March 30, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 52-029-COL
Progress Energy Florida, Inc.	)	52-030-COL
	)	
Levy County Nuclear Plant, Units 1 and 2	)	ASLBP No. 09-879-04-COL

PROGRESS ENERGY'S ANSWER OPPOSING THE MOTION BY THE GREEN PARTY OF FLORIDA, THE ECOLOGY PARTY OF FLORIDA, AND NUCLEAR INFORMATION AND RESOURCE SERVICE FOR LEAVE TO FILE A NEW CONTENTION

Pursuant to the Atomic Safety and Licensing Board ("ASLB" or "Board") March 11, 2009 Order,[1] Progress Energy Florida, Inc. ("Progress" or "PEF") hereby submits this answer ("Answer") in opposition to the motion to admit a new contention[2] by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service (collectively the "Petitioners"). For the reasons discussed below, the Board should deny Petitioners' Motion.

I. BACKGROUND

This proceeding involves Progress's application, dated July 28, 2008, for a combined license to construct and operate two Westinghouse AP1000 pressurized water reactors at Levy (the "Application" or "COLA"). On February 6, 2009, Petitioners filed their Petition to Intervene and Request for Hearing ("Petition"). On March 3, 2009, Progress and the NRC Staff filed answers Opposing Petition for Intervention and Request for Hearing by the Green Party of

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[1] Order (Specifying Process for Responding to Proposed New or Amended Contentions) (Mar. 11, 209) ("March 11 Order").

[2] 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 (Mar. 9, 2009) ("Motion").

Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service.[3] On March 17, 2009, Petitioners replied to PEF's and NRC Staff's Answers.[4]

On March 9, 2009, Petitioners filed the Motion, noting that the Motion "represents a broader effort," and did not require the time of Petitioners' representative to draft the comments or, presumably, the Motion.[5] Essentially identical contentions have been filed in numerous combined license application dockets pending before the NRC.

II. LEGAL STANDARDS FOR CONSIDERING LATE-FILED CONTENTIONS

Three regulations address the admissibility of additional contentions or new bases for existing contentions once an adjudicatory proceeding has been initiated: 10 C.F.R. § 2.309(f)(2); 10 C.F.R. § 2.309(c); and 10 C.F.R. § 2.309(f)(1). The Commission has held that the proponent of new bases for a contention must comply with the late-filing requirements of both 10 C.F.R. §§ 2.309(c) and 2.309(f)(2):

> New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2).

Nuclear Management Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 732 (2006); see also Crow Butte Resources, Inc. (License Amendment for the North Trend Expansion Project), LBP-08-6, 67 N.R.C. 241, 256-60 (2008) (considering the admissibility of documents relating to petitioner's standing and certain contentions under both 10 C.F.R. §§

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[3] Progress Energy's Answer Opposing Petition for Intervention and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service (Mar. 3, 2009) ("PEF's Answer"); 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" (Mar. 3, 2009) ("NRC Staff's Answer").

[4] 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 (Mar. 17, 2009) ("Petitioners' Response").

[5] Electronic mail, "New contention Levy County units 1 and 2," from M. Olson to the Board, et al. (Mar. 9, 2009).

2.309(f)(2) and 2.309(c)). The Commission has also held that both regulations apply when considering the admissibility of purportedly material information in support of a contention that was first submitted as part of a reply pleading to an initial intervention petition. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 224 (2004) ("LES") (the initial petition was timely filed, but the supporting material filed in support of the contention was not). There, the Commission held that the "'untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2), [such untimely materials could not] be considered in determining the admissibility of their contentions.'" Id. (quoting LES, LBP-04-14, 60 N.R.C. 40, 58 (2004)) (emphasis added). Even if a new contention (or new bases for a contention) meets the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), they must also meet the requirements of 10 C.F.R. § 2.309(f)(1), which establishes the basic criteria that any contention must meet in order to be admissible.

