UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
ENERGY NORTHWEST	Docket No. 50-397-LR
(Columbia Generating Station)	November 7, 2011

ENERGY NORTHWEST'S ANSWER IN OPPOSITION TO MOTION TO REINSTATE AND SUPPLEMENT THE BASIS FOR FUKUSHIMA TASK FORCE REPORT CONTENTION

I. INTRODUCTION

On August 22, 2011, Northwest Environmental Advocates ("Petitioner" or "NWEA") filed a Petition for Hearing and Leave to Intervene along with a single proposed contention ("Contention") claiming to address the environmental implications of the NRC Task Force Report on Fukushima ("Task Force Report").[1] On September 15, 2011, the NRC Staff filed an answer requesting that NWEA's Petition be denied;[2] on September 16, 2011, Energy Northwest filed an answer in opposition to NWEA's Petition.[3] On October 18, 2011, this Atomic Safety and Licensing Board ("Licensing Board") issued LBP-11-27, which rejected NWEA's contention as "premature."[4]

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1 Petition for Hearing and Leave to Intervene in Operating License Renewal for Energy Northwest's Columbia Generating Station (Aug. 22, 2011) ("Petition"). The Petition also attached the Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 211) ("Makhijani Declaration"). The Task Force Report is available at ADAMS Accession No. ML111861807.

2 NRC Staff's Answer to Petition for Hearing and Leave to Intervene (Sept. 15, 2011).

3 Energy Northwest's Answer in Opposition to Petition for Hearing and Leave to Intervene (Sept. 16, 2011) ("Energy Northwest's Answer").

4 *PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant), LBP-11-27, 74 NRC __, slip op. at 5 (Oct. 18, 2011).

On October 28, 2011, NWEA filed a Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention ("NWEA's Motion"). NWEA's Motion points to a Staff Requirements Memorandum ("SRM") on SECY-11-0124[5] issued by the Commission on October 18, 2011 ("SRM/SECY-11-0124"),[6] and argues that its contention is no longer premature because the Task Force recommendations have now been accepted by the Commission.[7] NWEA requests that the Licensing Board: (1) reinstate the Contention; (2) permit supplementation of the contention's basis to include the SRM on SECY-11-0124; and (3) rule on the admissibility of the reinstated and revised contention.[8] For the reasons discussed below, NWEA's Motion is procedurally defective. Furthermore, NWEA's Motion mischaracterizes the SRM and the Licensing Board's decision in LBP-11-27, and issuance of SRM/SECY-11-0124 does not cure the defects in NWEA's Petition or Contention.[9] Accordingly, the NWEA's Motion should be denied.

II. BACKGROUND

NWEA's Contention states:

> The ER [Environmental Report] for CGS [Columbia Generating Station] 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.[10]

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5 SECY-11-0124, Recommended Actions to be Taken Without Delay From the Near-Term Task Force Report (Sept. 9, 2011), *available at* ADAMS Accession No. ML11245A127.

6 Staff Requirements – SECY-11-0124 – Recommended Actions To Be Taken Without Delay from the Near Term Task Force Report (Oct. 18, 2011), *available at* ADAMS Accession No. ML112911571.

7 *See* NWEA's Motion at 3.

8 *Id.* at 3-4.

9 NWEA's Motion also "notifies" the Board that it intends to petition the Commission for review of LBP-11-27. *Id*. at 2 n.2. NWEA recently filed that petition. *See* Petition for Review of LBP-11-27 (Nov. 2, 2011).

10 Petition at 20.

Energy Northwest's Answer demonstrated that the Petition and Contention do not satisfy the timeliness requirements of 10 C.F.R. § 2.309(c) and (f)(2),[11] and the Contention fails to satisfy the NRC's admissibility requirements.[12] For example, Energy Northwest's Answer demonstrated that:

- The Contention mischaracterizes the Task Force recommendations and, at its core, is an impermissible challenge to current NRC regulations and requirements.
- The Contention fails to demonstrate that anything in the Task Force Report constitutes new and significant information within the meaning of NRC regulations and case law implementing the National Environmental Policy Act ("NEPA").
- Nothing in the Task Force Report or the Petitioner's supporting declaration disputes or even discusses any specific information related to severe accidents in the Columbia Generating Station ("Columbia") Environmental Report ("ER").[13]

After NWEA submitted the Contention, the Commission issued a decision in this proceeding and a number of other proceedings, rejecting a petition submitted by NWEA and various other organizations to suspend this proceeding pending preparation of a NEPA analysis to address the Fukushima accident. That decision held that the Fukushima accident and the Task Force Report do not constitute "new and significant" information and that the petitioners' request was "premature" given that "the full picture of what happened at Fukushima is still far from clear."[14] On October 18, 2011, the Licensing Board issued LBP-11-27, which rejected NWEA's

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11 *See* Energy Northwest's Answer at 15-24.

