March 9, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
	)	
PROGRESS ENERGY FLORIDA, INC.	)	Docket Nos. 52-029 and 52-030
	)	
	)	
(Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)	)	
	)	

NRC STAFF ANSWER TO JOINT INTERVENORS'
MOTION FOR LEAVE TO FILE NEW CONTENTION 14

INTRODUCTION

The NRC staff (Staff) hereby answers Joint Intervenors'[1] "Motion for Leave to File Contention 14: Proposed Levy County Site for Two AP1000 Reactors Does Not Comply With Existing State and Federal Law" (Motion) and "Contention 14 and Contention 14-A" (Contention 14) pursuant to 10 CFR § 2.309(h)(1) and the Atomic Safety and Licensing Board's Initial Scheduling Order. Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 647 (2009). As explained below, the Joint Intervenors' proposed new contention should be denied because it does not meet the contention

[1] The Joint Intervenors are the Ecology Party of Florida, the Green Party of Florida, and Nuclear Information and Resource Service.

admissibility requirements in 10 CFR § 2.309(f)(1) and because it does not meet the timeliness requirements in 10 CFR §§ 2.309(f)(2) and 2.309(c)(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). On August 13, 2010, the NRC published its Draft Environmental Impact Statement (DEIS). There is currently one environmental contention—Contention 4A—admitted in the proceeding. Joint Intervenors filed the present Motion and proposed Contention 14 on February 13, 2012. On February 15, 2012 the Board issued a Memorandum directing the Applicant and the Staff to address in their answers whether the Board's jurisdiction and the scope of the proceeding encompass the claims of unlawfulness specified in proposed Contention 14. Licensing Board Memorandum (Issue to Address in Answers to Proposed Contention 14) at 2 (Feb. 15, 2012) (unpublished) (ADAMS Accession No. ML12046A254).

LEGAL STANDARDS

The admissibility of new and amended contentions is governed by 10 CFR § 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 CFR § 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 CFR § 2.309(f)(2)(i)-(iii).

Additionally, a new or amended contention must also meet the general contention admissibility requirements of 10 CFR § 2.309(f)(1). Id. In accordance with 10 CFR § 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 CFR § 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 section 2.309(f)(2) may still be admitted if it meets the provisions governing nontimely contentions set forth in 10 CFR § 2.309(c)(1).[2] Pursuant to 10 CFR § 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. Contention 14 Is Not Timely

The NRC Staff opposes the admission of Contention 14 as untimely because it is not based upon previously unavailable information, nor upon information that is significantly or

[2] The Board's Initial Scheduling Order clarifies that if a movant is uncertain as to whether a new contention is timely or untimely, he or she may file under both 10 CFR §§ 2.309(f)(2) and 2.309(c). In such case, the movant should address the criteria under both sections, in addition to the admissibility criteria under section 2.309(f)(1). See Levy County, LBP-09-22, 70 NRC at 647.

materially different from information that was previously available. See 10 CFR § 2.309(f)(2). Further, Joint Intervenors have not shown that Contention 14 meets the section 2.309(c) criteria for an untimely filing. Therefore, Contention 14 should be dismissed.

A. Contention 14 is not timely under 10 CFR § 2.309(f)(2).

Joint Intervenors have not shown that Contention 14 meets the timeliness requirements in 10 CFR § 2.309(f)(2)(i)-(iii). Section 2.309(f)(2) specifies that a new or amended contention must satisfy three conditions:

> (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 CFR § 2.309(f)(2)(i)-(iii). These requirements are conjunctive—the petitioner must show that all three conditions exist. Id.

Joint Intervenors concede that the information upon which Contention 14 was based was, in fact, previously available: "the existence of [the statutes described in the contentions] cannot meet the standard in 10 CFR Part 2 for 'new information' [10 CFR §§ 2.309(f)(2)(i)] since the statutes have been 'on the books' for twenty years[.]" Motion at 4. Joint Intervenors nevertheless point to 10 CFR §§ 2.309(f)(2)(ii) and (iii), asserting that "the statutes in question provide materially different information than that presented in the COL" and that the contention was offered "the Monday after 30 days of the Limited Appearance session held in Crystal River on January 12, 2012 when intervenors became aware of this information." Motion at 4. Finally, Joint Intervenors again acknowledge that their submission "does not meet the standard, but in our view, the force of law exists continuously, and that force does not rest upon it being known, or new. . . . It is in this light that we respectfully submit that any issue of 'timeliness' is

irrelevant." Motion at 4-5.

