

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of)	
)	
Florida Power & Light Company)	Docket Nos. 52-040 and 52-041
)	
Turkey Point,)	ASLBP No. 10-903-02-COL-BD01
Units 6 and 7)	
_____)	

**JOINT INTERVENORS' MOTION FOR LEAVE TO FILE RESPONSE TO NRC
STAFF'S ANSWER TO FLORIDA POWER & LIGHT'S MOTION FOR
SUMMARY DISPOSITION OF JOINT INTERVENORS' AMENDED
CONTENTION 2.1**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, SOUTHERN ALLIANCE FOR CLEAN ENERGY, NATIONAL PARKS CONSERVATION ASSOCIATION, DAN KIPNIS, and MARK ONCAVAGE (collectively, "Joint Intervenors") hereby file this motion for leave to respond to the new arguments set forth in NRC Staff's Answer to Florida Power & Light Company's ("FPL's") Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1, dated February 3, 2016 ("NRC Staff's Answer").

Joint Intervenors first filed their Response to NRC Staff's Answer (the "Response"), addressing the new arguments set forth by the NRC Staff, on February 15,

2016. Joint Intervenors respectfully submit that pursuant to NRC regulations (10 C.F.R. §§ 2.1205 and 2.710) they were entitled to respond. Nevertheless, Joint Intervenors are filing this Motion for Leave to File a Response out of an abundance of caution and are re-filing their Response with this Motion.¹ For the reasons explained below, leave to file a response to NRC Staff's Answer should be granted.

II. ARGUMENT

A. NRC Regulations Entitle Joint Intervenors to File a Response to NRC Staff's Answer.

Joint Intervenors are entitled to file a response under the NRC regulations in this instance. 10 C.F.R. Part 2 contains the NRC's rules of practice and procedure. Subpart L provides for Simplified Hearing Procedures for NRC adjudications. 10 C.F.R. § 2.1205, which governs summary disposition under Subpart L, states in part:

The presiding officer shall issue a determination on each motion for summary disposition no later than fifteen (15) days before the date scheduled for commencement of hearing. In ruling on motions for summary disposition, *the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part.* 10 C.F.R. § 2.1205(c) (emphasis added).

In turn, Subpart G provides, in part:

(a) Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. Summary disposition motions must be filed no later than 20 days after the close of discovery. The moving party shall attach to the motion a short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Any other party may serve an answer supporting or opposing the motion, with or without affidavits, within 20 days after service of the motion. The party shall attach to any answer opposing the motion a short and concise statement of the material facts as to which it is contended there exists a genuine issue to be heard. All material facts

¹ Joint Intervenors note that the Response is still timely under 10 C.F.R. § 2.710. Joint Intervenors first filed their Response on February 15, 2016, which was a federal holiday (Presidents' Day). The ten (10) day deadline for filing a response to new information raised in NRC Staff's Answer (dated February 3, 2016) is February 16, 2016.

set forth in the statement required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party. *The opposing party may, within 10 days after service, respond in writing to new facts and arguments presented in any statement filed in support of the motion.* No further supporting statements or responses to the motion will be entertained. 10 C.F.R. § 2.710(a) (emphasis added).

Pursuant to 10 C.F.R. §§ 2.1205(b) and 2.710, NRC Staff filed their Answer to FPL's Motion for Summary Disposition on February 3, 2015. *See* NRC Staff Answer at 1. Joint Intervenors contend that NRC Staff's characterization of previous contamination from deep well injections in the region on page 13 of their Answer presents "new facts and arguments." Specifically, NRC Staff asserts in their Answer, "even though upwelling has been documented at the [Miami-Dade Water and Sewer Department South District Wastewater Treatment Plant ("SDWWTP")] site north of the Turkey Point COL site, there was no impact to the Upper Floridan aquifer, and such an impact is unlikely at the Turkey Point COL site as well." NRC Staff Answer at 13; *see also* Barnhurst Aff. at ¶ 17 ("Even though upwelling has been documented at the SDWWTP site north of the Turkey Point COL site, there was no impact to the Upper Floridan aquifer, and such an impact is unlikely at the Turkey Point COL site as well."). Comparatively, while acknowledging the migration of wastewater, neither FPL's Second Motion for Summary Disposition nor FPL's Statement of Material Facts assert that such migration caused no impact to the Upper Floridan aquifer. *See e.g.*, FPL Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1 (December 15, 2015) at 20-22. Joint Intervenors should be afforded the opportunity to respond to NRC Staff's characterization of the upwelling that has been documented at the SDWWTP site and its impact (or lack thereof) to the Upper Floridan aquifer. Moreover, Joint Intervenors should be permitted to explain why this characterization leads to the inaccurate conclusions, on pages 10 and 12 of the

