February 12, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
DUKE ENERGY CAROLINAS, LLC	)	Docket Nos. 52-018-COL
	)	52-019-COL
(William States Lee III Nuclear Station, Units 1 and 2)	)	
	)	

ANSWER OF DUKE ENERGY CAROLINAS, LLC OPPOSING PETITION TO SUPPLEMENT W. S. LEE FINAL ENVIRONMENTAL IMPACT STATEMENT

I. INTRODUCTION

Pursuant to the January 29, 2015 Order from the Secretary of the Commission, Duke Energy Carolinas, LLC hereby submits this Answer opposing the Petition to Supplement Reactor Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage (January 28, 2015) ("Petition"). The Petition, which was filed in this proceeding by Blue Ridge Environmental Defense League and in seven other pending reactor licensing and license renewal proceedings by other organizations,[1] asserts that the National Environmental Policy Act ("NEPA") and regulations implementing NEPA require that the final environmental impact statement ("FEIS") for the proposed William States Lee III Nuclear Station ("W. S. Lee") (and the FEISs for the other seven projects named in the Petition) must be supplemented to incorporate by reference and summarize NUREG-2157, Generic Environmental Impact Statement for Continued Storage

[1] The Petition has been filed jointly by Beyond Nuclear, Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Southern Alliance for Clean Energy, and Sustainable Energy and Economic Development Coalition (collectively, "Petitioners").

of Spent Nuclear Fuel ("GEIS"). Petition at 2. Petitioners also claim that supplementation is necessary for Petitioners to lodge "placeholder" contentions challenging the Commission's reliance on the recently promulgated Continued Storage Rule, 10 C.F.R. § 51.23, in individual licensing proceedings.[2] *Id.* at 2-3. The Continued Storage Rule states in relevant part that the impact determinations in the GEIS "regarding continued storage shall be deemed incorporated" into certain environmental impact statements, including those for new reactor projects such as W. S. Lee. 10 C.F.R. § 51.23(b).

Petitioners' supplementation request is an impermissible challenge to the Commission's rules and should be rejected out of hand. Further, as will be established below, Petitioners' NEPA arguments are incorrect. There is no statutory or regulatory requirement that the Commission supplement reactor-specific environmental impact statements to incorporate by reference the GEIS, or otherwise to summarize the GEIS's environmental impact findings. Nor do the Commission's regulations permit the filing of "placeholder" contentions. Even if placeholder contentions were permitted (which they are not), Petitioners have waited far too long to lodge them. Accordingly, and as discussed more fully below, Petitioners' attempt to manufacture a dispute with the Commission's NEPA licensing documents should be rejected.

II. THE PETITION IMPERMISSIBLY CHALLENGES AN NRC RULE

The Commission should reject the Petition in the first instance because the Petition directly challenges the Continued Storage Rule, 10 C.F.R. § 51.23(b), and such challenges (absent a waiver, which Petitioners have not sought) are not permitted under the Commission's rules. 10 C.F.R. § 2.335(a)-(b).

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[2] The Commission approved the Continued Storage Rule and associated GEIS on August 26, 2014. Staff Requirements Memorandum (SECY-14-0072 – Final Rule: Continued Storage of Spent Fuel (RIN 3150-AJ20)) (Aug. 26, 2014). The rule was published in the Federal Register on September 19, 2014 (79 Fed. Reg. 56,238 (Sept. 19, 2014)), as was notice of the publication of the GEIS (79 Fed. Reg. 56,263 (Sept. 19, 2014).

The Continued Storage Rule establishes how the environmental impact determinations in the GEIS are to be considered in the environmental reviews for specified licensing proceedings, including new reactor licensing proceedings such as W. S. Lee. The Continued Storage Rule states:

> The environmental reports described in §§ 51.50, 51.53, and 51.61 are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an ISFSI for the period following the term of the reactor operating license, reactor combined license, or ISFSI license. *The impact determinations in NUREG–2157 regarding continued storage shall be deemed incorporated into the environmental impact statements described in §§ 51.75, 51.80(b), 51.95, and 51.97(a).* The impact determinations in NUREG–2157 regarding continued storage shall be considered in the environmental assessments described in §§ 51.30(b) and 51.95(d), if the impacts of continued storage of spent fuel are relevant to the proposed action.