12 *See id.* at 24-38.

13 Applicant's Environmental Report, Operating License Renewal Stage, Columbia Generating Station (Jan. 2010) ("ER"), *available at* http://www.nrc.gov/reactors/operating/licensing/renewal/applications/columbia/columbia-er.pdf.

14 *Union Elec. Co.* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __, slip op. at 30-31 (Sept. 9, 2011).

proposed contention.[15] Citing to the Commission's decision in CLI-11-05, the Licensing Board ruled that the contentions were premature.[16]

On October 18, 2011, the Commission issued SRM/SECY-11-0124, which forms the basis for the Petitioner's motion to reinstate and supplement the Contention. SRM/SECY-11-0124 approved the Staff's proposed actions to implement the Near-Term Task Force recommendations as described in SECY-11-0124. In so doing, the Commission directed the Staff to develop approaches that are "flexible and able to accommodate a diverse range of circumstances and conditions."[17]

NWEA's Motion argues that the pre-condition for accepting the contention, supposedly set forth in LBP-11-27, has been satisfied. In essence, NWEA's Motion argues that litigation of the Task Force recommendations is no longer premature given that the SRM accepts some of those recommendations.[18] As discussed below, the Petitioner overstates the implications of the SRM. In particular, the Petitioner's reference to the SRM does not cure the defects in the Contention as identified in Energy Northwest's Answer, CLI-11-05 and LBP-11-27.

III. ARGUMENT

A. NWEA's Motion Suffers from Fatal Threshold Deficiencies

The Board should deny NWEA's Motion because of two threshold deficiencies.

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[15] Similar to this Licensing Board's decision in LBP-11-27, the licensing board in the Seabrook license renewal proceeding rejected a proposed contention that was substantially identical to the contention offered by the Petitioner. *See Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-28, 74 NRC __, slip op. at 2-3, 9 (Oct. 19, 2011).

[16] *See* LBP-11-27, slip op. at 13.

[17] SRM/SECY-11-0124 at 1.

[18] *See* NWEA's Motion at 3.

First, to the extent NWEA is seeking reconsideration of LBP-11-27, the Motion falls far short of the mark. Although NWEA refers once to 10 C.F.R. § 2.323(e),[19] which governs motions for reconsideration, NWEA's Motion does not explicitly seek reconsideration or demonstrate the required compelling circumstances. Under Section 2.323(e), a motion for reconsideration may only be filed with leave of the presiding officer, "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." NWEA's Motion does not address or meet this high standard, so even if it is considered under Section 2.323(e), it must be rejected.[20]

Moreover, to the extent NWEA's Motion seeks to supplement or amend its original Contention—as opposed to seeking reconsideration of the Board's decision—the Board lacks jurisdiction. Instead, jurisdiction lies with the Commission.[21] Accordingly, to the extent NWEA seeks to supplement or amend its Contention, the Board does not have any authority to rule on the merits of NWEA's Motion.

Beyond these threshold deficiencies, NWEA's Motion is deficient for numerous additional reasons, as explained below.

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19 NWEA's Motion at 1.

20 *See*, *e.g.*, *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-9, 71 NRC 245, 252 (2010) (denying a request for reconsideration because the movant "failed to assert any compelling circumstances"); *Pa'ina Haw., LLC* (Material License Application), No. 30-36974, Order (Denying Motion for Reconsideration and Directing Parties to Bind, Mark, and Divide Written Statements and Supplemental Materials) at 2 (Dec. 31, 2008) (unpublished) ("Although the motion is styled a motion for reconsideration/clarification, the motion fails to pay even lip service to, much less meet, the regulatory requirements of 10 C.F.R. § 2.323(e) . . . .") (internal quotations omitted).

