can be provided through seismically qualified safety-related makeup connections from the passive containment cooling systems. These connections are located in an area of the auxiliary building that can be accessed without exposing operating personnel to excessive levels of radiation or adverse environmental conditions. Section 9.1.3.7 identifies the instrumentation provided for the spent fuel pool cooling system, which includes safety related instrumentation that alerts control operators to low water levels.

Proposed Contention 13 is also outside the scope of this proceeding because all of the Task Force recommendations applicable to new plants are recommendations for rulemaking. See Task Force Report at 71 (stating that recommended orders are inapplicable to new reactors, but rulemaking recommendations have been assessed as applicable). It is well established that issues being considered for rulemaking should not be admitted as contentions. Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 N.R.C. ___, slip op. at 2-3 (July 8, 2010); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 N.R.C. 328, 345 (citing Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 A.E.C. 79, 85 (1974)).

3. The Environmental Claims Asserted in Proposed Contention 13 Lack Basis, Fail to Demonstrate Issues Material to the Findings the NRC Must Make, and Fail to Establish a Genuine Dispute with the ER or DEIS

In addition to impermissibly challenging the NRC rules, Proposed Contention 13 is also inadmissible because it lacks basis (required by 10 C.F.R. 2.309(f)(1)(ii)), fails to demonstrate the

¹⁷ NUREG-1793, Final Safety Evaluation Report Related to Certification of the AP1000 Standard Design (Sept. 2004), § 8.5.2.1.

existence of issues material to the findings that the NRC must make (required by 10 C.F.R. § 2.309(f)(1)(iii)), and fails to support the existence of a genuine dispute with the Levy COLA on a material issue of law or fact (required by 10 C.F.R. 2.309(f)(1)(iv), (v), and (vi)).

a. There Is No Requirement for Progress to Supplement the Levy ER

As a threshold matter, Intervenors do not provide any support for their assertion that the Levy ER is required to address “new and significant information” concerning the implications of the Fukushima Daiichi accident or Task Force Report. Intervenors refer to the Council on Environmental Quality (“CEQ”) regulations at 40 C.F.R. § 1502.9(c)(1)(ii) (Proposed Contention 13 at 11),¹⁸ but this CEQ rule refers to the Federal Agency’s obligation to prepare a supplement to a draft or final EIS. It imposes no duty on an applicant. Intervenors also point to a number of NRC regulations (Proposed Contention 13 at 12), but no regulation that requires that Progress supplement the Levy ER. 10 C.F.R. § 51.50(c)(iii) applies only if the application references an early site permit, which the Levy COLA does not. 10 C.F.R. § 51.53(b) applies when an applicant is using the two-step Part 50 licensing process, and 51.53(c)(iv) applies only to license renewal proceedings. Moreover, while 10 C.F.R. § 50.71(e) requires a COL applicant to update its FSAR annually, the NRC rules contain no such requirement regarding the ER. In sum, Intervenors fail to identify any legal basis for the proposition that an applicant must supplement its ER.

b. The Task Force Report Does Not Constitute New and Significant Information Requiring a Supplement of the Levy ER or DEIS

Even if one were to assume some requirement to supplement an ER to address new and significant information, Intervenors fail to provide any meaningful support for its claim that the Task Force Report constitutes new and significant information as that phrase is used in the NEPA context. Neither the Task Force Report nor the Makhijani Declaration discuss environmental impacts of Levy or AP1000 operation. For new information to be considered significant in the NEPA context, that

¹⁸ Intervenors incorrectly cite this as 40 C.F.R. § 1509(c)(1)(ii). Proposed Contention 13 at 11.

information must materially alter some environmental finding or conclusion. Here, Section 7.1 and Table 7.1-1 of the Levy ER presents the consequences of design basis accidents, Section 7.2 presents the consequences of severe accidents, and Section 7.3 analyzes the cost and benefits of severe accident mitigation alternatives. The DEIS provides a SAMA analysis. DEIS § 5.11.3. Intervenors do not identify any error in any of these analyses and do not provide any information indicating that the probability or consequences of any accident scenario is greater than as assessed in the ER or DEIS, or that any SAMA is cost beneficial. Intervenors thus fail to address or demonstrate any genuine dispute with the ER or DEIS.

Intervenors argue that “the NRC must revisit any conclusions in the Levy County ER based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable” (Proposed Contention 13 at 13), but make no showing that any portion of the ER relies on such an assumption. Again, the Levy ER estimates the consequences of design basis accidents and the risk of severe accidents, and Intervenors do not dispute any of these estimates. The ER compares the estimated consequences of design basis accidents with regulatory dose limits to show that projected doses are small fractions of permissible limits (ER at Table 7.1-12), but specifically states that “conformance to these dose limits is not required for this environmental impact analysis.” ER at 7.1-3. Further, Intervenors do not claim or provide any information to suggest that any of the projected consequences of these design basis accidents is unacceptable.¹⁹

Instead, Intervenors’ principal argument reduces to the claim that some accident scenarios evaluated as severe accidents should instead be considered design basis accidents. Proposed Contention 13 at 13. Apart from being an impermissible challenge to the designation of design basis accidents in the DCR, this claim does not present any material issue. Because the Levy ER analyzes both design basis

¹⁹ Intervenors claim that section 7.1.4 of the ER concludes that the health effects resulting from design basis accidents are negligible. Proposed Contention at 13. This language does not appear in the Levy ER.

accidents and severe accidents, the manner in which particular accident scenarios are labeled would not alter the overall accident risk presented in the ER. Further, Intervenor's argument rests on the false premise that the ER must "reach a conclusion that the design of the reactor adequately protects accident risks." Proposed Contention 13 at 13. That is the purpose of the AP1000 DCD and the NRC safety requirements on which it is based, not the ER. The purpose of the ER is to analyze environmental impacts of the proposed action and alternatives to mitigate (or avoid) those impacts. Consequently, this argument also lacks any legal basis and fails to present any genuine dispute with the Levy application.

c. Intervenor Provide No Basis or Legal Support for their Claim that Levy SAMAs Must Be Re-evaluated in Light of the Task Force Report

Similarly, there is no basis for Intervenor's argument that "the values assigned to the cost-benefit analysis for Levy SAMAs must be re-evaluated in light of the Task Force's conclusions that the value of the SAMAs is so high that they should be elected as a matter of course." Proposed Contention 13 at 14. The Commission's regulations implementing NEPA expressly provide that (with certain exceptions not applicable here) an applicant's environmental report and the NRC Staff's EIS should include consideration of the economic, technical, and other benefits and costs of the proposed action and alternatives. 10 C.F.R. §§ 51.49(c), 51.71(d). Any suggestion to the contrary is an impermissible challenge to the NRC rules, barred by 10 C.F.R. § 2.335(a). Furthermore, any suggestion that SAMAs must be evaluated without consideration of cost is simply at odds with the purpose of the SAMA analysis. See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. ___, slip op. at 39 (Mar. 26, 2010) (the goal of SAMA analysis "is only to determine what safety enhancements are cost effective to implement"). Nothing in NEPA requires the NRC to consider mitigation alternatives without regard to cost.

