September 4, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket No. 50-250-LA
	)	50-251-LA
(Turkey Point Units 3 and 4)	)	
	)	ASLBP No. 15-935-02-LA-BD01

FLORIDA POWER & LIGHT COMPANY'S
ANSWER TO CASE'S MOTION TO INVALIDATE NUCLEAR
REGULATORY COMMISSION ENVIRONMENTAL ASSESSMENT

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(i) and 2.323(c), Florida Power & Light Company hereby answers Citizens Allied for Safe Energy, Inc. ("CASE")'s "Motion To Invalidate Nuclear Regulatory Commission Environmental Assessment Of July, 31, 2014," ("Motion") dated August 25, 2015. CASE argues that an NRC document[1] requires that a project manager must prepare and sign any NRC Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"). CASE notes, however, that the EA for the Turkey Point Ultimate Heat Sink license amendment was "prepared by and entered into the [Federal Register] by the Acting Chief, Plant Licensing Branch II-2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation ["NRR"]" and argues that this is grounds to "invalidate" the EA.[2] But CASE fails to acknowledge that:

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1 Motion at 1 (*citing* NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with [Nuclear Material Safety and Safeguards ("NMSS")] Programs (Aug. 2003) (ADAMS Accession No. ML032450279)).

2 *Id*. at 2 (*referencing* Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4, Environmental assessment and final finding of no significant impact; issuance. 79 Fed. Reg. 44,464 (July 31, 2014)).

(1) NUREG-1748 is a non-binding guidance document, not a regulation; (2) NUREG-1748 was issued by the NRC's Office of Nuclear Material Safety and Safeguards (NMSS), an NRC office wholly separate from NRR, the reactor regulation office that issued the Turkey Point EA; (3) while NUREG-1748 mentions who should prepare an EA, it makes no statement regarding who should sign the document or the *Federal Register* notice; and (4) both the EA and NUREG-1748 have long been publicly available, rendering CASE's motion almost a year late. For all of these reasons, CASE's Motion should be denied.[3]

At the outset, it is not readily apparent whether CASE intended to submit a motion asking the Board for action under 10 C.F.R. § 2.323, or a motion for leave to file a new contention under 10 C.F.R. § 2.309(c). The former would require Answers within ten days, while the latter would afford 25 days. Out of an abundance of caution, FPL answers the Motion based on the schedule for responding to motions under 10 C.F.R. § 2.323. However, while it is captioned as a Motion to Invalidate the EA, the body of the Motion references a "contention."[4] Because the Motion uses the term "contention" and contentions filed under 10 C.F.R. § 2.309 are the appropriate procedural mechanism for parties to seek Licensing Board review of the sufficiency of an NRC action, FPL's Answer responds to it as though it were a request for leave to file a new contention. As a new contention, CASE's Motion must be denied because it fails to address or meet either the Commission's contention admissibility standards or its standards for new contentions filed after the initial deadline.

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[3] FPL maintains that CASE has not demonstrated standing in this proceeding, but acknowledges the Board's ruling on standing and that CASE need not attempt that showing again.

[4] *See* Motion at 1, 2.

II. APPLICABLE LEGAL STANDARDS FOR CONTENTIONS FILED AFTER THE INITIAL DEADLINE AND ADMISSIBLE CONTENTIONS

The NRC does not look with favor on amended or new contentions filed after the initial filing.[5] As the Commission has repeatedly stressed,

> our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners "who must examine the publicly available material and set forth their claims and the support for their claims at the outset." There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.[6]

In keeping with this policy, new contentions filed after the initial deadline for contentions in a proceeding will not be entertained absent a determination by the presiding officer that the proponent has demonstrated good cause by showing that:

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[7]

The NRC typically applies a "30-day clock" to the filing of a new contention based on new information.[8]

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5 *Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).

6 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009) (citations omitted).

7 10 C.F.R. § 2.309(c)(1).

8 *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC 214, 218 n.8 (2011).

Under these standards, a proponent of a new contention must show that it could not have raised its contention earlier. "[T]he unavailability of [a] document does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner."[9] Therefore, an intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available "for some time" prior to the filing of the contention.[10] "Hearing petitioners have an 'ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.'"[11]

Even if a petitioner satisfies the requirements of 10 C.F.R. § 2.309(c), it must still demonstrate that its new contention satisfies the standards for admissibility in 10 C.F.R. § 2.309(f)(1).[12] That rule requires that an admissible contention:

(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;

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9 *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983) (emphasis added).

10 *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986).

11 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002), quoting Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

12 *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993).

(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) In a proceeding other than one under 10 CFR 52.103, 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.[13]

These pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now § 2.309, which was intended "to raise the threshold for the admission of contentions."[14] The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[15] These pleading standards are enforced rigorously. "If any one . . . is not met, a contention must be rejected."[16]

III. ARGUMENT

The proposed contention is inadmissible because it is both untimely and fails to meet the NRC's standards for an admissible contention. The proposed contention is untimely because it was not submitted within the period set forth in the Hearing Notice, or reasonably soon after the availability of new and materially different relevant

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13 10 C.F.R. §§ 2.309(f)(1)(i)-(vi).

14 54 Fed. Reg. 33,168 (Aug. 11, 1989); *see also Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999); *Arizona Public Service Co*. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

15 *Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citation omitted).

