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 Matters of	)	
LUMINANT GENERATION COMPANY LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4)	)	Docket Nos. 52-034-COL and 52-035-COL
ENERGY NORTHWEST (Columbia Generating Station)	)	Docket No. 50-397-LR
SOUTHERN NUCLEAR OPERATING CO. (Vogtle Electric Generating Plant, Units 3 and 4)	)	Docket Nos. 52-025-COL and 52-026-COL
DUKE ENERGY CAROLINAS, LLC (William States Lee III Nuclear Station, Units 1 and 2)	)	Docket Nos. 52-018-COL and 52-019-COL

CLI-12-07

MEMORANDUM AND ORDER

Today we address four identical petitions for review of the Atomic Safety and Licensing Board's decision in LBP-11-27, which declined to admit a new contention proposed in the captioned matters. As discussed below, we deny the petitions for review.[1]

[1] We authorized issuance of the combined licenses in the *Vogtle* matter on February 9, 2012; the Office of New Reactors issued the licenses the next day. *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-2, 75 NRC __ (Feb. 9, 2012) (slip op.); Matthews, David B., Office of New Reactors, NRC, letter to Joseph A. "Buzz" Miller, Southern Nuclear Operating Co., "Issuance of Combined Licenses and Limited Work Authorizations for Vogtle Electric Generating Plant (VEGP) Units 3 and 4) (Feb. 10, 2012) (continued . . .)

I. BACKGROUND

A. The New Contention

This matter stems from the filing of motions to reopen the *Vogtle*, *Comanche Peak*, and *Bell Bend* combined license (COL) proceedings, a motion to admit a new contention in the *Lee* COL proceeding, and a request for hearing and petition for leave to intervene associated with the *Columbia Generating Station* license renewal application, all of which sought to admit a substantively identical contention under the National Environmental Policy Act (NEPA).[2] The motions were referred to the Atomic Safety and Licensing Board Panel for resolution.[3]

(ADAMS accession no. ML113360395). Issuance of these licenses does not render the *Vogtle* petition for review moot; reopening was sought prior to license issuance.

[2] *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* (filed in the *Vogtle* docket on Aug. 11, 2011, by Center for a Sustainable Coast, Georgia Women's Action for New Directions f/k/a Atlanta Women's Action for New Directions (Georgia WAND), and Southern Alliance for Clean Energy (SACE)); *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* and a separately paginated *Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report* (filed in the *Vogtle* docket on Aug. 11, 2011, by Blue Ridge Environmental Defense League (BREDL)) (BREDL Motion and BREDL Contention, respectively); *Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report* (Aug. 11, 2011), and *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) (both filed by Texas State Representative Lon Burnam, Sustainable Energy and Economic Development (SEED) Coalition, and True Cost of Nukes in the *Comanche Peak* docket); *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* (filed in the *Lee* docket on Aug. 11, 2011, by BREDL); *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* (filed in the *Bell Bend* docket on Aug. 10, 2011, by Gene Stilp); *Petition for Hearing and Leave to Intervene in Operating License Renewal for Energy Northwest's Columbia Generating Station* (filed in the *Columbia Generating Station* docket on Aug. 22, 2011, by Northwest Environmental Advocates).

[3] Order (Aug. 18, 2011) (referral to the Atomic Safety and Licensing Board) (unpublished); Order (Aug. 30, 2011) (referral to the Atomic Safety and Licensing Board) (unpublished); Memorandum from Vietti-Cook, Annette, Secretary of the Commission, to Chief Administrative Judge E. Roy Hawkens, "Request for Hearing With Respect to Notice of Opportunity of Hearing (continued . . .)

