

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 52-040 & 52-041
)
)
(Turkey Point Units 6 and 7))

NRC STAFF'S ANSWER TO FPL MOTION TO STRIKE
PORTIONS OF JOINT PETITIONERS' REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby files its response to a Motion to Strike filed by Florida Power and Light (FPL, Applicant) on October 12, 2010.¹ The Staff agrees that, for the reasons stated by the Applicant, the Atomic Safety and Licensing Board (Board) should exclude from its consideration certain material, including new arguments and supporting documents, filed by Petitioners Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy (SACE), and National Parks Conservation Association (Joint Petitioners) in their reply dated October 1, 2010.² As discussed below, because several portions of the reply and its attachments go beyond the permissible scope of a reply under the Commission's regulations, that material should not be considered by the Board.

¹ Florida Power and Light Company's Motion to Strike Portions of Joint Petitioners' Reply to FPL Answer Opposing Petition to Intervene and NRC Staff Answer to Petition to Intervene (Oct. 12, 2010) ("Motion").

² Joint Petitioners' Reply to FPL Answer Opposing Petition to Intervene and NRC Staff Answer to Petition for Intervention (Oct. 1, 2010) ("Joint Petitioners' Reply").

BACKGROUND

On June 30, 2009, FPL submitted an application for combined licenses for two AP1000 Pressurized Water Reactors to be located adjacent to the existing Turkey Point Units 1 through 5, at the Turkey Point site near Homestead, Florida (“Application”). See Letter from Mano K. Nazar, Florida Power & Light, to Michael Johnson, NRC Office of New Reactors, dated June 30, 2009 (ADAMS Accession No. ML091830589). On August 17, 2010, following the NRC’s publication of a Notice of Hearing in the *Federal Register*, the Joint Petitioners filed a petition to intervene (Petition).³ On September 13, 2010, both the Staff⁴ and the Applicant⁵ filed answers to the Petition. On October 1, 2010, the Joint Petitioners filed a combined Reply to the NRC Staff and FPL.⁶ As noted above, FPL filed a Motion to Strike portions of the Joint Petitioners’ reply on October 12, 2010.

DISCUSSION

In NRC practice, new arguments may not be raised for the first time in a reply brief. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *recons. denied*, CLI-04-35, 60 NRC 619 (2004); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261 (1996). The Board emphasized this governing principle in its Order granting an extension of CASE’s time for filing its reply. Order

³ Petition for Intervention (Aug. 17, 2010) (“Petition”).

⁴ NRC Staff’s Answer to “Petition for Intervention” of Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association (Sept. 13, 2010) (“NRC Staff Answer to Joint Petitioners”).

⁵ Florida Power & Light Company’s Answer Opposing Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association’s Petition to Intervene and Request for Hearing On Turkey Point Units 6 & 7 Combined Construction and Operating License Application (Sept. 13, 2010) (“FPL Answer to Joint Petitioners”).

⁶ Joint Petitioners’ Reply to FPL Answer Opposing Petition to Intervene and NRC Staff Answer to Petition for Intervention (Oct. 1, 2010) (“Joint Petitioners’ Reply”).

(Granting, In Part, Joint Petitioners' and CASE's Motions for Extension of Time) (Sept. 17, 2010), unpublished order, at 4 n.10 ("We emphasize that the granting of additional time to prepare a reply should not be viewed by petitioners as license to raise new arguments, to add new bases to their contentions, or to inject new issues into this proceeding.") (citing *LES*, CLI-04-25, 60 NRC at 225). Adding new information in reply briefs has been described as "untimely attempts to amend ... original petitions" that, in NRC practice, must be accompanied by arguments explaining how the proposed amendment meets the standards for untimely filings found in 10 C.F.R. § 2.309(c) and/or (f)(2). *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004). A reply brief also cannot expand the scope of the arguments set forth in the original hearing request. See *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); see also *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 541-42 (2008). Rather, the reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer. See *LES*, CLI-04-25, 60 NRC at 225. In short, the Commission's contention rules do not allow using reply briefs to provide, for the first time, the necessary threshold support for contentions. See *Louisiana Energy Services, L.P.*, CLI-04-35, 60 NRC at 623.

