

March 4, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 52-040 & 52-041
)
(Turkey Point Units 6 and 7))

NRC STAFF ANSWER TO “JOINT INTERVENOR’S MOTION FOR
LEAVE TO FILE A NEW CONTENTION CONCERNING THE SITING AND
ENVIRONMENTAL IMPACTS OF A RECLAIMED WATER TREATMENT FACILITY
AND ASSOCIATED PIPELINES AT THE TURKEY POINT NUCLEAR POWER PLANT”

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board (“Board”) Order dated March 30, 2011,¹ the staff of the U.S. Nuclear Regulatory Commission (“Staff”) hereby responds to the Joint Intervenors’ “Motion for Leave to File a New Contention Concerning the Siting and Environmental Impacts of a Reclaimed Water Treatment Facility and Associated Pipelines at the Turkey Point Nuclear Power Plant,” (“Motion”) dated February 6, 2013. Although the staff does not oppose the proposed new contention with respect to the criteria of 10 C.F.R. § 2.309(c)(1) for contentions filed after the deadline set in the Notice of Hearing, the contention is inadmissible for failure to meet the requirements of 10 C.F.R § 2.309(f)(1)(iv)–(vi), as explained in more detail below, and the Staff opposes the motion.

¹ *Florida Power and Light Co.* (Turkey Point Units 6 and 7), Initial Scheduling Order and Administrative Directives (Mar. 30, 2010) (unpublished) (ML110890768) (Initial Scheduling Order).

BACKGROUND

On June 30, 2009, Florida Power and Light Company (“Applicant” or “FPL”), pursuant to the Atomic Energy Act of 1954, as amended (“AEA”) and the Commission’s regulations, submitted an application for combined licenses (“COL”) for two AP1000 Pressurized Water Reactors (“PWRs”) to be located adjacent to the existing Turkey Point Units 1 through 5, at the Turkey Point site near Homestead, Florida (“Application”). See Letter from Mano K. Nazar, Florida Power & Light, to Michael Johnson, NRC Office of New Reactors, dated June 30, 2009 (ADAMS Accession No. ML091830589). The Application references the standard design certification (“DCD”) issued to Westinghouse Electric Company, as amended, including Revision 19. The proposed units would be known as Turkey Point, Units 6 & 7.

On August 3, 2009, the Staff published a notice of the receipt and availability of the Application in the *Federal Register*. 74 Fed. Reg. 38,477 (Aug. 3, 2009). The Application was accepted for docketing on September 4, 2009. 74 Fed. Reg. 51,621 (Oct. 7, 2009). On June 18, 2010, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding. See “Florida Power & Light Company, Combined License Application for the Turkey Point Units 6 & 7, Notice of Hearing, Opportunity for Leave to Petition 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) (“Notice of Hearing”).

In response to the Notice of Hearing, Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and the National Parks Conservation Association (“Joint Intervenors”) submitted their Petition, through which they sought to intervene in this proceeding, on August 17, 2010. See Petition for Intervention (Aug. 17, 2010) (“Petition”). On August 31, 2010, this Atomic Safety and Licensing Board was established to preside over the proceeding. See 75 Fed. Reg. 54,400 (Sept. 7, 2010). In a decision dated February 28, 2011, the Board admitted Joint

Intervenors' Contention NEPA 2.1 and granted the Petition. *See Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-11-06, 73 NRC 149, 190-94, 226 (2011).

On January 10, 2013, the Miami-Dade County Board of County Commissioners ("Board of County Commissioners") issued a Resolution approving the construction and operation of a reclaimed water treatment facility at the Turkey Point facility, but in a location different from that indicated by the applicant in its Environmental Report ("ER"), which is Part 3 of the Application. On February 5, 2013, the Joint Intervenors submitted the Motion, in which they propose a new contention for admission into this proceeding based on this new information.

DISCUSSION

I. LEGAL STANDARDS

To be admissible, a newly proffered contention must satisfy: (1) the timeliness standards in 10 C.F.R. § 2.309(c)(1) for new and amended contentions; and (2) the general contention admissibility standards in 10 C.F.R. § 2.309(f)(1). *See Florida Power and Light Co.* (Turkey Point, Units 6 & 7), LBP-11-15, 73 NRC 629, 633 (2011).² New or amended contentions filed after the initial filing period may be admitted only with leave of the presiding officer upon a showing that

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(c)(1) (modifying requirements of former 10 C.F.R. § 2.309(f)(2)).