10 C.F.R. § 51.23(b) (emphasis added). The environmental impact statements described in 10 C.F.R. § 51.75 include those supporting issuance of a combined license. Section 51.75(c), "Combined license stage," was also amended in the Continued Storage rulemaking to provide:

> As stated in § 51.23, the generic impact determinations regarding the continued storage of spent fuel in NUREG–2157 shall be deemed incorporated into the environmental impact statement.

10 C.F.R. § 51.75(c).

When promulgating the rule, the Commission explained that the previous version of Section 51.23 "provided that no discussion of any environmental impact of spent fuel continued storage is required in any NRC [environmental assessment] or [environmental impact statement] prepared in connection with the issuance or amendment of an operating license for a nuclear power reactor. . . ." 79 Fed. Reg. at 56,249-50. With the revised rule, "the NRC will now be relying on the GEIS for the generic determination instead of a [finding of no significant impact]." *Id.*at 56,250. In light of this change, the NRC "need[ed] to clarify how the generic determination will be used in future NEPA documents to ensure consistent use." *Id.* To ensure

consistent use across applicable licensing actions, the Commission revised the rule to provide that the GEIS impact determinations would be "deemed to be incorporated into EISs" prepared to support the specified licensing actions. *Id.* The Commission further explained that, for future licensing actions, the "NRC's review will simply consider the incorporated impact determinations along with the other environmental impacts associated with the proposed action." *Id.* And, for already existing environmental analyses, the Commission stated that it "will not prepare new analyses or revise the existing analyses with respect to the environmental impacts of continued storage." *Id.*

Petitioners' request that the Commission "incorporate[e] by reference and summariz[e] the Continued Spent Fuel Storage GEIS in the text of FEISs for individual reactors" (Petition at 6) directly contravenes Section 51.23(b) and the Commission's explanation for the rule in the Statement of Considerations. Petitioners have not sought a waiver of the rule pursuant to 10 C.F.R. § 2.335(b), nor do Petitioners assert any special circumstances with respect to W. S. Lee that could justify such a waiver. Consequently, Petitioners' request is an impermissible attack on an NRC rule and thus barred by 10 C.F.R. § 2.335(a).

III. PETITIONERS' NEPA CLAIMS ARE UNSUPPORTED AND INCORRECT AS A MATTER OF LAW

Petitioners' claim that NEPA, and applicable agency regulations implementing NEPA, require the NRC to supplement existing FEISs to incorporate by reference and summarize the GEIS is simply wrong. Decades ago, the Supreme Court ruled that a "basic tenet of administrative law" is that "agencies should be free to fashion their own rules of procedure," and that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 544, 548 (1978).

Five years later, the Supreme Court reiterated that "NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Elec. v. NRDC*, 462 U.S. 87, 100 (1983). *See also Massachusetts v. U.S.*, 522 F.3d 115, 130 (1st Cir. 2008) ("[b]eyond 'the statutory minima' imposed by NEPA . . . the implementing procedures are committed to the agency's judgment") (quoting *Vermont Yankee*). Although "NEPA does impose an obligation on the NRC to consider environmental impacts [of reactor licensing] before issuing a final decision, the statute does not mandate *how* the agency must fulfill that obligation." 522 F.3d at 130.

Petitioners' supplementation claim is inconsistent with this "basic tenet of administrative law." Nothing in NEPA dictates how the Commission is to consider the environmental impact determinations in the GEIS in individual reactor licensing proceedings. Thus, as in the case here, the Commission is free to promulgate a rule that directs that the GEIS's environmental impacts be deemed incorporated into reactor-specific environmental impact statements. Furthermore, the Commission explained its rationale for implementing this procedure: "to ensure consistent use" of the environmental impact determinations across current and future licensing actions. 79 Fed. Reg. at 56,250. Petitioners nowhere challenge this rationale.