Further, the Task Force Report provides no conclusions on the value of any particular SAMA. Moreover, Intervenor provide no information indicating that the quantitative assessment of SAMAs (i.e., the estimated risk that could be averted or corresponding cost) in the Levy ER is incorrect. Intervenor

provide no information demonstrating that any particular SAMA is cost beneficial, as required to raise an admissible SAMA contention. The NRC has held that because there are numerous conceivable SAMAs, and thus it will always be possible to come up with some mitigation alternative that has not been addressed by a licensee, it would be unreasonable to undertake full adjudicatory proceedings based merely upon a suggested SAMA where the petitioners have done nothing to indicate the approximate relative cost and benefit of the SAMA. In the Matter of Duke Energy Corp., (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 N.R.C. 1, 11-12. Likewise, Intervenor's suggestion that the overall cost-benefit analysis of the reactor or comparison with alternative energy sources could be affected (Proposed Contention 13 at 15) is nothing more than unsupported speculation. Currently, the NRC has not required any changes to the AP1000 design in response to the Fukushima accident, and Intervenor has not provided any information showing that any design change should be imposed as a cost-beneficial mitigation alternative. Moreover, as discussed, the issue of cost is irrelevant in the absence of any environmentally superior alternative. S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC __ (slip op. at 30-31) (Jan. 7, 2010); Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978). Thus, this claim fails to raise any issue material to the findings that the NRC must make.

In addition, Intervenor makes no meaningful attempt to relate any of the Task Force recommendations to Levy or the AP1000, and many of their claims are simply not supported by the Task Force Report.²⁰ For example, the references to the recommendations concerning flooding and seismic

²⁰ It is well established that, in determining the admissibility of a contention, licensing boards are to "carefully examine[]" documents provided in support of a contention to determine whether they "supply an adequate basis for the contention." See, e.g., Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 265 (2004). A document put forth by a petitioner as the basis for a contention is subject to Board scrutiny, both as to the portions that support the petitioners' assertions and those that do not. See, e.g., Virginia Electric & Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 N.R.C. 294, 334 n.207 (Aug. 15, 2008); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 N.R.C. 61, 90 and n.30 (1996). See also id. at 88-89 (rejecting a contention where the document referenced by petitioner on its face failed to establish a disputed material issue).

protection (Proposed Contention 13 at 16) do not raise any significant issue for Levy because the Task Force concluded that all COL and DC applicants are already using updated, state-of-the-art methodology and regulatory guidance to evaluate seismic and flooding hazards and establish appropriate design bases. Task Force Report at 71. Thus, there is no basis or support for Intervenors' assertion that the ER or DEIS must be supplemented to address these recommendations, and no information demonstrating any genuine dispute with the Levy ER or DEIS.

For the same reasons, Intervenors' references to the Task Force recommendations concerning Station Blackout ("SBO") and spent fuel pool capabilities do not raise any genuine, material dispute with the AP1000 design or Levy COLA. The Task Force Report specifically concludes that by nature of its passive design and inherent 72-hour coping capability for core, containment, and spent fuel pool cooling with no operator action required, the AP1000 design already has many of the design features and attributes necessary to address the Task Force SBO recommendations. Task Force Report at 71. Dr. Makhijani argues that the design of the AP1000 needs to be reviewed in the context of its ability to mitigate an SBO lasting more than 72 hours (Makhijani Decl., ¶ 17), but the Task Force Report nowhere supports this claim. In any event, the AP1000 DCD specifically addresses the potential for loss of AC power extending beyond 72 hours and identifies the actions required to address this scenario (AP1000 DCD § 1.9.5.4), so this claim too fails to demonstrate any genuine dispute with the COLA. In sum, Intervenors provide no basis for claiming that the AP1000 SBO mitigation capability needs to be strengthened, and no information demonstrating a genuine material dispute with the Levy COLA.

With respect to spent fuel pool cooling, the passive design of the AP1000 is sufficient to provide spent fuel pool cooling for at least seven days using on-site water sources and for the initial 72 hours using only gravity-driven flow. AP1000 DCD at § 9.1.3.4.3. Further, as described in DCD § 9.1.3.4.3.4, spent fuel pool makeup for long term station blackout can be provided through seismically qualified safety-related makeup connections from the passive containment cooling systems. These connections are located in an area of the auxiliary building that can be accessed without exposing operating personnel to

excessive levels of radiation or adverse environmental conditions. Id. DCD § 9.1.3.7 identifies the instrumentation provided for the spent fuel pool cooling system, which includes safety-related instrumentation that alerts control operators to low water levels. Intervenors do not address or dispute any of this information and thus fail to demonstrate any genuine dispute with the application or provide any basis for suggesting that the AP1000 spent fuel pool makeup capability and instrumentation need to be strengthened.

Additionally, for reasons addressed above, the recommendations in the Task Force Report do not meet the standard of new and significant information as that phrase is used in the NEPA context requiring the NRC to supplement an EIS. First, the Task Force Report contains no “new information;” rather, it contains only recommendations for action by the Commission and the NRC Staff, recommendations which may or may not be implemented or modified by the Commission in the process of addressing them. Consequently, not only do these recommendations not meet the standard of “new and significant information,” it is premature to assert that the recommendations are actionable as they merely represent one portion of the information the NRC is currently considering in its continuing endeavor to address the implications of the Fukushima accident.

Also, for “new information” to be considered “significant” thus triggering an agency’s duty to supplement an environmental impact statement, that information must materially alter some environmental finding or conclusion in the EIS. It is well established that a supplemental EIS is only required where new information “provides a seriously different picture of the environmental landscape.” Nat’l Comm. for the New River v. FERC, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis in original), quoting City of Olmsted Falls v. FAA, 292 F.3d 261, 274 (D.C. Cir. 2002). Numerous courts have so ruled.²¹ The Commission has adopted this same standard.²² As the Supreme Court made clear in Marsh

²¹ See also In re Operation of the Missouri River Sys. Litig., 516 F.3d 688, 693 (8th Cir. 2008) (“seriously different picture of the environmental impact”); Town of Winthrop v. FAA, 535 F.3d 1, 9 (1st Cir. 2008) (substantial change in conditions since the data used in the EIS were gathered); Sierra Club v. (Footnote continued on next page)

v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989) (footnote omitted), a requirement to supplement an EIS every time new information comes to light “would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.”

