UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	**Docket Nos. 52-025-COL and 52-026-COL**
Southern Nuclear Operating Company	)	
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	**November 14, 2011**

SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING PETITIONS FOR REVIEW OF LBP-11-27

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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In accordance with 10 C.F.R. § 2.341(b)(3), Southern Nuclear Operating Company ("SNC") submits this answer to two, nearly identical petitions for review filed by the Blue Ridge Environmental Defense League ("BREDL") and Center for a Sustainable Coast, Georgia Women's Action for New Directions, and Southern Alliance for Clean Energy ("CSC Movants") (collectively, "Petitioners") on November 2, 2011. On August 11, 2011, BREDL filed a motion to reopen the closed record ("BREDL Motion to Reopen")[1] of the contested portion of the Vogtle Units 3 and 4 combined license ("COL") application proceeding.[2] Also on August 11, 2011, CSC Movants filed a nearly identical motion and contention ("CSC Motion to Reopen;"

[1] BREDL's filing was styled as a "Motion to Reopen the Record and Admit Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident" along with a "Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report," which contained two subparts to the contention related to environmental justice and seismic seiches that the CSC Movants did not address.

[2] The Mandatory Hearing for the uncontested portion of the Vogtle Units 3 and 4 COL proceeding was held on September 27-28, 2011. The Commission's related adjudicatory decision on the Vogtle Units 3 and 4 COL is expected in December, 2011. *See* SECY-11-0042, Revisions to Internal Commission Procedures Section on Mandatory Hearings (Mar. 25, 2011), Enc. at p.5.

together with BREDL Motion to Reopen, the "Motions to Reopen").[3] On October 18, 2011, the Atomic Safety and Licensing Board ("ASLB") denied the Motions to Reopen the closed record ("LBP-11-27").[4] On October 28, 2011, BREDL and CSC Movants filed "Motion[s] to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention" ("Motions to Reinstate").

Despite their pending Motions to Reinstate requesting that the ASLB reconsider LBP-11-27, both BREDL and CSC Movants filed petitions for review of LBP-11-27 with the Nuclear Regulatory Commission ("Commission") pursuant to 10 C.F.R.§ 2.341 on November 2, 2011 ("Petitions"). BREDL and CSC Movants request that the Commission hold the Petitions in abeyance pending the ASLB's ruling on the Motions to Reinstate. More importantly, however, because the Petitions do not identify any substantial question warranting review under § 2.341(b)(4) and fail to identify any error of fact or law in LBP-11-27, the Petitions should be denied or, in the alternative, LBP-11-27 should be affirmed. Because the Petitions request relief from the Commission arising out of issues not raised before the ASLB in the Motions to Reinstate, under § 2.341(b)(6), the Commission should deny the request to hold the Petitions in abeyance and rule on the Petitions immediately.

I. Procedural Background

The contested portion of the Vogtle Units 3 and 4 COL proceeding is closed. The August 11, 2011 filings therefore were required to establish that the reopening standards in 10 C.F.R. § 2.326 were satisfied and to submit an admissible contention. SNC addressed these reopening

[3] The CSC Movants likewise styled their filing as a "Motion to Reopen the Record and Admit Contention to Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident" along with a "Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report." The CSC Movants filing, however, contained only one proposed contention.

[4] Memorandum And Order (Denying Motions To Reopen Closed Proceedings and Intervention Petition / Hearing Request as Premature), LBP-11-27, Docket Nos. 52-039-COL, et al. (Oct. 18, 2011).

