

August 22, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

**PROGRESS ENERGY FLORIDA, INC.’S RESPONSE OPPOSING  
REQUEST FOR SUSPENSION OF LICENSING PROCEEDINGS PENDING  
RESOLUTION OF RULEMAKING PETITION**

Applicant Progress Energy Florida, Inc. (“Progress”) hereby responds to and opposes the request for suspension included in the August 11, 2011 “Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision” (the “Petition”), filed by intervenors The Ecology Party of Florida, Nuclear Information and Resource Service and the Green Party of Florida (collectively the “Joint Intervenors”) before the Atomic Safety and Licensing Board (“ASLB”) in the Levy County Nuclear Plant Units 1 and 2 combined construction and operating license (“COL”) proceeding. The Petition asks that the Commission “rescind regulations in 10 C.F.R. Part 51 that make generic conclusions about the environmental impacts of severe reactor and spent fuel pool accidents and that preclude consideration of those

issues in individual licensing proceedings.” Petition at 1.<sup>1</sup> Progress opposes the request in the Petition that the Commission suspend the Levy COL proceeding while it considers the Petition’s request for rulemaking and the environmental issues raised in a proposed new contention alleging that the implications of the Fukushima Task Force Report must be addressed in the licensing proceeding. *Id.*

As discussed below in more detail, petitions to suspend licensing proceedings, including those such as the Petition which was filed under 10 C.F.R. § 2.802(d), are treated as motions under 10 C.F.R. § 2.323. Further, the Commission has indicated that suspension motions are best addressed to it. *AmerGen Energy Company, LLC et al.* (Oyster Creek Nuclear Generating Station, *et al.*), CLI-08-23, 68 NRC 461, 476 (2008); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002). Given the generic nature of the requests in the Petition to rescind regulations and suspend all pending licensing proceedings, and the fact that petitions for rulemaking under 10 C.F.R. § 2.802(a) and any associated motions for stay are to be addressed to the Commission, the request for suspension should be decided by the Commission instead of by the licensing board. A filing to this effect is being made with the ASLB in this proceeding.

The request for suspension fails to comply with the requirements for granting motions. In addition, the relief it seeks is inapplicable to the Levy COL proceeding. The request for suspension is also without legal basis, is unnecessary, and would be inimical to the interests of

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<sup>1</sup> The title of the Petition references suspension of the licensing *decision*, while the text of the Petition references suspension of the licensing *proceeding*. We conservatively assume that the request seeks suspension of the Levy COL licensing proceeding, not just withholding of final action on the COL application.

license applicants such as Progress and to the NRC's commitment to expeditious and efficient decision-making. For those reasons, the request for suspension must be denied.

## **BACKGROUND**

On March 11, 2011, the Tohoku-Taiheiyou-Oki Earthquake occurred near the east coast of Honshu, Japan. This magnitude 9.0 earthquake and the subsequent massive tsunami caused significant damage to at least four of the six units of the Fukushima Daiichi nuclear power station as the result of a sustained loss of both the offsite and on-site power systems. NRC Information Notice 2011-05, Tohoku-Taiheiyou-oki Earthquake Effects on Japanese Nuclear Power Plants (Mar. 18, 2011) at 1 (ADAMS Accession No. ML110950110).

The Commission created a Task Force, made up of current senior managers and former NRC experts with relevant experience, to conduct both short term and long term analysis of the lessons that can be learned from the Fukushima accident. The Task Force was directed to:

- evaluate currently available technical and operational information from the events that have occurred at the Fukushima Daiichi nuclear complex in Japan to identify potential or preliminary near term/immediate operational or regulatory issues affecting domestic operating reactors of all designs, including their spent fuel pools, in areas such as protection against earthquake, tsunami, flooding, hurricanes; station blackout and a degraded ability to restore power; severe accident mitigation; emergency preparedness; and combustible gas control.
- develop recommendations, as appropriate, for potential changes to inspection procedures and licensing review guidance, and recommend whether generic communications, orders, or other regulatory requirements are needed.

Tasking Memorandum – COMGBJ-11-0002 – NRC Actions Following the Events In Japan (Mar. 23, 2011) at 1 (ADAMS Accession No. ML110950110).

