LBP-11-15

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 June 29, 2011

MEMORANDUM AND ORDER
(Denying CASE's Motion to Admit Newly Proffered Contentions)

INTRODUCTION

Pending before this Licensing Board is a motion from an intervenor in this proceeding, Citizens Allied for Safe Energy, Inc. (CASE), seeking to admit three newly proffered contentions that are based, in part, on the recent events at the Fukushima Daiichi Nuclear Power Plant on the east coast of Honshu, Japan. For the reasons discussed below, we deny CASE's motion.[1]

At the outset, we note that the Commission has established a Task Force to conduct a systematic review of the Fukushima event. See NRC Actions Following the Events in Japan, COMGBJ11-0002 (Mar. 21, 2011). The Task Force is charged with performing near-term and long-term reviews that, among other things, "should evaluate all technical and policy issues related to the event to identify additional research, generic issues, changes to the reactor

[1] CASE characterizes its motion as a request to "amend" Contentions 1, 2, and 5. See infra note 7. In this Board's decision issued in February 2011, we rejected Contentions 1, 2, and 5 for failing to satisfy the 10 C.F.R. Part 2 admissibility requirements. See infra note 6 and accompanying text. Those contentions are thus no longer pending in this proceeding, and they are not susceptible to amendment by this Board. Therefore, CASE's motion, properly characterized, is one that seeks to admit newly proffered Contentions 1, 2, and 5, and we will so treat it.

oversight process, rulemakings, and adjustments to the regulatory framework that should be conducted by NRC." Id. at 2. The NRC Staff "anticipate[s] that ongoing review and evaluation of the events in Japan by the NRC Staff and the Task Force will identify actions to further enhance the safety of U.S. nuclear facilities based on the lessons from the Japanese event."[2] If the Task Force's recommendations result in changes to regulations that are relevant to Florida Power & Light Company's (FPL's) Combined License (COL) application, FPL's compliance with those regulations would become part of the NRC Staff's technical review. See id. Additionally, such changes, or any other new and material information that emerges from the Fukushima event and its aftermath, might give rise to an opportunity to proffer new contentions in this proceeding.

At this juncture and on these pleadings, however, CASE's attempt to admit new contentions based on the events at Fukushima is unavailing.

I. BACKGROUND

This proceeding concerns FPL's application for a COL for two proposed nuclear power reactors, to be known as Turkey Point Units 6 and 7, that are planned to be located near Homestead, Florida.[3] In August 2010, CASE filed a petition to intervene challenging FPL's COL application.[4] On February 28, 2011, this Board granted CASE's petition and admitted portions of CASE's Contentions 6 and 7.[5] We declined, however, to admit the other contentions

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[2] NRC Staff Answer to "[CASE] Motion to Amend Contentions 1, 2, and 5 of the CASE Revised Petition to Intervene" and "Amended Contentions 1, 2 and 5" (May 13, 2011) at 18 n.9 [hereinafter NRC Staff Response].

[3] See Florida Power & Light Company; Acceptance for Docketing of an Application for Combined License for Turkey Point Units 6 & 7 Nuclear Power Plants, 74 Fed. Reg. 51,621 (Oct. 7, 2009).

[4] See CASE [Revised] Petition to Intervene and Request for a Hearing (dated Aug. 17, 2010) (filed Aug. 20, 2010).

[5] See LBP-11-06, 73 NRC __, __ (slip op. at 119) (Feb. 28, 2011).

proffered by CASE. In particular, and as relevant here, we declined to admit Contentions 1 and 2 (which involved challenges concerning emergency planning) and Contention 5 (which involved a challenge concerning climate change-related sea-level rise).[6]

On April 18, 2011, CASE filed a motion,[7] accompanied by a petition,[8] asking this Board to admit previously rejected Contentions 1, 2, and 5, and arguing that these contentions, as supplemented by new information relating to the Fukushima event, are now admissible.

On May 9 and 13, 2011, FPL[9] and the NRC Staff,[10] respectively, filed responses opposing CASE's motion and petition, arguing that the newly proffered contentions should be rejected because they are untimely, fail to satisfy admissibility standards, or both.

