United States of America
Nuclear Regulatory Commission

Atomic Safety and Licensing Board

Before Administrative Judges:

Alex S. Karlin, Chair
Dr. Anthony J. Baratta
Dr. William M. Murphy

In the Matter of: PROGRESS ENERGY FLORIDA, INC. Combined License Application for Levy County Units 1 & 2	Dockets Numbers 52-029-COL and 52-030-COL December 17, 2010

Interveners' Reply to PEF Answer to Amended Contention 4

PEF has filed an extensive response to the submission of an amended Contention 4. In many instances, it appears to be a similar attempt to dismiss the contention via admissibility requirements as during the initial submittal of C4. Likewise, there is an attempt to dismiss the contention by dividing the issues and ignoring the evidence presented by Interveners and their expert, Dr. Sydney Bacchus. PEF provides no new information which might remedy some of the deficiencies found within the DEIS. The Contention should be admitted .

In their Introduction, PEF states:

> Rather than amending Contention 4 to challenge any new data or conclusions in the Draft Environmental Impact Statement, NUREG-1941 ("DEIS"), Joint Interveners' Amended Contention 4 simply reiterates their challenges to Progress's Environmental Report ("ER"), by substituting "DEIS" for "ER" in the text of the original Contention 4 as admitted by the Board. PEF Answer p. 1.

In one sense, they are correct. Interveners have substituted DEIS for ER because

the DEIS failed to correct the deficiencies noted in the ER. PEF is incorrect, however, when it says we do not "challenge any new data or conclusions". Answer at 1. In fact, Interveners have provided data in support of our Contention, while pointing out deficiencies in the DEIS based on the evaluation of the project by NRC Staff, and failures in the process by which Staff has reached its conclusions on certain environmental impacts. PEF 's Answer on p.2 goes on to say:

> Joint Interveners allege, without any support, that the NRC's independent review of a recent, relevant State of Florida siting certification, and in particular the Florida Department of Environmental Protection's Conditions of Certification ("COC"), must be disregarded.

There was no way to anticipate that NRC Staff would rely so heavily on compliance with the COC until the DEIS was released. We concur that the COC are not new data, however that Staff has *accepted* the COC as protecting the environment at Levy is new information that could not have been previously known. Contrary to PEF's assertion, NRC Staff has an obligation to analyze the data, conditions for protection and the possible impacts of the proposed project independently. We contend that, while Staff DID an independent analysis, they incorrectly relied on the COC for protection of the environment. In their initial admission of Contention 4, the ASLB noted that "Under NEPA, it is NRC, not the applicant, that must prepare the EIS and identify and discuss all reasonable alternatives. While NRC may require an applicant to submit certain information, the NRC cannot delegate its duty to comply with NEPA to the applicant." ASLB Ruling LBP-09-10. State and other Federal agencies involved also do not have an obligation to ensure that LNP does, indeed, comply with NEPA.

As stated in our Motion to Amend Contention 4, NRC Staff reasoning satisfies

neither the requirements of NEPA nor legal precedence. In *Calvert Cliffs' Coord. Com. v. United States A. E. Com'n, 449 F.2d 1109 (D.C. Cir., 1971),* one of the very first NEPA cases, regarding NEPA requirements, the court ruled:

> Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount….. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action — the agency to which NEPA is specifically directed.

Interveners do not suggest that PEF will not comply with the Conditions of Certification. Rather, we believe that PEF will comply but that compliance will not preclude harm. NRC Staff incorrectly relies on State rules (such as the COC) to guarantee that impacts will, *because of the COC,* be SMALL and not require mitigation. State certifications need not comply with NEPA standards, and certainly will not consider cumulative impacts.

PEF continues:

> In fact, compliance with 10 C.F.R. Part 51 and the CEQ regulations implementing the National Environmental Policy Act ("NEPA") encourage the NRC Staff to rely on existing environmental assessments taken by competent and responsible State authority in order to avoid the wasteful duplication of effort and expense.

It is worth noting that the NEPA publication, Considering Cumulative Effects Under the National Environmental Policy Act, the very first paragraph of the introduction is:

> Evidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.

NRC Staff may certainly rely on other agencies' environmental assessments but

that is not the case here, especially when cumulative effects need to be carefully and thoroughly considered. Staff has in some cases (the Environmental Motoring Plan, for example) depended on non-existent plans to protect the ecosystem at Levy. Staff has an obligation to examine every condition they present as protective of the environment, not simply take it on faith that somehow it will all work out. Staff should certainly evaluate how these other agencies reached their conclusions, such as how any modeling was accomplished, rather than merely accepting the conclusions. A Request for Additional Information is an example of how Staff regularly gains insight into the conclusions drawn by these other agencies. Interveners think Staff has not looked closely enough at certifications, licensing and permits.

