

August 10, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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PROGRESS ENERGY FLORIDA, INC.) Docket Nos. 52-029 and 52-030
)
)
(Combined License Application for Levy)
County Nuclear Power Plant, Units 1 and 2))

NRC STAFF MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF
THE PARTIES' TESTIMONY AND STATEMENTS OF POSITION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's ("Board") Initial Scheduling Order ("ISO")¹ the NRC staff ("Staff") submits this motion to exclude portions of the corrected pre-filed direct testimony filed by the Intervenors² on July 6, 2012 ("Intervenors' Direct Testimony"), the Intervenors pre-filed rebuttal testimony filed on July 31, 2012 (Intervenors' Rebuttal Testimony), and the Intervenors' Initial and Rebuttal Statements of Position. For the reasons set forth below, portions of the Joint Intervenors' Direct Testimony, Rebuttal Testimony and Statements of Position are outside the scope of this proceeding. Further, because both the Applicant and Staff responded to portions of the Intervenors' Direct Testimony that was outside the scope of this proceeding, if the Board agrees with the Staff's

¹ Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 647 (2009).

² The Intervenors were, at the time they filed their intervention petition, the Ecology Party of Florida, the Green Party of Florida, and the Nuclear Information and Resource Service. On May 17, 2012 the Intervenors filed a notice that the Green Party of Florida was withdrawing from the proceeding.

position in this Motion, portions of the Staff's and Applicant's pre-filed rebuttal testimony and statements of position should also be excluded.

BACKGROUND

As stated in more detail in the Staff's Initial Statement of Position, this case involves an application for a combined license (COL) filed by Progress Energy Florida, Inc. ("Applicant"). This contested hearing concerns Contention 4A as admitted by the Board, with certain exceptions, on February 2, 2011. Licensing Board Memorandum and Order (Admitting Contention 4A) at 22 (Feb. 2, 2011) (unpublished). On June 26, 2012, in conformance with the Board's ISO, the Intervenors, Applicant, and Staff filed their pre-filed direct testimony and exhibits for Contention 4A. On July 6, 2012, the Intervenors filed errata to their direct testimony, statement of position and exhibits, and they filed a motion to admit six new exhibits. On July 9, 2012, the Intervenors filed redline versions of their statement of position and testimony, a second erratum to their testimony, and a motion to admit the new versions of their direct testimony and exhibits. On July 18, 2012, the Board issued a Memorandum and Order admitting Intervenors' new exhibits, corrected exhibits and corrected testimony. Licensing Board Memorandum and Order (Ruling and Instructions Regarding Evidentiary Filings) at 3-5 (July 18, 2012) (unpublished). On July 31, 2012, the parties filed their pre-filed rebuttal testimony and exhibits for Contention 4A. Pursuant to the ISO, the Staff files this motion *in limine* to exclude portions of the Intervenors' Direct Testimony, Rebuttal Testimony and Initial and Rebuttal Statements of Position concerning Contention 4A. If the Board agrees with the Staff's position in this Motion, portions of the Staff's and Applicant's pre-filed rebuttal testimony and statements of position should also be excluded.

DISCUSSION

A. Legal Standard

In an evidentiary hearing, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will

be segregated and excluded so far as is practicable.” 10 C.F.R. § 2.337(a). While the “strict rules of evidence do not apply to written submissions,” Licensing Boards may “on motion or on the presiding officer’s own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative.” 10 C.F.R. § 2.319(d); *see also* § 2.319(e).

B. Material to be Excluded

1. Alternative Water Supplies

Portions of the Intervenors’ Direct and Rebuttal Testimony should be excluded because the Intervenors never previously included alternative water supplies as part of Contention 4A and because the Board has previously ruled that discussions of alternatives are outside the scope of the contention. First, portions of the Intervenors’ testimony that discuss alternative water supplies—included under Section 9.4 “System Design Alternatives” in the FEIS (NRC001B at 9-243 to 9-250)—are outside the scope of the contention as admitted. Contention 4A focuses on impacts from dewatering and salt-drift and deposition. Contention 4A does not mention alternatives. The Commission has stated that Intervenors “may not ‘freely change the focus of an admitted contention at will’ to add a host of new issues and objections that could have been raised at the outset. Where warranted we allow for amendment of admitted contentions, but do not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds.” Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010). By attempting to add arguments regarding alternative water supplies at this late date, the Intervenors are attempting to add distinctly new complaints to stretch the scope of the admitted contention.

