October 31, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
NextEra Energy Seabrook, LLC	)	Docket No. 50-443-LR
	)	
(Seabrook Station, Unit 1)	)	

NEXTERA'S ANSWER OPPOSING
PETITION TO SUSPEND LICENSING PROCEEDINGS

I. INTRODUCTION

Pursuant to the Commission's Memorandum and Order of October 7, 2014 (CLI-14-09), NextEra Energy Seabrook, LLC ("NextEra") hereby submits this consolidated answer opposing the Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014) ("Petition"). The Petition, which has been filed in this proceeding by Friends of the Coast and the New England Coalition and in fifteen other pending reactor licensing and license renewal proceedings by other organizations[1] asserts that, in order to satisfy its statutory obligation under the Atomic Energy Act ("AEA") to provide adequate protection to the public health and safety, the NRC must make predictive safety findings that spent fuel can be safely disposed of in a repository. *See* Petition at 7-8. The Petitioners argue that, because the Continued Storage Rule no longer contains generic safety

[1] The Petition has been filed jointly by Beyond Nuclear, Blue Ridge Environmental Defense League, Citizens Environmental Alliance of Southwestern Ontario, Citizens for Alternatives to Chemical Contamination, Don't Waste Michigan, Ecology Party of Florida, Friends of the Coast, Green Party of Ohio, Missouri Coalition for the Environment, National Parks Conservation Association, New England Coalition, Nuclear Information and Resource Service, San Luis Obispo Mothers for Peace, Sierra Club Michigan Chapter, Southern Alliance for Clean Energy and Sustainable Energy and Economic Development ("SEED") Coalition (collectively, "Petitioners").

findings concerning the feasibility and capacity of a geologic repository, the NRC must now make those findings either in individual proceedings or promulgate those findings generically with notice and comment supported by an environmental impact statement or environmental assessment. *See* Petition at 9. As will be established below, the Petitioners' sole argument fails as a matter of law. There is no requirement that the Commission address the feasibility of a geologic repository as a safety finding under the Atomic Energy Act ("AEA") in reactor licensing proceedings. Accordingly, and as discussed more fully below, the Petition should be denied. [2]

II. PETITIONERS' LEGAL CLAIMS ARE UNSUPPORTED AND INCORRECT AS A MATTER OF LAW

The Petitioners' sole claim – that NRC must make predictive safety findings that spent fuel can be safely disposed of in a repository in order to satisfy its statutory obligation under the AEA – is simply wrong as a matter of law. Decades ago, the Commission considered and rejected this very claim in denying a rulemaking petition, explaining that

> It seems clear . . . that the statutory findings required by section 103 [of the AEA] apply specifically to the "proposed activities" and "activities under such licenses." (42 U.S.C. 2133). These activities include some interim storage activities for spent fuel. *They do not include the permanent disposal of high-level wastes though wastes are, in fact, generated by operation of the reactor*.

Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391 (July 5, 1977) (emphasis added). The Commission also reasoned that Congress did not intend such a finding to be required, as Congress had authorized the NRC to issue licenses knowing that no repository was available. *See id.* at 34,392-93.

[2] Unlike the other licensing proceedings where a suspension petition was filed, Friends of the Coast and New England Coalition did not submit a motion to admit a related contention.

The Second Circuit upheld the Commission's decision. *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). The Court rejected the argument that the AEA requires an affirmative determination that spent fuel can be disposed of safely.[3] 582 F.2d at 171. The Court held that Congress did not intend such a condition. *Id.*

> If there were any doubt over the intent of Congress (1) not to require NRC to make the definitive determination requested by NRDC and (2) not to require a moratorium on nuclear power reactor licensing pending an affirmative determination, we are persuaded that the matter was laid to rest by enactment of the Energy Reorganization Act … [in which] Congress expressly recognized and impliedly approved NRC's regulatory scheme and practice under which the safety of interim storage of high-level radioactive wastes at commercial nuclear power reactor sites has been determined separately from the safety of Government-owned permanent storage facilities which have not, as yet, been established.

