ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1106 (Consolidated with No. 12-1151)

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, *et al.*,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Respondents,

WESTINGHOUSE ELECTRIC COMPANY LLC, *et al.*,
Intervenors.

On Petition for Review of the United States Nuclear Regulatory Commission's Final Decisions and Orders in NRC Docket Nos. 52-025-COL and 52-026-COL

JOINT BRIEF FOR INTERVENORS WESTINGHOUSE ELECTRIC COMPANY LLC, SOUTHERN NUCLEAR OPERATING COMPANY, GEORGIA POWER COMPANY, OGLETHORPE POWER CORPORATION, MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA, AND THE CITY OF DALTON, GEORGIA

IN SUPPORT OF RESPONDENTS

Initial Brief for Intervenors Dated: July 2, 2012
Final Brief for Intervenors Dated: August 2, 2012

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Fed. R. App. P. 28 and D.C. Circuit Rule 28, Intervenors Westinghouse Electric Company LLC, Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, Georgia hereby certify as follows:

A. Parties, Intervenors, and Amici

All parties, intervenors, and amici appearing before the United States Nuclear Regulatory Commission ("NRC") and this Court are listed in the Brief for Petitioners.

B. Rulings Under Review

The Brief for Petitioners identifies the rulings at issue.

C. Related Cases

The current proceeding consists of two consolidated cases: *Blue Ridge Environmental Defense League, et al. v. NRC*, No. 12-1106 and *Blue Ridge Environmental Defense League, et al. v. NRC*, No. 12-1151. In No. 12-1106, Petitioners allege that the NRC failed to comply with the National Environmental Policy Act ("NEPA") in certifying the AP1000® design. In No. 12-1151, Petitioners allege that the NRC failed to comply with NEPA in licensing two new nuclear reactors to be built with the AP1000 design.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and District of Columbia Circuit Rule 26.1, Westinghouse Electric Company LLC ("Westinghouse") hereby submits this corporate disclosure statement. Toshiba Nuclear Energy Holdings (US) Inc. is the indirect holder of a 100% ownership interest in Westinghouse. Toshiba Corporation, The Shaw Group Inc., and National Atomic Company Kazatomprom are all publicly held corporations that have at least a 10% ownership interest in Toshiba Nuclear Energy Holdings (US) Inc.

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and District of Columbia Circuit Rule 26.1, the undersigned counsel for Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, Georgia, Acting By and Through its Board of Water, Light and Sinking Fund Commissioners ("City of Dalton") discloses as follows:

1. Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton (collectively, "Owners") are intervenors in this proceeding.
2. Southern Nuclear Operating Company is the licensed operator of the Alvin W. Vogtle Electric Generating Plant located near Augusta, Georgia. Southern Nuclear Operating Company operates Plant Vogtle on behalf of Owners.
3. One hundred percent of the common stock of Southern Nuclear Operating Company and Georgia Power Company is owned by The Southern Company, a registered public utility holding company and a publicly-held corporation.

4. Georgia Power Company is a regulated public utility that provides electric power to customers in Georgia.

5. Oglethorpe Power Corporation is a power supply cooperative that provides electricity to 39 electric membership corporations which, collectively, provide electricity to customers in Georgia. The electric membership corporations are not-for-profit electric cooperatives owned by the actual customers to whom they supply electricity. There is no public company with a 10% or greater ownership interest in Oglethorpe Power Corporation.

6. The Municipal Electric Authority of Georgia is a public power entity authorized by the State of Georgia that generates and transmits electrical power to its 49 local government members in Georgia. There is no public company with a 10% or greater ownership interest in the Municipal Electric Authority of Georgia.

7. The City of Dalton is a municipality − a governmental entity. There is no public company with a 10% or greater ownership interest in City of Dalton.

Respectfully submitted,

Dated: August 2, 2012

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief.

2011 EA	December 22, 2011 Environmental Assessment for the AP1000 DCA, NRC Docket No. 52-006
AEA	Atomic Energy Act
AP1000 DCA	AP1000® Design Certification Amendment
ASLB	Atomic Safety and Licensing Board
BREDL	Blue Ridge Environmental Defense League
COLs	Combined Licenses
Comment Responses	December 2011 NRC Responses to Public Comments, Final Rule: Amendment to AP1000 Design Certification Rule
Commission	Nuclear Regulatory Commission
Draft EA	January 3, 2011 Draft Environmental Assessment for the AP1000 DCA, NRC Docket No. 52-006
EIS	Environmental Impact Statement
ESP	Early Site Permit
NEPA	National Environmental Policy Act
NRC	United States Nuclear Regulatory Commission
SAMDA	Severe Accident Mitigation Design Alternative
Task Force Report	Recommendations for Enhancing Reactor Safety in the 21st Century

Task Force	Near-Term Task Force
Westinghouse	Westinghouse Electric Company LLC

Intervenors Westinghouse Electric Company LLC ("Westinghouse"), Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, Georgia[1] (collectively, "Intervenors") submit this brief in support of respondents, the United States Nuclear Regulatory Commission ("NRC" or "Commission"), and the United States of America (collectively, "Respondents"), and in accordance with this Court's April 3, 2012 order.

STATEMENT OF THE ISSUES

Intervenors adopt the Statement of the Issues contained in the Respondents' June 25, 2012 brief.

STATUTES AND REGULATIONS

With the exception of the document in the attached Addendum, the relevant statutes and regulations are included in the addendum to the brief of Petitioners, Blue Ridge Environmental Defense League, Inc. ("BREDL"), *et al.*, filed on May 11, 2012.

STATEMENT OF FACTS

Intervenors adopt the Statement of Facts contained in the Respondents' June 25 brief, with the following additions related to the AP1000® Design

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[1] Southern Nuclear Operating Company, Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and the City of Dalton, Georgia are collectively referred to as "Licensees."

Certification Amendment ("AP1000 DCA") and the NRC's review of the events at the Fukushima Dai-ichi Nuclear Power Plant.

This appeal consolidates two separate but related NRC proceedings: (1) the generic rulemaking for the AP1000 DCA; and (2) the Combined Licenses ("COLs") for Vogtle Units 3 and 4, which reference the AP1000 certified design. The NRC first approved the rule certifying the AP1000 design in January 2006. Final Rule, AP1000 Design Certification, 71 Fed. Reg. 4,464 (Jan. 27, 2006). A design certification rule permits an applicant seeking a nuclear power plant combined license to incorporate the AP1000 design so long as "the site characteristics fall within the site parameters specified in the design certification." 10 C.F.R. § 52.79 (d)(1). The AP1000 pressurized water reactor, unlike earlier approved nuclear power plant technologies, has unique features that use natural forces − *e.g.*, evaporation, condensation, convection, and gravity – rather than operator actions and electric power to continue cooling the reactor core and spent fuel pool after the loss of all station power. This process can continue for at least 72 hours without relying on any operator action or electric power, and indefinitely thereafter with minimal power or operator support. NRC Responses to Public Comments ("Comment Responses") at 21, 47 (JA274, 283); Corrected Transcript, *In re Southern Nuclear Operating Co.*, NRC Docket Nos. 52-025-COL and 52-026-COL (Sept. 27-28, 2011) ("Mandatory Hearing Tr.") at 148:9-21 (JA345).

