LBP-12-07

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of FLORIDA POWER & LIGHT COMPANY (Turkey Point Units 6 and 7)	Docket Nos. 52-040-COL and 52-041-COL ASLBP No. 10-903-02-COL-BD01 March 29, 2012

MEMORANDUM AND ORDER
(Denying CASE's Motions to Admit Newly Proffered Contentions 9 and 10, and Dismissing CASE from this Proceeding)

An intervenor in this proceeding, Citizens Allied for Safe Energy, Inc. (CASE), submitted motions asking this Licensing Board to admit two newly proffered contentions.[1] For the reasons discussed below, we deny CASE's motions. Additionally, because it no longer has a contention or an unresolved pleading pending before this Licensing Board, we dismiss CASE from this proceeding.

I. BACKGROUND

A. Relevant Events Leading To The Filing Of CASE's Pending Motions

This proceeding arises from Florida Power & Light Company's (FPL's) combined license (COL) application for two new nuclear power reactors, Turkey Point Units 6 and 7, at its facility

[1] See Motion for Leave for [CASE] to File a New Contention (dated Feb. 2, 2012, filed Feb. 3, 2012) [hereinafter CASE Motion to File New Contention 9]; Motion to File a Timely Contention in Response to New Information (Feb. 10, 2012) [hereinafter CASE Motion to File New Contention 10].

near Homestead, Florida.[2] On February 28, 2011, this Board granted CASE's hearing request opposing FPL's COL application. See LBP-11-06, 73 NRC __, __ (slip op. at 119) (Feb. 28, 2011).[3]

In LBP-11-06, we, inter alia, admitted CASE's Contentions 6 and 7 for litigation.[4] Contention 6 was an environmental contention of omission that asserted FPL's Environmental Report (ER) improperly "fails to address environmental impacts in the event the applicant will need to manage Class B and Class C [low-level radioactive waste (LLRW)[5]] on the Turkey Point site for [more than two years]." LBP-11-06, 73 NRC at __ (slip op. at 104).[6] Contention 7 was a safety contention asserting that, in the event

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[2] See [FPL, COL] Application for the Turkey Point Units 6 & 7, Notice of Hearing, Opportunity To Petition for Leave To Intervene and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 75 Fed. Reg. 34,777 (June 18, 2010).

[3] We also granted a hearing request filed jointly by Mark Oncavage, Dan Kipnis, the Southern Alliance for Clean Energy, and the National Parks Conservation Association (hereinafter referred to collectively as Joint Intervenors), and we granted a request by the Village of Pinecrest to participate as an interested local governmental body. See LBP-11-06, 73 NRC at __ (slip op. at 119).

[4] In addition to admitting CASE's Contentions 6 and 7, we admitted Joint Intervenors' Contention 2.1, which was an environmental contention of omission. See LBP-11-06, 73 NRC at __-__ (slip op. at 36-40). We recently dismissed that contention, concluding that FPL's Revision 3 to its COL application rendered it moot. See Licensing Board Memorandum and Order (Granting FPL's Motions to Dismiss Joint Intervenors' Contention 2.1 and CASE's Contention 6 as Moot) (Jan. 26, 2012) at 6 (unpublished) [hereinafter January 26 Order]. Joint Intervenors have a request pending before this Board that seeks to admit a new contention challenging the adequacy of the measures taken by FPL to moot Contention 2.1.

[5] The NRC divides LLRW into three classes -- A, B, and C (10 C.F.R. § 61.55(a)(2)) -- based on the concentration and types of long-lived and short-lived radionuclides. See id. § 61.55(a)(1). As discussed in LBP-12-04, 75 NRC __, __ n.5 (slip op. at 2 n.5) (Feb. 28, 2012), LLRW generated in a nuclear power plant includes reactor water resin beds, contaminated filters, protective clothing and shoe covers, cleaning rags, and tools.

[6] As admitted, Contention 6 stated in full:

> Because there currently is no access to an offsite LLRW disposal facility for proposed Units 6 and 7, and because it is reasonably foreseeable that LLRW

FPL needs to manage Class B and Class C LLRW for an extended period of time, FPL's COL application "fails to provide information sufficient to enable the NRC to reach a final conclusion on safety matters regarding the means for controlling and limiting radioactive material and effluents and radiation exposures within the limits set forth in [10 C.F.R.] Part 20 and ALARA [as low as reasonably achievable, 10 C.F.R. Part 50, Appendix I]." Id. at __ (slip op. at 112).[7]

On December 16, 2011, FPL submitted to the NRC Revision 3 to its COL application for Turkey Point Units 6 and 7. See Letter from Mano K. Nazar, Executive Vice President and Chief Nuclear Officer, FPL, to U.S. Nuclear Regulatory Commission (Dec. 16, 2011) (ADAMS Accession No. ML11361A102).

On January 3, 2012, FPL filed two motions. One motion argued that Revision 3 to FPL's COL application supplied information that cured the omission in Contention 6, rendering that contention moot.[8] The other motion claimed that, in light of Revision 3, the inadequacy alleged

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> generated by normal operations will need to be stored at the proposed site for longer than the two-year period contemplated in FPL's ER, the analysis in the ER is inadequate because it fails to address environmental impacts in the event the applicant will need to manage Class B and Class C LLRW on the Turkey Point site for a more extended period of time.