Id. at 174.[4]

> In view of the foregoing, we hold that NRC is not required to conduct the rulemaking requested by NRDC or to withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level wastes can be permanently disposed of safely.

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[3] *See* 582 F.2d at 168, setting out the determination sought by the petitioner. NRDC asserted, "[p]lainly, a determination that operation of such a reactor will not create undue risk to the public health and safety requires a determination that these highly hazardous and long-lived radioactive materials can be disposed of safely." *Id.*

[4] The subsequent passage of the Nuclear Waste Policy Act ("NWPA" or "Act") strongly reinforces this conclusion. That law, from its enactment in 1982 and amendment in 1987, presumes that there have been no definitive safety findings as to the disposal of spent fuel. The Act establishes the process for making definitive safety findings for the disposal of spent fuel. *See, e.g.*, NWPA § 114(d) (NRC licensing of a repository) (42 U.S.C. § 10134(d)). The Findings and Purposes of the NWPA similarly make clear that definitive safety findings for disposal have yet to be made. *See, e.g.*, § 111(a)(1) ("radioactive waste creates potential risks"); § 111(a)(2) ("a national problem has been created by the accumulation of . . .spent nuclear fuel from nuclear reactors"); § 111(a)(7) ("high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety . . .); § 111(b)(1) (the purposes of the law are "to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository.") 42 U.S.C. § 10131. The standards for spent fuel disposal had not been created when the Act was passed. *See* NWPA § 121(b) (requiring the NRC to issue technical requirements and criteria), 42 U.S.C. § 10141(b). Yet, there is nothing in the NWPA to suggest that reactor licensing should be suspended until such time as the disposal standards had been enacted, let alone applied. Indeed, the NWPA provided for dry storage programs specifically aimed at reactors "that will soon have a shortage of interim storage capacity for spent nuclear fuel." NWPA § 218(a), 42 U.S.C. § 10198(a).

Id. at 175. Thus, there is no requirement to make any finding on the safety of a geologic repository either generically by rule or explicitly in any individual proceeding.

Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), on which the Petitioners principally rely (*see* Petition at 9), does not disturb this holding. The issue considered in *Minnesota* was whether, if no off-site solution to spent fuel disposal was projected to be probably available by license expiration, the NRC must take into account the safety and environmental implications *of maintaining the spent fuel at the reactor site after the expiration of the license*. *Id.* at 416. The Court confined its decision to this contention, *id.* at 419, and remanded the petitioners' claim to the Commission to consider whether there is reasonable assurance that an off-site storage solution would be available by "the expiration of the plants' operating licenses," *id.* at 418, *and if not, "whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates*." *Id.* at 418 (emphasis added). *Minnesota* makes no statements suggesting that the AEA predicates licensing on findings regarding the feasibility and capacity of a repository.

The Commission's Continued Storage Rule[5] and GEIS[6] are completely consistent with this direction. The GEIS analyzes continued storage under three time frames, including an indefinite period. *See* NUREG-2157, Vol. 1, at 2-24 to 2-35. It provides a specific discussion of the safety of continued storage at the site (which the Petitioners explicitly do not challenge[7]).

> The NRC concludes that spent fuel can continue to be safely managed in spent fuel pools and dry casks and that regulatory oversight exists to ensure the aging management programs continue to be updated to address the monitoring and maintenance of structures, systems, and components that are important to safety. Based on all of the information set forth in Appendix B of the GEIS, the NRC concludes that spent fuel can be safely managed in spent fuel pools in the short-

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[5] 79 Fed. Reg. 56,238 (Sept. 19, 2014).

[6] Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157) (Sept. 30, 2014) ("GEIS" or "NUREG-2157").

[7] Petition at 7 n.9.

> term timeframe and dry casks during the short-term, long-term, and indefinite timeframes evaluated in the GEIS.

79 Fed. Reg. at 56,253.

> This understanding is based upon the technical feasibility analysis in Appendix B of the GEIS and the NRC's decades-long experience with spent fuel storage and development of regulatory requirements for licensing of storage facilities that are focused on safe operation of such facilities, which have provided substantial technical knowledge about storage of spent fuel. Further, spent fuel is currently being stored safely at reactor and storage sites across the country, which supports the NRC's conclusion that it is feasible for spent fuel to be stored safely for the timeframes considered in the GEIS.

