LBP-11-33

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 November 21, 2011

MEMORANDUM AND ORDER
(Denying Request to Suspend Licensing Proceeding, Granting Motion to Supplement, and Denying Admission of Proposed New Fukushima Contention)

Intervenors Dan Kipnis, Mark Oncavage, Southern Alliance for Clean Energy, and National Parks Conservation Association (hereinafter referred to collectively as Joint Intervenors)[1] and Intervenor Citizens Allied for Safe Energy, Inc. (CASE)[2] have each moved to

[1] [Joint Intervenors'] Motion to Admit New Contention to Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) [hereinafter Joint Intervenors' Motion]; [Joint Intervenors'] Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) [hereinafter Joint Intervenors' Contention].

On October 28, 2011, Joint Intervenors moved to supplement their contention. See [Joint Intervenors'] Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Oct. 28, 2011) [hereinafter Joint Intervenors' Supplemental Motion].

[2] [CASE's] Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011); [CASE's] Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011). Because CASE's motion and its contention are substantially identical to those filed by Joint Intervenors, we will refer only to Joint Intervenors' motion and contention. This decision, however, applies with equal force to both requests.

admit an identical new contention regarding the NRC's July 2011 Near-Term Task Force Report on the March 2011 events at Fukushima, Japan. The Applicant, Florida Power & Light Company (FPL), and the NRC Staff oppose admission of this contention.[3] As discussed below, we deny admission of the contention because it is premature and does not meet the NRC's contention admissibility requirements.

I. BACKGROUND

This proceeding concerns FPL's combined license (COL) application for two new nuclear power reactors, Units 6 and 7, at its Turkey Point facility near Homestead, Florida.[4] On February 28, 2011, we granted Joint Intervenors' and CASE's hearing requests and petitions to intervene. See LBP-11-06, 73 NRC __, __ (slip op. at 119) (Feb. 28, 2011). We also granted a request by the Village of Pinecrest to participate as an interested local governmental body. See id.

In March 2011, following the events at the Fukushima Dai-ichi Nuclear Power Plant on the east coast of Honshu, Japan, the Chairman of the Commission directed the NRC Staff to "establish a senior level agency task force to conduct a methodical and systematic review of [the agency's] processes and regulations to determine whether the agency should make additional improvements to [its] regulatory system and make recommendations to the

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[3] [FPL's] Response Opposing Admission of SACE's and CASE's Late Filed Contentions (Sept. 6, 2011) [hereinafter FPL Answer]; NRC Staff Answer to "Motion to Admit New Contention Regarding the Safety and Environmental Implications of the NRC Task Force Report on the Fukushima Dai-ichi Accident" Filed by Citizens Allied for Safe Energy Inc. ("CASE") and NRC Staff Answer to "Motion to Admit New Contention to Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident" Filed by Joint Intervenors (Sept. 6, 2011) [hereinafter NRC Staff Answer].

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

Commission for its policy direction." NRC Actions Following the Events in Japan, COMGBJ-11-0002 at 1 (Mar. 21, 2011). On June 29, 2011, we denied a request from CASE to admit new versions of previously rejected contentions, which were ostensibly updated to reflect the events at Fukushima. See LBP-11-15, 73 NRC __, __ n.1 (slip op. at 1 n.1) (June 29, 2011). On July 12, 2011, the NRC Fukushima Task Force (Task Force) published its near-term recommendations. See U.S. Nuclear Regulatory Commission, Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011), available at http://pbadupws.nrc.gov/docs/ML1118/ML111861807.pdf [hereinafter Task Force Report].

On September 9, 2011, the Commission denied requests by Joint Intervenors and CASE (along with substantially identical requests by intervenors in other reactor licensing proceedings) to suspend this and other reactor licensing proceedings in light of the events at Fukushima. See Union Elec. Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2) et al., CLI-11-05, 74 NRC __, __-__ (slip op. at 41-42) (Sept. 9, 2011).[5] On September 21, 2011, we, inter alia, denied