Under 10 C.F.R. § 2.309(f)(2)(i)-(iii), a new contention may be filed after the initial filing only by leave of the presiding officer, upon a showing that:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Moreover, if a new contention does not meet the criteria in 10 C.F.R. § 2.309(f)(2), a petitioner must further demonstrate that the eight-factor balancing test of 10 C.F.R. § 2.309(c)[6] is met (as well as the six general contention admissibility standards contained in 10 C.F.R. § 2.309(f)(1)):

(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;

(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.

These factors must all be addressed in a petitioner's request for the admission of a new contention. See Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 (1998) (stating that the Commission has summarily dismissed petitioners that failed to address the factors for a late-filed petition). A petitioner seeking to

[6] A number of licensing Boards, in rulings that generally have not involved new bases for previously filed contentions, have held that the factors in 10 C.F.R. § 2.309(c)(2) apply only if a new contention does not meet the requirements of 10 C.F.R. § 2.309(f)(2). See, e.g., Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 N.R.C. 261 (2007). It is arguable that the eight factors in 10 C.F.R. § 2.309(c)(2) apply to all late contentions, with the standards in Section 2.309(f)(2) simply constituting the test for good cause under Section 2.309(c)(2). The Commission has not yet had the opportunity to speak to this issue. Because Petitioners clearly do not satisfy the criteria in 10 C.F.R. § 2.309(f)(2), as discussed further in this brief, it is not necessary to address this issue here.

have a late-filed contention admitted bears the burden of demonstrating that the balancing of these factors weigh in favor of admittance. Id.

In weighing these factors, whether good cause exists for failure to file on time is given the most weight. State of New Jersey (Department of Law and Public Safety), CLI-93-25, 38 N.R.C. 289, 296 (1993). If the petitioner cannot demonstrate good cause for lateness, petitioner's demonstration on the other factors must be particularly strong in order to justify the contention to be admitted. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 73 (1992). The Commission has determined that the availability of other means to protect the petitioner's interest, and the ability of other parties to represent the petitioner's interest, are entitled to less weight than the other factors. See id. at 74.

Finally, even if a petitioner satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), it must also demonstrate that its new contention satisfies the standards for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vii); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 N.R.C. 355, 362-63 (1993).

As discussed below, Petitioners' Contention 12 does not satisfy any of these tests.

III. CONTENTION 12 FAILS TO SATISFY THE CRITERIA OF 10 C.F.R. §§ 2.309(f)(2)(i)-(iii)

Petitioners admit that Proposed Contention 12 is an attempt to supplement proposed Contention 6: "Contention 12 (new) is a clarification and elaboration of the issues raised by Contention 6, which co-petitioners have embraced."[7] As such, it attempts to provide new bases for an existing contention and is subject to the requirements of both 10 C.F.R. § 2.309(f)(2) and

[7] Petitioners' Response at 33.

§ 2.309(c). See Palisades, CLI-06-17, 63 N.R.C. at 732. Petitioners claim that its new Contention 12 is timely based on the comments that Petitioners and other organizations filed with respect to a proposed update and revision to the Waste Confidence Decision,[8] and related proposed amendment to the Waste Confidence Rule.[9] However, the Proposed Waste Confidence Update and Proposed Waste Confidence Rule were published in the Federal Register on October 9, 2008 – more than five months ago. Petitioners essentially assert that they can satisfy the requirements of 10 C.F.R. § 2.309(f)(2) by creating their own new document, no matter whether the information has been publicly available prior to Petitioners' creation of a document. Such an interpretation of 10 C.F.R. § 2.309(f)(2) would render the regulation meaningless and allow any petitioner to create timely supplements to its pleadings simply by creating new documents that integrate previously available information. Petitioners fail to meet any of the three prongs of 10 C.F.R. § 2.309(f)(2).