Id. at 56,255.[8]

The Petitioners' assertion that the NRC must make safety findings – either generically by rule or in individual proceedings – that spent fuel can be safely disposed of in a repository is not supported by any authority, but instead relies solely on a misinterpretation of the decisions above.

First, the Petitioners' seize on the Commission's statement in the 1977 Denial of Rulemaking that "[t]he Commission would not continue to license reactors if it did not have reasonable confidence that wastes can and will in due course be disposed of safely." Petition at 6, quoting Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,393. The Commission's statement, and accompanying expression of confidence that a safe method of disposal would be available when needed (42 Fed. Reg. at 34,393), were presented as "Policy Considerations" in denying the rulemaking petition. 42 Fed. Reg. at 34,393-94. They were not made as specific required safety findings in a licensing proceeding or in a rule. Regardless, the Commission has already addressed the same policy considerations in the Statement of Consideration supporting

[8] The NRC's technical analysis of safe storage is set forth in detail in NUREG-2157, Vol. 1, App. B, at B-9 to B-33 (2014), none of which is challenged by the Petitioners.

the Continued Storage Rule and in Appendix B to the GEIS, which were issued after an opportunity for public comment. 79 Fed. Reg. at 56,253.

> As discussed in Section B.2.1, the consensus within the scientific and technical community engaged in nuclear waste management is that safe geologic disposal is achievable with currently available technology. . . .
>
> After decades of research into various geological media, no insurmountable technical or scientific problem has emerged to challenge the conclusion that safe disposal of spent fuel and high-level radioactive waste can be achieved in a mined geologic repository. . . .
>
> Based on the examination of a number of international programs and DOE's current plans, the NRC continues to believe that 25 to 35 years is a reasonable period for repository development (i.e., candidate site selection and characterization, final site selection, licensing review, and initial construction for acceptance of waste).

79 Fed. Reg. at 56,251.[9]

Second, the Petitioners point to the fact that the NRC has made findings regarding the feasibility and capacity of geologic repositories in its Waste Confidence Decisions since 1984. Petition at 6. That the Commission chose to do so in no way implies any requirement under the AEA to make safety findings on these issues either generically by rule or in individual proceedings. The Commission's Waste Confidence Decisions were not promulgated as a rule, but rather were published as separate decisions. Indeed, the Petitioners appear to be confusing and conflating the Waste Confidence Decisions and the former Waste Confidence Rule. *See, e.g.*, Petition at 3, 8. The Waste Confidence Decisions formalized the Commission's confidence that a repository would become available, previously articulated as "Policy Considerations" in denying NRDC's rulemaking petition. As *NRDC v. NRC* held, the Atomic Energy Act does not

[9] Moreover, as the Commission's statement in the 1977 Denial of Rulemaking was merely a policy declaration, and not a safety finding required by the AEA, there is nothing that would prevent the Commission from changing the basis for its policy declaration. The Commission's confidence that spent fuel can be stored safely and without significant environmental impact indefinitely amply supports the policy not to discontinue licensing.

require a finding that spent fuel can be permanently disposed of safely. And how the Commission chooses to articulate its policy determination does not alter statutory requirements.

While it also contained findings on the feasibility and capacity of a repository, the former Waste Confidence Rule addressed solely the Commission's responsibilities under NEPA. This is obvious from the placement of the findings not in 10 C.F.R. Part 50, but in Part 51. Further, in promulgating the first Waste Confidence Rule in 1984, the Commission made it clear that it was addressing the environmental impacts "of extended on-site storage of spent fuel" under NEPA's rule of reason because its Waste Confidence Decision had determined a probability that such on-site storage after license expiration would be necessary. 49 Fed. Reg. 34,688 (Aug. 31, 1984). The Commission further explained,