Petitioners are also incorrect in claiming that 10 C.F.R. Part 51, Appendix A, requires the Commission to supplement reactor-specific environmental impact statements. Petition at 7-8. The statements in Appendix A concerning the format of final environmental impact statements are permissive, not obligatory. 10 C.F.R. § 51.90, "Final environmental impact statements – general," states that the "format provided in section 1(a) of appendix A of this subpart *should* be used." 10 C.F.R. § 51.90 (emphasis added). Part 51, Appendix A, Section 1(a) also allows for a "different format" to be used, so long as that format is "appropriate." 10 C.F.R. Part 51, Appendix A § 1(a). Moreover, Appendix A itself states that it provides "*guidance* on the

presentation of material" in environmental impact statements. *Id.* (emphasis added). Finally, Appendix A Section 1(b) – the specific section of Appendix A to which Petitioners refer – explicitly confirms the Commission's discretion in preparing its environmental impact statements:

> The techniques of tiering and incorporation by reference described in [specified Council on Environmental Quality ("CEQ")] NEPA regulations *may be used as appropriate* to aid in the presentation of issues, eliminate repetition or reduce the size of an environmental impact statement.

10 C.F.R. Part 51, Appendix A § 1(b) (emphasis added). Stating that specified techniques "may be used as appropriate" is permissive – and a far cry from stating that the techniques must or shall be used. *See Int'l Union v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990) ("Effectively, appellants read the word 'may' as if it were 'shall,' despite the usual presumption that 'may' confers discretion, while 'shall' imposes an obligation to act").[3]

Even if Appendix A could be read as imposing obligations concerning the format and content of FEISs and the incorporation by reference technique requested by Petitioners, Appendix A would be subordinate to the more specific and more recent promulgation of 10 C.F.R. § 51.23. Applying canons of statutory construction to the Commission's regulations, the more recent and more specific direction in Section 51.23 controls the older and more general statements in Part 51, Appendix A. *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("A specific provision controls over one of more general application"); *ConArt, Inc. v. Hellmuth, Obata & Kassabaum Inc.*, 504 F.3d 1208, 1210 (11th Cir. 2007) (a specific provision

[3] Petitioners reliance on *Pacific Rivers Council v. U.S. Forest Service*, 689 F.3d 1012 (9th Cir. 2012) for support is infirm, to say the least. That case does not overturn the Supreme Court's binding precedent concerning agencies' wide discretion in establishing procedures to implement NEPA. Moreover, *Pacific Rivers Council* has been dismissed as moot. The U.S. Forest Service petitioned the U.S. Supreme Court for certiorari of that decision, which the Supreme Court granted. 133 S. Ct. 1582 (Mar. 18, 2013). Subsequently, the petitioners in the case before the Ninth Circuit (the respondents before the Supreme Court) abandoned their claims, and moved to vacate the Ninth Circuit's judgment and to dismiss it as moot, which motion the Supreme Court granted. 133 S. Ct. 2843 (June 17, 2013).

is read "as an exception to the general" and "the earlier enacted one yields to the later one to the extent necessary to prevent [any] conflict"); *Thompson v. Calderon,* 151 F.3d 918, 929 (9th Cir. 1998) (Kleinfeld, J., concurring) ("it is elementary that a more recent and specific statute is reconciled with a more general, older one by treating the more specific as an exception which controls in the circumstances to which it applies"). Here, the Commission has promulgated a specific rule that applies to certain EISs (including the FEIS for the proposed W. S. Lee reactors) to address how the generic environmental impacts from continued spent fuel storage will be considered in NRC licensing actions. The Commission acted with a specific purpose in mind – to ensure consistency in application of the GEIS's impact determinations across existing and future environmental analyses. Section 51.23's more recent and more specific command (compared to the older and more general statements in Appendix A) that those environmental impacts be deemed incorporated into the specified environmental impact statements is controlling.

