

March 7, 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
NextEra Energy Seabrook, LLC ) Docket No. 50-443-LR  
 )  
(Seabrook Station, Unit 1) ) ASLBP No. 10-906-02-LR-BD01

NRC STAFF'S RESPONSE TO FRIENDS OF THE COAST AND  
NEW ENGLAND COALITION, INC.'S MOTION FOR RECONSIDERATION OF LBP-11-02

INTRODUCTION

On February 15, 2011, the Atomic Safety and Licensing Board (Board) issued an Order "Ruling on Petitions for Intervention and Requests for Hearing."<sup>1</sup> Friends of the Coast and New England Coalition (FOTC/NEC)<sup>2</sup> and Beyond Nuclear, Seacoast Anti-Pollution League, and New Hampshire Sierra Club (Beyond Nuclear)<sup>3</sup> filed requests for hearing in this proceeding. This Order, *inter alia*,<sup>4</sup> denied admission of FOTC/NEC's Contention 3 and denied in part admission of FOTC/NEC's Contention 4. On February 25, 2011, FOTC/NEC filed a Motion for Reconsideration of the Board's Order.<sup>5</sup> Pursuant to 10 C.F.R. § 2.323(c), the Nuclear Regulatory Commission Staff (NRC Staff) hereby files its response to FOTC/NEC's Motion. For the reasons stated below, FOTC/NEC has not, as required by 10 C.F.R. § 2.323(e),

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<sup>1</sup> LBP-11-02, 73 NRC \_\_ (slip op.) (Feb. 15, 2011) (Order).

<sup>2</sup> See Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions (Oct. 20, 2010) (Agency Documents Access and Management System (ADAMS) Accession No. ML102940545) (FOTC/NEC Petition).

<sup>3</sup> See Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club Request for Public Hearing and Petition to Intervene (Oct. 20, 2010) (ADAMS Accession No. ML102930267) (Beyond Nuclear Petition).

<sup>4</sup> The Order also admitted Beyond Nuclear's one proffered contention. See LBP-11-02, 73 NRC at \_\_ (slip op. at 19-27).

<sup>5</sup> Friends of the Coast and New England Coalition, Inc. Motion for Leave to File for Reconsideration of Memorandum and Order LBP-11-02 (Feb. 25, 2011) (Motion).

demonstrated compelling circumstances that could not have been reasonably anticipated that render the Board's February 15, 2011 Order invalid. Consequently, FOTC/NEC's Motion should be denied.

### BACKGROUND

This proceeding concerns the May 25, 2010, application of NextEra Energy Seabrook, LLC (NextEra or Applicant) to renew the operating license for Seabrook Station, Unit 1 (Seabrook) for an additional 20 years from the current expiration date of March 15, 2030.<sup>6</sup> On February 15, 2011, the Board denied FOTC/NEC's proffered Contention 3<sup>7</sup> and denied in part proffered Contention 4.<sup>8</sup>

Specifically, the Board held that Contention 3 was inadmissible because the contention did not "specifically relate to the ability of buried structures to perform their intended functions as defined by 10 C.F.R. § 54.4(a)(1)-(3)."<sup>9</sup> Accordingly, the Board found that Contention 3 was outside the scope of the license renewal proceeding.<sup>10</sup> The Board also determined that FOTC/NEC failed to adequately support its claim that NextEra had not provided reasonable assurance that it will manage the aging effects on buried systems, structures and components (SSCs).<sup>11</sup>

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<sup>6</sup> Letter from Paul O. Freeman, Site Vice President, dated May 25, 2010, transmitting application for license renewal for Seabrook Station, Unit 1 (ADAMS Accession No. ML101590099).

<sup>7</sup> FOTC/NEC's Contention 3 read, "The aging management plan contained in the license renewal application violates 10 C.F.R. §§ 54.21 and 54.29(a) because it does not provide adequate inspection and monitoring for corrosion, structural failure, degradation, or leaks in all buried systems, structures, and components that may convey or contain radioactively-contaminated water or other fluids and/or may be important to plant safety." FOTC/NEC Petition at 22-23.

<sup>8</sup> FOTC/NEC's Contention 4 read, "The Environmental Report is inadequate because it underestimates the true cost of a severe accident at Seabrook Station in violation of 10 C.F.R. § 51.53(c)(3)(ii)(L) and further analyses by the applicant is called for." *Id.* at 34.

<sup>9</sup> Order at 37.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 37-38.