The common contention arises from the report of the agency's Near-Term Task Force regarding the Fukushima Dai-ichi accident, discussed further below. The contention was founded, as a general matter, on the Task Force's recommendation that the NRC "increase the level of safety associated with adequate protection of the public health and safety."[4] The common contention asserted that the environmental review documents in each of the captioned matters fail to satisfy NEPA because they do not account for the new and significant environmental implications stemming from the findings and recommendations included in the Near-Term Report.[5]

Regarding Renewal of Facility Operating License for Additional 20-Year Period for Energy Northwest Columbia Generating Station, Docket No. 50-397-LR" (Aug. 31, 2011). *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. 56,243 (Sept. 12, 2011). Each of these boards was comprised of the same three administrative judges; in the context of this decision, we refer to them as a single Board.

[4] *See generally* "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) (transmitted to the Commission via "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan," Commission Paper SECY-11-0093 (July 12, 2011), at 18 (ML11186A950) (package) (Near-Term Report)).

[5] BREDL Contention at 5. The NEPA documents challenged for the *Lee*, *Columbia Generating Station*, and *Bell Bend* applications were the environmental reports; the *Vogtle* petitioners challenged the final supplemental EIS; and the *Comanche Peak* petitioners challenged the final supplemental EIS. LBP-11-27, 74 NRC at __ (slip op. at 6 n.17). BREDL's proposed contention in the *Vogtle* matter differs slightly, in that the text of the contention references "seismic-flood and environmental justice issues." *Id.* at 4. The Board concluded that this slight difference in wording, and the fact that the contentions challenge various NEPA documents, were not significant for the purposes of its ruling. LBP-11-27, 74 NRC at __ (slip op. at 6 n.17). As the Board observed, since the new contention was filed, the Staff has issued a draft supplemental EIS associated with the *Columbia Generating Station* license renewal application, and a draft EIS associated with the *Lee* COL application. "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 47 Regarding Columbia Generating Station, Draft Report for Comment," NUREG-1437 (Aug. 2011) (ML11227A007); "Draft Environmental Impact Statement for Combined Licenses (COLs) for William States Lee III Nuclear Station Units 1 and 2, Draft Report for Comment," NUREG-2111 (Dec. 2011) (ML113430094) (package).

In a single, consolidated decision, the Board denied the motions and intervention petition.[6] The Board reasoned that the rationale in our recent decision in CLI-11-5 resolving multiple requests for relief was controlling, and denied the motions and petition as premature.[7] These four timely petitions for review followed.[8] The applicants and the Staff oppose the petitions.[9]

B. Events at the Fukushima Dai-ichi Nuclear Power Plant

A summary of the events that occurred at Fukushima Dai-ichi following the March 11, 2011 earthquake and tsunami, as well as actions taken by the NRC subsequent to the accident, is provided in our recent decision in CLI-11-5.[10] As relevant here, soon after the events in Japan we established a Near-Term Task Force to conduct a review of the agency's processes and regulations to determine if we should make additional improvements to our regulatory

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[6] LBP-11-27, 74 NRC __ (Oct. 18, 2011) (slip op. at 15-16); Memorandum (Corrections regarding LBP-11-27) (Oct. 20, 2011) (unpublished).

[7] *Id.* at __ (slip op. at 13-14). *See generally Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC__ (Sept. 9, 2011) (slip op.).

[8] *Petition for Review of LBP-11-27* (Nov. 2, 2011) (Petition). Representative Lon Burnam, SEED Coalition, Public Citizen, and True Cost of Nukes filed a petition in the *Comanche Peak* COL proceeding; BREDL filed a single petition in both the *Vogtle* and *Lee* dockets; Center for a Sustainable Coast and SACE also filed a petition in the *Vogtle* docket; and Northwest Environmental Advocates filed a petition for review associated with the *Columbia Generating Station* license renewal application. Collectively, we refer to these entities as "Petitioners." The petitions themselves are substantively identical. For convenience, page references in today's decision correspond to the petition filed by BREDL in the *Vogtle* and *Lee* matters. Mr. Stilp did not seek review in the *Bell Bend* case.