standards and the inadmissibility of Proposed NEPA-1, as well as the two separate issues raised by BREDL related to environmental justice and seismic seiches, in SNC's answer filed August 22, 2011.[5] NRC Staff also opposed the admission of the new contentions.[6] On September 9, 2011, the Commission issued Order CLI-11-05, which addressed a series of petitions to suspend adjudicatory, licensing, and rulemaking activities, and requesting additional related relief in several ongoing licensing and rulemaking proceedings, allegedly arising out of the recent events at the Fukushima Dai-ichi Nuclear Power Station, following the March 11, 2011, earthquake and tsunami in Japan.[7] SNC filed a supplemental answer addressing CLI-11-05.[8] In LBP-11-27, the ASLB stated that CLI-11-05 was "plainly controlling," and that CLI-11-05 mandated a finding that Proposed NEPA-1 was premature.[9] The October 28, 2011 Motions to Reinstate requested that the ASLB (i) permit the basis for the August 11, 2011 contention ("Proposed NEPA-1") to be supplemented with SRM/SECY-11-0124, "Staff Requirements – SECY-11-0124 – Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report;" (ii) "reinstate" Proposed NEPA-1; and (iii) rule on the admissibility of Proposed NEPA-1, as supplemented. SNC and the NRC Staff filed responses opposing the Motions to Reinstate on November 7, 2011.[10]

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[5] SNC's Answer in Opposition to Motions to Reopen The Record And Request To Admit New Contentions, Docket Nos. 52-025 and 52-026 (Aug. 22, 2011) ("SNC Answer to Motions").

[6] NRC Staff Answer To Petitioners' Motion To Admit New Contention Regarding The Safety And Environmental Implications Of The NRC Task Force Report On The Fukushima Dai-ichi Accident, Docket Nos. 52-025-COL and 52-026-COL (Sept. 6, 2011).

[7] *Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, __ NRC __ (Sept. 9, 2011) ("CLI-11-05").

[8] SNC's Supplement to Answer to Motions, Docket Nos. 52-025-COL and 52-026-COL (Sept. 20, 2011). The ASLB granted SNC's request for leave to file the supplemental answer and accepted the supplemental answer into the record. Order (Granting Leave To File Supplement to Answer), Docket Nos. 52-025-COL & 52-026-COL (Sept. 22, 2011).

[9] LBP-11-27, at 13.

[10] SNC's Response To Motion To Reinstate And Supplement The Basis For Fukushima Task Force Report Contention, Docket Nos. 52-025-COL and 52-026-COL (Nov. 7, 2011); NRC Staff's Answer To Motion To

Proposed NEPA-1 was based on "Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights From the Fukushima Dai-ichi Accident" (July 12, 2011) ("Task Force Report"). The Task Force Report was one step in the NRC's ongoing regulatory review of the events at Fukushima.[11] Since the Task Force Report, the NRC's regulatory review has continued, including the NRC Staff's issuance of SECY-11-0124, which recommended some preliminary actions to begin the process for addressing certain measures in the Task Force Report. On October 18, 2011, the Commission issued SRM/SECY-11-0124, approving the proposal in SECY-11-0124. To be clear, while SECY-11-0124 outlines certain actions the NRC Staff should take relative to some Task Force Report recommendations, SRM/SECY-11-0124 *endorses no specific changes to regulations or guidance, contains no new requirements or regulations for licensees or applicants*, reiterates that the Task Force Report identified no imminent hazard to public health and safety, and *contains no information specifically addressing or currently impacting the Vogtle Units 3 and 4 COL or any other licensee*.

II. Applicable Law

A. Standards for Motions to Reopen

As the Commission recently explained, because the Vogtle Units 3 and 4 COL contested proceeding is closed, in order to be admitted, a proposed new contention must meet "[the NRC's] 10 C.F.R. § 2.326 reopening standards, [the NRC's] § 2.309(c) standards for nontimely filings, and [the NRC's] § 2.309(f)(1) contention admissibility standards."[12] The Commission

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Reinstate And Supplement The Basis For Fukushima Task Force Report Contention, Docket Nos. 52-025-COL & 52-026-COL (Nov. 7, 2011).

[11] *See* CLI-11-05, at 5-6.