21 *See, e.g., Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-06-4, 63 NRC 32, 35-36 (2006) ("the Board has already dismissed the case and no longer has jurisdiction over the matter").

B. SRM/SECY-11-0124 Does Not Render the Contention Ripe for Litigation

NWEA's Motion argues that LBP-11-27 found the Fukushima contentions to be premature because the Commission had not yet approved the Task Force recommendations.[22] Furthermore, NWEA's Motion argues that the Licensing Board in LBP-11-27 "would consider the contention to be admissible if and when the Commission adopts the Task Force recommendations."[23] The Petitioner's argument, however, fundamentally misconstrues the Commission's decision in CLI-11-05, and mischaracterizes the Licensing Board's ruling in LBP-11-27.

Initially, it should be noted that the Commission's decision in CLI-11-05 did not hinge on the fact that the Commission at that time had not yet approved any of the Task Force's recommendations. Instead, the Commission ruled that the Fukushima accident and Task Force recommendations did not constitute new and significant information for purposes of NEPA because there was no information on how the accident might affect the proposed projects and their environmental impacts. In particular, the Commission ruled:

> This request is premature. 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. Therefore, any generic NEPA duty—if one were appropriate at all—does not accrue now.
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> 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

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22 *See* NWEA's Motion at 2.

23 *Id*.

> supplemental environmental review documents. Section 51.72(a) requires preparation of a supplemental draft EIS when:
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> > (1) There are substantial changes in the proposed action that are relevant to environmental concerns; or
> >
> > (2) There are significant *new circumstances or information* relevant to environmental concerns and *bearing on the proposed action or its impacts*.
>
> To merit this additional review, information must be both "new" and "significant," and it must bear on the proposed action or its impacts. As we have explained, "[t]he new information must present 'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'" That is not the case here, given the current state of information available to us.[24]

Similarly, the Licensing Board's decision in LBP-11-27 and the decision in LBP-11-28 in the *Seabrook* proceeding were not dependent upon the fact that the Commission had not yet approved any of the Task Force recommendations.[25] To be sure, those decisions mentioned that the Commission had not yet acted on those recommendations. But more to the point, those decisions stressed that it was unclear whether the Fukushima accident would have any environmental implications for pending licensing proceedings. Certainly, the Task Force recommendations did not reveal any new and significant environmental information. For example, in LBP-11-27 this Licensing Board stated:

> [I]t 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.[26]

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[24] CLI-11-05, slip op. at 30-31 (footnotes omitted).

[25] Contrary to the arguments of NWEA's Motion at 2, LBP-11-27 does not state or indicate "that the ASLB would consider the contention to be admissible if and when the Commission adopts the Task Force recommendations."

[26] LBP-11-27, slip op. at 13.

The Licensing Board in LBP-11-28 elaborated further:

> If – as the Commission has ruled – the available information (including specifically the Near-Term Task Force Report) does not at this time constitute "new" and "significant" information for purposes of generic environmental analysis, it follows that Interveners have failed to show how the report might constitute "new" and "significant" information for purposes of environmental analysis of renewing the license for Seabrook. Neither the Near-Term Task Force Report nor the declaration of Dr. Makhijani says anything at all about Seabrook, much less tries to link specific recommendations in the Near-Term Task Force Report to specific aspects of the Seabrook LRA.
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> The contention now before us rests on speculation built on speculation. We do not know which, if any, of the Near-Term Task Force recommendations the Commission might ultimately adopt. The Commission has stated only that, after further study, it "may" determine that regulatory or procedural changes are warranted. Furthermore, we do not know the implications for the Seabrook LRA of whatever recommendations might be adopted. And Interveners provide no guidance.
>
> Because Interveners fail to show how the Near-Term Task Force Report might potentially affect the DSEIS for Seabrook, they plainly have not demonstrated a genuine dispute as to whether the NRC Staff must address the report in its DSEIS.[27]

It is clear from LBP-11-27 and LBP-11-28 that the Contention cannot possibly be ripe for litigation, at the earliest, until the Commission approves the Task Force recommendations (or some other direction by the Commission). While necessary, however, such an approval by the Commission would not be sufficient to cure all of the deficiencies in the Contention. For example, a Commission decision on SECY-11-0124 was pending when LBP-11-27 and LBP-11-28 were issued.[28] If the then-anticipated Commission's SRM/SECY-11-0124 was expected to be sufficient to ripen the Fukushima contentions into a litigable issue, the decisions could have

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[27] LBP-11-28, slip op. at 7 (footnote omitted).

