

April 6, 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 GREEN PARTY
OF FLORIDA, THE ECOLOGY PARTY OF FLORIDA,
AND NUCLEAR INFORMATION AND RESOURCE SERVICE
FILING OF NEW BASES FOR PROPOSED CONTENTIONS 7 AND 8**

Pursuant to the Atomic Safety and Licensing Board (“ASLB” or “Board”) March 11, 2009 Order,¹ Progress Energy Florida, Inc. (“Progress”) hereby submits this Answer (“Answer”) in opposition to the new bases for proposed Contentions 7 and 8 filed by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service (collectively the “Petitioners”) as part of Petitioners’ Response² to Progress’s Answer³ and the NRC Staff’s Answer.⁴ For the reasons set forth below, Petitioners’ inappropriate attempt to amend their original proposed Contentions 7 and 8 through new bases raised for the first time in Petitioner’s Response should be denied.

¹ Order (Specifying Process for Responding to Proposed New or Amended Contentions) (Mar. 11, 2009) (“March 11 Order”).

² 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”).

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) (“Progress’s Answer”).

⁴ 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”).

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"), which included two proposed contentions related to low-level radioactive waste: Contentions 7⁵ and 8.⁶ Proposed Contentions 7 and 8 were originally based on the allegation that Progress was required to "evaluate the impacts of licensing the site itself under 10 CFR Part 61 (licensed permanent radioactive waste disposal) or Florida's compatible agreement state regulations for Class B and C waste." See, e.g., Petition at 91.

On March 3, 2009, Progress and the NRC Staff filed Progress's Answer and NRC Staff's Answer, respectively. Progress's Answer and NRC Staff's Answer both opposed the admission of proposed Contentions 7 and 8 because, among other things, proposed Contentions 7 and 8 were based entirely on Petitioners' assertion that Progress was required to demonstrate compliance with 10 C.F.R. Part 61, which the Commission recently ruled, in Tennessee Valley Authority (Bellefonte Nuclear Power Plants, Units 3 and 4), CLI-09-03, 69 N.R.C. ___ (Feb. 17, 2009), is not a proper regulatory basis to support a safety contention. Bellefonte, CLI-09-03, slip op. at 5-6.

⁵ Progress Energy Florida's (PEF) application to build and operate Levy County Nuclear Station Units 1 & 2 violates the National Environmental Policy Act by failing to address the environmental impacts of the waste that it will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment. PEF's environmental report does not address the environmental, environmental justice, health, safety, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.

Petition at 87.

⁶ A substantial omission in Progress Energy Florida's (PEF) COL application to build and operate Levy County Nuclear Station Units 1 & 2 is the failure to address the absence of access to a licensed disposal facilities [sic] or capability to isolate the radioactive waste from the environment. PEF's FSAR does not address an alternative plan or the safety, radiological and health, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.

Petition at 93-94.

On March 9, 2009, Petitioners filed a motion to admit a new contention.⁷ On March 27, 2009, the NRC Staff filed an answer in opposition to Petitioners' motion to admit a new contention.⁸ On March 30, 2009, Progress filed an answer in opposition to Petitioners motion to admit a new contention.⁹

On March 17, 2009, Petitioners filed Petitioners' Response, which included new bases for proposed Contentions 7 and 8 not previously asserted in the Petition. Specifically, Petitioners assert for the first time:

The assumption is made that all dose limits in 10 CFR 20 and 50 will be met for public releases and worker exposures, but there is no indication that those dose calculations were done including the full inventory of Class B, C and Greater-than-C radioactive waste that we contend could be present onsite. The applicant's underlying assumption appears to be that all but about a year's worth or one refueling cycle's worth of waste will have been removed from the site. It is not clear that the calculations account for accumulated Class B, C and GTCC for all the years the reactors operate. This is an omission.

Petitioners' Response at 36.

II. LEGAL STANDARDS FOR CONSIDERING LATE-FILED BASES

Three regulations address the admissibility of Petitioners' attempt to introduce new bases for proposed Contentions 7 and 8: 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):

⁷ 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).

⁸ NRC Staff Answer to 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 (Mar. 27, 2009).

⁹ 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 (Mar. 30, 2009).

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. §§ 2.309(f)(2) and 2.309(c)). The Commission has consistently held that a reply cannot be used to amend a petition without satisfying the late-filing factors in 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(2). Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 40, 58 (2004) (“LES”) (holding that the petitioners’ “‘reply’ filings essentially constituted 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), *cannot be considered in determining the admissibility of their contentions.*”)(emphasis added)).

