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To: PMLevyCOLPEm Resource
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January 27, 2015

Ms. Margaret Doane, Esq.
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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

10 CFR 52

SUBJECT: Duke Energy Carolinas, LLC (Duke Energy)
William States Lee III Nuclear Station (WLS), Units 1 and 2
Docket Nos. 52-018 and 52-019
Ltr#: WLG2015.01-05

Duke Energy Florida, Inc. (DEF)
Levy Nuclear Plant (LNP), Units 1 and 2
Docket Nos. 52-029 and 52-030
Serial: NPD-NRC-2015-009

Request for Guidance Clarifying Appropriate Methods for Resolving Generic
Errors in Certified Design Information

Dear Ms. Doane:

Duke Energy Carolinas ("Duke Energy") requests that the Nuclear Regulatory Commission ("NRC") clarify the appropriate means, under the NRC rules, in which generic errors in a Standard Design Certification may be corrected. In particular, Duke Energy seeks NRC's concurrence that significant errors in certified information – i.e., Tier 1 and Tier 2 information in the generic Design Control Document ("DCD") for a certified standard design – may be corrected outside of combined license ("COL") proceedings, without delaying COL issuance. The basis for this position is discussed further below.

This issue has considerable importance to Duke Energy and bearing on the NRC's ability to complete the review of COL applications in a timely manner. Currently, Duke Energy has two COL applications under active NRC Staff review – the application for Levy County, Units 1 and 2; and the application for William States Lee III, Units 1 and 2 – both of which reference the Standard Design Certification for the AP1000. These applications have been under review for 6 ½ and 7 years, respectively. The Levy application is the subject of a final environmental impact statement and a safety evaluation report ("SER") that addresses all site-specific issues. However, closure of the SER has been repeatedly delayed by review of significant errors in certified information for the AP1000. In particular, a significant error in the AP1000 Condensate Return System (part of the standardized design) was identified in December 2012 and remains under review in the Levy proceeding; and an error in the dose calculations supporting the Main Control Room design was identified in July 2014, and the Westinghouse calculations needed for

NRC review are not expected to be completed until March 2015 or later. Requiring Duke Energy, as the lead applicant for an AP1000 COL (for Levy), to resolve these issues in an individual proceeding not only denies Duke the timely completion of review on its application, but also unfairly imposes the burden on Duke to resolve generic issues relating to Westinghouse's standardized design. Moreover, if additional generic errors are discovered, COL issuance could be subject to even further delays.

Interim Staff Guidance DC/COL-ISG-011, Finalizing Licensing-basis Information ("ISG-11") indicates that certain changes after the "freeze point" in a design certification or COL application "should not be considered for deferral, owing to their relevance to the staff conclusions with respect to the requested certification or licensing decision." ISG-11 at 2. Under this guidance, the categories of changes that should not be deferred include correction of significant errors in an application, and changes needed to ensure compliance with regulations. *Id.* Although this ISG does not specifically address how a significant error in already certified information affects a COL applicant, Duke Energy believes that this ISG may have been misinterpreted as requiring COL applicants to resolve significant generic errors in certified information as a prerequisite for COL issuance.

As discussed below, Duke Energy submits that significant errors in certified information may be corrected outside of COL proceedings, without delaying COL issuance. The position is based on three principles:

- The preferred method for resolving significant errors in certified information is through an amendment to the Design Certification Rule ("DCR");
- The NRC Staff may – and should – rely on the existing DCR and the *process* for correcting significant errors in the generic DCD in making the findings allowing prompt issuance of a COL; and
- Requiring significant DCD errors to be corrected in a COL application, or delaying COL issuance until after such errors are corrected by rulemaking, is inconsistent with the NRC rules and NRC policy considerations.

Each of these principles is supported below.

A. The preferred method for resolving significant errors in certified information is through an amendment to the DCR

First, the Commission has clearly expressed its preference for correcting significant errors in a DCD generically by amending the DCD and DCR. As the Commission stated during the last 10 C.F.R. Part 52 rulemaking:

Some commenters proposed that the amendment process should allow for generic resolutions of errors in the certification information. The NRC is aware that design certification applicants have discovered errors in their design information after the NRC has completed its review and even after the NRC has certified their design. The final rule includes a new provision in § 52.63(a)(1)(v) to correct material errors in the certification information. This provision is only to be used to correct a material error, which is an error that significantly and

adversely affects a design function or analysis conclusion described in the design control document (certification information). **The NRC wants to correct material errors by amendment so that these errors will not have to be addressed in individual licensing proceedings** 72 Fed. Reg. 49,352, 49,382 (Aug. 28, 2007) (emphasis added).¹ In keeping with this intent, the Commission's rules only allow modification of certified information if the Commission "determines **in a rulemaking** that the change" involves one of the enumerated exceptions, including correction of material errors. See 10 C.F.R. § 52.63(a)(1) (emphasis added).

