

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

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Michael F. Kennedy
Dr. William W. Sager

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating, Units 3 and 4)

Docket Nos. 50-250-LA and 50-251-LA

ASLBP No. 15-935-02-LA-BD01

December 22, 2015

ORDER

(Denying Application for Subpoenas, Denying Motion for Summary Disposition, and Granting in Part and Denying in Part Motions to Strike)

Before the Board are four motions concerning the evidentiary record and the merits of this license amendment proceeding. The intervenor, Citizens Allied for Safe Energy, Inc. (CASE), requests subpoenas for four expert witnesses who are unwilling to testify voluntarily.¹ The applicant, Florida Power & Light Company (FPL), moves for summary disposition² and has also sought to strike significant portions of CASE's initial statement of position and exhibits.³ The NRC Staff seeks to strike large portions of CASE's rebuttal statement of position.⁴ For the reasons given below, the Board denies CASE's application for subpoenas, denies FPL's motion

¹ CASE Second Motion Requesting Subpoenas for Expert Witnesses for January, 2016 (Dec. 9, 2015) [hereinafter Second Application for Subpoenas].

² Florida Power & Light Company's Motion to Dismiss CASE Contention 1 or, in the Alternative, for Summary Disposition (Dec. 3, 2015) [hereinafter Motion for Summary Disposition].

³ Florida Power & Light Company's Motion to Strike Portions of CASE's "Initial Statement of Position, Testimony, Affidavits and Exhibits" or, in the Alternative, Motion In Limine to Exclude it and its Cited Documents from Evidence (Oct. 19, 2015) [hereinafter FPL's Motion to Strike].

⁴ NRC Staff's Motion in Limine to Exclude Portions of the Prefiled Rebuttal Testimony or in the Alternative Strike Portions of the Prefiled Rebuttal Testimony and Rebuttal Statement of Position (Dec. 14, 2015) [hereinafter NRC Staff's Motion to Strike].

for summary disposition, and grants in part and denies in part FPL's and the NRC Staff's motions to strike CASE's initial and rebuttal evidence.

I. CASE'S APPLICATION FOR SUBPOENAS

CASE previously submitted a request for subpoenas for five witnesses on November 3, 2015,⁵ which the Board denied because, among other reasons, CASE had not shown that it had sought voluntary testimony from any of the five witnesses.⁶ After trying and failing to obtain voluntary testimony from four of the five potential witnesses, CASE renewed its request for subpoenas on December 9, 2015.⁷ CASE seeks expert testimony from two employees of Biscayne National Park, two employees of Miami-Dade County's Department of Environmental Resources Management, and an employee of the South Florida Water Management District.⁸ FPL and the NRC Staff oppose CASE's request.⁹

As an initial matter, both FPL and the NRC Staff argue that CASE's application should be denied for failure to include the required certification that CASE consulted with the other parties.¹⁰ The Board reminds CASE that consultation and the certificate of consultation are required even when a party has already consulted with the other parties concerning an earlier, substantially similar motion.¹¹

⁵ CASE Motion Requesting Subpoenas for Expert Witnesses for January, 2016 Evidentiary Hearing (Nov. 3, 2015) (unpublished).

⁶ Licensing Board Order (Denying CASE's Application for Subpoenas) (Nov. 12, 2015) at 2.

⁷ Second Application for Subpoenas.

⁸ Id. at 2-4.

⁹ NRC Staff's Answer Opposing CASE Motion Requesting Subpoenas for Expert Witnesses for January 2016 Evidentiary Hearing (Dec. 15, 2015) [hereinafter NRC Staff Response to Subpoenas]; Florida Power & Light Company's Answer to CASE's Second Motion Requesting Subpoenas for Expert Testimony for Evidentiary Hearing (Dec. 15, 2015) [hereinafter FPL Response to Subpoenas].

¹⁰ NRC Staff Response to Subpoenas at 2; FPL Response to Subpoenas at 2.

¹¹ 10 C.F.R. § 2.323(b); Licensing Board Order (Initial Scheduling Order) (May 8, 2015) at 13

As the Board explained in its decision denying the original subpoena request, “a subpoena in a Subchapter L proceeding represents an extraordinary remedy,” and expert testimony in particular “may be compelled only in very limited circumstances.”¹² CASE has not shown that those special circumstances are present here. Although the witnesses identified by CASE are certainly well-qualified, CASE has not demonstrated that they are unique experts or that comparable experts are unavailable. Because this proceeding concerns groundwater migration and saltwater intrusion, any qualified hydrogeologist could provide an expert opinion on the matter in controversy. CASE does allege that two of the experts drafted a key piece of evidence in this proceeding.¹³ However, because the timeline and authenticity of this document is not in dispute, it is not clear what factual testimony these two witnesses would add to the proceeding. As CASE acknowledges in requesting subpoenas for expert testimony, the experts’ primary value lies in their opinion testimony about whether it is reasonably foreseeable that the license amendment will contribute to water migration out of the cooling canal system and saltwater intrusion.

