UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUSTAINABLE ENERGY and ECONOMIC DEVELOPMENT (SEED), et al.,	)	
Petitioners,	)	**No. 11-1457**
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

FEDERAL RESPONDENTS' MOTION TO DISMISS

The U.S. Nuclear Regulatory Commission (NRC) and the United States of America (together, Federal Respondents) hereby move for dismissal of the petition for review for lack of jurisdiction.

Pursuant to the Hobbs Act's jurisdictional provision, 28 U.S.C. § 2342(4), there must be a "final order" from the agency before the Court may exercise jurisdiction. Once a final order issues, a 60-day window opens for filing petitions for review. Petitions filed before, or after, the 60-day window must be dismissed for lack of jurisdiction.

As this Court has held repeatedly, in an NRC licensing proceeding, the "final order" is generally the order that grants or denies the license. Therefore, in the NRC licensing proceeding at issue here, the "final order" would be an NRC order granting or denying licenses for the two proposed new nuclear power reactors at the Comanche Peak site in Texas.

The petitioners, however, filed this petition for review without awaiting a final licensing order. Their petition for review challenges an interlocutory NRC adjudicatory decision rejecting two of their claims, but a final NRC licensing decision for Comanche Peak is likely still *years away*. As parties whose claims were admitted for hearing in the NRC licensing proceeding, the petitioners' ultimate right to seek judicial review of a final NRC licensing decision, if and when one eventually issues, is well-established. No interlocutory review in this Court is necessary to protect that right. Therefore, the petition for review is incurably premature under the Hobbs Act, as well as unripe, and it must be dismissed.

Furthermore, even were this a situation where the petitioners lawfully might pursue immediate review of an interlocutory NRC order, this particular petition for review would fail because when it was filed the petitioners were still pursuing adjudicatory relief at NRC in the Comanche Peak proceeding. Under this Court's

precedents, this fact alone renders the challenged NRC order non-final, thereby also requiring dismissal of the petition.

BACKGROUND

The procedural background of our motion to dismiss is intricate. But the record, as explained below, indicates that there has not yet been a final NRC licensing decision concerning the proposed new Comanche Peak reactors and also indicates that at the time the petitioners filed suit in this Court some of the petitioners' challenges remained pending at NRC.

A. SEED admitted as a party to the NRC proceeding

In 2008, Luminant Generation Company, LLC (Luminant) filed an application with the NRC for "combined licenses" to construct and operate two new nuclear power reactors at the existing Comanche Peak nuclear power facility in Somervell County, Texas.

This application remains pending before NRC. Completion of the NRC staff's safety review is not expected until approximately July of *2014*, with a final Commission decision on the license application not expected until December of 2014.[1]

[1] *See* "Application Review Schedule for the Combined License Application for Comanche Peak Nuclear Power Plant, Units 3 and 4," *available at* http://www.nrc.gov/reactors/new-reactors/col/comanche-peak/review-schedule.html.

In April 2009, following NRC publication of a notice of opportunity for a hearing on the application, petitioners Sustainable Energy and Economic Development Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam (to be referred to collectively as SEED) jointly petitioned NRC for intervention and requested a hearing regarding the Comanche Peak application. *See* CLI-11-09, 74 NRC __ (Oct. 4, 2011), Slip Op. at 1-2 (Attachment A). Nita O'Neal, Don Young, and J. Nile Fisher are individual members of Sustainable Energy and Economic Development Coalition, Public Citizen, and True Cost of Nukes, respectively. *See* Certificate as to Parties, Rulings and Related Cases (filed Dec. 29, 2011).

At NRC, a three-judge Atomic Safety and Licensing Board (ASLB) generally presides over the initial stage of contested NRC licensing adjudications. The ASLB rules on petitions for intervention and the admissibility of prospective intervenors' contentions (*i.e*., claims), and then adjudicates any contentions that are admitted for hearing. Parties disagreeing with the ASLB's decisions on intervention, contention admissibility, or the merits of admitted contentions may seek appellate review by the five-member Commission that heads the agency.

SEED's initial joint intervention petition and hearing request filed with NRC contained a variety of individual contentions asserting deficiencies in the Comanche Peak application. On August 6, 2009, the ASLB granted SEED's

intervention petition and hearing request in part, finding two of SEED's proffered contentions admissible for hearing and admitting SEED as a party to the licensing proceeding.[2] *See* CLI-11-09, Slip Op. at 3; LBP-09-17, 70 NRC 311, 382-83 (2009).

B. SEED's contentions on Mitigative Strategies Report

In May 2009, Luminant filed with NRC a "Mitigative Strategies Report" to supplement its Comanche Peak application and address implementation of various mitigation measures under a particular NRC regulation. *See* CLI-11-09, Slip Op. at 2. The regulation, a product of NRC's post-9/11 security-improvement initiatives, addresses mitigation measures to be taken in the event that "large areas" of a nuclear plant are lost due to fires or explosions. *See* 10 C.F.R. § 50.54(hh)(2). After Luminant's report was filed, SEED filed five new contentions with the ASLB challenging the adequacy of the report. CLI-11-09, Slip Op. at 3.

In further proceedings, SEED's contentions that had been admitted for hearing were dismissed on the merits under NRC's summary disposition rule (10 C.F.R. § 2.710) and on mootness grounds, and all of SEED's Mitigative Strategies

[2] Later in the proceeding, a third SEED contention—filed subsequent to this first set of contentions—was also technically admitted for hearing by the ASLB, although the ASLB essentially merged it with one of the previously admitted contentions to adjudicate them as a single contention. *See* LBP-10-10, 71 NRC 529, Slip Op. at 59-76, 86-87 (June 25, 2010) (Available online via NRC's public Agency-wide Documents Management and Access System (ADAMS), located at http://www.nrc.gov/reading-rm/adams.html, via accession number ML101760388).

Report contentions were rejected as inadmissible. *See* CLI-11-09, Slip Op. at 3-4; LBP-11-04, 73 NRC __ (Feb. 24, 2011), Slip Op. at 40;[3] LBP-10-10, Slip Op. at 15-37. SEED then, on March 11, 2011, petitioned for Commission appellate review of the ASLB's dismissal of two of its Mitigative Strategies Report contentions. *See* CLI-11-09, Slip Op. at 1 n.1, 4.

The first of these two contentions had asserted that the Mitigative Strategies Report, in explaining how Luminant planned to mitigate "loss of large areas of plant" events, was required to, but did not, "reference…the numbers and magnitudes of the fires and explosions that would be expected." CLI-11-09, Slip Op. at 8. The other contention had alleged that the Mitigative Strategies Report did not demonstrate that Luminant's radiation dose projection models "are adequate to project doses to onsite responders" during a loss of large areas of plant event. CLI-11-09, Slip Op. at 17-18.

On October 4, 2011, in the agency decision that the petitioners are now asking this Court to review (CLI-11-09[4]), the Commission rejected SEED's claims on appeal.

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[3] ADAMS Accession No. ML110550620.

[4] SEED's petition for review refers to CLI-11-09 as being issued on September 27, 2011. While the decision was indeed issued to the parties on that date, a subsequent 7-day period was provided to allow the applicant to inspect the decision for material that might require redaction before the decision could be

C. SEED's ongoing pursuit of adjudicatory relief at NRC

After the Comanche Peak proceeding's evidentiary record before the ASLB had closed, and while SEED's petition for appellate review filed with the Commission on the two Mitigative Strategies Report contentions (*i.e.*, the petition for review that led to the Commission's CLI-11-09 decision) remained pending, SEED, on August 10, 2011, filed with the ASLB a "Motion to Reopen the Record and Admit Contention Regarding the Safety and Environmental Implications of the [NRC] Task Force Report on the Fukushima Dai-ichi Accident" (Motion to Reopen). *See* CLI-11-09, Slip Op. at 25 n.97. This proposed new contention drew from a recently released NRC task force report prompted by the events at the Fukushima Dai-ichi plant in Japan, following the March 11, 2011, earthquake and tsunami.[5] The contention asserts that NRC's Environmental Impact Statement for Comanche Peak must address the Task Force Report findings and recommendations, which covered a broad range of severe accident prevention and mitigation issues. *See* LBP-11-27, 74 NRC __ (Attachment B).[6] Under NRC regulations, motions to reopen closed evidentiary records are permitted and may be

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issued publicly. No redactions were made, but the publicly-available decision is nonetheless separately dated October 4, 2011.

[5] Several other substantively identical motions were also filed with respect to other pending license applications.

[6] ADAMS Accession No. ML11291A126.

granted to permit adjudication of significant new contentions based upon new information. *See* 10 C.F.R. §§ 2.309(f)(2), 2.326.

On October 18, 2011, the ASLB denied SEED's Motion to Reopen. LBP-11-27. The ASLB decision rested largely on a previous Commission decision denying, as premature, various petitions seeking, among other things, NRC suspension of adjudicatory, licensing, and rulemaking activities because of the Fukushima events. LBP-11-27, Slip Op. at 11-15.

Also on October 18, 2011, the Commission issued a "Staff Requirements Memorandum" (SRM) directing NRC staff to undertake various actions in response to the Fukushima task force report.[7] On the theory that this SRM cured the prematurity problem relied upon by the ASLB in its denial of the Motion to Reopen, SEED, on October 28, 2011, filed with the ASLB a "Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention" (Motion to Reinstate). *See* LBP-11-36, 74 NRC __ (Attachment C). This motion again sought reopening of the Comanche Peak combined license proceeding, and the

[7] "Staff Requirements – SECY-11-0124 – Recommended Actions to be Taken without Delay From the Near-Term Task Force Report" (Oct. 18, 2011), available at http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2011/2011-0124srm.pdf.

contention SEED wanted to adjudicate was the same as the contention it had previously proposed in its Motion to Reopen.[8]

While that Motion to Reinstate was pending with the ASLB, SEED, on November 2, 2011, sought Commission appellate review of the ASLB's decision denying the Motion to Reopen.[9]

On November 28, 2011, while SEED's Motion to Reinstate was still pending before the ASLB, and while SEED's appeal of the ASLB's denial of its Motion to Reopen remained pending before the Commission, SEED filed the instant petition for review in this Court challenging the Commission's CLI-11-09 decision.

Two days after SEED filed its petition for review in this Court, the ASLB denied SEED's Motion to Reinstate. LBP-11-36, 74 NRC __. SEED has not sought Commission appellate review of that decision. But SEED's appeal to the Commission from the ASLB's denial of its original Motion to Reopen remains pending.

[8] Again, other petitioners also filed substantively similar motions with respect to other pending license applications.

[9] Petition for Review of LBP-11-27 (ADAMS Accession No. ML11306A339).

ARGUMENT

This court's jurisdiction, under the Hobbs Act, is premised on the existence of a "final order." *See* 28 U.S.C. § 2342(4). When an agency issues a final order, a 60-day "window" commences during which any petitions for review must be filed. *See Public Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988). Review petitions filed before, or after, this 60-day window must be dismissed for lack of jurisdiction. *Id.*

This Court has repeatedly stated that the "final order" in an NRC licensing proceeding is generally the order issuing or denying the license. Here, NRC has indicated on the public record (note 1 *supra*) that it does not anticipate issuing a final decision regarding Comanche Peak until December 2014, making SEED's petition for review *three years* premature. Having been admitted as a party to the NRC proceeding, SEED's rights to appeal from a final NRC licensing order are already protected, and the Commission's CLI-11-09 order—or any other interim NRC orders SEED should wish to challenge—may be reviewed then. SEED's current petition for review is therefore premature, as well as unripe, and must be dismissed.