The Task Force completed its 90-day review and issued its report to the Commission on July 12, 2011. The Task Force Report concludes:

The current regulatory approach, and more importantly, the resultant plant capabilities allow the Task Force to conclude that a sequence of events like the Fukushima accident is unlikely to occur in the United States and some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological releases. Therefore, continued operation and continued licensing activities do not pose an imminent risk to public health and safety. *Id.* at vii.

Moreover, the Task Force points out that the AP1000 (which is the plant design for Levy Units 1 and 2) already has many design features that satisfy the Task Force's recommendations. *Id.* at

71. According to the Task Force Report:

[T]he AP1000 ...[has] passive safety systems. By nature of [the] passive design[] and inherent 72-hour coping capability for core, containment, and spent fuel pool cooling with no operator action required, the ... AP1000 design[] [has] many of the design features and attributes necessary to address the Task Force recommendations. *Id.* at 71.

In summarizing the Task Force Report to the Senate Committee on Environment and Public Works, Subcommittee on Clean Air and Nuclear Safety, NRC Chairman Gregory Jaczko's statement included:

- "Overall, the Task Force found that continued operation and continued licensing activities do not pose an imminent risk to public health and safety. The Task Force concluded that a sequence of events like the Fukushima Dai-ichi accident is unlikely to occur in the United States, and that some appropriate mitigation measures have been implemented, reducing the likelihood of core damage and radiological releases."
- "The Task Force report included a comprehensive set of twelve overarching recommendations. The Task Force recommendations are intended to clarify and strengthen the regulatory framework for nuclear power plants, and are structured around the focus areas of the NRC's defense-in-depth philosophy as applied to

protection from natural phenomena; mitigation of prolonged station blackout events; and emergency preparedness. The Task Force also provided recommendations to improve the effectiveness of the NRC's programs."

Statement of Gregory Jaczko (Chairman, Nuclear Regulatory Commission), United States Senate Committee on Environment and Public Works, Subcommittee on Clean Air and Nuclear Safety (August 2, 2011) at 2-3, *available at*

[http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=6c8870f2-0484-49da-a275-2dd98a823cbd](http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=6c8870f2-0484-49da-a275-2dd98a823cbd).

The NRC staff ("Staff") is also proceeding with independent assessments of nuclear power plant readiness to address beyond design-basis natural phenomena. NRC Information Notice 2011-05 at 4-5.

The Commission will use the information from these activities to impose any requirements it deems necessary:

NRC has already announced its plan to draw upon "lessons learned" from the Japan events, as the agency has done previously after natural or man-made disasters. As in the past, NRC will conduct rulemaking, or issue orders and other directives, to make upgrades required to implement whatever short-term or longer-term safety improvements emerge from the Task Force directed by the Commission to analyze the Fukushima Daiichi disaster.

Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station at 21-22, *New Jersey Env'tl Federation v. NRC*, No. 09-2567 (3d Cir. Apr. 4, 2011)

("Federal Respondents' Memorandum"). The NRC has also made it clear that it has the authority to do so:

In response to the disaster at Fukushima Daiichi, NRC has authority to order . . . licensees of operating nuclear plants[] to adopt whatever measures NRC determines are needed in the short term for continued assurance of the public health and safety while NRC considers longer-term measures, including changes

in its safety regulations. Such measures may be subject to site-specific considerations.

*Id.* at 2-3.

In furtherance of its ongoing efforts to incorporate into the NRC regulatory scheme, as appropriate, the lessons learned from the Fukushima accident, the Commission issued on August 19, 2011 a Staff Requirements Memorandum (“SRM”), “Staff Requirements – SECY-11-0093 – Near-Term Report and Recommendations for Agency Action Following the Events in Japan,” in which the Commission directs the Staff to take a series of actions in response to the Task Force Report. These recommendations include:

- Producing within 21 days a paper outlining which of the Task Force’s recommendations, either in part or in whole, the Staff believes should be implemented without unnecessary delay. The 21-day effort will include a public dialogue on the Staff’s proposal, and the Staff expects to announce a public meeting in the next few days.
- Producing by October 3, 2011 a paper which prioritizes Task Force recommendations, other than the one calling for a change to the NRC’s overall regulatory approach. This paper is expected to lay out all agency actions to be taken in responding to lessons learned from the Fukushima Daiichi accident. The paper will also lay out a schedule for interacting with the public, other stakeholders, and the Advisory Committee on Reactor Safeguards.
- Producing a paper within 18 months to consider the Task Force’s call for revising the NRC’s regulatory approach. The paper is expected to provide options, including a recommended course of action, in dealing with the Task Force’s recommendation.