The NRC Staff agrees with Joint Intervenors that Contention 14 does not meet the standards for timeliness under 10 CFR § 2.309(f)(2). As Joint Intervenors recognize, the issues raised by the contention revolve around laws that have been effective for a number of years. Motion at 5. The U.S. Congress enacted the Water Resources Development Act of 1990 on November 28, 1990. Joint Intervenors' Attachment 1 at 1. Lawton Chiles, then Governor of Florida, issued his resolution on January 22, 1991. Joint Intervenors' Attachment 3 at 1. Florida Law XVIII F.S. § 253.781 became effective upon deauthorization of the Cross Florida Barge Canal on January 22, 1991, and was last amended in 1999. Florida Pub. L. 101-640 § 402; 1999 Fla. Sess. Law Serv. 99-205 (West). Additionally, Joint Intervenors have not shown that any of the information provided by Joint Intervenors on the basis of these laws—i.e., that PEF's construction, digging, and dredging activities in and near the Cross Florida Barge Canal may be affected by these laws—arose after the applicant's COL application. See Motion at 3; Contention 14 at 9-10. From the standpoint of timeliness, Joint Intervenors' challenge to the legality of the COL application could have been made at the time of their initial petition to intervene. See Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 143 (2009) (finding previously available information contained in previously available comments insufficient to support admission under 10 CFR § 2.309(f)(2)(i)). Consequently, "[i]f [Joint] Intervenors could have filed [this contention] with their intervention petition, Section 2.309(f)(2) required that they do so." Calvert Cliffs 3 Nuclear Project, LLC (Combined License Application for Calvert Cliffs Unit 3), LBP-10-24, 73 NRC __, __ (slip op. at 17) (Dec. 28, 2010).

For the same reason, the information derived from the existence of these laws is not significantly or materially different from information previously available. See 10 CFR

§ 2.309(f)(2)(ii). The information underlying Contention 14 is nothing more than an amalgamation of information regarding the existence, language, and effect of laws that have been in effect—and thus in the public record—for approximately twenty years. See Joint Intervenors' Attachment 1 at 1; Joint Intervenors' Attachment 3 at 1. The consolidation and reformulation of that information by Joint Petitioners in the instant Motion and Contention, or by Ms. Berger in her emails to Joint Intervenors and Limited Appearance Session presentation, does not in itself amount to new and "materially different" information. Levy County, LBP-09-10, 70 NRC at 142 ("The fact that a party 'integrates,' consolidates, restates, or collects previously available information into a new document, does not convert it into 'previously unavailable' information."). Because this information was available at the time Joint Petitioners filed their original petition, the consolidation and reformulation of this information by Ms. Berger, and subsequently in Contention 14, cannot "bootstrap" Contention 14 into satisfying the requirement that it be based upon significantly or materially different new information. See id.

Finally, Contention 14 has not been submitted in a timely fashion with respect to the availability of this information. See 10 CFR § 2.309(f)(2)(iii). The Board's scheduling order of August 27, 2009, stated that, for a contention to be timely, it must be filed within 30 days of "the date when the new and material information on which it is based first becomes available." Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 647 (2009). Because these statutes were available to Joint Intervenors even before the submission of the COL license application, Contention 14 should have been filed as part of their original petition to intervene in February 2009. See "Petition to Intervene and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service" (Feb. 6, 2009).

