

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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PROGRESS ENERGY FLORIDA, INC.) Docket Nos. 52-029 and 52-030
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(Levy County Nuclear Site, Units 1 and 2))

NRC STAFF ANSWER TO JOINT INTERVENORS' RESUBMISSION OF CONTENTION 5

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), and the Atomic Safety and Licensing Board's (Board) Initial Scheduling Order, *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 646 (Aug. 27, 2009), the NRC staff (Staff) hereby files its Answer to the Nuclear Information and Resource Service, Green Party of Florida, and Ecology Part of Florida's (Joint Intervenors) August 11, 2011, "Contention 5 on Severe Accident Impact on Multiple Sites —Submitted for Reconsideration by the The Ecology Party of Florida, Nuclear Information and Resource Service and the Green Party of Florida" (Contention 5 Resubmission). For the reasons discussed below, Contention 5 does not comply with the timeliness requirements for new and amended contentions in 10 C.F.R. § 2.309(f)(2), nor does it comply with the filing of nontimely contentions in 10 C.F.R. § 2.309(c). In addition, New Contention 12 should be dismissed for failure to comply with the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).

PROCEDURAL BACKGROUND

On July 28, 2008, Progress Energy Florida (Applicant) filed an application for a combined construction permit and operating license (COL) for two new reactors in Levy County, Florida. On February 6, 2009, the Ecology Party of Florida, the Nuclear Information and Resource Service, and the Green Party of Florida ("Joint Intervenors") collectively filed a petition

to intervene and several contentions. On July 8, 2009, the Board issued a Memorandum and Order granting the hearing request. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 121-25 (2009). There are currently two admitted contentions, Contention 8A and Contention 4.

On April 14, 2011, Joint Intervenors filed an “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” (Emergency Petition) before the Commission. Additionally, on April 18, 2011, Joint Intervenors filed an “Amendment and Errata to [the Emergency Petition].” The Staff and Applicant filed answers to the Emergency Petition on May 2, 2011. The Commission has not yet issued a ruling on the Emergency Petition.

On August 11, 2011, the Joint Intervenors filed a “Motion to Admit New Contention (13) and Reconsider Contention 5 Regarding the Safety and Environmental Implications of the [NRC] Task Force Report on the Fukushima Dai-ichi Accident” (Motion to Admit Contention 13 and Contention 5 Resubmission). Accompanying their motion, the Joint Intervenors filed “Contention 13 Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report,” “Contention 5 on Severe Accident Impact on Multiple Sites,” “Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision,” and the declaration of Dr. Arjun Makhijani.

LEGAL STANDARDS

The admissibility of new and amended contentions is governed by 10 C.F.R. § 2.309(f)(2) and 2.309(f)(1). New or amended contentions filed after the initial filing period may be admitted only with leave of the presiding officer if, in accordance with 10 C.F.R. § 2.309(f)(2), the contention meets the following requirements:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii).

Additionally, a new or amended contention must also meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). *Id.* In accordance with

10 C.F.R. § 2.309(f)(1), an admissible contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) 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;
- (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. . . .

10 C.F.R. § 2.309(f)(1)(i)-(vi). The Commission has emphasized that the rules on contention admissibility are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration*

denied, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). “Mere ‘notice pleading’ does not suffice.” *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

Finally, a contention that does not qualify for admission as a new contention under § 2.309(f)(2) may still be admitted if it meets the provisions governing nontimely contentions set forth in 10 C.F.R. § 2.309(c)(1). Pursuant to 10 C.F.R. § 2.309(c)(2), each of the factors is required to be addressed in the requestor’s nontimely filing. The first factor, whether good cause exists for the failure to file on time, is the “most important” and entitled to the most weight. *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 261 (2009). Where no showing of good cause for the lateness is tendered, “petitioner’s demonstration on the other factors must be particularly strong.” *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

DISCUSSION

I. Joint Intervenors’ Contention 5 Is Not Admissible Pursuant to 10 C.F.R. § 2.309(f)(1)

Proximity of Proposed LNP Site to Crystal River Nuclear Power Station Not Assessed in SAMA Analysis.

