



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

September 23, 2011

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Atomic Safety and Licensing Board Panel
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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Nicholas G. Trikorous, Administrative Judge
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Washington, DC 20555-0001

In the Matter of
FIRSTENERGY NUCLEAR OPERATING CO.
(Davis-Besse Nuclear Power Station, Unit 1)
Docket No. 50-346-LRA

Dear Administrative Judges:

On September 23, 2011, the NRC Staff ("Staff") transmitted to the Board and parties the "NRC Staff's Motion to Strike Portions of Intervenor's Reply Memorandum To Staff and Applicant Oppositions to Admission of New Contention," ("Staff's Motion to Strike"). Subsequent to transmitting the Staff's Motion to Strike, the Staff identified an error in footnote 23, which omitted some references. The Staff is submitting this Corrected Motion to Strike, which contains the omitted references in footnote 23.

The Staff regrets any inconvenience this inadvertent error may have occasioned.

Sincerely,

Signed (electronically) by
Brian G. Harris
Counsel for NRC Staff

cc: Service List

September 23, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FIRSTENERGY NUCLEAR OPERATING CO.) Docket No. 50-346-LRA
)
(Davis-Besse Nuclear Power Station, Unit 1))
)

CORRECTED NRC STAFF'S MOTION TO STRIKE PORTIONS OF INTERVENOR'S
REPLY MEMORANDUM TO STAFF AND APPLICANT OPPOSITIONS TO
ADMISSION OF NEW CONTENTION

INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") files this motion to strike limited portions of "Intervenors' Reply Morandum (sic) to Staff and Applicant Oppositions to Admission of New Contention," (Intervenors' Reply") dated September 13, 2011.¹ Intervenors' Reply impermissibly includes new arguments not within the scope of the original pleading without any attempt to satisfy the standards governing late-filed contentions as set forth in 10 C.F.R. §§ 2.309(c) and (f)(2). Accordingly, these new arguments should be stricken.

BACKGROUND

This proceeding concerns FirstEnergy's August 27, 2010 application to renew its operating license for Davis-Besse for an additional twenty years from the current expiration date

¹ As required under 10 C.F.R. § 2.323(b), counsel for the Staff contacted Mr. Terry Lodge, counsel for the Intervenors, in an attempt to resolve the dispute raised in this motion. Intervenors did not agree to the relief requested in this motion and are planning on opposing the motion. Counsel for the Applicant, FirstEnergy, authorized the Staff to state that FirstEnergy does not object to the motion and plans to file a motion to strike.

of April 22, 2017.² The Staff accepted the LRA for review, and on October 25, 2010, published a *Federal Register* Notice providing a Notice of Opportunity for Hearing.³ On December 27, 2010, Joint Petitioners filed a petition to intervene.⁴ On March 11, 2011, the Fukushima Dai-ichi site in Japan experienced an earthquake followed by a tsunami, which damaged some of the reactors located at the site. On April 26, 2011, the Atomic Safety and Licensing Board (“Board”) admitted in part two of four originally proffered contentions. On August 11, 2011, Petitioners filed a new contention in the *Davis-Besse* license renewal proceeding.⁵ The Davis-Besse Petitioners’ new contention states:

The ER for *Seabrook*⁶ license renewal fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC’s Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.⁷

² Letter from Barry S. Allen, Vice President, dated August 27, 2010, transmitting the license renewal application for Davis-Besse (Agencywide Document Access and Management System (“ADAMS”) (ADAMS Accession No. ML1024505650) (“LRA”) at 1.2-1. If the LRA is approved, Davis-Besse’s new license expiration date would be April 22, 2037.

³ Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License No. NPF-003 for an Additional 20-Year Period; FirstEnergy Nuclear Operating Company, Davis-Besse Nuclear Power Station, Unit 1, 75 Fed. Reg. 65,528 (Oct. 25, 2010).

⁴ Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010).

⁵ Similar contentions have been filed in other proceedings involving both COL and license renewal proceedings. But only the Davis-Besse Petitioners chose not to file a contention challenging the applicable plant’s LRA, ER, applicable EIS and incorporate by reference a contention filed in an unrelated proceeding.

⁶ It is important to note that Intervenors’ Reply made no attempt to correct the Fukushima Contention to address Davis-Besse instead of Seabrook. See *generally* Intervenors’ Reply.

⁷ Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of The Fukushima Task Force Report (“Fukushima Contention”) (Aug. 12, 2011) (ADAMS Accession No. ML11224A000) at 5 (emphasis added). Petitioners’ contention simply attached the contention filed in the Seabrook Nuclear Power Plant License Renewal proceeding (“Seabrook”). Compare Contention in Support of Motion to Admit New Contention Regarding the Safety and Environmental implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (“Seabrook Contention”) (Aug. 11, 2011) (ADAMS Accession No. ML11223A3760).

On September 13, 2011, the Intervenor's filed their reply to the Staff's and Applicant's answers that contained new arguments and supporting facts not present in the initial petition to add the new contention.

DISCUSSION

I. The Standards Governing Arguments Raised For the First Time In A Reply Brief

Under the Commission's rules, petitioners may file a reply to any answer filed in response to its petition.⁸ The scope of that reply, however, is not unlimited.⁹ In *Palisades*, the Commission explained that

[i]t is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first present in the original petition or raised in the answers to it. New bases for [the] contention cannot be introduced in a reply brief ... unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. 2.309(c), (f2).¹⁰

These pleading requirements form the cornerstone of the Commission's effort to "avoid unnecessary delays and increase the efficiency of NRC adjudication,"¹¹ and ensure the fundamental fairness of the proceedings.¹² "Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims."¹³ Therefore, petitioners are precluded from using a reply to present

⁸ 10 C.F.R. § 2.309(h)(2).

⁹ See *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

¹⁰ *Id.*

¹¹ *Louisiana Energy Services* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

¹² *Palisades*, CLI-06-17, 63 NRC at 732.

¹³ *Id.*

entirely new facts or arguments in an attempt to “reinvigorate thinly supported contentions.”¹⁴

Any improper arguments and factual support should be stricken.¹⁵

II. Bases for the Motion to Strike

Intervenors’ Reply contains new arguments and factual support that should be stricken.

The relevant pages of Intervenors’ Reply are attached to this Motion with new arguments and facts struck out using the “Cross Out Text” function in Adobe Acrobat. The new arguments and facts are highlighted in the table below.