16 *Palo Verde*, CLI-91-12, 34 NRC at 155 (citation omitted).

information. It is inadmissible because CASE's criticism of the EA is unsupported by any citation to authority that would demonstrate a genuine, material dispute.

A. CASE's New Contention is Not Timely

CASE's Motion is not timely as a contention. The NRC's Hearing Notice made clear that the deadline for submitting contentions was October 14, 2014.[17] Contentions filed after that date must address the factors in section 2.309(c), demonstrating good cause for the nontimely filing. CASE did not attempt to meet this burden and could not have met it even had it tried, because the EA was published in the Federal Register over a year ago and NUREG-1748 is twelve years old. That CASE may have just recently discovered that document does not render it new. Moreover, even if CASE's filing is treated as a motion under 10 C.F.R. § 2.323, it would be impermissibly late, because such a request must be filed within 10 days of the event giving rise to it, which, in this case, would be the publication of the EA.[18] For this reason, CASE's Motion is untimely and must be denied.

B. CASE's New Contention is Not Admissible

Similarly, CASE fails to address the Commission's contention admissibility requirements. By failing to identify any actually applicable law or regulation, CASE fails to provide sufficient information to show that a genuine dispute exists on a material issue of law or fact.[19]

CASE's Motion does not discuss any statutory or regulatory provision. Instead, it cites only a guidance document from an independent NRC office. Contrary to CASE's

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[17] *See* Florida Power & Light Company; Turkey Point Nuclear Generating Units 3 and 3, 79 Fed. Reg. 47,689 (Aug. 14, 2014) (setting the deadline as October 14, 2014); *see also* 10 C.F.R. § 2.309(b)(3)(i).

[18] 10 C.F.R. § 2.323(a)(2).

[19] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

characterization, NUREG-1748 is not a regulation. And, as it states on Page 1-1, it does not contain legal requirements: "this guidance is not a substitute for legislation and regulations and compliance with this document is not required." Therefore, NUREG-1748 is not binding authority and does not provide the basis for a genuine dispute regarding the NRC's EA. Moreover, even if it did represent binding authority, by its own terms, NUREG-1748 applies only to NMSS, the NRC office that issued it. As CASE acknowledges in its Motion, the EA was issued by NRR, the NRC's office that regulates commercial power reactors.

In any event, the guidance in NUREG-1748 only provides the common-sense direction that the responsibility for preparing an EA would be given to a staff-level employee. And contrary to CASE's characterization, it does not discuss who should sign the final document. *See generally* NUREG-1748. Moreover, CASE assumes, without any basis, that the individual who signed the Turkey Point EA is the same person who *prepared* it. Regardless of the fact that CASE has not provided any reason to believe that a project manager did not prepare the EA, that simply is not a material issue because there is no statutory or regulatory requirement that a project manager prepare it.[20]

While CASE does not cite any regulatory authority for its claim, 10 C.F.R. § 51.34 governs the preparation of findings of no significant impact, which must be prepared by "the NRC staff director authorized to take the action." "NRC staff director" is defined in Part 51, to include the Director of NRR, *or his or her designee*.[21] Similarly,

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[20] Note however, that the EA directs individuals to contact the NRR project manager to obtain additional information. *See* EA and FONSI, 79 Fed. Reg. at 44,465.

[21] 10 C.F.R. § 51.4. In fact, most of the significant actions under Part 51, such as establishing time schedules (§ 51.15), the decision to prepare an Environmental Impact Statement (§ 51.25 and § 51.31), publishing notice of intent (§ 51.26), and inviting the public to participate in the scoping process, (§ 51.27) are the responsibility of "the appropriate NRC staff director." The term "project manager" does not appear anywhere in Part 51.

10 C.F.R. § 51.119 requires "the appropriate NRC staff director" to publish the FONSI in the *Federal Register*. Thus, NRC policy, as set forth by regulation, makes its office directors responsible for carrying out the agency's responsibilities under NEPA and allows them to delegate that responsibility as they see fit in order to best accomplish those tasks. Prior to signing the EA and FONSI, the Acting Branch Chief had been delegated licensing oversight and supervisory duties.[22]

Because there is no statutory or regulatory requirement that a project manager prepare or sign an EA, there is no material issue in dispute and CASE's contention must be denied.

IV. CONCLUSION

For all of these reasons, CASE's Motion should be denied.

[22] Letter from Ryan E. Lantz, Acting Deputy Director, Division of Operator Licensing, Office of Nuclear Reactor Regulation to Mr. Mano Nazar, Executive Vice President and Chief Nuclear Officer, NextEra Energy, Turkey Point Nuclear Generating Unit Nos. 3 and 4 Branch Chief Reassignment for Plant Licensing Branch II-2 (May 5, 2014) (ADAMS Accession No. ML14119A347).

V. CERTIFICATION

I certify that I have made a sincere effort to be available to consult with the moving party, and to attempt in good faith to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

Respectfully Submitted,

Signed (electronically) by Steven Hamrick

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Florida Power & Light Company's Answer to CASE's Motion to Invalidate Nuclear Regulatory Commission Environmental Assessment," were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, and via e-mail to those marked with an asterisk.

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Dated at Washington, DC
this 4th day of September, 2015