

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARDS

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Gary S. Arnold
Dr. William H. Reed

In the Matter of

LUMINANT GENERATION COMPANY 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)

DUKE ENERGY CAROLINAS, LLC
(William States Lee III Nuclear Station, Units 1
and 2)

Docket Nos. 52-034-COL & 52-035-COL
ASLBP No. 11-914-02-COL-BD01

Docket No. 50-397-LR
ASLBP No. 11-912-03-LR-BD01

Docket Nos. 52-025-COL & 52-026-COL
ASLBP Nos. 11-914-02-COL-BD01 & 11-
913-01-COL-BD01

Docket Nos. 52-018-COL & 52-019 COL
ASLBP No. 11-913-01-COL-BD01

November 30, 2011

MEMORANDUM AND ORDER
(Denying Motions to Reinstate Contention)

1. On October 18, 2011, these three Licensing Boards addressed collectively in LBP-11-27¹ (1) motions to reopen four closed proceedings involving applications for combined licenses (COLs) for certain proposed nuclear facilities;² and (2) a petition to intervene in a not

¹ LBP-11-27, 74 NRC __ (slip op.) (Oct. 18, 2011).

² 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 (Aug. 10, 2011) [hereinafter Bell Bend Motion to Reopen]; 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 (Aug. 11, 2011) [hereinafter Comanche Peak Motion to Reopen]; Motion to Reopen the Record and (continuing . . .)

previously established proceeding involving the application of an existing facility for renewal of its current operating license.³ The motions and petition had an identical purpose: the admission into each of the five proceedings of a common environmental contention said to arise from an NRC Task Force report. That report focused upon the March 11, 2011 event at the Fukushima Dai-Ichi Nuclear Power Station in Japan in which, as a consequence of a magnitude 9.0 earthquake and an ensuing tsunami, that facility sustained very serious damage.⁴ The contention sought to be admitted would have it that the "new and significant environmental implications" of the findings and recommendations contained in the Task Force report had to be addressed by the Commission in an environmental impact statement.⁵

For the reasons developed in LBP-11-27, we denied all four reopening motions as well as the intervention petition. In a nutshell, we concluded that the common contention was prematurely advanced.⁶

(. . . continued)

Admit Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011) [hereinafter Vogtle Motion to Reopen]; 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 (Aug. 11, 2011) [hereinafter William States Lee Motion to Reopen].

³ Petition for Hearing and Leave to Intervene in Operating License Renewal for Energy Northwest's Columbia Generating Station (Aug. 22, 2011) [hereinafter Columbia Motion to Intervene].

⁴ 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).

⁵ Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 10, 2011) at 11. While this particular contention was filed in the Bell Bend proceeding, we note that the contentions submitted in all five proceedings are substantially similar, and therefore cite to only one.

⁶ LBP-11-27, 74 NRC at __ (slip op. at 13).

That conclusion rested in turn largely upon the teachings of a September 9, 2011 Commission decision (CLI-11-05), that examined a series of petitions seeking the suspension of adjudicatory, licensing, and rulemaking activities and other relief in light of the Fukushima event.⁷ Among other things, CLI-11-05 explicitly assessed the current significance of the Task Force's findings and recommendations. The outcome of that examination was the denial of virtually all of the requested relief on the ground that it was prematurely sought.⁸ As explained in LBP-11-27, the basis assigned for that outcome applied equally to the matter before us.⁹

Precisely the same Fukushima contention had been put before licensing boards in a number of active proceedings in which there are other issues requiring their adjudicatory consideration. Thus, no matter its substance, the action of other boards on that contention cannot serve of itself to close out any of those proceedings. In sharp contrast, the charge given to our three Boards was perforce limited to the passing upon the four reopening motions and the intervention petition. Thus, with the issuance of LBP-11-27, our assigned task would seem to have been completed, subject only to the possible filing of a motion for reconsideration of that decision or a remand from the Commission should that body undertake to review the decision either on an appeal taken from it or on the Commission's own initiative.

2. Although appeals to the Commission have been taken from LBP-11-27,¹⁰ there has not been an express request that we reconsider the underpinnings of our prematurity

⁷ Union Electric Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __ (slip op.) (Sept. 9, 2011).

⁸ Id. at __ (slip op. at 41-42).

⁹ LBP-11-27, 74 NRC at __ (slip op. at 13).