> The Commission hereby adopts a rule providing that *the environmental impacts* of at-reactor storage after the termination of reactor operating licenses need not be considered in Commission proceedings related to issuance or amendment of a reactor operating license. This rule has the effect of continuing the Commission's practice, employed in the proceedings reviewed in State of Minnesota, of limiting considerations of *environmental impacts* of spent fuel storage in licensing proceedings to the period of the license in question and not requiring the NRC staff or the applicant to address the impacts of extended storage past expiration of the license applied for. The rule relies on the Commission's generic determination in the Waste Confidence proceeding that the licensed storage of spent fuel for 30 years beyond the reactor operating license expiration either at or away from the reactor site is feasible, safe, and would not result in a significant impact on the environment. For the reasons discussed in the Waste Confidence decision, the Commission believes there is reasonable assurance that adequate disposal facilities will become available during this 30-year period. *Thus, there is no reasonable probability that storage will be unavoidable past the 30-year period in which the Commission has determined that storage impacts will be insignificant.*

Id. at 34,688-89 (emphasis added). As this statement makes clear, the conclusions on the feasibility and capacity of a repository were included in the Waste Confidence Rule to define the period of interim storage that was being generically assessed pursuant to NEPA. Because the GEIS now evaluates the environmental impacts of indefinite storage, there is no longer any need in the Continued Storage Rule to make findings on the availability or a capacity of a repository.

In sum, the findings in the Waste Confidence Rule related solely to the Commission's responsibilities under NEPA, and never purported to be safety findings required under the Atomic Energy Act.

It bears repeating that the Petition does not challenge the validity of these storage-related findings. Petition at 7 n.9. It only contends that safety findings *on disposal* are required, which, as discussed above, is not the case. As this contention is unsupported by legal basis, and is in fact contrary to all precedents, the Petition does not raise any credible basis for a moratorium on licensing.

III. THE SUSPENSION PETITION IS PROCEDURALLY IMPROPER AND FAILS TO DEMONSTRATE ANY IMMEDIATE THREAT TO PUBLIC HEALTH AND SAFETY

The Petition seeking suspension of final decisionmaking is procedurally improper and therefore should be denied. In requesting that the Commission make AEA safety findings on spent fuel disposal, Petitioners in effect challenge 10 C.F.R. § 54.29, which establishes the findings that the Commission must make in a license renewal proceeding, and limits those findings to matters related to managing the effects of aging. *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 N.R.C. 449, 462 n.71 (2010) (observing that the reasonable assurance findings in 10 C.F.R. § 54.29 is limited to the specified matters requiring aging management review). *See also N.J. Envtl. Fed'n v. NRC*, 645 F.3d 220, 224 (3d Cir. 2011) (License renewal proceedings are narrow in scope, focusing only on the "detrimental effects of aging … posed by long-term reactor operation.").[10] Here, Friends of the Coast and the

[10] To the extent that the Petitioners argue that there must be an environmental impact statement or environmental assessment analyzing the environment impacts of spent fuel disposal, Petition at 9, the Petition is also an impermissible challenge to 10 C.F.R. § 51.53(c) and App. B, Table B-1. Table B-1 as recently amended makes the disposal component of the fuel cycle a Category 1 issue (see 79 Fed. Reg. at 56,263), and 10 C.F.R. §

New England Coalition have not sought a waiver of 10 C.F.R. § 54.29, as required by 10 C.F.R. § 2.335. And while 10 C.F.R. § 2.802(d) allows a person that has submitted a petition for rulemaking to seek suspension of proceedings in which that petitioner is a participant, Friends of the Coast and New England Coalition have not submitted any rulemaking petition to revise 10 C.F.R. § 54.29 (or any other rule for that matter). No NRC rule allows suspension in such circumstances.

While the NRC rules do allow motions for stay under certain circumstances – *see* 10 C.F.R. §§ 2.342, 2.1213 – the Petitioners have made no attempt to address the standards applicable to a stay. Consequently, the Petition should be denied.