Accordingly, the Board denies CASE’s second application for subpoenas because these circumstances do not merit the extraordinary remedy of forcing expert witnesses to appear and provide their opinion testimony against their will and without compensation.

(unpublished).

¹² Licensing Board Order (Denying CASE’s Application for Subpoenas) (Nov. 12, 2015) at 2 (unpublished). The Board noted that “subpoenas for expert testimony are assessed based on ‘the degree to which the expert is being called because of his [or her] knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; the degree to which the witness is able to show that he [or she] has been oppressed by having continually to testify’” Id. at 3 n.11 (quoting Kaufman v. Edelstein, 539 F.2d 811, 822 (2d Cir. 1976)).

¹³ Second Application for Subpoenas at 9.

II. FPL'S MOTION FOR SUMMARY DISPOSITION

On December 3, 2015, FPL moved for dismissal of Contention 1, or in the alternative, summary disposition.¹⁴ Based on CASE's lack of expert testimony, FPL argues that CASE has not demonstrated standing and has not provided enough evidence to satisfy CASE's "burden of going forward."¹⁵ CASE responds that the proceeding should go forward because a hearing is necessary to resolve the dispute over the impacts of FPL's freshwater withdrawals from the L-31E Canal and FPL's "nearly freshwater" withdrawals from the Upper Floridan Aquifer.¹⁶

In a Subpart L proceeding, such as this one, the Board applies the summary disposition standard set forth in Subpart G.¹⁷ Under this standard, summary disposition is proper:

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.¹⁸

Because the burden is on the party requesting summary disposition, the Board must examine the record in the light most favorable to the non-moving party and give the non-moving party the benefit of all favorable inferences that can be drawn from the evidence.¹⁹ The Board may also

¹⁴ Motion for Summary Disposition at 1. On December 21, 2015, the NRC Staff filed an answer in support of FPL's motion for summary disposition. NRC Staff Answer to Motion to Dismiss or in the Alternative Summary Disposition (Dec. 21, 2015).

¹⁵ Id. at 6, 8.

¹⁶ Citizens Allied For Safe Energy, Inc.'s Answer to FPL's Motion to Dismiss Case Contention 1 or, in the Alternative, for Summary Disposition, and FPL's Statement of Material Facts on Which No Genuine Dispute Exists (Dec. 13, 2015) at 8.

¹⁷ 10 C.F.R. § 2.1205(c).

¹⁸ 10 C.F.R. § 2.710(d)(2).

¹⁹ Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010).

consider whether responding to a motion for summary disposition would “divert substantial resources from the hearing.”²⁰

In reviewing the filings submitted in this proceeding, the Board concludes that CASE has submitted sufficient evidence to satisfy its burden of going forward and that, at this stage of the proceeding, the Board’s resources would be best served by reviewing the evidence more thoroughly at a hearing. A motion for summary disposition requires significant and often duplicative time and effort from all parties (and the Board), whereas Subpart L evidentiary hearings have proven to be short, usually requiring a day or less to hear a contention.²¹ Based on a short review of the evidence, the Board determines that the questions raised by CASE’s evidentiary submissions would best be resolved at a hearing.

First, with respect to standing, the Board found that CASE had met its burden at the initial contention stage based on allegations of “a sufficient injury related to the use of freshwater aquifer resources and any resulting potential for increased saltwater intrusion.”²² CASE has now offered probative evidence of this injury in the form of an administrative order from the Florida Department of Environmental Protection.²³ In its finding of facts, that administrative order explains the rationale for the State’s conclusion that saline water from the cooling canal system (CCS) has migrated inland and contributed to saltwater intrusion.²⁴ As a

²⁰ 10 C.F.R. § 2.710(d)(1).

²¹ See Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-22, 70 NRC 640, 651-52 (2009).

²² LBP-15-13, 81 NRC 456, 466 (2015).

