

May 7, 2015

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of	)	
	)	
Progress Energy Florida, Inc.	)	Docket Nos. 52-029 and 52-030-COL
	)	
Levy County Nuclear Power Plant,	)	
Units 1 and 2	)	

**DUKE’S ANSWER OPPOSING NUCLEAR INFORMATION AND RESOURCE  
SERVICE’S MOTION TO REOPEN AND PETITION TO INTERVENE  
IN THE COMBINED LICENSE PROCEEDING FOR  
LEVY COUNTY NUCLEAR POWER PLANT, UNITS 1 AND 2**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(i)(1), Progress Energy Florida, Inc. (now Duke Energy Florida, Inc.) hereby submits this Answer opposing the Motion to Reopen the Record of Combined License Proceeding for Levy County Units 1 and 2 Nuclear Power Plant (“Motion”) and the Hearing Request and Petition to Intervene in Combined License Proceeding for Levy County Nuclear Power Plant (“Petition”) filed on April 22, 2015 by Nuclear Information and Resource Service (“NIRS”) in this combined license (“COL”) proceeding for the proposed Levy County Nuclear Power Plant, Units 1 and 2. NIRS’s proposed contention seeks to challenge the NRC Staff’s reliance on the recently promulgated Continued Storage Rule, 10 C.F.R. § 51.23(b) and its companion Generic Environmental Impact Statement (the “GEIS”)<sup>1</sup> in the Levy Units 1

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<sup>1</sup> Continued Storage of Spent Nuclear Fuel Rule, 79 Fed. Reg. 56,238 (Sept. 19, 2014); NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (Sept. 2014) (“GEIS”).

and 2 Final Environmental Impact Statement (“FEIS”).<sup>2</sup> Petition at 1. The Nuclear Regulatory Commission (the “NRC” or “Commission”) must reject the proposed Contention because it is untimely and inadmissible. Indeed, in two recently issued Orders,<sup>3</sup> the Commission rejected essentially identical contentions as impermissible challenges to the Continued Storage Rule.

## **II. THE PROPOSED CONTENTION IS INADMISSIBLE**

NIRS’s proposed Contention must be rejected as an impermissible challenge to the Continued Storage Rule. 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 North Anna Unit 3. 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). 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:

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<sup>2</sup> NUREG-1941, Final Environmental Impact Statement for Combined Licenses (COLs) for Levy Nuclear Plant Units 1 and 2 (Apr. 2012)

<sup>3</sup> *Union Electric Company* (Callaway Nuclear Plant, Unit 1), CLI-15-11, 81 N.R.C. \_\_\_, slip op. (Apr. 23, 2015) (“CLI-15-11”); *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 N.R.C. \_\_\_, slip op. (Apr. 23, 2015) (“CLI-15-12”).

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).

Contrary to the explicit direction provided in the Continued Storage Rule, NIRS's proposed Contention states:

While the text of the Levy County FEIS is outdated with respect to its discussion of spent fuel storage impacts, 10 C.F.R. § 51.23(b) provides that the Continued Spent Fuel Storage GEIS is incorporated by reference into the Levy County FEIS. For all of the reasons stated in NIRS et al.'s Comments on the Draft Waste Confidence GEIS, however, the Continued Spent Fuel Storage Rule and GEIS fail to provide the NRC with a lawful basis under NEPA for issuing a COL for Levy County. As discussed in NIRS et al.'s comments on the Rule and GEIS, they suffer from the following failures[.]

Petition at 7 (footnote omitted). As the proposed Contention's bases, NIRS alleges seven failures of the GEIS that purportedly undermine the Continued Storage Rule. *Id.* at 7-8. Among other things, NIRS alleges that the GEIS fails to examine the probability and consequences of failure to site a repository, to quantify alleged uncertainties concerning the long-term or indefinite storage spent fuel storage conditions, to "fully consider" spent fuel pool leaks and fires, or to show how the environmental impacts associated with the Continued Spent Fuel Storage Rule will be quantified and incorporated into cost-benefit analyses for nuclear reactors. *Id.* Acknowledging that none of these bases specifically pertains to the proposed Levy Units 1 and 2, NIRS concedes that "the subject matter of the contention is generic" and notes that it has not petitioned for waiver of the Continued Storage Rule. *Id.* at 2 & n.3. In addition, NIRS asserts that it "does not seek to litigate the substantive content of its contention in an adjudicatory proceeding," and that the "sole purpose" of its contention "is to lodge a formal challenge to the NRC's . . . reliance . . . on . . . the Continued Spent Fuel Storage Rule [and] GEIS" to ensure that "any court decision resulting from NIRS's appeal of the generic Continued Spent Fuel Storage

Rule and GEIS will be applied to the individual Levy County license proceeding.” *Id.* at 2.

NIRS has filed what it calls a “place-holder” contention. *Id.* at 1. NIRS asserts that its contention raises a significant environmental issue thus warranting reopening of the Levy Units 1 and 2 record because the Levy FEIS “is not supported by an adequate analysis of the environmental impacts of spent fuel storage and disposal.” Motion at 4.

Controlling precedent requires that the Commission reject the proposed Contention out of hand. In the recently issued *Callaway* and *Fermi* decisions, the Commission ruled inadmissible contentions essentially identical to the one NIRS proffers here. Just like NIRS, the petitioner in the *Callaway* proceeding (for example) (1) moved to reopen the record to proffer a “placeholder contention” seeking to challenge the NRC Staff’s reliance on the Continued Storage Rule and GEIS in the environmental impact statement at issue in that proceeding, but did not seek waiver of the rule; (2) offered seven bases for its contention, all of which challenged the generic findings of the GEIS and not the application at issue in that proceeding; (3) argued that it did “not seek to litigate the substance of its contention;” and (4) stated that its reason for filing the contention was to ensure that any court decision on its appeal of the Continued Storage Rule and GEIS would be applied to the individual *Callaway* proceeding. CLI-15-11 at 3-4.

