NRC STAFF ANSWER TO “MOTION BY INTERVENORS 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, the staff of the U.S. Nuclear Regulatory Commission (“Staff”) hereby responds to the November 2, 2011, “Motion by Intervenors for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety And Environmental Implications of the Fukushima Task Force Report” (“Motion”) filed by the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party (collectively, “Joint Intervenors”). The Motion requests leave to add a basis to supplement the Joint Intervenors’ filing entitled “Motion to Admit New Contention (13) and Reconsider Contention 5 Regarding the Safety and Environmental Implications of the Nuclear Regulatory commission Task Force Report on the Fukushima Dai-Ichi Accident” dated August 11, 2011 (“Joint Contention”), in which the Joint Intervenors proposed a new contention.

The background of this proceeding relevant to the Motion is set forth in the “NRC Staff Answer To Joint Intervenors’ Motion to Admit New Contention 13 Regarding the Safety and Environmental Implications of the NRC Task Force Report on the Fukushima Dai-Ichi Accident” (“Staff Answer”) dated September 6, 2011. See Staff Answer at 2. 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” (Attachment 1; also available at ADAMS accession number ML112911571). The Joint Intervenors assert the SRM as a new basis for their proposed contention. Motion at 1-2. For the reasons set forth below, the Motion is not timely, and the SRM is not an adequate basis for the proposed contention.

**DISCUSSION**

The Motion is untimely. In order for a motion to be timely it must be “made no later than ten (10) days after the occurrence or circumstance from which the motion arises.” 10 C.F.R. § 2.323(a). The Commission issued the SRM on October 18, 2011, but the Joint Intervenors’ did not file their Motion until November 2, 2011, 16 days after the SRM. Because the Joint Intervenors did not file within 10 days of the SRM, nor seek leave from the Board for an extension of time, the Motion is not timely.

The legal standards that govern the proposed new basis are set forth in the Staff Answer filed on September 6. See Staff Answer at 3-5. The Joint 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 accident have safety and environmental significance.”1 Motion at 2, citing SRM at 2. As set forth below, the SRM does

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1 The Joint Intervenors proposed the following contention:

The ER and subsequent DEIS for Levy County Units 1 & 2 fails to satisfy the requirements of NEPA because the documents do 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 Joint Contention at 5-6.
not form an adequate basis, in whole or in part, for the Joint Contention, because (1) the Joint 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 Joint Intervenors do not describe how the SRM give 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 Joint 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 Levy County 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 Levy County facility or the environmental significance of the accident at Fukushima Dai-ichi, which is the asserted foundation of the proposed contention. See id.; note 1, supra. Nor do the Joint Intervenors attempt to connect any matter discussed in the SRM to the arguments in the Joint Contention. Accordingly, the Joint 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 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 Joint Contention rather than providing a basis for it.²

With respect to the requirements of § 2.309(f)(1)(vi), the Motion does not identify any deficiency in the Applicant’s Environmental Report, and therefore fails to raise a genuine dispute

² The Joint 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 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, 75 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.
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 Joint Intervenors’ proposed contention, as described in the Staff Answer, and the Motion does not remedy the failure of the Joint Contention to satisfy the contention requirements of 10 C.F.R. § 2.309(f)(1). Accordingly, the Joint Intervenors’ addition of the new basis to their proposed contention is unavailing, and the Joint Contention should be denied.

CONCLUSION

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

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
This the 14th day of November 2011
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

PROGRESS ENERGY FLORIDA, INC. Docket Nos. 52-029 and 52-030
(Levy County Nuclear Site, Units 1 and 2)

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff Answer To “Motion By Intervenors 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 on the following persons by Electronic Information Exchange on this 14th day of November 2011:

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MEMORANDUM TO: R. W. Borchardt  
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FROM: Annette L. Vietti-Cook, Secretary /RA/

SUBJECT: STAFF REQUIREMENTS – SECY-11-0124 – RECOMMENDED ACTIONS TO BE TAKEN WITHOUT DELAY FROM THE NEAR-TERM TASK FORCE REPORT

October 18, 2011

The Commission has approved the staff’s proposed actions to implement without delay the Near-Term Task Force recommendations as described in SECY-11-0124, subject to the comments below.

The NRC should strive to complete and implement the lessons learned from the Fukushima accident within five years - by 2016.

The process for implementing new or modified regulatory requirements or programs should be transparent and the regulatory mechanism (e.g., order, rulemaking, 10 CFR 50.54(f) letter, generic letter, etc.) used to impose them should be as clear and specific as possible when issued.

As 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. In order to be effective, approaches should be flexible and able to accommodate a diverse range of circumstances and conditions. In consideration of events beyond the design basis, a regulatory approach founded on performance-based requirements will foster development of the most effective and efficient, site-specific mitigation strategies, similar to how the agency approached the approval of licensee response strategies for the “loss of large area” event under its B.5.b program.

Where 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.

For Recommendation 2.1, when the staff issues the requests for information to licensees pursuant to 10 CFR 50.54(f) to identify actions that have been taken or are planned to address
plant-specific vulnerabilities associated with the reevaluation of seismic and flooding hazards, the staff should explain the meaning of "vulnerability."

The staff should inform the Commission, either through an Information Paper or a briefing of the Commissioners’ Assistants, when it has developed the technical bases and acceptance criteria for implementing Recommendations 2.1, 2.3, and 9.3.

For NTTF recommendations 4.2 and 5.1 the staff should provide the Commission with notation vote papers for Commission approval of the orders once the staff has engaged stakeholders and established the requisite technical bases and acceptance criteria. For cases in which backfits cannot be justified using existing requirements, yet the staff believes that regulatory enhancements should be made, the staff should clearly explain the legal and policy bases for proceeding.

For Recommendation 4.1 -- “Station blackout regulatory actions,” the staff should initiate the rulemaking as an advance notice of proposed rulemaking (ANPR) rather than a proposed rule.

The staff should designate the station blackout (SBO) rulemaking associated with NTTF recommendation 4.1 as a high-priority rulemaking with a goal of completion within 24 to 30 months of the date of the Staff Requirements Memorandum for this SECY paper.

The staff should monitor nuclear industry efforts underway to strengthen SBO coping times and consider whether any interim regulatory controls (e.g., commitment letters or confirmatory action letters) for coping strategies for SBO events would be appropriate while rulemaking activities are in progress.

Concerning the potential to redefine what level of protection of public health and safety should be regarded as adequate, the Commission reaffirms its guidance to the staff in the SRM on SECY-11-0093 with respect to Recommendation 1.

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
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CFO
OCA
OPA
Office Directors, Regions, ACRS, ASLBP (via E-Mail)
PDR