

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
)
PROGRESS ENERGY FLORIDA, INC.) Docket Nos. 52-029 and 52-030
)
)
(Levy County Nuclear Site, Units 1 and 2))

NRC STAFF ANSWER TO "NEW CONTENTION BY THE GREEN PARTY OF
FLORIDA, THE ECOLOGY PARTY OF FLORIDA AND NUCLEAR INFORMATION AND
RESOURCE SERVICE BASED ON INFORMATION NOT PREVIOUSLY AVAILABLE;
REQUESTING THIS GENERIC ISSUE TO BE ADMITTED AND HELD IN ABEYANCE"

Laura R. Goldin
Counsel for the NRC Staff

March 27, 2009

TABLE OF CONTENTS

BACKGROUND 1

DISCUSSION..... 2

 A. Legal Standards for Admission of Late-Filed Contentions 2

 B. Petitioners’ New Contention 5

 C. Staff Analysis of the Proposed New Contention..... 6

 1. The Proposed Contention Does Not Satisfy Late-Filed Contention Requirements 6

 2. The Proposed Contention is Inadmissible Because it Concerns Ongoing, General Rulemakings..... 9

 3. Proposed Contention 12 is Inadmissible as it is Outside the Scope of This Proceeding 11

 4. Proposed Contention 12 is Inadmissible as it Fails to Provide a Concise Statement of Alleged Facts or Expert Opinions Which Support the Petitioners’ Position on the Issue and Fails to Provide Sufficient Information to Show That a Genuine Dispute Exists With Respect to the Application 13

CONCLUSION 14

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
)
PROGRESS ENERGY FLORIDA, INC.) Docket Nos. 52-029 and 52-030
)
)
(Levy County Nuclear Site, Units 1 and 2))

NRC STAFF ANSWER TO “NEW CONTENTION BY THE GREEN PARTY OF FLORIDA, THE ECOLOGY PARTY OF FLORIDA AND NUCLEAR INFORMATION AND RESOURCE SERVICE BASED ON INFORMATION NOT PREVIOUSLY AVAILABLE; REQUESTING THIS GENERIC ISSUE TO BE ADMITTED AND HELD IN ABEYANCE”

Pursuant to 10 C.F.R. § 2.309(h)(1) and the Board Order dated March 11, 2009, the staff (Staff) of the Nuclear Regulatory Commission (NRC or Commission) hereby answers the “New Contention By The Green Party Of Florida, The Ecology Party Of Florida And Nuclear Information And Resource Service Based On Information Not Previously Available; Requesting This Generic Issue To Be Admitted And Held In Abeyance” (Proposed Contention), filed in the Levy County Nuclear Site, Units 1 and 2 (Levy) combined license (COL) proceeding by the Green Party of Florida (GPF), the Ecology Party of Florida (EPF), and Nuclear Information and Resource Service (NIRS) (collectively “Joint Petitioners”). For the reasons set forth below, the Staff opposes the admissibility of Petitioners’ Proposed Contention.

BACKGROUND

By letter dated July 28, 2008, Progress Energy Florida, Inc. (Progress or Applicant), acting for itself submitted a COL application (Levy COL application or COLA) for two AP1000 advanced passive pressurized water reactors (PWRs) to be located in Levy County, Florida. The Federal Register notice of docketing was published on October 14, 2008 (73 Fed. Reg. 60,726), and the Federal Register notice of hearing (Hearing Notice) was published on December 8, 2008 (73 Fed. Reg. 74,532). The Hearing Notice included an “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information [SUNSI] and

Safeguards Information [SGI] for Contention Preparation” (SUNSI/SGI Access Order).

