July 30, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
PROGRESS ENERGY FLORIDA	)	
	)	Docket Nos. 52-029 COL
	)	52-030 COL
(Levy County Nuclear Station	)	
Units 1 & 2)	)	
	)	ASLBP No. 09-879-04-COL

REPLY OF THE GREEN PARTY OF FLORIDA, THE ECOLOGY PARTY OF FLORIDA AND NUCLEAR INFORMATION AND RESOURCE SERVICE TO PROGRESS ENERGY FLORIDA, INC.'S BRIEF IN SUPPORT OF APPEAL FROM LBP-09-10

Cara Campbell, Gary Hecker the Ecology Party of Florida
Mary Olson, Nuclear Information and Resource Service
On behalf of the members of the Intervening organizations
52-029-COL and 52-030-COL
Levy County Units 1 and 2

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The Green Party of Florida, the Ecology Party of Florida and Nuclear Information and Resource Service are co-interveners (Interveners) in the above captioned Progress Energy Florida (PEF) Combined Operating License (COL), as of the Atomic Safety and Licensing Board (ASLB) ruling of July 8, 2009, LBP 09-10. The Interveners hereby respond to the PEF Appeal from LBP 09-10 dated July 20, 2009 (Appeal). The Interveners support the ASLB Ruling on Contentions and through the reasons explicated in this brief show that the US Nuclear Regulatory Commission's review of the PEF project will be assisted and improved through the full hearing of the three contentions admitted by the ASLB panel. Therefore we ask that the Commission uphold LBP 09-10.

Background

The Interveners have joined this proceeding on PEF's application (the "Application" or "COL"), filed by it on July 28, 2008. PEF seeks to construct and operate two large atomic power reactor units to be built in wetlands that are part of a flood plain, on top of springs and also ground that provides the recharge for springs, and communicates with the underlying Floridan Aquifer, located in close proximity to the homes and livelihood of members of all three intervening organizations, who live in Levy and adjacent counties of Florida. Construction of the reactors would have irreversible environmental resource impacts. Operation of the reactors will generate more radioactive waste, result in more radioactive, chemical and thermal emissions and increase the risk of catastrophic events in the area.

The Notice of Hearing and Opportunity to Petition for Leave to Intervene was published by NRC in the Federal Register on December 8, 2008, 73 Fed. Reg. 74,532 (Dec. 8, 2008). The Interveners filed a timely Petition to Intervene (Petition) on February 6, 2009 with affidavits from a combined total of 20 members within the 50 mile radius (all three groups have since expanded membership inside the 50 mile radius, reflecting growing location concern and opposition to Levy County Units 1 and 2) a total of 12 contentions, appropriately supported by affidavits from four credentialed experts.

A hearing record is already developing, and is available in the above captioned docket. In that record, PEF has regularly opposed participation by the Interveners. There were lively oral arguments held in the vicinity of the Levy County 1 and 2 proposed reactor site, in a courthouse in Bronson, FL on April 20 and 21, 2009.

On July 8, 2009, the ASLB Board affirmed standing for all three Interveners and admitted three restated contentions in LBP-09-10. The discussion offered here is a respectful support of LBP-09-10 and stands in opposition to the request from PEF that the Commission reverse the

Board's decision admitting Interveners contentions. The Interveners ask the Commission to instead support the Intervener's standing and participation in the Levy County COL hearing and a full hearing of contentions 4, 7 and 8 as admitted. More specific background and response to the Applicant's Appeal is offered below for Contention 4 and for Contentions 7 & 8.

Response to PEF Argument on Contention 4

SUMMARY OF PEF ARGUMENT

Applicant seeks the rejection of Contention 4 subparts based on multiple procedural issues, including alleged lack of basis and errors in nomenclature and numbering. Additionally, Applicant claims the board consolidated subsections within Contention 4 and overstepped its authority in doing so.

Interveners adamantly reject these arguments. The ASLB was fair, and acted within its authority in admitting portions of Contention 4, which Interveners maintain was not "consolidated" but, rather, was always one Contention with many consecutively lettered subparts. The Board, in fact, did not allow many portions of the Contention that Interveners felt were equally valid. PEF instead seeks to deny the remaining portions of 4, even though it is the failure of PEF's own ER that is the problem. PEF's request to the Commission to overturn Contention 4 as admitted would, if granted, leave the PEF COL application incomplete, lacking in key analysis, and result in a misrepresentation of impact on key resources such as Outstanding Waters of Florida. PEF has a legal obligation under 10 C.F.R. § 51.45 to provide certain data pertaining to impacts and cumulative impacts. 10 C.F.R. § 2.35 puts the burden on the Applicant, as proponent of the license, to bear the burden of proof. Interveners maintain that PEF failed to provide this data, and in certain instances the Board agreed.