Petitioners' claim that the CEQ regulations referenced in Appendix A require the NRC to supplement new reactor FEISs, Petition at 7-8 & n.3, is likewise incorrect. The Commission regards CEQ regulations as "guidance" that "does not bind" it. *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), CLI-07-27, 66 N.R.C. 215, 222 n.21 (2007); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 N.R.C. 427, 443-44 (2011). *See also* 10 C.F.R. § 51.10(a) (noting NRC's "policy to take account of the [CEQ] regulations . . . voluntarily").[4] Further, there is no indication that the CEQ

[4] The Commission's position with respect to the CEQ regulations is aligned with the Third Circuit's decision in *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 725 (3d Cir. 1989), which held that "CEQ guidelines are not binding on an agency that has not expressly adopted them." In addition, the Commission's position is in accord with decisions of the D.C. Circuit (that did not involve the NRC) that held that the "binding effect of CEQ regulations is far from clear." *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 861

guidance on incorporating information by reference was intended to address the situation at hand, where issues have been resolved preclusively by generic environmental impact statement and rule, thus eliminating any need for further consideration or comment in individual impact statements.

In the same vein, there is no basis for Petitioners' claim that that the decision makers and the public will be denied "meaningful use of the FEIS" or will otherwise be uninformed as to the Commission's evaluation of the environmental impacts of continued spent fuel storage if the reactor-specific FEISs are not supplemented. Petition at 8-9. It makes no sense for Petitioners to suggest that the decision maker[5] for each individual license application – here, the Commission – will ignore its own direction to deem the GEIS environmental impacts from continued spent fuel storage incorporated into reactor-specific FEISs. It is also not credible for Petitioners to claim that the Commission or the public will overlook the environmental impacts of continued spent fuel storage summarized in the GEIS. As the Commission has previously noted in a recent order related to the Continued Storage Rule, leading up to the promulgation of the rule and the

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(D.C. Cir. 2006) (citing *City of Alexandria v. Slater*, 198 F.3d 862, 866 n.3 (D.C. Cir. 1999) (CEQ "has no express regulatory authority under [NEPA]" because it "was empowered to promulgate binding regulations" only by presidential executive order rather than by legislation). There are other decisions that have assumed, for the purposes of the case before the court, that the CEQ regulations apply, but have avoided deciding this issue and are thus not dispositive. *See Brodsky v. NRC*, 704 F.3d 113, 120 n.3 (2d Cir. 2013) ("Because the government conceded, at least for purposes of this appeal, that it would be fair to assume that the regulations do bind the NRC . . . we operate on that assumption here . . . ."); *Sierra Club v. NRC*, 862 F.2d 222, 228-29 (9th Cir. 1988) ("We observe that there is some uncertainty as to whether the CEQ regulations apply to the NRC's decision not to prepare an EIS . . . . We need not definitively decide the issue here, however, because the NRC has indicated it will voluntarily apply the CEQ regulation at issue in this case"); *San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1302 n.73 (D.C.Cir.1984) ("Without deciding, we assume that the [CEQ] regulations apply to the Commission"), *reh'g en banc,* 789 F.2d 26 (D.C. Cir.), *cert. denied,* 479 U.S. 923 (1986). The Supreme Court has not decided the issue. *Baltimore Gas & Elec.*, 462 U.S. at 99 n.12 ("we do not decide whether [the CEQ regulations] have a binding effect on an independent agency such as the Commission").

[5] Petitioners cite to (the now moot) *Pacific Rivers Council* when using the term "decision-makers," Petition at 8 (citing 689 F.3d at 1031), and then erroneously interpret that term to mean "state or local government officials" and "state and local decision-makers." *Id.* at 9. The cited discussion in *Pacific Rivers Council*, however, nowhere suggests such an interpretation. Rather, the cited discussion addresses the role that the EIS plays in informing the *agency* that will decide whether to approve the federal action (as well as informing the public in general). 689 F.3d at 1031. Here, that agency is the NRC.

publication of the GEIS, the Commission held "a robust public comment period [on the GEIS] that included an extensive campaign of public meetings across the United States . . . ." *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3) CLI-14-08, 80 N.R.C. __, slip op. at 6 (Aug. 26, 2014). "The proposed rule was published for a seventy-five-day comment period on September 13, 2013; the comment period ultimately was extended until December 20, 2013" – for a total of 98 days. *Id.* at 11 n.35. And, "[d]uring the comment period, the NRC staff held thirteen public meetings across the country. Overall, the NRC received over 33,000 comment submissions and recorded approximately 1,600 pages of public meeting transcripts." *Id.* The Continued Storage Rule was published in the Federal Register, 79 Fed Reg. 56,238, as was notice of the availability of the GEIS. 79 Fed. Reg. 56,263. Under long-established Supreme Court and Federal Court precedent, publication in the Federal Register "constituted formal notice to the world" of the Continued Storage Rule and its associated GEIS. *Gov't of Guam v. U.S.*, 744 F.2d 699, 701 (9th Cir. 1984) (citing *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384-85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents"). Moreover, the Commission has "not obfuscate[ed] its findings." *Vermont Yankee*, 435 U.S. at 556. Indeed, the GEIS is a "matter[] of public record, on file in the Commission's public-documents room" (*id.* at 556-57)„ and on its website. [6]