[5] Joint Intervenors and CASE filed motions with this Board that were substantially identical to motions they filed with the Commission requesting that the instant licensing proceeding be suspended pending resolution of their requests for rulemaking. See [Joint Intervenors'] Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Aug. 11, 2011); [CASE's] Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Aug. 12, 2011). In CLI-11-05, the Commission declined to suspend this licensing proceeding because "petitioners have not shown that continuation of licensing proceedings, pending consideration of the rulemaking petition, would 'jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge' from [the agency's] continued evaluation of the impacts of the events in Japan." Callaway, CLI-11-05, 74 NRC at __ (slip op. at 39) (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001)). Even assuming this Licensing Board (as opposed to the Commission) was empowered to grant a request to suspend a licensing proceeding pending disposition of a rulemaking petition (but see 10 C.F.R. § 2.802(d)), the Commission's decision in CLI-11-05 mandates that Joint Intervenors' and CASE's suspension requests be denied.

CASE's motion for reconsideration of LBP-11-15 and its requests to admit other newly proffered contentions concerning the events at Fukushima.[6]

In a Staff Requirements Memorandum (SRM) dated October 18, 2011, the Commission ordered the NRC Staff to implement "without delay" some of the recommendations of the Task Force and to complete its review of the lessons learned from the events at Fukushima by 2016. See Staff Requirements – SECY-11-0124 – Recommended Actions to be Taken without Delay from the Near-Term Task Force Report at 1 (Oct. 18, 2011), available at http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2011/2011-0124srm.pdf [hereinafter SRM].

II. JOINT INTERVENORS' AND CASE'S PROPOSED NEW CONTENTION IS PREMATURE AND INADMISSIBLE

In their newly proffered contention, Joint Intervenors and CASE argue that FPL's Environmental Report (ER) is deficient under the National Environmental Policy Act of 1969 (NEPA) "because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report." Joint Intervenors' Contention at 5. In light of the Task Force's recommendation to incorporate some severe accidents into a plant's design basis, as well as its conclusion that certain "SAMAs [severe accident mitigation alternatives] . . . should be elected as a matter of course," Joint Intervenors and CASE assert that the cost-benefit analysis for SAMAs in FPL's ER should be re-examined. Id. at 14-15.[7] Relying on the declaration of their expert, Dr. Arjun Makhijani, Joint

[6] Licensing Board Memorandum and Order (Denying CASE's Motion to Reconsider Rejection of Amended Contentions and to Admit Two Newly Proffered Contentions, and Denying FPL's Request to Impose Remedial Measures on CASE) (Sept. 21, 2011) (unpublished).

[7] SAMAs are "safety enhancements such as a new hardware item or procedure intended to reduce the risk of severe accidents." Entergy Nuclear Generation Co. & Entergy

Intervenors and CASE argue that if the NRC required some of these SAMAs to be implemented, the cost would be so great that other alternatives to the proposed action and the no-action alternative "may be more attractive," thus altering the ultimate conclusions of the ER and, ultimately, the Environmental Impact Statement (EIS) for Turkey Point Units 6 and 7. Id. at 15. Joint Intervenors and CASE also argue that the ER must be supplemented because language in the Task Force Report suggests that seismic and flooding hazards, design alternatives to counter such hazards, and other plant components need to be re-evaluated for the Turkey Point site. See Joint Intervenors' Contention at 16-18.

Turning their attention to the NRC, Joint Intervenors and CASE claim (Joint Intervenors' Contention at 20) that their contention challenges the "NRC's failure to fully comply with NEPA and federal regulations for the implementation of NEPA in its EIS for the proposed Turkey Point reactors, Units 6 and 7." Finally, in light of the Commission's mid-October directive to the Staff to complete its review of the lessons learned and to implement recommendations from the Task Force Report, Joint Intervenors' motion of October 28, 2011 seeks to supplement the basis of the newly proffered contention, maintaining that, as supplemented, the contention is ripe and admissible. See Joint Intervenors' Supplemental Motion at 1-2.

Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 290-91 (2010). As the Commission explained in Pilgrim, the SAMA analysis conducted by the NRC

> evaluates a number of potential accident progression sequences (scenarios) and the possible safety enhancements that may reduce the risk of those accident scenarios. The analysis assesses whether and to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented at a particular facility. SAMA analysis is used for determining whether particular SAMAs would sufficiently reduce risk . . . for the SAMA to be cost-effective to implement. . . . If the cost of implementing a particular SAMA is greater than its estimated benefit, the SAMA is not considered cost-beneficial to implement.

