

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**FLORIDA POWER & LIGHT COMPANY’S
MOTION TO DISMISS CASE CONTENTION 1
OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.1205, Florida Power & Light Company (“FPL”) files this motion to dismiss Citizens Allied for Safe Energy (“CASE”) Contention 1, or, in the alternative for summary disposition. Further proceedings are unnecessary because CASE has failed to submit any testimony or relevant documentary evidence in support of its standing to challenge the NRC’s amendment of the Turkey Point operating license while the unrebutted testimony of FPL and the NRC Staff demonstrates that CASE does not, in fact, have standing.

Moreover, as the party sponsoring the contention, CASE has the burden of going forward with testimony and other evidence sufficient to show there is a material issue in its contention. But because CASE has not presented testimony or other evidence relevant to the limited scope of the contention, it has failed to show that it maintains a genuine dispute as to whether the NRC’s Environmental Assessment (“EA”) complies with the requirements of the National Environmental Policy Act (“NEPA”). By contrast, the unrebutted testimony and evidence of FPL and the NRC Staff support the conclusion that the license amendment would have no significant environmental impact and that the NRC’s EA was adequate to comply with NEPA. Therefore,

FPL also moves for summary disposition on CASE Contention 1.¹ There are no genuine disputes as to any fact material to Contention 1 and FPL and the NRC Staff are entitled to judgment as a matter of law.

II. BACKGROUND

This proceeding pertains to FPL's License Amendment Request to amend certain Technical Specifications ("TS") for Turkey Point Nuclear Generating Units Nos. 3 and 4 ("Turkey Point") to increase the ultimate heat sink ("UHS") water temperature limit specified in TS 3.7.4 from 100°F to 104°F, add a surveillance requirement to monitor the UHS water temperature once per hour whenever the temperature exceeds 100°F, and increase the frequency of a component cooling water heat exchanger performance test.² In the summer of 2014, environmental conditions, including extraordinary algae growth in the Turkey Point Cooling Canal System ("CCS") and unseasonably dry weather, among other factors, resulted in UHS temperatures approaching the 100°F TS limit. Consequently, on July 10, 2014, FPL requested the NRC to increase the UHS temperature limit in TS 3.7.4. FPL did not submit an Environmental Report along with its amendment request, and instead invoked a categorical exclusion from NEPA for amendments that change requirements for facility components that do not involve: (1) significant hazards consideration; (2) a significant change in the types or a significant increase in the amounts of any effluents that may be released offsite; and (3) a significant increase in individual or cumulative occupational radiation exposure.³

¹ By order dated November 19, 2015, motions for summary disposition must be filed by December 3. Order (Granting in Part Extension for Summary Disposition Motions), (Nov. 19, 2015).

² Letter from M. Kiley, FPL to NRC Document Control Desk "License Amendment Request No. 231, Application to Revise Technical Specifications to Revise Ultimate Heat Sink Temperature Limit," dated July 10, 2014 (ADAMS Accession No. ML14196A006) (Exhibit FPL-008).

³ See 10 C.F.R. § 51.22(c)(9).

The NRC opted not to rely upon the categorical exclusion and published an EA for the license amendment in the *Federal Register* on July 31, 2014.⁴ The EA concluded that the UHS license amendment would not have a significant environmental impact and so it included a formal finding of no significant impact for the NRC's action. Having also determined that the amendment involved no significant hazards considerations and the criteria for exigent consideration were met, the NRC issued the amendment on August 8, 2014.⁵

On August 14, the NRC published a notice of issuance of the license amendment and a supplemental notice of opportunity for hearing in the *Federal Register*.⁶ In response to the NRC's Hearing Notice, CASE requested a hearing, submitting four proffered contentions.⁷ FPL and the NRC Staff opposed CASE's hearing request.⁸ CASE filed a reply on November 17, 2014.⁹ On March 23, 2015, the Licensing Board issued LBP-15-13, ruling that CASE had demonstrated standing and admitting CASE Contention 1 for hearing.¹⁰

CASE Contention 1, as admitted by the Board, alleges that the NRC's EA "does not adequately address the impact of increased temperature and salinity in the CCS on saltwater

⁴ Florida Power & Light Company, Turkey Point Units 3 and 4: Environmental Analysis and Finding of No Significant Impact, 79 Fed. Reg. 44,464 (July 31, 2014) (Exhibit NRC-009).

