

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Units 6 and 7)

Docket Nos. 52-040-COL
and 52-041-COL

ASLBP No. 10-903-02-COL-BD01

May 19, 2015

ORDER

(Denying SACE Motion to Admit New Contention)

Southern Alliance for Clean Energy (SACE) moves to file a new contention challenging the adequacy of the NRC Staff's Draft Environmental Impact Statement (DEIS) for the combined license applications for Turkey Point Units 6 and 7.¹ SACE argues that the DEIS fails to provide an adequate legal basis for licensing Units 6 and 7 because it relies entirely on the Commission's Continued Storage Rule and accompanying Generic Environmental Impact Statement (GEIS) for its evaluation of environmental impacts related to the storage and disposal of spent fuel.² As discussed below, the Commission's recent decisions in CLI-15-11 and CLI-15-12 mandate the denial of SACE's motion.

¹ [SACE's] Motion for Leave to File a New Contention Concerning Reliance by Turkey Point [DEIS] on the Continued Spent Fuel Storage Rule (Apr. 13, 2015) [hereinafter SACE Motion].

² See SACE Motion at 1-2.

I. Background

In September 2014, the Commission approved the Continued Storage Rule³ and GEIS⁴ in response to the decision in New York v. NRC, 681 F.3d 471 (D.C. Cir. 2012), which struck down the Commission's 2010 Waste Confidence Decision and Temporary Storage Rule. In a contemporaneously issued decision, the Commission stated that because "the impacts of continued storage will not vary significantly across sites[,] the impacts of continued storage at reactor sites, or at away-from-reactor sites, can be analyzed generically."⁵

Meanwhile, in February 2011, this Licensing Board granted SACE's jointly filed petition to intervene in the Turkey Point Units 6 and 7 combined license (COL) proceeding,⁶ and SACE (along with several joint intervenors) currently has one admitted contention pending before this Board.⁷ In February 2015, the NRC published the DEIS for Turkey Point Units 6 and 7.⁸ On April 13, 2015, SACE timely moved to file the present contention, which asserts that "[t]he DEIS for Turkey Point Units 6 and 7 is inadequate to satisfy NEPA because (at pages 6-14 – 6-16) it incorporates by reference the generic conclusions of the [Continued Storage Rule] and GEIS."⁹

³ Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) [hereinafter Continued Storage Rule].

⁴ Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014) [hereinafter GEIS].

⁵ Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-14-08, 80 NRC 71, 78-79 (2014).

⁶ See LBP-11-06, 73 NRC 149, 171-73 (2011).

⁷ See LBP-12-09, 75 NRC 615, 618, 629 (2012); Licensing Board Memorandum and Order (Granting in Part and Denying in Part Motion for Summary Disposition of Amended Contention 2.1) at 10 (Aug. 30, 2012) (unpublished).

⁸ Division of New Reactor Licensing, Office of New Reactors, Environmental Impact Statement for Combined Licenses (COLs) for Turkey Point Nuclear Plant Units 6 and 7 Draft Report for Comment, NUREG-2176 (Feb. 2015).

⁹ SACE Motion at 6.

SACE goes on to identify seven alleged deficiencies in the Continued Storage Rule and the GEIS.¹⁰

Notably, SACE states that it “expect[s] that [its motion] will be denied, because the subject matter of the contention is generic.”¹¹ SACE nonetheless asks the Board to admit its contention as a “placeholder” to “ensur[e] that any court decision resulting from SACE’s [pending] appeal of the generic [Continued Storage Rule] and GEIS [in the U.S. Court of Appeals for the District of Columbia Circuit] will also be applied to the individual Turkey Point Units 6 and 7 licensing proceeding.”¹²

On May 8, 2015, the Turkey Point COL applicant, Florida Power & Light Company (FPL), and the NRC Staff filed answers opposing SACE’s motion, arguing principally that the motion is barred by the Commission’s recent decisions in CLI-15-11 and CLI-15-12.¹³ On May 15, 2015, SACE filed a reply.¹⁴

II. Analysis

On April 23, 2015, the Commission issued decisions in Callaway (CLI-15-11)¹⁵ and Fermi 3 (CLI-15-12)¹⁶ that denied -- for two independent reasons -- admission of a newly

¹⁰ Id. at 6-7.

¹¹ Id. at 2.

¹² Id. at 2-3. The D.C. Circuit case in which the challenge to the Continued Storage Rule and GEIS is pending is Beyond Nuclear, Inc. v. NRC, No. 14-1216 (D.C. Cir.) (petition for review filed Oct. 29, 2014). SACE represents that the case has been consolidated with four other cases. See SACE Motion at 2 n.2.