Intervenors seek to demonstrate that the Task Force Report recommendations constitute “significant” information because the recommendations raise “an extraordinary level of concern regarding the manner in which the proposed operation of Levy County 1 & 2 ‘impacts public health and safety.’” Proposed Contention 13 at 12. However, the pertinent inquiry is not whether the Task Force Report is of concern to Intervenors, but whether it contains new information showing that some environmental analysis is materially altered. The Task Force Report suggests no changes that would result in any material alteration of the environmental analyses in the ER or DEIS.

In sum, Proposed Contention 13 totally fails to address or demonstrate any genuine material dispute with the Levy ER or DEIS. Its attempt to cast the Task Force’s recommendations as new and significant information that must be addressed in the ER or DEIS is without any factual or regulatory basis, and is nothing more than a pretext to litigate preliminary proposals to make improvements to the NRC’s safety regulations – proposals that are clearly outside the scope of this proceeding.

U.S. Army Corps of Eng’rs, 295 F.3d 1209, 1215-16 (11th Cir. 2002) (significant impact not previously covered); S. Trenton Residents Against 29 v. FHA, 176 F.3d 658, 663 (3d Cir. 1999) (“seriously different picture of the environmental impact”); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (same); Village of Grand View v. Skinner, 947 F.2d 651, 657 (2d Cir. 1991) (significant impact not previously covered); Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987) (“seriously different picture of the environmental impact”); Wisconsin v. Weinberger, 745 F.2d 412, 418 (7th Cir. 1984) (same).

²² Hydro Resources, Inc., CLI-01-04, 53 NRC 31, 52 (2001) (“The new circumstance must reveal a seriously different picture of the environmental impact of the proposed project.”) (internal quotes and citations omitted).

B. Resubmitted Contention 5

Intervenors' Contention 5 (Proximity of Proposed Site to Crystal River Nuclear Power Station Not Assessed in SAMA Analysis), as originally submitted with their Petition in February 6, 2009, and repeated verbatim in their Resubmitted Contention 5, states (in toto):

Progress relies on the Westinghouse probabilistic risk assessment ("PRA") which as cited in contention 1, was done in the Rev 15 phase of non-certified design. To date there is not an updated PRA for Rev 16 as incorporated in PEF's COLA, nor for Rev 17 that it appears has now supplanted Rev 16 in consideration for certification. Therefore the entire SAMA section does not appear to be relevant at this time. Nonetheless, there is a striking omission in the COL part 3, Environment Report, Chapter 7 on severe accidents, there is no consideration of the impact of a severe radiological accident at Crystal River Energy Complex ("CREC"). An accident at the nuclear unit at CREC could disrupt normal operations at Levy County units 1 and 2 and should be analyzed in the SAMA analysis for this COL. There is an additional concern that the safety provisions for control room operators at Levy County 1 and 2 if the AP 1000 is utilized, will presume that the source of any radiological disruption originates from an AP 1000. If however, the source of the radiological emergency is, in fact CREC, the protective measures supplied may not be sufficient due to the different assumptions for AP 1000s cited in section 7.2.1 of the PEF Environment Report.

Resubmitted Contention 5 at 2-3 (quoting Petition at 72).

There is no additional filing from Intervenors relating to Contention 5. In fact, Intervenors never replied to the response to Contention 5 in Progress's Answer Opposing Petition to Intervene (March 3, 2009). LBP-09-10 at 110. Intervenors admit Contention 5 was prepared without expert support. Tr. at 182, 190. The Motion requesting that the Board "reconsider" Contention 5 should be denied as it (1) is untimely, (2) fails to identify any errors in the Board's decision, and (3) fails to demonstrate compelling circumstances required for reconsideration. See 10 C.F.R. 2.323(e).

For completeness, Progress notes that if the Board were to consider the Motion as a request for admission of a new contention as regards Resubmitted Contention 5, the Motion should still be denied because it does not satisfy the Commission's requirements for the admission of a new timely or non-timely contention for the reasons stated above relating to Proposed Contention 13. In addition,

Intervenors never even attempt to address the Commission's substantive requirements for contention admissibility or the Board's reasons for dismissing Contention 5 in 2009.

1. Resubmitted Contention 5 is Not Timely and Makes No Showing of Compelling Circumstances

Intervenors request reconsideration of Contention 5 which they resubmit without any modification to reflect either the revised PRA or the SAMA analysis present in the DEIS. Intervenors state, without further elaboration, "This request is timely." Resubmitted Contention 5 at 2. In fact, requests for reconsideration are due within ten days of the relevant decision. 10 C.F.R. § 2.323(e). The Board found Contention 5 inadmissible on July 8, 2009. LBP-09-10 at 110. Intervenors provide no justification for its tardiness nor do they demonstrate the compelling circumstances required by 10 C.F.R. § 2.323(e) for reconsideration.²³ Therefore, Intervenors' motion for reconsideration is over two years late and should be summarily dismissed as untimely without justification.

The Intervenors are attempting here to re-raise a safety question in an environmental context. As the Board has discussed, a SAMA analysis contains both a safety and an environmental context. LBP-09-10 at 107. While Resubmitted Contention 5 is ostensibly a safety contention (Tr. at 189), it raises a challenge to the SAMA analysis in the environmental review. DEIS § 5.11.3. The DEIS was issued on August 13, 2010. Notice of Availability of the Draft Environmental Impact Statement for the Combined Licenses for Levy Nuclear Plant Units 1 and 2, 75 Fed. Reg. 49,539 (Aug. 13, 2010). If the omission of discussion of any impact of severe accident at CREC on Levy was material (which it is not for the reasons discussed below), any omission occurred when the DEIS was issued. As required by this Board, any environmental contentions based on the DEIS should have been filed by November 15, 2010. Licensing Board Order (Granting Motion for Extension of Time), September 29, 2010. Accordingly, Intervenors should have raised any issue with the environmental analysis in the DEIS over ten months ago; they

²³ Motions for reconsideration may not be filed except upon leave of the presiding officer. 10 C.F.R. § 2.323(e). Progress treats this pleading as a motion for leave to file bound with the motion for reconsideration.

provide no justification for failing to comply with the Board's Order. There is an obligation to structure participation in the agency's NEPA review process to be meaningful. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 539 (1977) (describing the general obligation to comment during the public comment period). Intervenors should not be allowed to flaunt Board and Commission deadlines.

Intervenors have seized upon the Task Force Report, but fail to identify a single new, factual finding from the Task Force Report that changes the Levy DEIS analysis. The Commission recently rejected a similar "bootstrapping" effort to create timeliness in upholding denial of a motion to reopen an adjudicatory record. See Entergy Nuclear Vt. Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-11-02, __ NRC ___, slip op. at 13 (Mar. 10, 2011). In Vermont Yankee, the petitioner argued that a proposed 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 stated:

[t]he first and most significant difficulty is that Contention 7 is based on the premise that the cable AMP in Entergy's Application is incomplete – an assertion that, if true today, was equally true when Entergy filed its Application in 2006. Consequently, NEC could have raised the contention in its Petition to Intervene, or any time after that pleadings filing date. The fact that the May 10 Inspection Report revealed that certain safety-related electrical cables had, in fact, been exposed to submerged conditions does not inform the issue of timeliness.