Furthermore, Contention 4 consisted of multiple challenges to NextEra's severe accident mitigation analysis for Seabrook.<sup>12</sup> The Board found some of these challenges admissible but found others were outside the scope of the proceeding, inadequately supported, or not material.<sup>13</sup>

FOTC/NEC's Motion requests that the Board's Order be reconsidered on the grounds that:

1. The Board incorrectly found that information provided by NextEra mooted the portion of Contention 4 addressing "wind borne radiation dose."<sup>14</sup>

2. The Board read 10 C.F.R. § 54.4 narrowly to exclude leakage from buried SSCs into the human environment from its license renewal review.<sup>15</sup>

3. The Board should have accepted as a basis the proposition that incidents and problems with respect to pipes are likely to occur at Seabrook because such incidents and problems have occurred at other nuclear facilities.<sup>16</sup>

4. FOTC/NEC is not required to prove the merits of its contentions at this stage of the proceeding.<sup>17</sup>

5. The Board erred in breaking proffered Contention 4 into "sub-contentions."<sup>18</sup>

## DISCUSSION

### A. Legal Standards Governing Motions for Reconsideration

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<sup>12</sup> *Id.* at 38.

<sup>13</sup> *Id.* at 63.

<sup>14</sup> Motion at 2.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

The standard governing motions for reconsideration is specified in 10 C.F.R. § 2.323(e), which requires that such motions demonstrate “compelling circumstances, such as a clear and material error in a decision, which could not have reasonably been anticipated, which renders the decision invalid.” The purpose of a Motion for Reconsideration is “to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.”<sup>19</sup> Such a motion “should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.”<sup>20</sup>

In keeping with the notion that, in a Motion for Reconsideration a party should not raise arguments previously presented, the Commission has held that a party cannot “incorporate[ ] by reference the legal arguments made in the previous motions and pleadings,” but must provide “new justification as to why [a decision] deserves reconsideration.”<sup>21</sup> Further, a party raising new arguments “must not previously have been able to make those arguments.”<sup>22</sup>

Also, a Motion for Reconsideration is not an opportunity for a party to attempt to cure an unsatisfactory outcome on a particular issue. Instead, a party seeking reconsideration must demonstrate a “fundamental . . . misunderstanding of a key point” by the Board.<sup>23</sup> Indeed, “[r]econsideration petitions must establish an error in a . . . decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of

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<sup>19</sup> Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). The 2004 changes to the standard for motions to reopen were intended to raise the standard above that established by existing case law. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC \_\_ (slip op. at 9) (Mar. 11, 2010).

<sup>22</sup> *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527 (2007) (citing *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-21, 65 NRC 519 (2007)).

<sup>23</sup> See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

law, or a factual clarification.”<sup>24</sup> Parties have 10 days from the date of the Board action being challenged to file reconsideration motions. 10 C.F.R. § 2.323(e).

FOTC/NEC has not demonstrated compelling circumstances that could not have been reasonably anticipated that render invalid the Board’s Order of February 15, 2011, and thus fails to meet the requirements for reconsideration.<sup>25</sup>

B. FOTC/NEC Has not Identified a Compelling Circumstance that Would Justify Reconsideration

1. FOTC/NEC’s Mootness Argument is Unclear and Otherwise Fails to Demonstrate Compelling Circumstances

At the outset of its argument, FOTC/NEC asserts that based on “sections of Seabrook’s Final Safety Analysis report provided to the Board months late[,]” “[t]he Board has chosen to declare moot that portion of Friends/NEC’s Contention 4 that deals with wind borne radiation dose.” Motion at 2. The NRC Staff does not understand why information in a safety document would impact an environmental contention, such as Contention 4. Moreover, the Board explicitly stated that it would not consider any information filed by NextEra after its contention response with respect to Contentions 3 and 4, the subjects of FOTC/NEC’s motion for reconsideration.<sup>26</sup> Consequently, this argument does not appear to identify an error in the Board’s order and therefore cannot serve as the basis for a motion for reconsideration.<sup>27</sup>

2. FOTC/NEC Has Not Demonstrated Compelling Circumstances Rendering the Board’s Ruling on Contention 3 Invalid

FOTC/NEC alleges that the Board incorrectly read 10 C.F.R. § 54.4 to exclude leakage of buried SSCs from the scope license renewal review. The Board’s reading of § 54.4 as

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<sup>24</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-1, 55 NRC 1, 2 (2002).

<sup>25</sup> See, e.g. *Entergy Nuclear Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-13, 65 NRC 211 (2007).

<sup>26</sup> Order at 18-19.

