August 3, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket No. 50-443-LR
NextEra Energy Seabrook, LLC	)	
	)	ASLBP No. 10-906-02-LR
(Seabrook Station, Unit 1)	)	

NEXTERA'S ANSWER OPPOSING ADMISSION OF WASTE CONFIDENCE CONTENTION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), NextEra Energy Seabrook, LLC ("NextEra") hereby answers and opposes admission of the contention concerning temporary storage and ultimate disposal of spent nuclear fuel ("the waste confidence contention")[1] filed by Friends of the Coast and New England Coalition ("Intervenors") on July 9, 2012, in the license renewal proceeding for Seabrook Station, Unit 1 ("Seabrook"). Intervenors seek admission of this contention based on the June 8, 2012 decision of the United States Court of Appeals for the District of Columbia Circuit[2] remanding for further proceedings certain issues related to the Commission's Waste Confidence Decision Update[3] and Temporary Storage Rule.[4]

For the reasons set forth below, the Atomic Safety and Licensing Board ("Board") should reject the contention or otherwise certify the contention to the Commission for resolution. The mandate in *NY v. NRC* has not yet issued, hence the proposed contention impermissibly seeks to challenge a Commission rule that remains in effect. Even if the mandate issues, admission of

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1 Intervenors' Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste Seabrook Station, Unit 1 (July 9, 2012) ("Motion").

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

3 75 Fed. Reg. 81,037 (Dec. 23, 2010).

4 10 C.F.R. § 51.23 (also referred to as the "Waste Confidence Rule").

this contention would be inappropriate if the Commission decides to address the remanded issues generically by rulemaking. Although, as of the date of this Answer, 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 (and NextEra believes it should do so), the contention would be inadmissible.[5] In any event, the proposed contention fails to meet the requirements for an admissible contention because it does not raise a genuine dispute with NextEra's application.

II. DISCUSSION

A. The Waste Confidence Contention Impermissibly Challenges a Commission Regulation

The Board should reject the proposed waste confidence contention because it is an impermissible attack on a Commission regulation. The proposed contention asserts that the Seabrook Environmental Report ("ER") does not satisfy the National Environmental Policy Act ("NEPA") 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. Motion at 4. The Waste Confidence Rule, which remains in effect as discussed below, provides that no such discussion is required. 10 C.F.R. § 51.23(b). Consequently, the proposed contention is barred. 10 C.F.R. § 2.335(a).

As Intervenors admit (Motion at 2), the mandate in 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

[5] In the event that the mandate issues and the Board lacks sufficient certainty that the Commission will address the implications of the *NY v. NRC* decision generically but otherwise finds the contention admissible, the Board should certify the claims raised by the Intervenors to the Commission because the claims are generic in nature.

after the time period for requesting rehearing or rehearing *en banc* has expired. Fed. R. App. P. 41(b).[6] 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 waste confidence contention impermissibly seeks to challenge a currently effective Commission rule, which by itself requires rejection of the contention.[7]

Nor should the proposed contention be held in abeyance until issuance of the mandate, as 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 N.R.C. 317, 322 (2009); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 N.R.C. 385, 407 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 N.R.C. 227, 251 (2009); *Conduct of New Reactor Licensing Proceedings; Final Policy Statement*, 73 Fed. Reg. 20,693, 20,972 (Apr. 17, 2008). The proposed waste confidence contention is not. 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 N.R.C. 1, 10 (2010). Even if the mandate in *NY v. NRC* issues, the proposed contention would remain an impermissible challenge to 10 C.F.R. § 51.53(c)(3), which defines the issues that must be addressed in a license renewal ER and requires no discussion of the environmental impacts of

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[6] 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*).

[7] In addition to challenging the waste confidence rule (at 10 C.F.R. § 51.23), the proposed contention is also an impermissible attack on 10 C.F.R. § 51.53(c)(2), which precludes consideration of any aspect of the storage of spent fuel within the scope of the generic determination in the waste confidence rule, as well as an impermissible attack on 10 C.F.R. § 51.53(c)(3) which defines the issues that must be addressed in an applicant's Environmental Report.

long term spent fuel storage. As discussed below, the proposed contention is inadmissible for other reasons as well.