[9] *Duke Energy's Answer to Petition for Review of LBP-11-27* (Nov. 14, 2011) (*Lee*); *Southern Nuclear Operating Company's Answer Opposing Petitions for Review of LBP-11-27* (Nov. 14, 2011) (*Vogtle*); *Luminant's Answer in Opposition to Petition for Review of LBP-11-27* (Nov. 14, 2011) (*Comanche Peak*); *Energy Northwest's Answer in Opposition to Petition for Review of LBP-11-27* (Nov. 14, 2011) (*Columbia Generating Station*) (Energy Northwest Answer); *NRC Staff's Answer to Petition for Review of LBP-11-27* (Nov. 14, 2011). The Staff filed two identically titled answers, one in the *Columbia Generating Station* matter and one in the COL proceedings.

[10] *Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 3-4).

system.[11] In July, the Task Force provided to us a report transmitting its recommendations. The Near-Term Report included twelve overarching recommendations for improving the safety of both new and operating nuclear reactors.[12] Also relevant here, we recently approved the Staff's recommended actions to be taken without delay from the Near-Term Report.[13]

II. DISCUSSION

A. Standards of Review

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;

(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.[14]

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[11] Tasking Memorandum—COMGBJ−11−0002—NRC Actions Following the Events in Japan, (Mar. 23, 2011) (ML110800456). *See generally* "Charter for the Nuclear Regulatory Commission Task Force to Conduct a Near-Term Evaluation of the Need for Agency Actions Following the Events in Japan" (Apr. 1, 2011) (ML11089A045).

[12] *See generally* Near-Term Report.

[13] Staff Requirements—SECY-11-0124—Recommended Actions To Be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ML112911571). *See generally* "Recommended Actions To Be Taken Without Delay from the Near-Term Task Force Report," Commission Paper SECY-11-0124 (Sept. 9, 2011) (ML11245A127, ML11245A144) (paper and attachment); Staff Requirements—SECY-11-0137—Prioritization of Recommended Actions To Be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ML113490055); "Prioritization of Recommended Actions To Be Taken in Response to Fukushima Lessons Learned," Commission Paper SECY-11-0137 (Oct. 3, 2011) (ML11272A111) (package).

[14] 10 C.F.R. § 2.341(b)(4)(i)-(v).

Petitioners in the *Comanche Peak*, *Vogtle*, and *Lee* matters properly raise this appeal under 10 C.F.R. § 2.341, which applies to new contentions filed after initial intervention petitions.[15] Instead of section 2.311, which permits an appeal as of right on the question of whether an initial intervention petition should have been wholly denied, or alternatively, was granted improperly,[16] in instances where an appeal involves a late-filed contention, 10 C.F.R. § 2.341 is routinely applied.[17]

With respect to the *Columbia Generating Station* matter, no timely initial intervention petition was submitted in response to the notice of opportunity for hearing published in the *Federal Register*, and as a consequence, no adjudicatory proceeding commenced.[18] Accordingly, our rules required—and Northwest Environmental Advocates filed—an intervention petition and request for hearing to advance the common contention in the *Columbia Generating*

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[15] *Cf. South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-09-18, 70 NRC 859, 862 (2009) ("As a general matter, contentions filed after the initial petition are not subject to appeal pursuant to section 2.311."). In the *Comanche Peak*, *Vogtle*, and *Lee* matters, Petitioners timely filed initial intervention petitions.

[16] *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) (stating that 10 C.F.R. § 2.714a (now 10 C.F.R. § 2.311) allows an appeal of a ruling on contentions, "only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for hearing should have been wholly denied"). *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125 (2006).

[17] *See South Texas Project*, CLI-09-18, 70 NRC at 862 (clarifying that "challenges to Board rulings on late-filed contentions normally fall under our rules for interlocutory review"). *See also Oyster Creek*, CLI-06-24, 64 NRC at 111; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235 (2009).

