UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )
) Docket Nos. 52-033 COL
) (Fermi Nuclear Power Plant, Unit 3)
)

NRC STAFF 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


¹ Order (Establishing schedule and procedures to govern further proceedings), at 1-2 (Sept. 11, 2009) (unpublished) (ADAMS Accession No. ML092540392).
Accident” dated August 11, 2011 (“Intervenors’ August 11 Motion”), and the “Contention in Support of [Intervenors’ August 11 Motion]” dated August 12, 2011 (“Proposed Contention”).

The background of this proceeding relevant to the Motion is set forth in the “NRC Staff Answer To [Intervenors’ August 11 Motion]” dated September 6, 2011 (“Staff Answer”), and need not be repeated here. See Staff Answer at 1-3. After the Staff filed the Staff Answer, the Commission, on October 18, 2011, issued a Staff Requirements Memorandum (“SRM”) on SECY-11-0124, “Recommended Action To Be Taken Without Delay From the Near-term Task Force Report” (ML112911571).2 The Intervenors assert the SRM as a new basis for their proposed contention.3 Motion at 1-2. For the reasons set forth below, the SRM is not an adequate basis for the proposed contention.4

DISCUSSION

The legal standards that govern the proposed new basis are set forth in the Staff Answer filed on September 6, and need not be repeated in this Answer. See Staff Answer at 4-6. The Intervenors argue that the SRM provides an adequate basis for their proposed contention since “[b]y 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

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2 In addition, on September 9, 2011, the Commission denied an “Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daichi Nuclear Power Station Accident” dated April 14, 2011 (Emergency Petition), filed by the Joint Intervenors before the Commission in this proceeding. 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). To the extent the Emergency Petition raised the same concerns raised in the Proposed Contention, the Commission decision in CLI-11-05 controls here.

3 On October 28, 2011, the same day Intervenors filed their Motion, the Staff published NUREG-2105, “Draft Environmental Impact Statement for Combined License (COL) for Enrico Fermi Unit 3” (“DEIS”) (ADAMS Accession Nos. ML11287A108 and ML11287A109). The Motion addresses the Applicant’s Environmental Report rather than the DEIS.

4 Consistent with the requirements of 10 C.F.R. § 2.323(a), the Intervenors submitted the Motion on October 28, 2011, ten (10) days after the Commission issued the SRM, and the Staff does not oppose the Motion on procedural grounds under that section of the NRC’s regulations.
accident have safety and environmental significance.\textsuperscript{5} Motion at 2, citing SRM at 2. As set forth below, the SRM does not form an adequate basis, in whole or in part, for the Proposed Contention, because (1) the Intervenors do not explain how the SRM provides such a basis, as required by 10 C.F.R. § 2.309(f)(1)(ii), and (2) the Intervenors do not describe how the SRM gives rise to a genuine dispute with some portion of the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi).

With respect to § 2.309(f)(1)(ii), the Commission’s issuance of the SRM, in and of itself, is inadequate to form a basis for the new contention. Rather, Commission regulations require the Intervenors to explain how the SRM provides such a basis. 10 C.F.R. § 2.309(f)(1)(ii). The Motion, however, fails to identify any SRM direction to redefine some particular design feature or other measure as providing a level of protection that “should be regarded as adequate” that is not now so regarded, and per force fails to identify any associated effect on the Fermi environmental analysis. See Motion at 1-2. Further, the Motion does not relate any direction in the SRM to the environmental impact of the proposed Fermi facility or the environmental significance of the accident at Fukushima Dai-ichi, which is the asserted foundation of the proposed contention. See id.; note 5, supra. Nor do the Intervenors attempt to connect any matter discussed in the SRM to the arguments in the Proposed Contention. Accordingly, the Intervenors fail to explain how the SRM forms any part of a basis for the Proposed Contention, in contravention of § 2.309(f)(1)(ii).

To the contrary, 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

\textsuperscript{5} As the Staff understands it, the Intervenors propose the following contention:

The ER for [the Fermi 3 COL Application] 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. Proposed Contention, Memorandum Regarding Seabrook Station License Renewal, at 5.
evaluate those events. See 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.), which indicates the Commission’s desire to seek stakeholder views in formulating its views on that matter.

All of the foregoing statements in the SRM individually and collectively conflict with the Motion’s assertion that the SRM calls for changes to NRC regulations that would be considered new and significant with respect to environmental analyses under the National Environmental Policy Act of 1969, as amended. In this regard, a document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), rev’d in part on other grounds, CLI-96-7, 43 NRC 235, 269 n. 39. Since the SRM does not approve specific actions, as described above, it undercuts the Proposed Contention rather than providing a basis for it.6

6 The Intervenors also assert that the SRM represents the Commission’s acceptance of the Task Force Report’s conclusions and recommendations, and therefore undermines the decision in PPL Bell Bend, L.L.C. (Bell Bend Nuclear Power Plant), Luminant Generation Co. LLC (Comanche Peak Nuclear Continual...
With respect to the requirements of § 2.309(f)(1)(vi), the Motion does not identify any deficiency in the Applicant’s Environmental Report (Application, Part 3), as compared to the SRM, and therefore fails to raise a genuine dispute with the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi). The SRM does not supply the basis missing from the Intervenors’ proposed contention, as described in the Staff Answer, and the Motion does not remedy the failure of the Proposed Contention to satisfy the contention requirements of 10 C.F.R. § 2.309(f)(1). Accordingly, the Intervenors’ addition of the new basis to their proposed contention is unavailing, and the Proposed Contention should be denied.

CONCLUSION

For the reasons set forth above, the SRM does not provide a basis for the proposed contention, which should be rejected for the reasons set forth in the Staff Answer.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland this 7th day of November, 2011

Power Plant, Units 3 and 4), Energy Northwest (Columbia Generating Station), Southern Nuclear Operating Co. (Vogtle Electric Generating Plants, Units 3 and 4), LBP-11-27, 74 NRC ___(Oct. 18, 2011). Motion at 2. However, the SRM, as explained above, does not describe particular environmental effects of the accident at Fukushima Dai-ichi, nor does it direct the staff to prepare orders or rules requiring licensees or applicants to implement particular design features or other measures. Accordingly, the SRM does not undermine the decision in LBP-11-27. Moreover, this proceeding is not a proper forum in which to attack LBP-11-27.
CERTIFICATE OF SERVICE

I hereby certify that copies of the “NRC STAFF 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’” 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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