[28] SECY-11-0124 was issued on September 9, 2011, more than a month before the Licensing Board decisions.

stated so. Both decisions, however, declined to identify such an event or any other event as a basis for a ripe contention.[29]

An SEIS would be warranted only if there were a "seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[30] Although the decisions in LBP-11-27 and LBP-11-28 declined to state what events would qualify to present a "seriously different picture of the environmental impact," it is clear that issuance of SRM/SECY-11-0124 by itself is not sufficient to render the basis of those decisions invalid.

SRM/SECY-11-0124 does not address environmental issues at all.[31] The SRM does not present "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned," and, therefore, SRM/SECY-11-0124 does not render the Contention ripe for litigation.

Furthermore, even with respect to safety issues, the SRM does not identify the specific requirements that will be implemented to address the Task Force recommendations. To the contrary, the Commission has directed the Staff to be "flexible and able to accommodate a diverse range of circumstances and conditions."[32] At this time, the potential impact of the SRM/SECY-11-0124 on any individual plant, such as Columbia, is speculative at best.

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29 *See* LBP-11-27, slip op. at 14-15; LBP-11-28, slip op. at 8.

30 CLI-11-05 at 31 (*quoted in* LBP-11-27, slip op. at 12-13; LBP-11-28, slip op. at 6).

31 NWEA's Motion at 1 states that, in issuing the SRM, the Commission has "recognized the safety and environmental significance of the conclusions and recommendations of the Fukushima Task Force." However, since the SRM does not even mention environmental issues, it can hardly be said the SRM recognizes the environmental significance of the Task Force Report.

32 SRM/SECY-11-0124 at 1.

C. SRM/SECY-11-0124 Does Not Cure the Defects in NWEA's Petition and Contention

As discussed above, Energy Northwest's Answer demonstrated that NWEA's Contention should be rejected because: (1) the Contention impermissibly challenges current NRC regulations and requirements; (2) the Contention fails to identify any new and significant information under NEPA; and (3) the Contention does not dispute any specific information related to severe accidents in the Columbia ER. The issuance of SRM/SECY-11-0124 does not cure any of these defects or the other defects discussed in Energy Northwest's Answer, or render the "supplemented" Contention admissible.

1. NWEA's Motion Raises Issues that Are Likely to Become the Subject of Rulemaking

As discussed in Section IV.C.1 of Energy Northwest's Answer, NRC case law makes clear that any contention that collaterally attacks the basic structure of the NRC regulatory process must be rejected as outside the scope of the proceeding.[33] Thus, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. Similarly, as also discussed in Section IV.C.1 of Energy Northwest's Answer, Commission precedent dictates that a contention that raises a matter that is, or is about to become, the subject of a rulemaking, is outside the scope of a licensing proceeding and, thus, does not provide the basis for a litigable contention.[34] Energy Northwest's Answer demonstrated that the Contention is inadmissible under both of these principles.

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[33] Energy Northwest's Answer at 25-26.

[34] *Id*. at 26 (*citing Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-19, 72 NRC __, slip op. at 2-3 (July 8, 2010)); *see also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 345 (1999) (holding that while the topic petitioners sought to raise was not governed by a current rule, the issuance of an SRM for the NRC Staff to initiate a rulemaking on the topic was sufficient to preclude the topic from litigation in individual licensing proceedings) (*citing Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974)).

The Petitioner's reference to SRM/SECY-11-0124 does not cure this defect. In fact, it exacerbates the defect. In particular, the SRM directs the Staff to initiate the rulemaking process for some of the Task Force recommendations. Accordingly, under well-established case law, the Contention is inadmissible because it deals with matters that are to become a subject of rulemaking in accordance with the Commission's directions in SRM/SECY-11-0124.

2. NWEA's Motion Does Not Identify Any New and Significant Information under NEPA

As discussed in Section IV.C.2 of Energy Northwest's Answer, NRC need only supplement an EIS if there are: (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[35] In order to be significant, "new information must present 'a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.'"[36]

Although SRM/SECY-11-0124 is new, it is not significant with respect to NEPA. As an initial matter, the SRM does not mention Columbia. More fundamentally, the SRM does not discuss any environmental matters. There is nothing in the SRM that would indicate that the DSEIS has either underestimated the environmental impacts of severe accidents or inadequately evaluated severe accident mitigation alternatives ("SAMAs").

