

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

Luminant Generation, Co., L.L.C. (Comanche Peak Nuclear Power Plant, Units 3 and 4))))	Docket Nos. 52-034-COL and 52-035-COL ASLBP No. 11-914-02-COL-BD01
ENERGY NORTHWEST (Columbia Generating Station)))	Docket No. 50-397-LR ASLBP No. 11-912-03-LR-BD01
Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4))))	Docket Nos. 52-025 & 52-026-COL ASLBP Nos. 11-912-02-COL-BD01 11-913-01-COL-BD01
Duke Energy Carolinas, L.L.C. (William States Lee III Nuclear Station, Units 1 and 2))))	Docket Nos. 52-018 and 52-019 ASLBP No. 11-913-01-COL-BD01

PETITION FOR REVIEW OF LBP-11-27

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b), Petitioners hereby seek review by the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) of LBP-11-27 (Memorandum and Order (Denying Motions to Reopen Closed proceedings and Intervention Petition/Hearing Request as Premature) (Oct. 18, 2011)).¹ In LBP-11-27, the Atomic Safety and Licensing Board (“ASLB”) relied on the Commission’s decision in *Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), et al., CLI-11-05, __ NRC __ (Sept. 9, 2011) (“CLI-11-05”) to deny as premature

¹ Petitioners are Lon Burman, Sustainable Energy and Economic Development (“SEED”) Coalition, Public Citizen, and True Cost of Nukes (Comanche Peak combined operating license “COL” proceeding); Blue Ridge Environmental Defense League (“BREDL”), (Vogtle COL proceeding); Center for a Sustainable Coast, Georgia Women’s Action for New Directions f/k/a Atlanta Women’s Action for New Directions, and Southern Alliance for Clean Energy (“SACE”) (Vogtle COL proceeding); Northwest Environmental Advocates (Columbia license renewal proceeding); and BREDL (William States Lee COL proceeding).

the admission of contentions which assert that the National Environmental Policy Act (“NEPA”) requires the NRC and license applicants to consider the environmental implications of the Fukushima Task Force Report² before it may issue combined operating licenses or renewed operating licenses in the above-captioned proceedings. The Commission should take review of LBP-11-27 because it is based on erroneous interpretations of both NEPA and CLI-11-05. In addition, even assuming for purposes of argument that the ASLB’s legal interpretations were correct, the Commission has now provided the endorsement of the Fukushima Task Force Report that the ASLB requires as a condition for admission of the contentions, by broadly directing the NRC Staff to adopt certain Task Force recommendations within the next five years.

SRM/SECY-11-0124, Memorandum from R.W. Borchardt, Executive Director for Operations to Annette L. Vietti-Cook, Secretary, re: Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report, ___ NRC ___ (October 18, 2011)(“SRM/SECY-11-0124”).³

Petitioners note that on October 28, 2011, in the Columbia, Comanche Peak, Vogtle, and W.S. Lee cases, they petitioned the ASLB to reinstate and supplement the bases for their contentions in light of SRM/SECY-11-0124. Therefore, Petitioners respectfully request the Commission to hold this petition for review in abeyance pending the issuance of a ruling by the ASLB on their petition to reinstate and supplement. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 3 (2001) (citing *International Uranium Corp.* (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24-25 (1997)).

² *Recommendations for Enhancing Reactor Safety in the 21st Century: the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident* (“Task Force Report”).

³ The SRM is posted on the NRC’s website at <http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2011/2011-0124srm.pdf>.

II. FACTUAL AND PROCEDURAL BACKGROUND

In March 2011, a catastrophic accident began at the Fukushima Dai-ichi Nuclear Power Station, Units 1-6 in Okuma, Japan. The NRC Commissioners immediately appointed a high-level Task Force, composed of its most qualified and experienced technical staff, to study the regulatory implications of the accident for the United States. The Commission instructed the Task force to provide:

a systematic and methodical review of [NRC] processes and regulations to determine whether the agency should make additional improvements to its regulatory system and to make recommendations to the Commission for its policy direction, in light of the accident at the Fukushima Dai-ichi Nuclear Power Plant.

Charter for the Nuclear Regulatory Commission Task Force to Conduct a Near-Term Evaluation of the Need for Agency Actions Following the Events in Japan (March 30, 2011).

On July 17, 2011, the Task Force issued its report, which contained a series of recommendations that “are intended to clarify and strengthen the regulatory framework for protection against natural disasters, mitigation, and emergency preparedness, and to improve the effectiveness of the NRC’s programs.” Task Force Report at viii. Underlying these recommendations was a conclusion with enormous environmental and safety significance: that the NRC needed to strengthen the level of protection that is minimally required for the protection of public health and safety. As stated in the Report:

In response to the Fukushima accident and the insights it brings to light, the Task Force is recommending actions, some general, some specific, that it believes would be a reasonable, well-formulated set of actions *to increase the level of safety associated with adequate protection of the public health and safety.*

Id. at 18 (emphasis added). In particular, the Task Force found that “the NRC’s safety approach is incomplete without a strong program for dealing with the unexpected, including severe accidents.” *Id.* at 20. Therefore the Task Force recommended that the NRC incorporate severe

accidents into the “design basis” and subject it to mandatory safety regulations. In order to upgrade the design basis, the Task Force also recommended that the NRC undertake new safety investigations and impose design changes, equipment upgrades, and improvements to emergency planning and operating procedures. *See, e.g.*, Task Force Report at ix-x, 73-75.