⁵ Letter from A. Klett, NRC to M. Nazar, FPL, Turkey Point Nuclear Generating Units Nos. 3 and 4 – Issuance of Amendments under Exigent Circumstances Regarding Ultimate Heat Sink and Component Cooling Water Technical Specifications (TAC Nos. MF4392 and MF4393) dated August 8, 2014 (ADAMS Accession No. ML14199A107). (Exhibit NRC-006).

⁶ Florida Power & Light Company; Turkey Point, Units 3 and 4; License Amendment, Issuance, Opportunity to Request a Hearing, and Petition for Leave to Intervene, 79 Fed. Reg. 17,689 (Aug. 14, 2014) ("Hearing Notice").

⁷ Citizens Allied for Safe Energy, Inc. Petition to Intervene and Request for a Hearing (Oct. 14, 2014).

⁸ FPL's Answer to Citizens Allied for Safe Energy, Inc.'s Petition to Intervene and Request for a Hearing (Nov. 10, 2014) ("FPL Answer"); NRC Staff's Answer to Citizens Allied for Safe Energy, Inc.'s Petition for Leave to Intervene and Request for Hearing (Nov. 10, 2014) ("NRC Staff Answer").

⁹ CASE Reply to FPL and to NRC Staff Answers to Its Petition to Intervene and Request for a Hearing (Nov. 17, 2014).

¹⁰ *Florida Power & Light Company* (Turkey Point Units 3 and 4), LBP-15-13, 81 NRC __ (March 23, 2015).

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.” Essentially, the contention alleges that the increase in UHS temperature allowed by the UHS license amendment will lead to an increase in average temperature in the CCS and a resultant increase in CCS salinity. According to the contention, this heightened CCS salinity, in turn, will exacerbate saltwater intrusion to the west (inland) of the CCS both by direct migration out of the CCS and by operation of FPL’s CCS mitigation measures.

In accordance with the Board’s Initial Scheduling Order, CASE submitted its initial statement of position and exhibits on October 9.¹¹ CASE did not file testimony. FPL and the NRC Staff filed their initial statements of position, testimony, and exhibits on November 10.¹² CASE filed a “Joint Rebuttal to NRC Staff’s and FPL’s Initial Statements of Position, Exhibit List and Exhibits” on December 1.¹³ Embedded within this position statement is a short section of proffered expert testimony and accompanying affidavit of Dr. Phillip Stoddard.¹⁴

¹¹ Citizens Allied for Safe Energy Initial Statement of Position, Testimony, Affidavits, and Exhibits (For January 2015 Evidentiary Hearing), dated October 9, 2015.

¹² Florida Power & Light Company’s Initial Statement of Position and Initial Written Testimony of Florida Power & Light Company Witnesses Steve Scroggs, Jim Bolleter, and Pete Andersen on Contention 1 (Nov. 10, 2015); NRC Staff’s Initial and Rebuttal Statement of Position Regarding Contention 1 and NRC Staff Testimony of Audrey L. Klett, Briana A. Grange, William Ford, and Nicholas P. Hobbs Concerning Contention 1 (Nov. 10, 2015). The FPL and NRC Staff testimony were accompanied by affidavits (or declarations) of its expert witnesses attesting to the accuracy of their testimony.

¹³ Citizens Allied for Safe Energy’s Joint Rebuttal to NRC Staff’s and FPL’s Initial Statements of Position, Exhibit List and Exhibits (“CASE Rebuttal Statement”) (Dec. 1, 2015).

¹⁴ *Id.* at 4-11.

III. CASE DOES NOT HAVE STANDING AND ITS CONTENTION SHOULD BE DISMISSED

In order to obtain a hearing before the NRC, a petitioner must demonstrate standing and file at least one admissible contention.¹⁵ To establish standing, a petitioner must plead “the nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding[,] . . . the nature and extent of [the petitioner’s] property, financial or other interest in the proceeding; and [t]he possible effect of any decision or order that may be issued in the proceeding on the [petitioner’s] interest.”¹⁶

CASE, as the petitioner, bears the burden of providing facts sufficient to establish standing.¹⁷ In determining whether a petitioner has established the requisite interest, the Commission has traditionally applied contemporaneous judicial concepts of standing.¹⁸ The petitioner must establish; (a) that he personally has suffered or will suffer a “distinct and palpable” harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding.¹⁹

In LBP-15-13, the Board found that CASE had made a “sufficient showing that its members meet the requirements for standing by establishing potential for injury caused by the NRC’s issuance of license amendments to FPL that can be remedied by the Board in this

¹⁵ See Atomic Energy Act § 189a, 42 U.S.C. § 2239(a).