Furthermore, even if SEED somehow were not required to await a final NRC licensing decision before suing in this Court, the NRC order SEED is challenging here cannot be "final" with respect to SEED, because SEED's

adjudicatory efforts at the NRC remain ongoing. For this reason as well, the challenged Commission adjudicatory decision cannot qualify as a "final order" under the Hobbs Act.

The Federal Respondents accordingly request that this Court dismiss the petition for review.

I. A party to an NRC licensing proceeding must await a final NRC decision on the license before seeking judicial review.

The Commission has not yet made a final decision on whether to issue licenses for the proposed Comanche Peak reactors. Accordingly, there is no "final order" for SEED to appeal. This renders SEED's petition for review incurably premature under the Hobbs Act, and also unripe. Dismissal is therefore required.

Under the Hobbs Act, this Court's jurisdiction is limited to review of "final orders." 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b). "Courts exercising jurisdiction under [the Hobbs Act] have narrowly construed the term 'final order.'"*NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982). For an agency order to be considered final, "the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature," and "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations and citations omitted).

Applying these principles to NRC licensing proceedings, this Court has held that "it is the *order granting or denying the license* that is ordinarily the final order." *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998) (emphasis added); *see Mass. v. NRC,* 924 F.2d 311, 322 (D.C. Cir. 1991); *NRDC*, 680 F.2d at 815-16; *see also Ohio Citizens for Responsible Energy, Inc. v. NRC*, 803 F.2d 258, 260 (6th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Ecology Action v. AEC*, 492 F.2d 998, 1000-01 (2d Cir. 1974). Permitting judicial review of non-final orders "would make unclear the point at which agency orders become final," *City of Benton*, 136 F.3d at 826, and would "disrupt the orderly process of adjudication." *See Alaska v. FERC*, 980 F.2d 761, 765 (D.C. Cir. 1992).

Because the Hobbs Act creates a jurisdictional 60-day "window" for requesting federal court review after a "final order" is issued, *Public Citizen*, 845 F.2d at 1109, and because this "window" for the Comanche Peak licensing proceeding is still three years away from opening, this Court must dismiss SEED's petition for review.

As this Court has recognized, it makes practical sense to interpret the term "final order" narrowly. If the agency proceeding is not yet complete when judicial review is sought, it would be imprudent for the reviewing court nonetheless to take up the case. That is because it remains possible that future developments in the ongoing agency proceeding would render the dispute before the court "moot or

insignificant," resulting in "a waste of judicial time and effort." *See Alaska*, 980 F.2d at 764; *see also Consolidated Edison Co. of New York, Inc. v. FERC*, 2004 WL 764494 (D.C. Cir. 2004) (unpublished). In addition, interlocutory judicial review can often result in delaying the final outcome of the proceeding below and "needlessly intrud[ing]" on its conduct. *Alaska*, 980 F.2d at 764. Thus, it typically makes sense to require that agency proceedings be complete before a court undertakes such review.

To be sure, there is an NRC case decided by the Seventh Circuit that points in a contrary direction, toward a more expansive interpretation of "final order." But in our view the Seventh Circuit approach cannot be squared with this Circuit's precedents. In *Environmental Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006), the Seventh Circuit held that a Commission rejection of an admitted party's contentions in an NRC "Early Site Permit" proceeding via the agency's summary-disposition process was directly reviewable even absent a final NRC order granting or denying the permit. In the Seventh Circuit's view, rejecting admitted contentions on summary disposition is comparable, for Hobbs Act purposes, to an agency's complete denial of a petition to intervene and participate in an agency proceeding. Both the Seventh Circuit and this Circuit recognize that complete denial of intervention presents a special circumstance necessitating an

immediate right to seek judicial relief. *See Envtl. Law & Policy Ctr.*, 470 F.3d at 681; *Alaska*, 980 F.2d at 763.

But the Seventh Circuit failed even to acknowledge, let alone address, the key reason for allowing immediate judicial review of intervention petition denials: having failed to achieve status of a formal "party" to the litigation, a putative intervenor cannot later seek review of the final judgment on the merits. *Alaska*, 980 F.2d at 763 (citing *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 524 (1947)); *see also Thermal Ecology Must be Preserved v. AEC*, 433 F.2d, 524, 525 (D.C. Cir. 1970). In the Hobbs Act context, this is because only a "*party* aggrieved" by an agency order may challenge it in the court of appeals. 28 U.S.C. § 2342(4) (emphasis added). The exception in the case of intervention petition denials, therefore, protects judicial-review rights that would otherwise be lost. *Alaska*, 980 F.2d at 763.

In contrast, it is well established that where, as is the case with SEED, an intervention petitioner *has* been admitted as a party to the agency proceeding, the party can safely await the final agency order before petitioning for review under the Hobbs Act, and, after filing a timely petition for review, may challenge previous, interlocutory agency orders that were issued during the course of the

proceeding. *See Alaska*, 980 F.2d at 763; *NRDC*, 680 F.2d at 816; *Thermal Ecology*, 433 F.2d at 525.[10]

In sum, the Hobbs Act requires dismissal of SEED's petition for review, and SEED loses no judicial-review rights by waiting until after NRC makes a final licensing decision. Once the Commission decides whether or not to issue combined licenses to Luminant, if that decision does not favor SEED, SEED may then file a petition for review challenging any NRC decisions or orders made during the course of the licensing proceeding, including the same CLI-11-09 decision that SEED attempts to challenge now. *See NRDC*, 680 F.2d at 816-17; *Thermal Ecology*, 433 F.2d at 526.

Of course, with NRC's safety review still ongoing and not expected to be complete until 2014, the possibility also remains that the Commission may deny the Comanche Peak application, "thereby avoiding judicial review entirely" on petitioners' claims. *NRDC*, 680 F.2d at 817. Other developments could also potentially occur over the next three years that could address or moot SEED's

[10] In any event, this case is distinguishable on its facts from *Environmental Law and Policy Center*. In that case, the putative intervenor's adjudicatory activities at NRC were complete when it filed its petition for review, and NRC staff had at least issued a draft of its relevant review. 470 F.3d at 681. In the instant case, by contrast, SEED continues to pursue adjudicatory relief at NRC, and NRC staff's first complete safety review issuance—the so-called "SER with Open Items"—is not expected until April 2013. *See* http://www.nrc.gov/reactors/new-reactors/col/comanche-peak/review-schedule.html.

concerns.[11] Thus, in addition to being legally required, dismissal here would be sensible under the circumstances.

Finally, the factors discussed above also render this dispute unripe, which independently requires dismissal. As this Court recently reiterated, "federal courts may exercise power only in the last resort and as a necessity," and so "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *In re Aiken County*, 645 F.3d 428, 434 (D.C. Cir. 2011) (internal quotation marks omitted). As in *Aiken County*, the outcome of the NRC licensing proceeding here remains uncertain, and the petitioners can safely wait to seek judicial review if and when their feared outcome eventually occurs. *See id.* at 435. For ripeness reasons as well, then, the Court lacks jurisdiction and must dismiss SEED's petition for review.

Accordingly, with a final NRC licensing order on Comanche Peak still years away, both the Hobbs Act and ripeness doctrine require dismissal for lack of jurisdiction.

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[11] For instance, it is always possible that an applicant's plans may change, causing it to withdraw, or at least suspend, its new reactor application after submitting it for NRC review. In the case of at least some of the 18 new nuclear plant applications NRC has received in recent years, this has already occurred. *See, e.g.*, http://www.nrc.gov/reactors/new-reactors/col/callaway.html; http://www.nrc.gov/reactors/new-reactors/col/grand-gulf.html; http://www.nrc.gov/reactors/new-reactors/col/river-bend.html; http://www.nrc.gov/reactors/new-reactors/col/victoria.html.

II. SEED's continued pursuit of adjudicatory relief at NRC also renders this petition for review incurably premature.

Even if one assumes, *arguendo*, that issuance of a final NRC licensing order regarding Comanche Peak is not necessary before SEED petitions this Court for review of a particular NRC adjudicatory order, it is at least true that SEED's *own* administrative adjudicatory efforts at the NRC must first be complete. Here, though, SEED's litigation efforts at NRC were still ongoing when it filed the instant petition for review. Therefore, for that reason as well, this Court must dismiss SEED's petition.

The jurisdictional defect is evident here due to three Hobbs Act principles: (1) a party's motion asking an agency to reconsider an order renders the order non-final as to the moving party; (2) motions to reopen are equivalent to reconsideration motions in this respect; and (3) Hobbs Act finality applies party-by-party, not issue-by-issue. Together, these principles make clear that SEED may not, with respect to a single licensing proceeding, seek judicial review of some issues in this Court while simultaneously asking the NRC to reopen the proceeding to adjudicate another issue.

Where a party requests that an agency reconsider what would otherwise be a final agency decision, this Court has adopted a party-based approach to determining whether the decision to be reconsidered can be deemed "final" for jurisdictional purposes. In this Court, "once a party has filed for administrative

reconsideration . . . the agency action with respect to that party is nonfinal, and thus nonreviewable, until the agency acts on the reconsideration request." *ICG Concerned Workers Ass'n v. United States*, 888 F.2d 1455, 1458 (D.C. Cir. 1989) (describing the "party-based" approach that the Court indicated it was "[a]dopting").

The same approach would apply even if a motion filed with the agency is styled as a "motion to reopen" rather than a "motion for reconsideration." *See Fritsch v. ICC*, 59 F.3d 248, 251 n.3 (D.C. Cir. 1995).

As this Court has recognized, "[t]he danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction . . . arises whether a party seeks agency reconsideration before, simultaneous with, or after filing an appeal or petition for judicial review. So long as a request for agency reconsideration remains pending, therefore, [an] attempt to seek judicial review must be dismissed as 'incurably premature.'" *Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993).

In addition, an order resolving only some issues raised by a party in an NRC licensing action is not "final" for jurisdictional purposes if the party still has other adjudicatory claims pending. *See Thermal Ecology,* 433 F.2d at 526. Accordingly, while, for example, the complete denial of a party's petition for intervention can permit an appeal prior to a final agency licensing decision, *Alaska*, 980 F.2d at

763, this avenue is not available to parties whose litigation efforts at the agency have not yet reached the "end of the line." *See id.*

In the instant case, SEED's pursuit of adjudicatory remedies before NRC has not yet reached the "end of the line," as evidenced by SEED's continued efforts to reopen the evidentiary record and introduce a new contention in the NRC proceeding. Those efforts were ongoing at the time SEED sought review in this Court and remain ongoing today (the Commission has not yet acted on SEED's appellate challenge to the ASLB's rejection of SEED's motion to reopen). Even if CLI-11-09 could otherwise be considered a Hobbs Act "final order," then, SEED's ongoing efforts to reopen the evidentiary record in the proceeding to litigate a new issue would render that order non-final. This Court accordingly lacks jurisdiction under the Hobbs Act, necessitating dismissal of the petition for review.

The instant case highlights the appropriateness of these jurisdictional rules. If SEED's litigation efforts currently pending before NRC tribunals succeed, and the result is denial of Comanche Peak's application, the instant lawsuit over other SEED challenges to the Comanche Peak application would become moot. Furthermore, concurrent, parallel litigation in different forums of different SEED contentions regarding Comanche Peak could, at least conceivably, yield inconsistent or confusing results.

Dismissal of the petition for review is therefore not only compelled by controlling precedent in this Circuit but also would reflect prudent judicial-review policy.

CONCLUSION

Accordingly, the Federal Respondents respectfully request that the Court dismiss the petition for review for lack of jurisdiction.

Respectfully submitted,

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Dated: January 13, 2012

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-11-09

MEMORANDUM AND ORDER

Today we resolve Intervenors' petition for review of an Atomic Safety and Licensing Board decision that dismissed certain new contentions.[1] For the reasons set forth below, we deny the petition for review, and affirm the Board's decision.