Further, in the Order admitting Contention 4A, the Board dealt with a similar instance where the Intervenors sought to include a discussion of alternatives that was not included in the initial contention. While the claims are not identical, the Board’s reasoning in that situation is

applicable here. The Board held that “[o]ur conclusion that C-4A is admissible is not without limits however. Specifically, we conclude that the Intervenors’ assertions (found in Dr. Bacchus’s Declaration, but not in C-4A itself) that the DEIS fails to consider alternatives that would avoid all adverse environmental impacts, is not timely and not admissible.” Licensing Board Memorandum and Order (Admitting Contention 4A), at 17 (Feb. 2, 2011) (unpublished). While the specific alternatives being addressed are different, the principle is the same; the Intervenors should not now be allowed to add arguments related to alternatives when this topic has never previously been part of the contention.

Contention 4A does allow discussion of mitigation measures as stated in Subpart C.4 of the contention. Here, however, it is clear that the Intervenors are discussing alternatives and not just mitigation measures. Even if not apparent by their repetitive use of the term “alternative,” the Intervenors’ Rebuttal Statement of Position also makes several arguments that are applicable to an alternatives analysis, but not to a discussion of mitigation measures. For example, on page 4 of their Rebuttal Statement of Position the Intervenors’ cite a case holding that alternatives must be considered prior to taking an action. Similarly, on page 6, the Intervenors argue that “the FEIS contains only a cursory discussion of alternative water supplies that includes no comparison of the relative costs and benefits of the proposed alternative of groundwater pumping with other alternatives such as desalinization or use of municipal wastewater.” The discussion of costs and benefits is an analysis done for comparing alternatives, not for identifying mitigation measures. The Intervenors’ cost-benefit argument is developed in more detail on pages 28-29 of the Intervenors’ Rebuttal Statement of Position, where the Intervenors also attack the adequacy of the Staff’s analysis of the desalination water supply alternative in the FEIS (NRC001C at 9-250). This challenge to the Staff’s consideration of alternative water supplies is necessarily directed to the environmental preferability conclusions in the Staff’s alternatives analysis. As such, this argument is outside the scope of the contention admitted by the Board.

Consequently, the Board should strike the following portions of the Intervenor's Direct and Rebuttal Testimony and Statements of Position. Additionally, if the Board finds that the Intervenor's testimony should be struck, then the Staff also lists questions and answers that should be struck from the Applicant and Staff Rebuttal Testimony that responded to the Intervenor's assertions.

The following portion of Answer 3 and all of Questions and Answers 16, 17, and 18 of Dr. Still's Direct Testimony should be excluded for discussing alternatives outside the scope of the contention:

- "postponement of essential work on alternative water sources," Still Direct Testimony at A.3.

The following portion of Dr. Still's Rebuttal Testimony in Answer 9 should also be excluded for discussing system design alternatives:

- "The implicit assumption in the FEIS is that LNP must be built using groundwater withdrawal and that therefore the only alternative is mitigation of impacts through the CoC. However, there are other alternatives. For example, the FEIS fails to address whether a better mitigation alternative would be to require the development of an alternative water supply *before* the plant is built, perhaps with groundwater withdrawal providing a short-term back-up. An alternative supply would eliminate the need for harvesting groundwater, inducing saltwater intrusion, and impacting the water resources in the area. Design after the fact, a remedy referred to as "retrofits," are always more expensive than when built into projects at the front end. Moreover, building mitigation into the front-end of the project precludes attempts to avoid the expense of mitigation at a later date." Still Rebuttal Testimony at A.9.

Similarly, the following portion of Dr. Bacchus' Answer to Question 50 in her Direct Testimony should be excluded because it discusses alternatives outside the scope of the contention.

- “Despite this evidence, the referenced quote on page 9-250 of the FEIS concludes with the following statement:

However, if monitoring indicates that an impact greater than SMALL might occur during operation, desalination would be the environmentally preferable alternative.

The FEIS does not include any analysis of the adverse direct, indirect, and cumulative impacts of a ‘desalination’ alternative. Therefore, this proposed ‘alternative’ is not a valid ‘alternative.’ Desalination has numerous LARGE environmental impacts associated with this action. One example is the disposal of brine extracted from the saline water.”

Bacchus Direct Testimony at A.50.

Additionally, the following portion of Dr. Bacchus’ Rebuttal Testimony in Answer 6, which discusses alternatives, should be excluded:

- “The ineffectiveness and incompleteness of the EMP also makes it crucial for the DEIS to have offered reasonable alternative water supply options for LPN, but the AWS Plan has not been submitted even to NRC, much less the public. All of these documents should have been included in the discussion of alternatives and mitigation measures in the DEIS.” Bacchus Rebuttal Testimony at A.6.