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, even if new bases for a contention do meet the requirements 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) is met:

- (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.

In weighing the § 2.309(c) 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 the proposed 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).

These factors must all be addressed in a petitioner's attempt to introduce new bases for, or otherwise amend, a contention. See Palisades, CLI-06-17, 63 N.R.C. at 732; LES, CLI-04-25, 60 N.R.C. at 58. As discussed below, Petitioners do not address, much less satisfy, any of these tests for the new bases for proposed Contentions 7 and 8 set forth in Petitioners' Response.

III. PETITIONERS' NEW BASES FOR CONTENTIONS 7 AND 8 FAIL TO SATISFY THE CRITERIA OF 10 C.F.R. § 2.309(f)(2)(i)-(iii)

Petitioners assert for the first time that “[i]t is not clear that calculations [for Part 20 and 50 dose limits] account for accumulated Class B, C and GTCC for all the years the reactor will operate.” Petitioners' Response at 36. Because this alleged omission was not raised in the Petition, it is an attempt by Petitioners 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 § 2.309(c). See Palisades, CLI-06-17, 63 N.R.C. at 732. Petitioners assert that this is an omission in the Application. Petition at 36. As such, Petitioners were required to submit these bases on March 3, 2009 as part of their Petition and they cannot use their reply to amend proposed Contentions 7 and 8. LES, CLI-04-25, 60 N.R.C. at 58.

Petitioners do not provide any analysis of how their newly asserted bases satisfy 10 C.F.R. § 2.309(f)(2)(i)-(iii); nor could they. The Application was available to Petitioners before they filed their Petition, and thus there is no new information upon which to assert new bases. Because there was no new information and the new allegation is based on the Application, the information is not materially different from what was available when the Application was filed. Finally, because there is no new information, the assertion of new bases is not timely. Petitioners cannot raise in a reply new allegations of omissions in the Application and thereby amend proposed Contentions 7 and 8 when any such allegation should have been raised in the

Petition. Palisades, CLI-06-17, 63 N.R.C. at 732; LES, CLI-04-25, 60 N.R.C. at 58.

Accordingly, the new bases for proposed Contentions 7 and 8 set forth in Petitioners' Response cannot be considered and must be rejected.

IV. PETITIONERS' RAISING NEW BASES FOR CONTENTIONS 7 AND 8 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." In Petitioners' Response, Petitioners fail to address the late-filed criteria contained in 10 C.F.R. § 2.309(c), which requires that the new bases be rejected.¹⁰ "[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 & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 (1998)).

The new bases for proposed Contentions 7 and 8, set forth in Petitioners' Response, do not meet the requirements of 10 C.F.R. § 2.309(c)(1). Petitioners cannot demonstrate good cause for the late-filing of these bases 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. The new bases asserted in Petitioners' Response are purported to be based on the Application, which has been available to Petitioners since it was submitted to the NRC. Petitioners cannot, therefore, claim that they have good cause for the late-filing of new bases for proposed Contentions 7 and 8. Thus,

¹⁰ 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 the new bases for proposed Contentions 7 and 8 were not timely filed.

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 the new bases for proposed Contentions 7 and 8 are inadmissible as late-filed. 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 status¹¹ and Petitioners have not shown that their interest in being made a party to this proceeding weighs in their favor. 10 C.F.R. § 2.309(c)(ii).

The new bases raised by Petitioners appear to be related to on-site occupational exposures. These are not related (nor have Petitioners alleged that they are related) to off-site exposures. Petitioners have failed to demonstrate that, with respect to the new allegations regarding the dose calculations in the Application, there would be any effect on Petitioners' interests in this proceeding. Therefore, 10 C.F.R. § 2.309(c)(iii)-(iv) weighs against admission of proposed Contentions 7 and 8 based on the newly alleged bases.