In the Applicant's Notice of Appeal (Appeal p.4), PEF contends Contention 4, as approved by the ASLB, should be rejected because the Board in LBP-09-10 "reformulated" "sixteen inadmissible contentions (Contentions 4.A through 4.O, including two labeled Contention 4.N) into a single one." Later in the appeal, PEF states:

> The Board erred as a matter of law by reformulating inadmissible Contentions to attempt to create an admissible one. Petitioners' new argument that Contentions 4.A to 4.O is [*sic*] to be read "whole cloth" starts at Tr. 40 and continues at Tr. 44-46. And, while Petitioners initially urge that Contentions 4.A to 4.O be considered "whole cloth" (Tr. at 44), Petitioners readily agree with the Board Chairman's suggestion that Contention 4.O be considered with Contentions 9 to 11. Tr. at 46. (Appeal, p.9)

A reading of the ASLB oral arguments transcript of April 20, 2009 in Bronson FL shows that the discussion between Interveners and the Board simply affirmed that Contention 4 is one Contention with many subsets. In fact, Interveners "urge" nothing. The Board, on page 40 of the Transcript, states that, "Contention 4 has numerous subparts." On Tr.p.41, Petitioner also makes it clear that Contention 4 has numerous subparts. On Tr. p. 44, Petitioner apologizes for a scrivener's error in having duplicate subparts "N" and for not having a more graceful submission. Substantive discussion begins with Petitioner's statement, "So, the big issue here is the assessment of direct, indirect, and cumulative impacts. You will find these words in almost every single subset of Contention 4." (Tr.p.45, line 2-25-p.46, line 11)

Applicant intentionally misrepresents what was said; the Transcript clearly indicates that rather than Interveners "urg[ing] that Contentions [*sic*] 4.A to 4.O be considered 'whole cloth'," Interveners simply defined the thread running through Contention 4. Since all Contentions submitted were consecutively numbered, Interveners assumed it was clear each different letter for Contention 4 was a subpart.[1] The Board accurately understood this.

PEF continues by claiming that the Board reformulated and admitted Contention 4

without identifying an adequate basis for it. (Appeal, p.4)

The Commission rightly recognized in Crowe Butte Resources Inc (North Trend Expansion Area) CLI-09-12, 69 NRC that, despite inadequacies in the contentions, it is permissible, and even perhaps desirable to evaluate the essence of the contentions. To wit:

> Petitioners agree with the Staff and Crow Butte that the admitted contentions are not adequately defined by the Board's ruling, and appear to include matters that are either irrelevant to the requested license amendment or unsupported in the pleadings. But this is not to say that there is no substance, at the core of Petitioners' complaints, that presents admissible issues." Crow Butte, p.15.

Though Petitioner's form may be flawed, the substance is clear enough and the subparts of Contention 4, as admitted by the ASLB should stand. Contention 4 is well defined and well supported in the Petition and in pleading, including the oral arguments on April 20, in Bronson FL. (See Transcript).

Applicants claim that the Board added material to an otherwise inadmissible contention. (Appeal, p.12) No material was added by the board. As the board states:

> This Board will not attempt to restate the 180 pages of pleadings filed concerning the admissibility of C4. Contention 4, as its single number implies, is intended as a single contention and was intended to be viewed as a single "whole cloth." … we view C4 as a whole, i.e., a major allegation that the ER is inadequate conjoined with numerous specific illustrations or examples (in the pre-1989 parlance, "bases") as to the alleged omissions or deficiencies." (p.28 ASLB ruling)

Obviously if PEF did not address the cumulative effects, it did not address them adequately. In addition, as noted before, the Licensing Board cut many issues raised in the original Contention 4, as filed in the Petition on February 6, 2009.

Applicants argue that the Board reformulated a new contention before finding the

[1] Interveners, in not noticing an "s" after the word "CONTENTION" on page 32 of our Petition to

underlying contentions admissible as submitted and cites Crow Butte, CLI-09-12, slip op. at 22; Andrew Siemaszko, CLI-06-16, N.R.C. 708, 720-21 (2006) (Appeal, p.11).

Neither of these citations supports PEF's contention that the board acted improperly. In fact, a cursory glance at the cited passages shows that, arguendo, even if the Board did "reformulate," it acted within its capacity. In the Crow Butte Case, the Commission affirmed that it is proper to reframe and consolidate contentions. Indeed, in Crow Butte, the Commission took it upon itself to perform this function (emphasis added in bold face):

> To the extent that challenge number 2, as originally framed by Citizens (supra p. 5), raises a question regarding the adequacy of AmerGen's plan to monitor for moisture and coating integrity, as shown above in text. See Andrew Siemaszko, CLI-06-16, 63 NRC 708, 720 (2006) (Board has discretion to reframe contention "for purposes of clarity, succinctness, and a more efficient proceeding") (quoting Virginia Elec. and Power Co. (North Anna Power Station, Units 1 & 2), LBP-84-40A, 20 NRC 1195 1199 (1984)). **it is duplicative of the question raised in challenge number 3. For simplicity and efficiency, we have reframed challenge number 2**, as shown above in text. See Andrew Siemaszko, CLI-06-16, 63 NRC 708, 720, (2006) (Board has discretion to reframe contention "for purposes of clarity, succinctness, and a more efficient proceeding") (quoting Virginia Elec. And Power Co. (North Anna Power Station Units 1 and 2), LBP-84-40A, 20 NRC 1195 1199 (1984).