¹⁰ See Petition for Review of LBP-11-27 (Nov. 2, 2011). Petitioners requested that the Commission hold that appeal in abeyance pending our action on the reinstatement motions. Id. at 2.

determination in that decision. Instead, what we now have in hand are a number of essentially identical pleadings that were filed on October 28, 2011¹¹ and cover all but one of the nuclear power plants embraced by the previously denied reopening motions and intervention petition.¹² Denominated motions to reinstate and supplement the basis for the previously rejected Fukushima contention, these new submissions are said to be justified by a development that coincidentally occurred on October 18, the date of the issuance of LBP-11-27. That development was the issuance by the Commission of a Staff Requirements Memorandum -- SRM/SECY-11-0124 (SRM).¹³ In the view of the movants, this document had the necessary effect of removing the ground assigned in LBP-11-27 for the rejection of the Fukushima environmental contention.

Given the lack of any significant difference between the several reinstatement motions, it is enough for present purposes to refer just to that submitted with regard to the Vogtle facility by a group of organizations headed by the Center for a Sustainable Coast and represented by the Turner Environmental Law Clinic at the Emory University School of Law (Vogtle motion).

¹¹ [Center for a Sustainable Coast, Women's Action for New Directions f/k/a Atlanta Women's Action for New Directions, and Southern Alliance for Clean Energy's] Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Oct. 28, 2011) [hereinafter Vogtle Motion]; [Blue Ridge Environmental Defense League's William States Lee] Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Oct. 28, 2011); [Northwest Environmental Advocates'] Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Oct. 28, 2011); [Blue Ridge Environmental Defense League's Vogtle] Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Oct. 28, 2011), and [Lon Burman, Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, and True Cost of Nukes'] Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Oct. 28, 2011).

¹² The exception is the Bell Bend Nuclear Power Plant.

¹³ Staff Requirements -- SECY-11-0124 -- Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report at 1 (Oct. 18, 2011) (unanimous approval) (SRM/SECY-11-0124).

Whatever might be concluded with regard to the substance of that filing will be equally applicable to the other motions.

In the October 18 SRM, the Commission directed the Staff to implement “without delay” the recommendations of the Task Force and to complete by 2016 its review of the lessons learned from the Fukushima event.¹⁴ On the apparent premise that the lack of previous Commission action on the Task Force findings and recommendations was the sole basis for the rejection of the Fukushima contention in LBP-11-27 as premature, the Vogtle motion would have it that the contention must now be deemed admissible.¹⁵

That premise is far wide of the mark. It is quite true that LBP-11-27 stressed that the Commission had not as yet accepted the Task Force’s findings and recommendations. A reading of the entire decision makes clear, however, that the prematurity determination did not rest solely upon that consideration. To the contrary, after a review of the analysis that undergirded the Commission’s conclusion in CLI-11-05 that the request for relief before it was premature, we had this to say: “It is difficult to fathom how the Commission could have stated more precisely and definitively that it remains much too early in the process of assessing the Fukushima event in the context of the operation of reactors in the United States to allow any informed conclusion regarding the possible safety or environmental implications of that event regarding such operation.”¹⁶

We have not been provided in the Vogtle motion any reason to believe that the issuance of the SRM of itself materially changed matters in that regard and gave rise to the environmental

¹⁴ Staff Requirements Memo at 1.

¹⁵ Vogtle Motion at 3.

¹⁶ LBP-11-27, 74 NRC at __ (slip op. at 13).

implications that the Fukushima contention maintains must now be examined in an environmental impact statement. Thus, were we required to address the reinstatement motion on the merits, we would be inclined to agree with the applicants and NRC Staff,¹⁷ as well as with other licensing boards that have already passed upon the significance of the document in a like context,¹⁸ that the SRM does not provide a foundation for the admission of the contention.

As we see it, however, the Vogtle motion and its companions are appropriately denied on an entirely different and independent ground not involving an inquiry into the merits of the claim that the Fukushima contention should be restored on the basis of the October 18 SRM. As noted above,¹⁹ these three Boards were established for the sole purpose of ruling upon the motions to reopen four closed proceedings and the intervention petition that sought to initiate a new proceeding. Neither the referral of the motions/petitions to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel nor his assignment of those pleadings to the newly-created Boards contains the slightest suggestion that the Boards' responsibilities might extend beyond a denial of the sought relief.²⁰ Most particularly, there is nothing in any document related to the establishment of these Boards that might suggest a contemplation that

¹⁷ See NRC Staff's Answer to Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Nov. 7, 2011) at 5-6; Southern Nuclear Operating Company's Response to Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention (Nov. 7, 2011) at 8-10.

¹⁸ See, e.g., Florida Power & Light Co. (Turkey Point Units 6 and 7), LBP-11-33, 74 NRC __, __-__ (slip op. at 9-10) (Nov. 21, 2011); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC __, __ (slip op. at 21) (Nov. 18, 2011).