Even if the Petition were procedurally proper (which it is not), it falls far short of the Commission's high standard for suspending a final licensing decision. *Union Electric Co.* (Callaway Plant, Unit 2), CLI-11-5, 74 N.R.C. 141, 146, 159 (2011). The Commission considers suspension a "'drastic' action that is not warranted absent 'immediate threats to public health and safety,' or other compelling reason." *Id.* at 158, quoting AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 484 (2008); *see also Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 N.R.C. 151, 173-74 (2000). The Commission has not taken such drastic action lightly and has allowed licensing proceedings to continue in the wake of the Three Mile Island accident, *see Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 N.R.C. 385, 390 (2001) (referring to Interim Statement of Policy and Procedure, 44 Fed. Reg. 58,559 (Oct. 10, 1979)), the terrorist attacks on September 11, 2001, *see Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 N.R.C. 376,

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5153(c)(3)(i) precludes consideration of Category 1 issues (absent a waiver or suspension of the rule, neither of which the Petitioners have sought).

380 (2001), and the more recent events at Fukushima Daiichi, *Callaway*, CLI-11-5, 74 N.R.C. at 175.

To determine whether there is an "immediate threat[] to public health and safety, or other compelling reason" warranting proceeding suspension, the Commission considers whether going forward with a proceeding will (1) "jeopardize the public health and safety;" (2) "prove an obstacle to fair and efficient decisionmaking;" and (3) "prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our …ongoing evaluation." *Callaway*, CLI-11-5, 74 N.R.C. at 158-59, quoting *Private Fuel Storage*, CLI-01-26, 54 N.R.C. at 380 (internal quotations omitted); *Mass. v. NRC*, 708 F.3d 63, 80 (1st Cir. 2013) (upholding the NRC's application of its suspension standard). These factors weigh heavily against suspending decisionmaking here.

The Petitioners have not even alleged that moving forward with this proceeding will immediately jeopardize the public health and safety. Instead, the Petitioners have based their arguments on purely procedural grounds, alleging that the NRC lacks a "lawful basis… to issue licensing decisions" (Petition at 9) without "*predictive* safety findings" (*id.* at 8, 9) (emphasis added). The Petitioners have failed to explain how their procedural argument implicates any immediate threat to the public health and safety.

The Petitioners are also seeking to suspend proceedings that themselves pose no immediate threat to public health and safety. As the Commission has found, there is no immediate threat to the public health and safety in a licensing renewal proceeding where the period of extended operation will not begin for at least a year. *Callaway*, CLI-11-5, 74 N.R.C. at 163. In this case, the period of extended operation will not begin until 2030, more than fifteen

years from now. There is simply no threat to the public health and safety by continuing this proceeding.

With respect to the second factor, moving forward will present no obstacle to fair and efficient decision-making. When considering a petition to suspend, the Commission has previously found that the need for timely adjudication may weigh in favor of denying a suspension petition so that the Commission may continue to resolve unrelated issues, *see Callaway*, CLI-11-5, 74 N.R.C. at 166; *see also Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-03-4, 57 N.R.C. 273, 277 (2003), as the Commission has "a responsibility to go forward with other regulatory and enforcement activities." *Callaway*, CLI-11-5, 74 N.R.C. at 166 (quoting *Private Fuel Storage*, CLI-01-26, 54 N.R.C. at 381). Petitioners nowhere address this second factor.

Additionally, going forward will not prevent the appropriate implementation of any pertinent rule or policy changes. Even if the Commission were inclined to address the substance of Petitioners' spent fuel disposal concerns in a future rulemaking or other proceeding, suspension of this license renewal proceeding is not warranted. The Commission has "well-established processes for imposing any new requirements necessary to protect public health and safety and the common defense and security." *Callaway*, CLI-11-5, 74 N.R.C. at 166. Going forward "will have no effect on the NRC's ability to implement necessary rule or policy changes that might come out of" any future Commission action. *Id.*

IV. 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: October 31, 2014

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UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing NextEra's Answer Opposing Petition to Suspend Licensing Proceedings has been served through the E-Filing system on the participants in the above-captioned proceeding, this 31st day of October, 2014.

/Signed electronically by David R. Lewis/

David R. Lewis