UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
SOUTHERN NUCLEAR OPERATING CO.	)	Docket Nos. 52-025-COL and 52-026-COL
	)	
(Vogtle Electric Generating Plant Units 3 and 4)	)	
	)	

NRC STAFF ANSWER TO PETITIONERS' MOTION TO STAY THE VOGTLE UNITS 3 AND 4 COMBINED LICENSES PENDING JUDICIAL REVIEW

INTRODUCTION

The staff of the U.S. Nuclear Regulatory Commission (Staff) hereby answers the "Petitioners' Motion to Stay The Effectiveness of the Combined License for Vogtle Electric Generating Plant Units 3 and 4 Pending Judicial Review" (Motion) filed by Southern Alliance for Clean Energy, Blue Ridge Environmental Defense League, Center for a Sustainable Coast, and Georgia Women's Action for New Directions (Petitioners) on February 16, 2012. For the reasons set forth below, the Motion should be denied.

PROCEDURAL BACKGROUND

On March 31, 2008, Southern Nuclear Operating Company (SNC, Licensee), on behalf of itself and several co-applicants, filed with the NRC an application for combined licenses (COLs) for Vogtle Electric Generating Plant Units 3 and 4. *See* Southern Nuclear Operating Company; Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 24,616 (2008). On September 27-28, 2011, following the completion of the Staff review of the application and the preparation of the Staff's safety and environmental review documents,[1]

[1] *See* "Final Safety Evaluation Report for Combined Licenses for Vogtle Electric Generating Plant, Units 3 and 4," U.S. Nuclear Regulatory Commission, August 2011 (ADAMS Accession No. ML110450302) (FSER); NUREG-1947, "Final Supplemental Environmental Impact Statement for Combined Licenses (COLs) for Vogtle Electric Generating Plant, Units 3 and 4," U.S. Nuclear Regulatory Commission, March 2011 (ML11076A010) (FSEIS). Because the Vogtle COL application referenced the

(continued…)

the Commission conducted a mandatory hearing pursuant to Section 189 of the Atomic Energy Act of 1954, as amended. *See* Southern Nuclear Operating Co., et al.; Combined Licenses for Vogtle Electric Generating Plant, Units 3 and 4, and Limited Work Authorizations; Notice of Hearing, 76 Fed. Reg. 50,767 (Aug. 16, 2011). On February 9, 2012, the Commission issued its decision on the mandatory hearing, authorizing the Staff to issue the requested licenses. *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-2, 75 NRC __ , __ (slip op.) (Feb. 9, 2012). On February 10, 2012, the NRC issued the COLs. *See* Combined License No. NPF-91 (ML112991101); Combined License No. NPF-92 (ML113060407).

On February 16, 2012, the instant Motion was filed by Petitioners, who were previously admitted as Intervenors in the contested portion of the Vogtle COL proceeding. *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-3, 69 NRC 139, 146, 167-68 (2009). The one admitted contention in the proceeding was resolved via summary disposition on May 19, 2010, terminating the contested portion of the proceeding. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC 433 (2010).

Following the accident at the Fukushima Dai-ichi Nuclear Power Station on March 11, 2011, Petitioners filed a series of motions in this proceeding, similar to motions filed in numerous other pending NRC reactor licensing proceedings. Petitioners initially sought to suspend the proceeding and to require a generic review of the Fukushima accident pursuant to the National Environmental Policy Act of 1969, as amended (NEPA), requests rejected by the Commission. *See generally Union Electric Co. d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2),

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(…continued)

Vogtle Early Site Permit (ESP-004), the environmental review of the COL application involved preparation of a supplement to the Final Environmental Impact Statement previously prepared in connection with the early site permit application. NUREG-1872, "Final Environmental Impact Statement for an Early Site Permit (ESP) at the Vogtle Electric Generating Plant (VEGP) ESP Site," U.S. Nuclear Regulatory Commission, August 31, 2008 (ML082260190); *see* 10 C.F.R. § 51.92(b), (e).

CLI-11-5, 74 NRC ___ (Sept. 9, 2011) (slip op.). Petitioners subsequently sought to reopen the record and admit new contentions based on asserted violations of the agency's obligations under NEPA.[2] These claims were rejected by the ASLB as premature. *PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant) *et al.*, LBP-11-27, 74 NRC __ at 4-5, 15-16 (Oct. 18, 2011) (slip op.).[3] The primary claim underlying Petitioners' motions, including the instant Motion to stay the effectiveness of the licenses, is that the Fukushima accident and, subsequently, the Near-Term Task Force Report (NTTF Report)[4] and the agency's ongoing consideration of the Task Force recommendations,[5] represent "new and significant" information requiring the NRC to supplement the Vogtle COL Final Supplemental Environmental Impact Statement (FSEIS).