²³ Ex. INT-004, Florida Department of Environmental Protection, Administrative Order, OGC No. 14-0741 (Dec. 23, 2014) [hereinafter Administrative Order]. The hearsay nature of this order does not bar its admission per se, particularly in the absence of any objection to the statement of facts recounted in the order. See Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 306-07 (1994) (construing prior version of summary disposition regulation, 10 C.F.R. § 2.749 (2004), which is substantially similar to the current regulation).

²⁴ Ex. INT-004, Administrative Order ¶ 25.

result, the State “determined the western [inland] migration of the saline water must be abated to prevent further harm to the waters of the State.”²⁵ The administrative order concludes by describing the State’s plan to reduce the environmental impact of saltwater intrusion by reducing salinity in the canals:

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. Higher precipitation amounts, lower temperatures, and higher regional water levels will also assist in reducing CCS salinity levels.²⁶

This administrative order is sufficient evidence to deny the motion for summary disposition with respect to standing because CASE’s members use water near the Turkey Point facility and so could suffer harm from freshwater withdrawals and from the CCS’s disputed contribution to saltwater intrusion.²⁷ CASE’s members rely on the water supply of the Floridan Aquifer;²⁸ although the parties dispute the freshness of this water source, FPL’s expert acknowledges that it can be used as drinking water after treatment.²⁹ And CASE members also face potential harm from saltwater intrusion exacerbated by FPL’s freshwater withdrawals from the L-31E Canal.

²⁵ Id.

²⁶ Id. ¶ 35 (emphasis added).

²⁷ See Cent. Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002) (finding that farmers had established standing based on a threatened injury from increase in salinity in a river the farmers used to water their crops).

²⁸ See Declaration in Support of Citizens Allied for Safe Energy, Inc./CASE Petition to Intervene In the Issuance of Amendments to Renewed Facility Operating License Nos. DPR-31 and DPR-41 Issued to Florida Power & Light for the Operation of the Turkey Point Nuclear Generating Units 3 and 4 Located in Miami-Dade County, Florida (Oct. 14, 2014).

²⁹ According to FPL’s hydrology expert, “[t]he salinity of water in the [Upper Floridan Aquifer] is approximately 2.5 [practical salinity units]. The water in the [Upper Floridan Aquifer] is relatively fresh, compared to the water in the CCS, but is still salty enough that it must be treated prior to its use as drinking water.” Ex. FPL-001, Initial Written Testimony of Florida Power & Light Company Witnesses Steve Scroggs, Jim Bolleter, and Pete Andersen on Contention 1 (Nov. 10, 2015) at 48 [hereinafter FPL Testimony].

According to the South Florida Water Management District, the freshwater in the canals is used, inter alia, to prevent saltwater intrusion.³⁰

In explaining how to alleviate the problem of hypersalinity in the CCS, the administrative order also provides probative evidence of the other two requirements for standing—causation and redressability. The order ties lower temperatures to lower salinity levels, which it concludes would reduce migration of hypersaline water out of the CCS.³¹ With the inference drawn in CASE's favor that increased salinity in the CCS leads to greater migration of hypersaline water out of the CCS, this evidence is enough to support CASE's standing argument regarding causation. Finally, with respect to redressability, were the Board to conclude that CASE is correct about saline water migrating out of the canals, the Board could partially redress this salinity issue by finding that a license condition would need to be inserted that prevented FPL from operating the canals at higher temperatures.³² A remedy that makes even a small contribution to resolving a larger, more complex injury can still support a standing claim.³³

The Board likewise concludes that the standard for summary disposition has not been met because the filings in this case demonstrate a genuine legal dispute over the adequacy of the NRC Staff's environmental assessment. The evidence submitted by CASE, primarily the State's Administrative Order and Miami-Dade County's Notice of Violation, provide probative evidence of saltwater intrusion and water migrating out of the CCS,³⁴ neither of which was

³⁰ See Ex. FPL-033, South Florida Water Management District, Final Order, SFWMD No. 2015-020-DAO-WU (Apr. 10, 2015).

³¹ Ex. INT-004, Administrative Order ¶ 35.

³² LBP-15-13, 81 NRC at 466.

³³ See Massachusetts v. EPA, 549 U.S. 497, 526 (2007) ("The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek.").

³⁴ See Ex. INT-004, Administrative Order ¶¶ 25, 29, 32, 34-35; INT-005, Miami-Dade County Department of Regulatory and Economic Resources, Notice of Violation and Orders for Corrective Action (Oct. 2, 2015) ("[The Department of Environmental Resources Management]

discussed in the environmental assessment.³⁵ The probative value of CASE's evidence, or on FPL's testimony to the contrary, is not a matter that the Board may decide at summary disposition.³⁶ The Board must consider the merits of the conflicting evidence and rule on the merits of each side's position at an evidentiary hearing.