LBP-11-06, 73 NRC at __ (slip op. at 104).

[7] As admitted, Contention 7 stated in full:

> FPL's COL [application] fails to provide information sufficient to enable the NRC to reach a final conclusion on safety matters regarding the means for controlling and limiting radioactive material and effluents and radiation exposures within the limits set forth in [10 C.F.R.] Part 20 and ALARA in the event FPL needs to manage Class B and Class C LLRW for an extended period.

LBP-11-06, 73 NRC at __ (slip op. at 112).

[8] See [FPL's] Motion to Dismiss CASE Contention 6 as Moot (Jan. 3, 2012).

to exist in Contention 7 had been remedied and, accordingly, this Board should grant a favorable judgment to FPL on that contention as a matter of law.[9]

CASE filed a response stating that it "will not oppose [FPL's January 3] motions."[10] CASE said it would, however, "file new contentions in a timely manner based on new information provided in those filings as warranted." CASE January 23 Response at 1.

On January 26, 2012, this Board issued an order granting FPL's motion to dismiss Contention 6 as moot. See January 26 Order at 5-6. We observed that, as modified by Revision 3, FPL's ER included "measures like reducing the service run length of resin beds or mixing spent resins to limit radioactivity concentrations [that] will reduce the volume of LLRW produced at Turkey Point to be sufficiently bounded within the levels and environmental impacts described in 10 C.F.R. § 51.51, Table S-3." Id. (internal quotation marks omitted). Additionally, we observed that "FPL's ER Revision 3 states that any necessary facilities to temporarily store additional waste would be built consistent with NRC guidance documents, and any such facilities would have small environmental impacts in addition to yielding small radiological impacts." Id. at 6. In short, Revision 3 cured the omission identified in Contention 6. Although we dismissed Contention 6 as moot, we stated that CASE could move to file a new contention challenging the adequacy of FPL's curative action, but any such motion must be filed by February 10, 2012. Id. We emphasized that "the scope of any newly proffered contention is strictly limited to challenging the adequacy of the measures taken by FPL in curing the omission in CASE's Contention 6." Id. at 6 n.13.

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[9] See [FPL's] Motion for Summary Disposition of CASE Contention 7 (Jan. 3, 2012).

[10] See [CASE] Response to FPL Motions to Dismiss Contention 6 as Moot and for Summary Disposition of CASE Contention 7 (Jan. 23, 2012) [hereinafter CASE January 23 Response]. The NRC Staff filed responses supporting both of FPL's motions. See NRC Staff Answer to "[FPL's] Motion to Dismiss CASE Contention 6 as Moot" (Jan. 23, 2012); NRC Staff Answer to "[FPL's] Motion for Summary Disposition of CASE Contention 7" (Jan. 23, 2012).

Regarding Contention 7, on February 28, 2012, this Board issued an order in which -- in light of FPL's Revision 3 to its Final Safety Analysis Report (FSAR) and the other filings in this proceeding, including CASE's failure to oppose FPL's request for summary disposition (see LBP-12-04, 75 NRC at __ (slip op. at 10)) -- we concluded that (1) there no longer existed a genuine dispute as to any material fact concerning Contention 7, and (2) FPL was entitled to a judgment in its favor on Contention 7 as a matter of law. See id. at __-__ (slip op. at 6-13). In particular, we determined that

> FPL's commitment . . . that it will -- if necessary -- design, construct, and operate a temporary onsite LLRW storage facility in accordance with the guidance in Appendix 11.4-A to NUREG-0800, coupled with FPL's plan in Section 11.4 of the FSAR for controlling and limiting radioactive material and effluents and radiation exposures from LLRW, which incorporates by reference the corresponding section of Revision 19 of the [Design Control Document (DCD)], provides "sufficient [information] to enable the Commission to reach a final conclusion on all safety matters" regarding "the means" FPL will use to comply with radiation protection requirements in 10 C.F.R. Part 20 (10 C.F.R. § 52.79(a)(3)), including LLRW handling and storage.

Id. at __ (slip op. at 13). We therefore granted FPL's motion for summary disposition of Contention 7. Id. at __ (slip op. at 14).

B. The Pleadings Under Consideration

1. CASE's Newly Proffered Contention 9. On February 3, 2012, CASE moved to admit newly proffered safety Contention 9, which CASE claims "is based on new information provided in FPL's [motion for summary disposition of Contention 7 filed on] January 3, 2012." See CASE Motion to File New Contention 9 at 2. Contention 9 claims that "[FPL's] revised [plan for the long-term, onsite handling of LLRW] from Turkey Point 6 and 7 is inadequate to protect public health and safety [in] all circumstances." Id., attach. 1 at (unnumbered) 1. CASE advances three arguments in support of Contention 9: (1) FPL's auxiliary onsite LLRW storage structures would "be inundated by water, either routinely due to sea level rise, or intermittently due to storm surge related to hurricanes" (id.); (2) FPL's revised FSAR does not address the

issue of permanent onsite storage for LLRW even though "the availability of permanent storage elsewhere in the nation is not assured" (id.); and (3) FPL's COL application erroneously "assumes that the current emergency plans in place with Miami-Dade County for [Turkey Point Units] 3 & 4 is likewise sufficient for [Units] 6 & 7." Id. at (unnumbered) 4.