[1] *Intervenors' Petition for Review Pursuant to 10 C.F.R. § 2.341* (Mar. 11, 2011) (Petition for Review) (non-public). Intervenors are the Sustainable Energy and Economic Development Coalition, Public Citizen, True Cost of Nukes, and Texas State Representative Lon Burnam. Where applicable we have indicated whether the documents that we cite are non-publicly available. Some of these documents have been redacted and released pursuant to the Sustainable Energy and Economic Development Coalition's February 2010 Freedom of Information Act request. The redacted documents are available through the Agencywide Documents Access and Management System (ADAMS). *See* Letter from SEED Coalition to FOIA/Privacy Officer, U.S. NRC (Feb. 26, 2010) (ADAMS accession no. ML100910567); FOIA Request 2010-0145 (ML102160598) (package).

I. BACKGROUND

This proceeding concerns the combined license (COL) application filed by Luminant Generation Company LLC (Luminant), to construct and operate two new nuclear reactors at the Comanche Peak site in Somervell County, Texas. In accordance with the notice of hearing issued for this proceeding,[2] Intervenors filed a joint hearing request.[3] One of Intervenors' proposed initial contentions, Contention 7, claimed that the COL application was incomplete because it did not address newly-promulgated regulations concerning guidance and strategies to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities in the event of loss of large areas of the plant due to explosions or fire.[4] Luminant later submitted its "Mitigative Strategies Report," a supplement to its COL application to address these regulations, and argued that the Board should dismiss Contention 7 as moot.[5] The first part of the report describes the proposed mitigative strategies in narrative form.[6] The second part of the report is organized as a two-column table – one column describes the expectation or item that the

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[2] Luminant Generation Company LLC; Application for the Comanche Peak Nuclear Power Plant Units 3 and 4; Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene, 74 Fed. Reg. 6177 (Feb. 5, 2009).

[3] *Petition for Intervention and Request for Hearing* (Apr. 6, 2009).

[4] *Id.* at 22-26.

[5] *See* Letter from Rafael Flores, Senior Vice President and Chief Nuclear Officer, Luminant Generation Co., LLC, to U.S. NRC (May 22, 2009) (Mitigative Strategies Report Transmittal Letter), unnumbered attachment 2, Mitigative Strategies Report for Comanche Peak Units 3 & 4 in Accordance with 10 CFR 52.80(d), Rev. 0 (ML091880970) (non-public) (Mitigative Strategies Report); Letter from Steven P. Frantz, counsel for Luminant, to Administrative Judges (May 26, 2009), at 2.

[6] *See* Mitigative Strategies Report at 1-8.

mitigative measure is intended to address (the "expectation/safety function" column), and the second column describes Luminant's plans to address it (the "commitment/strategy" column).[7] Intervenors obtained access to the report, which is not publicly available because it contains sensitive unclassified non-safeguards information (SUNSI), pursuant to a protective order.[8]

The Board granted Intervenors' petition, admitting two of their proposed contentions, but deferred ruling on Contention 7 to permit further consideration of the mootness issue.[9] In addition to arguing that Contention 7 was not moot, Intervenors submitted five new contentions challenging Luminant's Mitigative Strategies Report.[10]

In LBP-10-5, the Board addressed both Contention 7 and the admissibility of the five Mitigative Strategies Report contentions.[11] The Board found that Luminant's filing the Mitigative

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[7] *See* Mitigative Strategies Report Transmittal Letter, unnumbered attachment 3, Mitigative Strategies Table, at 1-15 (ML091880970) (non-public) (Mitigative Strategies Table).

[8] *See* Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009), at 1 (unpublished) (governing access to and use of the information in the Mitigative Strategies Report and "any related documents"). The order instructed the parties to file documents containing protected information on the non-public docket. *See id.* at 3.

[9] LBP-09-17, 70 NRC 311, 382-83 (2009).

[10] *See Petitioners' Brief Regarding Contention Seven's Mootness* (July 20, 2009) (non-public); *Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing* (Aug. 10, 2009) (non-public) (Mitigative Strategies Report Contentions). The pleadings and the full text of the Board decision discussing these contentions also contain SUNSI, and are likewise not publicly available.

[11] LBP-10-5 (Mar. 11, 2010) (slip op.) (non-public). Although a redacted version of LBP-10-5 has since been published, *see* LBP-10-5, 71 NRC 329 (2010), we cite the non-public slip opinion for references to the portions of the Board's decision that were redacted in the published version.

Strategies Report rendered Contention 7 moot, and rejected all five new contentions.[12] Recently, the Board terminated the contested adjudication on Luminant's COL application after granting summary disposition of the sole remaining admitted contention.[13] With the Board's termination of the proceeding, the Board's interlocutory rulings on contention admissibility, including LBP-10-5, became ripe for appeal.[14] Intervenors thereafter filed the instant petition for review.[15]

II. DISCUSSION

We will grant a petition for review at our discretion, giving due weight to the existence of a substantial question with respect to one or more of the following considerations:

> (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

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[12] *Id.* at 347. As discussed below, however, Judge Young would have admitted a narrowed version of one of the new contentions.

[13] LBP-11-4, 73 NRC __ (Feb. 24, 2011) (slip op. at 40).

[14] *See* 10 C.F.R. § 2.341(b).

[15] Luminant and the NRC Staff oppose the petition for review. *See Luminant's Answer in Opposition to Intervenors' Petition for Review of LBP-10-5* (Mar. 21, 2011) (non-public) (Luminant Answer); *NRC Staff Answer to Intervenors' Petition for Review* (Mar. 21, 2011) (non-public) (Staff Answer). Intervenors replied to Luminant's and the Staff's answers. *Intervenors' Reply to Applicant's Answer to Petition for Review* (Mar. 28, 2011) (non-public) (Intervenors' Reply to Luminant); *Intervenors' Reply to Staff's Answer to Petition for Review* (Mar. 29, 2011) (non-public) (Intervenors' Reply to Staff). Intervenors filed the reply to the Staff's answer a day past the deadline. Intervenors request us to permit their late filing, and advise that Luminant and the Staff do not oppose the motion. *Intervenors' Unopposed Motion for Leave to File Reply to Staff's Answer to Petition for Review, Out of Time,* Instanter (Mar. 29, 2011) (non-public). Given that the other parties do not object, and given that no party was harmed by the brief delay, we grant Intervenors' motion.

(ii) a necessary legal conclusion is without governing precedent or is a departure from 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 we may deem to be in the public interest.[16]

Intervenors argue that we should take review "because the regulations at issue have not been the subject of a prior adjudication or Commission decision," and taking review in this case will "provide administrative precedent" for subsequent adjudications.[17] They also assert that their petition raises "crucial policy question[s]" on the effectiveness of the mitigative strategies and the adequacy of the strategies to protect responders in a loss of large area event. We do not find a substantial question warranting review.

At bottom, Intervenors' petition raises basic concepts of contention admissibility, for which there is a wealth of governing precedent. We defer to licensing board rulings on contention admissibility absent error of law or abuse of discretion.[18] As discussed below, the Board did not err or abuse its discretion in rejecting Intervenors' contentions. Before we discuss

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[16] 10 C.F.R. § 2.341(b)(4)(i)-(v).

[17] Petition for Review at 9 (citing 10 C.F.R. § 2.341(b)(4)(ii)).

[18] *See Progress Energy Florida, Inc.* (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 29, 46-48 (2010); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260, 275-77 (2009).

the specific issues raised in the petition for review, however, we provide a brief background on our recently-promulgated mitigative strategies regulations.

After the September 11, 2011 terrorist attacks, the NRC issued a series of orders to existing licensees requiring various interim safeguards and security measures. One of these orders directed the implementation of mitigative strategies to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities in the event of loss of large areas of the plant due to explosions or fire.[19] Subsequently, we amended our regulations to codify generically-applicable security requirements. The rule was informed by the requirements of the security orders, and included new provisions identified as part of lessons learned from the Staff's review of licensee compliance with the security orders, as well as other, related activities.[20] The Power Reactor Security Rule was the result of this undertaking, which included two provisions dealing with the implementation of mitigative strategies that are relevant here: 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).[21]

Section 50.54(hh)(2) sets forth the mitigative strategies requirements for licensees. It provides that:

> [e]ach licensee shall develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire, to include strategies in the following areas:

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[19] *See* Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926, 13,926, 13,928 (Mar. 27, 2009) (Power Reactor Security Rule) (discussing the "B.5.b" provisions of the order issued to all operating licensees on February 25, 2002).

[20] *Id.* at 13,927.

[21] *Id.* at 13,969-70.

(i) [f]ire fighting;

(ii) [o]perations to mitigate fuel damage; and

(iii) [a]ctions to minimize radiological release.[22]

Section 52.80(d) applies to COL applicants, like Luminant, requiring each COL application to include a "description and plans for implementation of the guidance and strategies" required by section 50.54(hh)(2).[23] Applicants and licensees alike may use the guidance provided in the industry-generated guidance document, NEI 06-12, Revision 2, "as an acceptable means for developing and implementing the mitigative strategies."[24]

Luminant submitted its COL application prior to the effectiveness of the final Power Reactor Security Rule, but then subsequently submitted its Mitigative Strategies Report to satisfy the requirements of 10 C.F.R. § 52.80(d). Luminant stated that it prepared the report using a May 2009 revision to NEI 06-12, Revision 2.[25] Intervenors' contentions are directed at

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[22] 10 C.F.R. § 50.54(hh)(2)(i)-(iii). The requirements of section 50.54(hh)(2) are conditions in every Part 50 operating license. 10 C.F.R. § 50.54.

[23] 10 C.F.R. § 52.80(d).

[24] Power Reactor Security Rule, 74 Fed. Reg. at 13,958. *See generally* NEI 06-12, B.5.b Phase 2 & 3 Submittal Guideline, Rev. 2 (Dec. 2006) (ML070090060) (public). The Nuclear Energy Institute has developed Revision 3 to NEI 06-12, which it submitted to the Staff for consideration and possible endorsement. *See* Letter from Douglas J. Walters, Senior Director, New Plant Deployment, Nuclear Generation Division, NEI, to U.S. NRC (July 17, 2009), at 1 (ML092120157) (non-public). The Staff has endorsed Revision 3. *See* DC/COL-ISG-016, [Final] Interim Staff Guidance, Compliance with 10 CFR 50.54(hh)(2) and 10 CFR 52.80(d) Loss of Large Areas of the Plant due to Explosions or Fires from a Beyond-Design Basis Event (June 9, 2010), at 6 (ML101940484) (public).

[25] *See* Mitigative Strategies Report Transmittal Letter at 1. *See generally* Letter from Douglas J. Walters, Senior Director, New Plant Deployment, Nuclear Generation Division, NEI, to Thomas (continued. . .)

Luminant's Mitigative Strategies Report, and are labeled "MS" to distinguish the new contentions from the contentions in their initial petition.[26] Intervenors challenge "two aspects" of the Board's decision, but, in essence, they challenge the dismissal of Contentions MS-1 and MS-3.[27] We discuss each contention in turn.

A. Contention MS-1

Contention MS-1 states that:

> [the Mitigative Strategies Report] is deficient because it omits any reference to the numbers and magnitudes of the fires and explosions that would be expected, for example, from the impact of a large commercial airliner(s). Without such reference there is an inadequate basis to determine whether the proposed mitigative strategies are adequate to comply with 10 C.F.R. § 50.54(hh)(2). Compliance with 10 C.F.R. § 50.54(hh)(2) cannot be determined without a determination of the full spectrum of damage states. At a minimum, [Luminant] should be required to describe damage footprints both quantitatively and qualitatively, including composite damage footprints, that are reasonably expected with an airstrike(s) and include descriptions of anticipated physical damage, shock damage, fire spread, radiation exposures to emergency responders and the public and other effects such as failure of structural steel.[28]

(. . .continued)

A. Bergman, Director, Division of Engineering, Office of New Reactors, U.S. NRC (May 1, 2009) (ML091310577) (non-public) (transmitting a revised version of Revision 2 that pre-dated the submittal of Revision 3).