<sup>27</sup> The Board did consider whether new information mooted Contention 1, Order at 18, but no section of that contention challenged “wind borne radiation doses.”

excluding leakage from buried SSCs into the human environment from the scope of license renewal review is consistent with controlling Commission precedent on this issue.<sup>28</sup> In *Pilgrim* the Commission stated that the key functions that are the focus of license renewal review under Part 54 do *not* include preventing inadvertent leakage from buried pipes and tanks.<sup>29</sup> The Commission further stated that monitoring and leak prevention programs are part of the NRC's ongoing regulatory process, not license renewal review.<sup>30</sup> Therefore, the Board's conclusion that the issue raised by Contention 3 – the inadvertent release of radioactivity for buried SSCs – was outside the scope of license renewal is consistent with binding Commission precedent. FOTC/NEC's disagreement with controlling Commission precedent does not provide grounds for reconsideration of the Board's Order.

Also with respect to Contention 3, FOTC/NEC alleges that the Board should have accepted as a basis for Contention 3 the proposition that incidents and problems with respect to buried SSCs are likely to occur at Seabrook because such incidents and problems have occurred at other nuclear facilities.<sup>31</sup> FOTC/NEC alleges that by not accepting incidents at other plants as support for its contention, the Board erroneously required FOTC/NEC to prove its case at the contention admissibility stage.<sup>32</sup> FOTC/NEC's assertion is a misreading of the Board's Order and does not provide grounds for reconsideration. As stated above, the Board concluded, consistent with controlling Commission precedent, that key functions that are the focus of license renewal review under Part 54 do *not* include preventing inadvertent leakage of radioactivity from buried pipes and tanks into the environment. Thus, the Board rejected incidents of inadvertent leakage of radioactivity from buried SSCs into the environment at other

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<sup>28</sup> See Order at 37 (citing *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC \_\_, \_\_ (June 17, 2010)).

<sup>29</sup> *Pilgrim*, CLI-10-14, 71 NRC \_\_ (slip op. at 15).

<sup>30</sup> *Id.* at 15, 18 & n.76.

<sup>31</sup> *Id.* at 5.

<sup>32</sup> Motion at 5.

facilities as a basis for Contention 3 not because incidents at other facilities (*i.e.*, industry operating experience) cannot provide a basis for a contention, but because none of the incidents cited by FOTC/NEC compromised the ability of the affected systems to perform their intended safety functions. Furthermore, neither FOTC/NEC's Petition, the accompanying Blanch Declaration, nor the instant Motion provide a basis for concluding that leakage of buried SSCs within the scope of license renewal at Seabrook will impair the ability of those SSCs to perform their safety function.<sup>33</sup> Without evidence of incidents of buried piping leakage large enough to impair their intended safety function at other facilities, let alone at Seabrook, there was no basis for the Board to infer that leaks impairing safety function would occur at Seabrook. Thus, FOTC/NEC's arguments are insufficient to demonstrate unanticipated compelling circumstances that render the Board's Order invalid.

3. FOTC/NEC Has Not Demonstrated Compelling Circumstances that Render the Board's Denial of Portions of Contention 4 Invalid

FOTC/NEC also claims that the "Board has erred in converting the many sections of [Contention 4] into 'sub-contentions' as it were, for purposes of more orderly review."<sup>34</sup> FOTC/NEC asserts that the Board improperly held each subpart of Contention 4 to the full set of contention admissibility standards in 10 C.F.R. § 2.309.<sup>35</sup> Consequently, FOTC/NEC states that the Board held Contention 4 to a higher admissibility standard than required by Commission precedent.<sup>36</sup>

As stated above, a motion for reconsideration must be based on compelling circumstances, such as "an overlooked controlling decision or principle of law."<sup>37</sup> FOTC/NEC

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<sup>33</sup> See FOTC/NEC Petition at 23-26; Blanch Declaration ¶¶41-53; Motion at 4-5.

<sup>34</sup> Motion at 5.

<sup>35</sup> *Id.* at 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Millstone*, CLI-01-1, 55 NRC at 2.

has not pointed to any such controlling decision or principle of law to support its argument, apart from a generalized reference to “controlling law and precedent which require only a minimal showing” at the contention admissibility stage.<sup>38</sup> But, this familiar principle of law hardly establishes FOTC/NEC’s claim that the Board erred by considering each subpart of Contention 4 individually and requiring FOTC/NEC to demonstrate a basis for each subpart.

On the contrary, Commission precedent clearly states that boards are free to “reformulate contentions to eliminate extraneous issues or to consolidate issues for a more efficient proceeding.”<sup>39</sup> Thus, contrary to FOTC/NEC’s arguments, licensing boards are not constrained by the form in which intervenors propose their contentions. Rather, the Commission has authorized boards to split, combine, or reformulate contentions for the very purpose of a “more orderly review.” Such reformulated contentions must then meet the requirements of 10 C.F.R. § 2.309(f)(1).