In its Motion, the Applicant asserts that the Joint Petitioners' Reply raises, for the first time, new, late-filed issues and claims, along with supporting materials not included in its Petition. Motion at 1. The Staff agrees that new claims and supporting materials, which were available at the time the Petition was filed, and for which the Joint Petitioners have not

addressed the requirements of 10 C.F.R. § 2.309(c) for nontimely filings, should be excluded from consideration in this proceeding.⁷

In its motion, FPL proposes that certain information be stricken from the record. The Staff does not take a position at this time on whether every item delineated in the Motion should be excluded from consideration precisely as FPL proposes. However, the Staff below identifies some examples from the Motion that it agrees are representative of new material that should be excluded consistent with the principles discussed above. For example, as noted in the Motion, the Joint Petitioners' Reply included twenty-three (23) new exhibits, including a declaration and seventeen (17) new exhibits submitted in support of Contention 7 alone. Motion at 3, 10; and Motion at Attachment 1. On their face, the majority of these exhibits, including their subparts, were apparently available prior to the contention filing deadline, or support arguments that the Joint Petitioners could have raised in their initial petition. For example, Exhibit 5, although dated October 1, 2010, is the Declaration of Dr. Harold R. Wanless, who provided information, including a similar Declaration, in support of the separate intervention petition filed by other petitioners (Citizens Allied for Safe Energy, Inc.) in this proceeding. Therefore, there is no indication that the Joint Petitioners could not also have enlisted the assistance of Dr. Wanless in advance of the August 17, 2010 filing deadline. In addition, Exhibits 5.1 through 5.18 comprise a collection of 17 documents to which the Joint Petitioners have referred for the first time in their reply. Of the documents included in Exhibits 5.1 through 5.18, all but three references (Exhibits

⁷ Although FPL has chosen to file a motion to bring these issues to the Board's attention, the aforementioned precedent emphasizes that the restrictions on introducing new material in a reply brief is established by rule. See, e.g., *LES*, CLI-04-25, 60 NRC at 225; see also *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 568 (2009). Accordingly, the requirement that such new information may not be introduced unless it meets the NRC's late-filing criteria is not contingent on the objections of the other participants. See *id.* The Staff also notes that while the Board should thus exclude improperly-raised new arguments and exhibits from its consideration, to do so it may not be necessary to "strike" the material from the record. See *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 301 n.86 (2007).

5.5, 5.6, and 5.17, which appear to be undated) have publication dates indicating that they were available prior to the initial contention filing deadline. Further, although undated, Exhibits 5.5 and 5.6 each provide a list of references that do include publication dates.⁸ Exhibit 5.5 lists several references, the most recent of which was published in 1998. Exhibit 5.6 also lists several references, the most recent of which was published in 1997. Therefore, although undated, it appears that each of these two documents was published well in advance of the August 17, 2010 filing deadline and both would, therefore, have been available to the Joint Petitioners at the time the Petition was filed. The article designated as Exhibit 5.17, and attached to the Joint Petitioners' Reply, was originally published on October 28, 2009 by the American Geophysical Union as a Geophysical Research Letter.⁹

Of the remaining six exhibits which were submitted with the Joint Petitioners' Reply, all but two indicate publication dates prior to 2010. Exhibit 1, the National Park Service Scoping Comments, is dated August 16, 2010 (one day prior to the filing deadline), while Exhibit 4 is dated August 3, 2010. In any event, none of the exhibits submitted in support of the Joint

⁸ A Google search for these publications found them in undated form, identical to the documents provided by the Joint Petitioners.