[12] *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, __ NRC __ (2011) (slip op. at 5).

believes it is "self-evident" that "a motion to reopen is an 'extraordinary action,' and that a heavy burden is put on proponents."[13] The Commission has further recognized that "[t]he standards for reopening are strict and demanding."[14] A motion to reopen the record will not be granted unless the "demanding requirements in 10 C.F.R. § 2.326 are satisfied."[15] The Commission explains the § 2.326 standard as follows:

> Our rules place a heavy burden on petitioners who ask to have a record reopened. Section 2.326(a) makes it clear that a motion to reopen will not be granted unless all of the following criteria are satisfied:
>
> > (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.
>
> Additionally, pursuant to § 2.326(b), the motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Each of the criteria must be separately addressed, with a specific explanation of why it has been met.
>
> …
>
> As we have stated before, the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention. New information is not enough to reopen a closed hearing record at the last minute; the information must be significant and plausible enough to require reasonable minds to inquire further.[16]

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[13] *Criteria for Reopening Records in Formal Licensing Proceedings*, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986); *Amergen Energy Co*. (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668-69 (2008).

[14] *Amergen Energy Co*. (License Renewal for Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 15 (2008), *review denied* CLI-08-28, 68 NRC 658.

[15] *Amergen Energy Co, LLC* (Oyster Creek), LBP-08-12, 68 NRC at 9.

[16] *Southern Nuclear* (Vogtle Units 3 and 4), CLI-11-08, at 8-10 (citations omitted).

LBP-11-27 denied the original Motions to Reopen as premature, implicitly determining that the requirements of §§ 2.326, 2.309(c), and 2.309(f)(1) were not met.

B. Standards for Petitions for Review

Petitions for review, such as the Petitions here, are granted only at the discretion of the Commission based on "the existence of a *substantial question*" with respect to:

> (i) A finding of material fact that is *clearly erroneous* or in conflict with a finding as to the same fact in a different proceeding;
> (ii) A *necessary* legal conclusion that is *without governing precedent* or *contrary to established law*;
> (iii) A *substantial and important* question of law, policy, or discretion has been raised;
> (iv) The conduct of the proceeding involved a *prejudicial procedural error*; or
> (v) Any other consideration which the Commission may deem to be in the public interest.[17]

It is well-established that the Commission "generally step[s] in only to correct 'clearly erroneous' findings—that is, findings 'not even plausible in light of the record viewed in its entirety.'"[18] The Commission's standard "for overturning a Board's factual finding is quite high," and "unless there is strong reason to believe that in a particular case a [B]oard has overlooked or misunderstood important evidence, [the Commission] will defer to its findings of fact."[19] "As for conclusions of law, [the Commission's] standard of review is more searching."[20] The Commission "will reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law.'"[21] Further, "'[the Commission] give[s] substantial deference to [its]

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[17] 10 C.F.R. § 2.341(b)(4) (emphasis added); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 17 (2003).

[18] *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-06-22, 64 NRC 37, 40 (2006) (citing *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-06-15, 63 NRC 687, 697 (2006)).

[19] *AmerGen Energy Co., LLC* (Oyster Creek License Renewal), CLI-09-07, 69 NRC 235, 259 (2009).

[20] *Southern Nuclear Operating Co.* (Early Site Permit For Vogtle ESP Site), CLI-10-05, __ NRC __ (2010) (slip op. at 11) (citing *AmerGen* (Oyster Creek), CLI-09-07, 69 NRC at 259).

[21] *Id.*

boards' determinations on threshold issues, such as standing and contention admissibility,' and [the Commission] will affirm 'decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion."'[22] Pursuant to 10 C.F.R. § 2.341, the Commission should deny the Petitions because, as set forth below, Petitioners have failed to identify any clear error of fact, error of law, procedural error, or abuse of discretion by the ASLB.[23]

III. The ASLB Correctly Applied CLI-11-05 and NEPA

The Petitions only assert error in LBP-11-27 in two respects: that the ASLB erroneously interpreted CLI-11-05 and that the ASLB misinterpreted the National Environmental Policy Act ("NEPA"). Because LBP-11-27 correctly applied both CLI-11-05 and NEPA, the Commission should deny the Petitions.

A. LBP-11-27 Correctly Applied CLI-11-05

CLI-11-05 unequivocally found that no generic NEPA review is warranted based on the information currently available from the Commission's regulatory review of the Fukushima events:

> At bottom, according to petitioners, such a review is required now because the NRC has "admitted" that it "has new information that concededly could have a significant effect on its regulatory program and the outcome of its licensing decisions for individual reactors."
>
> *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*

[22] *AmerGen* (Oyster Creek), CLI-09-07, 69 NRC at 259-60 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) and *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 n.32 (2006)).