First, the information that is the basis of Contention 12 was unquestionably publicly available and, by their admission, previously available to Petitioners, and fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(2)(i). The comments submitted by Petitioners on the Proposed Waste Confidence Update and Proposed Waste Confidence Rule are simply a challenge to the sufficiency of these proposed actions by the Commission, and appear to be based, in all significant respects, on information that was available prior to these proposed actions. Although Petitioners assert that information was not available to Petitioners in the form in which it is attached to the Motion,[10] this is not a sufficient basis for saying that the information contained in the written comments submitted with respect to the Proposed Waste

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[8] Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008) ("Proposed Waste Confidence Update").

[9] Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008) ("Proposed Waste Confidence Rule").

[10] Motion at 9 (". . . it was not integrated into a single document . . . .").

Confidence Update and the Proposed Waste Confidence rule were not available to Petitioners. Petitioners have not provided any factual basis to support a finding that any portion of the information contained in the comments was not, or could not have been, available to Petitioners prior to the submission of the comments or that such information was not publicly available. Indeed, Petitioners concede that information in the comments was publicly available, without indicating that any portions were not publicly available. Motion at 9. As co-sponsors of some of the comments, this information was certainly available to Petitioners before their submission to the NRC or could have been requested by Petitioners from the other co-sponsors of the comments, if it was not otherwise publicly available to Petitioners.

The Commission has recently held, in denying an appeal from the denial of a late-filed contention, 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, 69 N.R.C. __, slip op. at 15 (Mar. 5, 2009) (emphasis in original) (footnote omitted). Here, there is no demonstration that the information integrated into the comments was not reasonably available to the public, much less Petitioners, who are co-sponsors of those comments.

Second, Petitioners have not demonstrated that any information contained in the comments is materially different from the information that they have already had available or previously included in support of previous contentions as required by 10 C.F.R. § 2.309(f)(2)(ii). Indeed, Petitioners concede that Contention 12 is a clarification and elaboration of the issues

raised by Contention 6.[11] The only basis Petitioners assert for the information being materially different is that "it was not integrated into a single document that presents a comprehensive and integrated analysis of the Waste Confidence Rule and the related Table S-3 and Proposed [Waste Confidence] Rule." Motion at 9-10. This assertion states nothing about what is purported to be materially different about the new information. Integration of previously existing information into a single document is not a basis for asserting that the information, now in integrated form, is materially different because it has been integrated into a new document. Nor do Petitioners explain how the information contained in the comments, which they concede was publicly available prior to its being integrated into the comments, is materially different from what was publicly available when Petitioners filed Contention 6.

Moreover, the NRC's publication of its Proposed Waste Confidence Update and Proposed Waste Confidence Rule do not provide materially different, new information. Indeed, the Commission, in the Supplemental Information published with the Proposed Waste Confidence Rule, states that nothing has undermined its prior Waste Confidence findings:

> Although the Commission concluded in 1999 that a detailed reevaluation of the Waste Confidence findings was unwarranted, it did state that it would consider undertaking a comprehensive reevaluation of the findings when the impending repository development and regulatory activities run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of those findings. *The Commission does not believe that these criteria have been met.*

Proposed Waste Confidence Rule, 73 Fed. Reg. at 59,548 (emphasis added). As the Commission further explains, the proposed revision "strengthen[s] [the Commission's] confidence in the safety and security of SNF storage" and "confirm[s] the Commission's confidence that spent fuel storage is safe and secure over long periods of time." Id. at 59,548-549.

[11] Petitioners' Response at 33.

Rather than undermining the Waste Confidence Rule, the Proposed Waste Confidence Rule confirms the existing Waste Confidence Rule and broadens it. The proposed revision states that "the Commission no longer finds it useful to include this [30-year] time limitation in its generic determination that SNF can be stored safety and without significant environmental impacts after the end of a reactor's licensed operation." Id. at 59,549. The Proposed Waste Confidence Rule further extends the generic determination that "a disposal facility can reasonably be expected to be available." Id. at 59,551. These proposed actions would not alter the outcome of this combined license proceeding.