III. FPL'S MOTION TO STRIKE

On October 19, 2015, FPL moved to strike portions of CASE's Initial Statement of Position, Testimony, Affidavits and Exhibits.³⁷ On October 26, 2015, the NRC Staff filed an answer in support of FPL's motion to strike.³⁸ CASE filed an answer in opposition to FPL's motion on October 29, 2015.³⁹ Both FPL and the NRC Staff contend that (1) a number of CASE's attached exhibits should be excluded because they were not sponsored by an expert, and (2) CASE raises arguments that are outside the scope of the Contention 1, as admitted.⁴⁰

maintains that hypersaline water attributable to FPL exists in the groundwater outside the CCS and outside the property boundaries.”).

³⁵ See Environmental Assessment and Final Finding of No Significant Impact, Issuance, 79 Fed. Reg. 44,464, 44,466 (July 31, 2014).

³⁶ See Pilgrim, CLI-10-11, 71 NRC at 297.

³⁷ FPL's Motion to Strike.

³⁸ NRC Staff's Answer to [FPL's Motion to Strike] (Oct. 26, 2015) [hereinafter Staff Answer].

³⁹ Citizens Allied for Safe Energy's Answer to [FPL's Motion to Strike] (Oct. 29, 2015) [hereinafter CASE Answer].

⁴⁰ FPL's Motion to Strike at 1; Staff Answer at 3-5. In its motion to strike, FPL also argues that certain exhibits should be excluded because they were not properly disclosed or introduced into the record. FPL's Motion to Strike at 1, 4. Specifically, FPL maintains that CASE ignored the Board's Initial Scheduling Order instructing the parties as to the proper presentation of exhibits. Id. at 5; see Licensing Board Order (Initial Scheduling Order) (May 8, 2015) at 14 (unpublished). Initially, CASE submitted multiple exhibits (such as emails, graphs, and excerpts from scientific reports) in one filing and did not number these exhibits. See Citizens Allied for Safe Energy Initial Statement of Position, Testimony, Affidavits and Exhibits (Oct. 9, 2015) [hereinafter CASE Statement]. However, in a October 21, 2015 order, the Board directed CASE to re-submit these exhibits individually and to number each individual exhibit in the order that they appear in CASE's Initial Statement of Position. Licensing Board Order (Requiring Proper Numbering of CASE's Exhibits) (Oct. 21, 2015) (unpublished). CASE then resubmitted its exhibits with proper numbering, although many of the exhibits were still filed as one document. See Ex. INT-001,

Thereafter, FPL and the NRC Staff submitted their initial statements of position and testimony.⁴¹ On December 1, 2015, CASE submitted its rebuttal testimony and statement of position, including a declaration by Dr. Phillip K. Stoddard.⁴² On December 14, 2015, the NRC Staff moved to exclude certain portions of CASE's prefiled rebuttal testimony and rebuttal statement of position.⁴³ FPL also filed an answer supporting the NRC Staff's motion to exclude CASE's rebuttal testimony.⁴⁴ For the reasons stated below, the NRC Staff's and FPL's motions to strike are granted in part and denied in part.

NRC regulations provide that "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted" in an evidentiary hearing.⁴⁵ A licensing board may "strike any portion of a written presentation . . . that is irrelevant, immaterial, unreliable,

CASE, The Science of the Turkey Point Wetlands (Oct. 26, 2015). Subsequently, FPL revised its Motion to Strike to address CASE's renumbered exhibits. See Florida Power & Light Company's Revision to Tables in its October 19, 2015 Motion To Strike (Oct. 27, 2015) [hereinafter FPL's Revised Motion to Strike]. Consequently, FPL's argument concerning the improper presentation of exhibits has been mooted by the Board's October 21st Order and CASE's resubmission of its exhibits.

⁴¹ NRC Staff's Initial and Rebuttal Statement of Position Regarding Contention 1 (Nov. 10, 2015) [hereinafter NRC Staff Statement]; Ex. NRC-001, NRC Staff Testimony of Audrey L. Klett, Briana A. Grange, William Ford, and Nicholas P. Hobbs Concerning Contention 1 (Nov. 10, 2015) [hereinafter Staff Testimony]; Florida Power & Light Company's Initial Statement of Position (Nov. 10, 2015) [hereinafter FPL Statement]; FPL Testimony.

