

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
FLORIDA POWER & LIGHT CO.)	Docket No. 50-250-LA
)	50-251-LA
(Turkey Point Nuclear Generating)	
Unit Nos. 3 and 4))	

NRC STAFF'S BRIEF IN SUPPORT OF ITS APPEAL OF LBP-15-13

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311, the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby files its brief in support of its appeal of Atomic Safety and Licensing Board (Board) Order LBP-15-13.¹ The Order granted Citizens Allied for Safe Energy, Inc.'s (CASE) standing to intervene and admitted-in-part a reformulated Contention 1 challenging the Environmental Assessment (EA) prepared by the Staff. The Board erred when it granted standing to CASE and admitted Contention 1, as reformulated by the Board.

The Staff submits that the Board erred when it (1) redrafted an otherwise inadmissible contention;² (2) determined that the license amendment request (LAR), would result in the need for additional aquifer withdrawals and that NEPA required the Staff's EA to address further the environmental impacts of State of Florida's (Florida) authorization of aquifer withdrawals and

¹ *Florida Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 & 4), LBP-15-13, 81 NRC ___ (Mar. 23, 2015) (slip op.). Available at Agencywide Documents Access and Management System (ADAMS) Accession No. ML15082A197).

² See *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 437 n.49 (2011) (citing *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552-53 (2009) (stating that "[o]ur contention pleading rules are designed to ensure ... that only well-defined issues are admitted for hearing," and that "a board should not add material not raised by a petitioner in order to render a contention admissible"); *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720-21 (2006) ("The [b]oard must not redraft an inadmissible contention to cure deficiencies and thereby render it admissible."). See also *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

chemical injections, although the LAR did not cause the environmental impacts associated with the state-licensed activities³ and the State's administrative orders;⁴ and (3) granted standing based on injuries related to the aquifer withdrawals that were neither caused by, nor could be redressed by a proceeding before the Board or the Commission. Thus, CASE's Petition should have been wholly denied.

BACKGROUND

FPL's Turkey Point facility consists of five steam electric generating units: three fossil fuel fired units (Units 1, 2 and 5) and two nuclear units (Units 3 and 4).⁵ Unit 2 is retired.⁶ The NRC licensed each nuclear unit.⁷

³ Units 3, 4 and 5 are licensed ("State License" or "Conditions of Certification (CoC) PA 03-45D") under the Florida Electrical Power Plant Siting Act, Fla. Stat. §§ 403.501-403.518. The Conditions of Certification for power plants, which are the licensing requirements for a specific facility, may be accessed through the Florida Department of Environmental Protection's website (Apr. 3, 2015), *available at* <http://www.dep.state.fl.us/siting/certification.htm>. The state-issued CoC for Turkey Point Power Plant Units 3-5 (June 19, 2009), is *available at* http://publicfiles.dep.state.fl.us/Siting/Outgoing/Web/Certification/pa03_45_2009_D_units_3_5.pdf.

⁴ The Florida Department of Environmental Protection (Department) has statutory authority to issue such orders as are necessary to effectuate the control of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings. Fla. Stat. § 403.061(8). The Department and its agents shall have general control and supervision over underground water, lakes, rivers, streams, canals, ditches, and coastal waters under the jurisdiction of the state insofar as their pollution may affect the public health or impair the interest of the public or persons lawfully using them. Fla. Stat. § 403.062.

⁵ Administrative Order OGC No. 14-0741, Turkey Point Power Plant DEP State License No. PA03-45, at 1 (Dec. 23, 2014) (ADAMS Accession No. ML15026A548) (AO). The Florida Department of Environmental Protection (Department) has statutory authority to issue such orders as are necessary to effectuate the control of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings. Fla. Stat. § 403.061(8). The Department and its agents shall have general control and supervision over underground water, lakes, rivers, streams, canals, ditches, and coastal waters under the jurisdiction of the state insofar as their pollution may affect the public health or impair the interest of the public or persons lawfully using them. Fla. Stat. § 403.062. Under its authority, the Department issued Administrative Order OGC No. 14-0741 which, *inter alia*, described the history and regulation of the CCS.

⁶ AO at 1.

⁷ The nuclear licenses are Unit 3, Docket No. 50-250, Renewed License No. DPR-31, and Unit 4, Docket No. 50-251, Renewed License No. DPR-41.

FPL owns and operates, pursuant to its state-issued Conditions of Certification (CoC) and the state's administrative orders, a cooling canal system (CCS), an approximately 5,900-acre network of unlined canals at Turkey Point.⁸ During the dry season, when the natural groundwater gradient is westward from Biscayne Bay and Card Sound toward the Everglades, water is pumped from the interceptor ditch into the CCS to create an artificial ground water gradient from the Everglades into the interceptor ditch, to restrict the flow of saline water from the CCS toward the Everglades.⁹

On July 10, 2014, FPL informed the NRC that the ultimate heat sink (i.e. the CCS) temperature has been recently trending higher than historical averages and has approached the current limit.¹⁰ Accordingly, FPL requested an amendment to the Technical Specifications (TS) for the Turkey Point Nuclear Plant (Turkey Point), Units 3 and 4 to revise the specified maximum UHS (i.e. CCS) temperature in TS LOC 3.7.4 from 100 °F to 104 °F (henceforth, LOC 3.7.4 LAR).¹¹

⁸ AO at 1. FPL began construction on the CCS in 1970, and in 1971, signed a Consent Decree with the U.S. Department of Justice that required the construction, after permitting of a closed-loop cooling configuration with limitations on make-up and blowdown water. The Florida Department of Pollution Control (later to become the Florida Department of Environmental Protection), in 1971, issued a construction permit for the CCS. In 1972, FPL entered into an agreement with the Central and Southern Florida Flood Control District (later to become the South Florida Water Management District or "District") addressing the operations and impacts of the CCS. In 1973, the construction of the CCS was completed, and the CCS was closed from the surface waters of both Biscayne Bay and Card Sound, becoming a closed-loop system. An approximately 18 feet deep interceptor ditch along the west side of the CCS was constructed to create a hydraulic barrier to keep water in the CCS from migrating inland or westward. The 1972 agreement between the District and FPL has been supplemented, and the CCS is being operated pursuant to the October 16, 2009, "Fifth Supplemental Agreement."