A. The AP1000 Design

Petitioners seek review of only one aspect of the AP1000 DCA – whether the environmental implications of the Near-Term Task Force ("Task Force") recommendations impacted the Environmental Assessment.[2]

The AP1000 is designed so that the reactor core and spent fuel pool remain cooled during and after design basis events − including natural disasters such as hurricanes, earthquakes, and tsunamis. Comment Responses at 20-21, 111 (JA273-74, 293). The "passive" cooling system activates automatically when the station loses all electric power (a "station blackout"). Mandatory Hearing Tr. at 148:9-21 (JA345).

Inside the reactor containment,[3] cooling is maintained through the operation of a heat exchanger submerged within a water storage tank whose bottom sits above the top of the reactor core. Comment Responses at 111 (JA293). Water circulates naturally in a loop between the reactor coolant system and the heat exchanger as hot water rises and cold water sinks, thereby transferring heat from the core to the tank. *Id.* When the water in the tank boils, the resulting steam rises

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[2] Unless otherwise noted, "Environmental Assessment" refers to the December 30, 2011 Environmental Assessment for the AP1000 DCA, and "draft Environmental Assessment" refers to the February 24, 2011 draft of that Environmental Assessment.

[3] This description addresses one key aspect of the AP1000 so-called "passive" cooling system. The design provides additional protections through other diverse mitigation functions included as part of this system.

and, when it contacts the cooler containment structure steel walls, it condenses and forms water droplets that are collected and channeled back to the storage tank to keep it full, thereby perpetuating the cooling function. *Id.*

The containment structure is housed within the shield building and these two structures also work together to transfer heat from the containment without relying on outside power sources. Final Rule, AP1000 Design Certification Amendment, 76 Fed. Reg. 82,079, 82,082 (Dec. 30, 2011) (JA196). During a station blackout, the containment's outside surface is coated by non-radioactive water from a seismically qualified tank located at the top of the shield building that flows by gravity through valves that open when the plant loses power. *Id.* at 82,084 (JA198); Comment Responses at 111 (JA293). The steel walls of the containment transfer heat from the water condensing on the interior walls to the water coating the exterior walls, causing the water on the exterior to heat up and evaporate. Comment Responses at 111 (JA293). Air circulating between the containment and the shield building vents the evaporated air, and, therefore, the heat, through openings in the shield building into the environment, which provides the ultimate heat sink. *Id.* Even if the reactor core is damaged, the same physical principles and passive cooling mechanisms will remove heat from the containment while keeping radioactive material contained. *Id.*

The AP1000 can be adequately cooled for three days without any power or operator action. After three days, two small ancillary generators installed in seismically qualified structures are available to continue reactor cooling. After one week, the reactor can be cooled indefinitely by providing fuel for at least one ancillary generator and water to replenish the water tank above the shield building. 76 Fed. Reg. at 82,084 (JA198); *see also* Comment Responses at 21 (JA274).

The AP1000 design also includes passive systems to continue cooling the spent fuel pool in the event of a station blackout. The stored spent fuel is located away from the reactor in the spent fuel pool – a safety-related seismically qualified structure in the Auxiliary Building – and is normally protected from overheating or radioactive releases by submerging the fuel in circulating water. If the station loses power normally available to circulate that water, the AP1000 design replenishes water lost due to boil off from other available seismically qualified water sources. *See* 76 Fed. Reg. at 82,082 (JA196). This process can also continue without power or operator assistance for at least 72 hours and can be maintained indefinitely through the infusion of additional onsite water pumped to the pool using power supplied by one of the ancillary diesel generators. *Id.*; Comment Responses at 46-47, 56 (JA282-83, 285).

B. The AP1000 Design Certification Amendment

In 2007, Westinghouse applied to amend the AP1000 design certification to update technical information and related design changes. On February 24, 2011, the NRC published notice of, and sought comments on, the proposed AP1000 DCA, including a draft Environmental Assessment for the proposed DCA. Proposed Rule, AP 1000 Design Certification Amendment, 76 Fed. Reg. 10,269, 10,280 (Feb. 24, 2011) (JA821). In accordance with the NRC's regulations, the draft Environmental Assessment considered only whether the design changes in the proposed DCA rendered a new or previously rejected Severe Accident Mitigation Design Alternative ("SAMDA") cost beneficial − *i.e.*, whether incorporating design alternatives would provide a commensurate benefit in mitigating the environmental impacts of a severe accident. *Id.*; *see also* Resp. Br. at 6-8. Westinghouse had evaluated SAMDAs for the NRC's environmental assessment for the 2006 design certification rule, and re-evaluated those SAMDAs and evaluated any new SAMDAs based on the design changes in the AP1000 DCA. The NRC concluded in the draft Environmental Assessment that the proposed design changes did not render a previously rejected SAMDA cost beneficial, and no new SAMDAs were identified that would be cost beneficial. Draft EA at 2 (JA831).

C. The Fukushima Accident and NRC Responses

On March 11, 2011, while the AP1000 DCA was pending, severe earthquakes and a tsunami hit the six-unit Fukushima Plant. The plant lost all power, causing a station blackout. Because the design of the Fukushima plant – unlike the AP1000 – required some power source to circulate cooling water to the reactor cores and the spent fuel pools, the station blackout caused the cores at some of the units to overheat, eventually causing breaches in their containment structures, damage to several units' spent fuel pools, and radioactive releases.

Promptly after the Fukushima accident, the NRC established a senior-level task force to recommend policy and regulatory improvements in light of the accident. This Task Force issued its report on July 12, 2011, including twelve "overarching recommendations." Recommendations for Enhancing Reactor Safety in the 21st Century ("Task Force Report") at 69-70 (JA647-48). The Task Force Report focused primarily on enhancements to the operating fleet to prevent and cope with loss of cooling capability as a result of severe external events, such as the tsunami that struck Fukushima. The Task Force Report did not address the probability or consequences of such external events or question the NRC's analyses of severe accidents in the AP1000 DCA or the Vogtle COL proceedings. In considering how these recommendations apply to the AP1000, the Task Force concluded that the AP1000 design has "many of the design features and attributes

necessary to address the Task Force recommendations" and, therefore, "support[ed] completing [the AP1000] design certification rulemaking activities without delay." *Id.* at 71-72 (JA649-50); *see generally* Resp. Br. at 18-20.

D. NRC Approval of the AP1000 DCA

The NRC considered the more than 200 substantive comments on the proposed AP1000 DCA that it received through June 30, 2011 − 51 days after the May 10, 2011 end of the noticed public comment period − and "briefly reviewed" all comments received thereafter "to ensure that there are no radiological health and safety matters within the regulatory purview of the NRC." Comment Responses at 10 (JA267). None of the comments specifically addressed the draft Environmental Assessment. Some comments did, however, raise issues related to the SAMDA analysis; and one-third specifically addressed whether the events at Fukushima provided new information that the NRC should evaluate before certifying the AP1000 DCA.

