May 16, 2011

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

**PROGRESS ENERGY FLORIDA, INC.'S RESPONSE OPPOSING MOTION TO PERMIT FILING OF UNAUTHORIZED REPLY**

## INTRODUCTION

Applicant Progress Energy Florida, Inc. ("Progress") hereby responds to and opposes the "Petitioners' Motion for Modification of the Commission's April 19, 2011 Order to Permit a Consolidated Reply" ("Motion") filed on May 6, 2011 in the above-captioned proceeding by intervenors Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, the "Joint Intervenors"). The same Motion is being filed in approximately twenty proceedings by some fifty individuals and organizations who, between April 14 and 18, 2011, filed with the Commission an "Emergency Petition to Suspend all Pending Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from the Fukushima Daiichi Nuclear Power Station Accident" ("Petition").[1]

[1] The Petition requests that the Commission take a two-page list of actions, which can be summarized as including: 1) suspension of all decisions pending completion of the NRC's review of the Fukushima accident; 2) suspension of all proceedings, hearings or opportunities for public comment on any issue considered in that review; 3)

(Footnote continued on next page)

On April 19, 2011, the Commission's Secretary issued an Order ("Order") that "set a schedule for further briefing" in connection with the Petition. Order at 1. The Order directed that (1) "[a]ny supplements to the petition may be filed no later than Thursday, April 21, 2011" (*id.* at 1-2, footnote omitted) and (2) that "[a]ny person may file an answer to the petition, or a brief *amicus curiae*, no later than Monday, May 2, 2011" (*Id.* at 2). The Order did not authorize any additional filings.

Responses to the Petition were filed by Progress, a number of other licensees, the NRC Staff, the Nuclear Energy Institute, and the Commonwealth of Massachusetts ("Massachusetts"). *See* Motion at (unnumbered) page 2, note 1. All responses, except that of Massachusetts, opposed the relief sought in the Petition.

The Motion cites 10 C.F.R. § 2.323(c) and seeks leave to file a "consolidated reply" to the various responses. Motion at 1.[2] Joint Intervenors have attached to their Motion the reply that they ask the Commission to consider, a document entitled "Petitioners' Reply to Responses to Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident" ("Proposed Reply").

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performance of an environmental analysis of the accident; 4) performance of a safety analysis of the accident's regulatory implications; 5) establishment of procedures and a timetable for raising new issues in pending licensing proceedings; 6) suspension of all decisions and proceedings pending the outcome of any independent Congressional, Presidential or NRC investigations; and 7) request for a Presidential investigation.

On April 19, 2011, the Joint Intervenors submitted the Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Relating Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (April 19, 2011) ("Makhijani Declaration"). The Makhijani Declaration was also filed in other proceedings.

[2] The Joint Intervenors argue that their original Petition was not a motion (Motion at 3-4; Proposed Reply at 5-6), yet the authority they cite for their Motion is 10 C.F.R. § 2.323(c), which sets conditions for the filing of responses to *motions* in NRC proceedings.

The Motion should be denied because neither the Order nor the Commission's rules allow replies, and the Motion does not make the requisite showing of compelling circumstances necessary to overcome the general prohibition against replies. Accordingly, the Commission should disregard the Proposed Reply.

## DISCUSSION

The Motion fails to meet the criteria for allowing exceptions to the prohibition on the filing of replies to the answers to motions in Commission proceedings. 10 C.F.R. § 2.323(c) provides:

> (c) Answers to motions. Within ten (10) days after service of a written motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. *The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.*

10 C.F.R. § 2.323(c) (emphasis added). Thus, the Commission Secretary or the presiding officer of the proceeding in question will deny a motion to file a reply unless the motion shows "compelling circumstances," such as a demonstration that the moving party could not "reasonably have anticipated the arguments" raised in the responses to which it wishes to reply.

The "compelling circumstances" standard is applied in 10 C.F.R. § 2.323 to both requests to file a reply to a motion (§ 2.323(c)) and to motions for reconsideration of decisions by the presiding officer (§ 2.323(e)). The standard is a rigorous one. As explained by the Commission in adopting the 2004 changes to the Rules of Practice,

> This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). Under the compelling circumstances standard, a reply to the answer to a motion would be permissible only if (1) "manifest injustice would occur" if a reply was not allowed, *and* (2) the matters set forth in the reply could not have been raised earlier.

Joint Intervenors acknowledge that the standards in 10 C.F.R. § 2.323(c) govern the disposition of their Motion. Motion at 3. However, the Motion does not meet these standards. It makes no showing of compelling circumstances that would warrant allowing a reply.

*First*, Joint Intervenors claim that the Fukushima accident raises "unprecedented technical and legal issues for which there is very little precedent in NRC jurisprudence." Motion at 3. There is, in fact, substantial Commission precedent on the standards that the Commission applies to petitions to suspend proceedings, including very similar petitions that were filed after the September 11, 2001 attacks.[3] The Petition simply ignored that case law and those standards. The issues sought to be raised in the Proposed Reply could and should have been addressed in the Petition. Joint Intervenors fail to demonstrate why they need a "second bite at the apple" to address the applicable law and standards.