Id., slip op. at 9 (footnote omitted). A subsequent NRC staff review does not refresh for timeliness purposes an issue with the completeness or adequacy of an application; therefore, the Intervenors' Motion is not timely regardless of the recommendations of the NRC Task Force.

2. Intervenors Identify No Errors in the Board Order Finding Contention 5 Inadmissible

Intervenors' request for reconsideration should be denied as it does not meet the standards for reconsideration. Under 10 C.F.R. § 2.323(e), a request for reconsideration will be granted "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision,

which could not reasonably have been anticipated, that renders the decision invalid.”²⁴ The Board found Contention 5 inadmissible as the allegation that the COLA omits a PRA was incorrect and its allegation that the SAMA analysis was inadequate lacked support. Nothing in Intervenor’s misapprehension of the Task Force recommendations are even relevant to the Board’s decision finding Contention 5 inadmissible, let alone provide compelling circumstances to reconsider that decision.

As support for reconsidering Resubmitted Contention 5, Intervenor’s argue, “We note that the Task Force put considerable emphasis on the need for the Commission to consider, and re-consider the possible impacts of accidents at multiple units and the impact of accidents at one unit on other units.” Resubmitted Contention 5 at 1-2. Contrary to Intervenor’s assertion, the Task Force recommendations do not discuss PRAs or SAMA analyses. The Task Force has two recommendations that relate, in the part, to multi-unit facilities, and both address emergency planning. The two recommendations are: “9. The Task Force recommends that the NRC require that facility emergency plans address prolonged station blackout and multiunit events 10. The Task Force recommends, as part of the longer term review that the NRC pursue additional emergency preparedness topics related to multiunit events and prolonged station blackout.” Task Force Report at ix. Specifically, the Task Force finds in § 4.3.1, “While of low probability, these events have the potential for severe consequences that require an effective EP response.” *Id.* at 51. The Board correctly found that Contention 5 did not address emergency planning. LBP-09-10 at 112 (discussing emergency planning issues separate from the discussion of issues raised in Proposed Contention 5); see also, Tr. at 182-183; 189-190. Therefore, Intervenor’s incorrectly assert, “Contention 5 is squarely within the concerns raised by the Task Force Report and deserves reconsideration.” Resubmitted Contention 5 at 2. The Task Force recommendations address emergency planning and Resubmitted Contention 5 does not.

²⁴ See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

In analyzing Contention 5, the Board separated the argument in two parts. First, the Board found Contention 5 inadmissible because its allegation that the COLA omits a PRA was incorrect. Second, the Board found Intervenors had not provided support for the allegation in Contention 5 that a severe accident at the CREC will lead to a severe accident at Levy. Nothing in Intervenors' request for reconsideration attempts to demonstrate any error in the Board's conclusions.²⁵

a. The Board Correctly Concluded That the Levy COLA Contains a PRA

In analyzing the first part of Contention 5, the Board found it inadmissible because its allegation that the COLA omits a PRA was incorrect. Intervenors asserted that a PRA based on the DCR was equivalent to not providing a PRA because it would be revised to reflect the pending AP1000 Amendment proceeding. Proposed Contention 5 at 2 (quoting Petition at 72). The Board properly rejected this point as the COLA contains a PRA. LBP-09-10 at 110. Furthermore, the NRC staff recently determined that the PRA based on the DCR was adequate for the Levy SAMA analysis. DEIS at 5-118. Intervenors do not reference, much less challenge, the DEIS conclusions. The Board correctly concluded the Levy COLA contains a PRA adequate for a SAMA analysis. Intervenors provide no justification to reconsider the Board's conclusion regarding the Levy PRA.

b. The Board Correctly Concluded that the Intervenors Lack Support to Challenge the Levy SAMA Analysis

In analyzing the second portion of Proposed Contention 5, the Board found it inadmissible because the Intervenors failed to provide support for the allegation that a severe accident at the CREC would lead to a severe accident at Levy. The Board concluded:

²⁵ The Board also discussed in dicta that Contention 5 does not meet the jurisdictional bar of 10 C.F.R. § 51.107(c). LBP-09-10 at 112. This discussion is dicta because 10 C.F.R. § 51.107(c) only applies to Severe Accident Mitigation Design Alternatives ("SAMDA"). SAMDA analysis is a subset of a SAMA analysis. LBP-09-10 at 107 n. 44. The Board also states that it is not certain whether the exception to requiring a SAMDA analysis applies to Levy. LBP-09-10 at 111. In fact, the Levy COLA includes a site-specific SAMDA analysis. ER § 7.3.2; DEIS § 5.11.3 and Table 5-20. In any event, the Board decision turned on whether the SAMA analysis was adequate, which would include the subset SAMDA analysis. LBP-09-10 at 111.

Petitioners do not allege any facts that demonstrate how an accident at CREC will affect LNP in such a way that would require PEF to include such an analysis in their COLA. Because Petitioners fail to allege facts that support their position that PEF must include a discussion of CREC in their SAMA analysis, Petitioners do not meet the contention admissibility requirement of 10 C.F.R. § 2.309(f)(1)(v).

LBP-09-10 at 111. Nothing in the Task Force Report changes this conclusion. The Task Force report finds that the existing requirements adequate to provide a reasonable assurance of safety.

Furthermore, if the Task Force recommendations are adopted, that would have the effect of further reducing the probability and impacts of severe accidents at existing facilities, making the SAMA analysis in the Levy DEIS even more conservative. As the D.C. Circuit explained in rejecting an argument by a petitioner regarding the need to supplement an EIS following the Three Mile Island accident, “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). With regard to Fukushima, there are no facts or other indications that the severe accident at Fukushima Daiichi had any significant impact on the four units at the Fukushima Daini facility, which lies less than 10 miles away, let alone causing a severe accident at that facility. If anything, the Fukushima experience reinforces the lack of interaction between nearby plants during a severe accident at one of those plants.²⁶

The Board correctly found Intervenors had not provided support for the allegation in Contention 5 that a severe accident at the CREC would lead to a severe accident at Levy. There is no justification to reconsider the Board’s conclusion about the Levy SAMA analysis. Even if it did, Resubmitted Contention 5 is inadmissible because Intervenors fail to support a genuine dispute on a material issue of law or fact because the reasons discussed above for Proposed Contention 13 also apply to Resubmitted Contention 5.

²⁶ Intervenors provide no support that a severe accident at CREC poses a credible risk to Levy, let alone could exceed the screening criterion for considering surrounding “industrial facilities” as specified in the AP1000 DCR. AP1000 DCD FSAR Ch. 2 at 2-2.

