UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

FirstEnergy NUCLEAR OPERATING COMPANY

(Davis-Besse Nuclear Power Station, Unit 1)

Docket No. 50-275-LR

NRC STAFF’S ANSWER TO MOTION FOR LEAVE TO SUPPLEMENT BASIS OF CONTENTION REGARDING NEPA REQUIREMENT TO ADDRESS SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE FUKUSHIMA TASK FORCE REPORT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission (“NRC Staff” or “Staff”) answers “Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report” (“Motion to Supplement”) filed on October 28, 2011, by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don’t Waste Michigan, and the Green Party of Ohio (collectively “Intervenors”).1 The Intervenors assert that the Commission’s recent Staff Requirements Memorandum regarding implementation of specific Near-Term Task Force recommendations establishes the environmental significance of the Near Term Task Force Report2 and thereby establishes a new basis for admitting their contention that is currently pending before the Atomic Safety and Licensing Board (“Board”). Intervenors'


proffered new contention asserts that the TFR’s environmental significance requires that the Applicant discuss the TFR’s findings in its Environmental Report.\(^3\)

As set forth below, the Board should deny the Motion to Supplement because it is procedurally defective and lacks basis. First, the Motion to Supplement does not discuss the Commission’s requirements for late, new, and amended contentions under 10 C.F.R. § 2.309(c), (f)(1), and (f)(2). Failure to discuss these requirements is sufficient grounds to deny the Motion to Supplement.

Second, even if the Board were to overlook these procedural defects, the Motion to Supplement fails to provide sufficient information that would make the underlying contention admissible. The Motion to Supplement bases its conclusory assertions on a recent SRM, SRM-SECY-11-0124\(^4\), in which the Commission responded to a Memorandum from the Executive Director for Operations, dated September 9, 2011. The Commission’s Memorandum authorizes the Staff to initiate activities to implement certain safety recommendations from the TFR.\(^5\) The actual specific licensing or rulemaking activities that may in themselves trigger NEPA requirements, however, have not occurred and are not expected to be implemented, if necessary, for several years. These activities and their environmental impacts, if any, are speculative because additional information will need to be developed, input from the public and other interested parties will need to be gathered, and additional Commission involvement or direction may be necessary prior to any implementation. Intervenors argue that the Commission’s Memorandum establishes the environmental significance of the TFR’s


\(^4\) SRM-SECY-11-0124, Recommended Actions to Be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ADAMS Accession No. ML112911571).

\(^5\) Id.
recommendations.\textsuperscript{6} But the Commission has already determined that the TFR’s recommendations are not new and significant, such that additional environmental analysis is required prior to any determination regarding Davis-Besse’s license renewal application. Moreover, to the extent that any environmental analysis may be required based on the TFR’s recommendations, such analysis would only be appropriate when the Commission takes specific regulatory actions based upon the TFR’s recommendations.

Additionally, the Motion to Supplement does not establish a material dispute with the applicant’s license renewal application. The Commission has held that contentions based on the currently available information regarding the Fukushima incident are premature, and the Motion to Supplement adds no additional information that would alter this conclusion. Finally, the Commission’s Memorandum reemphasizes the Commission’s intent to implement the Fukushima Task Force recommendations for all plants regardless of their licensing or hearing status. Thus, the Board should deny the Motion to Supplement.

\textbf{BACKGROUND}

On August 18, 2001, Intervenors filed a contention based upon the recommendations in the TFR.\textsuperscript{7}

Intervenors’ Contention stated:

The ER for Seabrook license renewal\textsuperscript{8} 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 NRC regulations, these implications must be addressed in the ER.\textsuperscript{9}

\textsuperscript{6} Id.
\textsuperscript{7} FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC \_\_ (April 26, 2011) (slip op.) (admitting two other contentions as limited by the Board).
\textsuperscript{8} The Intervenors attempted to incorporate by reference the Contention filed in the Seabrook Station license renewal proceedings. See Contention at 1.
\textsuperscript{9} Id. at 5. The same or similar contentions were filed in other pending license renewal, combined operating license, operating license, and standardized design certification proceedings. Id. at 3-4.
The Board has not yet ruled on the contention’s admissibility. On October 28, 2011, Intervenors filed the instant motion seeking to supplement the basis for that contention.\(^{10}\)