Petitioners filed their “Petition To Intervene And Request For Hearing By The Green Party Of Florida, The Ecology Party Of Florida And Nuclear Information And Resource Service” on February 6, 2009. On March 3, 2009, the Staff filed its “NRC Staff Answer To ‘Petition To Intervene And Request For Hearing By The Green Party Of Florida, The Ecology Party Of Florida And Nuclear Information And Resource Service.’” On March 17, 2009, Petitioners filed their “Response of the Green Party of Florida, The Ecology Party of Florida And Nuclear Information And Resource Service to Answers to Our Petition to Intervene From NRC Staff Attorneys And Progress Energy Florida Attorneys” (Reply). Petitioners also filed their “New Contention By The Green Party Of Florida, The Ecology Party Of Florida And Nuclear Information And Resource Service Based On Information Not Previously Available; Requesting This Generic Issue To Be Admitted And Held In Abeyance” on March 9, 2009. In response to the filing of the Proposed Contention, the Board issued an “Order (Specifying Process for Responding to Proposed New or Amended Contentions)” on March 11, 2009. This Order states that the NRC has 20 days from March 9, 2009, to respond to the Proposed Contention.

DISCUSSION

A. Legal Standards for Admission of Late-Filed Contentions

Under Commission regulations, a late-filed contention may be admitted only upon the presiding officer’s determination, *inter alia*, that the contention should be admitted after balancing the eight factors listed in 10 C.F.R. § 2.309(c), all of which must be addressed in the petitioner’s filing.¹ Petitioners seeking the admission of a late-filed contention bear the burden

¹ Section § 2.309(c) requires a balancing of the following factors for late-filed contentions:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor’s/petitioner’s interest;

of showing that a balancing of these factors weighs in favor of admittance. See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 83 NRC 289, 296 (1993). Where no showing of good cause for lateness is tendered, a petitioner's demonstration on the other factors must be particularly strong. *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner's interest, and the ability of other parties to represent the petitioner's interest, are less important than the other factors, and are therefore entitled to less weight. See *id.* at 74.

The Commission's regulations additionally provide that a proposed late-filed contention may be filed only with leave of the presiding officer, and must 1) be based upon new information that was not previously available, 2) show that the new information is materially different than what was previously available, and 3) show that the contention was filed timely once the new information became available. 10 C.F.R. § 2.309(f)(2). Lastly, a petitioner must also show that the late-filed contention meets the substantive contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). See *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993).²

-
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
 - (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
 - (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
 - (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c).

² 10 C.F.R. § 2.309(f)(1) requires a proposed contention to:

Failure to comply with any of the contention requirements may be grounds for dismissing a contention. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).³

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) In a proceeding other than one under 10 C.F.R. 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and
- (vii) In a proceeding under 10 C.F.R. 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 C.F.R. 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

10 C.F.R. § 2.309(f)(1)(i)-(vii).

³ While revised relatively recently (see Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004)), § 2.309 incorporates the NRC's long-standing late-filed contention requirements. Compare 10 C.F.R. § 2.309(c) and (f)(2) with 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004).

B. Petitioners' New Contention

Petitioners' late-filed proposed contention reads:

PROPOSED CONTENTION 12:

Neither the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act ("AEA"). Therefore they fail to provide adequate support for the Applicant's Environmental Report or for an Environmental Impact Statement in this particular licensing case. The deficiencies in the Waste Confidence Rule also fatally undermine the adequacy of the NRC's findings in Table S-3 of 10 C.F.R. § 51.51 to satisfy NEPA. Unless and until the NRC remedies the deficiencies in the Waste Confidence Rule, Table S-3, and the Proposed Spent Fuel Storage Rule, the NRC has no lawful basis to issue a license for the proposed Levy County nuclear power plant.

Proposed Contention at 4.

In Proposed Contention 12, Petitioners assert that the Levy COL application is inadequate due to the NRC's proposed Waste Confidence Decision, 73 Fed. Reg. 59,551 (Oct. 9, 2008) ("Waste Confidence") and the proposed rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008) ("Temporary Storage"). Petitioner's Proposed Contention 12 "seeks to enforce, in this specific proceeding, the NRC's commitment that 'it would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.' ...The contention also seeks to enforce the requirement of the National Environmental Policy Act ("NEPA") that generic determinations under NEPA must be applied to individual licensing decisions and must be adequate to justify those individual decisions." Proposed Contention at 2. Petitioners further contend that the NRC must finalize decisions on the Waste Confidence Decision and the Temporary Storage rules before the Agency issues a COL to Levy County. On these issues, the Petitioners state that "we do not seek to litigate them in this individual proceeding. Instead, the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding." *Id.* at 3.