PEF then makes several unsubstantiated allegations:

> After discounting the alleged facts or expert opinions that (1) this Board has already ruled implausible, (2) are legal conclusions not entitled to be assumed true, or (3) impermissibly assume that Progress will violate its permits or license, the meager remains of JI Motion to Amend C4 fail to support a genuine dispute on a material issue of law or fact.

First, Interveners have not alleged implausible facts, but rather laid out a detailed explanation of the deficiencies of the DEIS. Second, the opinions of Dr. Bacchus, a respected expert in the field of hydroecology, are certainly entitled to be assumed true at this stage. Indeed, by the same reasoning, the DEIS itself could then be considered "legal conclusions masquerading as expert opinion and legal conclusions couched as alleged facts." Answer at 2. Last, at no point, in any way, shape, or form, do Interveners state or imply that PEF will violate its permits or license.

Beginning on page 5, PEF launches into an explanation of the rules of admissibility of contentions. We will simply state that Interveners have merely rolled C-4 over from

the ER to the DEIS, filed an amendment to a previously admitted Contention 4 including the ill-advised reliance on the COC, and provided evidence to defend our positions. PEF is grasping at straws to prevent our contention from going forward.

At Footnote 10, P.9, PEF states:

> Commission precedent is clear that Petitioners are required to identify the evidence on which they rely with specific references. Joint Intervenors have failed to do so, and neither Progress nor the Board is required to sift through extensive affidavits and referenced documents to search for a needle of support that may be in a haystack. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-03, 29 NRC at 234 (1989). This is even more true where the November 15, 2010 Bacchus Affidavit addresses various issues in four different pleadings and the February 9, 2009 Bacchus Affidavit does not address the DEIS at all. Thus, if the purported evidence is not specifically cited, neither the Applicant nor the Board need look any further.

Interveners have complied with all legal requirements for disclosing documents, and have provided the necessary evidence for our contention. As far as Dr. Bacchus not having addressed the DEIS in her February 9, 2009 affidavit, Interveners wonder how she could do so, given the fact the DEIS was not yet released. Dr. Bacchus is currently disabled and while other parties have suggested we terminate her employment for that reason, we choose not to discriminate against the disabled. Dr. Bacchus requested that, to accommodate her disability she be allowed to provide one affidavit encompassing responses to the multiple motions and in support of amended C-4, and we agreed. We apologize for any confusion this may have caused. PEF also asserts that Dr. Bacchus never referenced the DEIS (PEF Answer, 9), yet a search in her affidavit for “DEIS” shows 128 occurrences. Considering the complexity of the LNP project, and the resources available to PEF and NRC Staff, it appears to be a stretch to say that Dr. Bacchus hides her opinions in a haystack of verbiage.

PEF makes assertions to deny the admission of the revised Contention:

A. The NRC Need Not Perform a Duplicate Environmental Review, But Rather May Independently Review The Impacts Expected From Compliance With The COC(Answer at 9)

As stated above, The NRC need not duplicate reviews, but has a responsibility to ensure that the reviews are evaluated for accuracy and completeness, including direct, indirect, cumulative impacts on and off site in an appropriate zone of impact. The overarching question is: How can NRC Staff have reached its conclusions on these environmental impacts when there cannot have been a review of monitoring plans that do not exist? The DEIS references an erosion and sediment control plan and a SWPPP (DEIS 4-2), a dewatering plan (DEIS p.4-35), and an environmental monitoring plan (DEIS p.5-5) all of which are not yet in existence. There has, therefore, been no evaluation of those plans by Staff. The abdication of duty is unacceptable:

> If wellfield aquifer performance testing, revised groundwater modeling or environmental monitoring of wetlands either detects or predicts adverse wetland impacts, PEF would be required to mitigate the impacts or implement an approved alternative water-supply project (FDEP 2010). (DEIS p 5-42-43)

How exactly would the mitigation occur? What exactly would constitute detection or prediction of adverse wetland impacts? What would the alternative water supply project consist of? Might that not also have adverse environmental effects? The public and Interveners deserve to be able to fully evaluate these, and cannot. Neither mitigation nor an alternative water supply may be achievable, regardless of the best efforts by PEF.

The COC do not address cumulative impacts, nor do they address climate change impacts, or indeed any abnormal weather conditions. Yet Staff apparently allowed COC

compliance to form the basis of its assurance harm could be mitigated and so impacts would be SMALL.