² The Commission has consolidated its requirements for filing contentions after the deadline set in the Notice of Hearing in 10 C.F.R. § 2.309(c)(1). *See Amendments to Adjudicatory Process Rules and Related Requirements*, 77 Fed. Reg. 46,562, 46,591 (Aug. 3, 2012).

In addition to satisfying the requirements in 10 C.F.R. § 2.309(c)(1) for a new or amended contention filed after the deadline, the petitioner must set forth with particularity the reasons why the proposed contention satisfies the 10 C.F.R. § 2.309(f)(1) general contention admissibility requirements, which are that the contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) 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;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, 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 and the supporting reasons for the petitioner's belief

10 C.F.R. § 2.309(f)(1).

The 10 C.F.R. § 2.309(f)(1) requirements should “focus litigation on concrete issues and result in a clearer and more focused record for decision.” Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004). The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.” *Id.* The Commission has emphasized that the rules on contention admissibility are “strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition*

for reconsideration denied, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Attempting to meet these requirements by “[m]ere ‘notice pleading’ does not suffice.” *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

II. THE PROPOSED NEW CONTENTION IS INADMISSIBLE

Proposed New Contention:

The ER for Turkey Point Units 6 & 7 does not satisfy the National Environmental Policy Act (“NEPA”) because it does not properly identify the location of the reclaimed water treatment facility and associated pipelines and does not include a discussion of the environmental impacts of constructing and operating the reclaimed water treatment facility and associated pipelines in the location and manner approved by the Miami-Dade County Commission.

Motion at 3.

Basis:

In describing the basis for the proposed new contention, the Joint Intervenors indicate that the Board of County Commissioners approved FPL’s request to construct the reclaimed water treatment facility, but at a location different from that presented in the ER. *Id.* at 2-3. As an attachment to the Motion, the Joint Intervenors provide a copy of the County Commissioners’ Resolution approving the alternative location of the reclaimed water treatment facility and pipelines, including a map of that approved location. See Motion, Attachment A. The Joint Intervenors assert that, because the ER fails “to accurately identify the location of the reclaimed water treatment facility and associated pipelines,” the ER “fails to assess the environmental impacts of constructing and operating the reclaimed water treatment facility and associated pipeline in that location.” Motion at 3-4. The Joint Intervenors further assert that, as a result of this asserted changed location, “[t]he construction and operation of the reclaimed water

treatment facility and associated pipelines will now impact a different geographic area and the species and habitats occurring therein.” *Id.* at 3.

Staff Response: Although the staff does not oppose the filing of the proposed new contention based on the criteria of 10 C.F.R. § 2.309(c)(1), the Proposed New Contention is inadmissible, as explained in more detail below, because it (1) is unsupported by alleged facts or expert opinion; (2) fails to explain why this issue is material to the findings that the NRC must make in this proceeding; and (3) fails to identify a genuine dispute with the application regarding a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iv)-(vi).

A. The Joint Intervenors do not provide information to support their position that new habitats and species will be affected by the reclaimed water treatment facility and therefore fail to satisfy 10 C.F.R. § 2.309(f)(1)(v).

As an initial matter, the Joint Intervenors state that construction of the reclaimed water treatment facility and pipelines in the recently approved location will impact “a new set of habitats and species.” Motion at 5. However, the Motion itself references a portion of the ER which states that the initial location of the facility and pipelines will impact “dwarf mangroves, mixed wetland hardwood and roads and highways.” Motion at 2, citing ER Rev 3. at 4.3.1.1.4. The Joint Intervenors fail to provide any supporting documentation to show how or why either habitats or species in the area of the location approved by the Board of County Commissioners for the reclaimed water treatment facility or associated pipelines would differ from those already discussed in the ER. Motion at 2-5. The Commission, however, requires petitioners to submit “supporting information and references to specific documents and sources that serve to establish the validity of the contention.” *Oyster Creek*, CLI-06-24, 64 NRC at 118-19. “[P]etitioners must do more than submit ‘bald or conclusory allegation[s]’ of a dispute with the applicant.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-12, 58 NRC 75, 81 (2003); see also “Final Rule, Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,171 (1989). The Joint Intervenors provide no information to support their assertion that the

reclaimed water treatment facility will affect a new set of habitats and species at the location approved by the Board of County Commissioners, contrary to 10 C.F.R. § 2.309(f)(1)(v).