B. Contention 14 is not timely under 10 CFR § 2.309(c).

Joint Intervenors have not argued that Contention 14 should be admitted as a late filed contention under the criteria of 10 CFR § 2.309(c). Consequently, they have not addressed the 10 CFR § 2.309(c) factors in their submission, as required by 10 CFR § 2.309(c)(2) and Commission precedent.[3] See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-16, 51 NRC 320, 325 (2000). Section 2.309(c) specifies eight factors that must be balanced in determining the admissibility of an untimely contention, the most important of which is the existence of good cause for the failure to file the contention on time. AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009); Crow Butte Res., Inc. (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 549 & n.61 (2009). The intervenor bears the burden of satisfying these criteria. See Private Fuel Storage, LBP-00-16, 51 NRC at 325.

The Commission has set out the test for good cause as (1) when the information supporting the contention became available and (2) when the petitioner reasonably should have become aware of that information. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992). "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." Id. In the present case, the information supporting the contention—the fact of the promulgation and text of the Federal and State laws—became a matter of public record in 1990 and 1991, respectively. Joint

[3] The Initial Scheduling Order permits parties to file under both 10 CFR § 2.309(f)(2) and 10 CFR § 2.309(c) if uncertainty exists as to which criteria to address, but it states that such a motion should address the three criteria of CFR § 2.309(f)(2) and the eight criteria of 10 CFR § 2.309(c). Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 647 (2009).

Intervenors' Attachment 1 at 1; Florida Pub. L. 101-640 § 402. Given that these statutes were in the public domain prior to the applicant's COL application and the initial petition to intervene, it is reasonable to find that Joint Intervenors should have been aware of this information from the outset of this proceeding.

Absent good cause, Joint Intervenors' showing under the other seven factors must be "compelling." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005); see *also* *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 319, 323 (2010). Several of the remaining factors weigh against Joint Intervenors, although they did not address them. With respect to factor (v), Joint Intervenors' interest in ensuring that nothing is built on the Greenway property will not be protected in this proceeding because, as discussed below, preventing such activities is outside the NRC's jurisdiction. Finally, because Contention 14 does not satisfy the section 2.309(f)(1) admissibility criteria, as discussed below, factors (vii) and (viii) do not weigh in favor of Joint Intervenors' submission. Taken together, and giving due weight to the absence of good cause for this nontimely filing, the criteria in 10 CFR § 2.309(c) do not support the admission of Contention 14.

II. Contention 14 Is Not Admissible Pursuant to 10 CFR § 2.309(f)(1)

Joint Intervenors' proposed Contention 14 is based primarily on their legal assertion that a Federal statute, 16 U.S.C. § 460tt, operates as a bar to the NRC licensing the Levy plant as currently proposed. Contention 14 at 1, 9. PEF received an easement from the State of Florida to build certain structures on land granted to the State by the Federal government. Contention 14 at 9. Joint Intervenors additionally claim that a related State law precludes the NRC from

licensing the proposed plant and that the State of Florida has acted in violation of the law in issuing an easement to PEF on land in the Marjorie Harris Carr Cross-Florida Greenway (Greenway), which contains the former Cross Florida Barge Canal (CFBC). Contention 14 at 9.

A. Contention 14 is outside the scope of the proceeding.

Proposed Contention 14 is not within the scope of this proceeding, as outlined by the Notice of Hearing, as required by 10 CFR § 2.309 (f)(1)(vi). See Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 N.R.C. 215, 233-34 (2007) (The scope of the proceeding is defined by the Notice of Hearing). It should, therefore, be dismissed.

The Notice of Hearing indicates that "[t]he hearing will consider the application. . . ." Progress Energy Florida, Inc. Notice of Order, Hearing, and Opportunity To Petition for Leave to Intervene, 73 Fed. Reg. 74,532. PEF's application was filed pursuant to Subpart C of 10 CFR Part 52; section 52.81 of this Subpart provides the applicable parts of the NRC regulations used by the Staff to evaluate the application—10 CFR parts 20, 50, 51, 54, 55, 73, 100, and 140.[4] The regulations in Part 51 implement Section 102(2) of NEPA, and portions of this Part are applicable to both the Staff and the applicant. The applicant's compliance with these regulations and the Staff's compliance with the relevant portions of Part 51 are appropriate issues for a hearing.