Third, 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. Petitioners fail this prong as well for the reasons discussed above. Moreover, Petitioners' interpretation of 10 C.F.R. § 2.309(f)(2) would render the timeliness requirement of the regulation meaningless if a petitioner can create timeliness merely by taking previously existing information and integrating it into a new document. Even assuming that the notice of proposed rulemaking has any significance regarding the timeliness of Contention 12, it is the date of the Notice of Proposed Rulemaking – October 9, 2008 – that should be considered the triggering event date for whether Contention 12 is timely. Filing Contention 12 on March 9, 2009, five months later, is inexcusably late.

Thus, Contention 12 does not satisfy any of the requirements of 10 C.F.R. § 2.309(f)(2)(i), (ii) or (iii). Accordingly, Contention 12 should be rejected.

IV. CONTENTION 12 DOES NOT SATISFY THE LATE-FILED CONTENTION REQUIREMENTS OF 10 C.F.R. § 2.309(c)

Under 10 C.F.R. § 2.309(c)(2), a petitioner is required to "address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing." Petitioners fail to address the late-filed criteria contained in 10 C.F.R. § 2.309(c), and Contention 12 should be rejected for this reason alone.[12] "[T]his omission provides an independent and sufficient basis for not admitting . . . belated contentions." AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 N.R.C. 391, 396 n.3 (2006) (citing Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 (1998)).

Moreover, Contention 12 does not meet the requirements of 10 C.F.R. § 2.309(c)(1). Petitioners cannot demonstrate good cause for the late-filing of Contention 12 for the same reasons that Petitioners fail to meet the requirements of 10 C.F.R. §§ 2.309(f)(2)(i)-(ii), discussed in Section III. Petitioners have not shown that the information contained in the comments was not reasonably available to the public, or to Petitioners as co-sponsors of some of the comments, and cannot, therefore, claim they have good cause for the late-filing of Contention 12. See Millstone, CLI-09-05, slip. op. at 15. Thus, Petitioners fail to satisfy the most important of the factors in determining whether to admit a late-filed contention – good cause.

Petitioners have not addressed, nor have they satisfied, any of the factors in 10 C.F.R. § 2.309(c). A balancing of these factors demonstrates that Contention 12 is inadmissible as a late-filed contention. Although the other factors in 10 CFR § 2.309(c) are less relevant where a petitioner has already been granted party status, Petitioners have not been granted party status

[12] Because Petitioners fail to satisfy 10 C.F.R. § 2.309(f)(2), there is no question that the factors in 10 C.F.R. § 2.309(c)(2) must be weighed because Contention 12 was not timely filed.

and Petitioners have not shown that their interest in being made a party to this proceeding weigh in their favor. 10 C.F.R. § 2.309(c)(ii). Petitioners have also failed to demonstrate that, with respect to the Proposed Waste Confidence Update or the Proposed Waste Confidence Rule that there would be any effect on Petitioners' interests in this proceeding. It is clear, as discussed below, that no order in this proceeding could properly affect the Proposed Waste Confidence Update or the Proposed Waste Confidence Rule, which are generic rulemakings and cannot be litigated in this proceeding. Therefore, 10 C.F.R. § 2.309(c)(iii)-(iv) weigh against admission of Contention 12.

The Commission has held that availability of other means to protect the petitioner's interest, and the ability of other parties to represent the petitioner's interest (10 C.F.R. §§ 2.309(c)(1)(v)-(vi), are entitled to less weight than the other factors. See Comanche Peak, CLI-92-12, 36 N.R.C. at 74. Because Petitioners' interests with respect to the Proposed Waste Confidence Update and the Proposed Waste Confidence Rule are being represented by Petitioners in those rulemakings, these factors weigh against admission of Contention 12.