On May 16, 2011, CASE filed a reply to those responses, thus rendering CASE's motion ripe for resolution by this Board.[11]

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) *or* the standards in 10 C.F.R. § 2.309(c)(1) for newly proffered nontimely contentions; *and* (2) the contention admissibility standards in 10 C.F.R. § 2.309(f)(1). We discuss these regulatory standards below.

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[6] See id. at __-__, __-__ (slip op. at 85-93, 96-99).

[7] See Motion to Amend Contentions 1, 2, and 5 of the CASE Revised Petition to Intervene (August 20, 2010) (Apr. 18, 2011) [hereinafter CASE Motion].

[8] See Amended Contentions 1, 2 and 5 (Apr. 18, 2011) [hereinafter CASE Petition].

[9] See Florida Power & Light's Response Opposing Admission of CASE's Late Filed Contentions (May 9, 2011) [hereinafter FPL Response].

[10] See NRC Staff Response.

[11] See CASE's Reply to [FPL's] and NRC Staff's Answer to CASE's Motion to Amend Contentions 1, 2, and 5 of the CASE Revised Petition to Intervene (August 20, 2010) (May 16, 2011) [hereinafter CASE Reply].

A. The Standards in 10 C.F.R. § 2.309(f)(2) and (c)(1) For Consideration of, Respectively, Timely and Nontimely Contentions

On March 30, 2011, this Board issued an Initial Scheduling Order instructing the parties, inter alia, that if they wish to proffer a new or amended contention, their pleadings must state whether they seek "leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2), or . . . leave to file a nontimely new or amended contention under 10 C.F.R. § 2.309(c)(1)."[12] We also instructed that if a party "is uncertain [whether a newly proffered contention is timely or nontimely], it may file pursuant to both [regulatory sections], and the [pleading] shall cover the three criteria of section 2.309(f)(2) and the eight criteria of section 2.309(c)(1)." Initial Scheduling Order at 8 (emphasis in original).

Pursuant to section 2.309(f)(2), a newly proffered contention is timely if:

> (i) The information upon which the . . . new contention is based was not previously available;
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> (ii) The information upon which the . . . new contention is based is materially different than information previously available; and
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> (iii) The . . . 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)(i)-(iii). Our Initial Scheduling Order provides that a newly proffered contention will be deemed submitted in a timely fashion pursuant to section 2.309(f)(2)(iii) "if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available." Initial Scheduling Order at 8.

A newly proffered contention that does not satisfy the timeliness requirements of section 2.309(f)(2) may still be considered for admission if it satisfies section 2.309(c)(1), which requires a Board to balance the following factors:

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[12] Licensing Board Initial Scheduling Order and Administrative Directives (Prehearing Conference Call Summary, Grant of Joint Motion Regarding Mandatory Disclosures, Initial Scheduling Order, and Administrative Directives) (Mar. 30, 2011) at 8 (unpublished) (emphasis in original) [hereinafter Initial Scheduling Order].

> (i) Good cause, if any, for the failure to file on time;
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> (ii) The nature of the requestor's . . . [statutory] right to be made a party to the proceeding;
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> (iii) The nature and extent of the requestor'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 . . . interest;
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> (v) The availability of other means whereby the requestor's . . . interest will be protected;
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> (vi) The extent to which the requestor's . . . interests will be represented by existing parties;
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> (vii) The extent to which the requestor's . . . participation will broaden the issues or delay the proceeding; and
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> (viii) The extent to which the requestor's . . . participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i)-(viii). The first factor – i.e., good cause – is entitled to the most weight. See, e.g., State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993). Where good cause is not shown for the late filing of the contention, the requestor's "'demonstration on the other factors must be particularly strong.'" Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 NRC 460, 462 (1977)).

B. The Contention Admissibility Standards in 10 C.F.R. § 2.309(f)(1)

To be admitted for adjudication, a contention – regardless of when it is filed – must also satisfy the requirements in 10 C.F.R. § 2.309(f)(1). Pursuant to those standards, an admissible contention must: (1) "[p]rovide a specific statement of the issue of law or fact to be raised"; (2) "[p]rovide a brief explanation of the basis for the contention"; (3) "[d]emonstrate that the issue raised in the contention is within the scope of the proceeding"; (4) "[d]emonstrate that the

issue raised . . . is material to the findings the NRC must make to support the action that is involved in the proceeding"; (5) "[p]rovide a concise statement of the alleged facts or expert opinions . . . together with references to the specific sources and documents on which the requestor/petitioner intends to rely"; and (6) "provide sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact," including "references to specific portions of the application . . . the petitioner disputes . . . 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 . . . ." 10 C.F.R. § 2.309(f)(1)(i)-(vi).