⁴² Citizens Allied for Safe Energy's Joint Rebuttal to NRC Staff's and FPL's Initial Statements of Position, Exhibit List and Exhibits (Dec. 1, 2015) [hereinafter CASE Rebuttal].

⁴³ NRC Staff's Motion to Strike.

⁴⁴ Florida Power & Light Company's Answer Supporting the NRC Staff's Motion in Limine (Dec. 15, 2015).

⁴⁵ 10 C.F.R. § 2.337(a).

duplicative or cumulative.”⁴⁶ The Commission has also stated that “a licensing board normally has considerable discretion in making evidentiary rulings.”⁴⁷

A. Expert Sponsorship

First, FPL moves to exclude a number of CASE’s exhibits on the ground that these materials were not properly sponsored by an expert witness.⁴⁸ The exhibits that FPL seeks to exclude primarily consist of (1) excerpted portions of academic articles,⁴⁹ and (2) various emails between state and local officials regarding the CCS.⁵⁰

Un-sponsored technical documents are primarily considered less reliable because they are hearsay.⁵¹ Since it is well-settled that a Board may consider hearsay evidence,⁵² “[w]hether

⁴⁶ Id. § 2.319(d).

⁴⁷ Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27 (2004).

⁴⁸ FPL’s Motion to Strike at 4-5.

⁴⁹ The challenged exhibits that consist of excerpted academic articles include INT-001, and INT-041 through INT-054. As indicated above, CASE did not file each exhibit as a separate document. Rather, many of the exhibits appear in CASE’s Statement of Position and within INT-001. For the sake of clarity, the Board will reference the document at issue using the exhibit number assigned by CASE in its exhibit list. See Ex. INT-007, Citizens Allied for Safe Energy, Inc. Hearing Exhibits (revised Oct. 26, 2015).

⁵⁰ The challenged exhibits that consist of emails include INT-018 through INT-025, INT-027, INT-036, and INT-037.

⁵¹ 10 C.F.R. § 2.337(a) (“Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted.”); see, e.g., Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), ALAB-950, 33 NRC 492, 500-01 (1991) (“For evidence on highly technical subjects (such as the response of reactor vessel materials to neutron irradiation and temperature variables) to be considered ‘reliable’ and thus admissible, the proponent thereof must show her or his qualifications to sponsor and discuss such evidence.”); Tenn. Valley Auth. (Hartsville Nuclear Power Plant Units 1A, 2A, 1B, and 2B), ALAB-367, 5 NRC 92, 121 (1977) (“Expert testimony in hearsay form from someone unknown is most unreliable.”); Wis. Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 332 (1972) (“The principal objection to expert testimony which relies on data prepared by others is that such data incorporated by reference in testimony constitutes hearsay.”).

⁵² Phila. Electric Co. (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 279 (1987).

evidence is or is not hearsay is significant only insofar as it bears on the question of its reliability.”⁵³ Although a Board may determine reliability before the hearing, there is no “ironclad requirement in administrative proceedings where no jury is involved”⁵⁴ because, unlike juries, Boards “include[] technical experts who can evaluate the factual material in the record and reach their own judgment as to its significance.”⁵⁵ As the Commission has stated:

The Board conducting an adversarial evidentiary proceeding is not required to act merely as an umpire calling balls and strikes. Its function as the arbiter of important safety and environmental questions ‘does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it . . .’ It has the right and duty to develop a full record for decision-making in the public interest.⁵⁶

Therefore, a “determination [of the reliability of the contested exhibits] can be safely left to a later date without prejudicing the interests of any party.”⁵⁷

Moreover, the reliability of such hearsay evidence bears more on the exhibits’ probative value than their admissibility. Accordingly, “the validity and sufficiency of any ‘hearsay’ information upon which [the allegations] are based generally is a matter to be tested in the context of an evidentiary hearing in which the NRC Staff must provide adequate probative evidence to carry its burden of proof.”⁵⁸ The Board, therefore, exercises its “considerable

⁵³ S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 366 (1983).

⁵⁴ Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-520, 9 NRC 48, 50 n.2 (1979).

⁵⁵ Pac. Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-35, 40 NRC 180, 192 (1994) (internal quotation marks omitted).

⁵⁶ Tex. Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), LBP-82-87, 16 NRC 1195, 1199 (1982) (quoting Scenic Hudson Pres. Conference v. Fed. Power Comm’n, 354 F.2d 608, 620 (2d Cir. 1965)).

⁵⁷ Seabrook Station, ALAB-520, 9 NRC at 50 n.2.

