

MARCH 7, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

_____)	
In the Matter of)	
)	
NEXTERA ENERGY SEABROOK (LLC))	
[Also Known As FLORIDA POWER & LIGHT])	
)	
SEABROOK NUCLEAR POWER PLANT)	DOCKET NO. 50-443-LR
)	
Regarding the Renewal of Facility Operating License)	ASLBP No. 10-906-02-LR
No-NFP-86 for a 20-Year Period)	
_____)	

**PETITIONERS' BEYOND NUCLEAR, SEACOAST ANTI-POLLUTION LEAGUE AND
NEW HAMPSHIRE SIERRA CLUB**

REPLY IN OPPOSITION TO NEXTERA SEABROOK, LLC'S APPEAL OF LBP-11-02

On February 25, 2011, NextEra LLC filed a Notice of Appeal of Atomic Safety and Licensing Board (ASLB or Licensing Board) Memorandum and Order (LB-11-02) dated February 15, 2011, which admitted for litigation the Petitioner's Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club, here in after referred to as the "Petitioners" and the "Beyond Nuclear contention" in the above captioned proceeding.

Pursuant to 10 C.F.R. § 2.311(3)(b) and §2.341(b)(3), the Petitioners respectfully reply in opposition to the NextEra LLC appeal and request that the Commission dismiss the appeal of the Licensing Board decision to admit the Petitioners and the Beyond Nuclear contention.

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REPLY IN OPPOSITION TO NEXTERA SEABROOK, LLC'S APPEAL OF LBP-11-02

INTRODUCTION

Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club, (collectively, "the Petitioners") hereby oppose the NextEra Seabrook LLC appeal of Atomic Safety and Licensing Board Memorandum and Order of February 15, 2011 (LB-11-02) granting the Petitioners a hearing on the single contention that the license renewal application is significantly deficient in the Environmental Review of the renewal energy alternative with specific focus on wind energy.

The Petitioners have diligently researched and expertly documented that wind energy is a feasible and commercially viable alternative that should have been more thoroughly

evaluated in the NextEra Seabrook Environmental Report so that the US Nuclear Regulatory Commission (NRC) staff can prepare an meaningful and accurate Environmental Impact State for the requested relicensing action in 2030 to 2050 to satisfy its obligations under the National Environmental Policy Act (NEPA).

The Petitioners further note that NRC staff has not raised an objection to LB-11-02 and did not appealed the decision. Therefore, NextEra stands alone in its appeal of the admission of the Beyond Nuclear contention.

On the most part, NextEra merely repeats the arguments to the Commission that were rejected by the Licensing Board.

The Petitioners have provided significant expert opinion and documentation to show that wind power is considered feasible and commercially viable for the requested federal licensing action period of 2030 to 2050. The Licensing Board has determined that the Petitioners have met the minimal requirements for admission of their contention.

NextEra argues that the Licensing Board decision has erred or abused its discretion in arriving at its decision on several points in LB-11-02.

The Petitioners object to the NextEra appeal and urge that the Commission should reject NextEra's appeal and uphold the Licensing Board decision.

BACKGROUND

This proceeding involves NextEra's application for a renewed operating license for Seabrook Station, Unit 1 ("Application") as submitted May 25, 2010. The NRC published notice of an opportunity for hearing in the Federal Register.¹ By separate orders dated

¹ "Notice of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. NPF-86 for an Additional 20-Year Period; Nextera Energy Seabrook, LLC; Seabrook Station, Unit 1," 75 Fed. Reg. 42,462, July 21, 2010

September 17, 2010 and September 20, 2010, the Secretary of the Commission granted Beyond Nuclear a 30-day extension of time to file intervention petitions, until October 20, 2010. The Petitioners timely filed its Petition on October 20, 2010. On November 15, 2010, NextEra and the Staff filed answers opposing the Petition.² On November 22, 2010, the Petitioners replied to the NextEra and Staff answers.² On February 15, 2011, the Board issued its ruling on the Petition. See LB-11-02. The Memorandum and Order granted the Petitioners standing and admitted same organizations to participate in the proceeding on its sole contention for hearing. On February 25, 2011, NextEra Seabrook filed “NextEra Energy Seabrook, LLC’s Notice of Appeal of LBP-11-02 as to Beyond Nuclear, The Seacoast Anti-Pollution League, and Sierra Club of New Hampshire.”³

COUNTER STATEMENT OF THE ISSUES

This case basically concerns the following three (3) issues:

- 1) Have the Petitioners met the minimum standard for admission of a contention that the wind energy should have been included in the NEPA required discussion and evaluation of the alternative activity within the Region of Interest as was formally initiated by state and federal government prior to NextEra Seabrook’s submittal?
- 2) Does the decision by NextEra Seabrook’s to submit its Application for relicensing the Seabrook nuclear power station approximately twenty (20) years in advance of the current license expiration date (2030) carry the responsibility to provide the agency with