IV. CONCLUSION

For the reasons set forth above, the Board should deny the Intervenor's request.

CERTIFICATION

I certify that we have made a sincere effort to make ourselves available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that our efforts to resolve the issues have been unsuccessful.

Respectfully Submitted,

/Signed electronically by John H. O'Neill, Jr./

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Dated: September 6, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)		
)	Docket Nos.	52-029-COL
Progress Energy Florida, Inc.)		52-030-COL
)		
(Levy County Nuclear Plant, Units 1 and 2))		
)		
(Combined License Application))	ASLB No.	09-879-04-COL

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Progress Energy Florida, Inc.'s Answer Opposing Motion to Admit New Contention 13 and Reconsider Contention 5 dated September 6th, 2011, was provided to the Electronic Information Exchange for service upon the following individuals:

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Attachment A

Federal Respondents' Memorandum on the
Events at the Fukushima Daiichi Nuclear Power Station
New Jersey Env'tl. Fed'n v. NRC, No. 09-2567
(3d Cir. Apr. 4, 2011)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NEW JERSEY ENVIRONMENTAL FEDERATION,)
et al.,)
Petitioners,)
v.) No. 09-2567
NUCLEAR REGULATORY COMMISSION, *et al.*,)
Respondents,)
and)
EXELON CORPORATION,)
Intervenor.)

**FEDERAL RESPONDENTS' MEMORANDUM ON THE EVENTS
AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION**

By letter dated March 21, 2011, this Court directed counsel "to advise the Court what impact, if any, the damages from the earthquake and tsunami at the Fukushima Daiichi Nuclear Power Station have on the propriety of granting the license renewal application for the Oyster Creek Generating Station." The Nuclear Regulatory Commission (NRC) is carefully monitoring those events, and assisting the Japanese government in

understanding, controlling and limiting plant damage. NRC is also evaluating the information from these events for planning both short-term and longer-term responses to ensure the safety of United States reactors. In support of these tasks, NRC is gathering and absorbing data from the Fukushima Daiichi site that will enable NRC, with appropriate public participation, to put in place any new safety measures necessary to protect public health and safety in the United States.

NRC issued a renewed license for Oyster Creek Nuclear Generating Station almost two years ago, on April 8, 2009 (*see* Fed. Resp. Br. 48 & n.23). The renewed license is before this Court on a series of process-driven challenges brought by petitioners. As our brief shows, none of petitioners' claims finds support in the extensive administrative record underlying NRC's license-renewal decision. Oyster Creek now is operating under its 20-year renewed NRC license, but its owner, Exelon Generating Company, has announced publicly that it will cease operations in 2019.¹

In response to the disaster at Fukushima Daiichi, NRC has authority to order Exelon, like other licensees of operating nuclear plants, to adopt whatever measures NRC determines are needed in the short term for continued assurance of the public health and safety while NRC considers

¹ See <http://www.nytimes.com/2010/12/09/nyregion/09nuke.html>.

longer-term measures, including changes in its safety regulations. Such measures may be subject to site-specific considerations. At this point, however, NRC has stated that licensed nuclear power reactors in the United States are currently safe, and may continue to operate under NRC's comprehensive scheme of safety regulations and inspections, pending development of any new safety measures that emerge as NRC's "lessons-learned" project moves forward.

I. NRC will carefully gather and analyze data from the damage to the Fukushima Daiichi plant to ensure safety at U.S. reactors as necessary to protect public health and safety in the United States.

A. NRC's immediate response to Japan events.

On March 21, 2011, the NRC Commissioners and the head of the NRC Staff – the Executive Director of Operations (EDO) -- conducted a public briefing on NRC's response to the events at the Fukushima Daiichi facility.² Each Commissioner extended personal condolences to the Japanese people for their hardships and losses in this great tragedy. Chairman Jaczko stated that the purpose of the meeting was "to discuss the tragic events in Japan and to begin to consider possible actions we may take to verify the safety of the nuclear facilities" in the United States. (Tr. 3).

² The transcript of this public hearing may be found at the NRC website in the "ADAMS" database as Accession No. ML110810254.

The Chairman noted that, since the earthquake and tsunami had struck, the NRC's headquarters operations center has, in addition to ordinary 24-hour operations, been continuously staffed just to "monitor and analyze events at nuclear power plants in Japan." (Tr. 4). The Chairman also pointed out that, at the request of the Japanese government, NRC had sent a team of agency technical experts in Japan to provide on-the-ground support. (*Id.*).

Chairman Jaczko outlined how these tragic events would shape NRC policy and regulatory changes:

Here in the United States we have an obligation to the American people to undertake a systematic and methodical review of the safety of our own domestic nuclear facilities in light of the natural disaster and resulting nuclear situation in Japan. Beginning to examine all available information is an essential part of our effort to analyze the event and understand its impacts on Japan and implications for the United States. Our focus will always be on keeping plants and radioactive materials in this country safe and secure.

As the immediate crisis in Japan comes to an end we will look at any information we can to gain experience from the event and see if there are any changes we need to make to further protect public health and safety. Together with my colleagues on the Commission, we will review the current status and identify the steps we will take to conduct that review. In the meantime we will continue to oversee and monitor plants to ensure that U.S. reactors remain safe.³ (Tr. 5)

³ Each Commissioner supported the Chairman's approach, noting the need for NRC to confirm, by thoughtful and rational examination, that its approach to the regulation of nuclear power is comprehensive and correct, while applying any lessons learned from these events. (Tr.7-8).

EDO William Borchardt then commented on how NRC had utilized this “lessons learned” process following significant events in the United States. Concluding that the “current fleet of reactors and materials licensees continue to protect the public health and safety,” the EDO pointed to the principle of redundant defenses against unanticipated events called “Defense in Depth:”

The fact that every reactor in this country is designed for natural events based upon the specific site that that reactor is located, that there are multiple fission product barriers, and that there are a wide range of diverse and redundant safety features in order to provide that public health and safety assurance. We have a long regulatory history of conservative decision-making. We’ve been intelligently using risk insights to help inform our regulatory process, and we have never stopped [making] improvements to the plant design as we learn from operating experience over the more than 35 years of civilian nuclear power in this country. Some have been derived from lessons learned from previous significant events, such as Three Mile Island. We have severe accident management guidelines, revisions to the emergency operating procedures, procedures and processes for dealing with large fires and explosions, regardless of the cause.⁴ (Tr. 9-10).