⁹ *Id.*

¹⁰ Letter L-2014-216 from Michael Kiley, FPL, to NRC, License Amendment Request No. 231, Application to Revise Technical Specifications to Revise Ultimate Heat Sink Temperature Limit (July 10, 2014) (ADAMS Accession No. ML14196A006) (LAR).

¹¹ *Id.* at Enclosure Page 2 of 17. The request would allow operation in Modes 1, 2, 3, and 4 when the CCS was warmer. *Id.* at Enclosure Page 2 of 17. FPL originally requested approval by August 30, 2014. *Id.* at 1. The request was supplemented by eight (8) letters from July 17, 2014, through August 4, 2014. See ADAMS Accession Nos. ML14202A392, ML14204A367, ML14204A368, ML14206A853, ML14210A374, ML14211A507, ML14211A508, and ML14217A341. The LAR, as supplemented, would change LCO 3.7.4 from: "The ultimate heat sink shall be OPERABLE with an average supply water temperature less than or equal to 100°F" to "The ultimate heat sink shall be OPERABLE with an average

As part of its review, the Staff completed an EA of the proposed licensing action, and on July 31, 2014, the NRC staff published the EA and a Finding of No Significant Impact (FONSI) on the proposed action.¹² The Staff's EA described earlier reviews of Turkey Point.¹³ The EA stated that:

The U.S. Atomic Energy Commission (AEC), the NRC's predecessor agency, and the NRC have previously conducted environmental reviews of Turkey Point in several documents, and the descriptions therein continue to accurately depict the Turkey Point site and environs. Those documents include the AEC's July 1972 Final Environmental Statement (FES); the NRC's January 2002 Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Turkey Point Units 3 and 4—Final Report (NUREG-1437, Supplement 5) (ADAMS Accession No. ML020280236); and the NRC's March 2012 environmental assessment and final FONSI for the Turkey Point extended power uprate (EPU) (ADAMS Accession No. ML12074A251).¹⁴

The NRC issued the amendment on August 8, 2014, using exigent procedures, and on August 14, 2014, the Staff published its approval of the LAR and extended the time for requesting an opportunity for hearing.¹⁵ Accordingly, this proceeding concerns the LAR to raise the temperature limit in LCO 3.7.4 from 100 °F to 104 °F.

Notably, the state-issued CoC already imposes requirements to address potential harm to the State's waters caused by the FPL's uprate, and those measures include the State imposing "mitigation measures to offset such impacts of the Uprate Project necessary to comply with State and local water quality standards, which may include methods and features to reduce

supply water temperature less than or equal to 104°F." Surveillance requirements (SR) 4.7.4 and 4.7.2 were changed to support the LAR. LAR at Enclosure Page 2 of 17 – Enclosure Page 3 of 17.

¹² Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4, 79 Fed. Reg. 44,464 (July 31, 2014) (Environmental Assessment and finding of no significant impact issuance).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Florida Power & Light Company; Turkey Point Nuclear Generating Units 2 and 4, 79 Fed. Reg. 47,689 (Aug. 14, 2014).

and mitigate salinity increases in groundwater.”¹⁶ State-issued administrative orders concerning water withdrawals, salinity management, canal operations, and the CCS are not part of the NRC proceeding, but may be challenged before the appropriate state agency.¹⁷

On October 14, 2014, CASE submitted its petition to intervene and hearing request, with four proposed contentions:

Contention 1 - The uprate of Turkey Point Reactors 3 & 4 has been concurrent with alarming increases in salinity, temperature, tritium, and chloride in the CCS area;¹⁸

Contention 2 - The exigent CCS problems started years before July, 2014 and were being addressed in 2013 and earlier;¹⁹

Contention 3 - The measures being used to control the CCS conditions are extraordinarily invasive, environmentally usurious and some untested;²⁰

Contention 4 - The CCS is aging, old technology and FPL has no redundancy for Units 3 & 4 limiting corrective actions.²¹

The NRC Staff and FPL filed timely answers arguing that CASE lacks standing and that its contentions fail to meet the NRC’s contention admissibility requirements.²² CASE submitted

¹⁶ Conditions of Certification (CoC) PA 03-45D at 22.

¹⁷ As described in the AO, if CASE believes it is injured by those operations, then CASE should petition Florida for relief under Fla. Stat. §§ 120.569 and 120.57, not the NRC. AO at 10. Indeed, it appears a legal challenge was raised against the AO. See *Tropical Audubon Soc’y, Inc. v. Florida Dep’t of Env’t Prot. & Florida Power & Light Co.*, Petition for Formal Administrative Hearing (Feb. 9, 2015), available at <https://www.no2fpl.com/wp-content/uploads/Ex.-3-Petition-for-Formal-Administrative-Hrg-02-09-15-FILED.pdf>.

¹⁸ Petition at 5 (emphasis omitted).

¹⁹ *Id.* at 10 (emphasis omitted).

²⁰ *Id.* at 14 (emphasis omitted).

²¹ *Id.* at 22 (emphasis omitted).