Correcting significant errors in certified information by rulemaking serves the Commission's policy of promoting standardization. The Commission established this generic process for correcting significant errors in a DCD in order "to enhance standardization by further completing or correcting the certification information." 72 Fed. Reg. at 49,368. It also allows all affected parties to participate in the decision-making process.

Once a certified design is amended by rulemaking, the new rule would apply to all applications referencing the DCR as well as plants referencing the DCR, unless the change has been rendered "technically irrelevant" through other action taken under §§ 52.63(a)(4) or (b)(1). Also, the NRC will decide whether to codify the proposed amendment based on comments from the referencing applicants and licensees. Thus, standardization is maintained by ensuring that any generic change to certification information is imposed on all nuclear power plants referencing the DCR.

72 Fed. Reg. at 49,382. See also 10 C.F.R. § 52.63(a)(3).

B. The NRC Staff may – and should – rely on the existing DCR and the process for correcting significant errors in the generic DCD in making the findings allowing prompt issuance of a COL

While a DCD error is being corrected generically, a COL applicant is entitled to rely on the existing DCR, and the NRC Staff is required to treat the certified information as resolved in making the findings for COL issuance. In this regard, 10 C.F.R. § 52.63 provides:

Except as provided in 10 CFR 2.335, **in making the findings required for issuance of a combined license**, construction permit, operating license, or manufacturing license, or for any hearing under § 52.103, **the Commission shall treat as resolved those matters resolved in connection with the issuance or renewal of a design certification rule.**

¹ Resolving significant errors in certified information through a DCR amendment is also consistent with the Commission's longstanding position that generic safety issues affecting multiple licensees should be resolved through rulemaking with the benefit of the wider spectrum of views that rulemaking entails. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-74-40, 8 A.E.C. 809, 814-15 (1974).

10 C.F.R. § 52.63(a)(5) (emphasis added).² 10 C.F.R. § 52.83 similarly provides:

If the application for a combined license under this subpart references . . . [a] design certification rule . . . , the scope and nature of matters resolved for the application and any combined license issued are governed by the relevant provisions addressing finality, including § . . . 52.63. . .

10 C.F.R. § 52.83(a). As previously discussed, 10 C.F.R. § 52.63 only allows certified information to be modified if the Commission “determines **in a rulemaking** that the change” involves one of the enumerated exceptions. See 10 C.F.R. § 52.63(a)(1) (emphasis added). Thus, in any COL proceeding, certified information is final unless and until the Commission changes it **by rulemaking**, and under the NRC rules must be treated as final in making the findings required for a COL.

Further, it would be inappropriate to delay issuance of a COL until errors in a DCD are resolved by DCR amendment because such delay would treat the DCR as invalid, and abrogate the directive in 10 C.F.R. § 52.63(a)(5) to treat certified information as resolved in making findings required for COL issuance. Any refusal to rely on or credit the DCR in proceeding with COL issuance would effectively treat the affected issue in the certified information as unresolved, contrary to the directive in Section 52.63(a)(5). The NRC Staff must respect the NRC rules until they are revised.³

As indicated by 10 C.F.R. § 52.63(a)(5), the NRC Staff can, and should, rely on the DCR in making the findings for issuance of the COL. In making findings supporting COL issuance, the NRC can also rely on the process that the Commission has established for correcting DCD errors generically. The correction process specified in 10 C.F.R. § 52.63(a)(1)(v) provides assurance that the error resolution will apply to all COL holders, and thus provides reasonable assurance of adequate protection to the public health and safety. Relying on (1) the duly promulgated DCR and (2) the correction process established by Section 52.63(a)(1)(v) as the basis for making prompt findings for COL issuance is analogous to the approach that the Commission has taken in issuing renewed operating licenses, where the Commission relies on its regulatory processes to maintain the adequacy of the current licensing basis and satisfy the statutory standards for license issuance. See, e.g., 56 Fed. Reg. 64,943, 64,946-47, 64,960-61 (Dec. 13, 1991).

² 10 C.F.R. § 2.335, which is referenced in 10 C.F.R. § 52.63(a)(5), allows the Commission to waive a rule when special circumstances with respect to a particular proceeding are such that application of the rule would not serve the purpose for which the rule was adopted. 10 C.F.R. § 2.335(b). Under this standard, such a waiver is only permissible when justified by special circumstances unique to the facility. See, e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 559-60 (2005). Generic changes to rules should be accomplished by rulemaking. *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 20 (2007).

³ An agency must follow its own rules until it changes them explicitly. *Andershock's Fruitland, Inc. v. Dep't of Agric.*, 151 F.3d 735, 736 (7th Cir. 1998); *Bergamo v. Commodity Futures Trading Comm'n*, 192 F.3d 78, 79 (2d Cir. 1999) (“[a]n agency is bound to follow procedures required by its own regulations”).