Contention 5 Resubmission at 2.

Joint Intervenors assert that PEF’s PRA is inadequate because the application does not contain an “updated PRA for Rev 16....nor for Rev 17 [of the COL application].” Due to this alleged deficiency, “the entire SAMA section does not appear to be relevant at this time.” They also allege that PEF’s application fails to consider “the impact of a severe radiological

accident at Crystal River Energy Complex” on Levy County Units 1 and 2. Contention 5 Resubmission at 2.

Staff Response: In addition to submitting Contention 13, Joint Petitioners also resubmit Contention 5, which they originally proposed in February 2009. The Board subsequently dismissed this contention in its July 2009 Order. See *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2) LBP-09-10, 70 NRC 51,110-111 (2008). Specifically, the Board found that since the Petitioners had not alleged a specific deficiency in the Application, their contention was inadmissible. The Board also rejected Contention 5 because it failed to provide a concise statement of the alleged facts which supported Joint Intervenors’ position on the issue, pursuant to 10 C.F.R. § 2.309(f)(1)(v):

Petitioners have failed to allege facts that establish any plausible scenario whereby an accident at CREC would ignite a severe accident at LNP...Petitioners also fail to establish how the mitigation and prevention measures in PEF’s existing SAMA analysis would be inadequate in dealing with a severe accident at LNP as a result of an accident at CREC...Because Petitioners fail to allege facts that support their position that PEF must include a discussion of CREC in their SAMA analysis, Petitioners do not meet the contention admissibility requirement of 10 C.F.R. § 2.309(f)(1)(v).

Id. at 60.

Further, Joint Intervenors even admit that this contention is identical to the Contention 5 that they filed in 2009. Contention 5 Resubmission at 2. Despite this acknowledgement, there is nothing new, notwithstanding the Commission’s Recommendations for Enhancing Reactor Safety in The 21st Century: The Near-Term Task Force Review of Insights From The Fukushima Dai-ichi Accident (July 12, 2011) (Task Force Report),¹ which would now render their resubmission of Contention 5 admissible.² Therefore, Contention 5 is still inadmissible for

¹ The Task Force Report is included as an attachment to the NRC Staff’s Answer to the Joint Intervenors’ “Motion to Admit New Contention (13) and Reconsider Contention 5 Regarding the Safety and Environmental Implications of the [NRC] Task Force Report on the Fukushima Dai-ichi Accident,” which is also being filed today.

² To the extent that the Joint Intervenors seek reconsideration of Contention 5, they do not even attempt to address the reconsideration standards set forth in 10 C.F.R. § 2.323(e).

the reasons set forth in the Board's order. See *Levy County*, LBP-09-10, 70 NRC at 110-111; 10 C.F.R. § 2.309(f)(1).

II. Joint Intervenors' Contention Is Not Timely Under 10 C.F.R. § 2.309(f)(2)(i) & (c)

To submit a timely contention, Joint Intervenors must show that the information upon which the amended or new contention is based was not previously available. 10 C.F.R. § 2.309(f)(2)(i). Contention 5, however, is not timely. Although the Joint Intervenors assert that Contention 5 is based on the Task Force Report, they fail to demonstrate what information in the Task Force Report forms the basis for their contention. Rather, Joint Intervenors only note that "the Task Force put considerable emphasis on the need for the Commission to consider, and re-consider the possible impacts of accidents at multiple units and the impacts of accidents at one unit on other units. Contention 5 is squarely within the concerns raised by the Task Force Report." Contention 5 Resubmission at 1-2. Joint Intervenors also admit that Contention 5 is the exact same contention that they previously filed in 2009. Contention 5 Resubmission at 2. Because Joint Intervenors fail to show what information was not previously available, or what information is new that forms the basis for their contention, they fail to satisfy 10 C.F.R. § 2.309(f)(2)(i).