[23] Additionally, although the Petitioners cite § 2.341 as the basis for their Petitions, the Petitions could be considered an interlocutory appeal under 10 C.F.R. § 2.311, since Petitioners are not currently parties to the Vogtle Units 3 and 4 proceeding. The Petitions are untimely and procedurally deficient if they are considered under § 2.311, which requires a Notice of Appeal to be submitted within ten days of the ASLB decision.

> *implications of the Japan events for U.S. facilities.* Therefore, any generic NEPA duty—if one were appropriate at all—does not accrue now.
>
> *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 supplemental environmental review documents. Section 51.72(a) requires preparation of a supplemental draft EIS when:
>
> > (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.* For these reasons, we decline petitioners' request to commence a generic NEPA review today.[24]

Petitioners contend that LBP-11-27 interpreted CLI-11-05 too broadly, arguing that "LBP-11-27 is based on a fundamental misperception of CLI-11-05: that the Commission held in CLI-11-05 that currently there is no basis for concluding that new and significant information has arisen in any licensing proceeding such that NEPA consideration is warranted."[25] According to Petitioners, CLI-11-05 does not mandate that Proposed NEPA-1 be rejected because CLI-11-05 is limited to a finding that no *generic* review is warranted. The Petitions cite CLI-11-05's statements that Fukushima-related contentions should be considered in individual licensing

[24] CLI-11-05, slip op. at 30-31 (citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989); *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987))) (other citations omitted) (original emphasis omitted and emphasis added).

[25] Petitions, at 6.

proceedings to support their conclusion that "the admissibility of [Proposed NEPA-1] was not disposed of by CLI-11-05."[26]

Petitioners argument misinterprets LBP-11-27. LBP-11-27 held that the Commission's legal finding that the current state of the Fukushima regulatory review (including the Task Force Report) was too preliminary to give rise to a NEPA duty also applied to Proposed NEPA-1. The application of the CLI-11-05 finding was correct because of the generic nature of Proposed NEPA-1, which relies entirely upon an assumption about the regulatory changes the Commission may adopt:

> Turning to the matter before us, we think the Commission's disposition of the NEPA review issue presented to it, and the rationale assigned for that disposition, is plainly controlling here. We can perceive no possible basis upon which, in opposition to the conclusion of prematurity reached by the Commission, we might conclude that the contention presented to us is ripe for adjudication. *Once again, that contention necessarily assumes the Commission's acceptance and implementation of Task Force findings and recommendations that might or might not be adopted in whole or part after the NRC Staff has completed the actions directed by the Commission upon receipt of that report.*
>
> It is worthy of note that neither BREDL nor any of the other sponsors of the contention have pointed to any unique characteristics of the site of the particular reactor that might make the content of the Task Force report of greater environmental significance to that reactor than to United States reactors in general. That consideration provides still further foundation for our reliance on the Commission's determination that a call for a generic NEPA review was premature.[27]

Since Proposed NEPA-1 is based on a generic argument that the Commission's regulations will or should change based on the Task Force Report, as to that *generic* issue, CLI-11-05 is plainly controlling. Contrary to the Petitions' claim, LBP-11-27 did not imply that there is no possibility of new and significant information in <u>any</u> individual licensing proceeding. Rather, LBP-11-27 correctly found <u>that there was no unique or different information offered in the Motions to</u>

[26] Petitions, at 6-8.

[27] LBP-11-27, at 13-14 (emphasis added).

Reopen filed in the Vogtle Units 3 and 4 COL proceeding that could support a finding different than the Commission's in CLI-11-05. Accordingly, there was no information in the Motions to Reopen that could support reopening the record under the standards set forth in 10 C.F.R. § 2.326.

