

November 28, 2014

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Florida Power & Light Company)	Docket Nos. 50-250
(Turkey Point Units 3 and 4))	50-251
)	

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO STRIKE NEW ARGUMENTS AND
REFERENCES IN CASE'S REPLY**

Pursuant to 10 C.F.R. § 2.323(a), Applicant Florida Power & Light Company (“FPL”) hereby moves to strike portions of “Citizens Allied for Safe Energy Inc.’s (“CASE”) Reply to FPL and to NRC Staff Answers to Its Petition to Intervene and Request for Hearing,” dated November 17, 2014 (“CASE Reply”).¹ The CASE Reply makes new arguments and provides new documentation not included in CASE’s October 14, 2014 “Petition to Intervene and Request for a Hearing” (“Petition”). CASE did not seek leave to amend its contentions to provide new bases or attempt to demonstrate compliance with the standards for accepting such late-filed amendments found in 10 C.F.R. § 2.309(c). For this reason, CASE’s new arguments and new references must be stricken.

¹ The CASE Reply is in response to “FPL’s Answer To Citizens Allied For Safe Energy, Inc.’s Petition to Intervene and Request for a Hearing,” dated November 10, 2014 (“FPL Answer”) and “NRC Staff’s Answer to Citizens Allied for Safe Energy, Inc.’s Petition for Leave to Intervene and Request for Hearing” dated November 10, 2014 (“NRC Staff Answer”).

ARGUMENT

I. NRC Standards for Reply Briefs

The Commission has ruled that a reply to an answer may *not* be used as a vehicle to raise new arguments or claims not found in the original contention, nor be used to cure an otherwise deficient contention. NRC's procedural rules do not allow "using reply briefs to provide, for the first time, the necessary threshold support for contentions," as that "would effectively bypass and eviscerate [its] rules governing timely filing, contention amendment, and submission of late-filed contentions." *Louisiana Energy Serv., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004). Instead, a Petitioners' reply brief should be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer," *Louisiana Energy Serv., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (citing Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)).

There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new bases or new issues that "simply did not occur to [them] at the outset." *Id.* (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)). *See also Nuclear Management Company* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2)"). Simply put, a petitioner cannot remediate a deficient contention "by introducing in the reply documents that were available to it...during the timeframe for initially filing contentions." *Id.* Board consideration of new arguments or evidence provided in a reply

would deprive the other parties of an opportunity to respond to or challenge the new evidence. *Id.*; see also *Entergy Nuclear Operations, Inc. and Entergy Nuclear Fitzpatrick, LLC* (James L. FitzPatrick Nuclear Power Plant), CLI-08-19, 68 NRC 251, 261 (2008); *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 & 276 (2009) (holding that neither new bases nor new arguments may be raised in a reply brief unless the standards for late-filed contentions are met); *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 568 (2009).

II. CASE's New Arguments and References Should be Stricken

Contrary to this established NRC caselaw, the CASE Reply is not “narrowly focused on the legal or logical arguments” in the FPL and NRC Staff Answers. Instead, CASE offers new arguments and new documentary material in an attempt to provide threshold support for its contentions and its claim of standing. Consequently, this new material should not be considered. These new documents and arguments may not be used to provide threshold support for the admission of CASE's contentions. *LES*, CLI-04-35, 60 NRC at 623. By waiting until its reply brief to mention these documents, CASE deprived FPL of an opportunity to rebut their relevance. *Palisades*, CLI-06-17, 63 NRC at 732. FPL is procedurally unable to respond to these claims and demonstrate that they do not support the admission of CASE's Contention. Reliance on these arguments and documents to support admission of CASE's contentions would be contrary to established Commission case law and patently unfair.

The CASE Reply identifies the following new references that were not included in its Petition:

- United States Geologic Service (“USGS”) - Delineation of Saltwater Intrusion in the Biscayne Aquifer, Eastern Dade County, Florida, 1995. CASE Reply at 9.
- USGS Average Altitude of the Water Table (1990-1999) and Frequency Analysis of Water Levels (1974-1999) in the Biscayne Aquifer, Miami-Dade County, Florida. CASE Reply at 9.
- Environmental Protection Agency (“EPA”) Detailed Facility Report, FPL Turkey Point Nuclear Generating Station. CASE Reply at 11.
- Everglades Restoration Plan, Indicator 4.4 - American Crocodile. CASE Reply at 20-21.
- Turkey Point Units 3 and 4, Wastewater Permit Number FL0001562, Minor Revision Notification (ADAMS Accession No. ML070440146). CASE Reply at 21.
- September 16, 2014 Miami Herald article. CASE Reply at 22-23.
- Final Judgment in the United States District Court for the Southern District of Florida, Civil Action No. 70-382-CA, dated September 10, 1971 (“Final Judgment”). CASE Reply at 23-26.

These new references and associated new arguments are discussed below.