LEGAL STANDARDS

I. Standards for Stays Pending Review

The Petitioners' Motion seeks to stay the effectiveness of the Commission mandatory hearing decision and the Vogtle COLs pending judicial review. Motion at 1. Because the

[2] These pleadings from Petitioners were not identical; Petitioner Blue Ridge Environmental Defense League (BREDL) filed motions separately from those of Petitioners Southern Alliance for Clean Energy (SACE), Center for a Sustainable Coast (CSC), and Georgia Women's Action for New Directions (WAND). *See generally* 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), and Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) (BREDL); Motion to Reopen the Record and Admit Contention to Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011), and Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) (SACE/CSC/WAND).

[3] On November 2, 2011, Petitioners filed a petition for review of LBP-11-27, which remains pending before the Commission. On November 30, 2011, the ASLB denied a motion to reinstate the basis for the contention. *See PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant) *et al.*, LBP-11-36, 74 NRC __ (Nov. 30, 2011) (slip op.).

[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) (NTTF Report) (transmitted to the Commission via Commission Paper SECY-11-0093, "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan" (July 12, 2011) (ML11186A950) (package)).

[5] Staff Requirements Memorandum on SECY-11-0124, Recommended Actions to be Taken Without Delay From the Near-Term Task Force Report (ML112911571) (Oct. 18, 2011) (Task Force SRM). The Task Force SRM stated that the Commission approved the Staff's proposed actions in SECY-11-0124 subject to the comments that the SRM provided.

licenses have already been issued, this is necessarily a request to stay an NRC staff action that has been taken, rather than a request to stay a decision or action of a presiding officer in an adjudicatory proceeding. Accordingly, the Commission's regulations at 10 C.F.R. § 2.342, concerning stays of presiding officer decisions, are not applicable here. *See Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 147 (2010).[6] The Commission's regulations thus do not explicitly authorize such a stay request; where the proceeding is terminated and the licensing action has been taken, the Commission has indicated that the appropriate remedy would ordinarily be a request for action pursuant to 10 C.F.R. § 2.206. See *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 58 (1993).

However, in circumstances where the Commission determines as a matter of discretion to consider requests for stays of final agency actions pending review, it considers the four well-established factors in Section 2.342(e).[7] *See Shieldalloy*, CLI-10-8, 71 NRC at 147, 150-51; *cf. Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 n.4 (2006) ("[w]hile technically not applicable to a request for a stay of NRC Staff action, the section 2.342(e) standards simply restate commonplace principles of equity

[6] *Shieldalloy* involved a request to stay an agency action entering into an agreement with New Jersey as an Agreement State. The entity seeking the stay, Shieldalloy, had been a party to the proceeding involving its decommissioning plan. In determining that Section 2.342 was not the appropriate regulation to use in seeking a stay of the Agency's action, the Commission held that the movant must be a "party to the proceeding," which, in the context of Section 2.342, refers to an adjudicatory proceeding presided over by a presiding officer or board. Similarly, while Petitioners have an appeal pending before the Commission from the ASLB decision in LBP-11-27 rejecting their motion to reopen the record and denying the admission of a late-filed contention and hence denying them party status, there is no contested Vogtle COL proceeding and thus they are not a "party" within the meaning of that provision. *See Shieldalloy*, CLI-10-8, 71 NRC at 147. Moreover, the Petitioners were not parties to the mandatory hearing in which the Commission's decision authorizing the Staff to issue the licenses was issued.

[7] The Staff notes that because Section 2.342 does not apply here, in the event the Commission were to determine as a matter of discretion to consider the Petitioners' request as a stay application, the page limitations of Section 2.342(b) would not strictly apply. In response to an SNC motion dated February 22, 2012, the Secretary of the Commission specifically authorized a page extension to 20 pages (exclusive of affidavits) for both the Applicant and Staff answers. *See* Order of the Secretary dated February 24, 2012.

universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief"); s*ee also Comanche Peak*, CLI-93-2, 37 NRC at 58. These standards are (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.