²² NRC Staff’s Answer to Citizens Allied for Safe Energy, Inc.’s Petition for Leave to Intervene and Request for Hearing (Nov. 10, 2014) (ADAMS Accession No. ML14314A874 (NRC Staff Answer); FPL’s Answer to Citizens Allied for Safe Energy, Inc.’s Petition to Intervene and Request for a Hearing (Nov. 10, 2014) (ADAMS Accession No. ML14314B019) (FPL Answer).

a consolidated reply to the NRC Staff and FPL answers.²³ The Board held oral argument on standing and contention admissibility on January 14, 2015.²⁴

On March 23, 2015, the Board issued LBP-15-13 denying proposed Contentions 2, 3, and 4; however, the Board reformulated Contention 1 and granted CASE's Petition to Intervene.²⁵ As reformulated, Contention 1 no longer mentions the uprates, and instead states:

The NRC's environmental assessment, in support of its finding of no significant impact related to the 2014 Turkey Point Units 3 and 4 license amendments, does not adequately address the impact of increased temperature and salinity in the CCS on saltwater intrusion arising from (1) migration out of the CCS; and (2) the withdrawal of fresh water from surrounding aquifers to mitigate conditions within the CCS.²⁶

In reformulating Contention 1, the Board utilized arguments made with respect to Contention 3 and *sua sponte* added bases not raised by petitioners to support the admission of the reformulated Contention 1.²⁷ In admitting Contention 1, the Board emphasized four primary issues: (1) aquifer withdrawals "are the immediate or reasonably foreseeable result of the NRC's granting of the subject [LOC 3.7.4 LAR] amendments";²⁸ (2) "elevated CCS temperatures ... could effectively require additional aquifer withdrawals";²⁹ (3) FPL could have shut down or reduced power and "obviated any need for more extensive aquifer withdrawals, at least during

²³ Citizens Allied for Safe Energy, Inc.'s Reply to FPL and to NRC Staff Answers to Its Petition to Intervene and Request for a Hearing (Nov. 17, 2014) (ADAMS Accession No. ML14324A042) (Reply).

²⁴ See Notice and Order (Scheduling Oral Argument) (Dec. 1, 2014) (unpublished) (ADAMS Accession No. ML14335A434); Transcript of Oral Argument in the Matter of Florida Power and Light Turkey Point Nuclear Generating Units 3 and 4, at 4 (Jan. 14, 2015) (Tr.).

²⁵ The Board declined to admit Contention 3 as a separate contention, and viewed Contention 3 as largely duplicative of Contention 1. *Turkey Point*, LBP-15-13, 81 NRC at __ (slip op. at 26).

²⁶ *Id.* at __ (slip. op at 24)

²⁷ *Id.* at __ (slip op. at 14 n.69).

²⁸ *Id.* at __ (slip op.12).

²⁹ *Id.* at __ (slip op.11).

periods when CCS intake temperatures exceed 100 °F³⁰; and (4) the need for aquifer withdrawals would not have been necessary if the NRC had not granted the LOC 3.7.4 LAR.³¹

APPLICABLE LEGAL STANDARD FOR REVIEW

The Commission's rules of practice provide an appeal as of right on the question of whether a hearing request should have been "wholly denied."³² The Commission generally defers to a Board's contention admissibility rulings in the absence of an error of law or abuse of discretion.³³ The Commission gives substantial deference to Board conclusions on standing and contention admissibility unless the appeal points to an error of law or abuse of discretion.³⁴ However, the Commission's deference to the Board's conclusions on standing and admissibility has limits. While a board may recast a contention "for purposes of clarity, succinctness, and a more efficient proceeding," it may do so only *after* it has determined that the contention as originally submitted was admissible.³⁵

In the past, the Commission has reversed Boards for inferring a basis for a contention, recasting, and admitting it.³⁶ For example, the Board in *Palo Verde* explained it was required "to construe appropriately the intent of the contention and its bases, then, once construed, to apply

³⁰ *Id.*

³¹ *Id.*

³² 10 C.F.R. § 2.311(d)(1).

³³ *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 379-380 (2012).

³⁴ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008), *citing PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007).

³⁵ *Siemaszko*, CLI-06-16, 63 NRC at 720-21 (quoting *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), LBP-84-40A, 20 NRC 1195, 1199 (1984)).

³⁶ *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2 and 3), LBP-91-19, 33 NRC 397, 401 (1991), *appeal granted in part*, CLI-92-12, 34 NRC 149 (1991).

the high-threshold substantive requirements for pleading contentions.³⁷ But this puts the cart before the horse. As the Commission explained when it reversed the Board in *Palo Verde*,

[w]hile the Board may appropriately view Petitioners' support of its contention in a light that is favorable to the Petitioner, it cannot do so by ignoring the requirements set forth in 10 C.F.R. § 2.714(b)(2)(i), (ii) and (iii).³⁸ These sections demand that all petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact. If any one of these requirements is not met, a contention must be rejected.³⁹

A board "must not redraft an inadmissible contention to cure deficiencies and thereby render it admissible. Such an action would be tantamount to raising a new issue *sua sponte* without the required prior permission from the Commission."⁴⁰

ARGUMENT

I. The Board Abused its Discretion in Reformulating an Otherwise Inadmissible Contention

NRC regulations require a petitioner to "[p]rovide a specific statement of the issue of law or fact to be raised or controverted" in support of its request for a hearing.⁴¹ The petitioner is responsible for formulating the contention and the scope of issues raised in the contention through its proposed bases.⁴² The Board abused its discretion when it reformulated Contention 1 from a challenge of the prior license amendment for power uprates for Turkey

³⁷ *Id.*

³⁸ In 2004, the Commission changed its adjudicatory procedural rules. The general threshold contention admission standards remained substantively the same, but were renumbered as part of the overall reorganization of Part 2. Prior to this 2004 revision, the contention admissibility standards were found in 10 C.F.R. § 2.714(b)(2). *USEC Inc. (American Centrifuge Plant) CLI-06-10*, 63 NRC 451, 456 n.21 (2006).