C. Staff Analysis of the Proposed New Contention

Proposed Contention 12 is inadmissible as it does not satisfy the late-filed contention requirements of 10 C.F.R. § 2.309(c)(2) or 10 C.F.R. § 2.309(f)(2). Further, even if Proposed Contention 12 had satisfied the late-filed contention requirements of 10 C.F.R. § 2.309(c) & (f)(2), Proposed Contention 12 would still be inadmissible as it concerns ongoing, general rulemakings, is outside the scope of this proceeding, fails to provide a concise statement of the alleged facts or expert opinions which support the Petitioners' position on the issue, and likewise fails to show that a genuine dispute exists with respect to the application on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1).

1. The Proposed Contention Does Not Satisfy Late-Filed Contention Requirements

The Petitioners do not satisfy the NRC's late-filed contention requirements and thus the proposed late-filed contention is inadmissible. Under 10 C.F.R. § 2.309(c)(2), a requester or petitioner is required to "address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing." In support of its late-filed contention, the Petitioners recite each of the § 2.309(f)(2) criteria, and corresponding reasons that those criteria run in the Petitioners' favor. They do not, however, address § 2.309(c). Accordingly, the Contention does not comply with the Commission's late-filed contention rules.

As to the requirements of § 2.309(c)(1), the Petitioners have not shown good cause as required by § 2.309(c)(1)(i). While the Contention asserts good cause because it is based upon information which was not previously available, it also claims that it is "based on comments that [the Petitioners] submitted on February 6, 2009, regarding [the NRC's] proposed Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (October 9, 2008)." Proposed Contention at 1. The Proposed Contention goes on to state that it aims to "plac[e] *the exact same concerns* raised in our [February 6, 2009] [c]omments before the ASLB in this contention"

(Emphasis added.) Proposed Contention at 3. Most importantly, the Proposed Contention claims that it responds to the October 9, 2008 proposed rule, and that it is based upon the

National Environmental Policy Act of 1969, as amended (42 U.S.C. § 4321, *et seq.*), the Atomic Energy Act of 1954, as amended (42 USC § 2011, *et seq.*), and Table S-3 to 10 C.F.R. § 51.51.

The Petitioners also claim that their own February 6, 2009 comments constitute new information. However, no new information is referenced or relied upon in the contention. Petitioners even concede that Proposed Contention 12 is not new in their March 17, 2009 Reply. Petitioners admit that “Contention 12 (new) is a clarification and elaboration of the issues raised by contention 6, which co-petitioners have embraced.” Reply at 33. Petitioners claim that this information is new for the purposes of the Proposed Contention because “the information on which the contention is based, *i.e.*, the legal and technical analyses of the Proposed Confidence Decision and the Proposed Temporary Storage rule, were not available to Petitioners until February 6, 2009, when the Comments were finalized, presented to NIRS, et al. for concurrence, and submitted to the NRC.” Proposed Contention at 9. This position is inconsistent with Commission precedent on new information. In a recent case, the Commission, in denying an appeal from the denial of a late-filed contention, stated that “[the Petitioner] did not justify its untimely attempt to raise these new issues. To show good cause, a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it. . . . [The Petitioner has] failed to demonstrate good cause, as the information it relied upon was available earlier, and is not new information merely because [the Petitioner] was not aware of it earlier.” *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-09-05, 67 NRC ___ (March 5, 2009) (slip op. at 15) (Emphasis in original).

Here, the Contention by its own terms is based upon the NRC’s October 9, 2008 notice of proposed rulemaking. None of the information contained either in the Petitioners’ February 6, 2009 comments on the proposed rule or the Proposed Contention are alleged to be based upon information that was not previously publicly available. Instead, the Petitioners claim that the Proposed Contention is based upon analyses performed for the Petitioners that were not

available prior to the day the Petitioners filed their comments. However, the Petitioners do not claim that those analyses are themselves based upon information that was not previously publicly available, or how they otherwise constitute new information. Therefore, the Petitioners have not shown good cause as required by 10 C.F.R. § 2.309(c)(1)(i). Thus, the most important of the late-filed contention factors in § 2.309(c) balancing weighs against consideration of the contention. As discussed below, for similar reasons, the Petitioners also fail to satisfy the late-filed contention requirements of 10 C.F.R. § 2.309(f)(2)(i) and (ii).

