

August 3, 2012

**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)	)	

**DUKE ENERGY’S ANSWER OPPOSING BREDL’S MOTION TO REOPEN  
THE RECORD AND ADMISSION OF WASTE CONFIDENCE CONTENTION**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.309(h)(1) and 2.323, Duke Energy Carolinas, LLC. (“Duke Energy”) hereby opposes the motion to reopen the record<sup>1</sup> and admission of the accompanying contention concerning temporary storage and ultimate disposal of spent nuclear fuel (“the waste confidence contention”)<sup>2</sup> filed by the Blue Ridge Environmental Defense League (“BREDL”) on July 10, 2012 in the combined construction permit and operating license (“COL”) proceeding for the William States Lee III Nuclear Station, Units 1 and 2 (“WLS”). BREDL seeks reopening of the record and admission of this contention based on the June 8, 2012 decision of the United States Court of Appeals for the District of Columbia Circuit<sup>3</sup> remanding for further proceedings certain issues related to the Commission’s Waste Confidence Decision Update<sup>4</sup> and Temporary Storage Rule.<sup>5</sup>

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<sup>1</sup> Motion to Reopen the Record for William States Lee III Units 1 and 2 (July 9, 2012) (“Motion to Reopen”).

<sup>2</sup> Intervenor’s Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at William States Lee III Units 1 and 2 (July 9, 2012) (“Motion for Leave”). BREDL is not an intervenor in this proceeding.

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

<sup>4</sup> 75 Fed. Reg. 81,037 (Dec. 23, 2010).

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

For the reasons set forth below, the Commission should deny the Motion to Reopen and reject the waste confidence contention. 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 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 Duke Energy believes it should do so), the contention would be inadmissible. In any event, the Motion to Reopen fails to meet the stringent standards for reopening a closed record, and the proposed contention fails to meet the requirements for an admissible contention by failing to raise a genuine dispute with the application.

## **II. DISCUSSION**

### **A. The Waste Confidence Contention Impermissibly Challenges a Commission Regulation**

The Commission should reject the proposed waste confidence contention because it is an impermissible attack on a Commission regulation. The proposed contention asserts that the WLS 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. 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 BREDL admits (Motion for Leave at 7), 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).<sup>6</sup> 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.

Nor should the proposed contention be held in abeyance until issuance of the mandate, as BREDL suggests (*see* Motion for Leave at 7). 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. . . ." *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 N.R.C. 1, 10 (2010).

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<sup>6</sup> 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 Waste Confidence Contention Raises Generic Issues That Should Be Resolved Through Rulemaking**

Should the mandate issue, Duke Energy respectfully submits that the Commission should address the issues raised in the D.C. Circuit remand generically through rulemaking and reject the proposed contention on this basis. 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.”<sup>7</sup> The use of rulemaking to evaluate the environmental impacts from spent nuclear fuel has long been judicially approved,<sup>8</sup> and *NY v. NRC* does not disturb this authority.<sup>9</sup> 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.<sup>10</sup> For such reasons, the industry has recommended to the Commission that if the mandate in *NY v. NRC* issues, the remanded

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<sup>7</sup> *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 343 (1999).

<sup>8</sup> *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).

<sup>9</sup> *NY v. NRC*, slip op at 20.

<sup>10</sup> 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).

issues should once more be generically addressed through rulemaking.<sup>11</sup> This course of action, which Duke Energy has previously endorsed,<sup>12</sup> 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.

In addition, the Commission should rule on the Motion to Reopen and proposed contention itself, rather than referring them to a licensing board, in order to ensure consistent results are reached with other petitions pending before the Commission, and similar motions pending before the Commission and multiple licensing boards. 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 BREDL 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 for Leave at 9. Clearly, the proposed contention is tantamount to a request for suspension of final decision-making in this proceeding. The Commission should therefore address the issues raised in the contention itself so 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.

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<sup>11</sup> 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.

<sup>12</sup> Duke Energy’s Answer Opposing Petition to Suspend Final Licensing Decisions (June 25, 2012) at 3 n.3.

**C. The Motion to Reopen Fails to Meet the Reopening Standards**

BREDL petitioned to intervene in this proceeding, but its request was denied because BREDL had failed to submit any admissible contentions. *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 N.R.C. 431 (2008), review declined, CLI-09-21, 70 N.R.C. 927, 932 (2009). Accordingly, the contested portion of this proceeding has been terminated, and there are no intervenors in this proceeding. Thus, the Motion to Reopen must satisfy all of the standards for reopening a closed record in 10 C.F.R. § 2.326. The Motion to Reopen does not do so.

The Motion to Reopen should be denied because it is not supported by an affidavit as required by Section 2.326(b). That section states unequivocally:

The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . .

10 C.F.R. § 2.326(b). The failure to meet this mandatory affidavit requirement is alone sufficient grounds to reject the Motion to Reopen. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992), citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989).

In addition, the Motion fails to meet all of the Section 2.326(a) criteria for reopening the record. The Motion fails to demonstrate that a materially different result would be likely. 10 C.F.R. § 2.326(a)(3). BREDL asserts that the environmental consequences of long-term storage must be examined (Motion to Reopen at 4), but provides no information to even suggest that such an examination would affect the outcome of the proceeding. BREDL's only other claim is

that it is “*possible*” that spent fuel will be stored at reactors sites permanently (*id.* at 4 (emphasis added)), but BREDL again provides no demonstration that this would likely produce a materially different result in the proceeding. Such bare assertions and speculation are insufficient to support a motion to reopen. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 287 (2009).

Finally, the Motion does not address all of the factors in 10 C.F.R. § 2.309(c), which must be satisfied pursuant to 10 C.F.R. § 2.326(d). While BREDL claims good cause for its filing (Motion to Reopen at 4), it makes no effort to balance the remaining factors in 10 C.F.R. § 2.309(c) as that rule requires. If simply addressing good cause were sufficient, 10 C.F.R. § 2.326(d) would be rendered superfluous, because the good cause requirement is already implicit in 10 C.F.R. § 2.326(a)(1) (the requirement to demonstrate timeliness). The failure to properly address the criteria in 10 C.F.R. § 2.309(c) is by itself reason enough to reject the Motion to Reopen. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 N.R.C. 115, 126 (2009). *See also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998).

**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 WLS COL application, as required by 10 C.F.R. § 2.309(f)(1)(vi). The Commission’s rules prescribe that 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 license may be issued” unless certain analyses can be performed. Motion for Leave at 9. 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. Indeed, BREDL appears to recognize as much, because, as previously noted, it has already filed such a suspension request with the Commission. *See* Petition. BREDL need not be provided two bites at this apple, and the contention is beyond the permissible scope of admissible contentions.

In addition, the challenge to the sufficiency of the WLS ER fails to raise a genuine dispute with the application, because there is no requirement in 10 C.F.R. Part 51 for a COL 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 N.R.C. \_\_\_, slip op. at 13 (Nov. 18, 2011) (“LBP-11-32”);<sup>13</sup> *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”). 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). 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.” *Diablo Canyon*, LBP-12-13 at 6 (emphasis in original).

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<sup>13</sup> 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 N.R.C. \_\_\_, slip op. at 7 & n.31 (June 7, 2012).

“[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.<sup>14</sup> Consequently, the issues that BREDL seek to litigate fail to raise a genuine dispute with the WLS application.

### III. CONCLUSION

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

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: August 3, 2012

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<sup>14</sup> 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).

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**CERTIFICATE OF SERVICE**

I hereby certify that Duke Energy's Answer Opposing BREDL's Motion to Reopen the Record and 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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