² See “NextEra Energy Seabrook Answer Opposing the Petition to Intervene and Request for Hearing of Beyond Nuclear, Seacoast Anti-Pollution League, and New Hampshire Sierra Club,” Nov. 15, 2010, (“NextEra Answer”); and “NRC Staff’s Answer to Petitions to Intervene and Requests for Hearing Filed By (1) Friends of the Coast and New England Coalition and (2) Beyond Nuclear, Seacoast Anti-Pollution League and New Hampshire Sierra Club” (Nov. 15, 2010) (“Staff Answer”).

³ See “NextEra Energy Seabrook LLC’s Notice of Appeal of LBP-11-02 as to Beyond Nuclear, Seacoast Anti-Pollution League and Sierra Club of New Hampshire,” February 25, 2011.

a reasonably complete record for what can be expertly considered a feasible and commercially viable energy alternative as projected for the requested relicensing period of 2030 to 2050?

- 3) Is it reasonable for NextEra to truncate the Environmental Review to narrow the scope of the Environmental Impact Statement process by omission from disclosure, discussion and evaluation in its Application all available expert documentation on the academic achievements, research and development, technological advances, initiation of State task forces, Memorandums of Understanding between State and Federal authorities, Requests for Proposals, Leasing Agreements, alternative energy infrastructure and transmission development and commercial ventures relating to the aggressive deployment in the Region of Interest by 2030 for what is now expertly considered a feasible and commercially viable alternative energy for this proceeding?

LEGAL STANDARD

I. The Standard for Interlocutory Review is Deferential

The Commission must affirm the Licensing Board rulings on the admissibility of contentions if the appellant “points to no error of law or abuse of discretion.”

Dominion Nuclear Conn., Inc., CLI-04-36, 60 NRC 631, 637, (2004), quoting *Private Fuel Storage, LLC, (Independent Fuel Storage Installation)*, CLI-00-21, 52 NRC 261, 265 (2000).

This standard is analogous to that utilized by courts of appeal reviewing trial court rulings on motions and is highly deferential. See *Engbretsen v. Fairchild Aircraft Corp.*, 21F. 3rd 721, 728 (6th Cir. 1994) (“We will find an abuse of discretion only when [we have] ‘a definitive and firm conviction that the trial court committed a clear error of judgment.’”) quoting *Logan v. Dayton Hudson Corp.*, 865 F. 2nd 789, 790 (6th Cir. 1989).

The Commission avoids engaging in *de novo* factual inquiries when reviewing Board decisions, particularly where the Board proceeding was especially complex and involved numerous experts and voluminous exhibits and where the Board has devoted weeks or months to the controversy. In general, the Commission will defer to the Board's factual findings unless there is strong reason to believe, in the case at hand, that the Board has overlooked or misunderstood important evidence. *Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation)*, CLI-05-19, 62 NRC 403, 411 (2005).

Thus, the standard of review of the Atomic Safety and Licensing Board is highly deferential and requires appellants to either show how the Licensing Board misinterpreted the law or that the Licensing Board clearly abused its authority or committed a clear error of judgment.

The Petitioners assert that NextEra Seabrook has failed to demonstrate that the Licensing Board misinterpreted law, abused its authority, or committed a clear error of judgment.

II. The Basis Required is Minimal

At this preliminary stage, Petitioners do not have to submit admissible evidence to support their contention, rather they have to “provide a brief explanation of the basis for the contention,” 10 CFR 2.309(f)(1)(ii), and “a concise statement of the alleged facts or expert opinions which support the petitioners position.” 10 CFR 2.309(f)(1)(v).

This rule ensures that “*full adjudicatory hearings are triggered only by those able to offer minimal factual and legal foundation support of their contentions.*” *Duke Energy Corp. (Oconee Stations Units 1, 2 and 3)*, 49 NRC 328, 334 (1999) (*emphasis added*). The Commission has clarified that “*an intervener need not ... prove its case at the contention*

stage... The factual support necessary to show a genuine dispute need not be in affidavit or formal evidentiary form, or be the quality necessary to withstand a summary disposition motion.” In the Matter of Georgia Institute of Technology, 42 NRC 111(1995)

While the Commission has stated that it is “*unwilling to throw open its hearing doors to petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions,*” Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 8 (2002), it has indicated that where petitioners make a meritorious contentions supported by diligent research, information, expert opinion and documents, the requirement for an adequate basis is more than satisfied.