The next balancing factor, found in § 2.309(c)(1)(ii), concerns a petitioner's right to be made a party to the proceeding. In its answer to the petition to intervene, the Staff does not object to Petitioners' standing to intervene in this proceeding. Therefore, this factor balances in Petitioners' favor. As to § 2.309(c)(iii), (iv), (v) and (vi), concerning the Petitioners' interests in this proceeding, as described in their petition to intervene, balancing likewise would seem to run in their favor.

Concerning § 2.309(c)(vii), admission of Proposed Contention 12 could cause a substantial delay. Thus this factor does not weigh in favor of the Petitioners. Lastly, as to § 2.309(c)(viii), the Petitioners' participation would not assist in developing a sound record, as the subject of the Proposed Contention is an ongoing rulemaking where the Petitioners have already filed their comments with the Commission. The record is not developed further by reprising the same issue in this adjudication. The Petitioners have not shown good cause for their late-filed contention, nor will this contention assist in the development of a sound record. As such, the Petitioners have not satisfied 10 C.F.R. § 2.309(c), as a balancing of its factors does not weigh in favor of consideration of the Contention. Therefore, the Proposed Contention is inadmissible.

The Proposed Contention is also inadmissible because it does not satisfy 10 C.F.R. § 2.309(f)(2). As discussed above concerning § 2.309(c)(1)(i)'s good cause requirement, the Proposed Contention is not based upon information that was not previously available (as

required by 10 C.F.R. §2.309(f)(2)(i)), as the Petitioners have alleged neither the Proposed Contention nor their February 6, 2009 comments to be based upon any information that was not publicly available following the Commission's October 9, 2008 notice of proposed rulemaking.

The Proposed Contention is not based upon information that is materially different than information previously available. The Petitioners allege that they satisfy this requirement because "[w]hile some of the information presented in this contention may have been publicly available, it was not integrated into a single document that presented a comprehensive and integrated analysis of the Waste Confidence Rule and related Table S-3 and Proposed Temporary Storage Rule. The reason for this is that the NRC has not offered an opportunity to comment on the Waste Confidence rule or its Finding of No Significant Impact regarding temporary spent fuel storage in approximately ten years." Proposed Contention at 9. Nothing in the above description explains how the already publicly available information might combine to form new information that is materially different from that already available. Therefore, the Petitioners have not satisfied 10 C.F.R. § 2.309(f)(2)(ii), making the Proposed Contention inadmissible.

Lastly, 10 C.F.R. § 2.309(f)(2)(iii) requires that all information in a late-filed contention be submitted in a timely fashion based upon the availability of new information. The Petitioners have identified no new information as the basis of the Proposed Contention. Thus, they have not satisfied this requirement.

Therefore, the Proposed Contention does not satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i), (ii) or (iii), and is inadmissible.

2. The Proposed Contention is Inadmissible Because it Concerns Ongoing, General Rulemakings

The Commission has stated that "[i]t has long been agency policy that Licensing Boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." *Oconee*, CLI-99-11, 49 NRC at

345 (quoting *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)) (alteration in original). In *Oconee*, the Commission also stated that “a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies.” *Id.* at 334. Here, Petitioners make an argument concerning issues subject to ongoing, general rulemaking proceedings. Petitioners even acknowledge that their contention raises generic issues. Proposed Contention at 3. Thus, if Petitioners wish to take issue with the Commission’s Waste Confidence and Temporary Storage positions, the proper venue is the rulemaking process and not the adjudicatory process. See 10 C.F.R. § 2.335; see also *Oconee*, CLI-99-11, 49 NRC at 345.