¹³ See [FPL’s] Answer Opposing [SACE’s] Motion for Leave to File a New Contention Concerning Reliance by Turkey Point [DEIS] on the Continued Spent Fuel Storage Rule at 3-4 (May 8, 2015) [hereinafter FPL Answer]; NRC Staff Answer to “[SACE] Motion for Leave to File a New Contention Concerning Reliance by Turkey Point Environmental Impact Statement on the Continued Spent Fuel Storage Rule” at 2, 8 n.18, 12 (May 8, 2015) [hereinafter NRC Staff Answer].

¹⁴ See Reply by [SACE] to Oppositions by FPL and NRC Staff to Motion to Admit New Contention Regarding the Continued Spent Fuel Storage Rule (May 15, 2015) [hereinafter SACE Reply].

¹⁵ See Union Electric Co. (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC __ (slip op.) (Apr. 23, 2015).

proffered contention that was substantively identical to the contention proffered here by SACE.¹⁷ First, the Commission concluded that the proposed contention was inadmissible because it challenged an agency regulation without seeking a waiver and, hence, was outside the scope of the licensing proceeding.¹⁸ Second, the Commission found that, by not challenging any specific aspect of the relevant license applications, the petitioners in Callaway and Fermi 3 failed to raise a genuine dispute with the applicant on a material issue.¹⁹ The Commission also stated that the contention need not be admitted as a “placeholder” to ensure that the D.C. Circuit’s decision would be applied in NRC licensing proceedings, because “[s]hould the D.C. Circuit find any infirmities in the Continued Storage Rule or GEIS, [the NRC] would take appropriate action consistent with the court’s decision.”²⁰

We conclude that the Commission’s decisions in Callaway and Fermi 3 mandate the rejection of SACE’s so-called placeholder contention. First, as in those cases, SACE’s contention challenges an agency regulation without seeking a waiver and, hence, is outside the scope of the licensing proceeding.²¹ Second, as in those cases, SACE’s contention fails to

¹⁶ See DTE Electric Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC __ (slip op.) (Apr. 23, 2015).

¹⁷ In Callaway and Fermi 3, the petitioners moved to reopen the records of the proceedings in order to adjudicate newly proffered contentions. In both cases, the Commission concluded that the contentions were inadmissible, which necessarily precluded reopening the proceedings. See Callaway, CLI-15-11, 81 NRC at __ n.17 (slip op. at 4 n.17); Fermi 3, CLI-15-12, 81 NRC at __ n.17 (slip op. at 4 n.17).

¹⁸ See Callaway, CLI-15-11, 81 NRC at __ (slip op. at 3-4); Fermi 3, CLI-15-12, 81 NRC at __ (slip op. at 4).

¹⁹ See Callaway, CLI-15-11, 81 NRC at __ (slip op. at 4); Fermi 3, CLI-15-12, 81 NRC at __ (slip op. at 4).

²⁰ Callaway, CLI-15-11, 81 NRC at __ (slip op. at 5).

²¹ See 10 C.F.R. § 2.309(f)(1)(iii). SACE concedes that “its contention is not accompanied by a petition for a waiver of 10 C.F.R. §§ 51.71(d), 51.95(c)(2), or any of the other regulations on which the Commission relies to bar members of the public from litigating generic NEPA issues in individual licensing proceedings.” SACE Motion at 3 n.3. SACE explains that “[n]o purpose would be served by such a waiver because SACE does not seek an adjudicatory hearing on the NRC’s generic environmental findings.” Id. Instead, SACE’s only purpose in raising the placeholder contention is to ensure any court decision invalidating the Continued Storage Rule

challenge any specific provision of the license application and, hence, fails to show a genuine dispute with the applicant on a material issue.²² SACE's contention is thus not admissible.²³

III. Conclusion

For the foregoing reasons, SACE's motion for leave to file a new contention is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 19, 2015

and GEIS will be applied in this COL licensing action. See id. Contrary to SACE's stated concern, the admission of its contention as a placeholder is not necessary to ensure that the D.C Circuit's decision in the pending challenge to the Continued Storage Rule and GEIS will be appropriately applied in NRC licensing actions. See supra note 20 and accompanying text.

²² Rather than endeavoring to show a genuine dispute with FPL's COL application on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi), SACE's contention impermissibly challenges the generic findings in the GEIS. See SACE Motion at 6-7.

²³ In their answers, FPL and the NRC Staff also argue that SACE's motion should be denied because the proposed contention is untimely. See FPL Answer at 5-6; NRC Staff Answer at 11-12. In its reply, SACE disputes the timeliness arguments put forth by FPL and the NRC Staff. See SACE Reply at 1-2. Given our rejection of SACE's contention based on the Commission's rationale in Callaway and Fermi 3, we need not address the timeliness of SACE's filing.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying SACE Motion to Admit New Contention)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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[Original signed by Clara Sola _____]
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Dated at Rockville, Maryland,
this 19th day of May, 2015