If a Commission can consolidate two contentions with different numbers, then the ASLB certainly has the authority to consolidate subsections of a single numbered contention, especially those dealing with similar arguments: insufficient information and failure to consider cumulative impacts and, therefore, consequences. If PEF cannot be trusted to cite cases accurately and in good faith to this body, can any of their assertions be trusted?[2]

Interveners committed a scrivener's error that went undetected before submission.

[2] Even assuming, *arguendo*, that the ASLB did "reformulate" the contentions, in Crowe Butte, the Commission specifically stated: "Our boards may reformulate contentions to "eliminate extraneous issues or to consolidate issues for a more efficient proceeding." Crow Butte, CLI-09-12, p.22.The ruling goes on, "Our rules of procedure authorize boards to hold prehearing conferences for the purposes of simplifying or clarifying the issues for hearing, after which a board might admit a revised contention." Crow Butte p.22
Again, assuming, *arguendo*, that our Contention 4 was somehow "reformulated," Interveners maintain that by labeling each section of Contention 4 A-O, and consistently reiterating the claim that the ER continuously failed to provide required information and

Applicants argue that “reformulated” Contention 4 itself is impermissibly vague, and does not “achieve ‘the goal of clarity, succinctness, and a more efficient proceeding’.”(Appeal, p.4)

10 C.F.R. § 51 requires ERs to analyze and consider all significant indirect and cumulative environmental impacts resulting from a proposed project. When a subpart of C4 asserts that certain information is omitted or inadequate, the reason Interveners believe that this information is necessary is clear: Interveners believe that it is required under Part 51. This is true, whether C4 is considered as a whole or considered as a series of related contentions. PEF’s failure adequately to provide required information inevitably leads to a certain “vagueness” in the Contention. PEF has neglected key issues and omitted key analysis of what the impact of construction and operation of Levy County Units 1 and 2 would be. The argument that this Contention is “vague” is a cover for PEF’s disregard that such information matters, and may, when engaged with substantively, reflect badly upon the project. Interveners’ position is that there is insufficient concrete information in the ER.

Contention 4 is crystal clear, succinct and will facilitate an efficient proceeding. To quote the Board (ASLB ruling p.52):

> In conclusion, we rule that, properly narrowed, C4 presents an admissible contention. It is a contention alleging that the ER fails to comply with Part 51 because it fails adequately to address, and underestimates, the following indirect and cumulative environmental impacts of constructing and operating the proposed LNP project: (a) onsite and offsite dewatering impacts associated with the connection of the site with the underlying Floridan aquifer system, impacts on OFWs, impacts to water quality resulting from increased concentrations of nutrients resulting both directly from dewatering and indirectly via additional wildfires that will be caused by dewatering, (b) impacts of salt drift from the saltwater cooling towers into the freshwater aquatic environment, and (c) the underestimation of the zone of environmental impact and real extent of impact on listed

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address cumulative impacts, the Board was well within its rights to reformulate the contention for administrative ease and clarity.

species, irreversible and irretrievable impacts, and mitigation measures associated with (a) and (b).

Interveners wonder just how much more clear, succinct and efficient the Board could conceivably be. Similarly, despite PEF's assertion to the contrary, (which is supported by no logic whatsoever) the Board has defined the scope of these admitted contentions to the letter.

PEF states the Board also erred by failing to analyze whether the Contentions met the six criteria of contention admissibility. Instead, Applicant claims the Board abused its discretion by relying upon failed "logic" to admit the subjects discussed in the consequential Contentions.(Appeal,p.4-5)

Interveners are forced to wonder just which "logic" [*sic]* is failed here. The Board clearly, logically, and repeatedly stated that the contentions were in compliance with 10 C.F.R. § 2.309, and accepted or rejected each subsection of Contention 4 on its own merits. PEF has neglected key issues and omitted key analysis of the impact of construction and operation of Levy County Units 1 and 2. In addition, the Board correctly stated that since Contention 4 is a single contention, all of the initial subsections are the material bases upon which the consequences spelled out in the later subsections rest, including underestimation of the zone of impact of the project, the zone of impact on endangered and listed species, and scope of mitigation measures.

PEF contends the Board committed an error of law by relying solely on the expert opinion of Dr. Sydney Bacchus to find that the admitted Contention raised a genuine issue of material dispute with the Application, and that Dr. Bacchus merely makes conclusory statements "without

providing a reasoned basis or explanation for that conclusion." (Appeal, p.5)

PEF presents no basis in fact to validate this bold assertion. The regulations require that a petitioner:

> 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 10 C.F.R. § 2.309(f)(1)(v).

Indeed, Interveners are not required to present expert opinion, and would have been well within the admissibility standards by merely "alleging facts." Not proving facts, alleging them. Interveners have, nonetheless, included the expert opinion of Hydroecologist Dr. Sydney Bacchus, who holds a Ph.D., whose master's degree and doctoral research focused specifically on the ecosystems that occur on and surrounding the site of the proposed nuclear facility, and who has published extensive peer-reviewed papers regarding the impacts of hydroperiod alteration to these ecosystems. Interveners have complied with 10 C.F.R. § 2.309(f)(1)(v and the Board is correct in relying on Bacchus' opinion in admitting subparts of Contention 4.