Location of New Information in Intervenors’ Reply	Description of the New Information
<p>Section Entitled “ADAMS Reveals Complete Indifference in Licensing Deliberations to Implications of Fukushima for License Renewals (sic) Applications”</p> <ul style="list-style-type: none">On page 3, strike the last two full sentences on the page, which state: “However, the contention is one of omission. We are challenging the completeness of FENOC’s License Renewal Application and Environmental Report in their entirety, for FENOC has not incorporated any “lessons learned” from the new and significant information revealed by the NRC Near-Term Fukushima Task Force Report dated July 12, 2011.”	<p>These two sentences re-characterize Intervenors’ challenge as being an omission from FirstEnergy’s Davis-Besse LRA and ER, while the original language of the contention challenged Seabrook’s LRA, ER, and DSEIS. The Fukushima Contention failed to challenge any FirstEnergy or Davis-Besse related document.</p>
<ul style="list-style-type: none">On page 4-5, strike the last sentence of the first full paragraph and the following paragraph, which state: “In both cases, the Applicant has failed to incorporate “lessons learned” from the NRC’s Fukushima Task Force Near Term Report dated July 12, 2011[,] into the NEPA documents, including their respective	<p>Intervenors have added new facts not present in their original filing, apparently based on a recent review of documents existing prior to events at Fukushima Daiichi, namely the FirstEnergy LRA and</p>

¹⁴ *Louisiana Energy Services* (National Enrichment Facility), CLI-04-32, 60 NRC 223, 224 (2004).

¹⁵ 10 C.F.R. § 2.319. *See, e.g., Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-16, 68 NRC 361, 376-77, 399-400, 407, 429 (2008).

<p>Environmental Reports.</p> <p>A PDF search on FENOC's 648 page long ER posted at NRC's website (http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-enviro.pdf) for the terms "Fukushima" and "Task Force" revealed that the Fukushima Daiichi accident is mentioned nowhere throughout the entire voluminous document. Although other task forces are mentioned a few places, no mention is made of the NRC's Fukushima Task Force, created shortly after the Fukushima nuclear catastrophe began on March 11, 2011, nor its Near-Term Report published on July 12, 2011. It appears that FENOC's ER, dated August 2010, has not been updated in any way, shape, or form since the catastrophe began on March 11, 2011, nor since the NRC's Fukushima Task Force Near-Term Report published its findings on July 12, 2011. Likewise, FENOC's August 2010, 1810-page License Renewal Application posted at NRC's website (http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-lra.pdf) does not mention the Fukushima nuclear catastrophe, nor NR's Fukushima Task Force Near-Term Report."</p>	<p>ER. This untimely review and assertion of facts appears to be the primary source of new information that was not pled in the Fukushima Contention. This fundamentally alters Intervenors' arguments from focusing on Seabrook's LRA, ER, and DSEIS, to Davis-Besse's LRA and ER. Seabrook and Davis-Besse are not similar, involve different reactor designs, different locations, different environmental concerns, and different documents. Intervenors should not be allowed to assert information in FirstEnergy documents that the Fukushima Contention failed to identify or make any other assertions regarding their completeness or error.</p>
<ul style="list-style-type: none">On page 5-6, strike the last sentence on page 5 continuing to its end on page 6, which states: <p>"FENOC has not analyzed the potentially catastrophic costs and risks that could be unleashed by a very long term station black out at Davis-Besse, whether caused by earthquake combined with flood (as has occurred at Fukushima Daiichi) or some other internal or external cause."</p>	<p>Intervenors assert for the first time in the reply that FirstEnergy has not analyzed the costs and risks of a long term station blackout ("SBO"). The Fukushima Contention failed to raise the issue of long-term SBO for Davis-Besse, originally, and should not now be allowed to raise it in their reply.</p>
<ul style="list-style-type: none">On page 6, strike the sentence beginning with "Despite," which states: <p>"Despite the lessons to be learned, and applied at Davis-Besse in its LRA and ER SAMA analyses, from the significant new information coming from the Fukushima Daiichi Nuclear Catastrophe (which began</p>	<p>Intervenors raise the issue of incorporating information from the events at Fukushima Daiichi into the Davis-Besse LRA and ER. Here, again, Intervenors did not identify a single</p>

<p>on March 11, 2011, just ten days after the March 1, 2011 ALSB oral prehearing in Port Clinton, Ohio[,] for this proceeding), such as reflected in the Near-Term Task Force Report dated July 12, 2011, FENOC has done no such updated SAMA analyses.”</p>	<p>dispute with Davis-Besse LRA or ER in the Fukushima Contention. They should not be allowed to repair their facially deficient contention in the reply.</p>
<ul style="list-style-type: none">On page 6-7, strike the last sentence on the page beginning at “it is precisely” through page 7 with the sentence ending with “climb even higher,” which states: “[I]t is precisely the new and significant information revealed by the NRC Near-Term Task Force Report about the catastrophic consequences that could be unleashed by a long term station black-out, due to an earthquake and flood (as by a seiche on Lake Erie, immediately adjacent to Davis-Besse, in fact, in the early 1970s, during Davis-Besse’s early construction activities, just such a seiche occurred on-site, causing significant flooding), that needs to be incorporated into new, carefully executed FENOC SAMAs. The Fukushima Daiichi Nuclear Catastrophe, months ago, had a ballpark figure of \$200 billion in property damage, recovery costs, etc. Since estimated radioactivity releases have been revised upward a number of times since March 11th, and since even this \$200 billion ball park figure is already months old, and radioactivity releases have continued since then, even this catastrophic figure will likely climb even higher.”	<p>Intervenors raise both new arguments and facts in their reply. The Fukushima Contention contained no assertions regarding the potential for seiches at Lake Erie or the flooding which Intervenors assert occurred during the construction of Davis-Besse. As such, these “new facts” should be stricken from the reply. Similar to other arguments regarding the applicability of the Fukushima Contention to Davis-Besse, Intervenors failed to argue or articulate any of these arguments in the original filing and should not be allowed add new arguments to support the deficient contention.</p>

Instead of focusing narrowly on the scope of the contention as Intervenors originally proffered it to this Board, Intervenors’ Reply attempts to recast, re-argue, and add additional bases to support their originally deficient new contention. Intervenors’ Reply quite simply seeks to substitute its original contention with a contention that at least purports to address FirstEnergy’s LRA and ER. Intervenors have previously been warned by this Board about the perils of filing documents without sufficient review and failing to comply with the regulatory

requirements of 10 C.F.R. § 2.323,¹⁶ they have elected to disregard the Board's prior warnings as non-consequential. As the Staff addressed in its answer, Intervenors' wholesale substitution of Seabrook and NextEra for Davis-Besse and FirstEnergy whether done in an "errata" or a reply brief fundamentally undermines the fairness of the proceeding for all the parties.¹⁷ The identified passages from Intervenors' Reply as identified in the table above do not legitimately amplify their previous arguments and should be stricken.¹⁸