Admission of Contention 12 would unnecessarily delay this proceeding and impermissibly broaden the proceeding to entail the subject of generic rulemaking proceedings. 10 C.F.R. § 2.309(c)(vii), therefore, weighs against admission of Contention 12. Moreover, nothing in Contention 12 would assist in developing a sound record in this proceeding because none of the comments attached in support thereof are relevant to the combined license proceeding. As previously discussed, the Proposed Waste Confidence Update and the Proposed Waste Confidence Rule do not undermine the existing Waste Confidence Decision and are being addressed in their own proceedings, rendering Contention12 inadmissible in this proceeding. Petitioners have filed their comments in the Proposed Waste Confidence Update and Proposed

Waste Confidence Rule proceedings, where they properly belong. The admission of Contention 12 would clutter the record in this proceeding. Thus, 10 C.F.R. § 2.309(c)(viii) also weighs against admission of Contention 12. Accordingly, the factors in 10 C.F.R. § 2.309(c) weigh against the admission of Contention 12.

V. CONTENTION 12 IS OTHERWISE INADMISSIBLE

Even if Petitioners had demonstrated compliance with the standards in 10 C.F.R. §§ 2.309(c)(2) and 2.309(f)(2) – which they clearly have not done – Contention 12 would still be inadmissible because it fails to meet the standards for the admissibility of contentions in 10 C.F.R. § 2.309(f)(1).

A. Contention 12 Is Inadmissible Because it Challenges Existing Rules and Involves the Subject of Ongoing, General Rulemakings

Contention 12 is a direct attack on the existing Waste Confidence Rule and Table S-3. Motion at 4-7. As such, it is impermissible to admit such a contention absent a waiver. See 10 C.F.R. § 2.335; Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Entergy Nuclear Generation Co., and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 17-18 & n.15 (2007); Dominion Nuclear Connecticut, Inc., (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 364 (2001). Licensing boards have rejected similar contentions seeking to attack the waste confidence rule in multiple combined license proceedings.[13] As one

[13] See Virginia Electric and Power Co., (Combined License Application for North Anna Unit 3), LBP-08-15, 68N.R.C.__, slip op. at 52-54 (Aug. 15, 2008); Tennessee Valley Authority, (Combined License Application for Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-16, 68 N.R.C. __, slip op. at 60-62 (Sept. 12, 2008); Duke Energy Carolinas, LLC., (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 N.R.C. __, slip op. at 28-30 (Sept. 22, 2008); Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 N.R.C. 237, 267-68 (2007); Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 N.R.C. 229, 246-47 (2004); Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 268-70 (2004); System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 N.R.C. 277, 296-97 (2004).

licensing board recently stated, such contentions are "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, 68 N.R.C. __, slip op. at 39 (Oct. 30, 2008).

Petitioners do not even assert that there is anything unique to this proceeding. Motion at 3. ("The co-petitioners recognize that the issues raised by our Comments – and therefore by this contention – are generic in nature.") Because Petitioners have admitted that their issues are only generic, it would not be possible for them to seek or be granted a waiver of those rules in this proceeding. The Commission has held that a waiver may be granted only under circumstances that are "unique" to a 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 N.R.C. 551, 560 (2005) (quoting Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 N.R.C. 573, 597 (1988)).

Moreover, Petitioners also concede that Contention 12 relates directly to two generic rulemakings that are currently underway, and that contentions challenging rulemakings are inadmissible for litigation in an individual combined license proceeding. Motion at 3-4. It is well established 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." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 345 (1999) (citing Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974); Duke Power Co. (Catawba Nuclear

Station, Units 1 & 2), ALAB-813, 22 N.R.C. 59, 86 (1985); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 179 (1998)).[14]