FPL and the NRC Staff filed answers opposing admission of Contention 9.[11]

2. CASE's Newly Proffered Contention 10. On February 10, 2012, CASE moved to admit newly proffered environmental Contention 10, which CASE claims "is based on new information provided in FPL's [motion to dismiss Contention 6 filed] on January 3, 2012." See CASE Motion to File New Contention 10 at (unnumbered) 3. Contention 10 asserts that "FPL's [ER] Revision 3 does not adequately address the impact of extended storage of all types of AP1000 [LLRW]." Id., attach. 1, Contention 10 at (unnumbered) 1 [hereinafter CASE Motion to File New Contention 10, attach. 1]. In support of Contention 10, CASE argues that FPL's ER, as modified by Revision 3, fails adequately to discuss: (1) the "impact . . . of catastrophic climactic conditions with total site inundation" on LLRW (including used steam generators and contaminated soil) and "liquid pathways analysis" (id. at (unnumbered) 1-3, 5-6); (2) the unavailability of offsite storage for LLRW (see id. at (unnumbered) 6-7); and (3) the high level of LLRW radioactivity that will be stored onsite due to the need to replace defective steam generators. See id. at (unnumbered) 3-5.

FPL and the NRC Staff filed answers opposing admission of Contention 10.[12]

[11] See [FPL's] Answer to CASE's Motion for Leave to File a New Contention and New Contention 9 (Feb. 28, 2012) [hereinafter FPL Answer Opposing Contention 9]; NRC Staff Answer to "Motion for Leave for [CASE] to File a New Contention" (Feb. 21, 2012) [hereinafter NRC Staff Answer Opposing Contention 9]. CASE filed replies to these answers. See [CASE] Reply to NRC Staff Opposition to Contention 9 (Feb. 29, 2012); [CASE] Reply to [FPL] Answer to CASE's Motion for Leave to File a New Contention and New Contention 9 (Mar. 7, 2012).

[12] See [FPL's] Answer to CASE's Motion for Leave to File a New Contention and New Contention 10 (Feb. 27, 2012) [hereinafter FPL Answer Opposing Contention 10]; NRC Staff Answer to "Motion to File a Timely Contention in Response to New Information" (Feb. 27, 2012)

II. APPLICABLE LEGAL STANDARDS

To be admissible, a newly proffered contention must satisfy: (1) either the timeliness standards in 10 C.F.R. § 2.309(f)(2) for new and amended contentions, or the balancing test in 10 C.F.R. § 2.309(c) for nontimely contentions; *and* (2) the general contention admissibility criteria in 10 C.F.R. § 2.309(f)(1). We discuss those standards in turn.

A. Timeliness Standards In 10 C.F.R. § 2.309(f)(2)

A new or amended contention filed after the initial filing period has expired may be admitted as timely only with leave of the Licensing Board on a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).

B. Balancing Test In 10 C.F.R. § 2.309(c) For Nontimely Contentions

A contention that fails to satisfy timeliness standards in section 2.309(f)(2) may still be admitted pursuant to a balancing test governing nontimely filings that weighs the following factors set forth in section 2.309(c):

> (i) Good cause, if any, for the failure to file on time;
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> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
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> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
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> (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

[hereinafter NRC Staff Answer Opposing Contention 10]. CASE filed a reply to these answers. See [CASE] Reply to [FPL] and to NRC Staff Opposition to CASE Contention 10 Regarding Turkey Point Units 6 & 7 (Mar. 6, 2012) [hereinafter CASE Reply on Contention 10].

> (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
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> (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
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> (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
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> (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i)-(viii). The "good cause" factor is the "most important" and entitled to the most weight. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 261 (2009). Where a petitioner fails to establish good cause, "petitioner's demonstration on the other factors must be particularly strong." Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73 (1992). A petition that attempts to proffer a nontimely contention without addressing the balancing factors in section 2.309(c) may be summarily rejected. See Oyster Creek, CLI-09-07, 69 NRC at 260-61.

C. Admissibility Criteria In 10 C.F.R. § 2.309(f)(1)

In addition to satisfying the timeliness standards in 10 C.F.R. § 2.309(f)(2) or the balancing test in 10 C.F.R. § 2.309(c), a newly proffered contention must satisfy the admissibility criteria in 10 C.F.R. § 2.309(f)(1), which require that a contention:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the

> petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
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> (vi) [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief . . . .

10 C.F.R. § 2.309(f)(1). The Commission has stressed that the standards governing contention admissibility are "strict by design." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Failure to comply with any of the admissibility criteria in section 2.309(f)(1) warrants rejection of a contention. USEC, Inc. (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 437 (2006).