³⁹ *Palo Verde*, CLI-91-12, 34 NRC at 155-56, *citing* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

⁴⁰ *Siemaszko*, CLI-06-16, 63 NRC at 720-21.

⁴¹ 10 C.F.R. § 2.309(f)(1)(i).

⁴² *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

Point Units 3 and 4⁴³ into a challenge of the Staff's EA for the LOC 3.7.4 LAR with respect to the impact of increased temperature and salinity in the CCS on saltwater intrusion arising from (1) migration out of the CCS and (2) the withdrawal of fresh water from surrounding aquifers to mitigate conditions within the CCS.⁴⁴ In reformulating the contention, the Board went beyond simply clarifying the contention; instead, the Board identified and imported wholly new issues for litigation.⁴⁵ The scope of Contention 1 as reformulated by the Board is not supported by CASE's bases for Contention 1 or Contention 3.

In the bases for Contention 1, CASE provided a single reference to the EA:

... in the NRC document (Docket ID NRC-2014-0181) relating to the Amendments to Renewed Facility Operating License Nos. DPR-31 and DPR-41, there does not seem to be any mention of the impact [of] the matter of salinity in the CCS or regarding saltwater intrusion into the Florida Aquifer, only the concern with temperature.⁴⁶

The EA prepared in conjunction with the LOC 3.7.4 LAR discusses the salinity in the CCS including actions that would mitigate high temperatures and salinity and, thus, create more

⁴³ The NRC approved the uprate and amended the licenses on June 15, 2012. See Turkey Point Nuclear Plant, Units 3 and 4 -- Issuance of License Amendments Regarding Extended Power Uprate (TAC Nos. ME4907 and ME4908 (June 15, 2012) (ADAMS Package ML11293A359). The amendments increased the licensed core power level for Turkey Point Units 3 and 4 from 2300 megawatts thermal (MWt) to 2644 MWt (approximately 15 percent). Pursuant to its regulations, the Staff prepared a draft EA and draft finding of no significant impact and published them in the *Federal Register*. Florida Power & Light Company, Turkey Point, Units 3 and 4; Draft Environmental Assessment and Draft Finding of No Significant Impact Related to the Proposed License Amendment To Increase the Maximum Reactor Power Level, 76 Fed. Reg. 71,379 (Nov. 17, 2011). The Draft EA provided a 30-day opportunity for public comment. The Staff received comments that were addressed in the final EA. The Final EA was published in the *Federal Register*, License Amendment To Increase the Maximum Reactor Power Level, Florida Power & Light Company, Turkey Point, Units 3 and 4, 77 Fed. Reg. 20,059 (Apr. 3, 2012), and based on the EA, Staff determined that the uprates will not have a significant effect on the quality of the human environment.

Per its regulations, the NRC offered an opportunity for hearing on the uprate. Florida Power & Light Company; Turkey Point, Units 3 and 4; Notice of Consideration of Issuance of Amendment to Facility Operating License, and Opportunity for a Hearing and Order Imposing Procedures for Document Access to Sensitive Unclassified Non-Safeguards Information, 76 Fed. Reg. 26,771, (May 9, 2011). CASE did not request a hearing on the uprate. Tr. at 80-81.

⁴⁴ Petition at 4; *but see Turkey Point*, LBP-15-13, 81 NRC at __ (slip op. at 19-20).

⁴⁵ See *Diablo Canyon*, CLI-11-11, 74 NRC at 437, n.49.

⁴⁶ Petition at 6.

favorable conditions for CCS aquatic biota and crocodiles.⁴⁷ Specifically, the EA discusses in some detail the use of chemical treatments for the blue-green algae and the addition of water into the CCS to moderate temperature and reduce salinity.⁴⁸ These actions to mitigate both the high temperatures and salinity, however, were not part of the LOC 3.7.4 LAR. Instead, the State and its agencies approved or imposed these requirements.⁴⁹ The Staff's EA discussed these issues in some detail. With respect to the aquifer withdrawals, the EA stated:

The CCS is situated above two aquifers: the shallower saltwater Biscayne Aquifer and the deeper brackish Floridan Aquifer. A confining layer separates the two aquifers from one another. Turkey Point, Unit 5 uses the Floridan Aquifer for cooling water. The South Florida Water Management District (SFWMD) recently granted FPL approval to withdraw a portion (approximately 5 million gallons per day [MGD]) of the Unit 5 withdrawal allowance for use in the CCS. FPL began pumping Floridan Aquifer water into the CCS in early July. FPL has also received temporary approval to withdraw 30 MGD from the Biscayne Aquifer, though FPL has not yet used this allowance.

FPL also anticipates the FDEP to issue an Administrative Order requiring FPL to install up to six new wells that will pump approximately 14 MGD of water from the Floridan Aquifer into the CCS. Modeling performed by FPL consultants and the SFWMD indicates that in approximately 2 years, the withdrawals would reduce the salinity of the CCS to the equivalent of Biscayne Bay (about 34 parts per thousand [ppt]). Such withdrawals could also help moderate water temperatures.

The current and anticipated future aquifer withdrawals have the potential to contribute to cumulative effects on CCS surface water resources, CCS aquatic resources, and crocodiles. Because the CCS is a manmade closed cycle cooling system, aquifer withdrawals are not likely to have a significant cumulative effect on surface water resources. Aquifer withdrawals would result in beneficial impacts to CCS aquatic resources and the crocodiles inhabiting the Turkey Point site. FPL anticipates that the withdrawals will reduce the salinity of the CCS to about 34 ppt and could also help moderate CCS temperatures over the long term. Both of these effects would create favorable conditions for CCS

⁴⁷ 79 Fed. Reg. at 44,468.