For example, Intervenors waited until their reply to mention FirstEnergy, Davis-Besse, the Davis-Besse LRA, or the Davis-Besse ER and merely characterize this as responding to allegations that their contention lacks specificity. Intervenors explain that they have now conducted a cursory word search of the LRA and ER and not found any references to the terms "Fukushima" and "Task Force" related to the Fukushima Dai-ichi event.¹⁹ Similarly, Intervenors' other references, like seiches²⁰ on Lake Erie and its complaints regarding Davis-Besse, were never raised in the original Fukushima contention. Intervenors' Reply simply seeks to amend its facially deficient Fukushima contention and add new support without any showing that it meets

¹⁶ Licensing Board Order (Granting Motion To Strike and Requiring Re-filing of Reply) (Feb. 18, 2011) at 4 (unpublished). (granting motion to strike portions of Intervenors' Reply). In particular, the Board emphasized the importance of complying with 10 C.F.R § 2.323(d), which states that:

Accuracy in filing. All parties are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citations to the record. Failure to do so may result in appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of the party. (emphasis added)

¹⁷ NRC Staff's Answer In Opposition To Motion To Admit New Contention Regarding The Safety And Environmental Implications Of The Nuclear Regulatory Commission Task Force Report On The Fukushima Dai-Ichi Accident, at 5-6 (Sep. 6, 2011).

¹⁸ *Louisiana Energy Services*, CLI-04-25, 60 NRC at 224-25.

¹⁹ Intervenors' Reply at 4.

²⁰ Seiches are "an oscillation of the surface of a landlocked body of water (as a lake) that varies in period from a few minutes to several hours." WEBSTER'S II NEW COLLEGE DICTIONARY 1024 (3d ed. 2005).

that late filing criteria under 10 C.F.R. § 2.309(c) or (f)(2). Allowing Intervenors, here, to argue that they did not need to address either the LRA or the ER and to add additional facts defeats the fundamental fairness of the proceeding and the Commission's clear guidance to intervenors. The Commission has warned intervenors that they need to be prepared to meet the high standards of participating in an NRC proceeding. The Commission stated that:

As we have stressed previously, our 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 claim and the support for their claim at the outset.'²¹

Quite clearly, Intervenors' Reply demonstrated the lack of discipline and preparation that this Board explained would not be acceptable going forward.²² Each of these issues could have been identified in a pleading that challenged the LRA and ER for Davis-Besse, as each of the other intervenors did in other similarly situated cases, including Beyond Nuclear in the Seabrook proceeding.²³ As such, the references to specific issues for Davis-Besse, FirstEnergy, and the Davis-Besse LRA and ER should be stricken from Intervenors' Reply.

²¹ *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009) (quoting *Louisiana Energy Services, L.P.*, CLI-04-25, 60 NRC at 224-25).

²² See *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP11-13, 73 NRC ____ (April 26, 2011) (slip op. at 7 – 8); Licensing Board Order (Granting Motion To Strike and Requiring Re-filing of Reply) (Feb. 18, 2011) at 4 (unpublished). (granting motion to strike portions of Intervenors' Reply).

²³ Comparing the Fukushima contentions filed in the other proceedings, only the Intervenors in Davis-Besse chose to forego challenging the application and ER at issue. See Intervenors' Reply. *But compare* Seabrook Contention; Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc. New Contention Regarding NEPA Requirement To Address Safety And Environmental Implications Of The NRC Fukushima Task Force Report (Aug. 11, 2011) (ADAMS Accession No. ML11229A712) (filed in the *Indian Point* Proceeding).

CONCLUSION

For the foregoing reasons, the new arguments and facts should be stricken from
Intervenors' Reply.

Respectfully submitted,

Signed (electronically) by

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FIRSTENERGY NUCLEAR OPERATING CO.) Docket No. 50-346-LRA
)
(Davis-Besse Nuclear Power Station, Unit 1))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the "CORRECTED NRC STAFF'S MOTION TO STRIKE PORTIONS OF INTERVENOR'S REPLY MEMORANDUM TO STAFF AND APPLICANT OPPOSITIONS TO ADMISSION OF NEW CONTENTION" and Letter to Board from Brian G. Harris in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 23rd day of September, 2011.

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September 13, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of) Docket No. 50-346
First Energy Nuclear Operating Company)
(Davis-Besse Nuclear Power Station, Unit 1))
(Regarding the Renewal of Facility)
Operating License NPF-003 for a 20-Year)
Period))

* * * * *

**INTERVENORS' REPLY MORANDUM TO STAFF AND
APPLICANT OPPOSITIONS TO ADMISSION OF NEW CONTENTION**

Pursuant to 10 C.F.R. § 2.309(h)(2), the Intervenors hereby reply to the oppositions submitted by the Applicant, First Energy Nuclear Operating Company ("FENOC") and the U.S. Nuclear Regulatory Commission ("NRC") Staff to Intervenors' new contention seeking consideration of the environmental implications of the Fukushima Task Force Report.

Intervenors respectfully submit that the arguments by Applicant and the NRC Staff regarding the timeliness and admissibility of the contention are without merit and the contention should be admitted.

The arguments raised by the applicant and the NRC Staff in response to Intervenors' contention are similar or identical to arguments made by the applicant and staff in response to

Fukushima Task Force Report-related contentions that were filed in other reactor licensing proceedings on the same day. Intervenors attach and incorporate by reference a Reply Memorandum which addresses the most common arguments that are made in the responses and was prepared by counsel for intervenors in the Turkey Point, Vogtle, and Watts Bar cases.¹ The Reply Memorandum also discusses the effect of the NRC Commissioners' recent decision regarding the Emergency Petition that was submitted by Intervenors and many other intervenors and petitioners in April 2011. *Union Electric Co., d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2) et al., , CLI-11-05, __ NRC __ (Sept. 96, 2011) ("CLI-11-05").²

**Reply as to Public's Burden to Show Necessity
for Changing Scope of NEPA Consideration**

The point repeatedly ignored by the Applicant and Staff is that the burden placed on Intervenors or other members of the public to trigger consideration of new information is quite low, particularly when the NEPA process is, as here, not even consummated at the DEIS stage. "To [require an EIS], a plaintiff need not show that significant effects will in fact occur ... raising substantial questions whether a project may have a significant effect is sufficient." (Emphasis supplied). *Anglers of the Au Sable v. U.S. Forest Service*, Case #05-10152-BC (E.D. Mich. N.D. 2005) at 13-14, citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir.