Contention 12 not only seeks to raise issues that are subject to ongoing rulemaking, but also constitutes an allegation that the Commission will conduct the rulemaking in an unlawful manner. See Motion at 4 ((Statement of Issue) contending that "[n]either the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act."). Essentially, Petitioners' comments on the Proposed Waste Confidence Update and Proposed Waste Confidence Rule are simply a challenge to the sufficiency of these proposed actions by the Commission, which is not a valid basis for admission of a contention. It is difficult to envision an allegation less suitable for adjudication in an individual combined license licensing proceeding, or one further beyond a licensing board's jurisdiction, than a claim that an ongoing rulemaking is unlawful. As the Commission has held: "If Petitioners are dissatisfied with our generic approach to the problem, their remedy lies in the rulemaking process, not in this adjudication." See Oconee, CLI-99-11, 49 N.R.C. at 345. Moreover, Petitioners state that, because of the generic nature of the issues purported to be raised in Contention 12, ". . . we do not seek to litigate them in this individual proceeding." Motion at 3. There is no basis for admitting generic contentions that will not be litigated in an individual

[14] As an admitted "clarification and elaboration of the issues raised by contention 6" (Petitioners' Response at 33), Contention 12 is also inadmissible for the same reasons set forth by PEF in PEF's Answer at 159-72 with respect to Contention 6, which arguments are incorporated herein by reference. Specifically, Contention 12 is inadmissible because: (1) Contention 12 is a collateral attack on the Waste Confidence Rule; (2) Contention 12 involves the subject of the Commission's Proposed Waste Confidence Update; (3) Contention 12 is a collateral attack on Table S-3 of 10 C.F.R. § 51.51; (4) Contention 12 involves malevolent attacks that are beyond the scope of NEPA; and (5) Petitioners have neither requested nor provided any basis for waiver of the Waste Confidence Rule or Table S-3.

license proceeding,[15] but are filed in other generic rulemaking proceedings.[16] Accordingly, Contention 12 must be rejected.

B. Contention 12 Does Not Satisfy the Pleading Requirements of 10 C.F.R. § 2.309(f)(1)

Petitioners also fail to satisfy other aspects of the Commission's pleading requirements. Although Petitioners assert that proposed Contention 12 is based, in part, on the 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")," Motion at 7-8, Petitioners do not assert that these opinions dispute any specific aspect of the Application. Petitioners also fail to state how those opinions support their assertions that the Proposed Waste Confidence Update and Proposed Waste Confidence Rule are inadequate with respect to this proceeding. The perfunctory statement of the basis for Contention 12 merely references more than 200 pages of comments without providing any explanation of how they relate to Contention 12 or why Contention 12 should be admitted in this

[15] Petitioners suggest that Contention 12 should be admitted "to ensure, as required by NEPA and *Baltimore Gas and Electric Co.,* that whatever decisions the NRC reaches in response to our Comments on the Proposed Waste Confidence Decision and Proposed Waste Confidence Rule will be applied in a timely way to the licensing decision for the proposed Levy County nuclear power plant, *i.e.,* before that plant is licensed." Motion at 3. This argument ignores the fact that there is an existing Waste Confidence Rule. It also ignores the fact that neither the Proposed Waste Confidence Rule nor the Proposed Waste Confidence Update would alter the NRC's confidence that spent fuel storage is safe and secure over long periods of time (73 Fed. Reg. at 59,548-49), or the determination that "a disposal facility can reasonably be expected to be available" (id. at 59,551). Thus, there is no apparent basis for Petitioners' suggestion that the Commission must apply its decisions in the Proposed Waste Confidence Rule and Proposed Waste Confidence Update rulemaking proceedings to this proceeding before the Commission may issue a combined construction permit and operating licenses for Levy County Units 1 and 2. Moreover, Petitioners' citations to case law do not support their argument that generic determinations under NEPA must be applied to individual licensing decisions. In Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983), U.S. Supreme Court states that ". . . NEPA does not require agencies to adopt any particular internal decisionmaking structure." Id. at 100. The NRC may "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." Id. at 100-01. It has done that with respect to the Waste Confidence Decision and Table S-3, both of which remain in effect.