Id. at 291.

FPL and the NRC Staff argue that the proposed new contention should be rejected, even as supplemented by Joint Petitioners' motion of October 28, 2011. See [FPL's] Response Opposing [Joint Intervenors'] Motion to Amend Late Filed Contention (Nov. 7, 2011); NRC Staff Answer to "Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report" (Nov. 7, 2011); FPL Answer at 7-38; NRC Staff Answer at 8-21. We agree that the contention is not admissible.[8]

A. The Newly Proffered Contention In The August 11, 2011 Motion Is Procedurally Deficient. At the outset, we find no merit in the argument advanced by Joint Intervenors and CASE that FPL must supplement its ER in light of the recommendations in the Task Force Report. See Joint Intervenors' Contention at 13-18. The regulations that govern the conditions for supplementing environmental review documents direct the NRC Staff, not the license applicant, to supplement the draft EIS if "[t]here are substantial changes in the proposed action that are relevant to environmental concerns" or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R. § 51.72(a); see also id. § 51.92(a) (requiring similar supplementation after issuance of final EIS). Joint Intervenors and CASE have cited no legal requirement that obligates FPL to supplement its ER upon the occurrence of new information that arises during the pendency of this COL proceeding. Therefore, their assertion that the ER *must* be supplemented to take account of allegedly new and significant information is, as a procedural

[8] A discussion of the 10 C.F.R. § 2.309 contention admissibility requirements may be found in our prior decisions. See LBP-11-15, 73 NRC at __-__ (slip op. at 3-6) (discussing the requirements for new contentions); see also LBP-11-06, 73 NRC at __-__ (slip op. at 8-10) (discussing multi-factor contention-admissibility test in section 2.309(f)(1)).

matter, unfounded and must be rejected. See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC __, __-__ (slip op. at 12-16) (Nov. 18, 2011).[9]

Joint Intervenors' and CASE's assertion (see Joint Intervenors' Contention at 18-20) that the EIS improperly fails to account for the events at Fukushima likewise suffers a fatal procedural flaw. The NRC Staff has not yet completed a draft or final EIS.[10] Until each document is issued, it cannot plausibly be argued that the document is inadequate or otherwise fails to satisfy NEPA. Accordingly, insofar as Joint Intervenors and CASE seek to challenge the NRC's compliance with NEPA in light of the NRC's Fukushima Task Force Report, we conclude -- in agreement with other Licensing Boards that have addressed that issue[11] -- that their challenge is premature.[12]

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[9] Of course, the NRC Staff, pursuant to its obligation to prepare an adequate EIS (see LBP-11-06, 73 NRC at __-__ n.25 (slip op. at 17-18 n.25)), is empowered to issue requests for additional information relevant to an applicant's ER (see 10 C.F.R. § 51.41), and an applicant may update an ER if relevant new and significant information becomes available. The salient point, however, is that an applicant is under no regulatory or statutory obligation to effect such an update.

[10] On November 9, 2011, the NRC Staff advised that its current review schedule contemplates completing the draft EIS in February 2013, and completing the final EIS in February 2014. See Letter from Robert M. Weisman, Counsel for NRC Staff, to Atomic Safety and Licensing Board (Nov. 9, 2011).

[11] See, e.g., Diablo Canyon, LBP-11-32, 74 NRC at __ (slip op. at 12); NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-28, 74 NRC __, __-__ (slip op. at 7-8) (Oct. 19, 2011).

[12] In addition to specifying the circumstances under which the NRC Staff must prepare supplemental environmental review documents (see 10 C.F.R. §§ 51.72(a), 51.92(a)), the governing regulations provide that a "petitioner may amend [its] contentions or file new contentions if there are data or conclusions in the NRC draft or final [EIS], . . . or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." Id. § 2.309(f)(2). The latter provision confers a remedy on Joint Intervenors and CASE to the extent they believe the Staff's draft or final EIS fails to account for new and significant information arising from the Fukushima events.

