August 2, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040-COL
	)	52-041-COL
(Turkey Point Units 6 and 7)	)	
	)	ASLBP No. 10-903-02-COL
(Combined License)	)	

FLORIDA POWER & LIGHT COMPANY'S ANSWER OPPOSING JOINT INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), Applicant Florida Power & Light Company ("FPL") hereby answers and opposes the Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at Turkey Point Nuclear Power Plant ("Motion"), filed on July 9, 2012 by intervenors Southern Alliance for Clean Energy, National Parks Conservation Association, Dan Kipnis, and Mark Oncavage ("Joint Intervenors") in the combined license ("COL") proceeding for Turkey Point Units 6 and 7 ("the Turkey Point Units").[1] The Motion seeks to litigate a new contention concerning temporary storage and ultimate disposal of nuclear waste at the Turkey Point Units based on a June 8, 2012 decision of the United States Court of Appeals for the District of Columbia Circuit.[2] That decision remanded for further proceedings certain issues related to the Commission's Waste Confidence Decision Update and Temporary Storage Rule.

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[1] On July 10, 2012, former intervenor Citizens Allied for Safe Energy, Inc. ("CASE") filed a substantially identical motion to that submitted by Joint Intervenors. FPL is responding separately to CASE's motion. Similar motions have been filed in a number of pending Commission licensing proceedings.

[2] *New York v. NRC*, 681 F.3d 470 (D.C. Cir. 2012) ("*NY v. NRC*").

For the reasons set forth below, the Atomic Safety and Licensing Board ("Board") should deny the Motion and reject the underlying contention, or otherwise certify the proposed contention to the Commission for resolution.

The mandate in *NY v. NRC* has not yet issued, hence the Motion impermissibly seeks to challenge a Commission rule that remains in effect. Even if the mandate issues, admission of the proposed contention would be impermissible if the Commission decides to address the remanded issues generically. Although, as of the date of this Response, the Commission had not yet indicated how it will address the remanded issues, the Commission has typically handled such issues via a rulemaking. Should the Commission follow this course of action (and FPL believes it should do so), the contention would be inadmissible.[3] The proposed contention also does not meet the requirements for an admissible contention because it fails to raise a genuine dispute on a material issue with FPL's combined license application for the Turkey Point Units.

II. DISCUSSION

A. The Proposed Contention Impermissibly Challenges a Commission Regulation

The Board should reject the Motion and the proposed contention because they constitute an impermissible attack on a Commission regulation. The proposed contention asserts that the Environmental Report ("ER") for the Turkey Point Units does not satisfy the National Environmental Policy Act because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, and that unless and until the NRC conducts such an analysis, no license may be issued. The Waste Confidence Rule,

[3] In the event the mandate issues without Commission direction on how it will address the remand issues, the Board should certify the claims raised by the Joint Intervenors to the Commission because the claims are generic in nature.

10 C.F.R. § 51.23(b), which remains in effect as discussed below, provides that no such discussion is required. Consequently, the proposed contention is barred. 10 C.F.R. § 2.335(a).

As recognized in the Motion (Motion at 2), the mandate from the D.C. Circuit in *NY v. NRC* has not yet issued. Absent issuance of the mandate, the Commission's Waste Confidence Rule remains in effect. At the earliest, the mandate will not issue until August 29, 2012, seven days after the time period for requesting rehearing or rehearing *en banc* has expired. Fed. R. App. P. 41(b).[4] Should the NRC or any other party to the case seek rehearing or rehearing *en banc*, issuance of the mandate will be further delayed. *Id.* And, if rehearing or rehearing *en banc* is granted, the mandate may not issue for a long time, if at all. Accordingly, the Motion and the proposed contention impermissibly seek to challenge an effective Commission rule and thus should be rejected on that basis alone.

Nor should the proposed contention be held in abeyance until issuance of the mandate, as Joint Intervenors suggest (*see* Motion at 2). Generally, for a contention to be held in abeyance, it must otherwise be admissible. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 322 (2009); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 407 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 251 (2009); *Conduct of New Reactor Licensing Proceedings; Final Policy Statement*, 73 Fed. Reg. 20,693, 20,972 (Apr. 17, 2008). Thus, "[i]f the contention is inadmissible in the first instance, as is the case here, no further action is required on the part of the Board." *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 10 (2010). That is the case here as well.

[4] The D.C. Circuit has extended the time to file a petition for rehearing or rehearing *en banc* until August 22, 2012. *NY v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012), Order (*per curiam*).

B. The Motion and the Proposed Contention Impermissibly Seek to Raise an Issue Subject to a Rulemaking

In addition to the fact that the Motion and the proposed contention seek to challenge a valid rule, the Board should reject them because, if the mandate issues, the Commission is likely to address issues raised in the D.C. Circuit remand generically through a rulemaking. The Commission has long held that a contention that seeks to litigate a matter that is, or is about to become, the subject of a rulemaking is inadmissible. *Southern Nuclear Operating Co*. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC __, slip op. at 19 & n.68 (Sep. 27, 2011) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)). Here, consistent with longstanding Supreme Court[5] and Federal court[6] precedent approving of the use of rulemaking to evaluate the environmental impacts from spent nuclear fuel, the Commission will most likely address the issues raised in *New York v. NRC* generically, via rulemaking. As the Commission has previously explained, "[i]n the area of waste storage, the Commission largely has chosen to proceed generically."[7] Moreover, predating the Court's decision, the Commission already has underway a plan for preparation of a generic environmental impact statement and rulemaking assessing the safety and environmental impacts of longer term HLW storage.[8] Accordingly, absent any indication that the Commission intends to abandon its generic assessment of spent fuel storage, the proposed contention is inadmissible.