¹The Reply Memorandum was prepared by the attorneys who represent the intervenors or petitioners in those cases: Diane Curran (counsel for the intervenor in the Diablo Canyon license renewal proceeding and Watts Bar operating license proceeding), Mindy Goldstein (counsel for some of the intervenors in the Vogtle and Vogtle Turkey Point COL proceedings), and Jason Totoui (counsel for some of the intervenors in the Turkey Point COL proceeding).

²Because the applicant and the NRC Staff have not had an opportunity to address the effect of CLI-11-05 on the timeliness and admissibility of Intervenors' [Petitioners'] contention, Intervenors [Petitioners] would not object to a response by the applicant and the Staff to their arguments regarding the relevance of CLI-11-05 to their contention.

1998) (EIS required if “substantial questions are raised” about effects on environmental quality). The Court must not “substitute [its] judgment of the environmental impact for the judgment of the agency, once the agency has adequately studied the issue.” *Crouse Corp. v. Interstate Commerce Comm’n*, 781 F.2d 1176, 1193 (6th Cir. 1986). However, “[i]t is [the Court’s] role . . . to determine whether the agency has, in fact, adequately studied the issue and taken a ‘hard look’ at the environmental consequences of its decision.” *Id.* The harm NEPA seeks to prevent is complete when the agency makes a decision without considering information NEPA requires be placed before the decision-maker and public. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). “The injury of an increased risk of harm due to an agency’s uninformed decision is precisely the type of injury {NEPA} was designed to prevent.” *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996).

ADAMS Reveals Complete Indifference in Licensing Deliberations To Implications of Fukushima for License Renewals Applications

Various sections of NRC staff’s response³ claim that this new contention lacks specificity to this Davis-Besse license extension proceeding. ~~However, the contention is one of omission. We are challenging the completeness of FENOC’s License Renewal Application and Environmental Report in their entirety, for FENOC has not incorporated any “lessons learned” from the new and significant information revealed by the NRC Near-Term Fukushima Task Force Report dated July 12, 2011.~~ It is FENOC’s legal responsibility under NEPA to incorporate

³P. 4, “I. Intervenor Failed to Raise a Challenge to Davis-Besse’s License Renewal Application or Environmental Report;” p. 14, “III. The NEPA Contention Does Not Raise a Material Issue;” p. 17, “B. The NEPA Contention Does Not Identify the Specific Portions of the Application It Challenges;” p. 19, “The NEPA Contention Does Not Raise a Material Contention with Respect to Severe Accidents;” p. 22, “D. The NEPA Contention Does Not Raise a Material Challenge to the SAMA Analysis;” and p. 24, “2. The NEPA Contention Does Not Raise a Material Dispute on Any Specific SAMA.”

such new and significant information, as it is NRC's legal responsibility to incorporate such new and significant information in its own NEPA related documents, such as the DSEIS (Draft Supplemental Environmental Impact Statement) for the Davis-Besse license extension that is scheduled soon to be published, by October 2011 (see <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse.html#licrenapp>).

The contention is a contention of omission. A contention of omission is a claim, in the words of 10 C.F.R. § 2.309(f)(1)(vi), that "the application fails to contain information on a relevant matter as required by law . . . and the supporting reasons for the petitioner's belief." It was reasonable and appropriate for Intervenors to incorporate by reference the contention filed in the Seabrook license renewal application proceeding, to which intervenor Beyond Nuclear is also a party with standing, just as the organization is also a party to this Davis-Besse license renewal application proceeding. ~~In both cases, the Applicant has failed to incorporate "lessons learned" from the NRC's Fukushima Task Force Near Term Report dated July 12, 2011 into the NEPA documents, including their respective Environmental Reports.~~

~~A PDF search on FENOC's 648 page long ER posted at NRC's website (<http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse/davis-besse-enviro.pdf>) for the terms "Fukushima" and "Task Force" revealed that the Fukushima Daiichi accident is mentioned nowhere throughout the entire voluminous document. Although other task forces are mentioned a few places, no mention is made of the NRC's Fukushima Task Force, created shortly after the Fukushima nuclear catastrophe began on March 11, 2011, nor its Near Term Report published on July 12, 2011. It appears that FENOC's ER, dated August 2010, has not been updated in any way, shape, or form since the catastrophe began on March 11, 2011, nor~~

~~since the NRC's Fukushima Task Force Near-Term Report published its findings on July 12, 2011. Likewise, FENOC's August 2010, 1810-page License Renewal Application posted at NRC's website (<http://www.nrc.gov/reactors/operating/licensing/renewal/application/s/davis-besse/davis-besse-lra.pdf>) does not mention the Fukushima nuclear catastrophe, nor NRC's Fukushima Task Force Near-Term Report.~~

Regarding NRC staff's response at Section III.C., The NEPA Contention Does Not Raise a Material Issue/The NEPA Contention Does Not Raise a Material Contention with Respect to Severe Accidents (pages 19 to 22), Intervenor's once again point out that NRC's GEIS (Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, posted at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/>), in its Main Report/Volume 1, likewise contains no updated reflecting NEPA significant "lessons learned" from the Fukushima Nuclear Catastrophe, as reflected in the NRC Near-Term Task Force Report (as of now, a Davis-Besse specific "Supplement" to the GEIS has not yet been produced, published, or posted to its website by NRC staff).

This is a significant omission that needs to be corrected to comply with NEPA. This is NRC's responsibility, not Intervenor's'.

Regarding NRC staff's response at Section III.D., The NEPA Contention Does Not Raise a Material Issue/The NEPA Contention Does Not Raise a Material Challenge to the SAMA Analysis, 1. NEPA Does Not Require Implementation of Mitigation Measures, (pages 22-24), NRC staff argues that NEPA does not require that SAMA mitigation measures be implemented. However, NEPA does require that the costs and risks of not implementing mitigation measures be analyzed. ~~FENOC has not analyzed the potentially catastrophic costs and risks that could be~~

~~unleashed by a very long term station black out at Davis-Besse, whether caused by earthquake combined with flood (as has occurred at Fukushima Daiichi) or some other internal or external cause.~~ Without examining the consequences that would result from a long term station blackout, meltdown, and catastrophic radioactivity release into the environment, FENOC has violated its legally binding NEPA obligations. ~~Despite the lessons to be learned, and applied at Davis-Besse in its LRA and ER SAMA analyses, from the significant and new information coming from the Fukushima Daiichi Nuclear Catastrophe (which began on March 11, 2011, just ten days after the March 1, 2011 ASLB oral pre-hearing in Port Clinton, Ohio for this proceeding), such as reflected in the NRC Near-Term Task Force Report dated July 12, 2011, FENOC has done no such updated SAMA analyses.~~ Given that the ASLB has not scheduled hearings on the admitted contentions (including SAMA contentions) in this proceeding until far into the future, and given that Davis-Besse's current operating license does not expire until March, 2017, there is plenty of time for FENOC to carry out such updated SAMAs based on the significant and new information contained in the NRC Near-Term Task Force Report. To not do such updated SAMA analyses is a dereliction of FENOC's NEPA-related obligations.