In addition to the applicant's compliance with the regulatory parts laid out in section 52.81, the NRC has also stated that "NRC's hearing process is not limited to claims under the Atomic Energy Act, . . . but encompasses any claim of unlawfulness that would defeat issuing a

[4] Additionally, 10 CFR 52.85 clarifies that COL proceedings are subject to the procedural requirements of 10 CFR Part 2.

license, including (for example) claims under the National Environmental Policy Act, the National Historic Preservation Act, and the [Clean Water Act] itself."[5] Initial Brief for the Federal Respondents [NRC] at 29, Vermont Department of Public Service; New England Coalition v. U.S. Nuclear Regulatory Commission, Nos. 11-1168 and 11-1177 (D.C. Cir. filed Jan. 20, 2012) (emphasis in original). The statutes provided as examples of non-AEA laws under which cognizable claims for relief can be made in NRC licensing proceedings have one notable similarity: they explicitly require the NRC to take certain steps prior to issuing a license. For instance, Section 106 of the National Historic Preservation Act provides that

> [t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to . . . issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f.[6] In other words these statutes clearly require a predicate step—completing an EIS under NEPA, completing consultation under the NHPA, or verifying that a 401 permit has been obtained under the Clean Water Act—prior to the NRC granting a license. Whether the NRC has taken this predicate step is a question appropriately within the ambit of this COL proceeding because it squarely relates to whether the agency may grant a license.

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[5] On February 15, 2012, this Board issued a Memorandum requesting that the Staff address this position, which was raised in the NRC's brief to the D.C. Circuit Court of Appeals filed on January 20, 2012 in VT Dep't of Public Service; New England Coalition v. NRC, vis-à-vis the claims of unlawfulness in proposed Contention 14.

[6] Similarly, Section 401(a)(1) of the Clean Water Act provides: "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. . . ." Finally, Section 102(2)(C) of NEPA requires that "all agencies of the federal government shall" complete an EIS for "every recommendation or report on . . . major federal actions. . . ."

The same cannot be said of the statute granting the former CFBC land to the State of Florida because the language of that statute is critically different from those discussed above. The enforcement provision that Joint Intervenors argue precludes NRC action provides, in relevant part, that "[t]he United States is directed to vigorously enforce the agreement referred to in subsections (a) and (b) of this section in the courts of the United States . . . . The United States district courts shall have original and exclusive jurisdiction of any action under this subsection." 16 U.S.C. § 460tt(c)(1). There is no allusion, much less an explicit statement, that federal agencies should use the licensing process to evaluate and prosecute suspected noncompliance with the CFBC land grant conditions. Rather, Congress explicitly directed that U.S. district courts are the exclusive venue for resolving questions regarding the use of the former CFBC land.[7] See id. As such, it is outside the NRC's statutory purview to take action under this statute, and, accordingly, compliance with the statute cannot be an issue within the scope of this proceeding. See Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), ALAB-661, 14 NRC 1117, 1123 (1981) (A Notice of Hearing must correspond to the agency's statutory authority over a given matter; it cannot confer or broaden that jurisdiction to matters expressly proscribed by law). Because compliance with 16 U.S.C. § 460tt is not within the scope of the proceeding, the Board does not have jurisdiction to rule on the State of Florida's compliance

[7] Congress also directed that actions to enforce the conditions in 16 U.S.C. 470tt be brought at the initiative of the U.S. It is outside of the NRC's statutory authority to file actions in U.S. district courts. Federal law provides that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. The exception to this law is 28 U.S.C. § 2348, which provides the NRC with independent litigating authority to respond to challenges to NRC Orders and licenses.

with it. See Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 N.R.C. 147, 150 (2002) (Where an issue is outside the NRC's public health, safety, and environmental mission, a lack of expertise, resources, and statutory mandate prevent the NRC from investigating the issue).