ARGUMENT

A. The Motion to Supplement is Procedurally Defective

The Motion to Supplement is procedurally defective because it does not discuss how the supplemental basis satisfies the requirements for late, new, and amended contentions under 10 C.F.R. § 2.309(c), (f)(1), and (f)(2). The Commission has stated: “New bases for a contention cannot be introduced in a reply brief, or at any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).”\(^{11}\) Amended contentions must also “satisfy the usual contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1).”\(^{12}\) To meet the requirements of § 2.309(f)(1), a petitioner must produce “a detailed, fact-based showing that a genuine and material dispute of law or fact exists.”\(^{13}\) The Motion to Supplement falls far short of the Commission’s standards. The Motion to Supplement contains no reference to 10 C.F.R. § 2.309, nor does it make any demonstration of how it meets the Commission’s requirements. At best, the Motion to Supplement contains only general conclusory references to the Commission’s Memorandum without any specific explanation or argument regarding Davis-Besse’s license renewal application. Thus, the Motion to Supplement should be denied.

\(^{10}\) Motion to Supplement.

\(^{11}\) Nuclear Management Company, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

\(^{12}\) Shaw Areva Mox Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 66 (2009).

\(^{13}\) Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 289 (2002).
B. The Motion to Supplement Does Not Demonstrate that the Underlying Contention is Admissible

Even if the Board overlooks these procedural inadequacies, the Motion to Supplement still fails to provide sufficient information to render the underlying contention admissible. The Motion to Supplement asserts: “By ordering the Staff to adopt and implement numerous Task Force recommendations, including redefining what level of protection of public health and safety should be regarded as adequate, the Commission makes clear that it believes the lessons learned from the Fukushima accident have safety and environmental significance.”

However, the Commission’s Memorandum makes no reference to the term “environmental.” The Intervenors did not point to any specific language in the Commission’s Memorandum to support their bare assertion of significance.

As the Staff previously stated in its response to Intervenors’ motion to admit their new contention, the TFR’s recommendations relate to the NRC’s safety oversight of nuclear reactors under the Atomic Energy Act, not the agency’s environmental review of licensing actions under the National Environmental Policy Act (“NEPA”). Likewise, the Commission’s Memorandum responds to the safety recommendations. It does not discuss environmental matters generally or the specific environmental significance of any recommendation in particular. The Commission’s SRM directed the Staff to undertake actions such as engaging with stakeholders, developing technical basis documents, and publishing advanced notices of proposed rulemaking, as it works on implementing certain Task Force recommendations. The SRM, in sum, reaffirms the Commission’s prior direction to the Staff to separately address Task Force

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14 Motion to Supplement at 1-2.

15 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 13-15 (Sep. 6, 2011) (ADAMS Accession No. ML11249A158) (“Contention Response”). In addition the Staff noted that while the contention’s argument focused on environmental concerns, a number of statements in the contention attacked the Commission’s safety regulations on the grounds that they did not adequately consider severe accidents. Id. at 8-10. The Staff reminded the Board that such claims are plainly outside the ambit of a license renewal proceeding. Id.
Recommendation 1. The Commission’s directions focus solely on safety issues, not environmental issues. Thus, the Commission’s Memorandum leaves undisturbed the Commission’s previous evaluation regarding the environmental significance of the TFR’s recommendations.

The Commission previously responded to a request from several intervenor groups (including the Davis-Besse intervenors) to conduct “a separate generic NEPA analysis regarding whether the Fukushima events constitute ‘new and significant information’ under NEPA that must be analyzed as part of the environmental review for new reactor and license renewal decisions.”17 The Commission surveyed the current information regarding the Fukushima accident, including the Task Force Report, and concluded that the available information did not constitute the “new” and “significant” information necessary to trigger a generic NEPA review.18 Nothing in the Intervenors’ Motion or supplement alters this result. Accordingly, even if the Board considered the contention in light of Intervenors’ latest conclusory assertions, the contention would still be inadmissible.