Based on the Task Force Report, in the summer of 2011, Petitioners submitted contentions and motions to re-open the record in the above-captioned reactor licensing proceedings. The contentions challenge the failure of the environmental impact statements or environmental reports prepared in support of the licensing decisions to address the environmental implications of the Task Force Report, especially its conclusion that the requirements of the adequate protection standard needed to be upgraded.

On September 9, 2011, the Commission issued CLI-11-05 in response to an Emergency Petition, to which some of the Petitioners had been party. The Emergency Petition, filed in April 2011, had asked the Commission to establish a procedure for addressing the safety environmental implications of the Fukushima accident in licensing proceedings; and to suspend all licensing decisions, as it had after the Three Mile Island accident in 1979, pending resolution of the safety and environmental issues raised by the Fukushima accident.

In CLI-11-05, the Commission refused to suspend any licensing decisions or to establish procedures for addressing Fukushima-related issues in licensing proceedings. *Id.* at 25. The Commission also concluded that “given the current state of information,” the Fukushima accident had not raised any generic environmental issues that should be addressed in a generic NEPA review. *Id.* at 30-31. The Commission instructed that:

Reactor adjudications should go forward, including those that may involve proposed contentions based on issues implicated by the Fukushima events. To the extent that the Fukushima events provide the basis for contentions appropriate for litigation in individual proceedings, our procedural rules contain ample provisions through which litigants may

seek admission of new or amended contentions, seek stays of licensing board decisions, appeal adverse decisions, and file motions to reopen the record, as appropriate.

Id., slip op. at 35.

On October 18, 2011, the ASLB issued LBP-11-27, rejecting as premature Petitioners' contentions. The ASLB interpreted CLI-11-05 to preclude admission of the Petitioners' contentions because "it remains much too early in the process of assessing the Fukushima event in the context of the operation of reactors in the United States to allow any informed conclusion regarding the possible safety or environmental implications of that event regarding such operation." *Id.* at 13. LBP-11-27 indicates, however, that the ASLB would consider the contentions to be admissible if and when the Commission adopts the Task Force recommendations:

It is difficult to fathom how the Commission could have stated more precisely and definitively that it remains much too early in the process of assessing the Fukushima event in the context of the operation of reactors in the United States to allow any informed conclusion regarding the possible safety or environmental implications of that event regarding such operation. *Of still greater importance given [the Petitioners'] entire reliance on the findings and recommendations of the Task Force, the Commission stressed with equal force and clarity that, while under active study, none of those findings and recommendations has been accepted.* Thus, they scarcely have been given the effect that, according to [the Petitioners], gives rise to the environmental implications that undergird the contention that is sought to be admitted.

Id. (emphasis added).

III. ARGUMENT

Under 10 C.F.R. § 2.341(b)(ii), a decision may be reviewed if a "necessary legal conclusion is without governing precedent or is a departure from or contrary to established law." In addition, review may be granted where a "substantial and important question of law, policy, or discretion has been raised." 10 C.F.R. § 2.341(b)(iii). *See also Nuclear Management Company LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 729 (2006). Both of these standards are

met here, because the ASLB’s decision misinterprets CLI-11-05’s holding and the standard for new and significant information in 10 C.F.R. § 51.92.

A. LBP-11-27 is Based on a Misinterpretation of CLI-11-05.

LBP-11-27 is based on a fundamental misperception of CLI-11-05: that the Commission held in CLI-11-05 that currently there is no basis for concluding that new and significant information has arisen in any licensing proceeding such that NEPA consideration is warranted. In CLI-11-05, however, the Commission ruled only that, to date, there is insufficient basis for a “generic” NEPA review. *See, e.g.*, slip op. at 30 (“ . . . any generic NEPA duty—if one were appropriate at all--does not accrue now”); 31 (“ . . . we decline petitioners’ request to commence a generic NEPA review today”); 41 (For the reasons provided above, we: . . . *Deny* petitioners’ request for a separate generic NEPA analysis of the potential impacts of the Fukushima events”) (emphasis in original).

Nowhere in CLI-11-05 does the Commission state that it has made a determination as to whether the Task Force Report raises new and significant information that should be considered in individual licensing proceedings. Indeed, the Commission states that the appropriate forum for considering the question is in individual licensing proceedings. For instance, at page 30 the Commission states that:

Although the Task Force completed its review and provided its recommendations to us, the agency continues to evaluate the accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear. In short, we do not know today the full implications of the Japan events for U.S. facilities.

If, however, new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents, the agency will assess the significance of that information, as appropriate. Our regulations specify the circumstances under which the Staff must prepare supplemental environmental review documents.