In December 2011, the NRC issued extensive responses to these public comments, including detailed responses to comments on the SAMDA analysis. *Id.* at 44-46 (JA280-82). For each of the comments, the NRC concluded that no changes to the AP1000 DCA, the Design Control Document, or the Environmental Assessment were necessary. *E.g.*, *id.* at 45, 48 (JA281, 284). The NRC also issued the Environmental Assessment on December 22, 2011, referencing its responses to

"several comments regarding technical issues related to the AP1000 [DCA] SAMDA analysis" and finding no need to modify the Environmental Assessment based on these comments. 2011 EA at 6 (JA225). On December 30, 2011, the NRC approved the AP1000 DCA, affirming that the public comments did not require any modification to the Environmental Assessment.[4] 76 Fed. Reg. at 82,079, 82,096 (JA193, 210).

SUMMARY OF ARGUMENT

1. Petitioners appeal only one aspect of the AP1000 DCA − whether the NRC violated the National Environmental Policy Act ("NEPA") when it concluded that there was no need to supplement the Environmental Assessment to address the implications of the Task Force recommendations. Pet. Br. at 1. Those recommendations could not have affected the Environmental Assessment because the NRC had already evaluated in detail whether environmental consequences at least as severe as those at Fukushima rendered SAMDAs cost beneficial and concluded that they did not. Thus, none of the Task Force recommendations or their implications affected the previously analyzed SAMDAs. Moreover, the Task Force itself concluded that the AP1000 already had "many of the design features and attributes necessary to address" its recommendations. Task Force Report at 71

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[4] The NRC reiterated that under NEPA and NRC regulations a design certification "is not a major Federal action significantly affecting the quality of the human environment" or requiring an Environmental Impact Statement ("EIS"). 76 Fed. Reg. at 82,096 (JA210).

(JA649). Additionally, none of the comments suggested that the Fukushima events raised any new SAMDAs or caused any previously considered SAMDAs to be cost beneficial.

Nonetheless, the NRC took a "hard look" at whether the events at Fukushima provided any new, significant information that would affect the SAMDA analysis. Based on its analysis, the NRC determined that Fukushima provided no new information that was sufficiently significant to make new or previously analyzed SAMDAs cost effective in mitigating potential severe accidents or to alter the Environmental Assessment. As it customarily does, the Court should defer to the NRC's conclusions on these highly factual, technical determinations.

2. As a threshold matter, the NRC fully complied with NEPA in issuing the Vogtle COLs. The NRC Staff completed the draft and final supplemental EIS for the Vogtle COLs. The NRC Staff also continued to conduct a "new and significant information" evaluation, pursuant to which the NRC Staff considered information arising out of the Fukushima accident. The NRC Staff found that the information was not significant to the Vogtle EIS, and thus no supplement was warranted, because the Vogtle EIS already contained a severe accident analysis which considered Fukushima-like accidents. Upon review in the mandatory hearing, including prefiled testimony, discussion at the hearing itself, and post-hearing

written questions on this topic, the Commission found this NEPA analysis adequate. The NRC's conclusion that the information known regarding Fukushima was not "significant" to the Vogtle EIS is entitled to substantial deference.

The NRC properly denied Petitioners' motion to reopen the Vogtle contested proceeding record and found Petitioners' proposed contention inadmissible in accordance with applicable NRC regulations, 10 C.F.R. §§ 2.309(f) and 2.326. In particular, the NRC correctly rejected the contention as premature, for its failure to raise an issue material to the Vogtle COLs, and for its failure to include appropriate facts, analysis, expert opinion or other support explaining how the Vogtle EIS was deficient. Moreover, as the Commission pointed out, Petitioners also failed to meet the heightened standard for a motion to reopen the closed contested proceeding, an "extraordinary action" for which NRC regulations require a stronger showing than contention admissibility. The NRC's denial of Petitioners' motion to reopen is entitled to substantial deference.

3. Petitioners' demonstrably baseless allegation that the NRC violated NEPA and/or the Atomic Energy Act ("AEA") by excluding Petitioners from the Vogtle COL mandatory hearing constitutes nothing more than a misunderstanding of, or a collateral attack on, established NRC procedures.

STANDARD OF REVIEW

Intervenors adopt the Standard of Review set out in Respondents' June 25 Brief, with the following addition.

The NRC's conclusion that the Task Force recommendations did not constitute "significant" information sufficient to require supplementation of its EIS is a factual determination "the resolution of which implicates substantial agency expertise." *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 375–77 (1989). Thus, because the NRC's review of the recommendations "'requires a high level of technical expertise,'" the Court must "defer to 'the informed discretion of the responsible federal agenc[y].'" *Id.* at 377 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). In reviewing an agency's decision not to supplement an EIS, courts should "carefully review[] the record and satisfy[] themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information." *Id.* at 378. Additionally, because Petitioners apparently challenge NRC's finding that the Task Force recommendations were not significant, *Marsh*'s arbitrary and capricious standard squarely applies. *Id.* at 376-77.

ARGUMENT

I. In Issuing the AP1000 Design Certification Amendment, the NRC Adequately Considered the Potential Environmental Consequences From a Fukushima-Type Event.

Petitioners mistakenly contend that the NRC dismissed any lessons that might be learned from Fukushima-like accidents as "'not imminent' or too improbable to warrant NEPA consideration," without considering the consequences if such unlikely harm should occur. Pet. Br. at 39. The NRC's review of the AP1000 DCA did not ignore Fukushima, however, but determined that it had already considered environmental consequences from severe accidents that encompassed the Fukushima events and concluded in its Environmental Assessment that no SAMDAs were cost beneficial. *See State of New York v. NRC*, No. 11-1045, slip. op. at 18-19 (D.C. Cir. June 8, 2012) ("an agency conducting an EA generally must examine both the probability of a given harm occurring *and* the consequences of that harm if it does occur" (emphasis in original)).

In reviewing an agency's determination not to supplement an environmental assessment, a court considers only whether the agency "'has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nuclear Info. & Res. Serv. v. NRC*, 509 F.3d 562, 568 (D.C. Cir. 2007) (discussing review of an EIS), (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983) ("*BG&E*")). A

court performs this analysis by considering whether the agency evaluated the relevant factors and whether it made a clear error of judgment, and "defer[s] to 'the informed discretion of the responsible federal agencies'" on highly technical issues such as those at issue here. *Marsh*, 490 U.S. at 377-78 (quoting *Kleppe* at 412); *see also Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004).