⁵⁸ Indiana Reg’l Cancer Ctr., LBP-94-21, 40 NRC 22, 31 (1994).

discretion”⁵⁹ to defer its ruling on the disputed portions of CASE’s unsponsored exhibits. The Board will be better able to resolve the disputes surrounding FPL’s motion upon consideration of the full evidentiary record.

B. Arguments Outside the Scope of the Contention

Second, in its motion to strike, FPL asserts that CASE has raised a number of arguments that are outside the scope of the admitted contention. Contention 1, as admitted by the Board, reads as follows:

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.⁶⁰

As a general matter, FPL moves to strike CASE’s evidence (including portions of the Environmental Assessment (EA) itself), that FPL claims to be outside the scope of Contention 1, as admitted. While CASE certainly has included quotes from portions of the EA that are outside the scope of the admitted contention, some are clearly within the scope of the admitted contention and the Board is more than capable of considering those portions of CASE’s evidence that are properly within the scope of the admitted contention. Certainly, there is no need to throw out the baby with the bathwater by excluding all quoted portions of the EA from the record. Thus, the Board denies FPL’s motion to strike the cited portions of the EA.

Next, FPL maintains that CASE’s assertions concerning the need for additional monitoring of the CCS are beyond the scope of the admitted contention.⁶¹ In its statement of position, CASE argues that the NRC Staff’s monitoring requirements are insufficient because

⁵⁹ Catawba Nuclear Station, CLI-04-21, 60 NRC at 27.

⁶⁰ LBP-15-13, 81 NRC at 473, 476.

⁶¹ FPL’s Motion to Strike at 9, 11-12.

the license, as amended, obligates FPL to monitor for temperature, but not for the presence of other chemicals.⁶² In support of this argument, CASE cites to numerous emails between state officials regarding sampling for “trace metals” and “nutrients” in the CCS.⁶³

The Board agrees with FPL that this argument concerning the potential environmental impact of certain chemicals in the CCS is outside the scope of the Contention 1. In the Board’s March 23, 2015 decision admitting Contention 1, the Board determined that CASE failed to demonstrate there was a genuine dispute regarding the EA’s discussion of the environmental impacts associated with these chemicals in the CCS.⁶⁴ CASE cannot stretch the limits of Contention 1 to encompass arguments that this Board has already deemed inadmissible. As such, the Board grants FPL’s motion to strike those portions of CASE’s statement of position and exhibits insofar as they discuss the need for increased monitoring for these chemical constituents in the CCS. The specific sections being stricken are identified in Appendix A.

FPL also takes issue with an email, cited by CASE, which concerns the double-crested cormorant.⁶⁵ This email simply states that the colony of double-crested cormorants in the CCS has undergone a severe decline; there is no statement linking this decline to increases in the CCS’s temperature or salinity.⁶⁶ As such, this email has no bearing on the contention at issue, and the Board grants FPL’s motion to strike this excerpt.⁶⁷

Similarly, FPL and the NRC Staff contend that CASE improperly relies on excerpts from a paper by Dr. Sydney Bacchus entitled “Knowledge of Ground Water Responses - Critical

⁶² CASE Statement at 35-43.

⁶³ Id. at 41-43.

⁶⁴ LBP-15-13, 81 NRC at 478.

⁶⁵ CASE Statement at 38.

⁶⁶ Id.

⁶⁷ See 10 C.F.R. § 2.319(d) (stating that a Board may strike “any portion of a written presentation . . . that is irrelevant . . .”).

Factor in Saving Florida's Threatened and Endangered Species Part I; Marine Ecological Disturbances" and which CASE has labeled exhibit INT-052.⁶⁸ According to FPL and the NRC Staff, the so called "Bacchus Paper"⁶⁹ discusses the various negative impacts on wildlife due to "groundwater alterations"⁷⁰ that are well beyond the scope of Contention 1.⁷¹ The Bacchus Paper describes these "groundwater alterations" or "groundwater perturbations" as including, among other things, "(1) aquifer injection of effluent and other ecologically hazardous wastes; (2) aquifer 'storage' and 'recovery'; (3) groundwater mining; and (4) structural mining of the aquifer system" ⁷² Upon review of the quoted excerpts, the Board concludes that the Bacchus Paper concerns a wide range of issues that are wholly outside the narrow scope of Contention 1. Accordingly, the Board grants FPL's motion to strike the Bacchus Paper.