III. ANALYSIS

A. Newly Proffered Contention 9 Is Not Admitted

1. Contention 9, Which Is Effectively An Opposition To FPL's Request For Summary Disposition Of Contention 7, Is Unjustifiably Late. In Contention 9, CASE asserts that "[FPL's] revised [plan for the long-term, onsite handling of LLRW] from Turkey Point 6 and 7 is inadequate to protect public health and safety [in] all circumstances." CASE Motion to File New Contention 9, attach. 1 at (unnumbered) 1. This is precisely the issue that, *without opposition from CASE*, we adjudicated in FPL's favor in LBP-12-04.

As discussed supra Part I.A, on January 3, 2012, FPL moved for summary disposition of Contention 7, arguing that its COL application, as supplemented by Revision 3, contained sufficient information to enable the NRC to reach a conclusion on safety matters regarding the means by which FPL would handle long-term onsite LLRW storage. FPL therefore claimed that it was entitled to a favorable judgment on Contention 7 as a matter of law. See LBP-12-04, 75 NRC at __, __ (slip op. at 7, 10).

Pursuant to 10 C.F.R. § 2.1205(b), CASE had twenty days from FPL's filing of its motion, or until January 23, 2012, to oppose FPL's request for summary disposition. CASE filed a timely response in which it waived its right to contest FPL's motion, stating explicitly that it "will not oppose" summary disposition of Contention 7. See CASE January 23 Response at 1.

Informed by FPL's pleadings and filings, and relying on CASE's non-opposition to FPL's motion (see LBP-12-04, 75 NRC at __ (slip op. at 10)), this Board granted summary disposition of Contention 7 in favor of FPL on February 28, 2012. See id. at __ (slip op. at 14).

Now, in its motion to admit Contention 9, CASE proffers a contention that is substantially identical to former Contention 7 and is supported by arguments that, in effect, assert that -- contrary to FPL's arguments in its summary disposition motion -- Revision 3 did not remedy the alleged inadequacies in Contention 7. But CASE allowed the January 23 deadline for challenging FPL's summary disposition motion to lapse without filing an opposition. We will not permit CASE to raise a belated challenge to FPL's summary disposition motion in the guise of seeking to admit a newly proffered contention. If we were to rule otherwise, we would be allowing CASE -- in derogation of section 2.1205(b) -- to submit an unjustifiably late filing, thereby condoning CASE's cunctation. This we decline to do.[13]

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[13] CASE asserts that Contention 9 is timely because it "is based on new information provided in FPL's [summary disposition motion] of January 3, 2012." CASE Motion to File New Contention 9 at 2. But as the NRC Staff correctly explains (see NRC Staff Answer Opposing Contention 9 at 10-12), CASE fails to show that the three arguments underlying Contention 9 are based on new and materially different information, as required by 10 C.F.R. § 2.309(f)(2)(i)-(ii). Rather, CASE's arguments regarding water inundation, lack of off-site LLRW storage, and inadequate emergency planning replicate old arguments this "Board has heard and rejected three times" (id. at 10), leaving us to conclude that -- even assuming arguendo that Contention 9 is not effectively a late-filed opposition to FPL's summary disposition motion -- it is nonetheless nontimely in derogation of section 2.309(f)(2). See supra Part II.A. And CASE's failure to show (or even attempt to show) that this Board should consider this nontimely contention pursuant to the balancing test in 10 C.F.R. § 2.309(c) provides a basis for summarily rejecting Contention 9 as inexcusably nontimely. See Oyster Creek, CLI-09-07, 69 NRC at 260-61; supra Part II.B.

2. Contention 9 Also Fails To Satisfy The Admissibility Criteria In 10 C.F.R. § 2.309(f)(1). We also conclude that Contention 9 must be rejected for the alternative reason that it fails to satisfy the admissibility criteria in 10 C.F.R. § 2.309(f)(1). In its first argument underlying Contention 9, CASE asserts (CASE Motion to File New Contention 9, attach. 1 at (unnumbered) 1) that FPL's auxiliary onsite LLRW storage structures would "be inundated by water, either routinely due to sea level rise, or intermittently due to storm surge related to hurricanes." CASE argues that water-level calculations should be determined from mean high tide, but that FPL improperly "starts with mean low tide." Id. at (unnumbered) 3-4. However, CASE's motion fails to reference a specific portion of FPL's COL application that calculates the water level in the manner alleged, much less demonstrates how CASE's assertion ultimately controverts a particular analysis or conclusion in the application. Because CASE's motion fails to "include references to specific portions" of the COL application that it disputes (10 C.F.R. § 2.309(f)(1)(vi)), Contention 9, as supported by the water inundation argument, is not admissible. See FPL Answer Opposing Contention 9 at 12-18; NRC Staff Answer Opposing Contention 9 at 13-14.