While the Commission is taking these actions to assess the implications of the Fukushima accident, its informed assessment is that continued operation and continued licensing activities for U.S. plants do not pose an imminent risk to public health and safety (that was also the conclusion of the NRC Task Force; *see* Task Force Report at vii.). Consistent with that assessment, the Commission has continued its licensing activities, including the completion of several license renewal proceedings, the review of standard design certification applications, and the processing of COL applications. It has scheduled for September 27, 2011 its first mandatory hearing on a COL application (that for Vogtle Units 3 and 4), *see* 76 Fed. Reg. 50767 (Aug. 16, 2011), and has completed its technical review for Revision 19 of the Design Certification for Westinghouse's AP1000 advanced reactor, *see* Final Safety Evaluation Report Related to Certification of the AP1000 Standard Plant Design, NUREG-1793 Supplement 2 (Aug. 2011), ADAMS Accession No. ML112061231.<sup>2</sup>

## **ARGUMENT**

### **I. SUSPENSION OF LICENSING PROCEEDINGS PENDING ACTION ON RULEMAKING PETITIONS SHOULD NOT BE GRANTED ABSENT IMMEDIATE THREATS TO PUBLIC HEALTH AND SAFETY**

The Commission has stated on numerous occasions that suspension of licensing proceedings is a “drastic” action that is not warranted absent “immediate threats to public health and safety.” *Petition for Rulemaking to Amend 10 C.F.R. § 54.17(c)*, CLI-11-01, 73 NRC \_\_\_\_ (Jan. 24, 2011) (“CLI-11-01”), slip op. at 3; *AmerGen Energy Co., LLC* (Oyster Creek Nuclear

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<sup>2</sup> The Commission also has not acted on 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” (“Emergency Petition”) filed with the Commission by Joint Intervenors last April in the Levy COL docket and by intervenors in over twenty other pending proceedings. The Emergency Petition seeks, as does the suspension request in the Petition, that all licensing proceedings be stayed pending completion of the NRC review of the Fukushima accident.

Generating Station, *et al.*), CLI-08-23, 68 NRC 461, 484 (2008); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation) (“PFS”), CLI-01-26, 54 NRC 376 (2001). *See also Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393 (2001); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000). The NRC’s reluctance to suspend licensing proceedings is particularly strong when the suspension would last for potentially long periods of time, and where the duration of the suspension would depend on the completion of other pending Commission actions, such as proposed rulemakings. CLI-11-01, slip op. at 3; Petition for Rulemaking Denial, 71 Fed. Reg. 74,848 (2006); *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC \_\_\_\_ (July 8, 2010) (slip op. at 10 & n.36).

Here, continuing to conduct the ongoing Levy COL licensing proceeding poses no immediate threat to the public health and safety, thus stay of the proceeding is not warranted.

## II. THE PETITION IS DIRECTED AT REGULATIONS NOT APPLICABLE TO THE LEVY COL APPLICATION, THEREFORE THE REQUEST FOR SUSPENSION DOES NOT APPLY TO THE LEVY COL APPLICATION

The Petition makes no showing that it applies to the COL application for Levy Units 1 and 2. The Petition seeks rescission of all regulations in 10 C.F.R. Part 51 “that make generic conclusions about the environmental impacts of severe reactor and spent fuel pool accidents and that preclude consideration of those issues in individual licensing proceedings.” Petition at 1. The specific regulations that the Petition asks be rescinded are “10 C.F.R. Part 51, Appendix B; 10 C.F.R. §§ 51.45, 51.53, and 51.95.” *Id.* at 2.