To ensure that significant errors are being addressed through the DCR amendment process, the NRC Staff could publish an advance notice of proposed rulemaking to identify the issue, publish a Regulatory Issue Summary ("RIS") identifying the issue, or add the issue to the Rulemaking Plan that it maintains. Alternatively, any COL applicant (or holder) could file a petition for rulemaking. Any of these mechanisms would ensure that the appropriate regulatory process is underway at the time of COL issuance. Further, the NRC has ample means to ensure that the significant errors in certified information are indeed corrected prior to a referencing plant commences operation, including issuance of a plant-specific order pursuant to 10 C.F.R. § 52.63(a)(4) if it appears that the rulemaking proceeding correcting the generic errors in certified information will not be complete by the scheduled date for fuel loading. A license condition might also be used to ensure resolution prior to operation.⁴

C. Requiring significant DCD errors to be corrected in a COL application, or delaying COL issuance until after such errors are corrected by rulemaking, is inconsistent with the NRC rules and NRC policy considerations.

Finally, delaying issuance of a COL until generic errors in certified information are corrected would be not only contrary the NRC rules, but also contrary to sound policy considerations.

- Such delay would deny the applicant a prompt decision on its application. The Commission's *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 N.R.C. 18 (1998), recognizes that "applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications." CLI-98-12, 48 N.R.C. at 19.
- Delaying issuance of a COL until generic errors in certified information are corrected would encourage individual COL applicants to address the DCD errors in the COL proceeding (to avoid the delays and expense described above), which may lead to different resolutions in different proceedings, and loss of standardization.
- By encouraging resolution in individual proceedings, the NRC Staff would also be encouraging a process that does not involve and consider the input of all stakeholders.
- Requiring or encouraging the resolution of generic DCD errors in multiple individual COL proceedings is inconsistent with Commission's Principles of Good Regulation, which include Efficiency. In explaining this principle, the Commission has stated:

⁴ While NRC's policy is that license conditions should not be used as a means of avoiding required safety findings, a license condition could be used in this context to ensure the significant errors in certified information are corrected before operation, because under 10 C.F.R. § 52.63(a)(5) further findings on certified information are not required for COL issuance.

The American taxpayer, the rate-paying consumer, and licensees are all entitled to the best possible management and administration of regulatory activities. . . . Where several effective alternatives are available, the option which minimizes the use of resources should be adopted.⁵

It should be recognized that there may be instances where a COL applicant or holder may seek a more immediate, plant-specific resolution of a DCD error through the exemption and departure process. The position described above for generically resolving DCD errors does not preclude a COL applicant or holder from electing to resolve such issues by plant-specific application in appropriate cases. 10 C.F.R. § 52.63(b) allows a COL applicant or holder to seek exemptions from elements of the certification information (consistent with 10 C.F.R. §§ 52.93(a)(1), 52.98(c)(1), and the change process in Section VIII of each DCR). Thus, a COL applicant or holder is entitled under the NRC rules to proceed in this manner if it so elects. Further, where a COL applicant or licensee chooses to resolve a significant error in certified information by plant-specific application, 10 C.F.R. § 52.63(a)(3) relieves the applicant or licensee from compliance with any subsequent DCR amendment made technically irrelevant by the site-specific licensing action.

In sum, the Commission has established a preferred process for resolving significant errors in a DCR generically by rulemaking, and has directed by rule that, for the findings required for issuance of a combined license, matters resolved in connection with a DCR shall be treated as resolved. The process for generically correcting significant errors in certified information, which applies the generic resolution to all plants referencing the DCR unless plant-specific licensing action has rendered the DCR amendment technically irrelevant, provides reasonable assurance that plants referencing a DCR will adequately protect the public health and safety. In accordance with the NRC rules and consistent with principles of good regulation, the NRC Staff should allow COL applicants to rely on this process, and need not, and should not, delay COL issuance while errors in certified information are being corrected in this generic fashion.

Accordingly, Duke Energy requests your concurrence that, under the NRC rules, significant errors in certified information may be corrected by rulemaking outside of COL proceedings, without delaying COL issuance. We seek your concurrence that 10 C.F.R. § 52.63(a)(5) requires the NRC Staff to make the findings required for COL issuance by treating certified information as resolved (unless a COL applicant voluntarily seeks a departure from such information), and therefore absent such a voluntary departure, the NRC staff need not make further findings in a COL proceeding regarding certified information.

⁵ See <http://www.nrc.gov/about-nrc/values.html>.

Ms. Margaret Doane, Esq.
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We appreciate your timely consideration of these issues and are available to discuss this further or address any questions you or your staff might have.

Sincerely,

A handwritten signature in black ink that reads "Christopher M Fallon". The signature is written in a cursive, flowing style.

Christopher M. Fallon
Vice President
Nuclear Development

cc: Mr. Mark A. Satorius, Executive Director for Operations
Mr. Glenn Tracy, Director, Office of New Reactors
Mr. Francis Akstulewicz, Director, Division of New Reactor Licensing