[18] Energy Northwest submitted the license renewal application for Columbia Generating Station on January 19, 2010. The notice of opportunity for hearing was published in the *Federal Register* on March 11, 2010; an intervention petition would have been due by May 10, 2010. *See* Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. NPF-21 for an Additional 20-Year Period [,] Energy Northwest; Columbia Generating Station, 75 Fed. Reg. 11,572 (Mar. 11, 2010). Northwest Environmental Advocates filed its intervention petition on August 22, 2011, over one year later.

Station matter. Energy Northwest therefore argues that Northwest Environmental Advocates' appeal should have been filed pursuant to 10 C.F.R. § 2.311, and, as a result, also claims that the appeal was filed out of time—five days beyond the ten-day deadline set forth in section 2.311.[19] While we agree with Energy Northwest that Northwest Environmental Advocates' appeal lies under section 2.311,[20] as a matter of discretion we consider the petition for review. In any event, the standard for review of contention admissibility determinations is the same, whether an appeal lies under section 2.311 or 2.341—we will disturb a licensing board's contention admissibility ruling only if there has been an error of law or an abuse of discretion.[21]

Petitioners argue that the Board's decision is reviewable because a "necessary legal conclusion is without governing precedent or is a departure from or contrary to established law," and also because a "substantial and important question of law, policy or discretion has been raised."[22] As discussed below, Petitioners have not raised a substantial question warranting review.[23]

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[19] Energy Northwest Answer at 6.

[20] *See South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881 (1981) (applying the predecessor regulation to section 2.311, 10 C.F.R. § 2.714a, to its review of an initial intervention petition filed over four years after the deadline).

[21] *Progress Energy Florida, Inc*. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 29 (2010). *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 260 (2009); *Luminant Generation Co. LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-11-9, 74 NRC __ (Oct. 4, 2011) (slip op. at 5).

[22] Petition at 5-6.

[23] *Id.* at 2. Petitioners in all four proceedings filed motions to reinstate and supplement the basis for the rejected contention prior to filing their appeals of LBP-11-27. *See Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention* (filed in the *Comanche Peak* docket on Oct. 28, 2011 by Representative Burnam, SEED Coalition, Public Citizen, and True Cost of Nukes); *Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention* (filed in the *Vogtle* docket by Center for a Sustainable Coast, Georgia WAND, and SACE on Oct. 28, 2011); *Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention* (filed in the *Vogtle* docket by BREDL on Oct. 28, 2011); *Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report* (continued . . .)

B. Analysis

Petitioners first argue that the Board erred in concluding that the proffered contention was premature because it interpreted our holding in CLI-11-5 too broadly.[24] In CLI-11-5, we held that a request for a generic NEPA review arising out of the Near-Term Report was premature. According to Petitioners, however, the Board misconstrued that holding as applicable to individual licensing proceedings as well. Petitioners instead assert that CLI-11-5 determined that the Commission would consider the NEPA issue in individual licensing proceedings.[25] As explained below, we disagree with Petitioners' characterization of the Board's ruling.

A host of petitions were filed after the Fukushima Dai-ichi accident requesting the suspension of adjudicatory, licensing, and rulemaking activities associated with several power plants.[26] As part of a laundry list of requested relief, those petitions requested that the NRC conduct a generic NEPA analysis on the grounds that the Fukushima accident constituted "new and significant" information that must be analyzed as part of the environmental review for new reactor and license renewal decisions.[27] In resolving those petitions we noted that, although the Task Force had issued its report, the evaluation of the Fukushima Dai-ichi accident was still

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Contention (filed in the *Lee* proceeding by BREDL on Oct. 28, 2011); *Motion to Reinstate and Supplement the Basis for Fukushima Task Force Report Contention* (filed in the *Columbia Generating Station* docket by Northwest Environmental Advocates on Oct. 28, 2011). Petitioners requested on appeal that we hold the petitions for review in abeyance pending issuance of the Board's ruling on their motions to reinstate and supplement the contention. *See* Petition at 2. The Board has now ruled on their motions to supplement; Petitioners' request is moot. *See* LBP-11-36, 74 NRC __ (Nov. 30, 2011) (slip op.).