[16] The Commission has held that "[w]aiver of a Commission rule is simply not appropriate for a generic issue." Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-03-7, 58 N.R.C. 1, 8 (2003) (citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-16, 11 N.R.C. 674, 675 (1980)).

proceeding. A petitioner is not permitted to incorporate massive documents by reference as the basis for, or a statement of, its contentions. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 N.R.C. 209, 216 (1976). Likewise, the conclusory assertion that a material dispute exists does not support a determination that any material dispute does exist. There is no concise statement of the alleged facts or expert opinions that support Petitioners' position on the issue and Petitioners fail to demonstrate that a genuine dispute exists. Thus, proposed Contention 12 fails to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(1)(v) and (vi) and is, therefore, inadmissible.[17]

VI. AN INADMISSIBLE CONTENTION CANNOT BE HELD IN ABEYANCE

Petitioners request that Contention 12, which is otherwise inadmissible and which they have no intention of litigating in this proceeding, be nonetheless "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." Motion at 3. In order to be admitted, a contention must be admissible, which Contention 12 is not. There is no basis for admitting an inadmissible contention in order to hold it in abeyance.

[17] Moreover, the issues raised in the comments of Dr. Gordon R. Thompson have been available to the public, and filed in many licensing proceedings before the NRC over the years. See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), Docket No. 50-400-LA: Declaration of Dr. Gordon Thompson in Support of Orange County's Reply to Applicant's and Staff's Opposition to Request for Admission of Late-Filed Environmental Contentions (Jan. 31, 2000), *available at* ADAMS Accession No. ML03680588; Deposition of Gordon R. Thompson (Oct. 16, 2000), *available at* ADAMS Accession No. ML021700199; Declaration of March 16, 2001 by Dr. Gordon Thompson in Support of Orange County's Stay Motion, *available at* ADAMS Accession No. ML010800359; Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Docket No. 50-293: Declaration of Dr. Gordon Thompson in Support of Massachusetts Attorney General's Contention and Petition for Backfit Order (May 25, 2006), *available at* ADAMS Accession No. ML061640065; Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation): Declaration of Dr. Gordon R. Thompson in Support of San Luis Obispo Mothers for Peace Contentions (June 27, 2009 & Feb. 27, 2008), *available at* ADAMS Accession No. ML0719101692 & ML080640249, respectively. Dr. Thompson's reiteration of his long-standing concerns in a new document is not new information and is not relevant to the Application (i.e., they do not specifically address any part of the Application).

VII. PETITIONERS' REQUEST TO REFER CONTENTION 12 TO THE COMMISSION SHOULD BE DENIED

The Licensing Board should also deny Petitioners' request to refer Commission 12 to the Commission "[i]f the ASLB does not consider that it has the authority to admit the contention because it presents a challenge to a generic rule. . . ." Motion at 3-4. Petitioners' request does not meet the standard for interlocutory review in 10 C.F.R. § 2.341(f)(1), which provides that the Commission will review an issue referred to it only "if the referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding." The issues raised by Petitioners are neither significant nor novel, but rather simply matters currently addressed by the Waste Confidence Rule, which the Commission intends to strengthen. There is no basis to request that the Board refer a challenge to a generic rule, which is inadmissible in this proceeding, to the Commission, particularly when Petitioners apparently have already presented their comments to the Commission in the proper venue – the rulemaking proceedings.

VIII. CONCLUSION

For the foregoing reasons, the Board should deny Petitioners leave to file Contention 12.

Respectfully Submitted,

/signed electronically by Blake J. Nelson/

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March 30, 2009

March 30, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 52-022-COL
Progress Energy Florida, Inc.	)	52-023-COL
	)	
Levy County Nuclear Power Plant,	)	ASLBP No. 09-879-04-COL-BD01
Units 1 and 2	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Progress Energy's Answer Opposing the Motion by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service for Leave to File a New Contention," dated March 30, 2009, were provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, and courtesy copies were provided by email to the persons listed below, this 30th day of March 2009.

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