We now apply the above standards to CASE's newly proffered contentions.

III. CASE'S NEWLY PROFFERED CONTENTIONS ARE NOT ADMISSIBLE[13]

A. Newly Proffered Contention 1 Is Neither Timely Nor Admissible

CASE's newly proffered Contention 1 alleges that FPL's COL application "does not adequately protect public health of people in the Turkey Point Plume Exposure Zone following an accidental radiation release . . . ." CASE Petition at 3. In addition to grounding this contention on the same arguments previously considered and rejected by this Board (see supra note 6 and accompanying text),[14] CASE advances the following two new arguments: (1) "[i]t is

[13] Our regulations declare (10 C.F.R. § 2.323(b)) that "[a] motion must be rejected if it does not include a certification . . . that the movant has made a sincere effort to contact other parties . . . and resolve the issues(s) raised in the motion . . . ." In our Initial Scheduling Order, we emphasized this requirement, stating that "motions will be summarily rejected if they are not preceded by a sincere attempt to resolve the issues and include the certification required in 10 C.F.R. § 2.323(b)." See Initial Scheduling Order at 9. CASE failed to comply with this requirement. Although CASE's failure provides an alternative ground for rejecting its newly proffered contentions (see FPL Response at 5-6), we exercise our discretion to overlook its failure in this instance. We caution, however, that a moving party's future failure to comply with this requirement will render its motion vulnerable to summary denial with prejudice.

[14] CASE's original Contention 1 was grounded principally on the following four arguments:

> (1) FPL's evacuation plan will not be carried out in a timely manner for all those who could be affected by a radiation release; (2) FPL's plans for evacuation

not clear that critical emergency communications will be viable in the event of a loss of power and back-up power at the site" (CASE Petition at 10); and (2) in the event of a core melt accident, FPL's Emergency Plan should "order an evacuation" of persons within a 10-mile radius of the Turkey Point facility. Id., Exh. 7, Attachment C-1 Risk – 10-Mile [Emergency Planning Zone] and Probability Shenanigans [hereinafter CASE Petition, Exh.7].[15]

FPL and the NRC Staff argue that Contention 1 should be rejected because (1) it is not timely, insofar as its allegedly "new" arguments could have been raised previously, and (2) it fails, in any event, to satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1). See FPL Response at 6-11; NRC Staff Response at 7-14. We agree.[16]

First, although CASE proffered it within thirty days of certain events that occurred at Fukushima, this does not automatically render newly proffered Contention 1 timely within the

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> screening and shelter contain inadequate capacity for those living in the evacuation zone; (3) potassium iodide (KI) cannot be delivered to all those affected in a timely manner; and (4) because the design for Units 6 and 7 at Turkey Point increases the risk of radiation release, the importance of evacuation and KI distribution is enhanced.

LBP-11-06, 73 NRC at __ (slip op. at 86).

[15] In support of Contention 1, CASE also argues that (1) KI will not be timely administered in the event of a radiological emergency at Turkey Point (CASE Petition at 10-11), and (2) it is impossible to be "sufficiently prepared for what can evolve in a nuclear accident." Id. at 13. In our prior decision, we rejected both arguments as insubstantial. See LBP-11-06, 73 NRC at __-__, __-__ (slip op. at 88-89, 92-93). CASE fails to show that the Fukushima events it describes (CASE Reply at 6-8) provide new, material support for these recycled arguments. See FPL Response at 9-10; NRC Staff Response at 10-11.