Petitioners seek to avoid the clear mandate of CLI-11-05 by arguing that Proposed NEPA-1 is a contention proposed in an individual licensing proceeding, and thus falls outside CLI-11-05's holding. Petitioners raise a distinction without a difference. As is obvious from a review of the Motions to Reopen, and as the ASLB noted in LBP-11-27, Proposed NEPA-1 and the Motions to Reopen are purely generic and contain no information or analysis specific to the Vogtle Units 3 and 4 COL application.[28] The Motions to Reopen do not even describe how the information in the Task Force report would change the analysis of environmental impacts of construction or operation of Vogtle 3 and 4 contained in the Final Supplemental Environmental Impact Statement ("FSEIS"). This lack of Vogtle-specific information is what mandates that Proposed NEPA-1 be rejected, whether under CLI-11-05 or the Commission's rules for reopening a closed record or for admitting contentions.[29] Petitioners chose to submit Motions to Reopen and Proposed NEPA-1 as catch-all, non-specific filings in many proceedings.[30] They did not offer any expert analysis or support to explain how the NEPA analysis in the Vogtle Units 3 and 4 proceeding is affected by the Task Force Report. The ASLB correctly found that, because the Motions to Reopen and Proposed NEPA-1 are generically applicable and based only

[28] The exception to this, as noted in LBP-11-27, is the BREDL environmental justice claim, which is blatantly untimely. *See* LBP-11-27, at13-14 and n.54.

[29] *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, slip op. at 15 (agreeing with the ASLB that the § 2.326(a)(3) criteria was not met because "[n]othing in the Gundersen Affidavit or the Fairewinds Report links Appellants' concerns about the AP1000 design to the particulars of the Vogtle units in a way that merits resolution in this adjudicatory proceeding").

[30] *See, e.g.* Petitions, at 1; LBP-11-27, at 2-3 (noting that the same filings and contentions are applicable in several proceedings).

on the content of the Commission's ongoing regulatory review, the finding regarding the generic NEPA analysis and the Commission's ongoing regulatory review in CLI-11-05 mandates that the Motions to Reopen be denied. Even in the Petitions, Petitioners cannot point to a single Vogtle-specific fact or issue which supports reopening the record in this docket. The ASLB did not depart from established law, and there was no error in its application of CLI-11-05.

B. LBP-11-27 Correctly Applied NEPA in Denying the Motions to Reopen

LBP-11-27 did not make the allegedly erroneous finding Petitioners claim regarding "new and significant" information pursuant to NEPA. Petitioners attempt to set up a straw man by arguing that LBP-11-27 erroneously "holds that information is not 'new and significant' for purposes of NEPA consideration unless and until it is acted upon by the agency."[31] The ASLB made no such holding.

To the extent that LBP-11-27 implies any finding regarding the need for Commission adoption of the Task Force Report, that finding is that such action is required for Proposed NEPA-1 to support a colorable argument of any potential effect on the Vogtle Units 3 and 4 COL—not that such action is required for information to be "new and significant" under NEPA. Conversely, the mere adoption by the NRC of Task Force Report recommendations does not automatically result in new and significant information under NEPA. Rather, LBP-11-27 holds simply that where, as here, the purportedly new and significant information is based on NRC's adoption of new regulatory requirements, such information cannot be "new and significant" before those regulatory requirements are formally adopted. In the absence of the actual imposition of the new requirements, "they scarcely have been given the effect that, according to

[31] Petitions, at 8.

BREDL et al., gives rise to the environmental implications that undergird the contention that is sought to be admitted."[32]

LBP-11-27 contains no statement nor implication that, according to NEPA, information may only be new and significant after the Commission has reviewed or accepted it. Indeed, the portion of LBP-11-27 Petitioners cite for their claim that the ASLB made this finding was clearly only background discussion of the issue.[33] In its holding, the ASLB explained that its decision was based on Proposed NEPA-1's reliance on future Commission acceptance of the Task Force Report: "Once again, [Proposed NEPA-1] necessarily assumes the Commission's acceptance and implementation of Task Force findings and recommendations that might or might not be adopted in whole or part after the NRC Staff has completed the actions directed by the Commission upon receipt of that report."[34]

Petitioners' Motions to Reopen attempted to bootstrap a finding of new and significant information by first presuming that the Commission would change its regulations based on the Task Force Report and second by speculating that the new regulations would impact the FSEIS, all without any logical argument or support.[35] LBP-11-27 does not address when or under what circumstances information associated with a new NRC requirement could constitute "new and significant information" for NEPA purposes. Rather it simply draws the logical conclusion that where Petitioners' arguments are based on new NRC requirements, the requirements must be more than mere proposals before Petitioners' theory is even ripe for consideration. Thus, LBP-

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[32] LB-11-27, at 13.