Regarding NRC staff's response at Section III.D., The NEPA Contention Does Not Raise a Material Issue/The NEPA Contention Does Not Raise a Material Challenge to the SAMA Analysis, 2. The NEPA Contention Does Not Raise a Material Dispute on Any Specific SAMA (pages 24 to 27), ~~it is precisely the new and significant information revealed by the NRC Near-Term Task Force Report about the catastrophic consequences that could be unleashed by a long term station blackout, due to an earthquake and flood (as by a seiche on Lake Erie, immediately adjacent to Davis-Besse; in fact, in the early 1970s, during Davis-Besse's early construction~~

~~activities, just such a seiche occurred on-site, causing significant flooding), that needs to be incorporated into new, carefully executed FENOC SAMAs. The Fukushima Daiichi Nuclear Catastrophe, months ago, had a ballpark figure of \$200 billion in property damage, recovery costs, etc. Since estimated radioactivity releases have been revised upward a number of times since March 11th, and since even this \$200 billion ball park figure is already months old, and radioactivity releases have continued since then, even this catastrophic figure will likely climb even higher.~~ This is the very heart of the SAMA NEPA requirement, to determine if such catastrophic expenses can be prevented through relatively inexpensive fixes to the Davis-Besse vulnerabilities that could lead to such catastrophic damages. Yet FENOC has refused to undertake any such post-Fukushima “lessons learned” analysis. NRC’s SDEIS will only be the weaker because of this, a violation of NEPA, since the new and significant information is at hand and ready to be applied here – thanks to the NRC Near-Term Task Force Report, for starters

The Allegedly Missing Fukushima-Driven Rulemaking

At fn. 12 of its response, the NRC Staff complains that it was not served a copy of the Intervenor’s petition for rulemaking in light of the Fukushima Task Force report and the disaster itself. Intervenor will file that for record, but they attach hereto the email transmission to the NRC of August 11, 2011, by means of which they prove it was timely submitted to the NRC, and as well, the NRC’s acknowledgement of receipt thereof.

Respectfully submitted this 13th day of September 2011.

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**REPLY MEMORANDUM REGARDING
TIMELINESS AND ADMISSIBILITY OF NEW CONTENTIONS
SEEKING CONSIDERATION OF ENVIRONMENTAL
IMPLICATIONS OF FUKUSHIMA TASK FORCE REPORT
IN INDIVIDUAL REACTOR LICENSING PROCEEDINGS**

INTRODUCTION

The purpose of this Reply Memorandum is to address the most common arguments made in the U.S. Nuclear Regulatory Commission (“NRC”) Staffs’ and applicants’ responses (collectively, the “Responses”) opposing the admissibility of contentions that were submitted in over twenty NRC licensing and relicensing proceedings (collectively, the “Proceedings”) on September 6, 2011. This Reply Memorandum also addresses the relevance of a decision issued by the NRC Commissioners shortly after the Responses were filed: *Union Electric Co., d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2) et al., CLI-11-05, __ NRC __ (Sept. 9, 2011) (“CLI-11-05”).

BACKGROUND

On August 11, 2011, intervenors and petitioners (collectively, “Intervenors”) in over twenty proceedings submitted motions and contentions seeking consideration under the National Environmental Policy Act (“NEPA”) of new and significant information presented by the NRC’s Fukushima Task Force in its report, “Recommendations for Enhancing Reactor Safety in the 21st Century: the Near-term Task Force Review of Insights from the Fukushima Dai-ichi Accident” (July 12, 2011) (the “Task Force Report”).¹ While the contentions addressed the particulars of each individual proceeding,

¹ Contentions were submitted in the following proceedings: Callaway Plant, Unit 2 (Docket No. 52-037-COL); Calvert Cliffs Nuclear Power Plant, Unit 3 (Docket No. 52-016-COL); Fermi Nuclear Power Plant, Unit 3 (Docket No. 52-033-COL); William

they all relied on the far-reaching conclusions and recommendations of the Task Force Report.

In all but one the proceedings, the applicants and the NRC Staff submitted Responses on September 6, 2011. The Responses make very similar, if not identical, arguments with respect to the timeliness and the admissibility of the contentions. Three days after the Responses were filed, the NRC Commissioners also issued CLI-11-05, which contains language that bears on the timeliness and admissibility of the contentions.

I. INTERVENORS' CONTENTIONS ARE TIMELY

All Responses argue that the contentions are not timely because they are late; some argue the contentions were both late and premature. None of these arguments has merit.

Notably, some applicants and the NRC Staff (all of whom now argue that the contentions are too late) previously contested the Emergency Petition to Suspend all

States Lee III Nuclear Station, Units 1 and 2 (Docket No. 52-018-COL and 52-019-COL); Columbia Generating Station (Docket No. 50-397-LR); Pilgrim Nuclear Power Station (Docket No. 50-293-LR); Indian Point Nuclear Generating Station, Units 2 and 3 (Docket Nos. 50-247-LR and 50-286-LR); Davis-Besse Nuclear Power Station, Units 1 (Docket No. 50-346-LR); Turkey Point, Units 6 and 7 (Docket Nos. 52-040-COL and 52-041-COL); Comanche Peak Nuclear Power Plant, Units 3 and 4 (Docket Nos. 52-034-COL and 52-035-COL); Seabrook Station, Unit 1 (Docket No. 50-443-LR); Diablo Canyon, Units 1 and 2 (Docket Nos. 50-275-LR and 50-323-LR); Bell Bend Nuclear Power Plant (Docket No. 52-039-COL); Shearon Harris Nuclear Power Plant, Units 2 and 3 (Docket Nos. 52-022-COL and 42-023-COL); Levy County Nuclear Power Plant, Units 1 and 2 (Docket Nos. 52-029-COL and 52-030-COL); Virgil C. Summer Nuclear Station, Units 1 and 2 (Docket Nos. 52-027-COL and 52-028-COL); South Texas Project, Units 3 and 4 (52-012-COL and 52-013-COL); Vogtle Electric Generating Plant, Units 3 and 4 (52-025-COL and 52-026-COL); Bellefonte Nuclear Power Plant, Units 3 and 4 (Docket Nos. 52-014-COL and 52-015-COL); Watts Bar, Unit 2 (Docket No. 50-391-OL); and North Anna, Unit 3 (52-017-COL). In addition, comments for filed in the following rulemaking proceedings: AP1000 Design Certification Amendment (NRC-2010-0131, RIN 3150-AI81); and ESBWR Design Certification Amendment (NRC-2010-0135, RIN-3150-AI85).