The Commission ruled the proffered *Callaway* contention inadmissible because it impermissibly challenged the Continued Storage Rule and was therefore outside the scope of the proceeding. CLI-15-11 at 4. The Commission also ruled that, because all of the contention’s bases challenged the generic findings in the GEIS and did not “pertain specifically to the *Callaway* license renewal application,” the contention failed to “provide sufficient information to determine a genuine dispute with the applicant on a material issue.” *Id.* Because the petitioner had not submitted an admissible contention, the Commission ruled that “it necessarily has not

satisfied [the] reopening standards because it has not raised a significant environmental issue and has not demonstrated that a materially different result would be likely if the contention had been considered initially.” *Id.* at 4 n.17. In light of the *Callaway* petitioner’s recourse to the D.C. Circuit for legal review of the Continued Storage Rule and GEIS, the Commission ruled that a “placeholder” contention was “not necessary to ensure that [petitioner’s] challenges to the Continued Storage Rule and GEIS receive a full and fair airing.” *Id.* at 5. The Commission also said that it would take “appropriate action consistent with the court’s direction . . . [s]hould the D.C. Circuit find any infirmities in the Continued Storage Rule or GEIS.” *Id.*

NIRS has proffered an essentially identical contention challenging the Continued Storage Rule with essentially the same seven generic bases as the contentions at issue in *Callaway* and *Fermi*. Consistent with this precedent, the Commission must reject NIRS’s proposed Contention. NIRS’s proposed Contention is beyond the scope of this combined license proceeding, 10 C.F.R. § 2.309(f)(1)(iii), because it impermissibly challenges the Continued Storage Rule. CLI-15-11 at 4. And not one of the proposed Contention’s bases pertains specifically to the proposed Levy Units. They all thus fail to raise a genuine dispute on a material issue of law or fact under 10 C.F.R. § 2.309(f)(1)(vi). *Id.* Because NIRS has failed to proffer an admissible contention, it necessarily has failed to meet the Commission’s reopening standards. *Id.* at 4 n.17. Finally, NIRS is seeking legal review of the Continued Storage Rule and GEIS before the D.C. Circuit. Petition at 2. Therefore, admitting a placeholder contention is not necessary to ensure that NIRS will have a full and fair airing of its concerns with the Continued Storage Rule and GEIS. CLI-15-11 at 5.

The Commission should also find that NIRS’s proposed Contention is untimely, and that NIRS has failed to demonstrate good cause for its untimely filing. Section 2.309(c) provides that

a new or amended contention filed after the deadline for hearing requests and contentions will not be entertained, absent a determination that a participant has demonstrated good cause by showing that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(c)(1). NIRS claims that its proposed contention is timely because it is a “‘place-holder’ that depends on an event that will occur in the future: the U.S. Court of Appeals’ decision in *New York II*.” Petition at 10. NIRS’s arguments do not demonstrate the proposed contention’s timeliness.

The Commission approved the Continued Storage Rule on August 26, 2014,<sup>4</sup> and the Rule was published in the Federal Register on September 19, 2014. 79 Fed. Reg. 56,238. NIRS knew, when the Commission approved the Continued Storage Rule on August 26, 2014, that the Commission had determined to apply the conclusions in the Continued Storage GEIS in all COL proceedings. As the Continued Storage Rule stated, NIRS knew that the generic conclusions in the GEIS would be considered incorporated into the SEIS. Thus, if any part of NIRS’s contention were admissible (which it is not), NIRS could have raised its present challenge many months ago.

Indeed, three months ago, NIRS and several other organizations petitioned the Commission to order the supplementation of the environmental impact statements in this and

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<sup>4</sup> Staff Requirements –SECY-14-007 – Final Rule, Continued Storage of Spent Nuclear Fuel (Aug. 26, 2014) (ADAMS Accession No. ML14237A092).

other licensing proceedings, asserting that such supplementation was required in order for them to lodge “place-holder” contentions to challenge the Continued Storage Rule and GEIS in each proceeding. *DTE Electric Company* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 N.R.C. \_\_\_, slip op. at 2-4 & n.7 (Apr. 23, 2015). The Commission rejected these petitions the day after NIRS filed its present petition. *Id.* at 4. The fact that NIRS filed its supplementation request shows that NIRS obviously had more than sufficient information available to it months ago to enable it to raise its present challenge with the Continued Storage Rule and GEIS. NIRS nowhere explains why it waited so long to file its present challenge, and the Commission should not excuse NIRS’s untimeliness.

### III. CONCLUSION

Consistent with NIRS’s “reasonable expectation that [the Contention] will be denied,” Petition at 2, the Commission should reject it for all of the foregoing reasons.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: May 7, 2015

Counsel for Duke Energy Florida, Inc.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Duke's Answer Opposing Nuclear Information and Resources Service's Motion to Reopen and Petition to Intervene in the Combined License Proceeding for Levy County Nuclear Power Plant, Units 1 and 2 has been served through the E-Filing system on the participants in the above-captioned proceeding, this 7th day of May 2015.

/Signed electronically by Timothy J. V. Walsh/

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Timothy J. V. Walsh