¹⁶ 10 C.F.R. § 2.309(d)(1).

¹⁷ *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001).

¹⁸ See, e.g., *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994).

¹⁹ *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998)); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988).

proceeding.”²⁰ The Board based its standing determination on CASE’s assertions regarding FPL’s use of local groundwater to mitigate conditions in the CCS, water that CASE alleged to be fresh.²¹ Acknowledging that FPL and the NRC Staff disputed CASE’s characterization of the local groundwater as fresh, the Board noted that “[r]esolution of that factual dispute [was] not necessary or appropriate at [that] stage.”²² Now, we are at a different stage of the proceeding, where this dispute can be easily resolved.

At this stage, based on FPL’s testimony and evidence and the NRC Staff’s testimony and evidence, it is clear that CASE’s assertions were simply incorrect. The water in the Biscayne Aquifer in the vicinity of Turkey Point is salty, like ocean water.²³ FPL’s withdrawal of this water will not affect saltwater intrusion.²⁴ And the water in the Upper Floridan Aquifer in the vicinity of Turkey Point is brackish.²⁵ FPL’s withdrawal of this water will not affect saltwater intrusion.²⁶ These points stand unrebutted—the CASE Rebuttal Statement did not address these issues.²⁷ The Board can now resolve this factual dispute and find that CASE has not shown that its members have suffered an injury-in-fact attributable to the NRC license amendment.

Similarly, the other allegations CASE has raised that might give rise to standing are similarly misplaced. The unrebutted testimony of FPL and the NRC Staff makes clear that the amendment itself will not cause FPL to withdraw additional water.²⁸ In fact, as FPL’s testimony

²⁰ LBP-15-13, slip op. at 12.

²¹ LBP-15-13, slip op. at 10-11.

²² LBP-15-13, slip op. at 10.

²³ FPL Testimony at A35; NRC Staff Testimony at A18.

²⁴ FPL Testimony at A79; NRC Staff Testimony at A68.

²⁵ FPL Testimony at A32; NRC Staff Testimony at A21.

²⁶ FPL Testimony at A81-82; NRC Staff Testimony at A70.

²⁷ *See generally*, CASE Rebuttal Testimony.

²⁸ FPL Testimony at A96; NRC Staff Testimony at A82-83.

discussed at length, addition of local groundwater to the CCS is FPL's chosen method to help reduce the westward movement of hypersaline water by lowering the salinity in the CCS.²⁹ CASE's argument that these withdrawals will exacerbate saltwater intrusion is exactly backwards.³⁰ Finally, contrary to CASE's claims, the NRC has not and could not have authorized any withdrawals.³¹

In summary, FPL's water withdrawals will not cause an injury to CASE or its members because they do not involve fresh groundwater and will not exacerbate saltwater intrusion. But even if they did, that injury could not be traced back to the challenged NRC license amendment. CASE does not have standing to raise its contention, which must be dismissed.

IV. The Board Should Grant Summary Disposition in Favor of FPL and the NRC Staff

In the alternative, the Board should grant summary disposition on CASE Contention 1 in favor of FPL and the NRC Staff. Under the NRC Rules of Practice, a moving party is entitled to summary disposition of a contention as a matter of law if the filings in the proceeding, together with the statements of the parties and any relevant affidavits, demonstrate that there is no genuine dispute as to any material issues of fact.³² The Commission has held that summary disposition is appropriate "[a]bsent any probative evidence supporting [a party's] claims"³³ Commission case law is clear that for there to be a genuine issue, "the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the

²⁹ FPL Testimony at A60, A63, A68, A70-A76.

³⁰ See FPL Testimony at A79-A82, A92.

³¹ FPL Testimony at A95.

³² 10 C.F.R. § 2.710(d)(2). Under 10 C.F.R. § 2.1205, summary disposition motions in Subpart L proceedings are governed by the standards in Subpart G (section 2.710).