Dr. Bacchus has included numerous documents supporting her conclusion that myriad adverse cumulative environmental impacts will result from Levy 1 and 2. See, for example: Bacchus Exhibit E, the peer reviewed, published paper "Nonmechanical Dewatering of the Regional Floridan Aquifer System." Indeed, it appears to the interveners that it is PEF that "merely makes conclusory statements without providing a reasoned basis of explanation." Interveners maintain and repeatedly stated that simply mentioning an impact does NOT comply with the requirements for an Environmental Report. The Board rightly agreed with this conclusion in admitting subparts of Contention 4.

PEF contends that Interveners do not even cite 10 C.F.R. § 51.45, therefore Contention 4 is based on a rationale not raised by the Interveners. (Appeal, p.7)

This is an egregious falsehood. See page 13 of our Response to PEF and Staff's answers to our Petition:

> CFR 51.45 (c) specifically states "The environmental report must also contain an analysis of the cumulative impacts of the activities to be authorized by the limited work authorization, construction permit, or combined license in light of the preconstruction impacts described in the environmental report.

Interveners strenuously object to PEF's continual and willful misrepresentation of Petitioner and Board writings. This tactic is improper and should not be tolerated by the Commission.

The burden of proof rests on the Applicant to provide required information. Additionally, it is the information legally required by 10 C.F.R. § 51.45 that is not adequately addressed in the ER. Whether or not interveners specifically mention 10 C.F.R. § 51.45, it is the legal responsibility of Progress Energy to provide the information in a acceptable ER.

Applicants argue that NRC Staff, not the Board, is tasked with determining whether a COLA is complete in accordance with that Part. 10 C.F.R. § 2.101(a)(3). PEF writes that, "That discretionary decision of the Staff is not subject to adjudication." (Appeal, p.7)

Let us review 10 C.F.R. § 2.101(a)(3) which states (emphasis added in bold face):

> If the Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, Director, Office of Federal and State Materials and Environmental Management Program, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, determines that a tendered application for a construction permit or operating license for a production

> or utilization facility, and/or any environmental report required pursuant to subpart A of part 51 of this chapter, or part thereof as provided in paragraphs (a)(5) or (a–1) of this section **are complete and acceptable for docketing**, a docket number will be assigned to the application or part thereof, and the applicant will be notified of the determination. With respect to the tendered application and/or environmental report or part thereof that is acceptable for docketing, the applicant will be requested to…

This has absolutely nothing to do with the admissibility of Contention 4. If the docketing of a COL application is the standard of "completeness" then the Notice of Hearing and Opportunity to Petition for Leave to Intervene should be posted in the Federal Register the day that the COL arrives, and the applicant should be held to account for it from day one.

PEF is attempting to use an irrelevant citation to mislead Interveners and Commission intentionally. At the oral arguments in Bronson, FL, the Board was firm in its assertion that licensed lawyers should be held accountable for providing disinformation. Apparently PEF wants to attempt to intimidate Interveners with citations and waste Interveners' time in researching those which are irrelevant.

Interveners are not arguing that NRC Staff does not docket COLA applications. Can PEF REALLY argue that only Staff can challenge the content and completeness of the information provided? Were this the case, there would be no public participation as provided for under the Atomic Energy Act nor any role for ASLB oversight of Intervention process.

PEF contends that the Board rejected the need to show an adequate basis for a contention. (Appeal, p.8)

Quoting the Board, PEF writes:

> [C]hallenges to the admissibility of a contention pursuant to § 2.309(f)(1)(ii) on the ground

> that it does not include an 'adequate basis' because it does not include sufficient facts, evidence or supporting factual information are … misguided. If the petitioner provides a brief explanation of the rationale underlying the contention, it is sufficient to satisfy 10 C.F.R. § 2.309 (f)(1)(ii)." LBP-09-10, slip op. at 45. (Appeal, p.8)

This is another disingenuous misrepresentation of what the Board wrote. By selectively quoting from the Board's decision, PEF attempts to twist and subvert the Board's intentions. At no point does the board state or imply that a contention need not be supported. Rather, the Board wrote (emphasis added in bold face):

> Third, it is important to clarify that there is nothing in the law or regulations that requires, **at the admissibility stage, that a contention be supported by an expert opinion, substantive affidavits, or evidence**. The regulations require that a petitioner provide a concise statement of the "alleged facts or expert opinion" that support the petitioner's position. 10 C.F.R. § 2.309(f)(1)(v). **This disjunctive statement – alleged facts or expert opinion – makes clear that there is no requirement to have an expert or to provide an expert opinion.** And it simply requires alleged facts, not proven facts or evidence. **Nor does the second half of 10 C.F.R. § 2.309(f)(1)(v), that requires the petitioner to provide "references" to the specific sources and documents which the petitioner "intends to rely on" to support its position, constitute a requirement that, to be admissible, a contention must be accompanied by facts, experts, affidavits or evidence.** Likewise, 10 C.F.R. § 2.309(f)(1)(vi), which requires that the petition include "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of fact" does not require the submission of expert affidavits or evidence. It merely requires some information showing that there is a genuine dispute on a material issue. Fourth, the requirement of 10 C.F.R. § 2.309(f)(1)(ii) that the petition include a "brief explanation of the basis" for the contention, merely requires an explanation of the rationale or theory of the contention. Challenges to the admissibility of a contention pursuant to § 2.309(f)(1)(ii) on the ground that it does not include an "adequate basis" because it does not include sufficient facts, evidence or supporting factual information are thus misguided. If the petitioner provides a brief explanation of the rationale underlying the contention, it is sufficient to satisfy 10 C.F.R. § 2.309(f)(1)(ii). (ASLB p. 47-48)