[26] *See Intervenors' Consolidated Response to the Answers of Applicant and NRC Staff to the Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)* (Sept. 11, 2009), at 3 n.3 (non-public).

[27] *See* Petition for Review at 1, 3 n.4, 5. While Intervenors do not directly address Contention MS-1, their references all point to Contention MS-1 even though the issues raised in this contention underlie all five Mitigative Strategies contentions. *See* Mitigative Strategies Report Contentions at 13, 15, 17-18.

[28] Mitigative Strategies Report Contentions at 5 (citing 10 C.F.R. § 50.150; NEI 07-13, Methodology for Performing Aircraft Impact Assessments for New Plant Designs, Rev. 7, Public Version (May 2009), at 32-36 (ML091490723) (NEI 07-13, Revision 7)).

Intervenors assert that Luminant has not met its burden of showing that the Mitigative Strategies Report is effective because it does not specify the underlying assumptions regarding the initiating events and the nature and extent of the expected damage that the mitigative strategies are intended to address.[29] "Without baseline assumptions about the number and magnitude of fires and explosions," Intervenors argue, "there is no reasonable assurance that the mitigative strategies will be adequate."[30]

Although they acknowledge that sections 52.80(d) and 50.54(hh)(2) do not specify the number and magnitude of fires and explosions that a COL applicant must consider, Intervenors argue that the regulatory history contemplates that applicants will use aircraft attacks as a baseline for the expected damage.[31] Intervenors argue that the results of an aircraft impact are quantifiable and "known sufficiently to tailor [an appropriate] response strategy."[32] Intervenors suggest that the Aircraft Impact Rule and its corresponding guidance should inform Luminant's choice of mitigative strategies because the rule and the guidance provide descriptions of the effects of aircraft impacts.[33]

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[29] *See id.* at 11.

[30] *Id.* at 11-12.

[31] *Id.* at 6-7.

[32] *Id.* at 9.

[33] *Id.* at 5, 10-11 (citing 10 C.F.R. § 50.150; NEI-07-13, Revision 7). The Aircraft Impact Rule was promulgated separately from the Power Reactor Security Rule. *See* Final Rule, Consideration of Aircraft Impacts for New Nuclear Power Reactors, 74 Fed. Reg. 28,112 (June
(continued. . .)

Intervenors also question Luminant's use of the mitigative strategies guidance in NEI 06-12 because it permits the use of a "flexible response," without requiring a discussion of the number and magnitude of fires and explosions.[34] According to Intervenors, the guidance is contradictory because on the one hand it explains that there are no means to predict the nature and extent of damage to the plant, while on the other it implies that there is a known "spectrum of potential damage states."[35] Intervenors assert that if there is a known spectrum of potential damage states, then Luminant must define the damage states and demonstrate that its strategies will effectively mitigate them.[36]

The Board dismissed Contention MS-1 because it did not find in the rules or the Atomic Energy Act any express or implied requirement that an applicant discuss damage states or the number and magnitude of fires and explosions to demonstrate the

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12, 2009) (Aircraft Impact Rule). The rule requires designers of new nuclear plants to conduct an assessment of the effects of a large commercial aircraft impact on a nuclear power plant, and based on that assessment, discuss design features that will mitigate the effects of an aircraft impact. *See id.* at 28,112-13. *See also* Power Reactor Security Rule, 74 Fed. Reg. at 13,957. The Power Reactor Security Rule differs from the Aircraft Impact Rule because it focuses on operational activities rather than design features, and because it focuses on fires and explosions from any cause, rather than aircraft impacts alone. *See* Power Reactor Security Rule, 74 Fed. Reg. at 13,957-58.

[34] Mitigative Strategies Report Contentions at 8.

[35] *Id.* at 9 (pointing out that the guidance acknowledges that the mitigative strategies might not "'ensure success under the full spectrum of potential damage states'").

[36] *See id.* at 9.

effectiveness of the proposed mitigative strategies.[37] First noting that the rules did not require expressly a discussion of damage states, the Board then analyzed whether such a requirement could be implied.[38] In doing so, the Board reviewed Commission precedent, the regulatory history of the Power Reactor Security Rule, and general principles of statutory construction, focusing on our intent in adopting sections 52.80(d) and 50.54(hh)(2).[39] Rather than finding anything in the Statements of Consideration for these sections to support Intervenors' arguments, the Board found indications of intent to the contrary.[40] The Board pointed to a response to a comment rejecting as not "necessary, or even practical," a suggestion that the rule "specify types of fires and explosions and areas most susceptible to damage."[41] The Board also noted that we considered including fourteen specific strategies in section 50.54(hh)(2), but rejected this approach for a more flexible, general performance-based approach.[42] Both of these examples, the Board reasoned, while not precisely on point, suggest a lack of intent to

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[37] *See* LBP-10-5 (slip op. at 30-31).

[38] *Id.* (slip op. at 30).

[39] *See id.* (slip op. at 31-35).

[40] *Id.* (slip op. at 32).

[41] *Id.* (slip op. at 32). *See also* Power Reactor Security Requirements; Supplemental Proposed Rule, 73 Fed. Reg. 19,443, 19,445 (Apr. 10, 2008) (Supplemental Proposed Power Reactor Security Rule).

[42] LBP-10-5 (slip op. at 32-33). *See also* Power Reactor Security Rule, 74 Fed. Reg. at 13,957.

require applicants to define damage states or specify a particular number and magnitude of fires and explosions.[43]

The Board also was not persuaded by Intervenors' argument that it will be "impossible" to evaluate the effectiveness of Luminant's proposals in the Mitigative Strategies Report without knowing the "full spectrum of damage states."[44] The Board observed that the NRC has the ability to evaluate the proposed mitigative strategies based on experience from the assessments that the agency undertook at existing plants in response to the September 11, 2011 terrorist attacks.[45] In addition, the Board pointed out that Intervenors could have "postulated *some* examples of damage states and made any arguments they might have that the measures described in [Luminant's] Report would not be able to mitigate them."[46] Applying principles of statutory interpretation, the Board declined to insert into the regulations a requirement to specify damage states or the number and magnitude of fires and explosions with Commission intent to the contrary and without a showing that such a requirement is "'unavoidable' or 'imperatively required.'"[47] Ultimately, the Board reasoned that Intervenors were attempting to impose an additional requirement that is not present in the Power Reactor Security Rule,

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[43] LBP-10-5 (slip op. at 32-33).

[44] *Id.* (slip op. at 33).

[45] *Id.* (slip op. at 33 & n.151)

[46] *Id.* (slip op. at 33) (emphasis in original).

[47] *Id.* (slip op. at 34) (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 47:38 at 393-95 (6th ed. 2000)).

contrary to 10 C.F.R. § 2.335.[48] Thus, the Board found that Intervenors failed to show that a specification of damage states or fires and explosions is required, and dismissed the contention.[49]

In their petition for review, Intervenors maintain that the regulatory history supports their view of the section 50.54(hh)(2) requirements.[50] Intervenors reference a statement in the final rule that the purpose of section 50.54(hh)(2) is to ensure that licensees "'will be able to implement effective mitigation measures.'"[51] Intervenors rely on the use of the word "effective" to support their claim that Luminant must specify the damage states and the scale of fires and explosions, reiterating that without this information, we and the Staff will be unable to determine the effectiveness of the mitigative strategies.[52] According to Intervenors, the "fundamental flaw" in the Board's decision is the Board's failure to require Luminant to demonstrate the "effectiveness" of the mitigative strategies. Intervenors take this to mean that the Board implicitly approved Luminant's mitigative strategies.[53]

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[48] *Id.* (slip op. at 35).

[49] *Id.* ("Intervenors have not shown that the information they argue should be contained in the Mitigative Strategies Report is 'required by law.'" (quoting 10 C.F.R. § 2.309(f)(1)(vi))).

[50] Petition for Review at 3.

[51] *Id.* at 4 (quoting Power Reactor Security Rule, 74 Fed. Reg. at 13,597) (emphasis omitted).

[52] *See id.* at 3-5.

[53] Petition for Review at 4-5.

The Board's analysis of the rule is sound, and we decline to disturb it. Intervenors' arguments on this point amount to an impermissible challenge to sections 50.54(hh)(2) and 52.80(d). In essence, Intervenors would have us substitute their interpretation of "effective" mitigation strategies for ours.

As the Board stated, our intent is apparent from the regulatory history of sections 52.80(d) and 50.54(hh)(2). Contrary to Intervenors' assertions, we contemplated a flexible approach for maintaining or restoring core cooling, containment, and spent fuel pool cooling capabilities in the event of loss of large areas of the plant.[54] We explained that, consistent with the security orders imposed on licensees after September 11, 2001, the rule "called for development of mitigation measures *to generally deal with* the situation in which large areas of the plant were lost due to fires and explosions, whatever the beyond-design basis initiator."[55] Although we considered comments suggesting that the rule be narrowed to certain types of events,[56] or that the rule "specify [the] types of fires or explosions . . . or what areas of the plant are considered particularly susceptible to damage or destruction by fire or explosion,"[57] we "decided that the more general

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[54] *See* Power Reactor Security Rule, 74 Fed. Reg. at 13,928.

[55] Supplemental Proposed Power Reactor Security Rule, 73 Fed. Reg. at 19,445 (emphasis added).

[56] *See* Power Reactor Security Rule, 74 Fed. Reg. at 13,933 (rejecting a comment that we limit section 50.54(hh) to beyond design basis security events).

[57] Supplemental Proposed Power Reactor Security Rule, 73 Fed. Reg. at 19,445 (finding it not "necessary, or even practical" to incorporate the additional requirements into section 50.54(hh)). The final rule explains that section 50.54(hh)(2) requires "the use of readily available resources and identification of potential practicable areas for the use of beyond-readily-available (continued. . .)

performance-based language . . . [that we adopted] was a better approach."[58] Moreover, we rejected a comment suggesting that the rule require demonstration of the ability to handle an aircraft impact.[59] And as the Board noted, we contemplated including fourteen specific strategies in section 50.54(hh)(2) that were part of the original security orders, but opted for more flexible language.[60] Therefore, the regulatory history directly contradicts Intervenors' assertions that Luminant must specify damage states or the number and magnitude of fires and explosions, or that Luminant must use aircraft impacts as a baseline to plan mitigative strategies. At bottom, Intervenors would have us impose upon Luminant requirements expressly not called for our in our regulations. This proposition constitutes an improper collateral attack upon our regulations; the Board therefore correctly rejected Intervenors' challenge.[61]

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resources" – indicating our preference for practicability. Power Reactor Security Rule, 74 Fed. Reg. at 13,928.

[58] *Id.* at 13,957. *See also* Supplemental Proposed Power Reactor Security Rule, 73 Fed. Reg. at 19,445 (noting the success of the general performance criteria approach when implementing the security order requirements).

[59] *See* Supplemental Proposed Power Reactor Security Rule, 73 Fed. Reg. at 19,445. *See also* Power Reactor Security Rule, 74 Fed. Reg. at 13,933.

[60] Power Reactor Security Rule, 74 Fed. Reg. at 13,957 (recognizing that "future reactor facility designs . . . may contain features that preclude the need for some of these strategies").