The NRC correctly concluded that no revision to the Environmental Assessment was necessary because (1) the original AP1000 Environmental Assessment had already evaluated the environmental consequences of SAMDAs in response to a Fukushima-type event, (2) the Task Force itself recognized that the AP1000 design already had many of the features necessary to address its recommendations, obviating any need to perform additional SAMDA analyses, and (3) the NRC examined each of Petitioners' contentions about the possible consequences from a Fukushima-type accident and correctly found that no new information from the Fukushima event changed the SAMDA analysis or otherwise warranted any modification to the Environmental Assessment. For these reasons, the Court should find that the NRC complied fully with NEPA and should deny the petition relating to the AP1000 DCA.

A. An Event Like Fukushima Would Not Produce Environmental Consequences That Would Affect the AP1000 Environmental Assessment "to a Significant Extent not Already Considered."

The environmental assessment for a design certification amendment considers only whether the design change that is the subject of the proposed amendment renders a previously rejected SAMDA cost beneficial or identifies a new SAMDA that is cost-beneficial.[5] 10 C.F.R § 51.30(d); *see also* Resp. Br. at 6-8. Thus, the impact of the Task Force recommendations could only require a supplement to the Environmental Assessment if they identified a new *type* of impact – not merely a new cause for a previously analyzed impact – that affects the SAMDA analysis "to a significant extent not already considered." *Marsh*, 490 U.S. at 374; *see also New Jersey DEP v. NRC*, 561 F.3d 132, 137, 143-44 (3d Cir. 2009); Resp. Br. at 43-46.

Westinghouse's SAMDA analysis for the AP1000 DCA – which the NRC evaluated to prepare the Environmental Assessment – already considered the environmental consequences of a range of radiological releases that were at least as significant as those experienced at Fukushima. It also used assumptions that biased the analysis toward finding that the postulated design alternatives would be cost beneficial. Comment Responses at 44-46 (JA280-82); *accord* AP1000 DCD, App. 1B at 1B-9–11 (JA672-74) (describing the spectrum of containment failure

[5] The NRC evaluates site-specific environmental impacts during licensing proceedings. *See* 2011 EA at 4 (JA223).

assumptions used for the analysis). Specifically, the SAMDA analysis assumed that any failure to cool the core sufficiently would cause a containment failure and radioactive releases directly to the environment − *i.e.*, disregarding for this purpose the numerous AP1000 safety features that would mitigate the environmental effects of such a failure. Comment Responses at 44-45 (JA280-81). That analysis further assumed that adoption of any studied design alternative would eliminate all release of radioactive material, effectively reducing the environmental impact to zero. *Id.* Even using this conservative analysis, however, the NRC determined that no SAMDAs provided sufficient benefits to justify their cost. *Id.*

Thus, even before the Fukushima accident, the SAMDA analysis had already systematically evaluated design alternatives and determined that severe accidents – like the one that subsequently occurred at Fukushima – did not cause new or previously studied SAMDAs to become cost beneficial. Consequently, the events at Fukushima did not result in identification of an impact that had not already been thoroughly studied and did not "significantly transform the nature of the environmental issues" that the NRC had already analyzed. *See Nat'l Comm.*, 373 F.3d at 1330. In sum, the Fukushima events simply did not provide new information beyond the analysis previously conducted that would significantly affect the Environmental Assessment.

B. The NRC Considered the Task Force Recommendations And Determined That They Do Not Significantly Affect the AP1000 Environmental Assessment.

Petitioners' contention that the NRC failed to apply the Task Force recommendations to the AP1000 DCA misconstrues the Task Force's role, which was to advise the NRC about *safety* lessons learned from Fukushima − not to identify or evaluate new or previously studied SAMDAs that might prove cost beneficial and therefore impact the Environmental Assessment.

In any case, the AP1000 design already incorporated the substance of the Task Force recommendations that the NRC considered relevant to the AP1000 DCA.[6] For example, the Task Force's seismic and flooding protection recommendation related to site-specific – not reactor design – issues, *e.g.*, whether each new licensee had evaluated its site's characteristics against the most current seismic and flooding hazards. Task Force Report at 30 (JA608). The AP1000 DCA specifies the parameters of seismic events and external floods that it is designed to withstand, and licensees must demonstrate that their site characteristics fall within those parameters. Comment Responses at 18 (JA271). In addition, the recommendation to mitigate prolonged station blackout would require all plants to

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[6] *See* Task Force Report at 69-72 (JA647-650) (identifying recommendations NRC considered relevant); 76 Fed. Reg. at 82,081 (JA195) (same). The other Recommendations apply only to operating plants, to site-specific new license applications, or to boiling water reactors –like Fukushima and unlike the AP1000 – and need not be considered in the AP1000 DCA proceeding. Task Force Report at 69-72 (JA647-650).

have a 72-hour coping mechanism and to pre-stage offsite resources to support core and spent fuel cooling − both of which the AP1000 design already includes. Task Force Report at 37-38 (JA615-16); Comment Responses at 20-21 (JA273-74). Further, recommendations for enhanced instrumentation and makeup capability for spent fuel pools are also addressed through the features the AP1000 design has already implemented. Task Force Report at 46 (JA624); Comment Responses at 46-48 (JA282-84).[7]

Because the Task Force and the NRC correctly determined that none of these safety recommendations affected the AP1000 DCA, there were no recommendations that the NRC needed to incorporate into the Environmental Assessment.

C. The NRC Took a "Hard Look" at Petitioners' Fukushima-Related Issues and Determined that No Supplement to the Environmental Assessment Was Required.

Petitioners suggest that the NRC provided insufficient time for comments to address the implications of events at Fukushima. Pet. Br. at 20-21, 47-48. In fact,

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[7] Petitioners claim that the NRC did not identify the AP1000 "'features and attributes necessary to address the Task Force recommendations' [that] have yet to be implemented." Pet. Br. at 46-47. In fact, the NRC summarized the Task Force's conclusion that "by the nature of its passive design and inherent 72-hour coping capability, the AP1000 design has many of the features and attributes necessary to address the Task Force recommendations." 76 Fed. Reg. at 82,081 (JA195). Nowhere does the NRC suggest that there are *any* further design features or attributes that it considered necessary to address the Task Force recommendations.

the NRC extended the close of the comment period from May 10, 2011, until June 30, 2011 (76 Fed. Reg. at 82,081 (JA195)) − more than three months after the Fukushima accident. No comments submitted to the NRC challenged the Environmental Assessment, but one-third of the substantive comments – including many submitted by Petitioners – raised Fukushima-related issues. A few of these comments addressed the SAMDA analysis, although none contended that additional SAMDAs should be considered or that any evaluated SAMDAs were cost beneficial. Comment Responses at 44-46 (JA280-82); 2011 EA at 6 (JA225). The NRC responded to each comment in a detailed, comprehensive, 125-page document that it incorporated into the Environmental Assessment and Final DCA. 2011 EA at 6 (JA225); 76 Fed. Reg. at 82,081 (JA195).