In addition, Petitioners note that on February 6, 2009, they submitted comments to the Commission on the proposed Waste Confidence and Temporary Storage rules. See Proposed Contention at 3, 7 & 9. If Petitioners wish to voice additional comments about the Commission’s proposed rules, the proper forum for such comments is through the rulemaking process and not before the Board in this licensing proceeding. See 10 C.F.R. § 2.335. In *Shearon Harris*, the Board rejected a similar contention in which petitioners attacked the adequacy of the Waste Confidence rule. The Board held the contention inadmissible, as “an impermissible challenge to NRC regulations (in contravention of 10 C.F.R. § 2.335(a)). At least seven other licensing boards have considered identical matters and have squarely rejected it.” *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 67 NRC ___ (2008) (slip op. at 39).

Further, under § 2.335, an NRC regulation may not be attacked in an adjudicatory proceeding unless the petitioner meets the following standards for a waiver of, or exception to, the regulation:

The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the

purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.

10 C.F.R. § 2.335(b). In explaining these standards in the *Millstone* license renewal proceeding, the Commission held, among other things, that a waiver or exception could only be appropriate if the alleged special circumstances were “‘unique’ to the facility rather than ‘common to a large class of facilities.’” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560 (2005) (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsid'n denied*, CLI-89-3, 29 NRC 234 & CLI-89-7, 29 NRC 395 (1989)) (internal footnote omitted). Here, Petitioners do not address the § 2.335 standards, and the issues raised by Petitioners are not unique to the Levy COL application but, instead, represent a generic attack on the current regulations. Proposed Contention 12, therefore, must be rejected.

Petitioners also state that they do not seek to litigate this contention in this proceeding, but request that “the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal.” Proposed Contention at 3. Petitioners fail to provide any legal support for the proposition that an otherwise inadmissible contention should be admitted and held in abeyance. Petitioners’ suggestion that the contention be held in abeyance does not serve to make this inadmissible contention admissible.

3. Proposed Contention 12 is Inadmissible as it is Outside the Scope of This Proceeding

Petitioners also state that Proposed Contention 12 “seeks to enforce the requirement of the National Environmental Policy Act (“NEPA”) that generic determinations under NEPA must be applied to individual licensing decisions and must be adequate to justify those individual decisions.” Proposed Contention at 2. As such, Petitioners request that the Commission finalize the Waste Confidence and Temporary Storage rules so these rules will be applied to the

Levy COL licensing decision. *Id.* at 3. Essentially, by claiming that NEPA requires the Commission wait for these rules to be finalized before issuing a Levy COL licensing decision, Petitioners take issue with an ongoing, general rulemaking. The Board has repeatedly stated that the adjudicatory process is not the proper forum in which to attack the rulemaking process. See 10 C.F.R. § 2.335; see also *Pub. Serv. Co. of New Hampshire*, (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Peach Bottom*, ALAB-216, 8 AEC at 20-21).

Further, Petitioners cite little case law to support their argument that generic determinations under NEPA must be applied to individual licensing decisions. However, Petitioners do cite to the Supreme Court decision of *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87 (1983). Contrary to what Petitioners argue, this case does not stand for the proposition that the NRC will violate NEPA if it issues a licensing decision on the Levy COL prior to issuance of final Waste Confidence and Temporary Storage rules. See Proposed Contention at 2-3. The Court's decision states that

[a]s *Vermont Yankee* made clear, NEPA does not require agencies to adopt any particular internal decisionmaking structure. Here, the agency has chosen to evaluate generically the environmental impact of the fuel cycle and inform individual licensing boards, through the Table S-3 rule, of its evaluation. The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA.

Baltimore Gas and Elec. Co., 462 U.S. at 100-101. Here, the Commission has chosen to address this issue through a general rulemaking. More fundamentally, however, the Petitioners' position fails to recognize that licenses can be issued based on the conclusions in the current waste confidence regulation in 10 C.F.R. § 51.23 until any new regulation is finalized. Thus, the contention is outside the scope of the immediate proceeding and is therefore inadmissible. See 10 C.F.R. § 2.309(f)(1)(iii).