[16] CASE repeatedly asks that we "re-evaluate" and "revisit" the arguments it previously advanced for Contentions 1, 2, and 5. See, e.g., CASE Petition at 50; CASE Reply at 11, 13. This we decline to do. Not only is CASE's request to revisit our prior decision untimely (see 10 C.F.R. § 2.323(e) (motions for reconsideration must be filed within ten days of a Board's decision)), but CASE makes no effort to show that the stringent conditions for granting reconsideration are satisfied. See id. (motions for reconsideration require "a showing of compelling circumstances, such as the existence of a clear and material error in a decision . . . that renders the decision invalid"). Accordingly, we focus on CASE's new arguments, and we conclude that none – whether viewed individually or in concert with CASE's other arguments – renders newly proffered Contentions 1, 2, and 5 admissible.

meaning of 10 C.F.R. § 2.309(f)(2). As discussed supra Part II.A, for a newly proffered contention to be timely, it must, inter alia, be based on information that "was not previously available" (10 C.F.R. § 2.309(f)(2)(i)) and that "is materially different than information previously available." Id. § 2.309(f)(2)(ii). In our view, CASE has not shown that the two "new" arguments underlying Contention 1 – i.e., (1) FPL's emergency communications might not be viable in the event of a station blackout, and (2) in the event of a core melt accident, FPL's Emergency Plan should order an evacuation of persons within a 10-mile radius of the Turkey Point facility – are based on new information that is materially different from previously available information. Notably, the record does *not* indicate (nor does CASE allege) that there has been any change in those portions of FPL's COL application that address emergency communications or emergency evacuation. Nor has CASE explained how the events at Fukushima require altering any of the data in FPL's COL application. In short, CASE could have raised the two arguments it now advances in support of Contention 1 in its August 2010 petition to intervene. Its failure to do so renders Contention 1 nontimely. See 10 C.F.R. § 2.309(f)(2). Because CASE made no effort to demonstrate that Contention 1, despite its lateness, should be considered for admission pursuant to 10 C.F.R. § 2.309(c)(1), we reject Contention 1 as inexcusably nontimely. See AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 260-61 (2009).

We also conclude Contention 1 must be rejected for the additional reason that it fails to satisfy the admissibility standards in 10 C.F.R. § 2.309(f)(1). With respect to the first argument underlying Contention 1, CASE asserts (CASE Petition at 10) that "[i]t is not clear that critical emergency communications will be viable in the event of a loss of power and back-up power at the site." Further, states CASE, "FPL['s] COL application . . . enumerate[s] the methods and equipment for communications during an emergency . . . however the [application] fails to clarify

which of these emergency communication systems would be functional in the event of a Station Black-Out . . . ." Id. at 3.

Under NRC regulations, FPL's Emergency Plan must contain and describe "[a]dequate provisions . . . for emergency facilities and equipment, including . . . [a]t least one onsite and one offsite communications system; each system shall have a backup power source." 10 C.F.R. Part 50, app. E, § IV.E.9. CASE does not identify any regulatory requirement that FPL's COL application fails to satisfy with respect to its discussion of emergency communications and station blackouts, nor does CASE raise specific challenges to those portions of FPL's COL application pertaining to emergency communications. See Turkey Point Units 6 & 7, COL Application, Part 5: Radiological Emergency Plan, Rev. 2 at F-1 to F-8 (Dec. 2010). CASE also neglects to provide explanatory support for its claim (CASE Petition at 4) that a station blackout would "likely interfere with the communications from the reactor site." Accordingly, to the extent Contention 1 is grounded on CASE's first argument, it is not admissible because it fails to "provide sufficient information to show that a genuine dispute exists with [FPL's COL application] on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi).

Nor is Contention 1 admissible under CASE's second argument, which alleges (CASE Petition, Exh. 7) that, in the event of a core melt accident, FPL's Emergency Plan should "order an evacuation" of persons within a 10-mile radius of the Turkey Point facility. Notably, the rationale underlying CASE's argument (infra note 17) is not limited to the Turkey Point site or the proposed Turkey Point Units; rather, it would apply to all licensees and license applicants. Such an argument is foreclosed by 10 C.F.R. § 2.335(a), because it effectively attacks the NRC's regulation governing emergency planning.