For example, the NRC addressed the environmental implications of Petitioners' comment suggesting that the events at Fukushima should prompt an analysis of the environmental effects of a containment failure. Petitioners' April 29, 2011 Comment 39-3 (JA684). The NRC explained that the SAMDA analysis already considered the environmental consequences of radiological releases in the event of a containment failure and used conservative assumptions that overstated the potential harm a containment failure would cause. Comment Responses at 44-45 (JA280-81). These conservative assumptions biased the analysis in favor of

adding environmental protections, but nothing learned from Fukushima indicated that an additional level of conservatism was necessary. *Id.*

Petitioners argue that the Task Force recommendations − which addressed technical *safety* considerations − should somehow have affected the Environmental Assessment. *See*, *e.g.*, Pet. Br. at 1. As previously noted, however, an environmental assessment for a design certification amendment properly addresses only one question: whether any SAMDAs are cost beneficial. Thus, the Task Force's safety recommendations do not bear on the only Fukushima-related issue before the NRC in the AP1000 DCA − whether the events at Fukushima provided information that would make a new or previously identified SAMDA cost beneficial.

Any doubt as to whether these Fukushima-related *safety* considerations impacted the Environmental Assessment is obviated because the NRC evaluated these considerations in the AP1000 DCA proceeding and confirmed that they did not affect the SAMDA analysis. For example, Petitioners also commented about whether the AP1000's passive safety features could cool the core, containment, and spent fuel pool after a station blackout such as occurred at Fukushima. Comment Responses at 20-21, 35, 46-48, 79-80, 84-85, 110-11 (JA273-74, 277, 282-84, 286-87, 290-91, 292-93). The NRC identified Fukushima's reliance on electricity − which was not available after a station blackout − as the root cause for

core damage and radioactive emissions from the containment and spent fuel pools. In light of this failure, the NRC reviewed the AP1000's passive safety features that are designed to continue cooling the units for at least 72 hours after a station blackout, evaluated the ability of the passive safety features to cool the units in the event of a station blackout, and assessed the viability of the passive safety features to function in a Fukushima-type event. *Id.* Based on this detailed technical analysis, the NRC determined that the passive features "of the AP1000 design demonstrate that the reactor can be properly cooled during accident conditions," thereby preventing or mitigating any radioactive release. *E.g.*, *id.* at 21 (JA274); s*ee also* Task Force Report at 39-40 (JA617-18) (providing recommendations based on lessons learned from Fukushima to protect against containment failures in two particular types of reactors that lack passive safety features but not applying these recommendations to the AP1000).

The NRC provided similarly detailed responses to other safety issues that Petitioners raised, such as (1) the validity of assumptions regarding the AP1000's design basis in light of the beyond-design-basis earthquake and tsunami at Fukushima (Comment Responses at 18 (JA271)), (2) the integrity of the AP1000's structures to survive a seismic event (*id.* at 22-23, 82-84 (JA275-76, 288-90)), (3) the AP1000's ability to survive a detonation shock wave like that experienced at Fukushima (*id.* at 42-43 (JA278-79)), (4) the integrity of the shield building to

withstand pressures and stresses like those placed on the Fukushima reactor (*id.* at 110 (JA292)), and (5) concerns regarding water recirculation cooling system failures from large amounts of structural debris, as experienced at Fukushima (*id.*). Based on this review, the NRC concluded that neither the Fukushima events nor any other safety issues raised in the comments required a change to the DCA or Environmental Assessment. 2011 EA at 6 (JA225); *e.g.*, Comment Responses at 45, 48 (JA281, 284) ("No change was made to the rule, the DCD, or the EA as a result of this comment.").

The NRC's extensive responses to Petitioners' and others' Fukushima-related comments provide ample evidence that the NRC made a "reasoned decision based on its evaluation of the significance – or lack of significance – of the new information." *Marsh*, 490 U.S. at 378; *see also Nat'l Comm.*, 373 F.3d at 1331 ("[T]he Commission's process for evaluating the environmental impact of East Tennessee's proposed project was comprehensive, based on public comments that focused the Commission's attention on the issues that New River now contends were inadequately addressed in the [Draft Environmental Impact Statement]."). This detailed, comprehensive, and highly technical analysis demonstrates that the NRC "carefully scrutinized the proffered information" and "conducted a reasoned evaluation of the relevant information" before finding that the information was not

sufficient to affect the Environmental Assessment, thereby satisfying NEPA. *Marsh*, 490 U.S. at 383, 385; *see also BG&E*, 462 U.S. at 90, 98-99.

Just as the Task Force determined that the AP1000 addressed its applicable recommendations, the NRC, based on its own analysis, concluded that the Fukushima events did not identify any SAMDAs that should be incorporated into the AP1000 DCA, and this Court "must generally be at its most deferential" on these highly factual, technical issues. *BG&E*, 462 U.S. at 103; *see Marsh*, 490 U.S. at 385.

II. The NRC Complied with NEPA and Correctly Denied Petitioners' Motion to Reopen the Proceeding in issuing the Vogtle COLs.

Just as the NRC committed no error in the AP1000 DCA, in the Vogtle COL proceeding the NRC properly concluded that Petitioners failed to offer an admissible contention under 10 C.F.R. § 2.309(f) or to meet the heightened standard for motions to reopen. *See Entergy Nuclear Generation Co.*, CLI-12-06, __ NRC __ (NRC Mar. 8, 2012) (slip op. at 18-19); *Oystershell Alliance v. NRC*, 800 F.2d 1201, 1207 (D.C. Cir. 1986) (referring to the NRC's reopening standards as "court-sanctioned"). In this regard, Licensees adopt Section I of Respondents' June 25 Brief with the following additions.

Petitioners' proposed contention alleged that the NRC did not comply with NEPA because it did not consider the "environmental implications of the findings and recommendations" of the Task Force Report. Contention at 4 (JA468). The

contention failed to identify, however, any environmental impacts for Vogtle implicated by the Report. The NRC concluded that the contention was premature and did not meet the requirements of §§ 2.309(f)(1)(iv) and (f)(1)(v). The NRC did not abuse its discretion in denying Petitioners' motion to reopen the Vogtle contested proceeding.

The NRC evaluates the safety and environmental aspects of COL applications, which stem from different statutory mandates, as distinct issues. *See Exelon Generation Co. LLC* , CLI-05-17, 62 NRC 5, 30-31 (2005). The AEA requires the NRC to determine whether the proposed license meets minimum safety standards, whereas NEPA requires no particular finding but ensures that the NRC adequately identifies and evaluates the adverse environmental consequences of the proposed license. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). Because the Task Force Report addresses only safety enhancements to avoid or mitigate Fukushima-type events, primarily for older reactors, Petitioners' reliance on the Report does not support a contention that the NRC failed to identify or consider an environmental impact.

Moreover, as a threshold matter, the NRC fully complied with NEPA in issuing the Vogtle COLs, as documented by the extensive record. *See Southern Nuclear Operating Co.*, CLI-12-02, 75 NRC __ (Feb. 9, 2012) (slip op.).