⁴⁸ *Id.*

⁴⁹ See, e.g., AO at 5-6.

aquatic biota and crocodiles, which are currently tolerating an unusually hot, hypersaline environment.⁵⁰

Similarly, the EA considered impacts to groundwater.⁵¹ The Staff's EA also references other documents that discussed these issues and others in more detail, including the Biological Opinion prepared for the American Crocodile,⁵² and NUREG-1437, Supp. 5, Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Turkey Point Units 3 and 4⁵³ and Turkey Point's uprate license amendment request EA.⁵⁴ Thus, it was error for the Board to admit the contention because the Staff's EA did, in fact, discuss the precise issues that CASE alleged were missing.

As originally drafted by CASE, Contention 1 challenged the previously granted license amendment for power uprates for Turkey Point Units 3 and 4.⁵⁵ However, the Board substituted additional bases from Contention 3 that challenged the State authorized aquifer withdrawals and chemical treatments and bases not raised by petitioners to transform an inadmissible contention into one that was admitted.⁵⁶ The NRC's regulations are strict by design and require a petitioner

⁵⁰ 79 Fed. Reg. at 44,468.

⁵¹ *Id.* at 44,467. "The proposed action would have no effect on the remaining resources (i.e., land use, visual resources, air quality, noise, the geologic environment, groundwater resources, terrestrial resources, historic and cultural resources, socioeconomic conditions including minority and low income populations (environmental justice), and waste generation and management activities), and thus, cumulative impacts would not occur for these environmental resources." *Id.*

⁵² Biological Assessment on the American Crocodile (*Crocodylus acutus*), Turkey Point Nuclear Generating Unit Nos. 3 and 4 Proposed License Amendment to Increase the Ultimate Heat Sink Temperature Limit (July 2014) (ADAMS Accession No. ML14206A806).

⁵³ License Renewal Supplemental Environmental Impact Statement or "LR SEIS" (ADAMS Document Package ML020280236).

⁵⁴ 7590-01-P, License Amendment to Increase the Maximum Reactor Power Level, Florida Power & Light Company Turkey Point, Units 3 and 4 (Mar. 27, 2012) (ADAMS Accession No. ML12074A251) (Uprate EA).

⁵⁵ See *Diablo Canyon*, CLI-11-11, 74 NRC at 437 ("in the context of an adjudicatory proceeding, our contention admissibility rules require that contentions be raised with sufficient detail to put the parties on notice of the issues to be litigated."); see also 10 C.F.R. § 2.309(f)(1)(v), (vi).

⁵⁶ *Diablo Canyon*, 74 NRC at 437 n.49.

in its request for hearing to “[p]rovide a brief explanation of the basis for the contention.”⁵⁷

Because the scope of an admitted contention is defined by its bases,⁵⁸ the Board cannot expand the contention beyond the scope of the petition.⁵⁹

Moreover, the Board erred by combining the bases of Contention 1 (Challenge to the Turkey Point Units 3 and 4 prior power uprate license amendment) and Contention 3 (Challenge to the State Authorized Chemical Treatments and Aquifer Withdrawals) into a single contention challenging the LOC 3.7.4 LAR.⁶⁰ By combining the contentions in such a way, the Board substituted its judgment for that of the petitioners and added bases to the contention that were not raised.⁶¹

Nevertheless, as explained in the following, the Staff addressed the allegedly-omitted issues in its EA and in documents cited by the EA. For example, the Staff listed the environmental and other documents related to the NRC's FONSI.⁶² Among those documents listed were the LR SEIS and the Uprate EA. Section 4.5, Groundwater Use and Quality, of the

⁵⁷ 10 C.F.R. § 2.309(f)(1)(ii). CASE is responsible for supporting its contention because a “contention’s proponent, not the licensing board, is responsible for ... providing the necessary information to satisfy the basis requirement for the admission of contentions” *Statement of Policy*, CLI-98-12, 48 NRC at 22.

⁵⁸ *Crow Butte Res., Inc.* (North Trend Expansion Area), CLI-09-12. 69NRC 535, 553 (2009) (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)). The Commission recently reminded the Boards of the need to specify each basis relied upon for admitting a contention. *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 309-10, n.50 (2012) (citing *Crow Butte*, CLI-09-12, 69 NRC at 553-54). Where a Board failed to specify which bases were admissible and which were not, and which applied to each admitted contention, the Commission has found that the Board improperly recast the contentions. *Crow Butte*, CLI-09-12. 69 NRC at 553-554.

⁵⁹ *Diablo Canyon*, CLI-11-11. 74 NRC at 437 n.49.

⁶⁰ See *Turkey Point*, LBP-15-13, 81 NRC at ___ (slip op. at 18-19) (finding support for CASE beyond what CASE cited in Contention 1).

⁶¹ See *Seabrook*, CLI-12-5, 75 NRC at 348 n.277 (citing *American Centrifuge*, CLI-06-10, 63 NRC at 457 (“it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply infer unarticulated bases of contentions.”) (footnote and internal quotation marks omitted).

⁶² 79 Fed. Reg. at 44,469-70.