4. Proposed Contention 12 is Inadmissible as it Fails to Provide a Concise Statement of Alleged Facts or Expert Opinions Which Support the Petitioners' Position on the Issue and Fails to Provide Sufficient Information to Show That a Genuine Dispute Exists With Respect to the Application

In addition, Petitioners claim that Proposed Contention 12 is based in part on expert opinions of “Dr. Arjun Makhijani, President of the Institute for Energy and Environmental Research (“IEER”)” and “Dr. Gordon R. Thompson, Executive Director of the Institute for Resource and Security Studies (“IRSS”).” Proposed Contention at 8. However, Petitioners do not rely upon these expert opinions to dispute any specific aspect of the Levy COL application. Nor do Petitioners state how these expert opinions support Petitioners’ assertions that the Waste Confidence and Temporary Storage rules are inadequate. *Id.* at 7. Petitioners merely cite the existence of these expert declarations, but fail to show how these opinions bolster their argument. For instance, page 9 of the Petition states, “[I]n support of this contention, the co-petitioners rely on the facts, expert opinion, and documentary resources set forth in the attached IEER Comments and Thompson Report. The IEER Comments and Thompson Report contain sufficient information to show that the co-petitioners have a genuine dispute with the Applicant and with the NRC.” *Id.* at 9 (alteration in original). However, Proposed Contention 12 does not provide a concise statement of the alleged facts or expert opinions which support the Petitioners’ position on the issue. Nor does Proposed Contention 12 provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Therefore, Proposed Contention 12 is inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(v) & (vi).

CONCLUSION

In view of the foregoing, current Petition should be denied because, pursuant to the requirements of 10 C.F.R. § 2.309(c), 10 C.F.R. § 2.309(f)(2), and 10 C.F.R. § 2.309(f)(1), Joint Petitioners have failed to satisfy the requirements for late-filed contentions and have not submitted an admissible contention.

Respectfully Submitted,

/Signed (electronically) by/
Laura R. Goldin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3082
Laura.Goldin@nrc.gov

Dated at Rockville, Maryland
this 27th day of March, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
)
PROGRESS ENERGY FLORIDA, INC.) Docket Nos. 52-029 and 52-030
)
)
(Levy County Nuclear Site, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO "NEW CONTENTION BY THE GREEN PARTY OF FLORIDA, THE ECOLOGY PARTY OF FLORIDA AND NUCLEAR INFORMATION AND RESOURCE SERVICE BASED ON INFORMATION NOT PREVIOUSLY AVAILABLE; REQUESTING THIS GENERIC ISSUE TO BE ADMITTED AND HELD IN ABEYANCE" has been served on the following persons by Electronic Information Exchange on this 27th day of March, 2009:

Administrative Judge
Alex S. Karlin, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Alex.Karlin@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAmal@nrc.gov

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Anthony.Baratta@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Administrative Judge
William M. Murphy
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: William.Murphy@nrc.gov

John H. O'Neill, Esq.
Robert B. Haemer, Esq.
Counsel for Progress Energy Florida, Inc.
Pillsbury, Winthrop, Shaw, Pittman, LLP
2300 N. Street, NW
Washington, DC 20037-1122
E-mail: john.e'neill@pillsburylaw.com
Robert.haemer@pillsburylaw.com

Stephen J. Burdick
Counsel for Progress Energy Florida, Inc.
1111 Pennsylvania Ave, NW
Washington, DC 20004
E-Mail: sburdick@morganlewis.com

Michael Canney
The Green Party of Florida
Alachua County Office
PO Box 12416
Gainesville, FL 32604
E-mail: alachuagreen@windstream.net

Mary Olson
NIRS Southeast
PO Box 7586
Asheville, NC 28802
E-mail: nirsnet@nirs.org

Cara Campbell
The Ecology Party of Florida
641 SW 6th Ave
Ft. Lauderdale, FL 33315
E-Mail: levynuke@ecologyparty.org

/Signed (electronically) by/
Laura R. Goldin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3082
Laura.Goldin@nrc.gov

Dated at Rockville, Maryland
this 27th day of March, 2009