III. The Required Showing of Materiality is Minimal

The regulations require the Petitioners to “*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.*” 10 CFR 2.309(f)(1)(iv). In this case, the Commission may issue a license renewal if it is satisfied that its obligations under NEPA to thoroughly evaluate the alternatives less harmful to the requested federal action for 2030 to 2050 have been sufficiently addressed in the Applicant’s Environmental Review so as to adequately inform a reasonable complete of an Environmental Impact Statement prepared by the NRC staff. In making such a finding the Commission must conduct a full review of a number of issues, including the completeness of the record on the alternatives discussed and considered.

The requirement for showing of materiality is not intended to be overly burdensome, but rather all that is needed is “a minimal showing that material facts are in dispute, indicating that a further inquiry is appropriate.” Georgia Institute of Technology, 42 NRC 111 (1995), *citing*

Gulf States Utilities Company, (River Bend Station Unit 1), 40 NRC 43, 51(1994): Final Rule, Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process. 54 Fed. Reg. 33,171 (Aug. 11, 1989).

The Commission has further stated that the decision to admit a contention “does not intimate any view on the merits of a particular issue.” *Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), 56 NRC 1(2002)*. Thus, so long as the Licensing Board saw a material issue, it should admit the contention, without further judgment at this stage of the proceeding on the matter.

The NRC staff did not raise an objection to the Licensing Board determination that the contention meets this minimal standard.

Therefore, the Petitioners argue that the standard used by the Licensing Board regarding materiality was entirely consistent with the Commission’s decision on this issue.

IV. The Scope of License Renewal Includes a NEPA Evaluation of Alternatives Less Harmful than the Requested Relicensing Action for 2030-2050

The National Environmental Policy Act seeks to drive a thorough and sufficiently complete disclosure of the reasonable and feasible alternatives within the federal licensing process. The Petitioners have pointed to NRC regulations at 10 C.F.R. § 51.92(a)(2), Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions, Subpart A, National Environmental Policy Act---Regulations Implementing Section 102(2), Final Environmental Impact Statements---General Requirements, Supplement to the Final Environmental Impact Statement” (a) If the proposed action has not been taken, the NRC

staff will prepare a supplement to a final environmental impact statement for which a notice of availability has been published in the Federal Register as provided in § 51.118, if: (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

A “*hard look*” for a superior alternative is a condition precedent to a licensing determination that an applicant’s proposal is acceptable under NEPA. *Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 513 (1978)*.

As the Licensing Board has recognized in LB-11-02, the Commission must now take pains to avoid the “losing proposition” of “blindly adopting the applicant's goals”, because it does not allow for the full consideration of alternatives required by NEPA. *Simmons v. Corps of Engineers, 20 F.3d 664, 669 (7 Cir. 1997)*. NEPA requires than agency to “exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project” and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals.” *Id.*

V. The Commission Must Follow the Administrative Procedures Act, the Atomic Energy Act and Must Provide Due Process

NextEra Seabrook now argues that the Commission should overrule and reverse the Licensing Board determination where they affirm that “*we agree that, taken together, they [the Petitioners’ 20 exhibits] provide the ‘minimal’ factual support for admitting their contention, and that the contention otherwise satisfies each of the requirements of 10 CFR § 2.309(f)(1). The arguments against advanced by the Applicant and by the NRC staff are not persuasive.*” LBP-11-02 at 22-23.

Petitioners reply that NextEra’s argument is incorrect because all that is needed is to meet the minimal showing of basis. Furthermore, the DC Circuit Court has confirmed that “Section 189(a) [of the Atomic Energy Act, 42 U.S.C. 2239(a),] prohibits the NRC from preventing all parties from ever raising in a hearing a specific issue it agrees is material to [a licensing]... decision.” Union of Concerned Scientists v. NRC, 920 F. 2d50, 53 (DC Cir. 1990). The First Circuit has also confirmed that the new Part 2 rules “may approach the outer limits of what is permissible under the APA.” Citizens Awareness Network Inc. v. NRC, 391F3d 338, 355 (1st Cir., 2004).

The Commission must take care to interpret the requirements of the Part 2 rules in accordance with AEA and APA. To adopt NextEra’s expansive interpretation of what it asserts is required of the Petitioners at the contention stage would go beyond the boundaries imposed on the Commission by those statutes and would deprive the Petitioners of their due process.