The Board was merely summarizing 10 C.F.R. § 2.309(f)(1)(ii) which nowhere requires facts (other than alleged facts) or hard evidence at the admissibility stage. Interveners do not have the burden of proving an entire case at the contention admissibility level. If that were so, there would be no need for evidentiary hearings. Rather, Interveners must meet the requirements of Section 2.309(f)(1 which has been done.

PEF seeks to have Contention 4 subparts rejected on grounds that “a contention must allege sufficient facts or other information to ensure that only well-defined issues are admitted for hearing”. (Appeal, p.8)

True, and, as outlined in 10 C.F.R. § 2.309, the requirements for an adequate contention have been met. Note that the Crow Butte citation (Crowe Butte CLI-09-12 p. 21) (emphasis added in bold face): “a contention must allege sufficient facts **or** other information to ensure that only well-defined issues are admitted for hearing.”

Again, “allege sufficient facts OR other information.” Interveners have alleged repeatedly that the PEF Application does not meet the requirements of 10 C.F.R. § 51.45 (c) which specifically states “The environmental report must also contain an analysis of the cumulative impacts of the activities to be authorized by the limited work authorization, construction permit, or combined license in light of the preconstruction impacts described in the environmental report.”

PEF further alleges sufficient facts or other information was not identified by the Board, and Contentions 4.L, 4.M and 4.N were admitted solely because the other “subparts” were admitted. (Appeal, p.8-9)

This is not accurate, to couch it in the most generous of terms. Contention subparts 4.L-N were not admitted solely because subparts 4.B-4K were admitted. Rather, because of deficiencies in PEF’s ER, which 4.B-K identified correctly, it followed logically that subparts 4.L-N should also be admitted. For example, once again, PEF, attempts to equate “description of habitat” with IMPACTS on the habitat or the species therein. “It is an abuse of discretion to admit

Contention 4.M without Interveners having alleged an error in the ER's description of the federally protected species' habitat." (Appeal, p.16) Interveners allege no error in "description;" Interveners allege failure to address impacts and cumulative impacts upon said habitat.

PEF claims Interveners pled a Contention of omission, not a Contention of inadequacy and the Contention should be denied. (Appeal, p.11)

In the Petition to Intervene, (p.32) the Contention is titled thus: CONTENTIONs 4.A – 4.O Omissions, misrepresentations and failures of proposed Levy Nuclear Plant (LNP) environmental report (ER) TO ADDRESS ADVERSE DIRECT, INDIRECT AND CUMULATIVE Environmental impacts

As previously explained in footnote 1 the small "s" in the original, after the capitalized word "CONTENTION" was a scrivener's error. Furthermore, the words "misrepresentations and failures" also appear in the title, indicating this is not solely Contention of omission.

Interveners have challenged work of PEF's paid specialists who produced an ER that as yet does not satisfy the requirements of 10 C.F.R. § 51.45. Our challenge is solid, and in frustration, PEF employs nitpicking procedural issues to attack Interveners' valid Contention 4, and the ASLB's ruling. We respectfully request the Commission to do as it did in Crow Butte and recognize that despite an admittedly less than perfect petition to intervene, "… this is not to say that there is no substance, at the core of Interveners' complaints, that presents admissible issues."(Crow Butte, p.15)

PEF continually treats this Intervention process as a battle to stop their project, rather than what it truly is; a search for accurate information from which authorities and the public may

draw their own conclusions on the advisability of proceeding, and a quest for an accurate and complete ER. Had PEF met their legal obligation to provide all of the information required, quibbling over whether the information was “omitted” or “inadequate” would be unnecessary. PEF tries to avoid producing this information through any means possible. In the ER, Applicant makes lists of SOME things, such as species affected, but fails to say just HOW they will be affected. Listing is NOT addressing. Is this an omission or inadequate? Other issues, such as cumulative affects, are simply ignored, and thereby yield a skewed analysis of impact. PEF claims “small” impacts practically across the board, and Interveners contend that a closer look is warranted, and with expert advice, will likely yield a different outcome, i.e. “large” impacts. Interveners are looking for transparency.