The following portion of Dr. Davies’ Rebuttal Testimony in Answer 4 should be excluded for discussing alternatives:

- “would allow design alternatives, such as not using local groundwater, to be considered, and it” Davies Rebuttal Testimony at A.4.

All of Section E “Inadequate Analysis of Alternatives” should be struck from the Intervenors Rebuttal Statement of Position on pp 27-29. Additionally, the following portions of Intervenors’ Initial and Rebuttal Statements of Position should be excluded for discussing alternatives outside the scope of the contention:

- “Where a proposed action will have environmental impacts that are significant, NEPA requires that an agency must consider alternatives for avoiding or mitigating those impacts. *Van Eye v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000). Therefore the designation of impacts as “significant” or “insignificant” is important.” Intervenors’ Initial Statement of Position at 6.
- “Indeed, it is arguable that the consideration of alternatives is *the* most important aspect of an EIS. In addition, as Mr. Still testifies, water-use alternatives are available that could significantly mitigate the impacts of LNP. Yet, the NRC has postponed this vital analytical step until after licensing the LNP. In addition, NRC does not propose to do the analysis itself. Instead, it proposes to foist its responsibility onto ill-equipped and underfunded local and State authorities.” *Id.* at 13 (emphasis in original).
- “Finally, the FEIS fails to provide an adequate assessment of alternatives. Although the NRC Staff believe that finding an alternative source of water to groundwater extraction could be a feasible mitigation alternative, the FEIS fails to assess whether this should be required at the outset. This is illegal because under NEPA, a reasonable array of alternatives must be considered *before* the action is taken, not afterwards. *Van Eye v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000).” Intervenors’ Rebuttal Statement of Position at 4.
- “. . . NEPA required the NRC to examine alternative water supplies other than groundwater pumping. Contrary to NEPA’s requirement for a detailed cost-benefit analysis of alternatives, the FEIS contains only a cursory discussion of alternative water supplies that includes no comparison of the relative costs and benefits of the proposed alternative of groundwater pumping with other alternatives such as desalinization or use of municipal wastewater.” *Id.* at 6.

- “. . . would allow design alternatives, such as not using local groundwater, to be considered,” Id. at 7.
- “Instead, for a project of this size, accurate prediction of impact is necessary because it would enable feasible mitigation alternatives to be properly evaluated. *Id.* One such alternative is the alternative water supply. *Id.*” Id. at 12.
- “. . . and whether to require mitigation such as the development of an alternative water supply to groundwater withdrawal prior to the commencement of operation of the plant.” Id. at 13.

If the Board finds that the discussion of alternatives was improperly raised by the Intervenors, then the following portions of the Applicant’s Rebuttal Testimony and Rebuttal Statement of Position, which responded to the improper statements in the Intervenors’ Direct Testimony, should be excluded. First, in the Applicant’s Rebuttal Statement of Position, footnote 14 should be excluded. Applicant Rebuttal Statement of Position at 25. In addition, the following portions of Dr. Hubbell’s Rebuttal Testimony should be excluded:

- Answer 5: “I address a number of specific criticisms by Mr. Still of information on water resources described in the FEIS, including alternatives for fresh water supply”
- The entirety of Question 8 and Answer 8.

Similarly, if the Board finds that the discussion of alternatives was improperly raised by the Intervenors, then Question and Answer 34 of the Staff’s Rebuttal Testimony, which addressed the improper statements in the Intervenors’ Direct Testimony, should be excluded. Additionally, should the Board grant this Motion, the entire paragraph in the Staff’s Rebuttal Statement of Position responding to the Intervenors’ inclusion of arguments regarding alternatives should be struck. This paragraph, which begins with the phrase “In its ruling on the admissibility of Contention 4A,” is the last paragraph on page 4 and continues on to page 5. Staff Rebuttal Statement of Position at 4-5.

2. Staff Response to Dr. Bacchus' Comments on the DEIS

In the Intervenor's Initial Statement of Position, they claim that the Staff did not adequately respond in Appendix E of the FEIS to comments submitted by Dr. Bacchus and did not "undertake to gather any additional data or to cure the deficiencies listed above; instead, it merely attempted to rationalize them. Accordingly, the NRC's response to Intervenor's comments is insufficient to comply with NEPA." Intervenor's Initial Statement of Position at 14. Further, in her testimony, Dr. Bacchus states that "the FEIS has not resolved the concerns raised in my affidavits and comments[.]" Bacchus Direct Testimony at A.8. However, because the Intervenor never raised this assertion in their original contention or in Contention 4A, they are foreclosed from raising it now. The Intervenor "may not 'freely change the focus of an admitted contention at will' to add a host of new issues and objections that could have been raised at the outset. Where warranted we allow for amendment of admitted contentions, but do not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds." Pilgrim, CLI-10-11, 71 NRC at 309. Further, pursuant to 10 C.F.R. 2.309(f)(2), the Intervenor could have sought to amend their contention after the FEIS was issued to include this assertion, but they failed to do so. Amending their contention was the appropriate way to add this issue to this litigation, not attempting to expand the scope of the contention in their testimony. As such, the above portions of the Intervenor's Statements of Position and of Dr. Bacchus' Direct Testimony should be excluded.