Further, Joint Intervenors do not meet the criteria for nontimely filings under 10 C.F.R. § 2.309(c). A 10 C.F.R. § 2.309(c) determination must be based on a balancing of eight factors, the most important of which is 'good cause' for failure to submit a timely filing. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 609-609 (1988), *reconsid. denied on other grounds*, CLI-89-6, 29 NRC 348 (1989), *aff'd sub nom.*, *Citizens for Fair Utility Regulation v. NRC*, 898 F. 2d 51 (5th Cir. 1990). The intervenor bears the burden of satisfying these eight criteria. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-16, 51 NRC 320, 325) (2000). The eight factors listed in 10 C.F.R. § 2.309(c) are:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

A good cause determination based on new information rests on two prongs: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information became available, how long did it take for the contention admission request to be filed. "In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992).

Joint Intervenors lack good cause. First, Joint Intervenors state that they filed Contention 5 within thirty days of issuance of the Task Force Report. Motion to Admit Contention 13 and Contention 5 Resubmission at 5. They also claim that "the information on which this Motion and accompanying contention are based is taken from the Task Force Report, which was issued on July 12, 2011 and analyzes NRC processes and regulations in light of the Fukushima accident, an event that occurred a mere five months ago...Accordingly, the

Intervenors have good cause to submit this Motion and the accompanying contention now.” *Id.* at 6. However, as discussed above, the Joint Intervenors fail to show that information in the Task Force report is, in fact, new. Therefore, this factor cannot be weighed in Joint Intervenors’ favor.

Moreover, absent a showing of good cause, the Joint Intervenors’ other seven factors must be strong. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-75 (1992). It is rare for the Commission to excuse a late-filed petition that lacks good cause. See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2) CLI-10-12, 71 NRC__ (slip op. at 4) (Mar. 26, 2010). Because the Joint Intervenors are parties, the second and third criteria balance in their favor. The Joint Intervenors satisfy 10 C.F.R. § 2.309(c)(iv), because the effect of the Board’s order will be to admit this contention. As for the fifth prong, the Joint Intervenors claim that “no other means exist. Only through this hearing do Intervenors have a right that is judicially enforceable to seek compliance by NRC with NEPA before the COL for Levy County Units 1 & 2 is issued, permitting these new reactors to operate and impose severe accident risks on Intervenors and the individuals they represent.” Motion to Admit Contention 13 and Contention 5 Resubmission at 8; 10 C.F.R. § 2.309(f)(c)(v). This factor weighs in favor of the Joint Intervenors, as they will not be able to voice their rights on Contention 5 if it is dismissed here. The sixth factor also favors the Joint Intervenors because there are no other parties in the proceeding that could represent their interests. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 141 (2002). For the seventh factor, if Contention 5 is now admitted, it will broaden the issues and conceivably delay the proceeding. Joint Intervenors concede this point as well. Motion to Admit Contention 13 and Contention 5 Resubmission at 8. Since the Board previously rejected the same Contention 5 in 2009, and admission now of this contention will broaden this issues in the proceeding, this prong should be weighed against the Joint Intervenors. Finally, the eighth factor balances against the Joint Intervenors because, as

discussed below/above, this contention is inadmissible and thus it will not contribute to the development of a sound record. Assessing all of the eight factors together and giving due weight to the lack of good cause, Joint Intervenors have failed to satisfy the criteria in 10 C.F.R. § 2.309(c) for late-filed contentions.

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

CONCLUSION

For the reasons set for above, Joint Intervenors' Contention 5 should be rejected for failure to meet the timeliness requires in 10 C.F.R. 2.309(f)(2) and (c) and for failure to comply with the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1).

Respectfully Submitted,

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF ANSWER TO JOINT INTERVENORS' RESUBMISSION OF CONTENTION 5 have been served upon the following persons by Electronic Information Exchange this 6th day of September, 2011:

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