Id., slip op. at 30-31 (emphasis added). And at page 35, the Commission states:

Reactor adjudications should go forward, including those that may involve proposed contentions based on issues implicated by the Fukushima events. To the extent that the Fukushima events provide the basis for contentions appropriate for litigation in individual proceedings, our procedural rules contain ample provisions through which litigants may seek admission of new or amended contentions, seek stays of licensing board decisions, appeal adverse decisions, and file motions to reopen the record, as appropriate.

Thus, the ASLB's reading of CLI-11-05 is too broad. CLI-11-05 does not contain any ruling with respect to the question of whether the Task Force Report contains new and significant information that must be considered in individual licensing proceedings. Not only is CLI-11-05 devoid of any statement to that effect, but no indication is given that the Commission gave the issue the "hard look" required by NEPA. *See, e.g., SUWA v. Norton*, 301 F.3d 1217, 1238-39 (10th Cir. 2002); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 385 (1989).⁴ Instead, CLI-11-05 contains only a determination that (a) the Commission does not yet have enough information to make broad generalizations about the environmental implications of the Fukushima accident in a generic proceeding and (b) the question is more appropriately

⁴ To evaluate whether an agency took a "'hard look' at the new information to determine whether [supplemental NEPA analysis] is necessary, (*id.* (quoting *Headwaters Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1177 (9th Cir. 1990)) (internal citations omitted)), Courts consider "whether the agency 'obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny, [] responds to all legitimate concerns that are raised,' . . . or otherwise provides a reasoned explanation for the new circumstance's lack of significance." *Id.* (quoting *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (internal citations omitted)). *See also Natural Resource Defense Counsel, Inc. v. F.A.A.*, 564 F.3d 549, 561 (2nd Cir. 2009); *see further Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024-5 (9th Cir. 1990) ("These regulations do not in themselves provide a suitable standard for reviewing an agency's decision not to supplement an EIS in light of new information. However, the standard applied in reviewing an agency's decision not to file an EIS in the first instance is appropriate here as well; the decision will be upheld if it was reasonable . . . When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures. Reasonableness depends on such factors as the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and *the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data.*" (internal citations omitted)(emphasis added)).

addressed in individual licensing proceedings. Contrary to the ASLB's ruling in LBP-11-27, the admissibility of Petitioners' contentions was not disposed of by CLI-11-05.

B. LBP-11-27 is Based on a Misinterpretation of NEPA.

Petitioners also seek review of LBP-11-27 to the extent that it holds that information is not "new and significant" for purposes of NEPA consideration unless and until it is acted upon by the agency. *See* slip op. at 11 (expressing "considerable doubt" as to how the attribute of "new and significant" could be attributed to "a mere report that had neither received the endorsement of the Commission nor, more importantly, led to some concrete affirmative action being taken in light of its content.") Slip op. at 11. The Commission should take review of LBP-11-27 because such a reading of NEPA is "contrary to established law." 10 C.F.R. § 2.341(b)(ii). NEPA review is triggered by the release of "new and significant information," not by an agency's decision to consider and evaluate such information. 10 C.F.R. 51.92. Indeed, the purpose of NEPA is to force consideration and evaluation of relevant information that comes to the agency's attention. *Marsh*, 490 U.S. at 371 ("NEPA ensures that the agency will not act on incomplete information . . ."); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) (describing requirement to prepare an environmental impact statement as "action-forcing.")

The ASLB's circular reasoning in LBP-11-27 would deprive NEPA of any action-forcing effect and therefore must be rejected. Instead, the Commission should require the ASLB to assess whether the Petitioners have raised a litigable claim, under an objective test of reasonableness, regarding the newness and significance of the Task Force Report. *South Trenton Residents Against 29 v. Federal Highway Administration*, 176 F.3d 658, 663 (3d Cir. 1999) ("[A]n agency's determination not to revise an Environmental Impact Statement must be

reasonable under the circumstances when viewed in the light of the mandatory requirements and high standards set by NEPA.”) (quoting *Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982) (internal quotations and citations omitted)).

Petitioners respectfully submit that the Task Force’s recommendation to completely overhaul the NRC regulatory structure, including redefining what level of protection of public health and safety should be regarded as adequate, easily surpasses the objective “new and significant” test because it “paints a “seriously different picture of the environmental impact” of the licensing and re-licensing of nuclear reactors than before the release of the Task Force Report. *South Trenton*, 176 F.3d at 663; *see also Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005).⁵

⁵ Even assuming for purposes of argument that the Task Force Report constitutes new and significant information only if its recommendations are adopted by the Commission, that condition has been fulfilled by SRM/SECY-11-0124, which directed the NRC Staff to “strive to complete and implement the lessons learned from the Fukushima accident within five years – by 2016.” *Id.* at 1. While the SRM did not order the adoption of every single recommendation, it did endorse a significant number of them, including the sweeping Recommendation # 1 which would expand the scope of the adequate protection standard. Thus, the Commission has “accepted” the Task Force Report in significant respects. LBP-11-27, slip op. at 13.

IV. CONCLUSION

For the foregoing reasons, the petition should be granted and LBP-11-27 should be reversed.

Respectfully submitted this 2nd day of November, 2011.

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