If the Board agrees with the Staff's Motion that the above portions of Intervenor's Initial Statement of Position and Bacchus Direct Testimony should be excluded, then Section III.C of the Staff's Rebuttal Statement of Position, entitled "The Intervenor's Assertion Regarding Staff's Response to FEIS Comments Lacks Merit," should also be struck. Staff Rebuttal Statement of Position at 26. This section responds to the Intervenor's arguments described above.

3. Staff Circulation of PEF's Environmental Monitoring Plan for Public Comment

In their Rebuttal Statement of Position and in Dr. Bacchus' Rebuttal Testimony, Intervenor assert that the Staff should have circulated PEF's Environmental Monitoring Plan (EMP) for public comment because the Staff relied on the EMP when drafting the DEIS. But the Staff did not evaluate PEF's EMP in its DEIS or FEIS. Because the EMP was not released until after the publication of the FEIS, in the DEIS and FEIS the Staff considered the Conditions of Certification, which provided parameters for the development of the EMP. The Conditions of Certification document was included in the Staff's DEIS references and, therefore, was circulated for public comment. If the Intervenor thought that the EMP should have been circulated for public comment—even though the Staff did not rely on its content—they should have raised that concern in a new or amended contention.³ Contention 4A includes no claims regarding public comments on the EMP, or any other document. As the Intervenor failed to raise this issue in compliance with the requirements for filing new or amended contentions in 10 C.F.R. § 2.309, they are now foreclosed from raising it. See Pilgrim, CLI-10-11, 71 NRC at 309. Therefore, all of Section 2.c of Intervenor's Rebuttal Statement of Position entitled "The Staff's reliance on the EMP violates NEPA because it did not subject the EMP to public comment in the draft EIS" should be excluded. Intervenor's Rebuttal Statement of Position at 25-26. Additionally, the following portions of the Dr. Bacchus' Rebuttal Testimony should be excluded:

- "[c]onsidering the magnitude of reliance by PEF and the NRC Staff on the EMP and the lack of scientific support for assertions regarding the benefits of the EMP, it is clear that

³ In their motion to amend contention 4, entitled "An Amended Contention 4", the Intervenor did include one sentence asserting that it was impossible for the public to comment on the EMP. However they made no attempt to change the text of the contention to include this concern, and they did not provide any citations or further information to support this sentence. "An Amended Contention 4" (November 15, 2010) at 6 ("It is impossible for the public to comment on a fictional EMP.")

the EMP should have been circulated for public comment in a Draft Environmental Impact Statement (“DEIS”).” Bacchus Rebuttal Testimony at A.6.

- “The ineffectiveness and incompleteness of the EMP also makes it crucial for the DEIS to have offered reasonable alternative water supply options for LPN, but the AWS Plan has not been submitted even to NRC, ~~much less the public~~. All of these documents should have been included in the discussion of alternatives and mitigation measures in the DEIS.” Bacchus Rebuttal Testimony at A.6 (only portion with strikethrough font).⁴

ANSWER CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion. The Applicant supports the positions in this Motion. Regarding the Intervenors, my efforts to resolve the issues in this motion have failed.

CONCLUSION

For the reasons discussed above, the Staff moves that the identified portions of the Joint Intervenors’ Direct Testimony and Rebuttal Testimony and Direct and Rebuttal Statements of Position be excluded from consideration in this proceeding. If the Board agrees with the Staff’s arguments, then portions of the Staff’s and Applicant’s Rebuttal Testimony and Statements of Position should also be excluded.

Respectfully submitted,

⁴ In Section B.1 of this Motion, the Staff sought to strike this entire statement, not just the portion with strikethrough font. The Staff repeats this statement here—seeking only the exclusion of the information in strikethrough font—in the event that the Board does not rule for the Staff regarding the arguments in Section B.1 of this Motion.

/Signed (electronically) by/

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Dated at Rockville, Maryland
the 10th Day of August 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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PROGRESS ENERGY FLORIDA, INC.) Docket Nos. 52-029 and 52-030
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(Levy County Nuclear Site, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's Pre-filed Rebuttal Testimony and Exhibits have been served on the following persons by Electronic Information Exchange on this 10th day of August 2012:

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