LR SEIS specifically addresses saltwater intrusion. It states, “Based on information in the GEIS, the Commission found that ... ‘Nuclear power plants do not contribute significantly to saltwater intrusion.’”⁶³ More recently, the Commission reexamined the saltwater intrusion in its 2013 GEIS and associated rule.⁶⁴ The Commission stated:

Groundwater Quality Degradation Resulting from Water Withdrawals: The final rule amends Table B-1 by consolidating two Category 1 issues, “Ground-water quality degradation (Ranney wells)” and “Ground-water quality degradation (saltwater intrusion),” each with an impact level of small, and names the consolidated issue, “Groundwater quality degradation resulting from water withdrawals.” The consolidated issue remains a Category 1 issue, with an impact level of small. The final rule further amends Table B-1 by removing the entries for “Ground-water quality degradation (Ranney wells)” and “Ground-water quality degradation (saltwater intrusion)” and, by adding an entry for “Groundwater quality degradation resulting from water withdrawals.” The finding column entry for the consolidated issue states “Groundwater withdrawals at operating nuclear power plants would not contribute significantly to groundwater quality degradation.” The two issues were consolidated as they both consider the possibility of groundwater quality becoming degraded as a result of plant operations drawing water of potentially lower quality into the aquifer.^[65]

Accordingly, by rule, the Commission addressed groundwater quality degradation resulting from water withdrawals, finding it to be small, stating “Groundwater withdrawals at operating nuclear power plants would not contribute significantly to groundwater quality degradation.”⁶⁶ The Board in reformulating Contention 1 did not acknowledge that the impact of saltwater intrusion at Turkey Point was already considered during license renewal, as documented in the LR SEIS and referenced in the LAR EA. The Board did not explain why the existing analyses, which

⁶³ LR SEIS at 4-31 (quoting the 1997 version of Appendix B to Subpart A of 10 C.F.R. part 51, Environmental Effect of Renewing the Operating License of a Nuclear Power Plant, as promulgated in Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 66,537, 66,548 (Dec. 18, 1996) (Final rule)).

⁶⁴ Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 78 Fed. Reg. 37,282, 37,300-301 (June 20, 2013) (Final rule).

⁶⁵ *Id.* at 37,300.

⁶⁶ *Id.* CASE did not challenge the license renewal. Tr. at 79-80.

covered the period of the renewed license, must be revisited in an EA. CASE has not provided any evidence challenging the previous conclusions,⁶⁷ nor the instant EA and the FONSI.

The Commission's contention admissibility regulations require that a proponent of a contention demonstrate that the issue raised in a contention is material to the findings the NRC must make to support the action.⁶⁸ The purpose of an EA is to enable the NRC Staff to determine whether to prepare an EIS or a FONSI.⁶⁹ Accordingly, the proponent of a claim of omission from an EA must, to meet the Commission's strict admissibility standards, demonstrate that the claimed omission is material to the NRC Staff's determination based on the EA. In light of the existing regulations and the Staff's previous analyses of Turkey Point Units 3 and 4, as referenced in the EA and documented in the LR SEIS, there is not an omission; neither CASE nor the Board made mention of the existing information.⁷⁰ Thus, the claimed omission is not material to staff's conclusion.

The Board abused its discretion by reformulating proposed Contention 1 from a challenge to the previously issued power uprates into to a challenge to the EA, importing bases for a different contention that challenged actions by the State of Florida rather than the LAR, and adding bases not raised by the petitioner *sua sponte*. Further, the reformatted contention is

⁶⁷ See *New Jersey Dept. of Env't Prot. v. Nuclear Regulatory Comm'n*, 561 F.3d 132, 136 (3rd Cir. 2009).

⁶⁸ 10 C.F.R. § 2.309(f)(1)(iv).

⁶⁹ 10 C.F.R. § 51.31(a).

⁷⁰ The Board's *sua sponte* challenge as to whether the Staff consulted the correct state official when preparing its EA is beyond the scope of this proceeding. In its memorandum and order, the Board indicated that the Staff consulted the incorrect state official. *Turkey Point*, LBP-15-13, 81 NRC at ___ (Order slip op. at 23). This issue was not raised by CASE. See Tr. at 195-206. Moreover, the Staff consulted the State of Florida's designated state official when preparing its EA. The Board has no authority to direct the Staff to consult alternative state officials instead of or in addition to those designated by the State.

The Staff note that while the Board may question who was contacted at the State, the regulatory requirement is for an EA to provide "A list of agencies and persons consulted, and identification of sources used[,]" 10 C.F.R. § 51.30(a)(2), and the Staff's EA satisfies that requirement. Nonetheless, the Board noted that a determination on the adequacy of EA must await full consideration at an evidentiary hearing. *Turkey Point*, LBP-15-13, 81 NRC at ___ (Order slip op. at 24).

beyond the scope of and immaterial to the LCO 3.7.4 LAR. Thus, the Board's order granting CASE's petition should be reversed, and the petition dismissed.

II. The Board Abused its Discretion When It Determined that the Staff Needed to Consider the Environmental Impacts from the FPL's Existing State Authorizations to Withdraw Water From the Aquifers and Speculated that Additional Withdrawals Would Be Necessitated by the LAR

As reformulated by the Board, Contention 1 states that the EA was inadequate because it did not address the impact of saltwater intrusion caused by State authorized aquifer withdrawals and migration from the CCS. The aquifer withdrawals and chemical treatments were authorized by the State of Florida, not the NRC.⁷¹ While the State's authorization for aquifer withdrawals and chemical treatments helped to maintain the temperature of the CCS, the LAR and the State authorizations were independent regulatory actions.