Furthermore, the Motion to Supplement also fails to establish a genuine dispute with the license renewal application. The Board in the Seabrook license renewal proceeding dismissed the exact contention asserted by Intervenors here because it failed to establish a genuine dispute with the Seabrook applicant’s environmental report.19 The Motion to Supplement does not cure this deficiency. Neither the Motion to Supplement nor the Commission’s Memorandum

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16 The TFR’s Recommendation 1 requires the Staff to evaluate what level of protection for public health and safety should be regarded as adequate. The Commission’s Memorandum (at 2) directs the Staff to submit a separate Commission notation vote paper providing option to disposition Task Force recommendation 1 within 18 months of issuance of the SRM.

17 Union Elec. Co. d/b/a American Mo. (Callaway Plant, Unit 2), CLI-11-05, 74 NRC ___ (Sept. 9, 2011) (slip op. at 30).

18 Id. at 6

19 NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-28, 74 NRC ___ (Oct. 19, 2011) (slip op. at 7).
contains any information specific to Davis-Besse. Intervenors have not attempted to link the TFR’s recommendations to any site-specific feature of Davis-Besse. Therefore, the Motion to Supplement does not demonstrate a genuine dispute.

Additionally, the issues raised by the Intervenors’ contention have not yet ripened to the point where they can appropriately be litigated in this adjudicatory proceeding. In CLI-11-05, the Commission found that because the agency did not know “the full implications of the Japan events for U.S. facilities . . . any generic NEPA duty – if one were appropriate at all – does not accrue now.” On its face, the Commission’s Memorandum does not suggest that in the short period of time since CLI-11-05, the NRC has gained sufficient knowledge to trigger its NEPA obligations. Rather, as discussed above, the SRM is silent with respect to NEPA. In light of that silence, the obligation falls to Intervenors to demonstrate how SRM-SECY-11-0124 constitutes sufficient information to warrant further NEPA consideration. But, the Motion to Supplement abdicates this obligation, and simply alleges that in SRM-SECY-11-0124, “the Commission makes clear that it believes the lessons learned from the Fukushima accident have safety and environmental significance.” Such bare allegations cannot constitute the detailed, fact-based showing needed to trigger an NRC adjudicatory hearing on this issue. Consequently, the Motion to Supplement does not demonstrate that sufficient information exists to litigate the underlying contention at this time.

Finally, by their terms the TFR’s recommendations are intended to apply to all existing plants, regardless of their license renewal status. The Commission’s Memorandum reemphasizes that intent and illustrates the Commission’s intended path to implement that plan. Specific licensing or rulemaking activities that may trigger the NRC’s environmental obligations

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20 Callaway, CLI-11-05, 74 NRC at ___ (slip op. at 30).

21 Motion to Supplement at 2.

22 McGuire/Catawba, CLI-02-14, 55 NRC at 289.

23 Contention Response at 7-8.
have not yet occurred, but may occur as the Staff strives to complete these actions over the next five years. Any need to determine the environmental significance of those actions can only be considered at that time, once specific actions have been identified and taken. Thus, the Board should deny the Intervenors’ current motion.

CONCLUSION

For the reasons set forth above, the Motion to Supplement is procedurally defective because it does not address the Commission’s standards for augmenting a contention’s factual basis. Further, the motion does not demonstrate sufficient grounds for the relief sought. The motion’s reliance on the Commission’s Memorandum is misplaced because the Memorandum does not support the underlying contention, does not demonstrate a genuine dispute unique to the Davis-Besse license renewal proceeding, and does not show that the concerns the motion raises are ripe for adjudication. For all of these reasons, the Board should deny the motion.

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 “NRC STAFF’S ANSWER TO MOTION FOR LEAVE TO SUPPLEMENT BASIS OF CONTENTION REGARDING NEPA REQUIREMENT TO ADDRESS SAFETY AND ENVIRONMENTAL IMPLICATIONS OF THE FUKUSHIMA TASK FORCE REPORT” in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 7th day of November, 2011.

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