⁹ A Google search using the title of the document provided as Exhibit 5.17, "Anthropogenic forcing dominates sea level rise since 1850," indicated the document was available at the following web address: http://2027293623233439848-a-glaciology-net-sites.googlegroups.com/a/glaciology.net/grinsted/Home/PDFs/jevrevevagrI09anthropogenicforcingdominat esSLR.pdf?attachauth=ANoY7craYxYZEoCnHi2o0P3Lp0udhi1xA6WcJgfyYHh3NevxN251TgKFZCOJBX drw8TZwRNsgmTqS1Ptx3oLn-lkeGnNd_eYxHacWs0DKRdk4YTi9FvnfFZQgEo2RZRiaThbLqciisQVYE7iWyxiRFyB-nLIBY5WpMFn7iu2Vj4OUZ6glzumaAp--gayOkBa4Df-fKtOLpob7rE2hk1bsGSsG50R-ttZEBM48prAyBb0BISdy5kE38O1d5mQkPzNxKI-Vm7hAEWg&attredirects=0. According to that website, this article was published by the American Geophysical Union on October 28, 2009, as a Geophysical Research Letter.

Similarly, a Google search for the article, using the title for Exhibit 5.17 as described on the Joint Petitioners' exhibit list, "How will sea level respond to changes in the natural and anthropogenic forcings by 2100?," found an abstract at the following web address: <http://www.agu.org/pubs/crossref/2010/2010GL042947.shtml>. According to that website, this separate article was also published as a Geophysical Research Letter by the American Geophysical Union on April 3, 2010.

Petitioners' Reply was accompanied by an explanation for why these documents were not included in the initial intervention petition and have only been identified now, after the deadline for submitting petitions. Thus, regardless of when the documents in fact became available, because the Joint Petitioners made no attempt to address the 10 C.F.R. § 2.309(c) requirements for nontimely filings, these exhibits are examples of material that should be excluded from consideration in this proceeding because they are untimely and outside the permissible scope of a reply.

The Staff agrees that, as stated in FPL's Motion, the Joint Petitioners also included multiple arguments in their reply that were not part of the Petition and which the Joint Petitioners have not shown to be timely. For example, as noted in the Motion, the Joint Petitioners present a new claim related to Proposed Contention 7. Motion at 10. The Joint Petitioners now assert that, in addition to failing to address the impacts of rising sea level on "the construction and operation of Units 6 & 7," (Petition at 52), the ER "fails to inform the NRC of potential environmental impacts due to sea level rise." Joint Petitioners' Reply at 89. Thus, while the initial petition characterized this contention as being about the effect of sea level rise on the proposed reactors, the Joint Petitioners' reply now also alleges other effects of the reactors on the environment, contending that, with respect to considerations of rising sea level, "NEPA demands that the effects on the environment of increased groundwater levels and resulting groundwater intrusion, when coupled with the effects of the construction and operation of Units 6 and 7 and associated facilities, be addressed in the ER." *Id.* at 84-85; see Motion at 11. As another representative example of new argument, the Joint Petitioners' Reply asserts in support of Proposed Contentions 8 and 9 (relying, in part, on Exhibit 6 to the reply) that the Florida Public Service Commission's (FPSC) determination of need for the proposed new Turkey Point units was proved wrong by a 2009 FPSC demand-side management proceeding. Motion at 12; see *also* Joint Petitioners' Reply at 100, 105-06.

In summary, the Joint Petitioners have offered no explanation as to why their various new arguments and references were not included in the Petition, which would have given the Applicant and Staff the opportunity to respond to them within the usual contention pleading framework of NRC proceedings. Nor have the Joint Petitioners addressed the nontimely filing factors of 10 C.F.R. § 2.309(c), which are required for nontimely amendments to contentions. Because Joint Petitioners have submitted, for the first time in their reply, new arguments and support they could have raised in their Petition, this new information should not be considered by the Board in ruling on the admissibility of the contentions in the Petition.

CONCLUSION

In view of the foregoing, the Staff agrees that new arguments and exhibits proffered by the Joint Petitioners in their reply should not be considered in this proceeding. Accordingly, to the extent that the Joint Petitioners' Reply impermissibly includes new arguments and support for their proposed contentions, the Staff supports the Motion.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in Accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO FPL MOTION TO STRIKE PORTIONS OF JOINT PETITIONERS' REPLY" have been served on the following persons by Electronic Information Exchange on this 21st day of October, 2010:

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