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[3] *Private Fuel Storage, LLC,* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001);*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 389-90 (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399 (2001), *reconsideration denied*, CLI-02-2, 55 NRC 5 (2002); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23 56 NRC 230, 237 (2002); *AmerGen Energy Co., LLC et al.* (Oyster Creek Nuclear Generating Station *et al.*), CLI-08-23, 68 NRC 461, 476 (2008); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000).

Joint Intervenors also assert that the Fukushima accident "raises unprecedented safety and environmental concerns for members of the public who are neighbors of proposed or existing reactors, and who seek to exercise their rights." *Id.* However, those members of the public have several avenues available to them to exercise their rights; indeed, a number of them are participants in pending licensing proceedings and can express their concerns within the framework of those proceedings. The existence of generalized concerns by members of the public does not constitute "compelling circumstances" that warrant authorizing the filing of a reply lest "manifest injustice" occur.[4]

*Second,* Joint Intervenors claim that they could not have anticipated that the Petition would be characterized as a "motion" to suspend "proceedings." Motion at 3-4. There is no merit to this assertion. Commission case law clearly holds that petitions to suspend proceedings are treated by the Commission as motions under 10 C.F.R. § 2.323. *Oyster Creek*, CLI-08-23, 68 NRC at 476; *Diablo Canyon*, CLI-02-23 56 NRC at 237. Moreover, the Motion itself treats the Petition as a motion, and Joint Intervenors invoke the provisions of 10 C.F.R. § 3.323(c) (applicable only to motions) to justify their filing a reply.

Also, the Petition *does* ask for the suspension of all licensing proceedings with respect to "any reactor-related or spent fuel pool-related issues that have been identified for investigation in the Task Force's Charter" and "with regard to any other issues that the Task Force subsequently may identify as significant in the course of its investigation." Petition at 2, 28. The Petition

[4] Joint Intervenors argue that "[i]t is therefore appropriate to allow a thorough debate regarding the regulatory significance of the Fukushima accident under the AEA and NEPA and what procedural measures must be imposed to protect the public's right to participate in a meaningful way in the consideration of Fukushima-related issues [sic] licensing decisions." Motion at 3. Joint Intervenors do not explain why their Petition and the responses thereto do not constitute the "thorough debate" they claim is needed, or what is missing from the debate that requires supplementing the arguments made in the Petition in order to avoid manifest injustice.

further states that licensing proceedings "should be suspended pending completion of the Task Force's investigation into those issues and the issuance of any proposed regulatory decisions and/or environmental analyses of those issues." *Id.* at 2, 28-29. It is inexplicable how the Joint Intervenors can now claim that the Petition does not seek the suspension of licensing proceedings.

In any event, suspending "decisions" and suspending "proceedings" is a distinction without a difference. The Commission has treated a request to stay consideration of a petition for review (i.e., a request to withhold a decision) as "at bottom" seeking a suspension of a proceeding. *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __, slip op. at 8-10 (July 8, 2010).

Joint Intervenors also claim that they "could not have anticipated the numerous technical arguments that the Responses have made in challenging the validity of Dr. Makhijani's supporting declaration regarding the new and significant information demonstrated by the Fukushima accident, or that the Responses would fail to provide expert support for their technical arguments." Motion at 4. However, the Makhijani Declaration is a thirteen page document, comprising 37 paragraphs replete with technical arguments. Joint Intervenors should have anticipated that the responses to the Petition would point out the weaknesses in Dr. Makhijani's arguments. Furthermore, the responses did not require expert support to counter Dr. Makhijani's Declaration, and that fact provides no basis for filing a reply.[5]

[5] Progress's response points out that the assertions in Dr. Makhijani's Declaration raised issues that were speculative and unsupported by facts, and that the Declaration failed to provide any discussion specific to the proceedings that the Petition sought to bring to a halt. Therefore, the response was legal argument that should have been reasonably anticipated by Joint Intervenors.

*Finally*, Movants state that they "could not have anticipated the numerous ways in which the opponents misinterpret NEPA's requirement for consideration of new and significant information in NRC licensing decisions." *Id.* According to the Movants, the Petition's opponents "ascribe to the NRC a level of discretion that simply does not exist in the statute. [The Petition's opponents] also fail to recognize that to the limited extent that NEPA does give agencies discretion to avoid public participation on some issues, the AEA nevertheless requires the NRC to allow the public to participate." *Id.* Again, the raising of legal arguments in refutation of the arguments presented in a motion is the expected focus of a response to such motion and cannot possibly be claimed to be "unanticipated." In this case, Progress, the NRC Staff, and other respondents referenced NRC and Federal case law in their responses. The legal arguments in the responses do not become "unanticipated" because Joint Intervenors failed to research them, or disagree with them. Joint Intervenors had the opportunity to raise every relevant legal argument in support of the Petition in the first instance. It was also incumbent on them to identify all applicable precedents and distinguish them in their Petition. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991); *U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), Memorandum and Order (Denying Petition to Certify Issue to the Commission and Motion for Leave to File Replies), slip. op. at 4-5 (Dec. 22, 2008) (ADAMS Accession No. ML083570498).

## CONCLUSION

For the above stated reasons, the Commission should deny the Motion and disregard the Proposed Reply attached to it.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2011 the foregoing "Progress Energy Florida, Inc.'s Response Opposing Motion to Permit Filing of Unauthorized Reply" was provided to the Electronic Information Exchange for service upon the following individuals:

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