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[5] *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 100-01 (1983).

[6] *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979).

[7] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 343 (1999).

[8] SRM-SECY-09-0090: Final Update of the Commission's Waste Confidence Decision (Sep. 15, 2010) (requiring the NRC Staff, apart from the final waste confidence rule update, to initiate a study to update the rule to account for waste storage onsite and/or at offsite storage facilities for 200-300 years or more).

C. The Board Should Certify the Contention to the Commission if there is Uncertainty as to how the Remanded Issues will be Addressed

In the event the mandate issues and it is uncertain whether the Commission will address generically the implications of the *New York v. NRC* decision, the Board should certify this matter to the Commission for review pursuant to 10 C.F.R. § 2.319(l). Certifying the matter to the Commission for review would avoid any unnecessary expenditure of resources considering a contention that will likely be rendered inadmissible by future Commission action.

Certification to the Commission is warranted for another reason. Currently pending before the Commission is a Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012) ("Petition") filed by Joint Intervenors and some twenty-three other individuals and organizations (including CASE) in this and eighteen other proceedings. Although the Commission has not yet ruled on the Petition, the Petition addresses essentially the same substantive issues that are raised in the proposed contention. Indeed, the contention propounded by the instant Motion asserts that "unless and until the NRC conducts such an analysis [of the impacts of spent fuel storage after permanent cessation of operations], no license may be issued." Motion at 4. Clearly, the Motion and its underlying contention are in essence a request for suspension of final decision-making in this proceeding. Certifying Joint Intervenors' proposed contention to the Commission would ensure that the contention's resolution is consistent with the Petition's resolution, as well as the resolution of the essentially identical proposed contentions and suspension petitions filed in numerous other licensing proceedings.

D. The Proposed Contention does not Meet Commission Admissibility Requirements

1. The Proposed Contention Raises Issues Beyond the Scope of this Proceeding

Should the Board decide to rule on the Motion, it should reject the propounded contention because it seeks to raise issues not properly within the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii). The Commission's rules prescribe that environmental contentions must be based on the applicant's documents and on the data and conclusions in the NRC Staff's draft or final environmental impact statements. 10 C.F.R. § 2.309(f)(2). Contrary to this requirement, the proposed contention asserts that "no license may be issued" unless certain analyses can be performed. Motion at 4. This assertion is not a challenge to the application or the Staff's environmental documents. Rather, it is a roundabout way of seeking suspension of the final licensing decision herein. Joint Intervenors appear to recognize as much, because, as previously noted, they have already filed such a suspension request with the Commission. *See* Petition. The contention is thus beyond the permissible scope of admissible contentions.

2. The Contention Fails to Raise a Genuine Dispute on a Material Issue

The proposed contention also fails to raise a genuine dispute with the Turkey Point Units' environmental report ("ER"). 10 C.F.R. § 2.309(f)(1)(vi). There is no requirement in Part 51 for a license applicant to update an originally compliant ER in light of subsequent events. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC __, slip op. at 13 (Nov. 18, 2011);[9] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power

[9] On referral from the Board, the Commission declined to review the Board's ruling that an applicant has no duty to supplement an ER. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC __, slip op. at 7 & n.31 (June 7, 2012).

Plant, Units 1 and 2), LBP-12-13, 75 NRC __, slip op. at 6 (June 27, 2012) ("LBP-12-13")).[10] 10 C.F.R. § 51.50 specifies the contents of a combined license application's ER (including compliance with Sections 51.45, 51.51, and 51.52), and there is no requirement that an applicant supplement the ER. *See* 10 C.F.R. § 51.45(a) ("An applicant . . . *may* submit a supplement to an [ER] at any time") (emphasis added). Absent any requirement in Part 51 for an applicant to supplement an originally compliant ER based on subsequent events and information, "subsequent events and information (regardless of how 'significant') are simply *not material* to the compliance status of the ER" and "do not create a 'genuine dispute' as to the compliance status of the ER." LBP-12-13 at 6 (emphasis in original). "[B]ecause an applicant has no duty to supplement its ER [based on subsequent information], there is no deficiency that can form the basis of a contention." *Id.* at 8. Consequently, the issues that Joint Intervenors seek to litigate fail to raise a genuine dispute on a material issue with the Turkey Point Units' COL application.

III. CONCLUSION

For the above stated reasons, the Motion and the proposed contention should be rejected.

Respectfully submitted,

/Signed electronically by Matias F. Travieso-Diaz/

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[10] Although the *Diablo Canyon* decisions were issued in the context of the renewal of existing operating licenses, the rulings equally apply to combined license applications.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Florida Power & Light Company's Answer Opposing Joint Intervenors' Motion for Leave to File a New Contention" were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, this 2nd day of August, 2012.

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