Pending Reactor Licensing Decisions pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (the “Emergency Petition”), which was filed within thirty days of the Fukushima accident, on the ground that it was too early to determine the environmental significance of the event. *See, e.g.*, PG&E Opposition to Emergency Petition to Suspend Licensing Decisions and Proceedings at 8 (May 2, 2011). To the extent that the NRC Staff and applicants have made inconsistent arguments within the proceedings regarding timeliness, and submit Responses that argue both sides of the timeliness question, an Atomic Safety and Licensing Board has previously dismissed such “Catch-22” tactics as a “shell game, with the usual street-corner outcome: whatever guess the [Intervenors] make will prove wrong.” *Shaw Area MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460 at 502, n 15, 503 (2008).²

Regardless of the impermissible and inconsistent timeliness arguments made in the proceedings and Responses, the contentions are timely. The Responses argue that the contentions are late because they are based on the events of the Fukushima accident that occurred more than thirty days before the contentions were filed. While the Fukushima accident is relevant to the Task Force Report, it is the issuance of the Task Force’s sweeping conclusions regarding the relevance of the Fukushima accident to NRC’s regulatory program that serves as the basis for the contentions.

As the Commission found in CLI-11-05, while the Task Force Report does not justify a generic NEPA review, it is possible that new and significant information about

² In *MOX Services*, the applicant controlled the creation of and access to the information that petitioners used as a basis for ongoing contentions. While the applicants and the NRC Staff did not control the creation of or access to the Task Force Report, the significant similarity is that interested members of the public were unable to predict or control the timing of the development and release of new, significant information contained in the Report.

the environmental implications of the Fukushima accident may “come to light” and require consideration “as part of the ongoing preparation of application-specific NEPA documents” with respect to individual reactor license applications. CLI-11-05, slip op. at 30. At this point in time, neither the Commission nor the NRC Staff has yet undertaken its independent NEPA obligations to consider the question of whether the Task Force Report constitutes such new and significant information that must be considered in individual reactor licensing decisions. By submitting the Task Force Report-based contentions within thirty days of the issuance of the Task Force Report, the Intervenors have timely raised their concern regarding this failure to satisfy NEPA.

Some Responses also argue that the Task Force Report is not “new” for purposes of assessing timeliness, because the Task Force Report is simply a collection and summary of existing facts. *See, e.g.*, FPL Response (Turkey Point) at 11-12 (citing *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC_, slip op. at 7 (Sep. 30, 2010)); NRC Staff Response (Watts Bar 2) at 38-38. But the Task Force Report does not merely compile and organize certain pre-existing information, without further analysis. To the contrary, in the words of one applicant, the Task Force Report is a “short term and long term *analysis of the lessons that can be learned* from the Fukushima accident.” FPL Response to Emergency Petition at 4 (May 2, 2011) (emphasis added).

Some Responses argue that the contentions are “premature” because the Commission may “moot” or “negate” the relief they seek. *See, e.g.*, FPL Response (Turkey Point) at 2-3, NRC Staff Response (Diablo Canyon) at 11. But future action by the Commission is only a possibility, and the Commission has not guaranteed that it will

take action before licensing decisions are made, as required by NEPA. Whether the Commission might address the concerns of the Task Force Report at some point in the future is immaterial. The release or development of new and significant information, not future possible agency action, triggers the Commission's non-discretionary duty under NEPA.

The contentions are not only timely, but also meet the requirements for consideration of non-timely contentions in 10 C.F.R. § 2.309(c)(1). Most importantly, Intervenor has good cause for filing the contentions after the release of the Task Force Report. Given the lack of complete public information issued from Japan in the aftermath of the accident, and given the fact that the Task Force was chartered by the NRC Commissioners with the specific purpose of assembling information about the accident and subjecting it to analysis by some of the most highly qualified members of the NRC Staff, it was eminently reasonable for Intervenor to await and depend upon the Task Force Report for the contentions.

In sum, the contentions are timely because they are neither late nor premature. Additionally, as the contentions provide, they also meet the eight requirements for the consideration of non-timely contentions in 10 C.F.R. § 2.309(c)(1).

II. NEPA REQUIRES THE SUPPLEMENTATION OF THE ENVIRONMENTAL REPORT, DRAFT ENVIRONMENTAL IMPACT STATEMENT, OR FINAL ENVIRONMENTAL IMPACT STATEMENT

The applicants and the NRC Staff devote surprisingly little attention to responding to the underlying basis for the contentions: that NEPA requires the environmental report, draft environmental impact statement, or final environmental impact statement (collectively, the "NEPA Documents") in each proceeding to be

supplemented in light of the significant new information contained in the Task Force Report. Most of the NRC Staffs' Responses make the barest mention of NEPA, while many applicants provide only a cursory and flawed treatment of the law. Their strategies for evading NEPA fall into three basic categories: (1) attempts to avoid all treatment of safety issues within the context of NEPA by employing an overly narrow definition of environmental effects to exclude those impacts to public safety, (2) mischaracterizations of the contentions as contentions of inadequacy rather than omission, and (3) attempts to shift the agency's NEPA responsibilities onto the shoulders of Intervenors. Where the Responses do address NEPA, they incorrectly claim that the contentions are based upon no significant or new information. None of these arguments has merit.

A. The Responses Mischaracterize the Public Safety Issues Raised in the Contentions to Avoid Addressing NRC's Responsibility to Consider These Issues in the NEPA Documents.

A number of Responses claim that the contentions are inadmissible because they "attack" or seek an "overhaul" of NRC regulations. *See e.g.* FPL Response (Turkey Point) at 17-23, Entergy Response (Indian Point) at 18-21, Unistar Response (Calvert Cliffs) at 6-10, NRC Staff Response (Diablo Canyon) at 9-12, NRC Staff (Watts Bar 2) at 16, 20-22, TVA Response (Watts Bar 2) at 17. As the contentions make clear, Intervenors do not challenge the adequacy of NRC regulations to protect public health and safety under the Atomic Energy Act. Instead, the contentions question the sufficiency of the NEPA Documents because those documents make factual determinations that compliance with NRC safety regulations will ensure that environmental impacts of reactor accidents will be "SMALL," and the NRC's Task Force has called such determinations into question in its Report.