Nor is Contention 9 admissible pursuant to CASE's second argument, which alleges (CASE Motion to File New Contention 9, attach. 1 at (unnumbered) 1) that FPL's revised FSAR does not address the issue of permanent onsite storage for LLRW even though "permanent storage elsewhere in the nation is not assured." CASE's argument ignores that FPL's revised LLRW management plan provides that in the event offsite storage is not available, LLRW will be stored onsite in a facility that "would be designed, constructed, and operated in accordance with the design guidance provided in NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A." Turkey Point Units 6 & 7, COL Application, Part 2 -- FSAR Rev. 3 at 11.4-3 (Dec. 2011) [hereinafter FSAR Rev. 3]. In granting FPL's motion for summary disposition of Contention 7 in LBP-12-04, we held that FPL's commitment that it will -- if necessary -- construct and operate an

onsite LLRW storage facility in accordance with the relevant NRC guidance document, coupled with FPL's plan in Section 11.4 of its FSAR for controlling radiation exposures from LLRW, "provides sufficient [information] to enable the Commission to reach a final conclusion on all safety matters regarding the means FPL will use . . . [regarding onsite] LLRW handling and storage." LBP-12-04, 75 NRC at __ (slip op. at 13) (internal quotation marks omitted). In light of this prior holding, Contention 9, as supported by CASE's second argument, is not admissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi), because it fails to show a genuine dispute exists with FPL's COL application on a material issue of law or fact. See generally FPL Answer Opposing Contention 9 at 8-12; NRC Staff Answer Opposing Contention 9 at 14.

Finally, Contention 9 is not admissible pursuant to CASE's third argument, which alleges (CASE Motion to File New Contention 9, attach. 1 at (unnumbered) 4) that FPL's COL application improperly "assumes that the current emergency plans in place with Miami-Dade County for [Turkey Point Units] 3 & 4 is likewise sufficient for [Units] 6 & 7." We reject this argument for precisely the same reason we rejected it last year in our decision in LBP-11-06; namely, "CASE's attempt to challenge FPL's current emergency plan on file with Miami-Dade County . . . fails to raise a genuine dispute of material fact under section 2.309(f)(1)(vi) with FPL's [COL application], because there is no indication the extant plan on file with Miami-Dade County is encompassed in FPL's [COL application]." LBP-11-06, 73 NRC at __ n.91 (slip op. at 87 n.91) (internal quotation marks omitted).[14]

Newly proffered Contention 9 is therefore not admitted.

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[14] Contention 9, as supported by CASE's third argument, is also inadmissible for failing to "include references to specific portions" of FPL's COL application that CASE disputes. See 10 C.F.R. § 2.309(f)(1)(vi).

B. Newly Proffered Contention 10 Is Not Admitted

1. Contention 10 Is Inexcusably Nontimely. In Contention 10, CASE asserts that "FPL's [ER] Revision 3 does not adequately address the impact of extended storage of all types of AP1000 [LLRW]." CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 1. In support of this contention, CASE argues that FPL's ER fails adequately to discuss: (1) the "impact . . . of catastrophic climactic conditions with total site inundation" on stored LLRW (including used steam generators and contaminated soil) and on "liquid pathways analysis" (id. at (unnumbered) 1-3, 5-6); (2) the unavailability of offsite storage for LLRW (see id. at (unnumbered) 6-7); and (3) the high level of LLRW radioactivity that will be stored onsite due to the need to replace defective steam generators. See id. at (unnumbered) 3-5.

CASE asserts that Contention 10 is timely (CASE Motion to File New Contention 10 at (unnumbered) 2) because it "is based on new information provided in FPL's [motion to dismiss Contention 6 as moot] of January 3, 2012." Id. at (unnumbered) 3. We disagree. We conclude that Contention 10 must be rejected, because its underlying arguments are inexcusably nontimely.

In its first argument in support of Contention 10, CASE asserts that the ER fails adequately to consider the impact of total site inundation on stored LLRW (including used steam generators and contaminated soil) and on liquid pathways analysis. See CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 1-3, 5-6. This argument is nontimely, because the concern on which it is predicated -- i.e., that the Turkey Point site will become flooded -- is not based on new and materially different information. Cf. supra note 13 (rejecting as nontimely the site-inundation argument underlying Contention 9). CASE concedes that it previously and repeatedly has endeavored, without success, to raise contentions based on the possibility of site inundation. See, e.g., CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 1 ("CASE has, in many filings in this intervention, presented the matter of climate change and

tropical storm impact . . . ."). Because CASE fails to (1) show that the possibility of site inundation is based on new and materially different information added to the ER as part of FPL's revised LLRW management plan, or (2) identify any new and materially different information on which its site-inundation argument is based, this argument is nontimely pursuant to 10 C.F.R. § 2.309(f)(2)(i) and (ii). See FPL Answer Opposing Contention 10 at 7-9; NRC Staff Answer Opposing Contention 10 at 8-11.[15]

CASE's second argument in support of Contention 10 -- which asserts that FPL's revised ER fails adequately to consider the unavailability of offsite storage for LLRW (see CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 6-7) -- is likewise nontimely. Cf. supra note 13 (rejecting as nontimely the argument alleging the unavailability of offsite LLRW storage underlying Contention 9). This argument is based on a statement in the ER regarding a waste-disposal facility in Clive, Utah that CASE asserts is "only partially true." CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 7. But the statement that CASE finds objectionable is not new. CASE raised an identical objection to this statement in the intervention petition it filed in August 2010. See [CASE Revised] Petition to Intervene and Request for a Hearing, Declaration of Diane D'Arrigo in Support of [CASE] at 4 (dated Aug. 17, 2010). Because CASE's argument regarding the unavailability of offsite LLRW storage is based on information that was available to CASE over eighteen months ago, it is nontimely. See FPL Answer Opposing Contention 10 at 10; NRC Staff Answer Opposing Contention 10 at 11-12.