[6] Petitioners' request also fails to address the standard for supplementing a final environmental impact statement – i.e., demonstrating that there "are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R. § 51.92(a)(2). To require supplementation of an FSEIS, that new and significant information "must paint a *seriously* different picture of the environmental landscape." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 N.R.C. 523, 533 n.53 (2012). Petitioners nowhere claim, let alone demonstrate, that the Continued

IV. PETITIONERS' "PLACEHOLDER CONTENTIONS" ARE NOT PERMISSIBLE UNDER COMMISSION REGULATIONS AND ARE OTHERWISE UNTIMELY

Petitioners also claim that the reactor-specific FEISs must be supplemented to incorporate by reference the GEIS so that Petitioners can "lodge 'placeholder' contentions challenging the NRC's reliance, in individual licensing proceedings, on the Continued Spent Fuel Storage GEIS." Petition at 10. Petitioners' attempt to manufacture a dispute with the NRC's licensing documents should be rejected in the first instance because the Commission's regulations do not permit such "placeholder" contentions, which are tantamount to notice pleadings. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-05, 69 N.R.C. 115, 120 (2009).

Even if the Commission's rules could be construed to permit filing of placeholder contentions (which they cannot), Petitioners have waited far too long to file them. Petitioners have been on notice of the Commission's approval of the Continued Storage Rule and its associated GEIS for more than five months. Staff Requirements Memorandum (SECY-14-0072 – Final Rule: Continued Storage of Spent Fuel (RIN 3150-AJ20)) (Aug. 26, 2014). And as previously noted, the Federal Register announced the rule and the GEIS on September 19, 2014 – more than four months before Petitioners' filed their Petition. Indeed, Petitioners themselves note that "[o]ver *three months* have passed since the Final Continued Spent Fuel Storage Rule and GEIS became effective on October 20, 2014." Petition at 6 (emphasis added). Petitioners nowhere attempt to explain why they have waited so long to raise their claims. Petitioners cite the Commission's regulation on Motions (10 C.F.R. § 2.323) as the sole procedural basis for their supplementation request. Petition at 2. But, even assuming that a motion were the

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Storage Rule and the GEIS environmental impact determinations present a seriously different picture of the environmental impacts of the proposed action as compared to what is presented in the W. S. Lee FEIS.

appropriate mechanism to request the Commission to modify a promulgated rule, "[a]ll motions *must* be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a)(2) (emphasis added). That ten day deadline for filing motions has long since expired.

Alternatively, application of the Commission's more generous thirty- to sixty-day deadline from an initiating event for filing new or amended contentions (*see, e.g., Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 N.R.C. 491, 499 (2012)) fails to resuscitate Petitioners' tardy claims. If placeholder contentions were considered permissible or appropriate, Petitioners should have lodged their challenges no later than October 27, 2014 based on the Commission's August 26, 2014 approval of the Staff Requirements Memorandum, or no later than November 18, 2014, based on publication of the rule and GEIS in the Federal Register. Petitioners nowhere address the criteria for late-filed contentions in 10 C.F.R. § 2.309(c) and offer no good cause for their tardiness. The Commission should not excuse it.

V. CONCLUSION

For all of the above reasons, the Petition should be denied.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: February 12, 2015

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer of Duke Energy Carolinas, LLC Opposing Petition to Supplement W. S. Lee Final Environmental Impact Statement has been served through the E-Filing system on the participants in the above-captioned proceeding, this 12th day of February 2015.

/Signed electronically by Timothy J. V. Walsh/

Timothy J. V. Walsh