NEPA requires consideration of the safety risks posed by nuclear reactors before final agency action. Indeed, an environmental impact statement must be prepared whenever a major federal action may have a significant effect on the human environment. 42 U.S.C. § 4321 *et seq.* The term “human environment” must “be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.15. Moreover, the term “effect” is synonymous with “impact,” and includes the ecological (such as effects on natural resources and on the components, structures, and functioning of affected ecosystems) as well as the aesthetic, historic, cultural, economic, social, and health impacts of a proposed action. 40 C.F.R. § 1508.8. The degree to which a project may affect public health or safety is thus a major consideration under the statute. *See* 40 C.F.R. § 1508.27.

Therefore, the Responses’ attempts to dismiss the numerous public health and safety issues raised by the Task Force Report as being the subject of an impermissible rule challenge are unavailing, as they obscure the necessary role public health and safety issues play in the examination of a project’s environmental impacts under NEPA.

Incredibly, some applicants not only read the analysis of “safety” issues out of NEPA, but attempt to avoid addressing Intervenors’ claims by further arguing that because there is “no mention of any environmental reviews, either by applicants or by the Staff” the Task Force Report cannot provide support for the contention, “which seeks to raise environmental claims against the [NEPA Document].” FPL Response at 23; *see also* Entergy Response at 23 (asserting “the Task Force Report does not discuss NEPA issues at all”), NRC Staff Response (Watts Bar 2) at 30. NEPA requires supplementation of a NEPA Document whenever there is significant new information relevant to

environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1)(ii). The applicants' position that NEPA requires the consideration of new information for supplementation purposes only where such documents reference specific "environmental reviews" is unfounded and has no support in the law.

B. The Responses Mischaracterize Intervenors' NEPA Contentions as Contentions of Inadequacy Rather Than of Omission.

Throughout the Responses, applicants make numerous references to Intervenors' alleged failure to point to specific flaws in the NEPA documents. *See, e.g.*, FPL Response at 24-25; Entergy Response at 25-26; Unistar Response at 19-20, n. 12. For example, Florida Power & Light ("FPL") argues that the contention's reference to tsunami risks and seismic seiches does not dispute the findings of Turkey Point's Final Safety Analysis Report ("FSAR") and that the FSAR demonstrates that the units are not vulnerable to tsunamis. Therefore, according to FPL, Intervenors' flooding and seismic protection concerns do not raise any dispute on a significant issue with the application. *See* FPL Response at 24. FPL further argues that Intervenors' concerns with respect to spent fuel pool cooling do not demonstrate any genuine material dispute with the application because these issues are sufficiently addressed in the AP1000 DCD. *See* FPL Response at 25.

FPL's arguments completely miss the mark and are nothing more than an attempt to re-characterize the contention as one of inadequacy rather than of omission. Even a cursory reading of Intervenors' contention makes it abundantly clear that it is a contention of omission. The central thrust of the contention is that the Task Force Report constitutes "significant new information" under NEPA and the NEPA Documents need to be supplemented accordingly. The dispute is not that specific portions of the NEPA

Documents contain a flawed analysis or reach false conclusions, but rather that the NEPA Documents fail entirely to consider the findings, recommendations, and conclusions of the Task Force Report. Therefore, the Responses' efforts to dismiss the contentions based on the content of specific sections of the NEPA Documents and arguments that those sections do not demonstrate a genuine material dispute are without merit.

C. Applicants Erroneously Conflate Intervenors' Responsibilities under NEPA With Those of the Agency.

Applicants attempt to conflate Intervenors' responsibilities under NEPA with those of the agency by arguing that the contentions must explain in detail how the NEPA Documents should use the information contained in the Task Force Report. For instance, FPL argues that the contention "do[es] not identify any error in any of [the NEPA Document's] analyses" and that it "provide[s] no information indicating that the probability or consequences of any accident scenario is greater than as assessed in the [NEPA Documents]," where it concerns the consequences of design basis accidents, consequences of severe accidents, and analyzing the cost and benefits of severe accident mitigation alternatives ("SAMA"). FPL Response (Turkey Point) at 29-30, 33; NRC Staff Response (Watts Bar 2) at 37. This argument highlights a fundamental misunderstanding of Intervenors' duties under NEPA by positing that before the NEPA Documents must be supplemented, Intervenors must demonstrate (1) that the new information will, in fact, result in different or greater environmental effects than those described in the NEPA Documents and, (2) precisely how the conclusions in the NEPA Documents should read. *See* Entergy Response at 23 ("Intervenors do not identify with the requisite specificity any substantial changes in the environmental analysis of the

proposed Indian Point license renewal action resulting from the Task Force recommendations”).

Contrary to the applicants’ arguments, Intervenor’s carry only the obligation of showing that the new information at issue is “significant,” “relevant to environmental concerns,” and has “bearing on the proposed action.” 40 C.F.R. § 1502.9. Because Intervenor’s meet this burden, NRC has the responsibility to conduct supplemental environmental analyses and report the results in the NEPA Document. In this instance, however, applicants seek to require Intervenor’s to supply these analyses. As courts have made abundantly clear, “[it] is the agency, not an environmental plaintiff, that has a ‘continuing duty to gather and evaluate new information relevant to the environmental impacts of its actions,’ even after release of an [EA or EIS].” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980)); *See also Te-Moak Tribe v. Interior*, 608 F.3d 592, 605-606 (9th Cir. 2010); *Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (“[C]ompliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.”). As the First Circuit remarked in *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1291 (1st Cir. 1996), discussing the public’s role under NEPA:

Such specifics are not required. . . . [T]he purpose of public participation regulations is simply to ‘provide notice’ to the agency, not to ‘present technical or precise scientific or legal challenges to specific provisions’ of the document in question. . . . Moreover, NEPA requires the agency to try on its own to develop alternatives that will ‘mitigate the adverse environmental consequences’ of a proposed project. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

Here, Intervenor’s have met their burden in demonstrating that the Task Force Report contains new and significant information that is relevant to environmental

concerns and has a bearing on the proposed agency regulatory action. Thus NRC has the duty to evaluate this new information and, in conjunction with applicants, prepare supplemental NEPA Documents that rationally connect the facts found to the choices made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 158 (1972) (holding that the agency must consider “relevant factors” and articulate “a rational connection between the facts found and the choices made”).