Pursuant to 10 C.F.R. § 50.47(b)(10), a COL application must include an Emergency Plan that contains, in the event of a reactor emergency resulting in a radiological release, "[a] range of protective actions . . . for the public [located within about a 10-mile radius from the

plant]. In developing this range of actions, consideration [will be] given to evacuation, sheltering, and, as a supplement to these, the prophylactic use of potassium iodide (KI), as appropriate." 10 C.F.R. § 50.47(b)(10). Section 50.47(b)(10) thus requires an Emergency Plan to have "[a] range of protective actions" for persons within about a 10-mile radius (id.), and it also requires that "[g]uidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place . . . ." Id. This regulation, on its face, thus eschews an inflexible "one size fits all" approach to planning for radiological emergencies. In our view, CASE's claim that FPL must craft a rigid Emergency Plan that "order[s] an evacuation" of all persons within a 10-mile radius – regardless of site-specific conditions or the availability of alternative, equally effective protective actions – is effectively a challenge to section 50.47(b)(10). Our regulations (10 C.F.R. § 2.335(a)) preclude CASE from advancing such a challenge in this proceeding. Rather, if CASE wishes to challenge section 50.47(b)(10), its recourse is to petition for a rule change pursuant to 10 C.F.R. § 2.802.[17]

For the foregoing reasons, we reject Contention 1.

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[17] CASE argues generically in favor of a mandatory 10-mile evacuation area. See CASE Petition, Exh. 7. CASE's argument is grounded on its factual assertion (CASE Petition at 4) that the "[c]alculations of possibility of radiological impact [at a 10-mile radius] in guidance materials [NUREG-0396] are incorrect and should not be used." But CASE is wrong in asserting that its calculations and conclusions, which are located in CASE Exhibit 7, differ from those in NUREG-0396. To the contrary, CASE's calculations and conclusions are consistent with those in NUREG-0396. Both show that the odds of exceeding the Protective Action Guide dose at 10 miles from a nuclear reactor due to a core melt accident are about 1.5×10^{-5} during any given year. Compare CASE Petition, Exh. 7 with Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants, NUREG-0396 at I-37, I-41 (Dec. 1978) [hereinafter NUREG-0396]. And both show that if a core melt accident occurs, the chance of exceeding the Protective Action Guide dose at 10 miles from a nuclear reactor is about 0.3. Compare CASE Petition, Exh. 7 with NUREG-0396 at I-37, I-38. Thus, even if Contention 1, as supported by CASE's second argument, were not an impermissible attack on an agency regulation, it would nevertheless be inadmissible for the dual reasons that (1) it fails to provide alleged facts or expert opinions that support CASE's position on the issue, contrary to 10 C.F.R. § 2.309(f)(1)(v), and (2) it fails to provide sufficient information to show a genuine dispute with FPL's COL application on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

B. Newly Proffered Contention 2 Is Not Admissible

CASE's newly proffered Contention 2 alleges that FPL's COL application fails "to provide for the safe and orderly evacuation of the population during or following a nuclear event . . . ." CASE Petition at 14. In addition to grounding Contention 2 on the same arguments previously considered and rejected by this Board (see supra note 6 and accompanying text),[18] CASE advances the following argument: "[t]he NRC might be violating the [Fourteenth] Amendment to the U.S. Constitution and making a change in NRC policy" (CASE Petition at 21) to the extent it recommended in a March 18, 2011 U.S. Department of State Travel Warning that U.S. citizens in Japan evacuate the area within a 50-mile radius of the Fukushima facility rather than the 10-mile radius plume exposure pathway Emergency Planning Zone (EPZ) contemplated in the Turkey Point Emergency Plan.[19] CASE reasons that "[i]f the NRC . . . believe[s] a 50-mile [evacuation] radius of safety is necessary for U.S. Citizens near the crippled Fukushima plant, the Fourteenth Amendment requires equal protection under the law, so the same 50-mile

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[18] CASE's original Contention 2 was grounded principally on the following three arguments: (1) FPL's evacuation plan fails to reflect the large expansion in permanent population during the past forty years; (2) the plan improperly accepts sheltering over evacuation as an option in an emergency; and (3) the plan ignores the results of studies dealing with responses to actual emergencies. See LBP-11-06, 73 NRC at __-__ (slip op. at 89-90).

[19] As represented by CASE (CASE Petition at 21), the March 18, 2011 Department of State Travel Warning states in pertinent part:

> The United States Nuclear Regulatory Commission (NRC) recommends that U.S. citizens who live within 50 miles (80 kilometers) of the Fukushima Daiichi Nuclear Power Plant evacuate the area or take shelter indoors if safe evacuation is not practical. . . . Consistent with the NRC guidelines that would apply to such a situation in the United States, we are recommending, as a precaution, that U.S. citizens within 50 miles (80 kilometers) of the Fukushima Daiichi Nuclear Power Plant evacuate the area or take shelter indoors if safe evacuation is not practical.