[24] Petition at 6.

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

[26] *See generally Callaway*, CLI-11-5, 74 NRC __.

[27] *Id.* at 9. *See also, e.g.*, *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. 18, 2011), at 2 (ML111080869).

ongoing and the implications for U.S. reactors were not yet known.[28] In short, we declined to conduct a generic NEPA analysis at that time.[29]

Here, Petitioners argue that application-specific NEPA analyses must consider "new and significant" information arising from the Fukushima accident. They attempt to distinguish CLI-11-5 by claiming that our holding there rested on a finding that sufficient information was not yet available to conduct a *generic* analysis.[30] In support of its conclusion in LBP-11-27, however, the Board did not assume that we had ruled prospectively on application-specific NEPA contentions. The Board found that Petitioners did not relate their contention to any unique characteristics of the particular site at issue, and therefore, the contention was akin to the generic type of NEPA review that we declared premature in CLI-11-5.[31]

While it is true that the precise relief sought is slightly different—site-specific analyses versus a generic one—we decline to find that the Board erred in relying on the reasoning underlying our decision. Although some time has passed, and regulatory initiatives are well under way, we continue to gain information on the Fukushima Dai-ichi events. As we stated in CLI-11-5, "[if] new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents, the agency will assess the significance of that information as appropriate."[32]

Petitioners have not identified environmental effects from the Fukushima Dai-ichi events that can be concretely evaluated at this time, or identified specific new information challenging the site-specific environmental assessments in the captioned matters. We therefore decline to

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[28] *Id.* at 30-31.

[29] *Id.*

[30] Petition at 6.

[31] LBP-11-27, 74 NRC at __ (slip op. at 13-14).

[32] *Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 30-31).

disturb the Board's conclusion that nothing in Petitioners' contention overcomes the prematurity concerns we outlined in CLI-11-5.

The contention also fails on an independent ground. Petitioners argue that the Near-Term Report constitutes new and significant information because it stems from the Fukushima Dai-ichi accident and "because it raises an extraordinary level of concern regarding the manner in which the proposed operation of the [facilities in the captioned matters] 'impacts public health and safety.'"[33]

NEPA imposes a continuing obligation on federal agencies to supplement an existing environmental impact statement (EIS), if the proposed action has not been taken, "in response to 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'"[34] Our rules provide that we will supplement an EIS if there are: (1) substantial changes in the proposed action relevant to environmental concerns, or (2) new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[35] To constitute a basis for supplementing an EIS, Petitioners are correct that the new information must present a "seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[36] As discussed above, although our Fukushima lessons-learned review continues, Petitioners have

[33] *See* BREDL Contention at 12.

[34] *Idaho Sporting Cong*. *Inc. v. Alexander*, 222 F.3d 562, 566 n.2 (9th Cir. 2000).

[35] 10 C.F.R. §§ 51.72(a), 51.92(a).

[36] *Hydro Resources, Inc*. (2929 Coors Road, Suite 101, Albuquerque, NM, 87120), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989); *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

not pointed to concrete information that "is material to the findings the NRC must make to support" the captioned proposed actions.[37]

Petitioners further assert that the Board engaged in circular logic to conclude that information is "new and significant" only when it compels agency action and that, instead, the Board should assess whether "Petitioners have raised a litigable claim."[38] We disagree. As a general matter, "new" information that may be assessed for its relevance to an ongoing licensing matter may be derived in a wide variety of ways; such information is assessed for significance regardless of whether it has been acted upon in some way by us, or by the NRC Staff. In any event, however, a careful reading of the Board's decision makes clear that, while the Board expressed doubt as to the weight the Near-Term Report should be accorded prior to our action on the recommendations, the fact that we had not yet acted on the Report was not the basis for its decision. Rather, the Board fundamentally relied on the reasoning in CLI-11-5:

> 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.[39]

We find the Board's determination reasonable, and decline to disturb it. As tangible Fukushima lessons emerge—whether from inside or outside the NRC—Fukushima-related contentions in individual adjudications may become more plausible, except insofar as the NRC is taking generic steps to address them. Furthermore, although the question before the Commission in CLI-11-5 was a request for a generic analysis (rather than a particular

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[37] 10 C.F.R. § 2.309(f)(1)(iv).

[38] Petition at 8.

[39] LBP-11-27, 74 NRC at __ (slip op. at 12) (citing *Callaway*, 74 NRC at __ (slip op. at 30)).

contention), we expect the Boards in individual licensing proceedings to assess contentions against applicable procedural standards.

Here, the Board addressed—albeit briefly—Petitioners' failure to point to "any unique characteristics of the site of the particular reactor that might make the content," of the Near-Term Report "of greater environmental significance to that reactor than to United States reactors in general."[40] The contention presumes, without support, that the Near-Term Report raised "new and significant" environmental implications that have not been addressed in previous environmental reports (or Staff environmental reviews) prepared for the referenced applications. Petitioners make only broad claims that the Near-Term Report constitutes new and significant information "because it raises an extraordinary level of concern regarding the manner in which the proposed operation of the [facilities in the captioned matters] impacts health and safety."[41] Petitioners also assert, without more, that

> the Task Force's recommendation to completely overhaul the NRC regulatory structure, including redefining what level of protection of public health and safety should be regarded as adequate, easily surpasses the objective "new and significant" test because it []paints a "seriously different picture of the environmental impact" of the licensing and [license renewal] of nuclear reactors than before the release of the Task Force Report.[42]

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[40] LBP-11-27, 74 NRC at __ (slip op. at 13-14). Neither the declaration provided by Dr. Arjun Makhijani nor that provided by Dr. Ross McCluney referenced any conditions relevant to any of the sites—or applications— at issue here. *See* BREDL Motion (attaching *Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident* (Aug. 8, 2011) and *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). Dr. Makhijani's declaration was filed with each request; Dr. McCluney's declaration was filed in support of BREDL's motions in the *Vogtle* and *Lee* matters.

[41] BREDL Contention at 12.

[42] Petition at 9.

But our contention admissibility rules require a proposed contention to be supported by "alleged fact or expert opinion."[43] As the Board correctly observed, reference to the Task Force Report recommendations alone, without facts or expert opinion that explain their significance for the unique characteristics of the sites or reactors that are the subject of the petitions, does not provide sufficient support for the common contention.[44] We expect Petitioners to identify information that was not considered in the environmental review for the application at issue and explain, with asserted facts or expert opinion, how it presents a "seriously different picture of the environmental impact of the proposed project from what was previously envisioned."[45] Applying this standard, we see no error or abuse of discretion in the Board's finding that Petitioners failed to include facts sufficient to demonstrate a genuine dispute with respect to a particular captioned application.[46] While this may be because information available to, and relied upon by,

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[43] 10 C.F.R. § 2.309(f)(1)(v) & (vi). *See also Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005).

[44] LBP-11-27, 74 NRC at __ (slip op. at 13).

[45] *Callaway*, CLI-11-5, 74 NRC at __ (slip op. at 31) (citing *Hydro Resources*, CLI-99-22, 50 NRC at 14 (citing, in turn, *Marsh*, 490 U.S. at 373; *Sierra Club*, 816 F.2d at 210)).