As the EDO stated, NRC’s “philosophy of Defense-in-Depth . . . recognizes that the nuclear industry requires the highest standards of design, construction, oversight, and operation,” but even so, NRC regulation does

⁴ In support of this “lessons learned” philosophy, the EDO observed that NRC continues “to gather information [from Japan] and assess that information for implications on the U.S. facilities.” (Tr. 10)

“not rely on any one level of protection” to protect public health and safety. (Tr. 13-14) Further, the EDO said, “the designs for every single reactor in this country take into account *the specific site* that that reactor is located and does a detailed evaluation for any natural event such as *earthquakes, tornadoes, hurricanes, floods, tsunami*, and many others.”⁵ (Tr. 14) (emphasis added).

Later, Chairman Jaczko reiterated in testimony before Congress that NRC has “taken advantage of the lessons learned from previous operating experience,”⁶ including most significantly, the Three Mile Island accident in 1979, “to implement a program of continuous improvement for the U.S.

⁵ The EDO stressed that NRC planning for severe accidents includes the assumption of system failures:

Also as a result of operating experience and ongoing research programs, we have developed requirements for severe accident management guidelines. These are programs that perform the “what if” scenario. What if all of this careful design work, all of these important procedures and practices and instrumentation, what if that all failed? What procedures and policies and equipment should be in place to deal with the extremely unlikely scenario of a severe accident? Those have been in effect for many years and are frequently evaluated by the NRC inspection program. (Tr. 15)

⁶ Written Statement by Gregory B. Jaczko, Chairman, U.S. Nuclear Regulatory Commission to the Subcomm. on Energy and Water of the Senate Appropriations Comm. at 6 (March 30, 2011) (“Jaczko Statement”). (ADAMS Accession No. ML110890505)

reactor fleet.”⁷ The Chairman added that operating experience and research programs have produced severe accident management guidelines for U.S. reactors to ensure that, in the event all precautions failed and a severe accident occurred, “the plant would still protect public health and safety.”⁸

In short, the public statements of NRC’s leaders show that the agency remains confident that U.S. reactors, as designed, constructed, and operated, are safe, but acknowledge the need to monitor and learn from the events at the Fukushima Daiichi Nuclear Power Station to ensure safety at U.S. reactors, as NRC assists the Japanese government in that disaster.⁹

⁷ *Id.*

⁸ *Id.* at 6-7.

⁹ President Barack Obama, in addressing the American people on March 17, 2011, echoed the statements by NRC leaders:

Our nuclear power plants have undergone exhaustive study, and have been declared safe for any number of extreme contingencies. But when we see a crisis like the one in Japan, we have a responsibility to learn from this event, and to draw from those lessons to ensure the safety and security of our people. That’s why I’ve asked the Nuclear Regulatory Commission to do a comprehensive review of the safety of our domestic nuclear plants in light of the natural disaster that unfolded in Japan.

See <http://www.whitehouse.gov/blog/2011/03/17/president-obama-we-will-stand-people-japan>.

B. NRC's "lessons-learned" approach.

As the EDO mentioned, past significant events in the United States have prompted NRC toward insights leading to enhanced reactor design and operational safety. Two events stand out as models of NRC actions to respond to significant occurrences with "lessons learned" applied to licensed reactors. The first was the accident at the Three Mile Island, Unit 2 reactor on March 28, 1979. The other was the terrorist attacks on the United States on September 11, 2001.

In April 1979, just after the Three Mile Island-2 (TMI-2) accident, NRC created a Bulletin and Orders Task Force as the focal point for TMI 2-related Staff activities necessary to assure the immediate safety of all other operating power reactors. In May 1979, the NRC established the TMI-2 Lessons Learned Task Force to identify and evaluate safety concerns requiring prompt licensing actions for operating reactors, beyond the immediate actions announced by the Bulletins and Orders Task Force effort.¹⁰

¹⁰ Licensing Requirements for Pending Operating License Applications: Proposed Rule, 46 Fed. Reg. 26491 (May 13, 1981). A set of short-term recommendations offered by this task force was published as NUREG-0578 in July 1979. *Id.*

A steering group then assessed the many recommendations, from within and beyond NRC, “which would provide a comprehensive and integrated plan for all actions necessary to correct or improve the regulation and operation of nuclear facilities.”¹¹ After issuance of TMI-2 Action Plan requirements in guidance, NRC determined that the new reactor requirements should be codified by regulation.¹² For a variety of reasons, this specific TMI rule was not adopted, but NRC did adopt a number of rules to update licensing requirements on the basis of TMI “lessons learned.” Thus, a decade after the TMI-2 accident NRC Staff ultimately was able to advise the Commission that “all regulatory changes needed to implement [the TMI-2 Action Plan] have been completed and that compliance with existing regulations and orders is a sufficient response to all applicable TMI-2 accident ‘lessons learned.’”¹³

¹¹ *Id.* This “TMI-2 Action Plan” was published as NUREG-0660 in May 1980. These action items led NRC to issue a list of “Requirements for New Operating Licenses,” published in NUREG-0694, which was later clarified and superseded by NUREG-0737. *Id.*

¹² *Id.* at 26492.

¹³ See Statement of Policy on Litigation of TMI-Related Issues in Power Reactor Operating License Proceedings; Revocation of Superseded Policy Statement Concerning TMI-Related Procedures, 54 Fed. Reg. 7897 (Feb. 23, 1989). As noted above, the Chairman cited the lessons learned from the TMI-2 accident as major source of improvement in NRC safety. Jaczko Statement at 6.

The second example of NRC's lessons-learned approach is the agency effort to improve reactor site security following the terrorist attacks on September 11, 2001. NRC quickly issued interim advisories and directives upgrading security at all nuclear power plants.¹⁴ By 2003, NRC had issued formal orders to its reactor licensees to improve security against terrorist attacks, including changes in physical barriers, security guard posts and patrols, more restrictive site access and a host of other security enhancements.¹⁵ These included measures, such as additional makeup water and equipment to mitigate fires, that would have beneficial effects regardless of the triggering event.¹⁶

Eventually, NRC enacted many of its post-9/11 security improvements as formal regulations. In 2007, NRC upgraded the terrorist

¹⁴ See *Private Fuel Storage, L.L.C.* CL1-02-25, 56 NRC 340, 343-44, 356 (2002).

¹⁵ These post-9/11 actions are described in the NRC's later "Design Basis Threat" rulemaking. See *Design Basis Threat; Proposed Rule*, 70 Fed. Reg. 67380 (Nov. 7, 2005); *Design Basis Threat; Final Rule*, 72 Fed. Reg. 12705 (Mar. 19, 2007).