B. The Newly Proffered Contention In The August 11, 2011 Motion Is Not Admissible In Any Event. In addition to suffering from the above procedural deficiencies, we conclude that the newly proffered contention -- which alleges shortcomings in the COL application for failing to address the environmental implications of findings and recommendations in the NRC's Fukushima Task Force Report (see Joint Intervenors' Contention at 5) -- fails to satisfy the admissibility requirements for contentions. See 10 C.F.R. § 2.309(f)(1); supra note 8.

In CLI-11-05, the Commission, inter alia, denied requests for generic NEPA reviews in light of the events at Fukushima, declaring that

> [a]lthough the Task Force completed its review and provided its recommendations . . . , the agency continues to evaluate the [Fukushima] accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear. . . . [W]e do not know today the full implications of the Japan events for U.S. facilities. Therefore, any generic NEPA duty -- if one were appropriate at all -- does not accrue now.

Callaway, CLI-11-05, 74 NRC at __ (slip op. at 30). The Commission stated that "[i]f . . . new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents, the agency will assess the significance of that information, as appropriate." Id. at __-__ (slip op. at 30-31).

In the instant case, Joint Intervenors' and CASE's newly proffered contention is based on the identical information underlying the Commission's rejection, in CLI-11-05, of the request to commence a generic NEPA review. They allege no facts linking the events at Fukushima to the sufficiency of NEPA-related documents connected to FPL's COL application for Turkey Point Units 6 and 7. This omission renders their newly proffered contention inadmissible for failure "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).

C. Joint Intervenors' October 28, 2011 Motion Does Not Render The Newly Proffered Contention Admissible. In their October 28, 2011 motion seeking to supplement the basis of their newly proffered contention (see supra note 1), Joint Intervenors ask this Board to consider the Commission's mid-October SRM, which allegedly renders their new contention ripe and also supports its admissibility. Specifically, Joint Intervenors assert that "[b]y ordering the Staff to adopt and implement numerous Task Force recommendations, including redefining what level of protection of public health and safety should be regarded as adequate, the Commission makes clear that it believes the lessons learned from the Fukushima accident have safety and environmental significance." Joint Intervenors' Supplemental Motion at 2.

We grant Joint Intervenors' motion to consider the Commission's mid-October SRM. In our view, however, the SRM does not cure the prematurity and admissibility defects in Joint Petitioners' newly proffered contention.

The SRM does not impose any new requirements on NRC licensees in general, much less on FPL in particular. Rather, it simply confirms that in the coming years, *some* new requirements will likely be imposed, and that this outcome is intended to be achieved through a transparent and clear mechanism such as, for example, an order or a rulemaking. See SRM at 1. Notably, the SRM does *not* specify what those requirements will be. Moreover, until the review process is complete, it is impossible to predict what those requirements will be.

As relevant here, NEPA only mandates an examination of "reasonably foreseeable environmental impacts of the proposed project." Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC 27, 46 (2010). Until the Commission defines and imposes on licensees new requirements arising from the Fukushima events, such requirements are highly speculative. And any potential environmental impacts they might cause are likewise highly speculative and not ripe for challenge. Further, until any requirements are finalized and implemented, it is impossible to foresee what environmental impacts they would

yield. Accordingly, Joint Intervenors' newly proffered contention, even as supplemented by their October 28 motion, remains inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(vi) for failing to present a genuine dispute on a material issue of law or fact. See Diablo Canyon, LBP-11-32, 74 NRC at __ (slip op. at 19).

III. CONCLUSION

For the foregoing reasons, we (1) deny the motions to suspend this licensing proceeding (supra note 5), and (2) deny the motions of August 11, 2011 to admit a new NEPA contention (supra Part II.A and II.B), even as supplemented by Joint Intervenors' motion of October 28, 2011, which we grant. See supra Part II.C.

This decision 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 decision. 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

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Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 21, 2011

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 Request to Suspend Licensing Proceeding, Granting Motion to Supplement, and Denying Admission of Proposed New Fukushima Contention) (LBP 11-33) have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. 52-040 and 52-041-COL
MEMORANDUM AND ORDER (Denying Request to Suspend Licensing Proceeding, Granting Motion to Supplement, and Denying Admission of Proposed New Fukushima Contention)
(LBP 11-33)

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

Dated at Rockville, Maryland
this 21st day of November 2011