³³ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 308 (1994), *aff'd*, *Advanced Med. Sys., Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (Table).

issue.”³⁴ Summary disposition “is a useful tool for resolving contentions in short order that . . . are shown by undisputed facts to have nothing to commend them.”³⁵ “[D]emonstrably insubstantial issues’ . . . should be decided pursuant to summary disposition procedures . . .”³⁶

Further, the Statement of Considerations underlying Subpart L in the NRC’s Rules of Practice makes clear that, even though a party sponsoring a contention might not bear the ultimate burden of proof in a contested proceeding, that party still has the burden of going forward with testimony and other evidence sufficient to show there is a material issue requiring a hearing to resolve. In this regard, the Statement of Considerations provides:

[A] party sponsoring a contention bears the burden of going forward with evidence sufficient to show that there is a material issue of fact or law, such that the applicant/proponent must meet its burden of proof. Where cross-examination is not permitted, each party must bear its burden by going forward with affirmative evidentiary presentations and testimony, its rebuttal evidence and rebuttal testimony, and well-developed questions that the party suggests the presiding officer pose to the witnesses. Thus, the responsibility for developing an adequate record for decision is on the parties, not the presiding officer.³⁷

Thus, the burden of going forward on any issues that make it to the hearing process is on the intervenor that is pursuing that issue.³⁸ To satisfy this burden, an intervenor must provide “probative evidence or expert testimony” to support the contentions.³⁹ In *Oyster Creek*, the Commission approved the Licensing Board’s determination that an intervenor had not met its

³⁴ *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 NRC 218, 223 (1983).

³⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 509 (2001).

³⁶ *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), LBP-81-48, 14 NRC 877, 883 (1981) (citing *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980)).

³⁷ Final Rule “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2213 (January 14, 2004).

³⁸ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 268-69 (2009) (citing *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973)).

³⁹ *Oyster Creek*, CLI-09-7, 69 NRC at 269.

burden through: (1) testimony of a witness who was not an expert in the relevant field; (2) mere assertions and speculation; and (3) invocation of the applicant's ultimate burden.⁴⁰

CASE offered no testimony at all to accompany its Initial Statement of Position. In the CASE Rebuttal Statement, it embeds testimony of and an affidavit from an ostensible expert, Dr. Phillip Stoddard.⁴¹ But Dr. Stoddard is a biologist, who claims no expertise in any relevant field, such as hydrogeology.⁴² Accordingly, Dr. Stoddard's testimony focuses on issues beyond the scope of the proceeding, such as impacts to crocodiles, effects of copper sulfate, migration of cooling canal system water into Biscayne Bay, and effects on Biscayne Bay of reduced water from the L-31E canal.⁴³ With respect to relevant issues, CASE's Initial Statement of Position asserted, with no evidentiary basis, that the amendment will increase average CCS temperatures to approximately 108°F.⁴⁴ And CASE speculates that the resulting increases in salinity will be "much higher," with no evidentiary support.⁴⁵ But instead of offering evidence to meet its burden, CASE simply asks questions, demonstrating its failure to provide probative evidence addressing these issues, and reliance on the NRC's ultimate burden.⁴⁶

⁴⁰ *Id.* at 269-70.

⁴¹ CASE Rebuttal Statement at 4-10.

⁴² *Id.* at 5.

⁴³ *Id.* CASE's Rebuttal Statement includes further statements attributed to Dr. Stoddard on issues regarding CCS salinity (*Id.* at 26-27), but those statements are not included in his sworn testimony and the context in which those statements were made is unclear. Regardless, even if sworn, these statements do not present a genuine dispute on a material issue because CASE has not shown that Dr. Stoddard has any special expertise on these matters. And the only portion of the Stoddard testimony that is even arguably relevant regarding the L-31 E withdrawals, mischaracterizes those withdrawals as occurring when rainfall is low. *Id.* at 9. As shown in the permits themselves, the L-31 E withdrawal authorizations have all been limited to the rainy season, and when there is excess storm water available. FPL Testimony at A27; Exhibits FPL-031 at 21; FPL-033 at 12; and FPL-034 at 19.

⁴⁴ CASE Initial Statement at 19- 21.

⁴⁵ *Id.* at 21.

⁴⁶ *Id.* at 21-26.