A. The NRC Complied with NEPA in Issuing the Vogtle COLs.

Petitioners have consistently failed to demonstrate that the NRC did not comply with NEPA throughout the Vogtle COL licensing process. NRC's NEPA obligations are clear: to take a "hard look" at the environmental consequences of its licensing decision, *see Robertson*, 490 U.S. at 350, and to supplement that analysis only where "new information 'provides a *seriously* different picture of the environmental landscape.'" *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) (citing *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) (emphasis in original)); *see also* 10 C.F.R. § 51.92. NRC's NEPA analysis is subject to a "rule of reason," *see Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 195 (D.C. Cir. 1991), and an agency's decision that a supplemental EIS is not required is entitled to deference and subject to the arbitrary and capricious standard. *Marsh,* 490 U.S. at 373-75.

The NRC took the requisite "hard look" and analyzed the potential impacts associated with its decision to grant the Vogtle COLs, including the impact of severe accidents involving releases of radiation. The NRC then properly concluded that neither the Task Force's recommendations nor the fact that Fukushima occurred provided a seriously different picture of these already-analyzed environmental impacts. Thus, the NRC's decision not to supplement the EIS was neither arbitrary nor capricious.

1. The NRC took a "hard look" at the impacts associated with issuing the Vogtle COLs.

Pursuant to its NEPA regulations, the NRC prepared draft and final EISs in connection with the Vogtle Early Site Permit ("ESP"), analyzing the impacts of construction and operation of Units 3 and 4. *See generally* NUREG-1872. The draft EIS was subject to public notice and comment. The ESP EIS thoroughly analyzed the following types of impacts: land use; meteorological and air-quality; water-related; ecological; socioeconomic; historic and cultural resource; environmental justice; non-radiological and radiological health impacts; and postulated accidents. *See generally id.* During the ESP process, the NRC admitted three environmental contentions from Petitioners and held a contested hearing. *See Southern Nuclear Operating Co.*, LBP-09-07, 69 NRC 613, 624 (2009). The overall adequacy of the EIS was also considered in an uncontested hearing. At the conclusion of both hearings, the Atomic Safety and Licensing Board ("ASLB") found the ESP EIS sufficient *See generally Southern Nuclear Operating Co.*, LBP-09-19, 70 NRC 433 (2009). The Commission upheld the ASLB's decision on review of the contested issues. *Southern Nuclear Operating Co.*, CLI-10-05, 71 NRC 90, 98-99 (2010). Judicial review was not sought relative to this determination.[8]

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[8] Pursuant to the Limited Work Authorization issued with the ESP, safety-related construction began at the Vogtle site in August 2009, and has

Because the COL application referenced the ESP EIS, the NRC prepared draft and final supplemental EISs, in September 2010 and March 2011, respectively, to evaluate whether any "new and significant circumstances or information" had arisen since publication of the ESP EIS that might change the NRC's conclusions. NUREG-1947 (JA805). Although the final supplemental EIS did not address Fukushima specifically, the combined NEPA analyses fully considered the probability and consequences of severe accidents involving core damage, breaches of containment and releases of radiation to the environment. CLI-12-02 at 72-75 (JA166-69).

2. The NRC properly concluded that no supplemental Vogtle EIS was necessary following the Fukushima accident or the Task Force's recommendations.

The NRC's duty to supplement its NEPA analyses is limited to situations where there are (1) substantial changes in the proposed action that are relevant to environmental concerns, or (2) significant new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts. 10 C.F.R. § 51.92. As the Supreme Court has stated, "[a]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by

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continued since the COLs' issuance, currently involving approximately 2,000 craft workers.

the time a decision is made." *Marsh,* 490 U.S. at 373. Neither the Fukushima accident nor the Task Force recommendations changes the proposed action or presents new and significant information relevant to NRC's NEPA analysis.

To be "new," information must not have been considered in the preparation of the EIS or generally known and available during the preparation of the EIS. For information to be considered "significant," it must have been material to the issue being considered; that is, it must have the potential to affect the findings or conclusions of the NRC staff's evaluation of the issue. As this Court has recognized, to be "significant," information must present a "seriously different picture of the environmental landscape" known during the preparation of the EIS. *Olmsted Falls*, 292 F.3d at 274 (citing *Weinberger*, 745 F.2d at 418); *see also Nat'l Comm.*, 373 F.3d at 1330.

As with the AP1000 DCA's Environmental Assessment (*supra* at 13), the NRC's NEPA analysis for the Vogtle COLs considered accidents similar to the Fukushima accident as part of the site-specific SAMDA analysis. Accordingly, the consequences of severe accidents, including Fukushima-like accidents based on seismic events and a tsunami that assumed core damage and releases of radiation, were already evaluated in the EIS. *See* NUREG-1872 § 5.10 (JA832). Thus, nothing about the Fukushima accident raised new information not already analyzed in the NEPA analysis. CLI-12-02 at 74-75 (JA168-69). Similarly, the Task Force

conclusions and recommendations did not raise any "new and significant" information sufficient to warrant preparation of a supplemental EIS. Petitioners assert that the Task Force recommendations are significant "because they would alter the standards that the NRC deems essential for adequate protection of public health and safety." Pet. Br. at 37. But the recommendation of new *safety* measures does not alter the NRC's environmental analysis. To the contrary, the Task Force recommendations do not raise any new and significant environmental information because they do not address environmental impacts at all. Moreover, even if some environmental issue could be postulated from the recommendations, it would be neither new nor significant because the NRC's severe accident analyses already considered such impacts. To be considered "new and significant" the Task Force recommendations would have to change the conclusions in the EIS, particularly with respect to the probability or consequences of severe accidents. Petitioners point to no evidence that the accident at Fukushima or implementation of the Task Force recommendations would alter the NRC's conclusions that the probability weighted consequences of severe accidents would be SMALL.

Petitioners' argument that the NRC "pushed ahead as if Fukushima never happened" (Pet. Br. at 32), completely ignores the thorough review of the environmental analysis in the Vogtle mandatory hearing, particularly the consideration of whether information arising from the Fukushima events

constituted new and significant information. The NRC also required answers to post-hearing questions on the need to supplement the EIS. *See* Mandatory Hearing Tr. 63:19-64:9; 79:24-82:7, 296:12-297:16, 303:14-20, 326:19-330:7, 355:11-356:14 (JA339-40, 341-44, 346-47, 348, 349-53, 354-55); *see also* Exhibit SNCR00011 at 15-17 (JA319-21); Exhibit NRC000015 at 8, 11-12 (JA323, 324-25). The NRC carefully considered whether a supplemental EIS was required and concluded that it was not. The NRC based its conclusion on the record and its regulations and therefore did not abuse its discretion.

B. The NRC Correctly Found Petitioners' Contention Inadmissible.

The NRC reasonably rejected Petitioners' contention on the three independent grounds of prematurity and failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iv) and (f)(1)(v). The contention did not rely on the facts surrounding the Fukushima accident itself, but alleged only that the Vogtle EIS should be supplemented to consider the environmental implications of the Task Force Report.[9] Petitioners are bound by the as-submitted scope of the contention. *See Mass. v. NRC*, 924 F.2d 311, 332-33 (D.C. Cir. 1991) (upholding NRC's construction of contention's limited scope).