[15] FPL states (FPL Answer Opposing Contention 10 at 11) that CASE's first argument in support of Contention 10 is timely to the extent it asserts that "FPL's ER revision failed to address the potential inundation of the contingent [LLRW] storage facilities." In LBP-11-06, however, we concluded that CASE "ha[d] not demonstrated that FPL's unchallenged sea level rise analysis in the FSAR must be supplemented with an analysis in the ER." LBP-11-06, 73 NRC at __ n.103 (slip op. at 98 n.103). CASE fails to present any new or materially different information regarding the possibility of site flooding that changes our conclusion. Even assuming arguendo that FPL is correct that one aspect of CASE's first argument is timely (but see NRC Staff Answer Opposing Contention 10 at 8), Contention 10 still fails to satisfy the admissibility criteria of 10 C.F.R. § 2.309(f)(1). See infra Part III.B.2.a.

CASE's third argument in support of Contention 10 flows from the following syllogism: (1) the Westinghouse steam generators that will be used for proposed Units 6 and 7 are defectively designed and will need to be replaced during the life of the plant; (2) because no offsite LLRW storage will be available, the defective steam generators will be stored onsite when they are replaced, and they will be especially radioactive; and accordingly (3) the projected source term of the LLRW that is stored onsite will be greater than is anticipated in FPL's COL application. See CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 3-5. Each of the three prongs of this syllogism is based on information that has long been available and, accordingly, CASE's argument is nontimely for the following three, independent reasons. First, the information on which CASE bases its claim that the Westinghouse steam generator design is defective is at least seven-years-old (from a 2005 Bechtel report), and some of it is seventeen-years-old (from a 1995 Department of Energy report). See FPL Answer Opposing Contention 10 at 7-8; NRC Staff Answer Opposing Contention 10 at 12-13. Second, the information on which CASE bases its claim that the replaced steam generators will be especially radioactive was available over eighteen months ago, in September 2010. See FPL Answer Opposing Contention 10 at 8; NRC Staff Answer Opposing Contention 10 at 13. Finally, CASE attacks "the source terms described in the DCD Table 11.2-7" (CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 3), asserting that the table fails to account for the radiation from defective steam generators that will be stored onsite. See id. at (unnumbered) 3-5. But FPL's revised LLRW management plan did not change the DCD table, nor did it change the ER's discussion of that table in sections 3.5.1.2 and 5.4.1.1. The source term information challenged by CASE therefore constitutes neither new nor materially different information. See NRC Staff Answer Opposing Contention 10 at 12.

Contention 10 is thus nontimely because it is grounded on information that fails to satisfy the timeliness standards in 10 C.F.R. § 2.309(f)(2). Further, CASE makes no attempt to show

that this nontimely contention satisfies the balancing test in 10 C.F.R. § 2.309(c), thus rendering Contention 10 inexcusably late and mandating its rejection.

2. Contention 10 Also Fails To Satisfy The Admissibility Criteria In 10 C.F.R. § 2.309(f)(1). Based on our examination of the three arguments CASE advances in support of Contention 10, we conclude the contention must also be rejected for the alternative reason that it fails to satisfy the admissibility criteria in section 2.309(f)(1).

a. Site Inundation. First, CASE argues that FPL's ER fails adequately to discuss the impact of total site inundation on FPL's contingent LLRW storage facility. See CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 1-3, 5-6. More specifically, CASE asserts that the ER "does not describe . . . elevat[ing] the auxiliary extended waste storage structures" to prevent radiation dispersal that would result from the impact of sea level rise and site inundation on LLRW. Id. at (unnumbered) 2.

But it is well established that an ER need only discuss reasonably foreseeable environmental impacts of a proposed action. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002). Here, CASE does not raise a genuine issue as to whether the dispersal of radiation due to the inundation of FPL's contingent LLRW storage facility is reasonably foreseeable. In LBP-11-06, we rejected a substantially identical argument advanced by CASE:

> [R]egarding Contention 6's concern with FPL's failure to consider the impact of projected sea level rise, storm surge, and site inundations that could result in the dispersal of LLRW off the Turkey Point site . . . , we conclude CASE fails to explain why such a scenario is plausible, much less reasonably foreseeable. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348-49 (2002) (ER need only consider environmental impacts that are "reasonably foreseeable.") . . . .

LBP-11-06, 73 NRC at __ (slip op. at 102). Because CASE provides no new information that would bolster a conclusion that a genuine issue exists as to whether radiation dispersal due to site inundation is reasonably foreseeable, we believe the above rationale applies here and

mandates a conclusion that FPL's ER need not have addressed the possibility of radiation dispersal due to site inundation. CASE thus fails to demonstrate, contrary to 10 C.F.R. § 2.309(f)(1)(iv), that the issue of radiation dispersal due to site inundation "is material to the findings the NRC must make to support" approving FPL's COL application. See FPL Answer Opposing Contention 10 at 14, 16; NRC Staff Answer Opposing Contention 10 at 14-15.