¹⁶ See *New York v. NRC*, 589 F.3d 551, 555 (2nd Cir. 2009). In his Congressional testimony, Chairman Jaczko reiterated that, as a result of the September 11 attacks, NRC has ordered reactor licensees to upgrade equipment available to deal with "a significant fire or explosion," regardless of its cause. Jaczko Statement at 7.

threat that licensees must defend against by issuing an enhanced “Design Basis Threat” rule.¹⁷ And, in 2009, after “a thorough review of the existing physical protection program requirements,” NRC enacted a new “Power Reactor Security Requirements” rule that “codif[ied] generically-applicable security requirements.”¹⁸ On judicial review, the courts have declined to second-guess the various measures NRC took in response to the September 11 attacks.¹⁹

These upgrades – and the methodology by which NRC developed and implemented them – illustrate how NRC undertakes “lessons learned” improvements to reactor safety from events that may bear on the safety and security of U.S. reactor operations.²⁰ As the Chairman and EDO explained at the agency’s March 21st public meeting on still-unfolding events in Japan,

¹⁷ See 10 C.F.R. § 73.1; 72 Fed. Reg. 12705 (Mar. 19, 2007).

¹⁸ Power Reactor Security Requirements; Final Rule, 74 Fed. Reg. 13926, 13927 (Mar. 27, 2009)

¹⁹ See, e.g., *Public Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156 (2nd Cir. 2004).

²⁰ We note that “lessons learned” from the Chernobyl accident also “added to our understanding of some of the phenomena that may be involved in a severe nuclear accident” and “provided some additional insights that are useful in guiding our severe-accident programs.” See *Potential Implications of Chernobyl Accident for all NRC-Licensed Facilities*, 26 NRC 520, 523 (1987).

NRC will use the same “lessons learned” approach in applying information from the Fukushima Daiichi experience to ensure safety here.

Toward that end, the Chairman, with the agreement of the Commission, has already instructed NRC Staff to create a Task Force to perform both short-term and longer-term tasks relating to Fukushima Daiichi to assure and enhance safety. In the short term, the NRC Task Force has been directed to:

... evaluate currently available technical and operational information from the events [that have occurred at the Fukushima Daiichi nuclear complex] in Japan to identify potential or preliminary near term/immediate operational or regulatory issues affecting domestic operating reactors of all designs[, including their spent fuel pools,] in areas such as protection against earthquake, tsunami, flooding, hurricanes; station blackout and a degraded ability to restore power; severe accident mitigation; emergency preparedness; and combustible gas control.”²¹

The Task Force will begin a longer-term review “as soon as NRC has sufficient technical information from the events in Japan,” and will develop “lessons learned” as it has in the past – that is, NRC will “evaluate all technical and policy issues related to the event to identify potential research,

²¹ SRM-COMGBJ11-0002 (March 21, 2011)(available via NRC web site for ADAMS (Accession No. ML110800456). Further, this Task Force will “develop recommendations, as appropriate, for potential changes to inspection procedures and licensing review guidance, and recommend whether generic communications, orders, or other regulatory requirements are needed.”

generic issues, changes to the reactor oversight process, rulemakings, and adjustments to the regulatory framework that should be conducted by NRC.”²²

The Commission, however, has not suspended reactor operations or licensing activity. As with the post-TMI and post-9/11 regulatory enhancements, any “lessons learned” from the Fukushima Daiichi event will be applied generically to all reactors, including Oyster Creek, as appropriate to their location, design, construction, and operation. No safety, technical, or policy justification exists to single out particular reactors for different treatment just because of their place in the licensing queue or status on judicial review.

For instance, NRC issued a renewed license for the Vermont Yankee Nuclear Power Plant quite recently – on March 21, 2011 – despite the events at Fukushima Daiichi.²³ This decision reflects NRC’s confidence in the robust and redundant safety design and construction of currently operating U.S. nuclear reactors, as restated by the Commissioners and the EDO in their

²² *Id.*

²³ See Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Notice of Issuance of Renewed Facility Operating License No. DPR-28 for an Additional 20-Year Period, 76 Fed. Reg. 17162 (March 28, 2011).

public briefing on March 21, 2011, and by the Chairman in his Congressional testimony.

II. NRC's statutory and regulatory scheme for operating reactors involves ongoing oversight to enhance safety and ample opportunities for public participation.

The petition for review pending before this Court in this case arises out of an NRC adjudicatory proceeding, initiated by petitioner, on alleged defects in the Oyster Creek application for license renewal. License renewal, of course, is an important matter and receives NRC's full attention. But, as we explain in detail below, NRC's license-renewal process was designed as a particularized and limited inquiry into aging management during the renewal period. It is NRC's continuous and ongoing oversight of licensed reactors, which includes a comprehensive scheme of safety regulation and the presence of resident inspectors at every reactor in the country, that assures public health and safety every day.

Indeed, Chairman Jaczko recently reassured Congress that review of information from Japan thus far, "combined with our ongoing inspection and licensing oversight, gives us confidence that the U.S. plants continue to operate safely."²⁴ As the basis for this confidence, the Chairman pointed to the "diverse and redundant safety systems that are required to be maintained

²⁴ Jaczko Statement at 3.

in operable condition and frequently tested to ensure that the plant is in a high condition of readiness to respond to any situation.”²⁵

NRC’s ongoing oversight assures that a licensed facility remains in compliance with what is known as the plant’s “current licensing basis” or CLB.²⁶ The CLB “represents the evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.”²⁷ NRC has emphasized that its ongoing oversight “continuously analyzes conditions, acts, and practices that could affect safe operation of plants”²⁸ through the ongoing regulatory process, which “includes research, inspections, audits, investigations, evaluations of operating experience, and regulatory actions to resolve identified issues.”²⁹

²⁵ *Id.* at 6.

²⁶ Oyster Creek’s CLB with respect to earthquake and flood analysis is not part of the record on review. Oyster Creek’s CLB, however, does implement plant design and construction criteria applicable to earthquakes and floods. This analysis is captured in Chapters 2.4 and 3.7 of the licensee’s Final Safety Analysis Report (“FSAR”) for that facility.

²⁷ Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22461, 22473 (May 8, 1995).

²⁸ *Id.* at 22485.

²⁹ Nuclear Power Plant License Renewal: Final Rule, 56 Fed. Reg. 64943, 64947 (Dec. 13, 1991); *see also* 60 Fed. Reg. at 22485 (NRC’s “program

NRC utilizes information gathered through routine oversight – or from external events – to improve safety through various regulatory mechanisms, any one or all of which NRC might use to implement “lessons learned” from the Fukushima Daiichi disaster. For example, NRC often promulgates new regulations, issues orders modifying or suspending licenses, requires amendments to existing licenses, or takes other licensing actions to improve safety. Such agency actions are accompanied by an opportunity for public comment or a hearing under Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a).

Concerned citizens also have two important avenues of redress to seek further action by NRC. The first is a petition for rulemaking under 10 C.F.R. §2.802, by which anyone may request NRC to initiate a rulemaking to issue, amend, or rescind a regulation. Second, concerned citizens may submit enforcement petitions under 10 C.F.R. § 2.206 to request the NRC to institute a proceeding to modify, suspend or revoke a license, or for other appropriate action, where a citizen believes that NRC or

for the review of operating events at nuclear power plants . . . offers a high degree of assurance that events that are potentially risk significant or precursors to significant events are being reviewed and resolved expeditiously”).

one of its licensees has not adequately addressed a safety or environmental issue.³⁰

In sum, the license renewal proceeding before this Court is narrowly focused on aging management. NRC has in place many broader regulatory tools that are appropriate vehicles to implement “lessons learned” from the events at Fukushima Daiichi, including mechanisms for members of the public to bring to NRC’s attention safety concerns that they believe the agency might have overlooked or underappreciated.