B. The Joint Intervenors fail to demonstrate that the location of the reclaimed water treatment facility, as approved by the Board of County Commissioners, is material to the findings the NRC must make in this proceeding and therefore fail to satisfy 10 C.F.R. § 2.309(f)(1)(iv).

In addition to the Joint Intervenors' failure to demonstrate that the location of the reclaimed water treatment facility approved by the County Commissioners and associated pipelines could affect habitats or species not considered in the ER, as explained above, the Joint Intervenors also do not explain how such asserted impacts would be different from those already assessed in the ER and thereby affect the findings the NRC must make in this proceeding. Motion at 4-5. Under 10 C.F.R. § 2.309(f)(1)(iv), however, a proponent of a contention is obligated to demonstrate that the contention is material to the findings the NRC must make in the proceeding. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (citing 54 Fed. Reg. at 33,172) (A "dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"); *see also Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 748-49 (2005) ("Materiality' requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding. This means that there must be some significant link between the claimed deficiency and either health and safety of the public, or the environment."). Especially since the Joint Intervenors have not presented support for their claim that different species or habitats would be affected, neither the Motion nor the attached Resolution nor the referenced sections of the ER demonstrate how this location of the reclaimed water treatment facility, as approved, could affect any conclusion in the ER, and thus do not explain why it would be material to the findings the NRC must make in this proceeding. *See* 10 C.F.R. § 2.309(f)(1)(iv).

C. The Joint Intervenors fail to raise a genuine dispute with the Applicant on a material issue of law or fact and therefore fail to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

For similar reasons, the Proposed New Contention also fails to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). The Joint Intervenors state that the ER does not accurately identify the location of the reclaimed water treatment facility and does not analyze the environmental impacts of constructing and operating this facility and pipelines in the location approved by the Board of County Commissioners, and that this is a material omission from the Application. Motion at 5. The ER, however, *does* describe the proposed location of the reclaimed water treatment facility and associated pipelines, and the Joint Intervenors claim the ER “inaccurately” or “improperly” identifies the location of that facility. *Id.* at 3. Accordingly, the proposed new contention cannot properly be characterized as one of omission. Although the proposed contention disputes the application in the sense that it asserts that the ER inaccurately identifies the location of the reclaimed water treatment facility, this is not an omission, and the Joint Intervenors have not shown why their asserted dispute is a material dispute with the application, as required by § 2.309(f)(1)(iv).

In regard to the materiality of the location of the reclaimed water treatment facility, both the original and approved locations of the reclaimed water treatment facility are within an area designated as a “new unusual use area.” See Attachment A to Motion. Although the Joint Intervenors include references to specific portions of the applicant’s environmental report that discuss the initially anticipated location of the reclaimed water treatment facility (*id.* at 2-3), the Joint Intervenors fail to show why the approved location would have different or greater impacts than the initial location, much less how those impacts could affect new habitats or species (*id.* at 3-5). They do not explain how the area containing the reclaimed water treatment facility at the approved location and the associated pipelines might also contain different species, nor do

they demonstrate that the ER's current analysis of environmental impacts to known species is inadequate. *Id.*

In determining contention admissibility, "[a]ny contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed." See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 433 (citing *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994)). Even if the Joint Intervenors were correct that the approved location of the reclaimed water treatment facility and associated pipelines would impact new habitats and species, neither the Motion nor the Attached Resolution explain why that would affect any assumptions, analysis, or conclusion in the Turkey Point ER, let alone demonstrate that the Turkey Point ER is inadequate, contrary to 10 C.F.R. 2.309(f)(1)(vi). See *Millstone*, LBP-08-9, 67 NRC at 433. Accordingly, the Joint Intervenors fail to identify any specific material disagreement with the actual analysis in the ER, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

For the foregoing reasons, the proposed new contention is inadmissible.

CONCLUSION

In view of the foregoing, the Joint Intervenors' Motion should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated at Rockville, Maryland
this 4th day of March, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Turkey Point Units 6 and 7))

CERTIFICATE OF SERVICE

I hereby certify that the “NRC STAFF ANSWER TO ‘JOINT INTERVENORS’ MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING THE SITING AND ENVIRONMENTAL IMPACTS OF A RECLAIMED WATER TREATMENT FACILITY AND ASSOCIATED PIPELINES AT THE TURKEY POINT NUCLEAR POWER PLANT” has been filed through the E-Filing system this 4th day of March, 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 4th day of March, 2013