Moreover, CASE's motion fails to dispute with specificity FPL's analysis of sea level rise and storm surge in the COL application at FSAR Section 2.4.5. In LBP-11-06, we ruled that CASE's "fail[ure] directly to controvert FPL's sea level rise analysis . . . [rendered] Contention 5 . . . inadmissible for failing to raise a genuine dispute of material fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi)." LBP-11-06, 73 NRC at __ (slip op. at 99). That rationale applies here and mandates rejection of Contention 10 pursuant to section 2.309(f)(1)(vi). See FPL Answer Opposing Contention 10 at 15-16; NRC Staff Answer Opposing Contention 10 at 15.[16]

Finally, to the extent CASE asserts that FPL's COL application fails to account for "elevat[ing]" auxiliary LLRW storage facilities to protect LLRW from flooding (CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 2), CASE ignores that FPL's FSAR, as

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[16] In its reply pleading, CASE: (1) identifies for the first time a specific portion of FPL's COL application that it claims is deficient (see CASE Reply on Contention 10 at 7); (2) offers a new (and nontimely) argument about sea level rise (see id. at 8-10); and (3) supports its new argument with a 191-page master's thesis written in June 2009. See id., attach. 1. These actions by CASE were procedurally improper. A petitioner may not, by design or neglect, fail to include critical admissibility-related information in its initial pleading, and then attempt to remedy that failure by including the information in a reply to which the respondent has no right of response. See Louisiana Energy Servs., L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) (the NRC's procedural rules do not allow "using reply briefs to provide, for the first time, the necessary threshold support for contentions," as that "would effectively bypass and eviscerate [its] rules governing timely filing, contention amendment, and submission of late-filed contentions"); Nuclear Mgmt. Co. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (petitioner may not remediate deficient contention "by introducing in the reply documents that were available to it during the timeframe for initially filing contentions"). If we overlooked these procedural improprieties (but see infra Part IV), CASE's litigation position would not be enhanced, because even with this material, CASE fails to "[p]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi).

supplemented by Revision 3, makes clear that FPL would not build a supplemental onsite LLRW storage facility without considering sea level rise and storm surge. FPL has committed itself to constructing any such facility in accordance with NUREG-0800 (see FPL Answer Opposing Contention 10 at 15 (citing FSAR Rev. 3 at 11.4-3; Turkey Point Unit 6 & 7 COL Application, Part 3 -- [ER] Rev. 3 at 3.5-15 (Dec. 2011) [hereinafter ER Rev. 3]), which calls for a flood protection analysis to assure radiological consequences do not exceed a small portion of regulatory limits. See NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A at 11.4-25 ("Facility design and operation should assure that radiological consequences of design basis events (e.g., fire, tornado, seismic occurrence, and flood) do not exceed a small fraction (10 percent) of 10 C.F.R. Part 100 dose limits . . . ."). By failing to acknowledge, much less challenge with specificity, the safety and environmental evaluations that FPL will perform prior to construction and operation of a supplemental onsite LLRW storage facility, Contention 10 fails to demonstrate the existence of a genuine dispute with the COL application on a material issue of law or fact, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).

b. Unavailability Of An Offsite LLRW Storage Facility. CASE's second argument in support of Contention 10 is that FPL's ER fails adequately to discuss the unavailability of offsite storage for LLRW. See CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 6-7.

The NRC Staff states that Contention 10, as supported by CASE's second argument, fails to satisfy 10 C.F.R. § 2.309(f)(1). See NRC Staff Answer Opposing Contention 10 at 16. We agree.

In its revised LLRW management plan, FPL committed itself to storing LLRW onsite in accordance with NRC guidance and regulations in the event that offsite storage is unavailable. See LBP-12-04, 75 NRC at __ (slip op. at 12) (citing FSAR Rev. 3 at 11.4-1, 11.4-3). Additionally, FPL's ER concludes that environmental impacts resulting from the "construction

and operation of any additional onsite [LLRW] storage facilities" would be "small." ER Rev. 3 at 5.7-7.

CASE fails to explain why -- in light of FPL's conclusion that the impacts of onsite LLRW storage would be small -- the unavailability of offsite LLRW storage facilities is an environmental concern that is "material to the findings the NRC must make to support" approving FPL's COL application. 10 C.F.R. § 2.309(f)(1)(iv). Nor does CASE provide "sufficient information to show that a genuine dispute exists" with FPL's conclusion. Id. § 2.309(f)(1)(vi). This aspect of Contention 10 is therefore not admissible.

c. Increased Onsite Radioactivity. The third argument advanced by CASE in support of Contention 10 is that FPL's ER fails adequately to discuss the high level of onsite LLRW radioactivity that will result from the need to replace what CASE alleges will be defective steam generators. See CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 3-5.

FPL and the NRC Staff argue that Contention 10, as supported by CASE's third argument, fails to satisfy 10 C.F.R. § 2.309(f)(1). See FPL Answer Opposing Contention 10 at 7-8; NRC Staff Answer Opposing Contention 10 at 16-18. We agree.