CASE Petition, Exh. 6, U.S. Department of State, Travel Warning: Japan (Updated March 18, 2011) (Mar. 19, 2011), https://www.osac.gov/pages/contentreportdetails.aspx?cid=10685 (last visited June 29, 2011) [hereinafter CASE Petition, Exh. 6].

[evacuation radius] must be addressed for safety for all U.S. nuclear power plants." Id. at 31-32.[20]

FPL and the NRC Staff argue that Contention 2 should not be admitted. See FPL Response at 11-15; NRC Staff Response at 14-19. We agree.

By way of background, NRC regulations provide for two EPZs around nuclear power plants in the event of a nuclear accident: (1) the plume exposure pathway EPZ, which consists of an area about 10 miles in radius around a plant, the principal concern of which is radiation exposure to the public (whole body external exposure and inhalation exposure) from a radioactive plume; and (2) the ingestion exposure pathway EPZ, which consists of an area about 50 miles in radius around a plant, the principal concern of which is ingestion of contaminated water or foods (e.g., milk or fresh vegetables). See 10 C.F.R. § 50.47(c)(2); id., Part 50, app. E; cf. 44 C.F.R. § 350.2(g)-(i) (defining plume and ingestion exposure pathway EPZs for federal emergency management purposes).

Section 50.47(b)(10) requires in each COL application that:

> A range of protective actions has been developed for the plume exposure pathway EPZ for emergency workers and the public. In developing this range of actions, consideration has been given to evacuation, sheltering, and, as a supplement to these, the prophylactic use of potassium iodide (KI), as appropriate. Guidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place, and protective actions for the ingestion exposure pathway EPZ appropriate to the locale have been developed.

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[20] Because CASE argues that the NRC's action might implicate equal protection concerns, we assume CASE intended to rely on the equal protection component of the Fifth Amendment's Due Process Clause that applies to *federal* action, rather than on the Equal Protection Clause of the Fourteenth Amendment that applies to *state* action. See Schweiker v. Wilson, 450 U.S. 221, 226 & n.6 (1981). As relevant here, equal protection principles require "'that all persons similarly situated shall be treated alike.'" Nguyen v. INS, 533 U.S. 53, 63 (2001) (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)).

10 C.F.R. § 50.47(b)(10). Guidance for the development of protective actions for the plume exposure pathway EPZ and for the ingestion exposure pathway EPZ is located in NUREG-0396. Significantly, NUREG-0396 states:

> The emergency actions taken in any individual case must be based on the actual conditions that exist and are projected at the time of an accident. For very serious accidents, predetermined protective actions would be taken if projected doses, at any place and time during an actual accident, appeared to be at or above the applicable proposed Protective Action Guides (PAGs), based on information readily available in the reactor control room, i.e., at predetermined emergency action levels. Of course, ad hoc actions, based on plant or environmental measurements, could be taken at any time.

NUREG-0396 at 2-3 (footnote removed and emphasis added).

According to CASE (see CASE Petition at 21-23), the NRC's recommendation that U.S. citizens within 50 miles of the Fukushima Daiichi Nuclear Power Plant evacuate or take shelter might constitute a policy change as well as an equal protection violation insofar as it treats U.S. citizens abroad differently than citizens in the United States. But CASE fails to explain why the NRC's recommendation in the fact-specific circumstances at Fukushima constitutes a difference in treatment between U.S. citizens abroad and in the United States, much less how the recommendation constitutes a change in regulatory policy.[21]

It is important to recognize that the NRC's recommendation was in response to an emergency situation that was fraught with uncertainties and that appeared to be "deteriorating." CASE Petition, Exh. 6. The Travel Warning explained that "[t]here are numerous factors in the aftermath of the earthquake and tsunami, including weather, wind direction, and speed, and the

[21] Notably, the NRC's recommendation was promulgated in a Travel Warning, which the Department of State issues "when long-term, protracted conditions that make a country dangerous or unstable lead the State Department to recommend that Americans avoid or consider the risk of travel to that country." See U.S. Department of State, Current Travel Warnings, http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html (last visited June 29, 2011). Travel Warnings, which are currently in effect with respect to conditions in over thirty countries (see id.), contain *recommendations* that have no force of law and, thus, need not be obeyed. For this reason alone, CASE's assertion that the NRC's recommendation might constitute a change in policy lacks merit.