PEF argues, The Board errs as a matter of law in deferring until later briefing, a key detail of the Contention, namely defining the impacted resource so that the impact can be characterized. A contention, however, is not admissible “with details to be filled in later.” Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11 (Appeal, p.13)

To quote Duke accurately, “Our revised rules do not permit "vague, unparticularized contentions” or "notice pleading, with details to be filled in later." (Id) Interveners have presented concise contentions, noting specific information lacking in the ER, and precisely defined Interveners’ view of the resources. During the oral hearing, when asked by the Board to give case evidence refuting Petitioner’s claims of resources, the representative for PEF, stated:

I … could not find a case that defined and provided any light for this Board on the word "resource" that is in the small, moderate, large, standard definitions that were developed for license renewal, you know, environmental impacts, and based on the CEQ guidelines. (Transcript, 52-030-COL, p. 378)

In admitting Contention 4, the Board did not decide the final disposition of each issue, but rather simply determined that the Contentions admitted had merit and deserve further scrutiny.

Applicants argue that since Interveners allege that the ER improperly characterized certain impacts as small, it is incumbent on the Interveners alleging large impacts to identify the resources so impacted. Progress Answer at 90. “The resource must be defined by Interveners in order to support their allegation that impacts are large. The Interveners, however, do not support their alleged characterization by identifying what resource is impacted.” (Appeal, p.14)

Applicant’s ER characterizes impacts as SMALL, without definition or explanation, and we are expected to accept this as fact. We do not. Interveners have provided the opinion of a recognized expert who disagrees, but PEF maintains we have to prove it. PEF cannot have it both ways: Had the ER provided the necessary data, this issue would be much easier to address. Additionally, the ER constantly provides only lists of WHAT will be impacted, such as waterways, but fails to provide data on what these cumulative impacts will actually be. Lists do not address issues, but rather simply present issues.

To quote PEF (emphasis added in bold face):

> An ER, which allegedly underestimates dewatering impacts, does not necessarily contain an inadequate **description** of the affected environment. Even if some impacts are large, it does not logically follow that those impacts must extend beyond the 50 mile radius of the affected environment analyzed in ER Chapter 2. Progress Answer at 128.

and;

> In addition, an ER, which allegedly underestimates dewatering impacts, does not necessarily inadequately **describe** the habitat of federally protected species. Regardless of the proper characterization of impacts on federally listed species, it does not logically follow that the ER’s **description** of their habitats is improper. Progress Answer at 138-42. It is an abuse of discretion to admit Contention 4.M without Interveners having alleged an error in the ER’s of the federally protected species’ habitat.” (Appeal, p.17)

In the above quotations PEF repeatedly mentions what their ER *describes*. A description is not a discussion of impacts. Apparently PEF legal counsel cannot find this information in the ER either or it would have been cited. Interveners seek a comprehensive explanation of actual IMPACTS as required by law 10 C.F.R. § 51.45

PEF argues that Dr. Bacchus's opinion is only conclusory and contains "no reasoned basis or explanation" to satisfy the requirement that Interveners raise a genuine issue of material dispute with the Application (Appeal, p.17 Citing USEC, CLI-06-10 63 NRC at 472.

In USEC, PRESS made the claim that "conclusory statements provide support for a contention, so long as they are made by an expert." USEC, CLI-06-10 (p.28). The Commission was specifically refuting that claim. Interveners have never made this claim. Rather, it is clear that reasons, not mere "conclusions," underpin Contention 4. For example the Petition explains:

> The pond-cypress wetlands and those associated with other natural waters on the site and within the vicinity and region of the proposed LNP project are connected to each other and the underlying Floridan aquifer system through a network of relict sinkholes. Therefore, adverse direct, indirect and cumulative impacts to pond-cypress wetlands proposed by the LNP project would result in adverse impacts beyond the proposed LNP site. (Petition p. 44-45)

And:

> Although "salt drift from cooling towers" may constitute "normal releases of contaminants into the environment" for a nuclear facility, such facilities in Florida "normally" are located on the coast. For the proposed location of the LNP facility, in an inland, freshwater flood plain, with extensive freshwater wetlands, special aquatic sites and other waters, including freshwater aquatic ecosystems and Outstanding Florida Waters, salt drift and deposition of that magnitude does not constitute "normal releases of contaminants into the environment." (Petition p.50-51)

There are many other such examples. Clearly, these are reasons for reaching a conclusion,

which is that the ER is deficient. The ER provided by PEF provided no data refuting the reasoning of Interveners' expert, so there is obviously a genuine dispute.

Scrivener's errors and other mistakes exist, and Interveners' submissions are patently not equivalent to that of a multi-billion dollar corporation with unlimited legal resources. We respectfully request that despite an admittedly less than perfect petition to intervene, the Commission, as was done in Crow Butte, consider the substance at the core of Contention 4 which presents admissible issues (Crow Butte, p.15)

In conclusion, Interveners ask that the Contention stand. Counsel for PEF has provided no new evidence or data that might be the basis for halting our search for additional information concerning the Levy project. In fact, PEF has consistently misrepresented facts and frequently taken quotes out of context in order to cover the weakness of their case. At the heart of this case are substantive issues which PEF has failed to address, and is working hard to suppress.