Contrary to 10 C.F.R. § 2.309(f)(1)(v), CASE fails to provide alleged facts or expert opinions to support its assertion that the steam generators that will be used at proposed Turkey Point Units 6 and 7 will be defective and need to be replaced. In its attempt to show that such steam generators will need early replacement, CASE references a list of steam generators that Bechtel Power Corporation (Bechtel) replaced between 1982 and 2010. See CASE Motion to File New Contention 10, attach. 1 at (unnumbered) 3. But CASE fails to explain how the mere fact that Bechtel previously replaced some steam generators supports CASE's claim that steam generators are defective in general, much less that the specific steam generators to be used in proposed Turkey Point Units 6 and 7 will be defective. Indeed, one of the articles on which CASE relies (id., attach. 2, Kenneth Chuck Wade, Steam Generator Degradation and Its Impact

on Continued Operation of Pressurized Water Reactors in the United States, ELEC. POWER MONTHLY (Energy Info. Admin.), Aug. 1995, at xiii, xix, xxi [hereinafter CASE Motion to File Contention 10, attach. 2]) points in the opposite direction, predicting that, due to operational, material, and chemistry advances, the degradation of steam generators in the future will decrease. Notably, this prediction is supported by the fact that the list of planned steam generator replacements does not include previously replaced steam generators. See id. at xvi. Moreover, one of CASE's supporting attachments shows that the steam generators for Turkey Point Units 3 and 4 were replaced in the early 1980s. After approximately thirty years of service, it appears that neither of these steam generators has required replacement. See id., attach. 3 (labeled as "Attachment 1, Steam Generator Replacements in the U.S., compiled 01/07/2012").

In sum, contrary to section 2.309(f)(1)(v), CASE fails to provide sufficient alleged facts or expert opinions to support its argument that the steam generators at proposed Turkey Point Units 6 and 7 will be defective and require early replacement. Contention 10, as supported by CASE's third argument, is thus not admissible.[17]

Newly proffered Contention 10 is therefore not admitted.

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[17] Further, CASE's documents do not provide sufficient alleged facts or expert opinions to support a claim that defects in a steam generator will perforce require that a steam generator be replaced. Rather, the article cited by CASE explains that steam generators are constructed with a surfeit of heat exchange tubes, which allows operators to plug numerous defective tubes (up to 20 percent) before steam generator replacement is necessary. See CASE Motion to File New Contention 10, attach. 2 at xiii. The article also discusses additional strategies that have been developed to prolong steam generator life. See id. at xiii-xv.

IV. FPL's MOTION TO STRIKE

On March 15, 2012, FPL filed a motion to (1) strike as untimely CASE's replies for Contentions 9 and 10, or alternatively (2) strike from CASE's reply for Contention 10 a new argument regarding the age of FPL's sea level rise data, as well as the 191-page master's thesis attached to that reply. See [FPL's] Motion to Strike CASE's Replies to Responses to CASE Proposed Contentions 9 and 10 (Mar. 15, 2012) at 7 [hereinafter FPL Motion to Strike].[18]

FPL is correct in asserting that CASE's replies were untimely. CASE itself concedes that neither was filed within the seven-day period prescribed in 10 C.F.R. § 2.309(h)(2). See [CASE] Answer to [FPL's] Motion to Strike CASE's Replies to Responses to CASE Proposed Contentions 9 and 10 (Mar. 22, 2012) at 3.[19] Mindful that CASE has exhibited a pattern of failing to comply with the Commission's procedural rules (see, e.g., FPL Motion to Strike at 3 n.4), we grant FPL's motion to strike CASE's replies for Contentions 9 and 10.

Although we grant FPL's motion to strike CASE's replies, we nevertheless reviewed those replies, and we found nothing in them that alters our conclusion that newly proffered Contentions 9 and 10 must be rejected.

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[18] FPL represents (FPL Motion to Strike at 8) that the "NRC Staff does not oppose the motion" to strike CASE's replies.

[19] FPL is also correct that CASE's reply for Contention 10 contains an argument and an attachment that should not have been included. See FPL Motion to Strike at 5-6; supra note 16.

V. CONCLUSION

For the foregoing reasons, we (1) deny CASE's motions to admit newly proffered Contentions 9 and 10, and (2) grant FPL's motion to strike CASE's replies. Because it no longer has a contention or an unresolved pleading pending before this Licensing Board, we dismiss CASE from this proceeding.

In accordance with 10 C.F.R. § 2.341(b), a party may file a petition for Commission review within fifteen (15) days after service of this decision. Within ten (10) days after service of such a petition, any other party may file an answer supporting or opposing Commission review. See 10 C.F.R. § 2.341(b)(3). Unless otherwise authorized by law, a party must file a petition for Commission review before seeking judicial review of an agency action. See id. § 2.341(b)(1).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

____
E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

____
Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

____
Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 29, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040 and 52-041-COL
(Juno Beach, Florida)	)	
	)	
(Turkey Point, Units 6 & 7)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Denying CASE's Motions to Admit Newly Proffered Contentions 9 and 10, and Dismissing CASE from this Proceeding) (LBP-12-07) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of March 2012