NRC Staff Answer, that hydrogeology across the Turkey Point site is not expected to vary significantly from what was reported at the single test well (“EW-1”) and that vertical flow features would be absent.

In accordance with “the standards” for summary disposition referenced in the Subpart G regulations (10 C.F.R. § 2.710), which are expressly imported into Subpart L proceedings under 10 C.F.R. § 2.1205, Joint Intervenors are authorized within ten days after service to respond in writing to these new facts and arguments.² Accordingly, Joint Intervenors’ Response should be accepted and considered by the Board in this proceeding.

B. Principles of Fundamental Fairness and Logic Allow Joint Intervenors to File a Response to NRC Staff’s Answer.

Even if this Atomic Safety and Licensing Board finds that 10 C. F. R. §§ 2.1205 and 2.710 do not automatically entitle Joint Intervenors to file their Response, as a matter of fundamental fairness and logic, Joint Intervenors should be granted leave to respond to NRC Staff’s Answer. As explained above, NRC Staff’s characterization of previous contamination from deep well injections in the region presents new facts and arguments in support of FPL’s Second Motion for Summary Disposition. Joint Intervenors should

² To the extent either FPL or the NRC Staff would argue that Subpart L does not import the procedural standards of Subpart G, that argument is not supported by the plain meaning of the language used by 10 C.F.R. § 2.1205(c), which makes no distinction between substantive and procedural “standards.” *See id.* (“the presiding officer shall apply *the standards* for summary disposition set forth in subpart G of this part”) (emphasis added). To interpret the rule in a manner that would exclude the procedural standards for summary disposition from applying in Subpart L proceedings, would not only impermissibly add words to the text of the rule that are not there, but it would also constructively amend the regulation without following the rules for notice and comment rulemaking under the Federal Administrative Procedure Act. 5 U.S.C. §§ 551 *et seq*; *see further, Exportal Ltd. v. United States*, 902 F.2d 45, 50-51 (D.C. Cir. 1990).

have an opportunity to respond to that new information. It would be logically inconsistent to allow Joint Intervenors to respond to FPL's Second Motion for Summary Disposition, while prohibiting Joint Intervenors from responding to additional information provided by the NRC Staff in support of that motion. Moreover, it would prejudice Joint Intervenors to prohibit them from fully addressing each party's position that summary disposition is warranted. Such a result conflicts with rules of fundamental fairness that govern these proceedings. *See Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N. R. C. 521, 524 (1979) ("the cardinal rule, so far as fairness is concerned, is that each side must be heard").

That Joint Intervenors should be afforded the opportunity to respond is further supported by the Nuclear Regulatory Commission's practice to treat summary disposition motions as federal courts treat such motions under Rule 56 of the Federal Rules of Civil Procedure. As Joint Intervenors previously explained in their Answer to FPL's Second Motion for Summary Disposition, "when ruling on motions for summary disposition, the Commission applies standards analogous to those used by federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure." Joint Intervenors' Answer to Florida Power & Light Company's Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1 (February 3, 2016) (quoting *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), Docket No. 52-033-COL, ASLBP No. 09-880-05-COL-BD01 (2010)). Under Rule 56, the moving party has the initial burden of demonstrating that no genuine issue as to any material facts exists and that it is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56. "Because the initial burden rests on the moving party, a licensing board must examine the record in the light

most favorable to the non-moving party and all justifiable inferences must be drawn in favor of the non-moving party.” *Detroit Edison Company* at 4-5. Adverse inferences, however, may be drawn where the non-moving party does not utilize its “right to respond” to the movant. *Reed v. Bennett*, 312 F. 3d 1190, 1195 (10th Cir. 2002). Therefore, principles of fundamental fairness dictate that Joint Intervenors be afforded the opportunity to respond to NRC Staff’s new facts and arguments, so that this Board does not draw an adverse inference from Joint Intervenors’ failure to respond to NRC Staff’s characterization of the previous contamination from deep well injections in the region.³