DISCUSSION

It is determined that, “*The Commission will reverse a licensing board’s determination on discretionary intervention only if the Board has abused its discretion. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 34 (1998) (“PFS”); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1149, reconsid’n denied, ALAB-402, 5 NRC 1182 (1977). Under that review standard, the appellant faces a substantial burden. ‘It is not enough for [the appellant] to establish simply that the Licensing Board might justifiably have’ reached the same conclusion as the appellant regarding the petition for discretionary intervention. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532, aff’d, CLI-91-13, 34 NRC 185 (1991), quoting Washington Public Power Supply System (WPPSS*

Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1171 (1983). Rather, the appellant must persuade us "that a reasonable mind could reach no other result." WPPSS, ALAB-747, 18 NRC at 1171. Rules of Practice: Interlocutory Appeals; Discretionary Intervention, In the Matter of Andrew Siemaszko, CLI-06-16 (2006).

The NRC staff has not raised an issue of abuse of discretion by the Licensing Board's or filed an objection to the Licensing Board Order and is ready to proceed on the admitted NEPA contention.

Further, NextEra Seabrook does not raise an issue of law with respect to the legal standards employed by the Licensing Board. NextEra must therefore show that the Board abused its discretion authority or made a clear error of judgment in arriving at its decision that the Petitioners have met the minimum requirements for admission of their contention.

In fact, most of the arguments made by NextEra to the Commission are the same arguments that were made to the Board and rejected. The Commission must now determine whether these arguments are in fact a clear abuse or error of discretion by the Licensing Board's or if the arguments are more of an issue of NextEra's entrenchment to oppose an opening of the issue to further discussion on significant omissions of material fact missing from its Environmental Review on the alternative wind power. NextEra clearly seems to have missed the Licensing Board's reiterations that by admitting the contention, the Applicant is provided the opportunity to further make its argument at the appropriate stage of the proceeding.

The Statement of Facts

I. The Contention has an Adequate Basis

The Petitioners have provided twenty (20) exhibits including expert documentation and expert opinion to demonstrate that alternative wind power is feasibly an environmentally superior baseload supply of electricity through transmission of interconnected wind farms for the region of interest (Maine, New Hampshire, Massachusetts and Rhode Island) and beyond for the requested relicensing action in 2030 which NextEra Seabrook omitted from discussion and evaluation in the Seabrook License Extension Environmental Report. Instead, the NextEra Environmental Report chose to rely heavily upon the NRC Generic Environmental Impact Statement (GEIS) from 1996 as their basis to conclude that the wind energy technology is “an inappropriate choice for baseload power” *NRC GEIS 1996*. The Licensing Board recognized that the GEIS is not binding and that the GEIS conclusion concerning the practicality of wind power has not been revised for 15 years. *LBP-11-02 at 20*.

Indeed, there is an argument that the 1996 Generic EIS parameters much be deemed legally void under NEPA’s requirement that “every significant aspect of environmental impact” be considered. *Baltimore Gas & Electric Co. v. Natural Res. Def. Counsel, Inc.*, 462 U.S. 87, 97 (1983) (*NEPA “places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action”*).

The Licensing Board ruled that “*taken together, they [Petitioners] provide the required ‘minimal’ factual support for admitting their contention, and that the contention otherwise*

satisfies each of the requirements of 10 C.F.R. § 2.309(f)(1). The arguments against admissibility advanced by the Applicant and by the NRC Staff are not persuasive.”

LB-11-02 at 22.

II. The Contention Has Raised Issues of Material Fact

The Licensing Board correctly determined that in challenging the admissibility of the Petitioners’ contention, NextEra and the NRC Staff mixed together the concepts of the merits of the contention with the adequacy of the Petitioners pleading. *LB-11-02 at 23.* Where NextEra has alleged that the Petitioners’ contention for demonstrating the baseload wind energy alternate is not feasible or reasonable and thus can be eliminated from any further consideration by the Applicant’s Environmental Review, the Licensing Board however determined that *“an interconnected system of offshore wind farms constitutes a ‘reasonable’ alternative is the very issue on which the Beyond Nuclear petitioners seek a hearing.” LB-11-02 at 23.* Citing from a decision in Progress Energy Levy County nuclear power plant, the Licensing Board further establishes, *“When a contention alleges the need for further study of an alternative, from an environmental perspective, ‘such reasonableness determinations are the merits, and should only be decided after the contention is admitted.’”⁴* The Licensing Board ruled that *“the Applicant’s and the Staff’s arguments improperly address the merits of the Beyond Nuclear petitioners’ contention, rather than whether petitioners have provided “a*

⁴ Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 86 (2009) (emphasis in original), rev’d in part on other grounds, CLI-10-02, 71 NRC __, __ (slip op. at 1-2) (Jan. 7, 2010).

*minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate.”*⁵

Where NextEra has argued that while the transmission of baseload wind power through interconnected wind farms is “*theoretically possible*” it cannot be reasonably realized and will be too expensive the Licensing Board determined “*Such disputed facts are not appropriately resolved, however, in connection with the Board’s determination of whether petitioners have made the necessary showing to warrant admission of a contention.*” LB-11-02 at 24.