Thus, CASE has utilized the same three techniques recognized in *Oyster Creek* as being insufficient to meet an intervenor’s burden of going forward (irrelevant expert testimony, speculation, and burden-shifting).⁴⁷ These failures are critical because, without relevant testimony, it has not carried its burden of “going forward with evidence sufficient to show that there is a material issue of fact or law, such that the [Licensee and Staff] must meet [their] burden of proof.”⁴⁸

The table below identifies the testimony and exhibits presented in this case on issues material to Contention 1. As shown in the table, FPL and the NRC Staff presented expert testimony and documentary evidence that is consistent on all disputed material facts. CASE presented nothing. There is no *genuine* dispute as to these facts. The table demonstrates that CASE has not met its burden of going forward.

Issue	FPL Testimony and Evidence	NRC Staff Testimony and Evidence	CASE Testimony and Evidence
Salinity of Biscayne Aquifer in Vicinity of Turkey Point	“essentially the same as bay water” (A35; <i>see also</i> A32, A36, Exhibits FPL-013, FPL-014, FPL-015, FPL-016, FPL-017, FPL-018, FPL-020)	“non-drinkable saltwater” (A18; <i>see also</i> A22, Exhibit NRC-022, NRC-026)	-
Salinity of Upper Floridan Aquifer in Vicinity of Turkey Point	“water withdrawn from [the Floridan Aquifer] in southeastern Florida, including Miami-Dade County, is brackish” (A32; <i>see also</i> A38, A80, A82 Exhibit FPL-021, FPL-022)	“the water quality in the upper Floridan Aquifer is brackish” (A21; <i>see also</i> A22, Exhibit NRC-026)	-

⁴⁷ See *Oyster Creek*, 69 NRC at 269-70.

⁴⁸ 69 Fed. Reg. at 2213.

Saltwater Intrusion Impact of Withdrawals from Biscayne Aquifer	Will not cause saltwater intrusion (A79)	“The freshwater/saltwater interface is too far away to be affected” (A68)	-
Saltwater Intrusion Impact of Withdrawals from the Upper Floridan Aquifer	“little to no impact on existing water levels or water quality in the Floridan Aquifer” and “no effect on saltwater intrusion in the surficial Biscayne Aquifer” (A82)	“Removing groundwater from the Floridan Aquifer would not affect the freshwater/saltwater interface in the Biscayne Aquifer because the Floridan Aquifer is isolated from the Biscayne Aquifer” (A70; <i>see also</i> A24)	-
Saltwater Intrusion Impact of Withdrawals from L-31 E Canal	No negative effect on saltwater intrusion (A92)	“no negative impacts on the freshwater/saltwater interface” (A72)	-
Impact of License Amendment on CCS Temperature	Significantly less than 4 degrees (A99); negligible (A103, A104; <i>see also</i> Exhibit FPL-036)	No significant impact (A60)	-
Impact of License Amendment on CCS Salinity	“negligible,” “insignificant” (A109)	No significant impact (A61)	-
Impact of License Amendment on Surrounding Groundwater	“little impact” (A98); no discernable impact on groundwater outside the CCS (A109)	No significant impact (A63-A64)	-

Consistent with this table, FPL’s attached “Statement of Material Facts on Which No Genuine Dispute Exists,” demonstrates, with citations to the testimony of FPL and the NRC Staff, that there are no material facts in genuine dispute. There will be no significant environmental impact from the NRC’s amendment of the Turkey Point technical specifications

to increase the ultimate heat sink temperature limit. The NRC's Environmental Assessment is adequate. The Board should grant summary disposition in favor of FPL and the NRC Staff.

V. CONCLUSION

Unrebutted testimony and evidence from the NRC Staff and FPL demonstrate that CASE does not have standing to challenge this license amendment because it will not be injured by any action traceable to the amendment. Further, CASE has not met its burden of going forward in this case as it has failed to present any testimony or evidence relevant to the issues raised by Contention 1. Accordingly, the Board should grant summary disposition in favor of FPL and the NRC Staff as there are no genuine disputes regarding material facts and FPL and the NRC Staff are entitled to judgment as a matter of law.

VI. CERTIFICATION

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful. CASE opposes the motion. Counsel for the NRC Staff indicated that it does not oppose the motion and that, while the issues appear ripe for dismissal or summary disposition, the Staff will respond to the motion in accordance with the Board's orders.

Respectfully Submitted,

Signed (electronically) by Steven Hamrick

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December 3, 2015

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Motion to Dismiss CASE Contention 1 or, in the Alternative, for Summary Disposition” were provided to the E-Filing system for service to those individuals on the service list in this proceeding.

Signed (electronically) by,

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Dated at Washington, DC
this 3rd day of December, 2015