

August 3, 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-COL
)		52-030-COL
(Levy County Nuclear Plant)		
Units 1 and 2))	ASLBP No.	09-879-04-COL
)		
(Combined License Application))		

**PROGRESS ENERGY FLORIDA’S ANSWER OPPOSING
MOTION TO ADMIT WASTE CONFIDENCE CONTENTION**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(h)(1) and 2.323, and the Licensing Board’s Initial Scheduling Order,¹ Applicant Progress Energy Florida, Inc. (“Progress Energy”) hereby opposes the motion for leave to file a new contention and admission of the accompanying contention concerning temporary storage and ultimate disposal of spent nuclear fuel (“the waste confidence contention”)² filed by Nuclear Information and Resource Services and Ecology Party of Florida (“Intervenors”) on July 9, 2012, in the combined construction permit and operating license (“COL”) proceeding for the Levy County Nuclear Power Plant, Units 1 and 2 (“Levy”). 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 Circuit³ remanding to the Commission

¹ *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 N.R.C. 640, 647 (2009).

² Intervenors’ Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Levy Nuclear Power Plant (“Motion”).

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

for further proceedings certain issues related to the Waste Confidence Decision Update⁴ and Temporary Storage Rule.⁵

For the reasons set forth below, the Licensing Board should deny the Motion and reject the waste confidence contention, or otherwise certify the proposed 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 this contention should 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 addressed such issues generically in a rulemaking. Should the Commission follow this course (and Progress Energy believes it should do so), the contention would be inadmissible.⁶ In any event, the proposed contention fails to meet the requirements for an admissible contention by raising issues outside the scope of the proceeding.

II. DISCUSSION

A. The Proposed Contention Impermissibly Challenges a Commission Regulation

The Commission should deny the Motion and reject the proposed waste confidence contention because it is an impermissible attack on a Commission regulation. The proposed contention asserts that the Levy final environmental impact statement 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

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

⁵ 10 C.F.R. § 51.23 (also referred to as the “Waste Confidence Rule”).

⁶ In the event that the mandate issues and the Board lacks sufficient certainty that the Commission will address the implications of the *New York 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.

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 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 (10 C.F.R. § 51.23) 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).⁷ 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 proposed contention impermissibly seeks to challenge an effective Commission rule and thus should be rejected on this basis alone.

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 inadmissible because, as previously discussed, it is barred by an effective rule and, as discussed below, it fails to raise a genuine dispute with the application. 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).

⁷ 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) (*per curiam* Order).

B. The Waste Confidence Contention Raises Generic Issues That Should Be Resolved Through 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 seeking 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 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 The use of rulemaking to evaluate the environmental impacts from spent nuclear fuel has long been judicially approved,⁹ and *NY v. NRC* does not disturb this authority.¹⁰ Further, the issues to be considered on remand remain generic in nature and are thus best addressed through rulemaking rather than in individual proceedings. Indeed, 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 For such reasons, 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.¹² This

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).

¹⁰ *NY v. NRC*, slip op at 20.

¹¹ SRM-SECY-09-0090: Final Update of the Commission's Waste Confidence Decision (Sept. 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).

¹² 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.

course of action, which Progress Energy has previously endorsed,¹³ would avoid unnecessary expenditure of resources that would result if the remanded issues were litigated in the eighteen proceedings in which this same waste confidence contention has been filed, and would eliminate the potential for inconsistent decisions. Accordingly, absent any indication that the Commission intends to abandon its generic assessment of spent fuel storage, the proposed contention is inadmissible.

C. The Proposed Contention Is Inadmissible

Should the Board decide to rule on the Motion, the Board should deny it and reject the proposed waste confidence contention because, as previously discussed, it is barred by an effective Commission rule and thus raises issues outside the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). In addition, the proposed contention fails to raise a genuine dispute with the application. 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 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 in part that "no COL 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. Intervenors need not be provided two bites at this apple, and otherwise fail to raise a genuine dispute with the COL application.

D. 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 that the mandate issues and the Board lacks sufficient certainty that the Commission will address the implications of the *New York v. NRC* decision generically but otherwise finds the contention admissible, the Board should certify this matter to the Commission for review pursuant to 10

¹³ Progress Energy Florida Inc.'s Answer Opposing Petition to Suspend Final Licensing Decisions (June 22, 2012) at 3 n.4.

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 the Petition to Suspend Final Decisions in All Pending Reactor 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 COL 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 proposed contention’s resolution is consistent with the Petition’s resolution, as well as the resolution of the essentially identical contentions and suspension petitions filed in numerous other licensing proceedings.

III. CONCLUSION

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

Respectfully submitted,

/Signed electronically by John H. O’Neill, Jr./

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Dated: August 3, 2012

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CERTIFICATE OF SERVICE

I hereby certify that Progress Energy's Answer Opposing Motion to Admit 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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