The essential thrust of Joint Intervenors' proposed Contention 14 is that the review process established by the State of Florida to review proposed uses of former CFBC land is contrary to Federal and State law. See Contention 14 at 9. According to Joint Intervenors, once the Board makes this determination, the Board should then rule that the NRC is precluded from issuing a license. See id. at 12-13. Quite simply, the NRC adjudicatory process is not the proper venue for "investigating alleged violations that are primarily the responsibility of other Federal, state, or local agencies." PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 N.R.C. 101, 105 (2007). The legality of the State of Florida's actions regarding the use of the former CFBC land is outside the scope of the proceeding. Thus, pursuant to 10 CFR § 2.309(f)(1)(iii), proposed Contention 14 should be dismissed.

B. Proposed Contention 14 does not raise issues material to findings the Staff must make.

Proposed Contention 14 does not demonstrate that the State of Florida's decision to grant to PEF an easement on former CFBC land is material to any licensing determination that the Staff must make. See 10 CFR § 2.309(f)(1)(iv). The Commission has spoken clearly on this point: Congress gave the NRC "no roving mandate to determine other agencies' permit authority." Hydro Resources Inc. (292 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 N.R.C. 119, 121 (1998). The Staff's analysis of the impacts of PEF's proposed barge slip and cooling water system pipelines, is consistent with the NEPA convention that only

reasonably foreseeable impacts require consideration. See Pa'ina Hawaii, LLC (Materials License Application), CLI-10-18, 72 NRC 56, 89 (2010) (NEPA requires the consideration of reasonably foreseeable environmental impacts.). The Staff need not question whether the State of Florida's easement was legitimately granted in order to conduct a thorough and reasonable analysis in compliance with NEPA. In order to project expected impact levels in its EIS, the Staff's takes into account compliance with applicable laws and permits, such as the Florida Conditions of Certification. In doing so, the Staff takes these permits as they are and does not second guess the expertise of another permitting agency, such as the Florida Department of Environmental Protection's decision to grant an easement on the former CFBC land. Cf. Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702, 712-13 (1978) (NRC is not to second guess EPA by setting its own standards on water quality where it has no mandate). Because the State of Florida's compliance with 16 U.S.C. § 460tt, and the State law implementing the Federal statute, is not material to the findings the Staff must make, proposed Contention 14 should be dismissed. See 10 CFR § 2.309(f)(1)(iv).

III. Contention 14 Should Not Be Held in Abeyance

Joint Intervenors request that, "if Judges choose not to give summary disposition [on Contention 14, Contention 14-A] be admitted but held 'in abeyance' until the issuance of the Record of Decision (ROD) on the Final Environmental Impact Statement."[8] Motion at 5. In

[8] Because the Record of Decision in a contested proceeding is composed of the FEIS, Board decisions (initial and subsequent), and any subsequent final Commission decision, it is unclear how a contention could be held in abeyance until the issuance of the ROD or what the advantage to this approach would be. Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-06-8, 63 N.R.C. 241, 259-60 (2006) (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Facility), CLI-98-3, 47 N.R.C. 77, 89 (1998)).

order to hold a contention in abeyance, the Board must first find that the contention is admissible; as discussed above, however, Contention 14 is not admissible. See Shaw Areva Mox Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 N.R.C. 55, 63 (2009)(The Board must dismiss insufficient contentions outright). Accordingly, the Board should rule on the admissibility of proposed Contention 14 now.

IV. Conclusion

Joint Intervenors' proposed Contention 14 does not satisfy the requirements for new or amended contentions in 10 CFR § 2.309(f)(2). Joint Intervenors also do not address, as they must, the criteria for untimely contentions in section 2.309(c). Nevertheless, as discussed above, Joint Intervenors lack good cause for being untimely, and a balancing of the remaining criteria falls far short of counseling for the admission of Contention 14. Contention 14 is also outside the scope of the proceeding and raises issues that are not material to the findings that the Staff must make in the proceeding. See 10 C.F.R. § 2.309(f)(1)(iii)-(iv). Also, Contention 14 should be adjudicated now, not held in abeyance. Accordingly, for the reasons discussed above, Contention 14 should be dismissed.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
The 9th day of March 2012

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NUCLEAR REGULATORY COMMISSION

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(Levy County Nuclear Site, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff Answer dated March 9, 2012, have been served upon the following persons by Electronic Information Exchange this 9th day of March, 2012:

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