¹⁹ See supra pages 1-2.

²⁰ See Energy Northwest; Establishment of Atomic Safety and Licensing Board, 76 Fed. Reg. 56,242 (Sept. 12, 2011); Duke Energy Carolinas, LLC; Southern Nuclear Operating Company; Establishment of Atomic Safety and Licensing Board, 76 Fed. Reg. 56,242 (Sept. 12, 2011); Southern Nuclear Operating Co., PPL Bell Bend, L.L.C., Luminant Generation Company LLC; Establishment of Atomic Safety and Licensing Board, 76 Fed. Reg. 56,242 (Sept. 12, 2011).

they would remain in existence indefinitely for the purpose of springing into action whenever some new development might be presented as support for the reinstatement of the Fukushima contention.

We need add only that there is no occasion to decide here whether there might possibly be some special circumstances in which, after having completed its assigned mission in the particular proceeding, a Board might justifiably be expected to remain available to entertain endeavors to resurrect the then-closed proceeding on the strength of some new development. Suffice it to say, we see no such circumstances in this instance and none has been presented to us by the movants.

For the foregoing reasons, the motions to reinstate the Fukushima contention are denied on the ground that they seek relief beyond what was within the Boards' charter.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARDS

/RA/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/

Dr. William H. Reed
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (DENYING MOTIONS TO REINSTATE CONTENTION) (LBP-11-36) have been served upon the following persons by Electronic Information Exchange.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-15 D21
Washington, DC 20555-0001
Marian Zobler, Esq.
Laura Goldin, Esq.
Susan Vrahoretis, Esq.
Sara Kirkwood, Esq.
Joseph Gilman, Paralegal
E-mail:

Ann Marshall Young, Chairman
Administrative Judge
E-mail: ann.young@nrc.gov

marian.zobler@nrc.gov
laura.goldin@nrc.gov
susan.vrahoretis@nrc.gov
Sara.Kirkwood@nrc.gov
Joseph.gilman@nrc.gov

Gary S. Arnold
Administrative Judge
E-mail: gary.arnold@nrc.gov

Alice C. Mignerey
Administrative Judge
E-mail: alice.mignerey@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

Hillary Cain, Law Clerk
E-mail: hillary.cain@nrc.gov

Docket Nos. 52-034-COL and 52-035-COL
 MEMORANDUM AND ORDER (DENYING MOTIONS TO REINSTATE CONTENTION)
 (LBP-11-36)

Morgan, Lewis & Bockius, LLP
 1111 Pennsylvania Ave., NW
 Washington, DC 20004

Stephen Burdick, Esq.
 Steven P. Frantz, Esq.
 Jonathan M. Rund, Esq.
 Timothy P. Matthews, Esq.
 Martin O'Neill, Esq.
 Jane T. Diecker, Esq.
 Mary L. Freeze, Legal Secretary
 E-mail: sburdick@morganlewis.com
sfrantz@morganlewis.com;
jrund@morganlewis.com
tmattthews@morganlewis.com
martin.oneill@morganlewis.com
jdiecker@morganlewis.com
mfreeze@morganlewis.com

True Cost of Nukes
 1067 W. Magnolia
 Fort Worth, TX 76014
 John N. Fischer
 E-mail: jnilefischer@sbcglobal.net

Sustainable Energy and Economic
 Development (SEED) Coalition
 Robert V. Eye, Esq.
 April Middleton, Assistant
 Kauffman & Eye
 112 SW 6th Avenue, Suite 202
 Topeka, Kansas 66603
 E-mail: bob@kauffmaneye.com
 E-mail: april@kauffmaneye.com

Pillsbury Winthrop Shaw Pittman, LLP
 2300 N. Street, NW
 Washington, DC 20037-1122

Counsel for Progress Energy
 R. Budd Haemer, Esq.
 Jason B. Parker, Esq.
 Matias F. Travieso-Diaz, Esq.
 Maria D. Webb, Senior Energy Legal
 Analyst/Paralegal Coordinator
 E-mail:
robert.haemer@pillsburylaw.com
jason.parker@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com
maria.webb@pillsburylaw.com

Sustainable Energy & Economic Development
 (SEED) Coalition
 1303 San Antonio #100
 Austin, Texas 78701
 Eliza Brown, Clean Energy Advocate
 E-mail: eliza.seedcoalition@gmail.com

[Original signed by Evangeline S. Ngbea]
 Office of the Secretary of the Commission

Dated at Rockville, Maryland
 this 30th day of November 2011