

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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)
LUMINANT GENERATION CO. LLC) Docket Nos. 52-034 & 52-035
)
)
(Comanche Peak Nuclear Power Plant,)
Units 3 & 4))

NRC STAFF'S ANSWER TO MOTION TO REINSTATE AND SUPPLEMENT
THE BASIS FOR FUKUSHIMA TASK FORCE REPORT CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the staff of the U.S. Nuclear Regulatory Commission (“Staff”) hereby responds to the October 28, 2011, “Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention” (“Motion”) filed by Public Citizen, the Sustainable Energy and Economic Development Coalition (“SEED Coalition”), and Lon Burnam (collectively, “Petitioners”). The Motion requests to add a basis to supplement the Petitioners’ filing entitled “Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report,” dated August 11, 2011 (“Petitioners’ First Motion to Reopen”), in which the Petitioners proposed a new contention. The Petitioners assert that a Staff Requirements Memorandum (“Task Force SRM”) issued on October 18, 2011, provides a new basis for their proposed contention. For the reasons set forth below, that SRM is not an adequate basis for the proposed contention¹ and Petitioners’ Motion fails to satisfy the reconsideration standards in 10 C.F.R. § 2.323(e).

¹ Consistent with the requirements of 10 C.F.R. § 2.323(a), the Petitioners submitted the Motion on October 28, 2011, ten (10) days after the Commission issued the SRM, and the Staff does not oppose the Motion’s timeliness under that section of the NRC’s regulations.

PROCEDURAL BACKGROUND

Between April 14 -18, 2011, an “Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident” (Emergency Petition) was filed in various NRC proceedings before the Commission. During this time period, a declaration of Dr. Arjun Makhijani was also filed in various NRC proceedings to support the Emergency Petition. Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend all Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from the Fukushima Daiichi Nuclear Power Station Accident (April 19, 2011) (ML1111107910) (“First Makhijani Declaration”).² The Staff and Applicant filed answers to the Emergency Petition on May 2, 2011. NRC Staff Answer to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (May 2, 2011); Luminant Generation Company LLC’s Answer in Opposition to Emergency Petition to Suspend Licensing Proceedings (May 2, 2011). On September 9, 2011, the Commission denied the Emergency Petition. *Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __ , __ (Sept. 9, 2011) (slip op. at 24-25, 41).

On August 11, 2011, the Petitioners filed their Petitioners’ First Motion to Reopen. In the September 6, 2011, NRC Staff answer to Petitioners’ Motion, the Staff opposed the admission of Petitioners’ new contention, as Petitioners’ filing failed to meet the Commission’s requirements for reopening the record or admitting a new contention. NRC Staff’s Answer to Petitioners’ Motion to Admit New Contention Regarding the Safety and Environmental

² Neither the Emergency Petition nor the First Makhijani Declaration was ever filed in this proceeding, although this proceeding was listed in the caption of the Emergency Petition and Robert Eye signed the Emergency Petition as Counsel for the Petitioners in this proceeding.

Implications of the NRC Task Force Report on the Fukushima Dai-ichi Accident (Sept. 6, 2011) (“Staff Answer”).

On October 18, 2011, the ASLB denied the Petitioners’ motion to reopen closed proceedings and rejected Petitioners’ contention as premature. *Luminant Generation Company LLC* (Comanche Peak Nuclear Plant, Units 3 and 4), LBP-11-27, 74 NRC ___ at 4-5, 15-16 (Oct. 18, 2011) (slip op.) (“LBP-11-27”). On that same day, the Office of the Secretary of the Commission issued a Staff Requirements Memorandum on SECY-11-0124, Recommended Actions to be Taken Without Delay From the Near-Term Task Force Report (ML112911571) (Oct. 18, 2011) (“Task Force SRM”). The Task Force SRM stated that the Commission approved the Staff’s proposed actions in SECY-11-0124 and provided direction for the Staff’s completion and implementation of lessons learned from the Fukushima accident. Relying on the Task Force SRM, on October 28, 2011, the Petitioners filed their Motion.

DISCUSSION

Petitioners assert that the Commission’s directive to the Staff in the Task Force SRM to “strive to complete and implement the lessons learned from the Fukushima accident within five years - by 2016” supports their contention because, they claim, the Commission has “recognized the safety and environmental significance of the conclusions and recommendations of the Fukushima Task Force Report.” Motion at 1. As a result, Petitioners argue that their contention, which was rejected by the Board, is no longer “premature” and should be admitted. Motion at 1-2; *see also Comanche Peak*, LBP-11-27, 74 NRC at 4-5, 15-16. Petitioners also seek to supplement their contention’s basis to include this SRM directive. Motion at 2.

First, although the Motion is styled as a request to “reinstate and supplement the basis” for the Petitioners’ contention, based on a review of the Motion, it appears that the Petitioners are actually requesting that the Board reconsider its decision in LBP-11-27.³ In fact, the

³ The Staff notes that motions to “reinstate and supplement the basis” of a contention are not explicitly provided for in the Commission’s regulations.

Petitioners specifically cite to 10 C.F.R. § 2.323(e), which concerns motions for reconsideration.

Motion at 1. However, the Petitioners have not satisfied the reconsideration standard in 10

C.F.R. § 2.323(e):

Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

10 C.F.R. § 2.323(e). They have failed to show “compelling circumstances,” a standard which the Commission intended to serve as a high threshold. Motions for reconsideration should be granted “only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.” Nuclear Regulatory Commission; Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). Further, a motion for reconsideration “cannot simply ‘republish’ prior arguments, but must give the Commission a good ‘reason to change its mind.’” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 n.13 (2004) (citing *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004)). A properly supported motion for reconsideration must identify errors or deficiencies in the presiding officer’s determination indicating the questioned ruling overlooked or misapprehended some legal principle or decision that should have controlling effect, or some critical factual information. See *Independent Spent Fuel Storage Installation*, LBP-00-31, 52 NRC at 342.