Additionally, FPL moves to exclude those portions of CASE's statement of position that concern various aspects of the NRC Staff's obligations under NEPA.⁷³ As an initial matter, FPL moves to strike portions of CASE's initial statement of position that simply quote sections of NEPA.⁷⁴ The Board sees no reason to strike these quoted portions of the statute. Nonetheless,

⁶⁸ See Ex. INT-007, Citizens Allied for Safe Energy, Inc. Hearing Exhibits (revised Oct. 26, 2015) at 8. Confusingly, CASE quotes the Bacchus Paper's "Abstract" in its Statement of Position, but then quotes the same portion of the Abstract with an additional excerpt from the paper's "Conclusions" in INT-001. CASE labels the quotations located within INT-001 as INT-052. See supra note 40. For the sake of clarity, the Board will refer to this proposed exhibit simply as "the Bacchus Paper."

⁶⁹ FPL's Motion to Strike at 10.

⁷⁰ CASE Statement at 34.

⁷¹ FPL's Motion to Strike at 10; NRC Staff Statement at 23.

⁷² See Ex. INT-001, The Science of the Turkey Point Wetlands (filed Oct. 26, 2015) at 23-24. The quoted portions of the Bacchus Paper that appear in the text can be found in INT-001. As explained supra at note 68, CASE quotes sections of the Bacchus Paper in both its Statement of Position and in INT-001. CASE labels the quotations located within INT-001 as INT-052.

⁷³ FPL's Motion to Strike at 10-12.

⁷⁴ Id. at 11-12.

the Board agrees with FPL and the NRC Staff that CASE raises two NEPA-related arguments that are outside the scope of Contention 1—namely: (1) CASE’s claim that the NRC Staff failed to consult with the U.S. Fish and Wildlife Service, and (2) CASE’s claim that the NRC Staff failed to adequately consider alternatives to granting the proposed license amendment.

Contention 1 is a narrow contention. Its scope does not encompass any and all arguments concerning the NRC Staff’s NEPA obligations. Moreover, in its challenge to the NRC Staff’s consideration of alternatives to the proposed action, CASE questions FPL’s position that, without the license amendment, the CCS could exceed the current temperature limit necessitating a dual unit shutdown. CASE’s arguments in this section are nearly identical to those set forth in support of Contention 2, which the Board previously deemed inadmissible.⁷⁵ As such, the Board grants FPL’s motion to strike those portions of CASE’s statement insofar as it discusses these NEPA issues.

IV. STAFF’S MOTION TO STRIKE CASE’S REBUTTAL

FPL’s motion to strike remained pending before the Board during the period in which the parties were required to submit their initial testimony. Accordingly, both FPL’s and the NRC Staff’s prefiled expert testimony addressed the purported out of scope topics, while still reserving their argument that such topics should be excluded.⁷⁶ CASE, in turn, addressed this testimony in its statement of rebuttal.⁷⁷ Consequently, consistent with FPL’s motion to strike, the NRC Staff moved to exclude those portions of CASE’s rebuttal that address the NRC Staff’s purported failure to comply with various sections of NEPA.⁷⁸ Specifically, in addition to the

⁷⁵ LBP-15-13, 81 NRC at 475-77.

⁷⁶ See NRC Staff Statement at 20-25; FPL Statement at 12, 27-28; Staff Testimony at 63-72; FPL Testimony at 26-30.

⁷⁷ CASE Rebuttal at 37-43.

⁷⁸ NRC Staff’s Motion to Strike at 8-9. On December 15, 2015, FPL filed an answer in support of the NRC Staff’s Motion to Strike. FPL’s Answer Supporting the NRC Staff’s Motion in Limine (Dec. 15, 2015).

arguments FPL identified as beyond the scope of the admitted contention and discussed above—namely, (1) CASE’s claim that the NRC Staff failed to consult with the U.S. Fish and Wildlife Service, and (2) CASE’s claim that the NRC Staff failed to adequately consider alternatives to granting the proposed license amendment—the NRC Staff also moves to exclude CASE’s argument that the EA was developed too quickly.⁷⁹ Consistent with the Board’s resolution of FPL’s motion to strike, those positions of CASE’s rebuttal statement that relate to the timing of the EA, the NRC Staff’s consultation with other agencies, and the NRC Staff’s review of alternatives to the proposed action are beyond the scope of the admitted contention and are accordingly stricken.

The Board notes that the NRC Staff’s motion primarily argues that the Board should exclude the entirety of Dr. Stoddard’s testimony by questioning Dr. Stoddard’s expertise and therefore the reliability of his testimony. However, “[w]hether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier.”⁸⁰ Certainly at this stage, the Board cannot conclusively determine that Dr. Stoddard’s testimony will not be “of assistance” to the Board.⁸¹ Therefore, to the extent the NRC Staff’s motion seeks to exclude Dr. Stoddard’s testimony, this relief is denied.