Of these, Appendix B to Part 51, entitled “Environmental Effect of Renewing the Operating License of a Nuclear Power Plant,” is clearly inapplicable to new reactors such as Levy Units 1 and 2. 10 C.F.R. § 51.45, which sets forth the general requirements for environmental reports, contains only one limitation to the required analyses in an applicant-prepared environmental report (“ER”): subsection (c) states that “[e]nvironmental reports prepared at the license renewal stage under § 51.53(c) need not discuss the economic or technical benefits and costs of either the proposed action or alternatives except if these benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation.” Again, this limitation only applies to license renewal proceedings, not COL applications.

By the same token, 10 C.F.R. § 51.53 applies only to the environmental reports prepared for post-construction activities, and is inapplicable at the COL application stage; the only limitation in the analysis required by that section refers to ERs for license renewal applications, stipulating that the report “need not discuss other issues not related to the environmental effects of the proposed action and the alternatives. In addition, the environmental report need not discuss any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b).” 10 C.F.R. § 51.53 (c)(2).

Finally, 10 C.F.R. § 51.95 addresses the environmental impact statements for post-construction activities, and is again inapplicable to COL applications such as that for Levy. Similar to 10 C.F.R. § 51.53, the only limitations in 10 C.F.R. § 51.95 to which the rulemaking petition would apply are those for license renewal applications: the supplemental environmental impact statement for license renewal “is not required to include discussion of need for power or the economic costs and economic benefits of the proposed action or of alternatives to the

proposed action except insofar as such benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation. In addition, the supplemental environmental impact statement prepared at the license renewal stage need not discuss other issues not related to the environmental effects of the proposed action and the alternatives, or any aspect of the storage of spent fuel for the facility within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b).” 10 C.F.R. § 51.95(c)(2).

Since the Petition requests institution of a rulemaking proceeding to rescind regulations that do not apply to the licensing of the Levy reactors, the Petition’s request for suspension should be denied insofar as it is directed at Levy Units 1 and 2.

### III. THE SUSPENSION REQUEST DOES NOT MEET THE REQUIREMENTS FOR MOTIONS TO STAY

Even if the Petition applied to the licensing of Levy, the request for suspension contained in the Petition should not be granted. Petitions to the Commission to suspend proceedings are treated as motions under 10 C.F.R. § 2.323. *AmerGen Energy Co., LLC, et al.* (Oyster Creek Nuclear Generating Station, *et al.*), Unpublished Order (Jan. 11, 2008) at 1 (ADAMS Accession No. ML080110284); *Diablo Canyon*, CLI-02-23, 56 NRC at 237.

NRC regulations establish that, in order to decide whether to grant a motion for a stay, the Commission will weigh four factors:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

10 C.F.R. § 2.342(e). *See also, Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-08, 71 NRC \_\_\_, slip op. at 11 (Jan. 7, 2010); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C.Cir.1958).

The most important of the four is the second, irreparable injury to the moving party if the stay is not granted. *Shieldalloy*, CLI-10-08 at 12. The NRC requires “a showing of a ‘threat of immediate and irreparable harm’ that will result absent a stay.” *Id.*, citing *Oyster Creek*, CLI-08-13, 67 NRC at 400.

As noted above, no such harm can be claimed in connection with the request for suspension. There is no urgency to granting a stay of the Levy COL licensing proceeding. The Levy reactors are years away from being constructed and placed into operation. The current projected in-service date for Levy Unit 1 is the second quarter of 2021 (or later). Levy COLA, FSAR Table 1.1-203. As the Commission has ruled, “[a] site that currently contains no radiological materials and will not for at least 2 years cannot present an immediate threat to public safety. Therefore, this consideration does not warrant a halt to the current proceeding.” *PFS*, CLI-01-26, 54 NRC at 381. The Commission’s reasoning in *PFS* applies with even more force to the Levy COL proceeding.<sup>3</sup>

Moreover, in the specific case of Levy Units 1 and 2, the current schedule calls for issuance of the Final EIS in April 2012. *See* <http://www.nrc.gov/reactors/new-reactors/col/levy/review-schedule.html>. There is sufficient time to incorporate into the Levy

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<sup>3</sup> Neither the Petition nor the underlying Contentions allege that there is an imminent threat to the health and safety of the public, and as noted above the Task Force Report confirms that no such threat exists. Task Force Report at vii.