[61] *See generally* 10 C.F.R. § 2.335.

At the contention admissibility stage, the burden is on Intervenors to demonstrate a deficiency in the application.[62] In this case, however, Intervenors attempt to shift the burden to Luminant. For example, Intervenors state that the Mitigative Strategies Report "may be adequate for its stated purpose but there is no way to [make that determination] without a defined description of the event(s) to which the . . . mitigative strategies apply."[63] Intervenors agreed that it would have been possible to hypothesize at least some event descriptions or damage states.[64] Yet Intervenors made no attempt to identify circumstances where the strategies identified in Luminant's report might be inadequate.[65]

Finally, as discussed above, Intervenors argue that in dismissing their contention, the Board implied that Luminant's Mitigative Strategies Report meets the requirements of 10 C.F.R. § 52.80(d) and 50.54(hh)(2).[66] Had the Board done so, this would have

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[62] *See* 10 C.F.R. § 2.309(f)(1)(vi). *See also Oyster Creek*, CLI-09-7, 69 NRC at 276; *Arizona Public Service Co.* (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991).

[63] Mitigative Strategies Report Contentions at 9.

[64] *See* Tr. at 556 (non-public); LBP-10-5 (slip op. at 33).

[65] *See generally* 10 C.F.R. § 2.309(f)(1)(vi) (to show a genuine dispute with the applicant on a material issue of law or fact, a contention must include references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute).

[66] *See* Petition for Review at 5.

been an improper finding on the merits.[67] We find, however, that the Board made no such merits determination. Rather, the Board appropriately focused on the contention admissibility requirements, and found that Intervenors had not met their burden of showing that the information they claimed to be missing is "required by law."[68] We find no error in the Board's ruling on Contention MS-1.

B. Contention MS-3

Intervenors also challenge the Board's decision to exclude Contention MS-3, in which Intervenors assert that:

> the . . . Mitigative Strategies Table is deficient because it fails to substantiate its assertion that the existing dose projection models currently referenced by [Luminant] in its existing . . . emergency plan are adequate to project doses to onsite responders under the conditions envisioned for this event, as specified by [Mitigative Strategies Table] Item 1.3.3. Without an appropriately detailed and accurate model, [Luminant] cannot demonstrate that its plan for mitigating [loss of large areas] can be effectively executed without subjecting on-site responders to excessive radiation exposure. [Luminant] has not conducted a dose assessment necessary to establish that the mitigative strategies could be implemented without reliance on extraordinary or heroic actions. Further, [Luminant] has not established that the dose assessment models are adequate

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[67] *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2190 (Jan. 14, 2004) ("The contention standard does not contemplate a determination of the merits of a proffered contention.").

[68] LBP-10-5 (slip op. at 35) (citing 10 C.F.R. § 2.309(f)(1)(vi)). Further illustrating the Board's focus on contention admissibility and not the merits, the Board provided the parties with the opportunity to submit legal briefs on the issue whether the Board should infer a "damage states" requirement in the mitigative strategies regulations. *See* Tr. at 717 (public). *See generally* Letter from Robert V. Eye, counsel for Intervenors, to Administrative Judges (Nov. 20, 2009) (public); Letter from Jonathan M. Rund, counsel for Luminant, to Administrative Judges (Nov. 27, 2009) (public); Letter from Susan H. Vrahoretis, counsel for the Staff, to Administrative Judges (Nov. 30, 2009) (public).

> to do the assessment in any event, taking into account the full spectrum of damage states.[69]

Intervenors argue that conditions that would necessitate the mitigative strategies likely will be "extreme and complex," and "may well exceed those that emergency responders would be expected to encounter under the existing . . . emergency plan."[70] Because the conditions will differ, Intervenors argue, the burden is on Luminant to demonstrate that the dose assessment model in the existing emergency plan "is capable of real-time, accurate dose assessment for the responders executing the complex mitigative actions."[71]

The contention references the table in Luminant's Mitigative Strategies Report, in which Luminant states that existing emergency plan procedures address dose projections for event

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[69] Mitigative Strategies Report Contentions at 15. For this contention, the Intervenors attach a declaration from their expert, Dr. Edwin Lyman, who generally asserts that he is "responsible for the factual content and expert opinions expressed in [Contention MS-3]." *Declaration of Dr. Edwin S. Lyman in Support of Petitioners' Contentions* (Aug. 10, 2009), ¶ 4. Dr. Lyman also provided support for Contention MS-4, which is not specifically at issue here.

[70] Mitigative Strategies Report Contentions at 15.

[71] *Id.* Intervenors offer as an example the potential for refilling spent fuel pools manually or using portable pumps, which could lead to "prolonged deployment" in high radiation areas. *Id.* In addition, Intervenors assert that the Mitigative Strategies Report must address how the volunteer and professional emergency responders identified in the existing emergency plan will be identified, trained, and mobilized. *Id.* at 16. With regard to the identification, training, and mobilization of emergency responders, Luminant pointed out that other items in the Mitigative Strategies Table provide this information. *See Luminant's Answer Opposing Late-Filed Contentions Regarding the Mitigative Strategies Report* (Sept. 4, 2009), at 21 n.70 (non-public). The Board majority did not expressly address this argument in rejecting the contention. *See* LBP-10-5 (slip op. at 48-53). To the extent that Intervenors continue to challenge this element of the Mitigative Strategies Report, that challenge is not litigable, as its assertions do not take issue with the particulars of the report.

responders, and also will include proposed Units 3 and 4.[72] Intervenors assert that Luminant's statement is ambiguous because it "neither commits to assessing the adequacy of its current dose projection approach for use in [loss of large area] mitigation scenarios, nor uses the current models to 'discuss the impact from dose.'"[73]

A majority of the Board, with Judge Young dissenting in part, rejected Contention MS-3. The majority found that to the extent the contention incorporated arguments from Contention MS-1 regarding the consideration of the "full spectrum of damage states," it is inadmissible for the same reasons as Contention MS-1.[74] In finding the remainder of the contention inadmissible, the majority noted that section 52.80(d) requires only a "description and plans," where more detailed procedures and inspections will be required after a COL is issued but before plant operation.[75] Although the majority agreed that the wording of Luminant's statement in the Mitigative Strategies Table is "somewhat cryptic, at best," the majority reasoned that, although they were "troubled" by the accuracy of the statement, this did not give

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[72] Mitigative Strategies Table at 11.

[73] Mitigative Strategies Report Contentions at 16-17. Intervenors allude to Luminant's incorporation of the dose assessment "expectation" from a draft of NEI 06-12, Revision 3, *see* Mitigative Strategies Report Contentions at 15; Tr. at 662 (non-public), which guides applicants to "[e]valuate existing dose projection models for their adequacy in projecting doses to event responders onsite." NEI 06-12, B.5.b Phase 2 & 3 Submittal Guideline, Rev. 3 (Sept. 2009), at 20 (ML092890400) (non-public). At the prehearing conference, counsel for Luminant explained that the expectation does not appear in NEI 06-12, Revision 2, but in a later revision to that document. *See* Tr. at 661. It is unclear from the record which version of NEI 06-12 the parties were referring to, but the September 2009 version of NEI 06-12, Revision 3 cited above contains the referenced "expectation" language.

[74] LBP-10-5 (slip op. at 48).

[75] *Id.* (slip op. at 52) (citing Power Reactor Security Rule, 74 Fed. Reg. at 13,933).

rise to a legal requirement.[76] Thus, the majority rejected the contention for failing to satisfy 10 C.F.R. § 2.309(f)(1)(vi) because Intervenors did not demonstrate that a dose evaluation or dose assessment model is required now, nor did Intervenors challenge the dose assessment model in the existing emergency plan.[77]

Judge Young would have admitted a narrowed version of Contention MS-3. She agreed that sections 52.80(d) and 50.54(hh)(2) do not require an evaluation of existing dose projection models or a dose assessment, and agreed that Intervenors did not affirmatively challenge Luminant's dose assessment model.[78] But Judge Young would have admitted the contention to the extent that it questioned the accuracy of Luminant's statement in the Mitigative Strategies Table, on the basis that Intervenors' arguments "go to the accuracy of whether, in fact, there exists any actual such evaluation, or assessment, of existing dose projection models, or any commitment to undertake such a task."[79]

Intervenors fault the majority for "diminish[ing] the significance of dose projection modeling" for the purposes of planning mitigative strategies by "relegat[ing]" it to "an activity that falls outside the adjudicative process and that can be completed as an operational matter."[80]

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[76] *Id.* (slip op. at 51). The Board majority noted a lack of reference to an evaluation, past or future.

[77] *Id.* (slip op. at 53).

[78] *Id.* (slip op. at 75) (Young, J., Additional Statement).

[79] *Id.* (slip op. at 80). *See also id.* (slip op. at 77 n.317) (observing that "[o]n its face the statement in question is a conclusory one, which does not indicate that any 'evaluation' has taken place, or will take place").

[80] Petition for Review at 8.

Intervenors assert that the purpose of the dose projection models is to "determine whether the mitigative strategies can be accomplished without resort to extraordinary or heroic acts."[81] Intervenors reason that the effectiveness of the mitigative strategies depends on the ability of responders to perform them without receiving high radiation doses.[82] According to Intervenors, the majority "erroneously approves [the] omission of any substantiation that radiation dose projection models in [the] emergency plan are sufficient to estimate doses to personnel who respond to [loss of large area events]."[83]

We find no error in the Board majority's ruling on Contention MS-3. Intervenors again attempt, improperly, to shift the burden to Luminant, when the burden rests with Intervenors at the contention admissibility stage. Intervenors claim that Luminant has not shown that the emergency plan dose projection approach is adequate for assessing dose during loss of large area events.[84] Our rules require intervenors to assert a sufficiently specific challenge that demonstrates that further inquiry is warranted.[85] Here, Intervenors have not challenged the

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[81] *Id.*

[82] *See id.* at 7-8.

[83] *Id.* at 5.

[84] *See id.* at 7 (shifting the burden to Luminant "to show that the strategy for dose projection contained in the existing . . . emergency plan is capable of real-time, accurate dose assessment for the responders executing the complex mitigative actions").

[85] *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi); *Oyster Creek*, CLI-09-7, 69 NRC at 276; *Palo Verde*, CLI-91-12, 34 NRC at 156.

adequacy of the dose projection models provided in Luminant's application.[86] As Intervenors acknowledge, the Mitigative Strategies Report, which is part of the COL application, "effectively adopts the . . . dose projection models in the existing emergency plan for Comanche Peak Units 1 [and] 2."[87] At most, Intervenors assert that events necessitating the mitigative strategies required by section 50.54(hh)(2) differ from those contemplated in the existing emergency plan, and by extension, what is contemplated in the emergency plan is inadequate for events necessitating 50.54(hh)(2) mitigative strategies.[88] But this is insufficient to support the admission of a contention. The Board majority appropriately found Intervenors' support lacking when it rejected Contention MS-3.[89] Moreover, we disagree with Intervenors' assertion that by rejecting the contention, the majority "diminished the significance" of dose projection models.

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[86] Intervenors also reference the proposed emergency plan for Units 3 and 4 in their discussion of Contention MS-3. *See* Mitigative Strategies Report Contentions at 16. As the Board noted, Intervenors do not question the dose information in the proposed emergency plan. LBP-10-5 (slip op. at 48 n.214). *See generally* Comanche Peak Nuclear Power Plant Units 3 and 4, Combined License Application, Part 5 - Emergency Plan, Rev. 0, Appendix 2, at A2-2 to A2-4 (Sept. 19, 2008) (ML082680315) (public) (describing the dose assessment models for Units 3 and 4). Luminant has since revised its emergency plan, but appears to use the same dose assessment approach. *See* Comanche Peak Nuclear Power Plant Units 3 and 4, Combined License Application, Part 5 - Emergency Plan, Rev. 1, Appendix 2, at A2-2 to A2-4 (Nov. 20, 2009) (ML100081186) (public).