The Board abused its discretion by concluding that there is a reasonably close causal relationship between the LCO 3.7.4 license amendment proceeding and the actions taken by the licensee under its state-issued CoC and in response to the State's orders.⁷² The NRC is not the "cause" of the water management steps. The NRC does not have authority to grant or deny any request by FPL to withdraw water from local aquifers. Florida, not the NRC, has exclusive authority to authorize cooling water withdrawals from the local aquifers and injections into the cooling canals.⁷³ In fact, Florida authorized FPL to make additional aquifer withdrawals before the NRC granted the LAR at issue here.⁷⁴ Moreover, Florida recently required FPL to submit a

⁷¹ Letter from Sharon Trost, South Florida Water Management District, to Stacy Foster, Florida Power & Light, FPL Turkey Point Power Plant Temporary Use of Water Conditions of Certification (PA 03-45D), SFWMD File 720202-1 (June 27, 2014) (ADAMS Accession No. ML14314A875); Letter from Sharon Trost, South Florida Water Management District, to Stacy Foster, Florida Power & Light, FPL Turkey Point Power Plant Additional Temporary Use of Water Conditions of Certification (PA 03-45D), SFWMD File 720202-1 (July 1, 2014) (ADAMS Accession No. ML14314A872).

⁷² See *New Jersey Dept. of Env't Prot. v. Nuclear Regulatory Comm'n*, 561 F.3d at 136.

⁷³ AO at 6 (upon termination of Administrative Order OGC No. 14-0741).

⁷⁴ AO at 5 ("Unit 5, which is authorized by the District to withdraw cooling water from the Floridan aquifer, was not using its full withdrawal allocation. On June 27, 2014, FPL received District approval to divert any excess allocation to the CCS to aid in salinity reduction. Despite the use of the excess

management plan to reduce salinity in the canals that will require additional aquifer withdrawals that are unrelated to the instant LAR.⁷⁵

The Board held that “absent NRC action, FPL would have been forced to shut down or at least reduce power ... potentially obviat[ing] any need for more extensive aquifer withdrawals.”⁷⁶ While it is true that Turkey Point Units 3 and 4 would have had to shut down if the temperature in the CCS exceeded the existing LCO, the conclusion that more extensive water withdrawals would not have been needed if FPL had been forced to shut down or reduce power is speculative.

The fundamental operation of the CCS is not altered by the minor increase in allowable inlet temperature for the component cooling water heat exchangers. By increasing the allowable inlet temperature of the component cooling water heat exchanger, the capacity for the CCS to store waste heat is increased and the need for additional aquifer withdrawals and injections into the CCS is decreased. FPL’s authorization to make additional aquifer withdrawals was not dependent on the operating status of Turkey Point Units 3 or 4. Moreover, the Board implicitly acknowledges that the NRC did not “per se” authorize these withdrawals.⁷⁷ Further, with respect to the environmental impact caused by the licensee’s withdrawals, the state-issued CoC already contains extensive requirements for the licensee to mitigate any harm

allocation, the salinity remained high and water levels in the CCS were well below normal.”); *Id.* (“On August 8, 2014, the District issued an emergency order to FPL that allowed FPL to divert water to the CCS that would otherwise be discharged to tide from the District’s S-20F, S-20G, and S-21A water control structures, in excess of flows reserved for protection of fish and wildlife under Rule 40E-10.06 1, Florida Administrative Code.”).

⁷⁵ *Id.* at 6. The Management Plan may propose a combination of options for reducing the salinity of the CCS, including (1) utilizing the existing unused allocation of water for Unit 5 from the Floridan aquifer; (2) licensing and constructing new Floridan wells; (3) utilizing water from the L-31E canal in a manner that is consistent with District water reservation and consumptive use rule criteria; and (4) removing organic and sediment biomass within the CCS. *Id.* at 6-7.

⁷⁶ *Turkey Point*, LBP-15-13, 81 NRC at ___ (slip op. at 11).

⁷⁷ *Id.*

caused by withdrawals,⁷⁸ which suggests that any impact from withdrawals is remote and speculative.⁷⁹ Here, there is no “reasonably close causal relationship” between the LCO 3.7.4 LAR and the aquifer withdrawals. The actions are independent. The LCO 3.7.4 LAR did not increase the need for cooling in the canals because, unlike the uprate LAR, the LCO 3.7.4 LAR did not change the energy output from the nuclear reactors. Because the energy output remained the same, the LCO 3.7.4 LAR did not increase the need for removing energy (i.e., cooling) from the canals. Instead, the LCO 3.7.4 LAR reduced the need for cooling by allowing for the canals to reach higher temperatures than before. If anything, this increase in maximum allowable temperature reduced FPL’s need to withdraw cooling water from the local aquifers for injection into the CCS. The Board abused its discretion, and thus, the Board’s Order should be reversed and the Petition denied.⁸⁰

III. The Board Erred When It Determined that CASE Had Standing to Intervene

The Board found CASE possessed standing to intervene using traditional concepts of judicial standing.⁸¹ Under the judicial concept of standing, petitioners must demonstrate (1) an actual or threatened, concrete, and particularized injury (injury-in-fact) that is (2) fairly traceable to the challenged action (causation) and (3) likely to be redressed by a favorable decision (redressability).⁸²

⁷⁸ CoC at 24-26.

⁷⁹ NEPA’s “hard look,” is tempered by a “rule of reason” where an agency need only address reasonably foreseeable impacts, not those that are “remote and speculative” or “inconsequentially small.” NEPA requires only reasonable forecasting, not using the worst case scenario. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC __ (Nov. 27, 2013) (slip op. at 452-54) and cases cited therein.

⁸⁰ During oral argument the Board suggested the Staff review the Board’s recent decision in *Fermi 3*. On January 13, 2015, the Commission denied the Board’s request for *sua sponte* review of the adequacy of the Staff’s review of transmission-corridor impacts, and does not support a hearing on the narrowed and reformulated Contention in this case. *DTE Elec. Co.*, (Fermi Nuclear Power Plant, Unit 3), CLI-15-01, 81 NRC __ (slip op. at 14) (Jan. 13, 2015) (ADAMS Accession No. ML15014A390).