The moving party has the burden of demonstrating that these factors weigh in its favor. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). When evaluating a motion for a stay, the Commission places the greatest weight on the second factor, irreparable injury to the moving party unless a stay is granted. *Shieldalloy*, CLI-10-8, 71 NRC at 151 (citing *David Geisen*, CLI-09-23, 70 NRC 935, 936 (2009)). The Commission requires a showing of a "threat of immediate and irreparable harm" that will result absent a stay. *Id.* (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008)). Without a showing of irreparable harm, the Petitioner must show that success on the merits is a "virtual certainty" to warrant issuance of a stay. *Id.* at 154 (citing *Geisen*, CLI-09-23, 70 NRC at 937).

II. Standards for EIS Supplementation

In addressing the stay factors, the Petitioners' motion relies fundamentally on a claim that "the NRC violated NEPA by refusing to supplement the EIS" for the Vogtle COLs. Motion at 13. However, the Staff must prepare a supplement to a final environmental impact statement only if: "(1) [t]here are substantial changes in the proposed action that are relevant to environmental concerns; or (2) [t]here are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R § 51.92(a)(1)-(2); *see Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 27-28 (2006).

The Commission has explained that this standard means that "new information must paint a '*seriously* different picture of the environmental landscape.'" *PFS*, CLI-06-3, 63 NRC at 28,

quoting *National Committee for the New River, Inc. v. Fed. Energy Regulatory Comm'n*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis in original); *see also Union Electric Company d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __ , __ (Sept. 9, 2011) (slip op. at 31). The Commission has characterized NEPA case law as requiring EIS supplementation where new information identifies an environmental concern that was "previously unknown," but not where the new information simply provides "additional evidence supporting one side or the other of a disputed environmental effect." *PFS*, CLI-06-3, 63 NRC at 28. In other words, to warrant supplementation, the asserted changes must "cause effects that are significantly different from those already studied." *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001) (quoting *Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000)).

DISCUSSION

The Petitioners have not demonstrated that any of the four stay factors support a Commission decision to stay the effectiveness of the licenses. In particular, on the two factors that are most important to the analysis – irreparable harm and likelihood of success on the merits – the Petitioners have failed to meet the high threshold for such relief. First, they have not explained how any of the asserted environmental effects of ongoing construction would harm Petitioners, nor shown that these harms would be either immediate or irreparable. Furthermore, with respect to their likelihood of success on the merits of their claim that the Staff's environmental analysis is inadequate, the Petitioners have not demonstrated why the environmental impacts or conclusion in the FSEIS would be altered at all as a result of available information about Fukushima or the implementation of NTTF recommendations under NRC consideration, much less how this information would result in environmental "effects that are significantly different from those already studied." *Hydro Resources*, CLI-01-4, 53 NRC at 52.

I. Petitioners Have Not Demonstrated Irreparable Harm

To show irreparable harm requires the movant to demonstrate injury that is "both certain and great." *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (quoting *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). In asserting irreparable harm from the effectiveness of the licenses pending judicial review, the Petitioners state that construction will result in "use of a vast amount of construction materials" and impacts to air quality. Motion at 16. The Petitioners assert that hazardous air pollutants will result from fabrication of concrete for the new units and that "steel production from ore involves considerable pollution." *Id.* at 17. They also assert that emissions will result from the "use of diesel engines on the site" and that pollution will occur as a result of transportation of materials to the site and indirectly from "production and refining of petroleum." *Id.* Finally, the Petitioners claim that construction will result in significant carbon dioxide emissions. *Id.*

However, neither the Motion nor the attached Declaration[8] explains why any of these considerations represent actual harms that would affect these Petitioners, let alone irreparable harm necessary to support a stay request. As documented in the FSEIS, the Staff considered impacts to air quality and water quality as a result of construction of two new units at the site, and found those impacts to be small. *See* FSEIS at §§ 4.2, 4.3 (finding that the impact conclusions from the Vogtle Early Site Permit FEIS remained valid). The Staff also concluded that commitments of resources during construction of the new units "generally would be similar to that of any major construction project" and that "the use of construction materials in the quantities associated with those expected for proposed Units 3 and 4, while irretrievable, would be of small consequence with respect to the availability of such resources." *See id.* at 11-4. While the Motion implies that the quantities of construction materials used, as well as emissions and pollution, would be significant, Petitioners do not specify why they would adversely affect

[8] "Declaration of Dr. Arjun Makhijani in Support of Motion to Stay Effectiveness of Vogtle COL Approval" (Feb. 16, 2012).

the Petitioners nor do they explain why any associated environmental impact would be more than negligible. For example, Petitioners do not explain why the asserted emissions or pollution associated with "steel production" or "production and refining of petroleum" would be significant or could adversely affect them, even if those activities or impacts were to occur in the site vicinity. Similarly, the Petitioners fail to explain why the asserted emissions of diesel or carbon dioxide, particularly those which would occur immediately onsite, would be noticeable to the Petitioners, let alone cause them cognizable harm. Petitioners likewise do not assert that any such emissions or pollution would exceed any applicable regulatory limits.