[87] Petition for Review at 6.

[88] *See* Petition for Review at 7-8; Mitigative Strategies Report Contentions at 15.

[89] *See* LBP-10-5 (slip op. at 49) (observing that none of Intervenors' factual assertions provide support for a requirement that Luminant: (1) substantiate its assertions in the table, or (2) provide a dose assessment, nor do they "challenge the adequacy of the dose assessment model").

To the contrary, the majority correctly focused on the contention admissibility standards, and made no comment about the dose projection models as a general matter.

Nor do we agree with Judge Young's view that Intervenors have impliedly challenged the "accuracy of Luminant's representation" that it has evaluated or will evaluate its existing dose projection models. Judge Young transforms Intervenors' challenge from one concerning the accuracy of the dose projection models to one concerning the "accuracy of Luminant's representation" – two distinctly different challenges. Intervenors focus on the ability of the dose projection models to assess dose in the event of a loss of large area of the plant. We see no assertion that Luminant has misrepresented that it has evaluated or will evaluate the models.[90]

Moreover, before us, Intervenors continue to challenge the accuracy of the dose projection models. Intervenors repeat Judge Young's view without commenting on or adopting it, and they argue that the majority "questioned the accuracy of the dose projections" when it acknowledged the ambiguity in Luminant's representation.[91] On this point, Intervenors misunderstand the majority opinion. The majority observed that Luminant's statement was ambiguous as to whether it has evaluated or will evaluate the models, not that the dose projection models are inaccurate. But Intervenors' characterization of the statement shows that they remain focused on the accuracy of the dose projection models, not the accuracy of Luminant's statements. In any event, even if Intervenors could be said to have challenged the accuracy of Luminant's representations, we would require far more than mere suggestion.

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[90] *See generally* Mitigative Strategies Contentions at 15-17.

[91] Petition for Review at 6-7.

Intervenors would be required to assert, with particularity and support, that there are misrepresentations or other inaccuracies in the application.[92] They have not done so here. Accordingly, we decline to disturb the majority's ruling on Contention MS-3.[93]

One other matter merits mention. Intervenors ask us to take "official notice" of the occurrence of the recent nuclear events in Japan.[94] On March 11, 2011, the Great East Japan Earthquake struck off the coast of Honshu Island, precipitating a large tsunami. These events caused widespread devastation across northeastern Japan, and severely damaged the Fukushima Daiichi Nuclear Power Plant.[95] At the current time, the agency continues to gather and examine all available information regarding the events at the Fukushima Daiichi Nuclear

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[92] *Cf. GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000) ("[A]bsent [documentary] support, this agency has declined to assume that licensees will contravene our regulations."); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 31-32 (1993) (explaining that challenges to an applicant's or licensee's character require sufficient support).

[93] Luminant states before us that after the Board rendered its decision, it amended the Mitigative Strategies Table for this item, clarifying that "during a [loss of large area event], the dose for onsite responders would be 'sampled, monitored and estimated in real time, on location and using actual dose readings to project exposure,'" and stating that "'[t]his provides the most accurate assessment of dose to control and ensure federal exposure requirements are followed and limits are not exceeded by either onsite or offsite responders.'" Luminant Answer at 22 n.81 (quoting Luminant Generation Company LLC, Comanche Peak Nuclear Power Plant Units 3 & 4, Loss of Large Areas of the Plant Due to Explosions or Fire, Mitigative Strategies Description and Plans Required by 10 CFR 50.80(d), Rev. 1 (Oct. 2010), at 23 (ML103060048) (non-public)).

[94] *See* Intervenors' Reply to Luminant at 1 n.2; Intervenors' Reply to Staff at 1 n.2.

[95] *See* "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), at 7-9 (transmitted to the Commission via SECY-11-0093, "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan" (July 12, 2011) (ML11186A950) (package)).

Power Plant. Intervenors do not, as part of their petition for review, seek particular relief with respect to the Japan events. For the purposes of ruling on the petition, we must look to the adjudicatory record before us. As discussed above, Intervenors have not shown that the Board erred in dismissing their Mitigative Strategies contentions.

We note, however, that Intervenors joined in a petition requesting, among other things, that we suspend "all decisions" regarding the issuance of COLs, pending completion of several actions associated with the recent nuclear events in Japan. Intervenors did not serve the petition on this docket, but our ruling is nonetheless instructive here.[96] Our decision includes a brief summary of the Japan events as we currently understand them, as well as a recitation of the agency's regulatory response to date. Among other things, we ruled that, to the extent that the Fukushima events provide the basis for matters appropriate for litigation in individual proceedings, our procedural rules contain ample provisions through which litigants may seek to raise them.[97]

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[96] *See generally Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident* (Apr. 14, 2011, corrected Apr. 18, 2011) (ML111080855); *Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident* (Apr. 20, 2011) (ML111101075).

[97] *See* CLI-11-5, 74 NRC __ (Sept. 9, 2011) (slip op. at 35); 10 C.F.R. §§ 2.309(c), 2.309(f), 2.326. Indeed, Intervenors have filed a motion to reopen the proceeding, together with a new contention relating to the Fukushima events. *See 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). The Secretary has referred the motion to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. *See* Order (Aug. 30, 2011) (unpublished).

III. CONCLUSION

For the reasons set forth above, we *deny* the petition for review and *affirm* the Board's ruling in LBP-10-5. Because this order includes information extracted from Luminant's Mitigative Strategies Report, it is being served on the parties through the non-public docket for this proceeding.[98] We *direct* Luminant to review the non-public version of this decision, and, within seven days, advise whether the decision, in whole or in part, may be released to the public. If Luminant is of the view that the decision is releasable only in redacted form, we *direct* Luminant to indicate where redaction is necessary.[99]

IT IS SO ORDERED.[100]

For the Commission

[NRC SEAL]

/RA/

_____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of October 2011

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[98] *See supra* note 8 and accompanying text.

[99] On October 4, 2011, Luminant advised that it did not object to public release of this decision in its entirety. *Notification Regarding Release of CLI-11-09* (Oct. 4, 2011), at 1.

[100] Commissioner Magwood did not participate in this matter.

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 **COMMISSION MEMORANDUM AND ORDER (CLI-11-09)** have been re-served after finding of no objection by applicant to full public release upon the following persons by Electronic Information Exchange.

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 4th day of October 2011

ATTACHMENT B

LBP-11-27

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 Matters of	
PPL BELL BEND, L.L.C. (Bell Bend Nuclear Power Plant)	Docket No. 52-039-COL ASLBP No. 11-914-02-COL-BD01
LUMINANT GENERATION COMPANY LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4)	Docket Nos. 52-034-COL & 52-035-COL ASLBP No. 11-914-02-COL-BD01
ENERGY NORTHWEST (Columbia Generating Station)	Docket No. 50-397-LR ASLBP No. 11-912-03-LR-BD01
SOUTHERN NUCLEAR OPERATING CO. (Vogtle Electric Generating Plants, Units 3 and 4)	Docket Nos. 52-025-COL & 52-026-COL ASLBP Nos. 11-914-02-COL-BD01 & 11-913-01-COL-BD01
DUKE ENERGY CAROLINAS, LLC (William States Lee III Nuclear Station, Units 1 and 2)	Docket Nos. 52-018-COL & 52-019 COL ASLBP No. 11-913-01-COL-BD01
	October 18, 2011

MEMORANDUM AND ORDER
(Denying Motions To Reopen Closed Proceedings and
Intervention Petition / Hearing Request as Premature)

I. INTRODUCTION

Before these three identically constituted Licensing Boards are (1) motions filed by individuals and organizations seeking to revive a total of four now-closed adjudicatory proceedings and (2) an intervention petition and hearing request (hereafter petition) in a not previously established proceeding. The purpose of both the motions and the petition is to put before the Boards a new and essentially identical contention for their consideration.

The four closed adjudicatory proceedings involved applications for combined construction permits and operating licenses (COLs) for the following nuclear power facilities:

> Bell Bend Nuclear Power Plant (Bell Bend) to be located in Luzerne County, Pennsylvania;[1]
>
> Comanche Peak Nuclear Power Plant, Units 3 and 4 (Comanche Peak), to be located in Somervell County, Texas;[2]
>
> Vogtle Electric Generating Plants, Units 3 and 4 (Vogtle), to be located in Burke County, Georgia;[3] and

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[1] Bell Bend Nuclear Power Plant Combined License Application Part 4: Technical Specifications and Bases at 1-19 (Rev. 2) (Feb. 2010) (ADAMS Accession No. ML101890281). Movant Gene Stilp moved to reopen the Bell Bend proceeding for consideration of the common contention on August 10, 2011. 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); Contention Regarding NEPA Requirement To Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 10, 2011) [hereinafter Bell Bend Contention]. Mr. Stilp filed a corrected motion to reopen on August 17, 2011. Corrected 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. 17, 2011).

[2] Comanche Peak Nuclear Power Company Units 3 and 4 COL Application Part 1 Administrative and Financial Information at 9 (Rev. 2) (June 2011) (ADAMS Accession No. ML11186A867). Movants Lon Burman, Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, and True Cost of Nukes, Notice of Appearance for Robert V. Eye (Apr. 7, 2009), jointly filed the common contention on August 11, 2011, Contention Regarding NEPA Requirement To Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011), and moved to reopen the Comanche Peak proceeding on September 15, 2011. 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 (Sept. 15, 2011).

[3] Southern Nuclear Operating Company Vogtle Electric Generating Plant, Units 3 & 4 COL Application at 1-16 (Rev. 4) (June 2011) (ADAMS Accession No. ML11180A098). Two motions to reopen the Vogtle proceeding for consideration of the common contention were filed. First, Blue Ridge Environmental Defense League (BREDL) filed the reopening motion and common contention on August 11, 2011. 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 Blue Ridge Vogtle Motion]; Contention Regarding NEPA Requirement To Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) [hereinafter Blue Ridge Vogtle Contention]. Second, Center for a Sustainable Coast, Georgia Women's Action for New Directions f/k/a Atlanta Women's Action for New Directions, and Southern Alliance for Clean Energy (collectively, CSC Intervenors) filed the common contention on August 11, 2011 and the reopening motion on August 12, 2011. Motion To Reopen the Record and Admit Contentions To Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 12,

William States Lee III Nuclear Station (Lee) to be located in Cherokee County, South Carolina.[4]

Each of these adjudicatory proceedings was terminated without an evidentiary hearing being held.

For its part, the petition is addressed to the application for a renewal of the operating license possessed by the Columbia Generating Station, located on the Department of Energy's Hanford Reservation in Benton County, Washington.[5] Because no hearing requests were submitted in response to the notice of opportunity published in the Federal Register,[6] no adjudicatory proceeding was established in the wake of that notice. Thus, in the case of Columbia Station, an intervention petition and request for hearing were required in order to advance the common contention.

The endeavor now to reopen four closed proceedings and to give birth to yet a fifth has its roots in a single event and, indeed, with regard to each, an essentially identical case is presented in support of the requested relief. That event was the severe and consequential damage to the Fukushima Dai-Ichi Nuclear Power Station in Japan brought about by a

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2011); Contention Regarding NEPA Requirement To Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011).

[4] Combined License Application Part 1 General and Financial Information William States Lee III Nuclear Station Units 1 and 2 at 1.0-5 (Rev. 3) (Dec. 2010) (ADAMS Accession No. ML110030639). BREDL moved to admit the common contention in the William States Lee proceeding on August 11, 2011. Motion To Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (Aug. 11, 2011); Contention Regarding NEPA Requirement To Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) [hereinafter William States Lee Contention].