[46] In the *Vogtle* matter, BREDL also raised an environmental justice claim, supported by the Declaration of Rev. Charles Utley. With respect to the *Vogtle* COL application, Rev. Utley challenges the conclusions in the final supplemental EIS regarding environmental justice, asserting that the applicant and the Staff "disregarded" particular new information. Dr. Utley also asserts that the NRC should require Southern to provide shelter, evacuation assistance, and other protections to residents of several communities, and that potassium iodide should be made available to all residents of Burke County. *See* BREDL Contention at 2, 6; *Declaration of Rev. Charles N. Utley Regarding Environmental Justice and Emergency Response Issues at Plant Vogtle Electric Generating Plant Based on Events at Fukushima and the Findings of the NRC Interim Task Force* (Aug. 11, 2011), at 3-6 (appended to the BREDL Motion). The Board found that BREDL's claims are rooted in "longstanding generic concerns" about the NRC's implementation of environmental justice and its policy on the distribution of potassium iodide, and noted that both of these concerns appropriately could have been raised much earlier in the proceeding—particularly, at the time the Staff issued the draft supplemental EIS associated with the *Vogtle* application in September 2010. LBP-11-27, 74 NRC at __ (slip op. at 14 n.54). BREDL did not expressly challenge the Board's decision on its environmental justice claims, and, thus appears to have abandoned the claim. In any event, however, we find no error in the Board's decision on that point.

Petitioners was not sufficient to support an admissible contention, the contention nonetheless is too vague to be appropriate for litigation in an individual proceeding.[47]

As discussed above, the NRC's continuing efforts to implement regulatory actions arising from post-Fukushima lessons learned may require, under NEPA, new or supplemental environmental analyses. However, as particularly relevant to the *Vogtle* matter, where COLs now have issued, we observe that an application-specific NEPA review represents a "snapshot" in time. NEPA requires that we conduct our environmental review with the best information available today.[48] It does not require that we wait until inchoate information matures into something that later might affect our review.[49]

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[47] The Board in this case did not rely on the NRC's standards for reopening a closed record. LBP-11-27, 74 NRC at __ (slip op. at 5). Those standards require, among other things, a fully-supported showing of "significance" and a likelihood of a "materially different result." *See* 10 C.F.R. § 2.326. As we recently found in *Pilgrim*, where we also considered (and rejected) Fukushima-related contentions, "[t]he level of support required for a motion to reopen is greater than that required for a contention under the general admissibility requirements." *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC __ (Feb. 22, 2012) (slip op. at 7). Given our holding (explained above) that Petitioners' contention lacked sufficient specificity and support to satisfy our ordinary contention-admissibility rule, it necessarily follows that the contention also failed our more stringent reopening rule. And, even were we to assume contention admissibility, Petitioners have not shown that their various claims, which are quite general, have the kind of "significance" and potential for a "different result" that under our reopening rule would justify restarting already-closed hearings.

[48] *See Village of Bensenville v. FAA*, 457 F3d 52, 71-72 (D.C. Cir. 2006) (reasoning that the review method chosen by the agency in "creating its models with the best information available when it began its analysis and then checking the assumptions of those models as new information became available, was a reasonable means of balancing . . . competing considerations, particularly given the many months required to conduct full modeling with new data"); *Town of Winthrop v. FAA*, 535 F.3d 1, 9-13 (1st Cir. 2008) (upholding agency decision not to supplement an EIS with information in an area of research that was "still developing"). *Accord Marsh*, 490 U.S. at 374 ("[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision[-]making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.").

[49] *See Marsh*, 490 U.S. at 374. As noted above, our rules enable us to supplement an EIS if, before a proposed action is taken, new and significant information comes to light that bears on the proposed action or its impacts, consistent with the Supreme Court's decision in *Marsh. See id.* at 373-74.

III. CONCLUSION

For the foregoing reasons, we *deny* the petitions for review.

IT IS SO ORDERED.[50]

For the Commission

[NRC SEAL]

/RA/

Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of March, 2012.

[50] Commissioner Magwood's approval does not pertain to the *Comanche Peak* COL proceeding, in which he is not participating.