The fact that NextEra efforts to adjudicate the key issues in its dissent merely serves to illustrate that the material facts are in dispute and adjudication of these facts is required.

The Petitioners have therefore demonstrated that there is a genuine dispute requiring further inquiry is necessary.

III. The Contention is within the Scope of the License Renewal Proceeding

The Petitioners have submitted a NEPA contention that is within the scope of the license renewal process. Contrary to NextEra and NRC Staff arguments that the contention is an impermissible attack on NRC regulations under 10 CFR 54.17(c), the Licensing Board determined that “*the contention is not a prohibited challenge to a Commission regulation. Petitioners apparently know how to challenge a Commission regulation, given that they have done so in a separate proceeding that questions whether the NRC should accept license renewal applications as early as 20 years before expiration of the existing license.*” LBP 11-02

⁵ Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,171 (quoting Connecticut Bankers Ass’n v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)).

at 26. The Licensing Board correctly addresses Petitioners' Petition for Rulemaking PRM 54-06 as posted in the Federal Register on September 27, 2010.⁶

IV. The Procedural Decisions by the Licensing Board Were within its Discretion

The Petitioners assert that they have met the minimal requirements for admission of their contention. The Petitioners further assert that the procedural decisions in this captioned matter were made within the Licensing Board's discretion. There is no "clear abuse of discretion" by Licensing Board Order LB-11-02.

PETITIONERS' REPLY TO NEXTERA ARGUMENTS

NextEra summarizes its Argument with "*the Beyond Nuclear contention is inadmissible because it calls for speculation about remote possibilities many years into the future.*" Appeal at 8. NextEra continues its argument by alleging the Licensing Board erred in ruling on the Beyond Nuclear petition's exhibits as follows:

A. NextEra Argues that the Contention Requires NextEra to Consider a Remote and Speculative Alternative

NextEra makes several arguments beginning with Carolina Environmental Study Group "*presupposed future developments' which are both 'speculative and remote.'* Where "*oil shale, geothermal energy, and solar energy, should have been considered.*" Appeal at 9.

Undeniably, the identification of "*reasonable alternatives*" involves degrees of rigor. "*There is a reason for concluding that NEPA was not meant to require detailed discussion of*

⁶ Earth Day Commitment/Friends of the Coast, Beyond Nuclear, Seacoast Anti-Pollution League, C-10 Research and Education Foundation, Pilgrim Watch, and New England Coalition; Notice of Receipt of Petitioner for Rulemaking [Docket No. PRM-54-6, NRC-2010-0291], [Federal Register: September 27, 2010, (Vol. 75, Number 186)]Proposed Rules][Pages59158-59160]

the environmental effects of ‘alternatives’ put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies---making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.” Natural Resources Defense Council v. Morton 148 U.S. App. D.C. 5, 15-16, 458 F2d. 827, 837-838 (1972). But this means that if an alternative does not involve “*protracted debate and litigation*” and is “*meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed,*” it is logically a “*reasonable alternative.*”

Offshore wind power, according to the significant number of exhibits provided by the Petitioners as is aggressively advancing in the Region of Interest as elsewhere globally is well past debate and is becoming reality as a matter of time. The Petitioners argue that there is in fact a high probability of construction of significant quantities of baseload offshore wind scheduled for completion by and before 2030 the commencement of Seabrook’s license renewal period that the Applicant has not addressed in the Environmental Report. The probability that offshore wind is highly likely to be deployed in baseload quantities before the onset of Seabrook’s renewal raises a significant factual and ultimately, legal distinction from Carolina Environmental Study Group v. U.S., 510 F.2d 796 (D.C. Cir. 1975). There, the Study Group argued “that because the nuclear plant is to operate for several decades, alternative power sources which may be developed such as oil shale, geothermal energy, and solar energy, should have been considered.” That is, the Study Group was claiming that the alternative energy sources might be developed *during the operational life of the plant they were challenging, not years before that operational life ever began.* It was the potential for

development of alternatives only after completion of construction of a new power plant that was a non-starter which prompted the Court of Appeals to deem those prospects “both speculative and remote.” The *Carolina Environmental Study Group* court doubted that “Congress intended an agency to devote itself to extended discussion of the environmental impact of alternatives so remote from reality as to depend on, say, the repeal of the antitrust laws.” *Id.* 510 F.2d at 8009 (citing *Natural Resources Defense Counsel v. Morton supra*).