[5] License Renewal Application Columbia Generating Station at 1.2-1 (Jan. 2010) (ADAMS Accession No. ML100250658). Petitioner Northwest Environmental Advocates petitioned to intervene in the Columbia Station license renewal application process on August 22, 2011. Petition for Hearing and Leave To Intervene in Operating License Renewal for Energy Northwest's Columbia Generating Station (Aug. 22, 2011) [hereinafter Columbia Station Petition].

[6] 75 Fed. Reg. 11,572 (Mar. 11, 2010).

magnitude 9.0 earthquake and an ensuing tsunami that occurred on March 11, 2011. Following that event, this agency immediately embarked upon a course designed to determine the implications of that disaster in terms of the safety of reactors located in the United States.

In that regard, at the Commission's direction, the NRC Staff established a Task Force.[7] Its assigned task was "to review [NRC] processes and regulations to determine, among other things, whether the agency should make additional improvements to our regulatory system."[8] The Task Force was instructed to "submit for [Commission] consideration recommendations for technical and policy direction."[9]

On July 12, 2011, the Task Force issued its near-term report, containing a substantial number of recommendations for improving the safety of both new and operating reactors.[10] At the same time, its authors stated that the "continued operation and continued licensing activities do not pose an imminent risk to public health and safety."[11]

As will shortly be seen, it was the issuance of this report, and more particularly the recommendations set forth in it, that triggered the motions and petition in hand. In addition, very similar contentions founded upon the Task Force report has been simultaneously placed before a number of other licensing boards in currently active proceedings.[12]

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[7] Commission Memorandum, "NRC Actions Following the Events in Japan" at 1 (Mar. 21, 2011) (ADAMS Accession No. ML110800456) [hereinafter Tasking Memorandum].

[8] Union Electric Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __, __ (slip op. at 4) (Sept. 9, 2011).

[9] Id. (citing Tasking Memorandum).

[10] Dr. Charles Miller et al., 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) (ADAMS Accession No. ML111861807) [hereinafter Near-Term Task Force Report].

[11] Id. at vii.

[12] For example, the common contention has also been filed in Tennessee Valley Authority (Watts Bar Unit 2), Docket No. 50-391-OL. Contention Regarding NEPA Requirement To Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) at 4 (ADAMS Accession No. ML11223A291).

The motions and petition are opposed by the various utility applicants and the NRC Staff on a variety of grounds, including an insistence that the filings are untimely and do not meet the standards imposed by the Commission's Rules of Practice with regard to reopening closed records and contention admissibility.[13] For the reasons set forth in greater detail below, we need not address those standards here. This is because, giving effect to a September 9 Commission issuance (CLI-11-05),[14] it is apparent to us that, far from being untimely, the motions and petition are, in fact, premature and must be denied on that basis without regard to any other considerations. The Columbia Station petitioner and the movants in two of the closed adjudicatory proceedings address CLI-11-05 in their reply memoranda.[15] The movants in all four closed adjudicatory proceedings, as well as the Columbia Station petitioner, will, of course, be free to seek the relief currently denied them at such time as the concern underlying their current contention becomes ripe for consideration in an adjudicatory context.

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[13] For example, these arguments ar raised by the applicant and NRC Staff in the Vogtle proceeding. 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 (Sept. 6, 2011) at 1; Southern Nuclear Operating Company's Answer in Opposition to Motions To Reopen the Record and Request To Admit New Contentions (Aug. 22, 2011) at 3, 6, 24.

[14] Callaway, CLI-11-05, 74 NRC __.

[15] In the Vogtle proceeding, CLI-11-05 is addressed in BREDL's reply memorandum, Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 18, 2011) at 1, and in the CSC Intervenors' reply memorandum, Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 13, 2011) at 1. BREDL also addresses CLI-11-05 in the reply memorandum it submitted in the William States Lee proceeding. Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 19, 2011) at 1. In the Columbia Station proceeding, CLI-11-05 is addressed in Northwest Environmental Advocates' reply memorandum. Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 22, 2011) at 1.

Given the commonality of the relief sought by the motions and petition, for the purpose of the ensuing discussion we are focusing upon the motion to reopen the Vogtle COL proceeding submitted by the Blue Ridge Environmental Defense League (BREDL).[16] Our conclusions relating to its prematurity have equal application to all of the other filings before us.

II. THE VOGTLE CONTENTION

BREDL filed its motion to reopen the Vogtle proceeding on August 11, 2011, the same date upon which most of the other motions to reopen and the petition to intervene were filed. Its purpose in seeking reopening is to have considered the following new contention that, as previously noted, is common to all of the other motions and the petition before the Board:

> The EIS [(environmental impact statement)] for Vogtle fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report, including seismic-flood and environmental justice issues. As required by 10 C.F.R. § 51.92(a)(2) and 40 C.F.R. § 1502.9(c), these implications must be addressed in a supplemental Draft EIS.[17]

As BREDL emphasizes, the contention is founded on its claim that the EIS prepared by the NRC Staff for this facility "fails to address the extraordinary environmental and safety

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[16] Blue Ridge Vogtle Motion; Blue Ridge Vogtle Contention.

[17] Blue Ridge Vogtle Contention at 4. The other five proposed new contentions are distinct in two respects, neither of which is of any significance for present purposes. First, BREDL's contention in the Vogtle proceeding is the only contention that contains the words "including seismic-flood and environmental justice issues." Id. Second, the proposed new contentions for the Bell Bend, Columbia Station, and William States Lee facilities each challenge the facility's ER, Bell Bend Contention at 4; Columbia Station Petition at 20; William States Lee Contention at 5, because an EIS had not issued by the time the proposed new contentions were filed. See Application Review Schedule for the Combined License Application for Bell Bend Nuclear Power Plant, http://www.nrc.gov/reactors/new-reactors/col/bell-bend/review-schedule.html (last visited Oct. 12, 2011); Columbia Generating Station - License Renewal Application, http://www.nrc.gov/reactors/operating/licensing/renewal/applications/columbia.html (last visited Oct. 12, 2011); Letter from David B. Matthews, Director, Division of New Reactor Licensing, Office of New Reactors, to Bryan J. Dolan, Vice President, Nuclear Plant Development, Duke Energy Carolinas, LLC (Jan. 11, 2011) tbl. 1 (ADAMS Accession No. ML103370325). The Bell Bend, Columbia Station, and William States Lee proposed new contentions also refer to "NEPA and the NRC regulations" instead of "10 C.F.R. § 51.92(a)(2) and 40 C.F.R. § 1502.9(c)." Bell Bend Contention at 4; Columbia Station Petition at 20; William States Lee Contention at 5.

implications of the findings and recommendations" of the Task Force report[18] and rests upon "information contained within the Task Force [r]eport."[19]

Turning to the specific assertions undergirding the contention, BREDL would have it that the Task Force report's "implication" is "that compliance with current NRC safety requirements does not adequately protect public health and safety from severe accidents and their environmental effects."[20] It characterizes the Task Force report as "recommending the NRC strengthen its regulatory scheme for protecting public health and safety by increasing the scope of accidents that fall within the 'design basis' and are therefore subject to mandatory safety regulation."[21] In that regard, BREDL maintains that the Task Force recommended that "severe accident mitigation alternatives ('SAMAs') [be] imposed as mandatory measures."[22] It further asserts that the Task Force "also recommended that the NRC undertake new safety investigations and impose design changes, equipment upgrades, and improvements to emergency planning and operating procedures."[23] BREDL additionally points out that "[t]he Task Force recommended that licensees reevaluate the seismic and flooding hazards at their sites and if necessary update the design basis and [structures, systems, and components] important to safety to protect against updated hazards."[24]

According to BREDL, the Task Force's recommendations also include

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[18] Blue Ridge Vogtle Motion at 1.

[19] Id. at 4.

[20] Id. at 5-6.

[21] Blue Ridge Vogtle Contention at 2 (citing Near-Term Task Force Report at 20-21).

[22] Blue Ridge Vogtle Motion at 5; accord Blue Ridge Vogtle Contention at 5-6 ("[T]he Task Force recommended that the NRC incorporate severe accidents into the 'design basis' and subject it to mandatory safety regulations.").

[23] Blue Ridge Vogtle Contention at 6 (citing Near-Term Task Force Report at 73-75).

[24] Id. at 15 (citing Near-Term Task Force Report at 30).

> strengthening [station blackout] mitigation capability at all operating and new reactors for design-basis and beyond-design-basis external events, . . . requiring reliable hardened vent designs in [boiling water reactor] facilities with Mark I and Mark II containments . . . , enhancing spent fuel pool makeup capability and instrumentation for the spent fuel pool . . . and strengthening and integrating onsite emergency response capabilities such as [emergency operating procedures], [severe accident management guidelines], and [extensive damage mitigation guidelines].[25]

BREDL argues that admission of the proposed new contention "constitutes the only way of ensuring that the environmental implications of the Task Force recommendations are taken into account in the licensing decision for Vogtle" because "the NRC Commissioners have postponed taking action on the Task Force's recommendations."[26]

BREDL represents that "[t]he Task Force urges that some of its recommendations," including proposed new measures for prolonged station blackout mitigation and for spent fuel pool makeup capability and instrumentation, should be considered before COL licensing decisions are made.[27] BREDL concludes that NEPA requires the NRC to "address the Task Force's findings and recommendations as they pertain to Vogtle" before making a licensing decision.[28]

Still further, BREDL asserts that the Task Force report's "conclusions and recommendations" are "'new and significant information' whose environmental implications must be considered" before the NRC makes decisions on the application.[29] BREDL would have it that "the information is 'new' because it stems directly from the Fukushima accident," which it concedes occurred five months before it filed the proposed new contentions.[30] In BREDL's

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[25] Id. at 16-17 (citing Near-Term Task Force Report §§ 4.2.1, 4.2.2, 4.2.4, 4.2.5).

[26] Id. at 3.

[27] Id. at 17.

[28] Id. at 18.

[29] Id. at 10.

[30] Id.

view, the Task Force report's conclusions and recommendations are "'significant' because [they] raises an extraordinary level of concern" about how the plant "impacts public health and safety."[31]

For factual support of its assertions, BREDL "relies on the Task Force [r]eport itself" and proffers a declaration by Dr. Arjun Makhijani as expert support.[32] According to BREDL, Dr. Makhijani's declaration "confirms the environmental significance of the Task Force's findings and recommendations with respect to the environmental analyses for all pending nuclear licensing cases and design certification applications."[33] BREDL assigns to Dr. Makhijani the belief that the "costs may be significant" if severe accident mitigation measures are imposed as mandatory measures.[34]

In addition, BREDL supplies the declaration of Dr. Ross McCluney.[35] It asserts that "Dr. McCluney is a highly qualified expert in seismic-flooding issues raised in the Task Force [r]eport."[36] BREDL attributes to Dr. McCluney the opinion that "seismic seiches – standing waves on rivers, reservoirs and lakes caused by disturbances from tectonic activity and earthquakes – may occur at great distances from the epicenter of the initiating seismic event."[37]

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[31] Id. (citing 40 C.F.R. § 1508.27(b)(2)).

[32] Blue Ridge Vogtle Motion at 6.

[33] Blue Ridge Vogtle Contention at 20.

[34] Id. at 12.

[35] Id., Att., Declaration of Dr. Ross McCluney Regarding Environmental and Safety Issues at Nuclear Power Plants Based on Events at Fukushima and the Findings of the NRC Interim Task Force (Aug. 11, 2011) [hereinafter McCluney Declaration]. The only other proceeding in which Dr. McCluney's declaration was supplied in support of the common contention was William States Lee. William States Lee Contention, Att., Declaration of Dr. Ross McCluney Regarding Environmental and Safety Issues at Nuclear Power Plants Based on Events at Fukushima and the Findings of the NRC Interim Task Force (Aug. 11, 2011).