Particularly considering the site development and limited work authorization activities already occurring at the Vogtle site prior to issuance of the COLs,[9] the Petitioners do little to distinguish the activities described in their Motion from the types of "ordinary consequence of any major construction project" that do not give rise to irreparable harm. *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 15 (1976). Irreparable harm requires injury that is "both certain and great." *Cuomo*, 772 F.2d at 976. The Petitioners' generalized invocation of construction-related emissions and use of construction materials falls well short of this standard.

II. Petitioners Have Not Shown A Likelihood of Success on the Merits

Without a showing of irreparable harm, the Petitioner must show that success on the merits is a "virtual certainty" to warrant issuance of a stay. *Shieldalloy*, CLI-10-8, 71 NRC at 154. Petitioners assert that they are likely to prevail on the merits of their claim that the NRC violated NEPA by not preparing a supplement to the FSEIS. This claim appears to rest on their assertion that because the Commission is considering enhancements to its regulations in response to the Fukushima event, that necessarily represents "new and significant" information warranting supplementation of the Vogtle FSEIS. Motion at 13, 15-16. However, this argument

[9] *See, e.g.*, *Vogtle*, CLI-12-2 at 16; Exhibit SNCR20001 at 5-8 (ML11270A201).

is fundamentally flawed because, as in their previously-rejected filings in this proceeding, the Petitioners fail to articulate why the Fukushima accident or any of the associated regulatory enhancements undergoing Commission consideration would entail any environmental impacts significantly different from those already thoroughly analyzed in the Vogtle review and documented in the FSEIS. *See Hydro Resources*, CLI-01-4, 53 NRC at 52. As a result, the Motion fails to show that the Fukushima event or the Commission's actions in response reveal any environmental effects that are significantly different from those already studied. This falls far short of demonstrating a likelihood of success on the merits.

The Petitioners characterize the Commission decision as "disregarding" the Task Force recommendations, and they assert that the Commission declined to consider the Fukushima event under NEPA because the Commission decided the potential for such an accident was "too unlikely to warrant consideration." Motion at 15. However, the Petitioners misread both the Commission decision and the mandatory hearing record.

In the mandatory hearing, the Commission examined the Staff's review of both safety and environmental matters. *Vogtle*, CLI-12-2 at 12-14. The Final Environmental Impact Statement for an Early Site Permit at the Vogtle Electric Generating Site (ESP FEIS), which was published in August of 2008, evaluated the environmental impacts of the construction and operation of new reactor units at the site, including potential environmental impacts from design basis accidents and severe accidents. *See, e.g.*, ESP FEIS at § 5.10. The Vogtle COL FSEIS found that the conclusions in the ESP FEIS with respect to the environmental impacts of accidents remained valid. FSEIS at § 5.10.

The Commission decision acknowledged the Staff's consideration of severe accident concerns in its environmental review and also referenced several Staff responses to the Commission's post-hearing questions concerning accident scenarios analogous to those at Fukushima. *Vogtle*, CLI-12-2 at 72-75 & nn. 327-341. The Commission emphasized that the risks for the Westinghouse AP1000 reactor design at the Vogtle site are expected to be lower

than those for current generation plants, supporting the Staff's conclusion that the probability-weighted consequences of severe accidents at the Vogtle site would be small. *Id.* at 73. Describing the Staff responses, the Commission decision acknowledged that "severe accidents, like the accident at Fukushima Dai-ichi, are potentially high consequence but extremely low probability accidents," and concluded that the Staff "has considered a range of postulated severe accidents and consequences of these accidents." *Id.* at 75.[10]

Thus, contrary to the Petitioners' characterization, the Commission decision does not presume severe accidents such as the Fukushima events are "too unlikely" to be considered in an EIS. Rather, it demonstrates that the Staff's FSEIS analysis of the environmental impacts of the proposed action already appropriately accounts for severe accidents and why, in light of available information (including the NTTF Report and its recognition that like other severe accidents, the risk of such a sequence of events in the U.S. is low in light of the U.S. regulatory framework and plant capabilities),[11] the events of Fukushima did not alter the Staff conclusion that severe accident risks at Vogtle remain small. *Vogtle*, CLI-12-2 at 22, 74-75.