Although it is possible that actions discussed in SRM/SECY-11-0124 would improve plant safety, that issue is not material in the context of the environmental analysis in this proceeding. Such actions would serve to reduce the environmental impacts of the project below

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35 10 C.F.R. § 51.92(a).

36 CLI-11-05, slip op. at 31; *Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, N.M. 87120), CLI-99-22, 50 NRC 3, 14 (1999) (*citing Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); *accord Wisconsin v. Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984)).

the level currently specified in the DSEIS. NEPA case law is clear—an agency need not prepare a supplemental EIS when a change will cause less environmental harm than the original project.[37] SRM/SECY-11-0124, therefore, cannot serve as a basis for arguing that the NRC must supplement the DSEIS.

3. NWEA's Motion Does Not Raise a Genuine Dispute Regarding the Environmental Impacts of Severe Accidents or SAMAs

As discussed in Section IV.C.4 of Energy Northwest's Answer, the Contention does not controvert relevant information in Section 5.3 and Appendix F of the DSEIS regarding the environmental impacts of severe accidents and SAMAs. NWEA's Motion does not discuss either of those portions of the DSEIS. Instead, NWEA's Motion is generic in nature and is similar to motions filed in a number of other proceedings.[38] Similarly, as discussed above, the SRM/SECY-11-0124 does not mention Columbia, let alone controvert anything in Section 5.3 and Appendix F of the DSEIS. Accordingly, the Contention as supplemented by SRM/SECY-11-0124 does not satisfy 10 C.F.R. § 2.309(f)(1)(vi) and should be rejected.

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[37] *See Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1221-22 (11th Cir. 2002); *S. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663-668 (3d Cir. 1999) (holding that design changes that cause less environmental harm do not require a supplemental EIS); *Township of Springfield v. Lewis*, 702 F.2d 426, 436 (3d Cir. 1983) (acknowledging that changes which "unquestionably mitigate adverse environmental effects of the project do not require a supplemental EIS"); *Concerned Citizens on I-190 v. Sec'y of Transp.,* 641 F.2d 1, 6 (1st Cir. 1981) (holding that adoption of a new environmental protection "statute or regulation clearly does not constitute a change in the proposed action or any 'information' in the relevant sense"); *New Eng. Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 94 (1st Cir. 1978) (holding that NRC need not supplement an EIS even though the EIS did not discuss the new cooling intake location that "would have a smaller impact on the aquatic environment than would the original location"); *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F.Supp. 2d 121, 137-138 (D.D.C. 2009) ("When a change reduces the environmental effects of an action, a supplemental EIS is not required.").

[38] *See, e.g., Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant Units 3 and 4), Nos. 52-034,-035, Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Oct. 28, 2011); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), No. 50-346, Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Oct. 28, 2011).

IV. CONCLUSION

As discussed above, SRM/SECY-11-0124 does not cure the defects in NWEA's Petition or Contention. Accordingly, NWEA's Motion should be denied.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)
Steven P. Frantz
Raphael P. Kuyler
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: sfrantz@morganlewis.com

Counsel for Energy Northwest

Dated in Washington, D.C.
this 7th day of November 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2011, a copy of "Energy Northwest's Answer in Opposition to Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention" was served electronically with the Electronic Information Exchange on the following recipients:

E. Roy Hawkens
Alan S. Rosenthal
Dr. Gary S. Arnold
Dr. William H. Reed
Hillary Cain, Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: alan.rosenthal@nrc.gov
gary.arnold@nrc.gov
roy.hawkens@nrc.gov
hillary.cain@nrc.gov

Nina Bell
Northwest Environmental Advocates
P.O. Box 12187
Portland, OR 97212-0187
E-mail: nbell@advocates-nwea.org

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Lloyd B. Subin
Maxwell Smith
E-mail: lloyd.subin@nrc.gov
maxwell.smith@nrc.gov

Signed (electronically) by Raphael P. Kuyler
Raphael P. Kuyler
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: 202-739-3000
Fax: 202-739-3001
E-mail: rkuyler@morganlewis.com

COUNSEL FOR ENERGY NORTHWEST