This same fundamental misunderstanding of NEPA undermines applicants’ arguments relating to SAMAs. Applicants assert that the NEPA Documents need not be supplemented with regard to the SAMA analyses because only through a rule change -- which Intervenor are precluded from requesting in this forum -- can the Task Force recommendations on this issue be considered. *See, e.g.*, FPL Response (Turkey Point) at 35. As discussed above, this attempt to shift the focus to the NRC regulations ignores the clear requirements of NEPA. Applicants’ further argument that the contentions fail to demonstrate that the cost-benefit analysis set out in the NEPA Documents for the proposed action will be affected by implementation of the Task Force Report fails for the same reason. *See, e.g.*, FPL Response at 37. It is not Intervenor’s responsibility to explain how the cost-benefit analysis contained in the NEPA Documents would change. That responsibility lies with the NRC.

Finally, to the extent the applicants argue that NEPA’s supplementation requirements do not apply to environmental reports (“ERs”), *see, e.g.*, FPL Response at 31, this argument also fails. Such a strained interpretation of the NEPA process as it applies to NRC decision-making is untenable for three reasons. First, to apply this interpretation would result in no conceivable trigger for the NRC to supplement its NEPA

Documents when significant new information, excluded from consideration and analysis in the ER, becomes available in advance of EIS publication. Nor could Intervenor compel such action, as they would be time-barred from filing new contentions alleging the need to supplement a draft or final EIS because such information was available well before those documents were prepared. As mentioned above, this type of “Catch-22” must be precluded in order to ensure that NRC processes comply with NEPA. *Shaw Area MOX Services*, 67 NRC at 502. Second, to preclude evaluation of significant new information in the ER would limit the NRC’s ability to adequately and timely consider and respond to new information relatively early in the decision-making process, before a significant amount of time and resources are expended in finalizing the project and developing the draft and final EIS for the action. Third, given that the NRC relies heavily on the contents of the ER to prepare its EIS, not including such information or analysis in the ER would create the potential for significant deficiencies in the resulting EIS. This would increase the likelihood for future litigation by parties seeking to cure these deficiencies. For all these legal and practical reasons, applicants’ argument that supplementation does not apply to all NEPA Documents, including ERs, cannot stand.

D. The Responses Incorrectly Claim the Contentions Are Based Upon No Significant New Information

The applicants also claim the contentions are inadmissible because Intervenor have failed to present “significant new information,” as required by 10 C.F.R. § 52.39(c)(v). *See, e.g.*, Entergy Response (Indian Point) at 21-25; FPL Response (Turkey Point) at 30-34; Unistar at 14-18; PEF Response (Levy) at 13-14. The contentions, however, are based upon the new and significant information contained in the Task Force Report. The Applicants’ efforts to use the Task Force Report to support a claim that the

Task Force itself did not identify significant regulatory changes that represent significant new information in the context of NEPA requirements are simply incorrect.

Many of the Responses argue that the Task Force Report does not present new and significant information because it did not conclude that the recommended design basis changes are necessary at this time. *See, e.g.*, NRC Staff Response (Watts Bar 2) at 28, TVA Response (Watts Bar 2) at 23, NRC Staff Response (Diablo Canyon) at 13. This argument ignores the fact that such a conclusion is provisional, that is to say that the Task Force assumed the NRC would make the recommended regulatory reforms. Thus, the Task Force found that current regulatory requirements can support a reasonable assurance finding “until the actions set forth below have been implemented” and that continued operation of existing nuclear plants does not pose an immediate threat to public health and safety. That the Report contains provisional statements does not detract from or contradict the essential message of the Task Force Report that the NRC’s program of *mandatory* safety regulations requires significant strengthening in order to provide, over the long term, adequate protection of public health and safety.³ It is this longer term, *i.e.*, the next 40 years or more, that is addressed by the NRC’s licensing process and by the associated NEPA Documents.

CONCLUSION

For the foregoing reasons, the applicants’ and NR Staff’s oppositions to the Fukushima Task Force related contentions submitted by Intervenors.

³ *See* Task Force Report at 18 (“As new information and new analytical techniques are developed, safety standards need to be reviewed, evaluated, and changed, as necessary, to insure that they continue to address the NRC’s requirements to provide reasonable assurance of adequate protection of public health and safety. The Task Force believes, based on its review of the information currently available from Japan and the current regulations, that the time has come for such change.”)

Respectfully submitted,

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September 13, 2011

September 13, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of) Docket No. 50-346
First Energy Nuclear Operating Company)
(Davis-Besse Nuclear Power Station, Unit 1))
)
)

* * * * *

CERTIFICATE OF SERVICE

I hereby certify that copies of "INTERVENORS' REPLY MORANDUM TO STAFF AND APPLICANT OPPOSITIONS TO ADMISSION OF NEW CONTENTION" have been served on the following persons via Electronic Information Exchange this 13th day of September, 2011:

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NRC Acknowledgement of Receipt of Petition for Rulemaking and Contention

Monday, August 29, 2011 2:15 PM

From: "Terry, Leslie" <Leslie.Terry@nrc.gov>
To: "Tjlodge50@yahoo.com" <Tjlodge50@yahoo.com>
Cc: "Bladey, Cindy" <Cindy.Bladey@nrc.gov>, "Inverso, Tara" <Tara.Inverso@nrc.gov>

Dear Mr. Lodge:

This e-mail is in reference to the petition for rulemaking entitled "Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision," dated August 11, 2011, which you filed with the U.S. Nuclear Regulatory Commission (NRC). The petition is currently under review to determine if it meets the NRC's requirements for docketing under Title 10 of the *Code of Federal Regulations*, Section 2.802. We will notify you once a decision has been reached in this matter.

On August 11, 2011, you also submitted contentions regarding Davis-Besse and Fermi 3; and comments on the ESBWR Design Certification rulemaking. The NRC is currently reviewing your submissions and will notify you once a decision has been reached in this matter.

If you have any questions, please contact me on 301-492-3667 (e-mail: Cindy.Bladey@nrc.gov) or Leslie Terry on 301-492-3679 (e-mail: Leslie.Terry@nrc.gov).

Sincerely,

Cindy Bladey, Chief
Rules, Announcements, and Directives Branch
Division of Administrative Services
Office of Administration



Rulemaking on behalf of intervenors in Davis-Besse OL extension and Fermi 3 COL

Thursday, August 11, 2011 11:28 PM

From: "Terry Lodge" <tjlodge50@yahoo.com>

To: rulemaking.comments@nrc.gov

Bcc: "Kevin Kamps" <kevin@beyondnuclear.org>, "Thomas Keegan" <mkeeganj@comcast.net>

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rulemaki...