III. The petition for review before this Court concerns discrete issues arising out of a now-closed adjudicatory record.

As discussed above, 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

³⁰ See, e.g., *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 158 (2nd Cir. 2004); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 n.4 (D.C. Cir. 1990); *Massachusetts v. NRC*, 878 F.2d 1516, 1520 (1st Cir. 1989). See also *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Station, Unit 1; H.B. Robinson Plant, Unit 2), DD-06-1, 63 NRC 133, 140 (2006) (granting a § 2.206 petition on fire protection).

(or proposed for admission) in a license renewal adjudication such as the current case before this Court.

As explained in our brief, the license renewal hearing process that is the focus of petitioners' lawsuit in this Court focused strictly on contentions relating to the "potential detrimental effects of aging that are not routinely addressed by ongoing regulatory programs" (Fed. Resp. Br. 3); the license renewal process was "not intended to duplicate the Commission's ongoing review of operating reactors." *Id.*

Years ago, when NRC considered what should be reviewed when the agency is considering a license-renewal application, the agency developed a process by which "adequate safety will be assured during the extended period of operation," but which avoided duplicative, inefficient assessments covered by routine regulatory oversight.³¹ Accordingly, NRC decided that it would not be necessary or desirable to open up the full range of criteria in a plant's current licensing basis to re-analysis during the one-time-only license renewal review. Instead, NRC concluded that "issues concerning operation

³¹ 60 Fed. Reg. at 22464.

during the currently authorized term of operation should be addressed as part of the current license rather than deferred until a renewal review.”³²

The NRC therefore determined that, for license renewal, the agency’s everyday regulatory process should be supplemented only by a very particularized inquiry, appropriate at the license-renewal stage, into “the detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation.”³³ In contrast to aging-management issues, NRC’s ongoing “regulatory process provides reasonable assurance that there is compliance with the [current licensing basis].”³⁴

Accordingly, the NRC hearing below – now before this Court on judicial review – was limited exclusively to aging-management issues. The

³² *Id.* at 22481. NRC concluded that its ongoing regulatory process is “sufficiently broad and rigorous” (56 Fed. Reg. at 64950) to “provide reasonable assurance that, as new issues and concerns arise, measures needed to ensure that operation is not inimical to the public health and safety and common defense and security are ‘backfitted’ onto the plants.” 56 Fed. Reg. at 64945.

³³ 60 Fed. Reg. at 22464.

³⁴ *Id.* at 22473. Indeed, “NRC conducts its inspection and enforcement activities under the presumption that non-compliances will occur.” *Id.* at 22473-74.

hearing, like all NRC contested hearings on license renewal, was limited to contentions material to license renewal and admitted for hearing. The only admitted contention in the present Oyster Creek case required NRC's adjudicatory tribunal, the Atomic Safety and Licensing Board, to determine whether Exelon's program for ultrasonic testing "is adequate to manage the aging effects of corrosion in the sand bed region of Oyster Creek's drywell shell so the intended functions of the shell (*i.e.*, structural integrity and pressure containment) will be maintained during the renewal period consistent with the current licensing basis." (Fed. Resp. Br. 4). That question was answered in the affirmative by the Licensing Board and (on administrative appeal) by the Commission. As our brief explains (*id.* at 43-49), the NRC Staff made all other necessary findings and issued the renewed license on April 8, 2009.

The record before this Court has been closed since the proceeding before the Licensing Board concluded two years ago (Appendix 831-32). As in all Hobbs Act lawsuits seeking direct review in the courts of appeals, this case must be decided "on the basis of the agency record compiled" in

the course of the proceedings below, not on a new record made for the first time in the court of appeals.³⁵

In any event, as discussed above, petitioners have other avenues open to them to raise Fukushima Daiichi-related issues on their own or in public-participation opportunities likely to arise after NRC, the industry, and the public have absorbed the technical, scientific and engineering knowledge that might evolve from the “lessons learned” process.

NRC has shown in implementing upgraded site security requirements after 9/11 to thwart terrorist attacks at nuclear facilities, and in adding safety enhancements after considering the lessons learned from the TMI-2 accident, that the agency is not dependent upon contested hearings to upgrade plant safety. NRC has already announced its plan to draw upon “lessons learned” from the Japan events, as the agency has done previously after natural or man-made disasters. As in the past, NRC will conduct

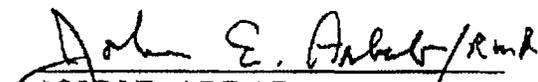
³⁵ *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). This Court has Hobbs Act jurisdiction only to review the “final agency action” from which petitioners have sought review. If petitioners were to seek relief before NRC regarding the events at Fukushima Daiichi, which they have not, any resulting final NRC action would not be reviewable under the rubric of the current petition. Rather, as in reopening cases in which a fresh agency order is entered, “the challenging party must file a new . . . petition for review from the now-final agency order.” *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989). *Accord, Council Tree Communications, Inc. v. FCC*, 503 F.3d 284, 287 (3rd Cir. 2007).

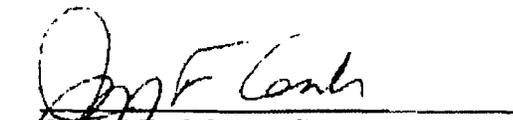
rulemaking, or issue orders and other directives, to make upgrades required to implement whatever short-term or longer-term safety improvements emerge from the Task Force directed by the Commission to analyze the Fukushima Daiichi disaster.

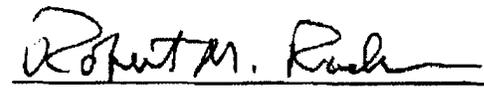
Conclusion

For the reasons given in our brief and at oral argument, the petition for review should be denied, based on the record before this Court. The disaster at the Fukushima Daiichi reactors in Japan is, of course, tragic and serious, and has triggered a full lessons-learned inquiry at NRC that may well lead to new safety measures at American operating reactors. But the disaster is not a basis for judicial relief in this case.

Respectfully submitted,


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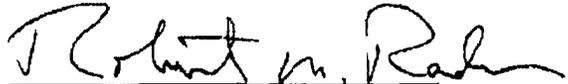
CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of April 2011 served, by e-mail and by electronic transmission through the Electronic Filing System, and by U.S. Mail, First-Class, postage prepaid, a copy of "Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station" upon the following:

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