⁷⁹ The Board notes that the NRC Staff took issue with CASE’s argument that the EA was developed too quickly in its Initial Statement of Position. See NRC Staff Statement at 21. However, at that time, the NRC Staff did not separately move to strike any portion of CASE’s Initial Statement relating to the timing of the EA. Instead, it only seeks to exclude those portions of CASE’s rebuttal that address the timing of the EA.

⁸⁰ Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982) (quoting Notes of Advisory Committee on Proposed Rules, 28 U.S.C.A., Federal Rules of Evidence, fol. Rule 702).

⁸¹ See Catawba Nuclear Station, CLI-04-21, 60 NRC at 27-28 (stating that the standard for whether a witness is qualified to serve an expert “is not rigid or self-defining” and “gives room to our boards to decide whether the expert witness will be of assistance”).

V. CONCLUSION

Before the Board is FPL's motion to strike large portions of CASE's statement of position and exhibits, and the NRC Staff's motion to exclude portions of CASE's rebuttal statement of position. For the above reasons, CASE's evidence is excluded insofar as FPL and the NRC Staff have established such evidence is outside of the permissible scope of Contention 1. All other relief requested is hereby denied. Those sections that are to be stricken are identified in Appendix A, which is attached to this ruling.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 22, 2015

APPENDIX A

The following portions are hereby stricken from the record of this proceeding:

Exhibit Number or Document Title⁸²	Page(s)	From	To
The Bacchus Paper	CASE Statement at 33-35	"Perhaps the strongest statement ..."	"... it was a walkover."
CASE Statement	35-37	"MONITORING..."	"...could be monitored . . ."
INT-019	CASE Statement at 38	"From: Alvear..."	"...been regularly monitored...."
INT-021	CASE Statement at 41	"From: Otero..."	"...no longer being sampled."
INT-022	CASE Statement at 41	"From: Grossenbacher..."	"...such may have already."
INT-024	CASE Statement at 42-43	"November 26, 2014..."	"... review and evaluate it' (emphasis added)."
CASE Statement	43	"As the citations above..."	"...specifically that it does."
CASE Statement	46	"CROCODILES AND WILDLIFE..."	"...before the 2014 EA was written."
CASE Statement	62	"It appears that the NRC staff did not..."	"...prior to issuing the 2014 EA."
CASE Statement	63-64	"In a July 25, 2014 Letter..."	"...accepted as fac[t]"
CASE Statement	65-66	"NEPA requires that..."	"...solving paradigm here?"
CASE Statement	67	"That's it; one short paragraph..."	"...wrong in the CCS."
INT-036	CASE Statement at 67-68	"CASE asked nuclear engineer Arnie Gunderson..."	"...The grid was reliable then!"

⁸² As explained above, in response the Board's October 21, 2015 order, CASE resubmitted its exhibits with proper numbering, although many of the exhibits were filed as one document. For the sake of clarity, the exhibit number of the stricken exhibits is provided in the above chart. See Ex. INT-007, Citizens Allied for Safe Energy, Inc. Hearing Exhibits (revised Oct. 26, 2015).

INT-037	CASE Statement at 68-69	“On September 1, 2015...”	“...for their planned outages.”
CASE Statement	69	“So, Mr. Gunderson said...”	“...copper sulfate and fresh water from the aquifer.”
The Bacchus Paper (INT-052) ⁸³	Contained in INT-001 at 23-25	“Knowledge of Groundwater Responses...”	“...UPDATE 83”

⁸³ CASE quotes the Bacchus Paper’s “Abstract” in its Statement of Position, but then quotes the same portion of the Abstract with an additional excerpt from the paper’s “Conclusions” in INT-001. CASE labels the quotations located with INT-001 as INT-052. Both references to the Bacchus Paper are therefore included in the above chart.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 50-250 and 50-251-LA
)
)
(Turkey Point Nuclear Generating)
Units 3 & 4)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying Application for Subpoenas, Denying Motion for Summary Disposition, and Granting in Part and Denying in Part Motions to Strike)** have been served upon the following persons by Electronic Information Exchange.

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ORDER (Denying Application for Subpoenas, Denying Motion for Summary Disposition, and Granting in Part and Denying in Part Motions to Strike)

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[Original signed by Herald M. Speiser ____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of December, 2015