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[9] *PPL Bell Bend, L.L.C.*, LBP-11-27, 74 NRC __ (Oct. 18, 2011) (slip op. at 10) (JA244) ("[T]he generic contention put forth by BREDL *et al*. is not founded on the March 11, 2011 Fukushima event per se. (Indeed, had it been, there might well be a serious question regarding the timeliness of the August 11 filing of the motion to reopen.").

1. The NRC Properly Rejected Petitioners' Contention as Premature.

The NRC explained that the contention was premature because the information known about the Fukushima events was incomplete and *how that information would impact U.S. plants* was still far from clear. *Luminant Generating Co. LLC*, CLI-12-07, 75 NRC __ (Mar. 16, 2012) (slip op. at 11) (citing LBP-11-27 at 12 (citing *Union Electric Co.*, CLI-11-05, 74 NRC __ (Sept. 9, 2011) (slip. op. at 30)) (JA29). This finding of prematurity indicated insufficient information had developed related to how the Task Force recommendations might ultimately be implemented for U.S. plants to warrant a supplemental NEPA analysis. *Id.* ("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 . . .").

Petitioners assert that the fact that the NRC has "adopted" the Task Force Report means there was enough information to address the contention. Pet. Br. at 39-41. Petitioners mischaracterize the NRC's action, however, as it has merely adopted a process for considering all but a handful of near term recommendations, which were implemented by order after the issuance of the Vogtle COLs. NRC Orders EA-12-049; EA-12-050; EA-12-051 (Mar. 12, 2012) (published at 77 Fed. Reg. 16,091, 16,098, & 16,082, respectively (Mar. 19, 2012)). The speculative

nature of Petitioner's contention is illustrated by its emphasis on what *might* happen if the NRC actually approved and implemented the Task Force recommendations in the manner Petitioners expected.[10]

In sum, up to the time of the issuance of the COLs, the NRC had not determined whether and how the Task Force recommendations might be implemented and Petitioners have not provided any information from the Task Force Report that calls the Vogtle EIS into question. Petitioners have shown no error in the NRC's rejection of the contention as premature due to the incomplete status of the NRC's consideration of the Task Force Report; therefore, this decision should be upheld. *See* CLI-12-07 at 14 (JA32) (citing *Village of Bensenville v. FAA*, 457 F.3d 52, 71-72 (D.C. Cir. 2006); *Town of Winthrop v. FAA*, 535 F.3d 1, 9-13 (1st Cir. 2008); *Marsh*, 490 U.S. at 374).

2. The NRC Properly Concluded That Petitioners' Contention Was Not Material to Any Finding Needed to Support the Vogtle COLs.

Petitioners argue that the NRC's focus on safety improvements that might avoid or mitigate an accident similar to Fukushima necessarily makes the Task Force recommendations material to the NRC's environmental analysis. Pet. Br. at

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[10] Contention at 8 ("If, as recommended by the Task Force, the design basis had been upgraded to include severe accidents . . . ."), 11 ("If the design basis for the reactor does not incorporate accidents that should be considered . . . ."), 12 ("Were SAMAs imposed as mandatory measures . . . .") (JA472, 475, 476).

38. Section 2.309(f)(1)(iv), however, requires that the proposed contention be "*material to the findings the NRC must make to support the action that is involved in the proceeding*." (Emphasis added.) Section 2.309(f)(1)(iv) requires that an issue be more than newsworthy or important to NRC's regulatory program to be admissible – it must affect a finding *necessary to the Vogtle COLs*. In this case, the issue specifically must be material to NRC's environmental analysis.

Petitioners' reliance on the "concerns" cited by the Task Force simply presumes materiality to the Vogtle EIS. CLI-12-07 at 10-11 (JA28-29). Petitioners cite *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016, 1030-31 (9th Cir. 2006) ("*SLOMP")*, as their only support for the assertion that the NRC's consideration of the Task Force Report pursuant to its *safety* function requires a supplemental *NEPA* analysis. Pet. Br. at 38, 40-41. The Ninth Circuit did not hold, however, that all safety-significant considerations are new and significant for NEPA purposes, but rather held that if the NRC treats an event as probable in its policy considerations, it cannot exclude the same event from its NEPA analysis on the ground that it is remote and speculative. *SLOMP,* 449 F.3d at 1031.

The NRC did not exclude the Task Force recommendations (or facts of the Fukushima accident) from its NEPA consideration. In fact, Petitioners concede that the NRC "'considered at length the possibility of severe accidents, including those like the accident at Fukushima' and examined the Task Force Report and its

environmental implications" in the mandatory hearing. Pet. Br. at 51 (quoting *Southern Nuclear Operating Co.*, CLI-12-11, 75 NRC __ (Apr. 16, 2012) (slip op. at 13-14)). Rather, the NRC held that Petitioners' vague, general reliance on the Task Force Report did not articulate an environmental issue material to the NEPA analysis underlying the Vogtle COLs. Nothing in *SLOMP* or other NEPA jurisprudence supports the presumption that NRC safety enhancements necessarily constitute "new and significant" environmental information. To the contrary, the Third Circuit has held that such enhancements do not trigger a NEPA analysis. *New Jersey DEP*, 561 F.3d at 143 ("[E]ven the Ninth Circuit Court of Appeals has held that precautionary actions to guard against a particular risk do not trigger a duty to perform a NEPA analysis.").

Petitioners mischaracterize the NRC's holding as requiring a contention to "show that the inadequacy is unique to that EIS among all others." Pet. Br. at 52-53. The NRC merely refused to assume that the Task Force's general considerations automatically raised an inadequacy in the Vogtle COLs. CLI-12-07 at 12 (JA30).[11] The Commission correctly held that "Petitioners have not pointed

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[11] "The contention presumes, without support, that the [Task Force] Report raised new and significant environmental implications . . . . Petitioners make only broad claims that the [Task Force] Report constitutes new and significant information 'because it raises an extraordinary level of concern regarding the manner in which the proposed operation of the [facilities in the captioned matters] impacts health and safety.'" CLI-12-07 at 12 (JA30).

to concrete information that 'is material to the findings the NRC must make to support'" the Vogtle COLs.[12]

3. The NRC Properly Concluded That Petitioners' Contention Lacked Adequate Support.

Section 2.309(f)(1)(v) requires "a concise statement of the alleged facts or expert opinions which support the [Petitioners'] position on the issue . . . ." The ASLB and the Commission both noted the lack of analysis or expert support explaining the specific alleged deficiency in the Vogtle EIS, or even mentioning the seismic, flooding, or other characteristics of the Vogtle site.[13] As the Respondents explain, the contention did not provide any specifics regarding what environmental implications Petitioners sought to litigate. For example, Petitioners discussed "accidents that should be considered in order to satisfy the adequate protection standard," implying that some additional accidents should be considered in the Vogtle EIS, but pointed to no such "accident," nor to the supporting portion of the Task Force Report. Contention at 11 (JA475). Petitioners discussed severe accident mitigation alternatives but failed to reference even one such measure they contended was not properly considered or what environmental impact such a measure would cause. Contention at 11-12 (JA475-76).