[36] Blue Ridge Vogtle Motion at 6.

[37] Blue Ridge Vogtle Contention at 14 (citing McCluney Declaration).

BREDL states that Dr. McCluney's declaration "confirms the need for a hard look at the impact of seismic seiches" on the plant and "that structures, systems and components be designed to withstand the effects of such natural phenomena."[38]

BREDL also supplies the declaration of Rev. Charles N. Utley[39] as "a highly qualified expert in environmental justice."[40] BREDL would have it that Rev. Utley's declaration "confirms the need for NRC to implement the Interim Task Force recommendations on emergency preparedness and public education and to comply with Executive Order 12898."[41] BREDL maintains that "[s]ubsequent to the Vogtle COLA and ESP-FEIS, a nuclear power siting study was published which suggests that there is 'reactor-related environmental injustice' at Plant Vogtle."[42]

III. ANALYSIS

As seen from the foregoing, the 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.) Instead, in terms, the bedrock of the motion is the July 12 Task Force report on the event which was released precisely 30 days before BREDL's submission to us.

Specifically, we are asked to reopen the proceeding for the purpose of admitting a contention that would have it that the findings and recommendations contained in the Task

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[38] Id. at 20.

[39] Id., Att., Declaration of Rev. Charles N. Utley Regarding Environmental Justice and Emergency Response Issues at Plant Vogtle Electric Generating Plant [sic] Based on Events at Fukushima and the Findings of the NRC Interim Task Force (Aug. 11, 2011) [hereinafter Utley Declaration]. Rev. Utley's declaration was not filed in connection with any other motion to reopen or with the petition to intervene.

[40] Blue Ridge Vogtle Motion at 6.

[41] Blue Ridge Vogtle Contention at 20.

[42] Id. at 15 (citing Utley Declaration).

Force report have "new and significant environmental implications" that must be addressed in a supplemental draft environmental impact statement. On first examination of that assertion, we found ourselves in considerable doubt as to how such 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, supra.[43]

CLI-11-05 was issued in response to a series of petitions seeking, with regard to a large number of nuclear power facilities including the five now before us, the suspension of adjudicatory, licensing, and rulemaking activities and other relief in light of the Fukushima event.[44] Included among the requested other relief was the agency's conduct of "a separate generic NEPA analysis regarding whether the Fukushima events constitute 'new and sufficient information' under NEPA that must be analyzed as part of the environmental review for new reactor and license renewal decisions."[45]

In addressing the various requests for relief, and ultimately denying all of possible relevance to the consideration of the matter now at hand, the Commission referred extensively to actions that it had taken upon the July 19 formal presentation of the Task Force report. Among other things, the Commission had directed the

> review and assessment, with stakeholder input, of the Task Force recommendations; provision of a draft charter for assessing the Task Force recommendations and conducting the agency's longer-term review; preparation of a notation vote paper that identifies recommended short-term actions; preparation of a notation vote paper that sets recommended priorities for the Task Force recommendations; and formal review of the Task Force recommendations by the Advisory Committee on Reactor Safeguards.[46]

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[43] Callaway, CLI-11-05, 74 NRC __.

[44] Id. at __ (slip op. at 1-3).

[45] Id. at __ (slip op. at 30).

[46] Id. at __ (slip op. at 6).

At a later point in its decision, once again alluding to the Task Force recommendations "for short-term and long-term agency action," the Commission stressed that its consideration of those recommendations and the "efforts [the Commission] directed the Staff to undertake based on [them] may result in actions including the issuance of regulatory and policy direction."[47] In this connection, the Commission observed that, as the Task Force report reflected, "the mechanisms and consequences of the events at Fukushima are not yet fully understood."[48]

It was against this background that the Commission reached the petitioners' request that a generic NEPA analysis be performed. Its answer was both brief and emphatic:

> 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 implications of the Japan events for U.S. facilities. Therefore, any generic NEPA duty – if one were appropriate at all – does not accrue now.[49]

Significantly, the Commission went on to acknowledge that "new and significant information" might come to light that "requires consideration as part of the ongoing preparation of application-specific NEPA documents."[50] Should that occur, "the agency will assess the significance of that information, as appropriate."[51] Pointing, however, to the regulation setting forth the circumstances in which the Staff must prepare supplemental review documents, the Commission cited its holding to the effect that "'[t]he new information must present a seriously different picture of the environmental impact of the proposed project from what was previously

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[47] Id. at __ (slip op. at 28-29) (citing Staff Requirements Memorandum SECY-11-0093, Near-Term Report and Recommendations for Agency Actions Following the Events in Japan (Aug. 19, 2011) (ADAMS Accession No. ML112310021)).

[48] Id. at __ (slip op. at 29).

[49] Id. at __ (slip op. at 30).

[50] Id.

[51] Id. at __ (slip op. at 30-31).

envisioned.'"[52] In the Commission's view, "[t]hat is not the case here, given the current state of information available to us."[53]

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. Of still greater importance given BREDL's entire reliance on the findings and recommendations of the Task Force, the Commission stressed with equal force and clarity that, while under active study, none of those findings and recommendations has been accepted. Thus, they scarcely have been given the effect that, according to BREDL et al., gives rise to the environmental implications that undergird the contention that is sought to be admitted.

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

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[52] Id. at __ (slip op. at 31) (quoting Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999)).

[53] Id.

United States reactors in general.[54] That consideration provides still further foundation for our reliance on the Commission's determination that a call for a generic NEPA review was premature.

Our conclusion that the contention is premature in the Vogtle proceeding, and thus as well in the four other proceedings in which it is presented, leaves open the question as to what might be an event that would trigger an assertion of the need for further NEPA review. Manifestly, the sponsors of the contention now held premature have a decided interest in the answer to that question. Indeed, it might well be that the motions to reopen and petition for intervention before us were filed simply out of an understandable abundance of caution in recognition of the fact that endeavors to reopen closed records or to open new proceedings at a late date are often greeted, as was the case here, with the claim that the endeavor comes too late.

Unfortunately, we are unable to provide guidance on that score. It is simply not possible to forecast at this writing when there might be some development associated with the Fukushima event that might give rise to a supportable contention respecting a need for further NEPA review either on a generic basis or in the context of one or more individual reactors. Nor is there room for speculation today regarding what that development might be.

In short, while perhaps of cold comfort to the sponsors of the contention now held to be premature, we can do no more than did the Commission itself in CLI-11-05 in its

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[54] The only possible exception in this regard is BREDL's environmental justice claims. E.g., Blue Ridge Vogtle Contention at 4. Although BREDL seeks to tie those claims to the Task Force report, see, e.g., Blue Ridge Vogtle Motion at 7-8, it seems apparent from the supporting declaration of Rev. Utley that those claims are footed in (1) longstanding generic concerns about the agency's implementation of environmental justice and its policy on potassium iodide distribution, Utley Declaration at 2-6; and (2) a 2009 siting study, id. at 4; see also Blue Ridge Vogtle Contention at 15-16, concerns about which could have been raised at a much earlier junction in the proceeding, e.g., relative to the staff's September 2010 draft supplemental environmental impact statement for the Vogtle COL. Office of New Reactors, Draft Supplemental Environmental Impact Statement for Combined Licenses (COLs) for Vogtle Electric Generating Plant Units 3 and 4, NUREG-1947 (Sept. 2010) (ADAMS Accession No. ML102370278).

acknowledgment that, with the passage of time, "new and significant information [might come] to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents."[55] At this juncture, as the Commission emphasized, "the full picture of what happened at Fukushima is still far from clear" with the consequence that "we do not know today the full implications of the Japan events for U.S. facilities."[56]

IV. CONCLUSION

For the reasons stated above, the motions to reopen the now-closed COL proceedings for the following nuclear power facilities:

Bell Bend Nuclear Power Plant;

Comanche Peak Nuclear Power Plant, Units 2 and 3;

Vogtle Electric Generating Plants, Units 3 and 4; and

William States Lee III Nuclear Station, Units 1 and 2

[55] Id. at __ (slip op. at 30).

[56] Id.

together with the intervention petition with regard to the application for a renewal of the operating license of

Columbia Generating Station

are hereby denied as premature.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[57]

/RA/

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/

Dr. William H. Reed
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 18, 2011

[57] Copies of this order were sent this date by the agency's E-Filing system to counsel and representatives for PPL Bell Bend, L.L.C.; Gene Stilp; Energy Northwest; Northwest Environmental Advocates; Luminant Generation Company, LLC; Lon Burman, Sustainable Energy and Economic Development (SEED) Coalition, Public Citizen, and True Cost of Nukes; Southern Nuclear Operating Co.; Blue Ridge Environmental Defense League; Center for a Sustainable Coast, Georgia Women's Action for New Directions f/k/a Atlanta Women's Action for New Directions, and Southern Alliance for Clean Energy; Duke Energy Carolinas, LLC; and the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENERGY NORTHWEST	)	DOCKET NO. 50-397-LR
(Columbia Generating Station)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensing Board **MEMORANDUM AND ORDER (Denying Motions to Reopen Closed Proceedings and Intervention Petition / Hearing Request as Premature) (LBP-11-27)**, dated October 18, 2011, have been served upon the following persons by Electronic Information Exchange.

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ENERGY NORTHWEST (Columbia Generating Station) – 50-397-LR
MEMORANDUM AND ORDER (Denying Motions to Reopen Closed Proceedings and Intervention Petition / Hearing Request as Premature) (LBP-11-27)

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[Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of October, 2011

ATTACHMENT C

LBP-11-36

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)	Docket Nos. 52-034-COL & 52-035-COL ASLBP No. 11-914-02-COL-BD01
ENERGY NORTHWEST (Columbia Generating Station)	Docket No. 50-397-LR ASLBP No. 11-912-03-LR-BD01
SOUTHERN NUCLEAR OPERATING CO. (Vogtle Electric Generating Plants, Units 3 and 4)	Docket Nos. 52-025-COL & 52-026-COL ASLBP Nos. 11-914-02-COL-BD01 & 11-913-01-COL-BD01
DUKE ENERGY CAROLINAS, LLC (William States Lee III Nuclear Station, Units 1 and 2)	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-11-27[1] (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

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[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, 2011[11] 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).

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[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

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[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

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[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

Rockville, Maryland
November 30, 2011

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.

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

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUSTAINABLE ENERGY and ECONOMIC DEVELOPMENT (SEED), et al.,	)	
Petitioners,	)	**No. 11-1457**
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the Federal Respondents represent that except for the following, all parties, intervenors, and amici appearing in the proceeding below before the Nuclear Regulatory Commission and who are participating in this appellate proceeding are listed in the Certificate as to Parties, Rulings and Related Cases filed by the Petitioners on December 29, 2011:

Parties:

The United States of America, which was not a party to the proceeding below before the Nuclear Regulatory Commission but which, by statute, 28

U.S.C. § 2344; *see also* 28 U.S.C. § 2348, is a respondent in the proceeding in this Court.

Respectfully submitted,

_/s/ James E. Adler_____
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Dated: January 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2012, copies of the foregoing Federal Respondents' Motion to Dismiss and its attachments were filed using the D.C. Circuit's CM/ECF system, which will deliver electronic copies to:

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Four paper copies are also being mailed to the Court using First-Class Mail in accordance with Circuit Rule 27(b) and rule ECF-6(D) from the Court's Administrative Order Regarding Electronic Case Filing.

___/s/ James E. Adler_____
James E. Adler