nature of the reactor problem that affect the risk of radioactive contamination within this 50-mile (80 kilometer) radius or the possibility of low-level radioactive materials reaching greater distances." Id. Additionally, stated the Travel Warning, "[s]trong aftershocks are likely for weeks following a massive earthquake such as this one. . . . Due to the continuing possibility of strong aftershocks, Japan remains at risk for further tsunamis." Id. The likelihood of strong aftershocks and the possibility of additional tsunamis generated even greater uncertainty about "the risk of radioactive contamination within th[e] 50-mile (80 kilometer) radius." Id.

In such uncertain and potentially perilous circumstances, the NRC acts in accord with extant policy in providing precautionary recommendations designed to protect the health and safety of U.S. citizens, regardless of their location. During a nuclear emergency in the United States, the individual licensee and the appropriate State and local government officials have direct responsibilities for the coordinated response to the event. See 10 C.F.R. Part 50, app. E, § IV.A. The NRC – in its capacity as the federal agency charged with regulating the nuclear industry in a manner that protects public health and safety (Atomic Energy Act, 42 U.S.C. § 2232(a); 10 C.F.R. § 1.11(b)) – monitors the emergency (10 C.F.R. Part 50, app. E, § VI) and is available to provide recommendations for emergency actions to either the licensee or local government officials, including a recommendation for a more extensive evacuation area as warranted by actual circumstances. The guidance in NUREG-0396 confirms that "[t]he emergency actions taken in any individual case must be based on the actual conditions that exist and are projected at the time of an accident." NUREG-0396 at 2-3; accord id. at 8-10, 13-17.

Because CASE fails to show that the NRC's response to the Fukushima events constituted a change in policy (supra note 21) that resulted in the disparate treatment of similarly situated U.S. citizens, CASE's equal protection claim is insubstantial. See supra note 20. Accordingly, Contention 2, as supported by CASE's new argument, is inadmissible

pursuant to section 2.309(f)(1)(vi) for failing to show a genuine dispute with FPL's application on a material issue of law or fact.[22]

C. Newly Proffered Contention 5 Is Not Admissible

CASE's newly proffered Contention 5, like its original Contention 5 (see LBP-11-06, 73 NRC at __ (slip op. at 97)), alleges that FPL's COL application is deficient because, contrary to 10 C.F.R. § 52.79, it fails "to consider or incorporate any scientifically valid projection for sea level rise and climate change through the end of this century and beyond." CASE Petition at 37. In addition to grounding Contention 5 on the same argument previously considered and rejected by this Board (see supra note 6 and accompanying text), CASE argues that the events at Fukushima demonstrate a potential for inundation of Turkey Point Units 3 and 4, which could, in turn, affect the operation of proposed Units 6 and 7. See CASE Petition at 41-50.

FPL and the NRC Staff argue that Contention 5 should not be admitted. See FPL Response at 16-17; NRC Staff Response at 19-25. We agree.

In support of newly proffered Contention 5, CASE relies principally on three sources: (1) a March 24, 2011 article from Climate Central appearing on the OnEarth website entitled "Sea Level Rise Brings Added Risks to Coastal Nuclear Plants," which has several references to Fukushima and to proposed Turkey Point Units 6 and 7 (see CASE Petition at 41-49); (2) the

[22] In support of Contention 2, CASE also advances several cursory challenges to the adequacy of FPL's evacuation preparation, arguing broadly that (1) a 10-mile plume exposure pathway EPZ is not sufficient to protect public health and safety, (2) FPL should consider planning for a "shadow evacuation" zone of 50 miles, and (3) the loss of engineered safety features at Fukushima militate in favor of hearing CASE's contentions on emergency planning and evacuation in full. See CASE Petition at 22-23, 30-32, 36. But CASE's perfunctory arguments fail to demonstrate a specific disagreement with an assumption, analysis, or conclusion in FPL's COL application, much less demonstrate a deficiency in the Emergency Plan or otherwise show a specific failure in the Plan to comply with a governing regulation.