A. Standing

The Commission’s rules against raising new threshold support in a reply are not limited to contention admissibility, but extend also to demonstrating standing. *Entergy Nuclear Operations, Inc.* CLI-08-19, 68 NRC at 261 (rejecting a standing authorization affidavit submitted with a reply). In its Petition, CASE relied on FPL allegedly “drawing excessive water from the aquifer” to demonstrate standing. Pet. at 4. In its Answer, FPL argued, among other things, that CASE had not demonstrated an injury-in-fact related to

the license amendment, noting that the Biscayne Aquifer “in the vicinity of the plant” is saltwater and that the Floridan Aquifer is brackish. FPL Answer at 11-12; *see also* NRC Staff Answer at 4, Att. B. In response, the CASE Reply argues, for the first time, that FPL plans to withdraw water from a fresh portion of the Biscayne aquifer. Pet. at 9. CASE relies on the two USGS documents for this purpose. Because CASE never originally argued that FPL planned to withdraw water from a fresh portion of the Biscayne aquifer, or cited these USGS documents, it cannot do so now.

The CASE Reply also raises another entirely new argument for standing based on an EPA website, which identifies the use of certain chemicals in the cooling canals from 2004-2012. CASE Reply at 11. To the extent CASE attempts to use this new reference and new argument to bolster its assertion of an injury-in-fact from the NRC’s licensing action, it must be stricken.

The CASE Reply also argues that the Atomic Safety and Licensing Board in the Turkey Point 6&7 new reactor licensing proceeding found that CASE had demonstrated standing in that proceeding. CASE Reply at 13-14. Again, this is a new argument not present in CASE’s Petition, which must be stricken.

B. Contention 3

The CASE Reply introduces several new arguments or references pertaining to Contention 3. In Contention 3, CASE discussed, among other things, the impacts of saline water on juvenile crocodiles. Pet. at 17. In its Reply, CASE seeks to bolster this claim by a citing to a new reference, “Everglades Restoration Plan, Indicator 4.4 - American Crocodile.” CASE Reply at 20-21. This new reference must be stricken.

The CASE Reply also introduces an entirely new claim regarding “contaminants from other sources in the [cooling canal system (“CCS”)] including hydrazine and low level radiation waste such as authorized since 2005.” CASE Reply at 21. In support of these claims, CASE cites a 2007 FPL submittal to the NRC, which provided a revision to the Wastewater Permit issued by the Florida Department of Environmental Protection (“FDEP”). *Id.* But the CASE Petition nowhere mentioned hydrazine and provided only a cursory discussion of radiological waste, with no discussion of Turkey Point-specific radiological issues. Pet. at 19-20. CASE’s introduction in its Reply of concerns about hydrazine and the reference to the 2007 Turkey Point Wastewater Permit must be stricken.

The CASE Reply includes a new Miami Herald article about the Turkey Point cooling canal temperature situation and emphasizes a statement about plans to eliminate monitoring requirements. CASE Reply at 22-23. CASE then introduces the new argument that the NRC must hold a hearing because it believes the state and local regulators are not doing enough. *Id.* at 23. This new article and argument must be stricken.

Also in its Reply as to Contention 3, CASE introduces the 1971 Final Judgment, which implemented the settlement agreement between FPL and the United States and led to the construction of the CCS at Turkey Point. CASE Reply at 23-24. CASE notes that this order states that FPL may not introduce biocides into the cooling waters except as allowed under state law, insinuating that FPL’s FDEP-approved chemical treatments violate state law and thus violate the terms of the Final Judgment. *Id.* This reference and argument were not raised in CASE’s Petition and must be stricken.

C. Contention 4

CASE also relies upon the Final Judgment in its Reply as to Contention 4. CASE Reply at 25-26. First, CASE mentions an interim provision that limited thermal discharges to Biscayne Bay while the CCS was being constructed. *Id.* at 25. Second, CASE discusses the Final Judgment's provision for enforcement in the event of noncompliance with its non-discharge requirements. *Id.* at 25-26. CASE uses these provisions of the Final Judgment to argue that its claim regarding FPL's power dispatch priorities is within the scope of this NRC license amendment proceeding. *Id.* Once again, CASE neither raised these arguments nor even mentioned the Final Judgment in its Petition. For that reason, this entire discussion must be stricken.

CONCLUSION

For the foregoing reasons, the portions of the CASE Reply identified above impermissible introduce new arguments and new references in support of CASE's Petition and should be stricken.

CERTIFICATION

As required by 10 C.F.R. § 2.323(b), FPL has consulted with CASE and the NRC Staff. CASE stated that any information referenced was in direct response to FPL or NRC Staff answers and that no new issues were presented. The NRC Staff does not oppose the filing of the motion to strike.

Respectfully Submitted,

/Signed electronically by Steven Hamrick/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “FPL’s Motion to Strike New Arguments and References in CASE’s Reply,” dated November 28, 2014, have been served upon the following persons by the Electronic Information Exchange and via e-mail to those marked with an asterisk.

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Signed (electronically) by,

Steven Hamrick

Dated at Washington, DC
this 28th day of November, 2014