Final EIS new regulatory requirements, if any and if they are relevant to the EIS, that come from the Task Force Report recommendations without needing to suspend the Levy COL proceeding.

As the Commission observed in *McGuire/Catawba*:

[T]o the extent the Commission does, during a later stage of this adjudication, modify this agency's safety, environmental, or safeguards rules in a manner that affects issues material to this adjudication, our procedural rules allow for the possibility of late-filed contentions to address such new developments. Moreover, if our generic review leads to new rules applicable here, there will be time enough to apply them.

CLI-01-27, 54 NRC at 391 (footnote omitted). That observation is equally applicable to the Levy COL proceeding. No stay of the proceeding is warranted.

Other factors to be considered in deciding whether to grant a motion to stay are whether the granting of a stay would harm other parties or be inconsistent with the public interest. The NRC has made it clear that it will not grant requests to suspend licensing processes pending consideration of generic issues because it would be contrary to the agency's duties to the applicants and to the interests of the general public. *See, e.g., Savannah River*, where the Commission rejected a petition to suspend licensing of a mixed-oxide fuel fabrication facility in the wake of the September 11, 2001 events in the following terms:

During the time when the NRC is pursuing its top-to-bottom reassessment of its regulations and policies on terrorism, the agency must also continue to meet its statutory responsibilities for licensing and regulation of all nuclear facilities and materials in a timely and efficient manner. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998). Permitting unnecessary delays would contravene the Commission's fundamental duties to the general public, as well as to applicants and licensees. The Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment. *Id.* at 19. Consistent with this policy, the Commission has a history of *not* delaying adjudications to await extrinsic actions,

absent special needs of efficiency or fairness. *See Private Fuel Storage*, CLI-01-26, 54 NRC at 381-83, and references cited therein; [*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2); Catawba Nuclear Station, Units 1 and 2)], CLI-01-27, 54 NRC [385, 390-91 (2001)].

CLI-01-28, 54 NRC at 400 (emphasis in original). In this case, the relief sought to suspend the Levy COL proceeding for an indefinite time would be detrimental to Progress and would contravene the Commission's fundamental duties to the general public and the NRC's policy to avoid unnecessary delays in the NRC's review and hearing processes.

The final factor in granting a stay is a strong showing that the moving party is likely to prevail on the merits. The Petition, and the Contentions with which it is associated, makes no such showing. The Petition is based on the flawed analysis in the Contentions that the Task Force Report recommendations *mandate* that the NRC must upgrade the design basis for nuclear reactors to include severe accidents and rescind the current Part 51 regulations that preclude consideration of the environmental impacts of such severe accidents, so that the environmental impact statements and environmental reports for pending license applications must be modified to incorporate the impacts of severe accidents. *See* Contentions at 10-14.

However, the Task Force Report recommendations are not regulations and may or may not be adopted by the Commission. Hence, the recommendations in themselves have no significance from the standpoint of NEPA.

The Contentions further assert that, even if the Task Force Report recommendations are not adopted, the environmental impacts of the recommended actions must be included in revisions to the ERs and EISs. There is no legal support for this claim, either. Modification of the environmental impact statements or environmental reports to consider the environmental impact of severe reactor or spent fuel accidents would only be required "where new information

provides a *seriously* different picture of the environmental landscape.” *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (emphasis in original; internal quotations omitted) (quoting *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002)). See also *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1215-16 (11th Cir. 2002) (significant impact not previously covered); *S. Trenton Residents Against 29 v. FHA*, 176 F.3d 658, 663 (3d Cir. 1999) (“seriously different picture of the environmental impact”). The Commission has adopted this standard. *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 52 (2001) (“The new circumstance must reveal a seriously different picture of the environmental impact of the proposed project”) (citation omitted). The Task Force Report, however, contains no new and significant information that would require modification of the Part 51 regulations or trigger the need for additional environmental analyses, since the Report only makes recommendations for Commission and Staff actions.