Moreover, the Commission has routinely upheld board decisions that found some portions of multi-part contentions adequately supported and others not.<sup>40</sup> In fact, in a case regarding a multipart SAMA contention similar to Contention 4, the licensing board considered every subpart of the contention separately to determine whether it met the admissibility criteria of 10 C.F.R. § 2.309.<sup>41</sup> On appeal, the Commission thoroughly considered the board’s decision, but did not suggest that the board inappropriately segmented the contention.<sup>42</sup> Therefore,

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<sup>38</sup> Petition at 6.

<sup>39</sup> *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, \_\_ NRC \_\_, (slip op. at 22) (2009) (internal quotations omitted).

<sup>40</sup> *E.g., Progress Energy Florida, Inc.* (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, \_\_ NRC \_\_ (slip op. at 9-11, 28) (2010); *South Carolina Electric Gas Co. and South Carolina Public Service Authority (Also Referred to As Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, \_\_ NRC \_\_ (slip op. at 17-32) (2010).

<sup>41</sup> *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Station), LBP-06-23, 64 NRC 257, 338-40 (2006).

<sup>42</sup> *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Station), CLI-10-11, \_\_ NRC \_\_ (slip op.) (2010).

FOTC/NEC has not pointed to a compelling circumstance to justify reconsideration. In fact, Commission precedent fully supports the Board's decision to consider Contention 4 as discreet subparts.

FOTC/NEC claims that the Board's consideration of Contention 4-A, the probabilistic modeling portion of Contention 4, is an example of how the Board's subdivision of the contention resulted in error.<sup>43</sup> But, FOTC/NEC does not demonstrate how independent consideration of this part of the contention led to error.<sup>44</sup> Rather, FOTC/NEC claims that the Board construed Contention 4-A as a generic challenge to probabilistic modeling when in fact FOTC/NEC only meant to challenge how NextEra used probabilistic modeling in the SAMA analysis.<sup>45</sup> But, even if the Board misunderstood FOTC/NEC's claims regarding probabilistic modeling, FOTC/NEC has not shown that this error "renders the decision invalid."<sup>46</sup> Contention 4-A primarily criticized the feature of the SAMA analysis that multiplied consequences by probabilities to determine risk. But, this is a feature of all probabilistic models. FOTC/NEC never alleged that any specific feature of NextEra's probabilistic model misapplied this basic probabilistic concept.<sup>47</sup> Thus, even if Contention 4-A only challenged how NextEra employed probabilistic modeling, it would plainly fail to meet the 10 C.F.R. § 2.309 criteria, which requires the petitioner to demonstrate a dispute with the application.<sup>48</sup>

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<sup>43</sup> Motion at 6.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 10 C.F.R. § 2.323(e).

<sup>47</sup> FOTC/NEC Request for Hearing at 38-40.

<sup>48</sup> FOTC/NEC also alleges that the Board erroneously considered the results from other SAMA analyses to reject FOTC/NEC's claim that using probability-weighted consequences in SAMA analyses could produce such low results that no mitigation measure could prove cost-beneficial. Motion at 7. FOTC/NEC asserts that this information is "irrelevant, unless the Board now says that experience with other licensees is an appropriate indicator of what is likely to happen at Seabrook." *Id.* But, it is apparent that the Board used the other SAMA analyses to show that a probability-weighted SAMA will not always reject all mitigation measures. The Board did not use this information to show that Seabrook itself is

CONCLUSION

For the reasons discussed above, FOTC/NEC's Motion for Reconsideration does not meet the high standard for reconsideration in 10 C.F.R. § 2.323(e) and thus should be denied.

Respectfully submitted,  
**Signed (electronically) by**

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Dated at Rockville, MD  
This 7th day of March, 2011

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similar to other plants. Consequently, this feature of the Board's opinion does not meet the high standard for reconsideration in 10 C.F.R. § 2.323(e). Likewise, FOTC/NEC's discussion of the "rule of reason" does not state how the Board erred, let alone how that error might meet the standard in § 2.323(e).

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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NextEra Energy, LLC ) Docket Nos. 50-443  
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CERTIFICATE OF SERVICE

I hereby certify that copies of: NRC STAFF'S RESPONSE TO FRIENDS OF THE COAST AND NEW ENGLAND COALITION, INC.'S MOTION FOR RECONSIDERATION OF LBP-11-02, dated March 7, 2011, have been served upon the following by the Electronic Information Exchange, this 7th day of March, 2011:

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