[33] *Id.* at 11 ("On first examination of that assertion, we found ourselves in considerable doubt as to how much weight and effect could attach to a mere report that had neither received the endorsement of the Commission nor, more importantly, led to some concrete affirmative action being taken in light of its content. On September 9, however, that doubt received dispositive reinforcement in CLI-11-05.").

[34] *Id.* at 13-14; *see also supra* note 27 and accompanying text (showing entire section of LBP-11-27).

[35] *See, e.g.,* Motions to Reopen, at 5-6.

11-27 is not contrary to any established law, is consistent with the Commission's application of NEPA in CLI-11-05, and contains no error.

C. The Motions to Reopen Fail Under § 2.326 and 2.309(f)(1)

Pursuant to 10 C.F.R. § 2.341(b)(4)(ii), in order to justify review, the legal conclusion challenged by Petitioners must be "necessary." Here, in addition to the challenged legal conclusions being non-existent, the Petitioners' characterization of those conclusions (were they to have been applied) would not have been "necessary" to support LBP-11-27's ultimate denial of the motions to reopen. LBP-11-27 denied the motions to reopen as preliminary pending some future action on the Task Force Report. Ripe or not, however, the Motions to Reopen failed to offer "new and significant" information under NEPA and 10 C.F.R. § 51.92, and in turn failed to meet the standards in §§ 2.326 and 2.309(f)(1).

The Task Force Report is a document created to recommend regulatory action to the Commission. It contains absolutely no analysis related to the environmental impacts of Vogtle Units 3 and 4. As SNC demonstrated in its original answer, the Task Force Report considered alone (*i.e.* considered separately from potential regulatory changes arising from it) contains nothing that qualifies as "new and significant" under NEPA. Petitioners' only attempt to argue any stand alone significance for the Task Force Report was to allege that the Vogtle FSEIS' "assum[ption] that compliance with existing NRC safety regulations was sufficient to ensure that the environmental impacts of accidents were acceptable" is called into question by the Task Force Report.[36] Petitioners have never supported this assertion with any evidence or particular citation to the Vogtle FSEIS showing or explaining where this "assumption" is found. SNC specifically pointed to this deficiency, explaining that the FSEIS does not make any such

[36] CSC Motion to Reopen, at 5; BREDL Motion to Reopen, at 4.

assumption based on safety regulations, and Petitioners have yet to offer any support for this bald assertion.[37] Again, Petitioners rely on nothing but conjecture about how the Task Force Report could hypothetically challenge the Vogtle FSEIS, without offering even one iota of verification.

Indeed, unlike the introduction or discovery of potentially new and significant substantive environmental information, the Task Force Report is devoid of any environmental information or analysis—much less information that would demonstrate that a materially different NEPA conclusion would be likely, as required by 10 C.F.R. § 2.326(a)(3). Even if regulatory changes were to result from the Task Force Report, they would also have to be tied to the Vogtle Units 3 and 4 environmental analysis before amounting to an actionable contention that is potentially admissible in the individual Vogtle Units 3 and 4 COL docket.

In sum, whether, as Petitioners impliedly request, the Motions to Reopen and Proposed NEPA-1 are divorced from future Commission action on the Task Force Report, or whether the Commission ultimately institutes the Task Force Report recommendations, the Task Force Report cannot support an admissible contention in the Vogtle Units 3 and 4 COL docket because the Motions to Reopen failed to substantiate any Vogtle-specific effect therefrom.[38] At best, the Task Force Report in and of itself could be considered a broad challenge to the adequacy of Commission regulations – an issue which cannot be litigated in this individual adjudication.[39] Accordingly, the ripeness finding was not "necessary" to the denial of the Petitioners' Motions to Reopen.