Moreover, to the extent CASE seeks to raise a generic challenge to the 10-mile plume exposure pathway EPZ (see CASE Petition at 23, 32), such an argument constitutes an impermissible challenge to 10 C.F.R. § 50.47(c)(2). See 10 C.F.R. § 2.335(a) (barring challenges to Commission regulations in adjudicatory proceedings); see also supra text accompanying note 17.

text of a Wikipedia entry regarding the tsunami waves that struck Japan incident to the Fukushima event (id. at 40-41); and (3) information from a March 28, 2011 posting on a blog entitled "Nuclear Power Plants," stating that "[h]igh levels of radiation from contaminated water hindered work on restoring the cooling pumps and other power systems to [Fukushima] reactors 1-4." Id. at 49.

After examining these sources, we conclude they fail to provide the support necessary to render Contention 5 admissible because: (1) they fail to explain how the information relating to the Fukushima event supports an argument that the inundation of Turkey Point Units 3 and 4 is a plausible scenario;[23] and (2) they fail to explain how, even if such inundation were to occur, it could adversely affect the safe operation of proposed Units 6 and 7 given the characteristics of the Turkey Point site and the design of the proposed Units. As supported by CASE's new argument, Contention 5 is thus inadmissible, because CASE fails to "[p]rovide sufficient information to show that a genuine dispute exists with [FPL] on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi).

Contention 5, as supported by CASE's new argument, is also inadmissible for the independent reason that CASE fails, in derogation of section 2.309(f)(1)(vi), to controvert a

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[23] To the extent it attempts to argue that sea level rise could result in the inundation of Units 3 and 4 that could, in turn, affect operations of proposed Units 6 and 7, CASE fails to provide this Board with new and material information that was not previously available (LBP-11-06, 73 NRC at __-__ (slip op. at 96-99)), thus rendering any such argument nontimely. See 10 C.F.R. § 2.309(f)(2). And because CASE made no effort to demonstrate that such an argument, despite its lateness, should be considered pursuant to 10 C.F.R. § 2.309(c)(1), it is rejected as inexcusably nontimely. See Oyster Creek, CLI-09-07, 69 NRC at 260-61.

As we indicated in our prior decision (LBP-11-06, 73 NRC at __ n.78 (slip op. at 73 n.78)), if evidence subsequently indicates the design basis of an operating nuclear power plant will not withstand a maximum flooding event, the NRC Staff and a licensee have an obligation to take appropriate action to protect public health and safety. Additionally, in such circumstances, Commission regulations provide a remedial mechanism for members of the public to "file a request to institute a proceeding . . . to modify, suspend or revoke a license . . . ." 10 C.F.R. § 2.206(a).

specific portion of FPL's COL application or otherwise explain why FPL's analyses or conclusions are incorrect or inadequate. See 10 C.F.R. § 2.309(f)(1)(vi) (information accompanying an admissible contention "must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute").[24]

[24] Notably, CASE fails to acknowledge, much less controvert, that portion of FPL's Final Safety Analysis Report (FSAR) that discusses radiological hazards and the possibility that a radiological release from Turkey Point Units 3 and 4 could affect operation of proposed Units 6 and 7. See Turkey Point Units 6 and 7 COL Application, Part 2 FSAR, Rev. 2, Section 2.2.3.1.6.1 at 2.2-47 (Dec. 2010).

IV. CONCLUSION

For the foregoing reasons, we deny CASE's motion to admit newly proffered contentions 1, 2, and 5, as supplemented by alleged new information relating to the events at the Fukushima Daiichi Nuclear Power Plant.

This Memorandum and Order is subject to interlocutory review in accordance with the provisions of 10 C.F.R. § 2.341(f)(2). A petition for review that meets the requirements of section 2.341(f)(2) must be filed within fifteen (15) days of service of this Memorandum and Order. See 10 C.F.R. § 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
June 29, 2011[25]

[25] Copies of this Memorandum and Order were sent this date by the agency's e-filing system to: (1) counsel for Joint Intervenors; (2) counsel for Pinecrest; (3) the representative for CASE; (4) counsel for FPL; and (5) counsel for the NRC Staff.

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 Motion to Admit Newly Proffered Contentions) (LBP-11-15) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
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Dated at Rockville, Maryland
this 29th day of June 2011