Here, although the SRM was issued contemporaneous with the Board’s decision, Petitioners do not state in what way its content constitutes “compelling circumstances” that would warrant reconsideration, nor why “manifest injustice” would occur in the absence of reconsideration. Instead, they simply point to the statement in the SRM that directs the Staff to implement the lessons learned from Fukushima by 2016. Task Force SRM at 1; see also Motion at 1. Petitioners merely assert that “the ASLB’s condition for admission of the contention is satisfied” by the issuance of the Task Force SRM because they claim the Board “would

consider the contention to be admissible if and when the Commission adopts the Task Force recommendations.” Motion at 3. However, Petitioners fail to explain how the Commission’s direction in the SRM provides any more specificity about the safety or environmental implications of the Task Force recommendations than did information previously available.

The SRM indicates that the “lessons learned” from the events at Fukushima Dai-ichi are not yet complete and that the Staff and Commission continue to evaluate those events. See Task Force SRM at 1, 2. Specifically, the SRM states that “[a]s the staff evaluates Fukushima lessons-learned and proposes modifications to NRC’s regulatory framework, the Commission encourages the staff to craft recommendations that continue to realize the strengths of a performance-based system as a guiding principle.” *Id.* at 1. The foregoing statement clearly indicates that the changes to the regulatory framework have yet to be determined. Similarly, the SRM states that “[w]here gaps in knowledge in the analyses of the reactor accidents at Fukushima Dai-ichi interfere with the staff’s ability to make an informed recommendation on regulatory action, the staff should inform the Commission of these gaps.” *Id.* And “[t]he staff should inform the Commission . . . when it has developed the technical bases and acceptance criteria for implementing [Task Force] Recommendations 2.1, 2.3, and 9.3.” *Id.* at 2. In regard to station blackout regulatory actions, the Commission directed that “the staff should initiate the rulemaking as an advance notice of proposed rulemaking (ANPR) rather than a proposed rule” (*id.* at 2), which indicates the Commission’s desire to seek stakeholder views in formulating its views on that matter.

Thus, the SRM did not, as the Petitioners mistakenly assert, issue any exact instructions to the Staff or provide specific courses of action for the Staff to embark upon at this time. Motion at 3. While the Motion asserts that the Commission’s Task Force SRM would effectively nullify the Board’s Order, which held that Petitioners’ contention was “premature,” the Motion actually misapprehends the Board’s reasoning. Motion at 2-3. The logic behind the Board’s ruling was not solely that the Task Force findings and recommendations have not been

accepted. Far from justifying reconsideration of the Board's decision as the Petitioners claim, the SRM indeed confirms the Board's view in LBP-11-27 that the Task Force's findings and recommendations "scarcely have been given the effect that, according to [the Intervenors], gives rise to the environmental implications that undergird the contention that is sought to be admitted." LBP-11-27 at 13. Just as importantly, Petitioners do not provide specific information demonstrating why the analysis already in the FEIS is deficient, or explain what information in the SRM now renders their contention admissible, such that the Board should reconsider it. As such, because Petitioners' motion provides no new basis for the Board to reconsider its prior decision, the Petitioners fail to meet the "compelling circumstances" standard for motions for reconsideration. See 10 C.F.R. § 2.323(e); Nuclear Regulatory Commission; Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). Furthermore, to the extent that the Motion may be understood as the Petitioners attempting for a second time to reopen the closed proceeding, it should be denied. As explained below, the Petitioners have failed to meet the stringent standards for reopening set forth in Section 2.326(a) of the Commission's regulations. 10 C.F.R. § 2.326(a). A motion to reopen a closed proceeding must meet the following criteria:

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue, and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Id. As with Petitioners' First Motion to Reopen, in their Motion here, Petitioners have failed to meet these standards. They do not explain how the SRM demonstrates that their contention addresses a significant safety or environmental issue, nor why a materially different result would have been likely had the newly proffered evidence been considered initially. *Id.*; see also Staff Answer at 7-8. In addition, the Petitioners have not shown how the Task Force SRM

demonstrates that there is a “grave” environmental or safety issue such that the record should be reopened. Consequently, the Motion does not show how the Task Force SRM meets the reopening standards any more than did the Petitioners’ First Motion to Reopen and the contention proposed therein. As such, Petitioners again do not satisfy the reopening standards pursuant to 10 C.F.R. § 2.326(a) and their motion should be denied.

For the reasons discussed above, Petitioners have failed to demonstrate that the Board’s decision in LBP-11-27 should be reconsidered or that the proceeding should be reopened. Additionally, for these reasons, the Staff’s position as previously explained in the Staff’s Answer filed on September 6, 2011, including with respect to the Petitioners’ failure to meet the Commission’s standards for reopening the proceeding and contention admissibility, remains valid. 10 C.F.R. §§ 2.326(a); 2.309(f)(1) and (2).

CONCLUSION

For the reasons set forth above, Petitioners’ Motion should be rejected for failure to meet the reconsideration requirements in 10 C.F.R. § 2.323(e) and for failure to meet the requirements in 10 C.F.R. § 2.326 for a motion to reopen.

Respectfully Submitted,

/Signed (electronically) by/
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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO MOTION TO REINSTATE AND SUPPLEMENT THE BASIS FOR FUKUSHIMA TASK FORCE REPORT CONTENTION pursuant to 10 C.F.R. § 2.341 have been served upon the following persons by Electronic Information Exchange this 7th day of November, 2011:

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Dated at Rockville, Maryland
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