C. Past Practice of the Atomic Safety and Licensing Board Supports Joint Intervenors’ Position.

In past instances, the Atomic Safety and Licensing Board has permitted and considered similar responses to NRC Staff answers in support of an applicant’s summary disposition motions. For example, in *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-07-12, 66 N. R. C. 113, 124 (2007), while not ruling on the issue, the Board considered an intervenor’s response to the NRC Staff’s summary disposition answer.

Further, in *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-03, 67 N. R. C. 85, 97-98 n. 7 (2008), the Board observed “a properly

³ See also, *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), LBP No. 06-844-01-LR (June 19, 2007) (declining to rule on an applicant’s motion to strike an intervenor’s response to NRC Staff’s answer to an applicant’s request for summary disposition, but noting that the board “would find it to be contrary to fundamental fairness if the regulations absolutely deprived [Intervenors] of the opportunity to respond to new facts or arguments presented by the Staff in support of the [applicant’s] summary disposition motion”).

supported request to reply to a summary disposition response would seem to be a reasonable candidate for a favorable Board discretionary decision permitting the filing.” The Board compared provisions allowing replies in 10 C. F. R. §§ 2.309(h)(2) (for contentions) and 2.323(c) (for motions involving exceptional circumstances). The Board made the same observation in *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-02, 67 NRC 54, 67 n. 8 (2008).

And in *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-15, 70 N.R.C. 198, 208 (2009), the Board granted the intervenors’ motion to respond to a “new basis for summary disposition” where NRC Staff filed for summary disposition and the license applicant responded with new arguments.

Thus, the Atomic Safety and Licensing Board has regularly found that responses to summary disposition answers are reasonable and has allowed parties to file such responses in previous licensing proceedings. Accordingly, this Board should grant Joint Intervenors’ Motion for Leave to File a Response in this instance, given the new information presented in NRC Staff’s Answer.

III. CONCLUSION

Joint Intervenors respectfully request that for the reasons stated above, the Board either (1) admit their Response as a matter of right, or (2) grant their Motion for Leave to a File Response to NRC Staff’s Answer and thus admit their Response.

IV. CERTIFICATION PURSUANT TO 10 C. F. R. § 2.323(b)

On February 15, 2016, counsel for Joint Intervenors contacted counsel for FPL and the NRC Staff in an attempt to obtain their consent to this Motion. Counsel for FPL

stated: “FPL opposes the Motion on the grounds that 10 C. F. R. 2.710(a), allowing for a Response to new facts in an Answer, does not apply to a subpart L proceeding, and in any event, Joint Intervenors have not identified new facts that could not reasonably have been addressed in its original Answer.” Counsel for NRC Staff stated: “The NRC Staff opposes the Joint Intervenors’ motion for leave to respond because (1) 10 C. F. R. § 2.1205 controls here and does not authorize any response to an answer to a motion for summary disposition and (2) while the Joint Intervenors assert ‘fundamental fairness’ as a reason for allowing them to respond to the Staff answer, the Joint Intervenors have not identified to the Staff any information in the Staff answer that the Joint Intervenors could not reasonably have addressed in their February 3, 2016, answer, nor any other circumstance that might justify leave to respond.”

Respectfully submitted this 16th day of February, 2016.

 /signed electronically by/

Jason Totoiu
Everglades Law Center
331 West Central Avenue, Suite 213
Winter Haven, FL 33880
Phone: (561) 568-6740
Email: Jason@evergladeslaw.org

 /signed electronically by/

Mindy Goldstein
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
Phone: (404) 727-3432
Fax: (404) 727-7851
Email: magolds@emory.edu