Admission of the new bases for proposed Contentions 7 and 8 would unnecessarily delay this proceeding and impermissibly broaden the proceeding to include aspects of the Application with which Petitioners did not timely take exception as required by the Commission's regulations. 10 C.F.R. § 2.309(c)(vii), therefore, weighs against admission of the new bases. Moreover, nothing in the new bases would assist in developing a sound record in this proceeding. Petitioners do not actually controvert any portion of the Application. Petitioners'

¹¹ Although Progress did not contest Petitioners' standing in Progress's Answer, Petitioners' are not correct that Progress "acknowledg[es] [Petitioners'] representational standing." Petitioners' Response at 2. Progress certainly did not concede Petitioners' standing and reserves the right to raise the issue of Petitioners' standing if, and where, appropriate.

assertions are vague and unspecific and do not actually allege that any particular error in any particular dose calculation exists that makes that particular dose calculation incorrect, much less incorrect in a way that would have any material effect. Thus, 10 C.F.R. § 2.309(c)(viii) weighs against admission of the new bases for proposed Contentions 7 and 8. Accordingly, the factors in 10 C.F.R. § 2.309(c) weigh against the admission of the new bases for proposed Contentions 7 and 8.

V. THE NEW BASES OF CONTENTIONS 7 AND 8 ARE 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 – the new bases for proposed Contentions 7 and 8 would still be inadmissible because they fail to meet the standards for the admissibility of contentions in 10 C.F.R. § 2.309(f)(1).

A. The New Bases for Proposed Contentions 7 and 8 Do Not Satisfy the Pleading Requirements of 10 C.F.R. § 2.309(f)(1)

Petitioners fail to satisfy the Commission’s pleading requirements with respect to the new bases asserted with respect to proposed Contentions 7 and 8. Although Petitioners generally allege that “[i]t is not clear that the calculations account for accumulated Class B, C and GTCC . . .” (Petitioners’ Response at 36), Petitioners fail to specify: (1) what calculations they assert are “not clear;” or (2) the basis for their assertion that (a) the calculation does not account for “accumulated Class B, C and GTCC,” or (b) that the calculation is required to account for it.¹² Such a vague assertion about unspecified calculations is not a sufficient basis for a contention. A contention that does not directly controvert a position taken by the applicant in the license application is subject to dismissal. See Texas Utilities Electric Co. (Comanche Peak Steam

¹² Moreover, if there is no safety issue with respect to a calculation, there cannot be an omission from purportedly “failing to address” the environmental impact of the non-issue.

Electric Station, Unit 2), LBP-92-37, 36 N.R.C. 370, 384 (1992). Despite alleging that there may be calculations that should account for the envisioned “accumulated Class B, C and GTCC,” Petitioners do not controvert any specific calculation.

An allegation that some aspect of a license application is inadequate does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 N.R.C. 509, 521 & n.12 (1990). Petitioners simply speculate that it is not clear to Petitioners whether unspecified calculations “account for accumulated Class B, C and GTCC for all the years the reactors operate.” Petition at 36. However, this speculation does not demonstrate a genuine dispute.

Moreover, there is no concise statement of the alleged facts or expert opinions that support Petitioners’ position on the issue or that a genuine dispute exists. Thus, the proposed new bases for proposed Contentions 7 and 8 fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi) and are, therefore, inadmissible.

B. The New Bases for Proposed Contentions 7 and 8 Are Inadmissible Because They Challenge 10 C.F.R. Part 20

The new bases for proposed Contentions 7 and 8 are a direct attack on the Commission’s regulations that have previously addressed the health impacts associated with onsite storage of low-level radioactive waste within the limits established in 10 C.F.R. Part 20. In promulgating the occupational and dose limits in Part 20, the NRC concluded that doses associated with the limits would have small health and environmental impacts. Standards for Protection Against Radiation; Republication, 51 Fed. Reg. 1,092, 1,120 (Jan. 9, 1986); see also Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 60 N.R.C. ____, slip op. at 10-11 (Oct. 23, 2008). There is no assertion by Petitioners and there is no

basis provided by Petitioners to assert that the doses at Levy will not be within the limits in 10 C.F.R. Part 20. Therefore, because the expected doses at Levy will be within the limits in 10 C.F.R. Part 20, the environmental and health impacts of onsite storage of low-level radioactive waste have been assessed. Accordingly, the new bases for proposed Contentions 7 and 8 are impermissible challenges to existing NRC regulations. 10 C.F.R. § 2.335.

VI. CONCLUSION

For the foregoing reasons, the Board should deny Petitioners' new bases for proposed Contentions 7 and 8 improperly raised in Petitioners' Response.

Respectfully Submitted,

/signed electronically by Blake J. Nelson/

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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 Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service Filing of New Bases for Proposed Contentions 7 and 8," dated April 6, 2009, were provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding this 6th day of April 2009.

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