B. The Contention Impermissibly Seeks to Raise Generic Issues

In addition to the fact that the contention seeks to challenge a rule still in effect, the Board should reject the contention because, if the mandate issues, the Commission is likely to address the issues raised in the D.C. Circuit remand generically through rulemaking. The Commission has long held that a contention seeking 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 N.R.C. __, slip op. at 19 & n.68 (Sept. 27, 2011) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85, 89 (1974).

As the Commission has previously explained, "[i]n the area of waste storage, the Commission largely has chosen to proceed generically."[8] Further, the use of rulemaking to evaluate the environmental impacts from spent nuclear fuel has long been judicially approved.[9] Consequently, the industry has recommended to the Commission that if the mandate in *NY v. NRC* issues, the remanded issues should once more be generically addressed through rulemaking.[10] Such an approach is particularly appropriate in license renewal proceedings, where the Commission primarily used rulemaking to codify extensive generic analysis of environmental issues in order to produce a more focused and effective review. 61 Fed. Reg. 28,467 (June 5, 1996).

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

[9] *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 100-01 (1983); *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979). Indeed, *NY v. NRC* once more upholds this authority. *NY v. NRC*, slip op at 20.

[10] Letter from E. Ginsberg, Nuclear Energy Institute, to Secretary, U.S. NRC, Response to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012) at 4-5. NextEra has previously endorsed NEI's recommendations. NextEra's Answer Opposing Petition to Suspend Final Licensing Decisions (June 25, 2012) at 3 n.3.

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.[11] Further, the Commission is currently conducting a rulemaking proceeding to update its Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437). *See* Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117 (July 31, 2009). That rulemaking includes consideration of the risk of spent fuel pool fires. *See* SECY-12-0063, Final Rule: Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses (April 20, 2012), Encl. 1 at 30. Intervenors' contention seeks to litigate these same issues in the Seabrook proceeding. Accordingly, absent any indication that the Commission intends to abandon its generic assessment of spent fuel storage, the proposed contention is inadmissible.

C. The Board Should Certify the Contention to the Commission If There Is Uncertainty How Remanded Issues Will Be Addressed

In the event that the mandate issues and the Board lacks sufficient certainty that the Commission will address the implications of the *NY v. NRC* decision generically but otherwise finds the contention admissible, the Board should certify this matter to the Commission for review pursuant to 10 C.F.R. §§ 2.319(l) and 2.341(f). 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 the Petition to Suspend Final Decisions in all Pending Reactor

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

Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012) ("Petition") filed by Intervenors and some twenty-three other individuals and organizations 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 proposed contention 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 proposed contention is tantamount to a request for suspension of final decision-making in this proceeding. Certifying 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 is Inadmissible Because It Fails to Raise a Genuine Dispute with the Application

The proposed Contention should be rejected because it fails to raise a genuine dispute with the Seabrook license renewal application, as required by 10 C.F.R. § 2.309(f)(1)(vi). 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. 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.

In addition, the challenge to the sufficiency of the Seabrook ER fails to raise a genuine dispute with the application, because there is no requirement in 10 C.F.R. Part 51 for a license renewal 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) ("LBP-11-32");[12] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-12-13, 75 N.R.C. __, slip op. at 6 (June. 27, 2012) ("LBP-12-13"). 10 C.F.R. § 51.51.53(c) specifies the contents of a license renewal 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).[13] 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." *Diablo Canyon*, 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.[14] Consequently, the

[12] On referral from the Board, the Commission declined to review the Board's ruling that a license renewal 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).

[13] It should be noted that "Part 51, not NEPA, is the source of the legal requirements applicable to the applicant's environmental report." *Diablo Canyon*, LBP-11-32 at 12 & n.29 (citing *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 N.R.C. 27, 34 (2010).

[14] *See also Union Electric Co.* (Callaway Plant, Unit 1), LBP-12-15, 76 N.R.C. __, slip op. (July 17, 2012) (concurring opinion of Judge Trikouros).

issues that Intervenors seek to litigate fail to raise a genuine dispute with the Seabrook license renewal application.

III. CONCLUSION

For all of the above stated reasons, the proposed contention should be rejected as inadmissible.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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CERTIFICATE OF SERVICE

I hereby certify that NextEra's Answer Opposing Admission of Waste Confidence Contention, dated August 3, 2012, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 3rd day of August, 2012.

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