Moreover, the hearing record makes clear that while the Fukushima accident and the Commission's ongoing response to it clearly has regulatory importance ("significance" in the ordinary sense of the word), that alone does not make it "new and significant" information for NEPA purposes and warranting supplementation of the EIS. The Commission recognized that at the time of the decision, "review of recommended actions associated with lessons learned from the Fukushima Dai-ichi events is ongoing," that "the agency continues to develop the technical basis for Fukushima-related requirements," and that "[t]he applicability of any new requirement will be determined when the justification is fully developed and we evaluate the

[10] The Staff's consideration of the Fukushima accident in its environmental review, and the basis for concluding that it did not in fact represent new and significant information with respect to the Vogtle FSEIS, is further discussed in the hearing transcript. *See* Transcript of Evidentiary Hearing at 63-64 (Hatchett), 79-82 (Hatchett) (September 27, 2011) (ML11305A228).

[11] *See* NTTF Report at vii; *see also Vogtle*, CLI-12-2 at 22.

Staff's bases." *Vogtle*, CLI-12-2 at 81, 85, 82. The Commission thus anticipated that further regulatory steps would be taken to enhance the NRC's regulatory framework in light of lessons learned from Fukushima, but emphasized that the details of any new requirements and their implementation remained to be determined. *See, e.g.*, *id.* at 83-84.[12] As the exact nature of (and basis for) such potential enhancements was not yet established, Petitioners do not explain how the general prospect of further safety requirements demonstrates the potential for a "seriously different picture" of the environmental impacts of the proposed action as already evaluated.[13] In sum, Petitioners have not articulated why information associated with Fukushima reveals a seriously different picture of the environmental impacts of severe accidents compared to the analysis already reflected in the FSEIS and the Vogtle hearing record, and accordingly have not demonstrated any likelihood of success on the merits. As with the Petitioners' failure to demonstrate irreparable harm, this factor likewise does not meet their burden for justifying a stay.

III. Petitioners Do Not Show That Either Harm to Other Parties or the Public Interest Weigh In Favor of Their Motion

A movant's failure to make an adequate showing relative to the first two stay criteria makes an extensive analysis of the third and fourth factors unnecessary. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1620 (1985); Babcock & Wilcox (Apollo, PA, Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 266, *reconsid. denied*, LBP–92–35, 36 NRC 355, 364 (1992). Nevertheless, the Petitioners have also

[12] The Commission also acknowledged the direction it had already provided to the Staff in response to Staff recommendations and the prioritization of those actions. *See* CLI-12-2 at 81 (referencing Staff Requirements—SECY-11-0124—Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ML112911571) and Staff Requirements—SECY-11-0137—Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ML113490055)).

[13] In particular, the Motion does not explain why the potential imposition of new requirements to further enhance safety would alter either the risks or impacts of a severe accident in a way that would present a "seriously different picture" from the analysis of those risks in the Vogtle COL FSEIS. It is clear for the reasons described above why, at the time the license was issued, neither the Staff nor the Commission determined information associated with Fukushima to be environmentally new and significant.

not shown that either the potential harm to other parties or the public interest weigh in favor of their motion.

As Petitioners implicitly recognize, the third stay factor concerning potential harm to other parties can properly encompass consideration of significant financial harms. *See Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1603 (1985); *Babcock & Wilcox*, LBP-92-31, 36 NRC at 266-67 (finding harm to applicant for decommissioning license amendment would result from, among other things, shutdown, demobilization, and remobilization costs). Petitioners acknowledge the likely financial costs to the licensee of a delay in construction due to a stay, but assert that the harm to the licensee is lessened because those costs, if incurred, may ultimately be paid by others. Motion at 17-18; Declaration at 5-6, 10. But even assuming Petitioners were correct in this regard, Petitioners' argument does not disclaim either the substantial financial consequences of delays in construction or that they would be borne at least initially by the licensee. *Id.* Furthermore, the Petitioners do not acknowledge another potential consequence of a stay, delay in the ultimate commencement of operation of the facility. Considering the demonstrated need for the electric power to be produced by the new units, *see* FSEIS at 8-1, such delay could represent a harm both economically to the licensee and also to the public interest in the availability of needed power. *Cf. Florida Power & Light* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977) (acknowledging harm to construction permit applicant as "monetary costs and impact upon the ultimate completion date of the facility"); *see also Limerick*, ALAB-808, 21 NRC at 1603 (giving weight in harm analysis to licensee's statement of cost of delays in full-power operation, including costs passed on to customers).