Response to PEF Argument on Contentions 7 and 8

Background on Contentions 7 and 8

A brief overview of contentions that focus on the lack of disposal options and therefore the need for on-site storage of so-called "low-level" radioactive waste:

May 9, 2008 -- Contentions filed by Blue Ridge Environmental Defense League and People's Action for Clean Energy in Petition at Dominion Energy's North Anna COL (Docket 52-017-COL)

August 15, 2008 -- ASLB Board ruled to admit the issue, structuring it into two contentions at Dominion North Anna (LBP-08-15)

June 6, 2008 -- Bellefonte 3 & 4 contentions filed in Petition by Southern Alliance for Clean Energy, Blue Ridge Environmental Defense League, and Bellefonte Efficiency and Sustainability Team (Docket 52-014-COL and 52-15-COL)

September 12, 2008 -- ALSB Board ruled in Bellefonte (LBP-08-16) admitting contention on waste. Bellefonte Contentions referred to Commission (Date?)

November 8, 2008 -- Contentions filed in Petition by Nuclear Information and Resource Service,

Beyond Nuclear, MaryPIRG, Public Citizen and on Unistar COL for Calvert Cliffs 3 (Docket 52-016-COL)

November 17, 2008 – Contentions filed by Atlanta WAND, Blue Ridge Environmental Defense League, Southern Alliance for Clean Energy, Savannah Riverkeeper and Center for a Sustainable Coast on Southern Nuclear Operating Co COL for Vogtle Units 3 and 4 (local people note that Vogtle 3 and 4 were previously canceled, therefore the current COLs should be labeled Vogtle 5 and 6) (Docket 52-025-COL and 52-026-COL)

February 6, 2009 -- Contentions filed by Ecology Party of Florida, Green Party of Florida and Nuclear Information and Resource Service on PEF COL for Levy 1 and 2 (Dockets 52-029-COL and 52-030-COL)

February 17, 2009 -- Commission rules on Bellefonte – CLI-09-03 reversing the Board but leaving the door open (with encouragement) for narrower contentions to be brought

March 5, 2009 – Contentions are admitted to COL proceeding at Vogtle by ASLB LBP-09-03

March 24, 2009 -- Board rules on Contentions at Calvert Cliffs admitting contentions in part LBP-09-04

July 8, 2009 -- Board rules on Levy County 1 and 2 admitting contentions in part LBP-09-10

PEF and indeed ASLB Chair Judge Karlin in oral argument have commented on the similarity of contentions 7 and 8 as filed in the Petition at Levy County Units 1 and 2 with other contentions at other COLs. There is no mystery in this. First, it is an objective situation that the generators of so-called “low-level” radioactive waste do not currently have anywhere to send class B, C and Greater than Class C waste. Since this situation applies to all so-called “low-level” radioactive waste generators except those operating in the Atlantic, Northwest and Rocky Mountain Low-Level Radioactive Waste Compacts, the same issue has been raised by interveners challenging new reactor construction in most locations, however not in South Carolina, which is in the Atlantic Compact.

To allege that somehow there is a value in originality of contention construction seriously undercuts the universality of the NEI “template” approach for other nuclear licensing issues.

PEF claims that because of the similarity to the Bellefonte contentions, contention 7 and 8 were admitted in "clear error" (Appeal page 5). PEF is ignoring the fact that when the portions of the contention that were struck down by the Commission's ruling (CLI-09-03) were removed, issues raised by the contentions filed by the Interveners still satisfy the criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi) and are thus admissible contentions. Since the Commission's Bellefonte ruling was subsequent to the filing of the Petition on the Levy COL, the Interveners did not have the benefit of CLI-09-03 with which to update the contentions prior to filing.

The Commission affirms in its Bellefonte ruling (CLI-09-03) that the Atomic Safety and Licensing Board has much flexibility in its jurisdiction over admitting contentions, including the interesting footnote 24 that asserts that the Board was "was free to decide this issue on a theory different from those argued by the litigants" under certain conditions. There is no basis for the allegation of error since the Board addressed (and removed) the issues rejected by the Commission (the relevance of Part 61) in restating contention 7 and 8 as admitted.

The claim by PEF that new bases for Contention 7 and 8 were added in Intervener's response to the PEF March 3, 2009 "Answer" to the Petition to Intervene filed February 6th, 2009 and raised in a document filed on April 6 (Progress Energy's Answer Opposing Green Party of Florida, Ecology Party of Florida and Nuclear Information and Resource Service Filing New Bases for Contention 7 and 8) is interesting. In Intervener's response to the PEF answer to the Petition to intervene, the matter of existing radiation standards is mentioned in substitute for previous language that invoked "health" and "safety." U.S. NRC's radiation protection standards are the measure of the applicant's ability to deliver "health" and "safety" and it was assumed in

the Petition that meeting such standards during the course of licensed activities is a given. The full hearing of site-specific issues pertaining to the accumulation of so-called “Low-Level” radioactive waste from the operation of Levy County Units 1 and 2 is necessary to ascertain whether the applicant will, in fact meet those standards under conditions that were not fully contemplated in the COL, as pointed out in the Petition, and the Interveners’ response to the PEF answer.