It bears repeating that here, the Petitioners have proposed the alternative of interconnected baseload offshore wind farms which would be in place and operating at megawatt levels providing Gigawatts of electricity to exceed Seabrook capacity before the 2030 license renewal period, not during the 20-year renewal span. Wind power technology is non-speculative, but more than that, it is “meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.” *Natural Resources Defense Council v. Morton, supra*, 148 U.S. App. D.C. 15-16, 458, F.2d 837-838.

NextEra further argues that “*The reasonableness of alternatives is determined based upon information available ‘at the time of drafting the EIS.’*” *Roosevelt Campobello*, 684 F.2d at 104. *Appeal at 10.*

NextEra cites *Roosevelt Campobello Int’l Park Comm’ v. EPA*, 684 F.2d 1041 (1st Cir. 1982) as standing for the proposition that “*([t]he reasonableness of alternatives is based upon information available ‘at the time of drafting the EIS.’*” *Id.* At 1047. NextEra has engaged in some very unfortunate editing in order to fix the precedent around the facts. The full quotation from *Roosevelt Campobello* says as follows, including the bold-faced crucial modifying clause inexplicably missing from NextEra’s recitation:

“EPA’s duty under NEPA is to study all alternatives that ‘appear reasonable and appropriate for study at the time of drafting the EIS, as well as ‘significant alternatives’ suggested by other agencies or the public during the comment period.” Id. at 1047.

Far from tying the maturity of alternative generating sources to the time of EIS preparation, as NextEra evidently wishes, this sentence merely says that the range of alternatives in the EIS is not limited solely to what is considered to be “appropriate for study” by the agency, but obligatorily embraces significant alternatives **suggested by...the public...** “At the time” refers only to the stage where the draft EIS is being written. *Roosevelt Campobello*, therefore, provides no safe harbor to NextEra.

In all of these arguments, NextEra further fails to address on appeal, as in the oral argument before the Licensing Board, as in their Answer to the Petitioners as to why their Environmental Review ignored and omitted the exhibited documentation that was publicly available at the writing and submission of the Seabrook License Renewal Application in 2010.

Further, NextEra refashions an erroneous argument several times in its appeal that the Beyond Nuclear contention is an impermissible attack on NRC rules.

They argue, *“the claim that NextEra is under a special obligation to speculate about future wind power developments in 2030 because of the timing of its LRA, is without any legal support and amounts to an impermissible challenge to 10 C.F.R. § 54.17(c),” Appeal at 10.*

NextEra argues, *“The Board took Beyond Nuclear at its word that it did not intend to challenge section 54.17(c). LBP-11-02 (slip op. at 26).” Appeal at 10.*

And again, NextEra argues, *“Thus, the contention is a challenge to the rule and is beyond the scope of this proceeding. See 10 C.F.R. § 2.335(a); see also Tennessee Valley*

Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-3, 69 NRC 68, 75 n.37 (2009). Appeal at 10.

As the Licensing Board correctly identifies, the Petitioners appropriately seek to redress their concerns with 10 C.F.R. § 54.17(c) through the Petition for Rulemaking process.

Petitioners' Exhibit #2, PRM-54-06.

Given that the Commission has docketed PRM-54-06 and is now reviewing publicly submitted comments, including NextEra's comments on same, it is surprising to the Petitioners that NextEra now belabors this non-starter to the Commission. The fact that the Licensing Board found this argument to be non-persuasive is not an abuse or clear error of its discretion and provides no basis for the Commission to reverse the Licensing Board's determination and Order.

NextEra further makes several arguments in appeal to the Commission with regard to errors in the discretion of the Licensing Board decision to admit the contention on what the Petitioners have asserted to be significant omissions and deficiencies in the Environmental Report on the feasibility and commercial viability of baseload wind for the requested relicensing action in 2030, combined as follows:

B. Beyond Nuclear Presented No Evidence that Baseload Wind Generation is Likely to Exist By 2015

C. The Board Erred in Dismissing NextEra's Challenges to the Reasonableness of Baseload Wind Generation as Improper Merits Arguments

F. The Board Erred In Finding a Factual Dispute as to Whether Baseload Wind Generation is a Reasonable Alternative

NextEra argues "*a review of the support cited by the Board shows that the Board's ruling is incorrect – Beyond Nuclear has provided no evidence to show that baseload power generated by offshore wind is likely to exist.*" *Appeal at 11.*

NextEra makes much ado for delivering “feasible” baseload wind power by 2015 as a reason for denying admission of the contention on the whole.