Petitioners also posit that financial harms to the licensee from a stay ultimately could be offset to the extent that, if new Fukushima-related requirements necessitate changes to the design of the facility, staying the licenses would avoid "costly redesign" at the stage where

"construction is well advanced or nearly completed." Motion at 18-19.[14] However, this claim depends on speculation regarding several assumptions – including that the NRC will impose Fukushima-related requirements that would require significant design changes; that those requirements would be applicable to the Vogtle licenses; that the associated costs of implementation would be significant; and that, by the time judicial review is complete, construction of the new units would have progressed to the point where the specific new requirements would necessitate redesign or retrofitting.[15] *Id.*; Declaration at 8-10. Given these variables, Petitioners have not shown why the mere possibility of averting such hypothetical costs should outweigh the foreseeable harms of delay from staying the licenses now. *Cf. St. Lucie*, ALAB-404, 5 NRC at 1188 (rejecting similar argument that avoiding "wasted" expenditures will benefit applicant if permit is ultimately set aside and thus stay would not constitute harm to applicant).[16]

These same considerations undercut Petitioners' claim that the fourth stay factor, the public interest, supports a stay. The Petitioners' asserted benefits to the public interest include avoidance of unnecessary cost and "effective" consideration of safety improvements. Motion at 19-20. However, whether these benefits will exist depends entirely on the Petitioners' aforementioned assumptions about the extent and expense of potential NRC requirements and

[14] The Petitioners state, for example, that such changes may be necessary with respect to flooding, seismic events, and station blackout. *See, e.g.*, Declaration at 8-9.

[15] Subsequent to the issuance of both CLI-12-2 and the Vogtle licenses, on February 17, 2012, the Staff sent the Commission SECY-12-0025, "Proposed Orders and Requests for Information in Response to Lessons Learned from Japan's March 11, 2011, Great Tohoku Earthquake and Tsunami." In that SECY paper, the Staff proposes issuing two orders to the Vogtle COL licensee. *See* SECY-12-0025 at Enclosure 4, Attachment 3; Enclosure 6, Attachment 3. The proposed orders relate to development of strategies to mitigate beyond design basis natural phenomena which addresses both multiunit events and reasonable protection of equipment identified under such strategies and installation of enhanced spent fuel pool instrumentation. In the SECY paper, the Staff does not propose having the Vogtle licensee address Tier 1 Recommendation 2.1, which would request that licensees reevaluate the seismic and flooding hazard for their sites. *See* SECY-12-0025 at 11.

[16] The Declaration opines at length about potential future costs that the Petitioners project could arise in the event of a delay in operation of the facility stemming from backfits. *See, e.g.*, Declaration at 9-11. However, it is not necessary to address these claims in detail because, for the reasons just explained, they are predicated on several degrees of speculation about both the nature and timing of eventual Commission actions associated with Fukushima recommendations.

the mere possibility that implementing them somewhat later in the construction process could prove less efficient. To the extent Petitioners are correct that financial costs from a stay might subsequently be borne by others, including ratepayers or taxpayers, Petitioners in effect concede that delay from an unjustified stay would also come at public expense. Thus, as discussed above with respect to the third criterion, given the degree of speculation underlying Petitioners' assertions regarding future "costly redesigns," the public interest is now better served by ensuring that there is no unnecessary delay in the start of power generation that has been shown to be needed. This is especially true given that the Commission has expressed its confidence that existing regulatory processes provide effective mechanisms for imposing new Fukushima-related requirements as they are determined to be necessary. *Vogtle*, CLI-12-2 at 81-84. Petitioners have not demonstrated that the likely delay in ultimate operation resulting from an indefinite stay would, at this time, be outweighed by the mere possibility of averting speculative costs.

Since Petitioners have not demonstrated that any of the four factors weighs in their favor, including the most dispositive factors of irreparable harm and likelihood of success on the merits, they have not met their burden to justify a stay.

CONCLUSION

As discussed above, Petitioners' Motion fails to meet the Commission's requirements for a stay. Accordingly, the Commission should deny the Motion.

/Signed (electronically) by/

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Dated at Rockville, Maryland
This 27th day of February, 2012

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO PETITIONERS' MOTION TO STAY THE VOGTLE UNITS 3 AND 4 COMBINED LICENSES PENDING JUDICIAL REVIEW" have been served upon the following persons by Electronic Information Exchange this 27th day of February, 2012:

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Dated at Rockville, Maryland
this 27th day of February, 2012