⁸¹ *Turkey Point*, LBP-15-13, 81 NRC at __ (slip op. at 9).

⁸² *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

CASE asserted that it satisfies the judicial concept of standing because “(1) drawing excessive water from the aquifer presents [a] tangible and particular harm to the health and wellbeing of the co-petitioners’ members living within 50 miles of the site and who are ratepayers of the company; (2) the Commission has authorized measures the granting of which would directly affect the co-petitioners and their members; and (3) the Commission is the sole agency with the power to approve, to deny or to modify a license to construct and operate a commercial nuclear power plant.”⁸³

In its analysis of standing, the Board concluded that aquifer withdrawals “are the immediate or reasonably foreseeable result of the NRC’s granting of the subject amendments.”⁸⁴ Even though the authority to regulate the aquifer withdrawals and chemically treat the CCS is outside the scope of the NRC’s jurisdiction and vested with the State, the Board concluded that CASE’s concerns regarding the withdrawals and treatments could be adequately addressed in an NRC hearing. In each respect, the Board committed clear error.

As discussed previously, the Board’s conclusion that the approval of the LCO 3.7.4 LAR to increase the allowable temperature in the CCS system would result in the increased need for aquifer withdrawals is incorrect.⁸⁵ Instead, the need for aquifer withdrawals based on the temperature of the CCS would logically decrease with higher allowable temperatures. Nothing in the LCO 3.7.4 LAR or the Staff’s authorization for the license amendments implicitly or explicitly authorized or required additional aquifer withdrawals. The Staff has not authorized the measures identified by CASE as causing its injury. Rather, the license amendment is likely to

⁸³ Petition at 4. The Petition also appears to make some unparticular and generalized claims regarding economic interests and health without providing any direct analysis of how the license amendment would result in these perceived harms. *Id.* The Commission has held that bare statements asserting impacts to health, safety, and financial interests fail to set forth with particularity sufficient information to grant standing in a license amendment proceeding. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000).

⁸⁴ *Turkey Point*, LBP-15-13, 81 NRC at __ (slip op. at 12).

⁸⁵ *Id.* at __ (slip op. at 11).

reduce the need for additional aquifer withdrawals. Thus, the Board's determination that CASE satisfied the causation element for standing constituted clear error.

The harm that CASE identified is the drawing of excessive water from the aquifer.⁸⁶ That harm cannot be remedied in a proceeding before the Board or Commission. The authorization for water withdrawal and use is controlled by the State of Florida. Even if Turkey Point was required to cease operations due to excessive UHS temperature, the State's requirements imposed upon FPL remain.⁸⁷ On December 23, 2014, the Florida Department of Environmental Protection ordered FPL to submit, a detailed CCS Salinity Management Plan for review and approval.⁸⁸ The primary goal of the Management Plan shall be to reduce the hypersalinity of the CCS to abate westward movement of CCS groundwater into a certain class of groundwaters of the State.⁸⁹ Reducing the salinity from a higher base salinity condition will require additional measures such as a greater addition of fresh water, removal of salt mass from the CCS, and alteration of CCS inflows and outflows.⁹⁰ The Florida Department of Environmental Protection will require these actions, once approved, regardless of the operation of Turkey Point Units 3 and 4.

⁸⁶ Petition at 4.

⁸⁷ See AO at 5; Letter from Sharon Trost, South Florida Water Management District, to Stacy Foster, Florida Power & Light, FPL Turkey Point Power Plant Additional Temporary Use of Water Conditions of Certification (PA 03-45D), SFWMD File 720202-1.

⁸⁸ AO at 6-10. The Management Plan may propose a combination of options for reducing the salinity of the CCS, including (1) utilizing the existing unused allocation of water for Unit 5 from the Floridan aquifer; (2) licensing and constructing new Floridan wells; (3) utilizing water from the L-31E canal in a manner that is consistent with District water reservation and consumptive use rule criteria; and (4) removing organic and sediment biomass within the CCS. *Id.* at 6-7.

⁸⁹ *Id.* at 6. Notably, with respect to the future legal authority to regulate the CCS, the Department of Environmental Protection and South Florida Water Management District agree that the historic regulatory role the District has held with regard to monitoring and operation of the CCS with FPL under the provisions of the Fifth Supplemental Agreement is redundant with the authorities vested with the Department through the Florida Electrical Power Plant Siting Act, and accordingly, the Department found that the State License shall be the sole license pursuant to State authorities to regulate the monitoring and operation of the CCS upon termination of Administrative Order OGC No. 14-0741. *Id.*

⁹⁰ *Id.*

The aquifer withdrawals are simply beyond the authority of the NRC, and the Staff cannot remedy the issues in CASE's petition. The Board erred when it determined that CASE's asserted water usage injury could be remedied in a proceeding before the Board or Commission. The Board's determination that CASE established standing should be reversed, and thus, the petition should be denied.

CONCLUSION

In finding that CASE had established standing to intervene and by reformulating an inadmissible contention, the Board abused its discretion and committed a clear error of law and fact. The Board erred in determining that CASE had satisfied the judicial concepts of standing when the issues raised were not the result of the Staff's actions and cannot be redressed in a proceeding before the Board or Commission. The Board's reformulation of Contention 1 using the bases of the denied Contention 3 (Challenge to the Chemical Treatments and Aquifer Withdrawals) and bases added *sua sponte* by the Board into a single contention directed at the Staff's EA was an abuse of discretion. The Board's Order should be reversed, and thus, the petition denied.

Respectfully submitted,

/Signed (electronically) by/

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