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[12] CLI-12-07 at 10-11 (JA28-29) (citing § 2.309(f)(1)(iv)).

[13] CLI-12-07 at 9, 12-13 (JA27, 30-31).

Petitioners did not even correctly describe their purported support, the Task Force Report, for these unexplained allegations. For example, although Petitioners claimed the Task Force called into question the need to consider additional accidents, the Task Force (i) did not recommend a new category of design basis accidents but instead a new framework for mostly existing requirements, and (ii) endorsed both the probabilistic risk assessments required by 10 C.F.R. Part 52 and the NRC's severe accident requirements applicable to new AP1000 reactors such as Vogtle. Task Force Report at 19-21 (JA597-99). Clearly, § 2.309(f)(1)(v)'s requirement for support cannot be met through such mischaracterizations.

Petitioners attempt to sidestep this lack of support by alleging the NRC may not require such support or that the NRC applied its admissibility requirements too stringently. Pet. Br. at 49-50. As Respondents point out, clear precedent establishes that the NRC's contention specificity requirements are reasonable and do not violate either NEPA or the AEA. Long-standing NRC precedent shows that the NRC has consistently required contention specificity under § 2.309(f)(1)(v). *See Dominion Nuclear Conn., Inc.*, CLI-01-24, 54 NRC 349, 359 (2001); *Duke Energy Corp.*, CLI-03-17, 58 NRC 419, 424 (2003) (quoting *Duke Energy Corp.*, CLI-99-11, 49 NRC 328, 337-39 (1999)) ("[O]ur contention rules bar contentions where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later' . . . .").

The NRC has consistently required that a petitioner "'state the applicant's position and the petitioner's opposing view,' and explain why it disagrees with the applicant." *Crowe Butte Res., Inc.*, LBP-08-6, 67 NRC 241, 292 (2008) (citing *Dominion*, 54 NRC at 358). An admissible contention "must . . . 'explain why the application is deficient.'" *Id.* (citations omitted). The NRC applied the same standard for support in the instant case. *See* CLI-12-07 at 13-14 (JA31-32).

Petitioners cite nothing in the record wherein the contention adequately explained a deficiency in the Vogtle EIS. As such, Petitioners have shown no error in the NRC's rejection of the contention for lack of the support required by § 2.309(f)(1)(v).

Neither did Petitioners even allege any error with respect to the NRC's conclusion that, even presuming contention admissibility, Petitioners failed to show the "kind of 'significance' and potential for a 'different result' that under [the NRC] reopening rule would justify restarting already-closed hearings." CLI-12-07 at 14 n.47 (JA32). The NRC's rejection of Petitioners' motion to reopen was therefore proper and should be upheld.

III. The NRC Provided Petitioners an Opportunity for a Hearing.

Petitioners were entitled to a hearing before the NRC only if their motion met the NRC's standards for reopening a closed record and for contention admissibility, which it did not. *See, e.g.*, *Oystershell*, 800 F.2d at 1207. The NRC

allows public participation through its contention admissibility process, and its reliance on that process in the Vogtle COL proceeding is entitled to deference on appellate review. *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 53-54 (D.C. Cir. 1990).

The contested portion of a licensing proceeding covers only those issues properly raised pursuant to the NRC's contention and reopening requirements. *See Exelon*, 62 NRC at 34-35. The mandatory ("uncontested") hearing in a licensing proceeding takes place regardless of whether any issues are raised in the contested proceeding and includes a sufficiency review of the Staff's entire review of the license *except* those issues which are litigated in the contested proceeding. *See id.*; NRC SECY-11-0042, Revisions to Internal Commission Procedures Section on Mandatory Hearings at 1 (Mar. 25, 2011) ("[I]issues within the scope of admitted contentions are not to be addressed in the uncontested proceeding."). Even had Petitioners successfully reopened the record, then, Petitioners would not have participated in the mandatory hearing—they would have participated in the limited contested proceeding on their contention. *Exelon*, 62 NRC at 49-50. Petitioners' claim of exclusion from the mandatory hearing is an oxymoron because the mandatory hearing is by definition uncontested.

Petitioners' claim amounts to an improper challenge to the NRC's duly promulgated procedures for hearings. *See id.* According to Petitioners, their

motion to reopen required the NRC to either (i) suspend review of a license on all related issues pending a determination on that motion or (ii) automatically allow Petitioners to participate in the mandatory (otherwise uncontested) proceeding. This would eviscerate the NRC's control over its hearing process and give movants either (i) the unlimited ability to delay a licensing proceeding through motions to reopen regardless of their motions' merits or (ii) the ability to reopen the contested proceeding and obtain a hearing just by filing close in time to a planned mandatory hearing. Petitioners have no support for such a usurpation of the NRC's hearing procedures. *Union of Concerned Scientists*, 920 F.2d at 54-55 (noting increased deference due NRC procedural rules).

Moreover, Petitioners' claim is smoke and mirrors as the mandatory hearing did not address Petitioners' proposed contention, nor did the NRC ground any of its bases for rejecting the contention on findings in its mandatory hearing order. *See* CLI-12-02 at 6 (JA100); *see also generally* CLI-12-07. Rather, consistent with NRC practice, the ASLB considered the proposed contention (*see* LBP-11-27) and the Commission then determined, separately from the mandatory hearing, that the ASLB did not err in rejecting the contention and so denied Petitioners' petition for review. *See* CLI-12-07.

In sum, Petitioners' argument that NEPA required the NRC to allow them a hearing (or to participate in the mandatory hearing) is baseless and wholly

unsupported by the law. *Union of Concerned Scientists*, 920 F.2d at 56-57 (explaining that NEPA provides no right to hearing and that "NEPA does not alter the procedures agencies may employ in conducting public hearings").

CONCLUSION

For the foregoing reasons, the Court should dismiss the Petition and affirm the NRC's determinations below.

Dated: August 2, 2012

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation set by the Court's Order issued April 3, 2012 in this Proceeding and Fed. R. App. P. 32(a)(7)(B), because this brief contains 8,744 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2007 was used for this purpose.

This brief complies with the typeface requirements of D.C. Cir. Rule 32(a)(1) and Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

Pursuant to Circuit Rule 25, the undersigned hereby certifies that the foregoing document has been served by electronic mail through the Court's CM/ECF system and/or by United States first class mail, postage prepaid, on the parties indicated on the attached Service List.

Dated at Washington, D.C. this 2nd day of August, 2012.

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ADDENDUM

REGULATION CITED

10 C.F.R. § 2.326 Motions to reopen.

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless 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.

(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. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).