Beyond Nuclear has made no claim to be the expert on the estimations of when the first feasible baseload wind power can be demonstrated in the United States. Moreover, such expert testimony is not required at the admission stage for a contention in this proceeding. The Petitioners’ response in oral argument by reference to their Exhibit #17 was for the scheduled delivery demonstration in the 2014 to 2016 timeframe of 25 megawatts of offshore wind power in the Gulf of Maine as a “steppingstone” to the scheduled five (5) Gigawatts of electric power from the Gulf of Maine by 2030. The Petitioners have asserted by expert exhibits that this is most certainly considered feasible and commercially viable through a series of interconnected offshore wind farms within the Region of Interest including Maine, New Hampshire, Massachusetts, Rhode Island and along the Northern Atlantic Coast including the six additional East Coast states as identified by Petitioners’ Exhibits #13 Department of Interior’s Memorandum of Understanding with ten East Coast governors to establish the Atlantic Offshore Wind Energy Consortium, and Petitioners’ Exhibit #20, “Assessment of Offshore Wind Energy Resources for the United States,” NREL, June 2010, Table 1, “Offshore wind resource area and potential by wind speed interval and state within 50 nm of shore,” and Petitioners’ Exhibit #4, “Supplying Baseload Power and Reducing Transmission Requirements by Interconnected Wind Farms,” Journal of Applied Meteorology and Climatology, Manuscript, Stanford University, February 2007. The Petitioners and the Licensing Board have stated that the licensing matter before the US Nuclear Regulatory Commission pertinently focuses the relevant time of the NextEra requested relicensing action for 2030 as there is no relicensing action requested for Seabrook by 2015. In fact, as the Licensing Board has noted “For

purposes of deciding the admissibility of the proffered contention, the Board need not decide the exact date by which an integrated system of offshore wind farms would have to be found 'likely to exist.' That issue will doubtlessly turn on disputed fact questions that cannot appropriately be resolved on the pleadings." LBP-11-02 at 25 Footnote 134.

Nonetheless, the Petitioners have provided expert documentation on the feasibility of baseload wind power. As the Licensing Board has so ruled "*taken together*" the Petitioners have provided enough such expert documentation to meet the minimum requirement for admission of their contention that baseload wind is currently expertly considered feasible and commercially viable for the requested relicensing action in 2030 to 2050. The Petitioners reassert that it is the NextEra application that has omitted and now attempts to delete from the required NEPA discussion all reference to expert documentation to include Memorandums of Understanding for aggressive offshore wind development between the states of Maine, New Hampshire, Massachusetts, Rhode Island (all within the Region of Interest) and the Department of Energy and Department of Interior who have similar MOUs along the Mid Atlantic Coast. Under NEPA, these and the additional expert documentation are germane to the requested licensing action as the Petitioners have argued and supported. This is not an abuse or clear error of discretion on the part of the Licensing Board and provides no basis for reversing the Licensing Board's determination. The Licensing Board ruling is correct that the Petitioners have met the minimum standard for admission of their contention and the NextEra Appeal should be denied.

NextEra argues that *“The Board also erred in finding that Beyond Nuclear presented sufficient information to support its contention that the generation of baseload wind generation is a reasonable alternative to license renewal and in rejecting NextEra’s and the NRC Staff’s challenges on that topic as improper arguments on the merits. LBP-11-02 (slip op. at 20-24).” Appeal at 15.* NextEra further argues that *“The Board erred in finding a factual dispute as to whether baseload wind generation is a reasonable alternative.” Appeal at 20.*

NextEra again mischaracterizes the Licensing Board determination that the Petitioners have met the “minimum” requirement for admission of the contention for what NextEra has deemed to be “sufficient information.” As is stated at the discretion of the Licensing Board, *“To be entitled to a hearing, petitioners need not demonstrate that they will necessarily prevail, but only that there is at least some minimal factual support for their position.” LBP-11-02 at 23.*

In this particular instance, NextEra continues to take the requested licensing action out of context for 2030 to 2050 and replace with its own interpretation of reasonableness for *“at this time,” “in the near term,”* and *“does not exist today,”* as if the Seabrook’s operating license is to expire *“at this time,” “in the near term,”* or tomorrow. This is simply not so. In its Order, the Licensing Board has merely recognized as have the Petitioners, that in this case, the requested relicensing action occurs approximately nineteen (19) years from now. As the Licensing Board has determined, as so should the Commission determine, *“simply that decisions have consequences. They [Petitioners] contend that, if an applicant chooses to seek renewal as early as 20 years prior to expiration — as it clearly is entitled to do under the Commission’s existing rules — then perhaps its ability to criticize as ‘speculative’ a petitioner’s claims about the necessarily distant extended operational period is somewhat attenuated.” LBP-11-02 at 26.* This is not an abuse or clear error of discretion on the part of the Licensing

Board and provides no basis for the Commission to reverse the Licensing Board's determination and Order.