PEF argues that some aspects of the revised contention have already been ruled implausible, “Specifically, Joint Intervenors raise issues related to excavation of the nuclear island (JI Motion to Amend C4 at 15) and impacts from sourcing fill or aggregate from a separate project; a proposed Tarmac Mine (JI Motion to Amend C4 at 12). The Board concluded that alleged impacts from these matters are too speculative to be part of an admissible contention. See LBP-09-10 at 49. Nothing in the DEIS has changed - nor is any such change cited by Joint Intervenors - to warrant reconsidering the Board’s decision.” PEF Answer at 14.

In fact, the reference to the nuclear islands is used to point out one of the many sources of passive and active dewatering associated with Levy. Dewatering is an issue already admitted in the contention. The Tarmac Mine was not even addressed in the ER, so Interveners could not assume the Staff would dismiss its impacts so readily, but more importantly, the DEIS is the first source of information on actual water usage at Tarmac (1Mgd), and such large water usage must be addressed to have an accurate determination of cumulative effects of dewatering.

PEF seems to want it both ways. First, they stress the accuracy of the DEIS analysis, but then they want to ignore huge water users from that very analysis. Throughout their response, PEF quotes the DEIS (Answer at 13, 14, et al) as proof of the accuracy of the DEIS. This is begging the question. We cannot agree with them, and see no new reasoning which leads us to believe that the DEIS is infallible.

PEF also references Attachment 13 from Intervener’s Amendment filing

(Footnote 13, Answer at 14). In truth, due to filing difficulties with EIE, this attachment was not refiled, but is available as ML 09174047-BDA Environmental Consultants, 93046-20.4, "Aerial Photographic Monitoring, Florida Power Corp. Crystal River Power Plant Salt Drift Study, Final Report 1994 Aerial Photography," Appendix A. We apologize for any inconvenience this may have caused.

PEF attacks the opinions of Dr. Bacchus by claiming, on a multitude of points, that "This statement is a legal conclusion that some aspect of the environmental resource will be noticeably altered couched as an alleged fact." PEF Answer at 15. Suffice to say that Dr. Bacchus is a respected expert in her field, and, at this stage, her opinions are absolutely admissible and as valid as those of Staff and their experts. It would seem that an affidavit would be of little use without an expert coming to any conclusion.

PEF makes the assertion that Interveners assume they will violate licenses or permits. On the contrary, we believe that the failure exists when NRC Staff accepts an assumption that complying with such permits will ensure appropriate environmental protection. The difficulties are obvious, not the least being that State and Federal requirements are not necessarily the same. A perfect example of compliance, but with resulting negative impacts:

> SWFWMD's failure to establish minimum flows and levels does not invalidate the evaluations made by Progress and the DEIS regarding alterations to flows and levels of surface and ground waters that would result from operation of Levy. If the levels are established then the standard conditions of the COC require that the levels be met. COC at 44-45. These levels are not referenced in or material to any of specific conditions in the COC.

Without minimum flows having been established, how can one evaluate whether

they are being maintained? And if levels are established, how can PEF blithely promise now that they CAN then meet those levels? Obviously, if the COC and the monitoring programs it requires are written and reviewed in advance, it will be possible not only for staff, but also for the public, to evaluate the potential impacts of the Levy project: a major reason a DEIS exists.

PEF asserts that the allegations contained in the submission of the amended C4 are factually neutral and that "All of these examples are factually neutral because the unknowns or uncertainties may be benign or harmful". (PEF Answer at 16). Dr. Bacchus has presented her opinion that, in fact, there is nothing benign in the issues presented, and that the results of constructing and operating LNP will result in impacts that individually and cumulatively are LARGE.

In conclusion, PEF fails to address the core issues of Contention 4. The hydroecological issues must be considered in total, and include an evaluation of both direct and indirect impacts as well as cumulative effects and weather conditions that are not average, i.e. drought. Under the assumption that PEF WILL comply with the COC, without a complete analysis of the component monitoring programs the DEIS cannot issue the accurate environmental assessment required by NEPA. The inadequacies of the ER have NOT been corrected by the DEIS. Interveners have met all requirements to move forward with C4, an already admitted Contention.

Respectfully Submitted,

_____/s/_____

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December 17, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
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In the Matter of PROGRESS ENERGY FLORIDA, INC. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)	Docket No. 52-029-COL, 52-030-COL ASLBP No. 09-879-04-COL-BD01 December 17, 2010

Certificate of Service

I hereby certify that copies of the Interveners Reply to PEF Answer to Amended Contention 4 have been served on the following persons by Electronic Information Exchange on this 17th Day of December, 2010:

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