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[37] *See* SNC Answer, at 26-27.

[38] *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, slip op. at 15; *see also Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-11-28, Docket No. 50-443-LR (Oct. 19, 2011) (slip op. at 7-8) ("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. Their contention therefore does not satisfy 10 C.F.R. § 2.309(f)(1)(vi), and for this reason is not admissible.").

[39] *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-03, 69 NRC 139, 152-53 (2009).

The ASLB's decision denying the Motions to Reopen is due to be affirmed both because the ASLB made no erroneous NEPA finding and because, regardless of this purported error, the Task Force Report does not contain "new and significant" information necessitating supplementation of the Vogtle Units 3 and 4 FSEIS. The Petitions fail to show any error in LBP-11-27, and the Commission should deny the Petitions pursuant to 10 C.F.R. § 2.341(b).

IV. The Commission Should Deny the Request to Hold the Petitions in Abeyance

The only argument raised in the Petitions which overlaps with the pending Motions to Reinstate before the ASLB is the claim that SRM/SECY-11-0124 constitutes Commission adoption of the Task Force Report such that the Motions to Reopen are no longer premature. SNC respectfully requests that, rather than hold the Petitions in abeyance in their entirety, the Commission deny the Petitions after addressing the merits of the other arguments and decline to address SRM/SECY-11-0124 pursuant to 10 C.F.R. § 2.341(b)(6). It is not necessary to await ASLB ruling on SRM/SECY-11-0124 in order to consider the other issues raised in the Petitions, and a finding on those issues will not effect any pending consideration of SRM/SECY-11-0124.

Should the Commission consider the Petitions after the ASLB has acted on the pending Motions to Reinstate, the Commission should hold that SRM/SECY-11-0124 is too preliminary to cure the prematurity found by the ASLB and is therefore insufficient to justify reopening the record or admitting Proposed NEPA-1.

SRM/SECY-11-0124 does not represent ultimate Commission approval of any particular (much less all) recommended regulatory action arising out of the Task Force Report. SRM/SECY-11-0124 is a process-oriented document that simply approves the preliminary steps to prepare for the imposition of some limited regulatory requirements, specifically indicating for each listed recommendation whether a Commission order, requests for information, or

rulemakings should be employed. In fact, SRM/SECY-11-0124 gives direction as to the process that must be followed to eventually complete such final action.[40] A facial reading of SRM/SECY-11-0124 makes clear that it does not represent the completion or finalization of any requirement or any guidance applicable to Vogtle Units 3 and 4 arising out of Fukushima, nor does it provide any indication that the NEPA analysis relative to the Vogtle Units 3 and 4 COL is different than that described in the FSEIS.

V. Conclusion

SNC respectfully requests that the Commission deny the Petitions in their entirety or, in the alternative, affirm LBP-11-27's denial of the Motions to Reopen.

Respectfully submitted,

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Dated this 14th day of November, 2011.

[40] *See, e.g.* SRM/SECY-11-0124, at 1-2 ("The process for implementing new or modified regulatory requirements or programs should be transparent and the regulatory mechanism … used to impose them should be as clear and specific as possible when issued;" "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;" "The staff should monitor nuclear industry efforts underway to strengthen SBO coping times and consider whether any interim regulatory controls … for coping strategies for SBO events would be appropriate while rulemaking activities are in progress.").

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	**Docket Nos. 52-025-COL and 52-026-COL**
Southern Nuclear Operating Company	)	
	)	
(COL Application for Vogtle Electric Generating Plant, Units 3 and 4)	)	**November 14, 2011**

CERTIFICATE OF SERVICE

I hereby certify that copies of SOUTHERN NUCLEAR OPERATING COMPANY'S ANSWER OPPOSING PETITIONS FOR REVIEW OF LBP-11-27 in the above-captioned proceeding have been served by electronic mail as shown below, this 14th day of November, 2011, and/or by e-submittal.

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