D. The Board Erred By Not Specifically Rejecting Beyond Nuclear's Energy Storage Claim

NextEra argues "*Beyond Nuclear briefly discusses the generation of baseload power by combining wind generation with compressed air storage and references but does not challenge the conclusion in NextEra's ER that such a system would be too costly to serve as a reasonable alternative source of baseload power.*" Appeal at 18. NextEra basically contends that the Licensing Board erred by not specifically rejecting the Petitioners inclusion of Exhibit #3 National Renewable Energy Laboratory, United States Department of Energy, "Creating Baseload Wind Power Systems," Background and Overview, October 3, 2006 which expertly states the case for the feasibility of baseload wind energy through compressed air storage and long distance transmission to address renewable energy intermittency. In this instance, NextEra attempts to project and speculate that even by 2030, the storage concept for making baseload wind will not be viable or commercially affordable. Again, the Petitioners assert that it is the Licensing Board's discretion to determine the materiality of the Petitioners exhibits without passing further judgment on them at the contention admission stage of the proceeding. This is not an abuse or clear error of discretion on the part of the Licensing Board and provides no basis for the Commission to reverse the Licensing Board's determination and Order.

E. The Board Erred By Reformulating the Contention and Relying Upon Information Not Included in Beyond Nuclear's Petition

NextEra argues that *“In order to admit this Contention, the Board impermissibly reformulated it from one alleging that NextEra must ‘reasonably foresee where [baseload wind generation] will be with 20 more years’ private investment, federal incentive programs [and] technological advancement,’ to one alleging that baseload wind generation ‘exists or is likely to exist’ in the near term. Compare Pet. at 30 with LBP-11-02 (slip op. at 25).” Appeal at 19 citing Andrew Siemaszko, CLI-06-16, 63 NRC 708, 720-21 (2006).*

It appears to the Petitioners that this particular NextEra argument by reaching deep into the text of the petition for comparison with language in the Order seeks to trump the Board’s determination that *“the relevant time frame is broader than the present time.”* [LBP-11-02 at 25]. This is but yet another attempt to insert NextEra’s interpretation to fix the time for evaluating the feasibility and commercial viability of the baseload wind to *“at this time,” “in the near term,”* and *“does not exist today.”* Again, NextEra’s misinterpretation ignores and seeks to strike all discussion of the proffered exhibits for assisting in establishing a sound record for what the Petitioners assert to be the relevant time for the requested relicensing action by 2030. Again in this case, NextEra has not demonstrated an abuse or clear error of discretion on the part of the Licensing Board and provides no basis for the Commission to reverse the Licensing Board’s determination and Order.

G. The Board Erred By Not Considering NextEra’s Argument That Beyond Nuclear Failed to Show that its Contention Raises a Material Issue

“Finally, the Board erred by not addressing NextEra’s argument that Beyond Nuclear failed to show that its contention is material because it failed to provide any evidence to support a conclusion that a massive interconnected network of offshore wind farms with undersea transmission lines spanning hundreds of miles would be

environmentally preferable to license renewal.”

The Licensing Board has determined that the Petitioners met the minimal requirements for admission of their contention alleging that offshore wind power is expertly considered commercially viable, technically feasible and made baseload through interconnected high voltage direct current transmission systems. The fact that NextEra efforts to adjudicate the key issues in its dissent merely serves to illustrate that the material facts are in dispute and adjudication of these facts is required.

CONCLUSION

For the foregoing reasons, including because the Licensing Board found that: the requirement for a sufficiently complete evaluation of the feasible alternatives in the Environmental Report is within the scope of the license renewal proceeding; and that the Petitioners have shown the minimal basis for the admission of a contention; and the Appellate has failed to allege any error of law or abuse of discretion, the Commission should deny the Appeal submitted by NextEra Seabrook, LLC.

/Signed by Paul Gunter & submitted by Digital Certificate /

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March 7, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**
Before the Commission

In the Matter of)	
)	
NEXTERA ENERGY SEABROOK (LLC))	
[Also Known As FLORIDA POWER & LIGHT])	
)	
SEABROOK NUCLEAR POWER PLANT)	DOCKET NO. 50-443-LR
)	
Regarding the Renewal of Facility Operating License)	ASLBP No. 0-906-02-LR
No-NFP-86 for a 20-Year Period)	
)	

CERTIFICATE OF SERVICE

The Petitioners certify that a copy of the “PETITIONERS’ BEYOND NUCLEAR, SEACOAST ANTI-POLLUTION LEAGUE AND NEW HAMPSHIRE SIERRA CLUB REPLY IN OPPOSITION TO NEXTERA SEABROOK, LLC’S APPEAL OF LBP-11-02” has been provided to the Electronic Information Exchange by Digital Certificate for service to the listed individuals and all others on the service list in this proceeding on this 7th day of March, 2011.

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March 7, 2011