Thus, none of the factors used in assessing motions to stay supports granting suspension of the licensing proceeding.

## CONCLUSION

For the above stated reasons, the Petition’s request for suspension must be denied.

Respectfully Submitted,

/Signed electronically by Michael G. Lepre/

John H. O’Neill, Jr.

Michael G. Lepre

PILLSBURY WINTHROP SHAW PITTMAN LLP

2300 N Street, NW

Washington, DC 20037-1128

Tel. (202) 663-8193

Counsel for Progress Energy Florida, Inc.

Dated: August 22, 2011

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Progress Energy Florida, Inc.'s Response Opposing Request for Suspension of Licensing Proceedings Pending Resolution of Rulemaking Petition dated August 22, 2011, was provided to the Electronic Information Exchange for service upon the following individuals:

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, DC 20555-0001  
E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

Office of the Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Mail Stop O-16C1  
Washington, DC 20555-0001  
Hearing Docket  
E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

Nuclear Information Resource Service  
6390 Carroll Avenue, #340  
Takoma Park, MD 20912  
Michael Mariotte, Executive Director  
E-mail: [nirsnet@nirs.org](mailto:nirsnet@nirs.org)

Nuclear Information & Resource Service  
P.O. Box 7586  
Asheville, NC 28802  
Mary Olson,  
NIRS Southeast Regional Coordinator  
E-mail: [nirs@main.nc.us](mailto:nirs@main.nc.us)

Alachua County Green Party, Green  
Party of Florida  
P.O. Box 190  
Alachua, FL  
Michael Canney, Co-Chair  
E-mail: [alachuagreen@windstream.net](mailto:alachuagreen@windstream.net)

Ecology Party of Florida  
641 SW 6<sup>th</sup> Avenue  
Ft. Lauderdale, FL 33315  
Cara Campbell, Chair  
Gary Hecker  
E-mail: [levynuke@ecologyparty.org](mailto:levynuke@ecologyparty.org)



Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3F23  
Washington, DC 20555-0001

Alex S. Karlin, Chair  
Administrative Judge  
E-mail: [ask2@nrc.gov](mailto:ask2@nrc.gov)

Anthony J. Baratta  
Administrative Judge  
E-mail: [ajb5@nrc.gov](mailto:ajb5@nrc.gov)

William M. Murphy  
Administrative Judge  
E-mail: [William.murphy@nrc.gov](mailto:William.murphy@nrc.gov),  
[wmm1@nrc.gov](mailto:wmm1@nrc.gov)

Ann Hove, Law Clerk  
E-mail: [ann.hove@nrc.gov](mailto:ann.hove@nrc.gov)

Joshua A. Kirstein, Law Clerk  
[josh.kirstein@nrc.gov](mailto:josh.kirstein@nrc.gov)

Eckert Seamans Cherin & Mellott, LLC  
600 Grant Street, 44th Floor  
Pittsburg, PA 15219  
Counsel for Westinghouse Electric Co., LLC  
Barton Z. Cowan, Esq.  
E-mail: [teribart61@aol.com](mailto:teribart61@aol.com)

Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15D21  
Washington, DC 20555-0001  
Marian Zobler, Esq.  
Sara Kirkwood, Esq.  
Jody Martin, Esq.  
Michael Spencer, Esq.  
Kevin C. Roach, Esq.  
Laura Goldin, Esq.  
Joseph Gilman, Paralegal  
E-mail:  
[mlz@nrc.gov](mailto:mlz@nrc.gov)  
[sara.kirkwood@nrc.gov](mailto:sara.kirkwood@nrc.gov)  
[jcm5@nrc.gov](mailto:jcm5@nrc.gov)  
[michael.spencer@nrc.gov](mailto:michael.spencer@nrc.gov)  
[jsg1@nrc.gov](mailto:jsg1@nrc.gov)  
[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)  
[Laura.goldin@nrc.gov](mailto:Laura.goldin@nrc.gov)  
OGC Mail Center : [OGCMailCenter@nrc.gov](mailto:OGCMailCenter@nrc.gov)

/Signed electronically by Michael G. Lepre/  
Michael G. Lepre