In raising Crow Butte (CLI-09-12) in its attack on the admission of Contentions 7 and 8, PEF again errs by attempting to bend the Commission’s ruling to produce diametric (wishful) results. Again, the Commission affirms the Board’s authority to re-fashion contentions. Citing another proceeding to which Nuclear Information and Resource Service (one of the Interveners) is currently a party to (Shaw, AREVA, MOX Services LBP-08-11, 67 NRC 460, 482 (2008)) the Commission stated:

> Our boards may reformulate contentions to “eliminate extraneous issues or to consolidate issues for a more efficient proceeding.” (page 22)

And goes on to say:

> Our rules of procedure authorize boards to hold prehearing conferences for the purposes of simplifying or clarifying the issues for hearing, after which a board might admit a revised contention. (citing 10 C.F.R. §§ 2.319(j) and 2.329(c)(1))

Oral arguments were held in Bronson, Florida on April 20 and 21 during which time many issues were discussed, including CLI-09-03 and the basis upon which the contentions rest, regardless of the Part 61 issue that CLI-09-03 rejects. See Transcript Pages 307-349 April 21, 2009 Bronson FL, ADAMS ML09120051).

PEF further complains that admitting these contentions “As reformulated, Contentions 7 and 8: (a) improperly impose requirements on a COL applicant that do not exist in the

Commission's regulations, and (b) allege that the Application omits information that it does, in fact, contain." (Appeal page 6)

Here PEF is ignoring the explicit invitation from the Commission extended in CLI-03-09 (see discussion acknowledging the problem of a lack of off-site disposal options, and the unreliability of projecting the availability of such, pages 10 –11 of CLI-03-09) in the statement:

> "The questions of the safety and environmental impacts of onsite low-level waste *storage* are, in our view, largely site- and design-specific, and appropriately decided in an individual licensing proceeding, provided that litigants proffer properly framed and supported contentions…"

PEF appeal (page 6, 29-30)

> "Finally, the Board erred in allowing Greater Than Class C Waste issues to be litigated as part of Contentions 7 and 8, which are based entirely on the inability of Progress to ship low-level radioactive waste to the Barnwell facility. The closure of that facility has no effect on Greater Than Class C Waste because the disposal of Greater Than Class C Waste is the responsibility of the Federal government and would not be shipped to Barnwell or any other low-level radioactive waste disposal facility. 42 U.S.C. § 2021c(b)(1)(D).

The incontrovertible fact is that PEF has nowhere to send its Greater than Class C waste at this time, therefore any address of the issue of storage of so-called "Low-Level" radioactive waste will either include it, or simply omit it in terms of disclosure since the waste will, unless and until a federal program to receive it convenes, be stored on the site. It should be included in any discussion of a site-specific storage plan since it will be present on the site.

Disposal of Greater-than-Class-C (GTCC) so called "low-level" radioactive waste was designated a federal responsibility in the Low Level Radioactive Waste Policy Amendments Act (P.L. 99-240 Section 3(b)(1)(D)).That Act passed in 1985. The Department of Energy (DOE) to this day does not have a storage or disposal site for GTCC waste. Some of this material has gone to so-called "low-level" radioactive waste sites on a case-by-case basis, but in the absence

of such facilities, all of that waste will remain onsite. Although DOE began to consider its responsibility for this waste in 2005, twenty years later after it was directed by Congress, no decision has been made yet on whether to look for a site or use existing weapons sites or on the method of disposal. It has been determined by the courts that DOE is responsible for the irradiated fuel (high level) radioactive waste from nuclear power but no disposal is available despite many efforts by DOE. DOE is in the very early stages of considering what kind of disposal would be necessary for GTCC disposal, thus the likelihood of DOE finding such a place in time for the waste generated by Levy County 1 and 2 is highly speculative. The long term management of the GTCC waste on site is not addressed in the COLA or generic AP 1000 documents. No waste confidence decision has been made on the GTCC waste.

Conclusion

The Interveners ask that the Commission uphold LBP-09-10 as written. The bar which PEF must meet in its appeal is to produce an actual instance of error in the ruling. This document addresses and unveils each of the alleged cases of error as being merely opinion and in many cases a highly selective reading of the cases cited.

Further, the Levy County Units 1 and 2 site is the first “Greenfield” site east of the Mississippi to be considered for a new reactor. It is vital that the hydro ecology and waste issues be properly attended to. Adjudication of the three admitted contentions will create a strong record that will honor the integrity of the US Nuclear Regulatory Commission in meeting its obligations under both the National Environmental Policy Act and the Atomic Energy Act, as cited by Judges Karlin, Murphy and Baratta throughout their ruling in LBP-09-10.

Respectfully submitted,

_____(*Electronically signed by)*_____
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on behalf of
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July 30, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PROGRESS ENERGY FLORIDA	)	
	)	Docket Nos. 52-029 COL
	)	52-030 COL
(Levy County Nuclear Station	)	
Units 1 & 2)	)	
	)	

Certificate of Service

I hereby certify that copies of RESPONSE OF THE GREEN PARTY OF FLORIDA, THE ECOLOGY PARTY OF FLORIDA AND NUCLEAR INFORMATION AND RESOURCE SERVICE TO PROGRESS ENERGY FLORIDA, INC'S BRIEF IN SUPPORT OF APPEAL FROM LBP-09-10 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 on this 30th day of July, 2009

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Respectfully Submitted,

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