

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

March 11, 2016

ORDER

(Clarifying Scope of Proposed Findings of Fact and Conclusions of Law
and Amending Initial Scheduling Order)

Given that the Board has recently ordered briefing on a legal development relating to the Turkey Point plant,¹ we deem it important to clarify that a recent report by Miami-Dade County² alleging that the Turkey Point cooling canal system may be contributing to an increase in tritium levels in Biscayne Bay is not within the scope of the existing contention and, therefore, should

¹ See Licensing Board Order (Clarifying Scope of Official Notice) (Mar. 10, 2016) at 3 (unpublished) (directing the parties to address the legal meaning and effect of a February 15, 2016 order by a Florida administrative judge).

² On March 7, Miami-Dade County published a “Report on Recent Bay Water Quality Observations associated with Florida Power and Light Turkey Point Cooling Canal Systems Operations.” See Memorandum from Carlos A. Gimenez, Mayor of Miami-Dade County, to Honorable Chairman Jean Monestime and Members, Board of County Commissioners (Mar. 7, 2016), <http://www.miamidade.gov/mayor/library/memos-and-reports/2016/03/03.07.16-Report-on-Recent-Biscayne-Bay-Water-Quality-Observations.pdf>. This report has also been the subject of local news articles. See e.g., Jenny Staletovich, “FPL Nuclear Plant Canals Leaking Into Biscayne Bay, Study Confirms,” Miami Herald (March 7, 2016, 9:08 PM), <http://www.miamiherald.com/news/local/environment/article64667452.html>; “Nuclear Plant Cooling Canals Reportedly Leaking into Florida Waters,” PennEnergy (Mar. 9, 2016), <http://www.pennenergy.com/articles/pe/2016/03/nuclear-plant-cooling-canals-reportedly-leaking-into-florida-waters.html>.

Although we may take official notice of the existence of this report and subsequent news articles, we stress that we are not accepting the truth of the facts stated in either the Miami-Dade County report or any of those recent news articles. See Washington Post v. Robinson, 935 F.2d 282, 291 (D.C. Cir. 1991) (stating that “[t]his court may take judicial notice of the existence of newspaper articles”).

not be addressed in the parties' proposed findings of fact and conclusions of law.³ Rather, this issue may only come before us as new contention.

In light of the fact that we have closed the record in this case,⁴ any party seeking to admit a new contention must satisfy the reopening standards under 10 C.F.R. § 2.326.⁵ To reopen a closed record, the movant must show that its motion is timely, addresses a "significant safety or environmental issue," and that a "materially different result would be or would have been likely had the newly proffered evidence been considered initially."⁶ Additionally, "[t]he motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim."⁷ If a motion to reopen relates to a new or amended contention, the motion must be filed "in a timely fashion based on the availability of the subsequent information."⁸

³ CASE's contention, as admitted by the Board, concerns possible saltwater intrusion into groundwater and movement of the freshwater/saltwater interface. See LBP-15-13, 81 NRC 456, 476 (2015), aff'd, CLI-15-25, 82 NRC ___, ___ (slip op. at 24) (Dec. 17, 2015). Although CASE's petition originally alleged there had been migration of tritium "in the [cooling canal system] area," CASE did not allege the migration of tritium into Biscayne Bay. Citizens Allied for Safe Energy, Inc. Petition to Intervene and Request for a Hearing at 5 (Oct. 14, 2014). Thus, the scope of that contention did not implicate whether tritium had migrated into Biscayne Bay as a result of the higher water temperature limit. See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010) ("The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules.").

⁴ Licensing Board Order (Adopting Transcript Corrections and Closing Evidentiary Record) (Feb. 17, 2016) at 2 (unpublished).

⁵ See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 120–21, 124–25 (2005). We also note that since we have not yet issued our initial decision, we retain jurisdiction to consider a motion to reopen the record. See id. at 120 ("Generally, once there has been an appeal or petition to review a Board order ruling on intervention petitions (or, where a hearing is granted, following a partial or final initial decision), jurisdiction passes to the Commission, including jurisdiction to consider any motion to reopen.").

⁶ 10 C.F.R. § 2.326(a)(1)–(3).

⁷ 10 C.F.R. § 2.326(b).

⁸ 10 C.F.R. § 2.309(c)(1)(iii); see 10 C.F.R. § 2.326(d) ("A motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the § 2.309(c) requirements for new or amended contentions filed after the deadline in § 2.309(b).").

The Board did not address the deadlines for new or amended contentions in its Initial Scheduling Order.⁹ To maintain an orderly process, the Board amends the Initial Scheduling Order to establish deadlines and procedures for any new or amended contentions. Under 10 C.F.R. § 2.309(c)(1), new or amended contentions may be filed with leave of the Board if (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 from 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.

The deadline to file a new contention based on new information shall be thirty days from the date on which the information became publicly available.¹⁰ The party seeking to file such a new contention must file a motion for leave to file a new contention and the substance of the proposed contention together. In addition to satisfying the timing requirements of 10 C.F.R. § 2.309(c)(1)(i)–(iii), a new or amended contention filed by a party or participant to the proceeding must also meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(i)–(vi).¹¹ However, if a party has already satisfied the 10 C.F.R. § 2.309(d) requirements for standing in a proceeding, that party “does not need to do so again.”¹²

⁹ See Licensing Board Order (Initial Scheduling Order) (May 8, 2015) (unpublished).

¹⁰ See, e.g., Nuclear Innovation N. Am. LLC (S. Texas Project, Units 3 & 4), LBP-11-39, 74 NRC 862, 867 (2011); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-11-15, 73 NRC 629, 634 (2011); U.S. Dep’t of Energy (High-Level Waste Repository), LBP-09-29, 70 NRC 1028, 1035-37 (2009). Parties may move to extend the deadline when the new information is particularly complicated or extensive. See Detroit Edison Co. (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 748–49 (2012); Virginia Electric & Power Co. (N. Anna Power Station, Unit 3), LBP-10-17, 72 NRC 501, 516 (2010); see also Initial Scheduling Order at 12 (setting requirements for motions for extension of time).

¹¹ 10 C.F.R. § 2.309(c)(4) (“A new or amended contention filed by a party or participant to the proceeding must also meet the applicable contention admissibility requirements in paragraph (f) of this section.”).

¹² Id.

Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer responding to both the motion and the substance of the proposed contention. Within seven (7) days of service of the answer, the movant may file a reply responding to any such answers.¹³

The Miami-Dade County study alleging an increase in tritium in Biscayne Bay was published on March 7, 2016.¹⁴ Therefore, a motion for leave to file a new contention and reopen the record based upon this purported increase in tritium resulting from alleged increases in water temperature and salinity will be deemed timely under 10 C.F.R. § 2.309(c)(1)(iii) and 10 C.F.R. § 2.326(a)(1) if it is filed on or before April 6, 2016. As stated above, any such motion must (1) address the remaining timing factors in 10 C.F.R. § 2.309(c)(1); (2) show that the new contention meets the standard admissibility requirements of section 2.309(f)(1)(i)–(vi); and (3) satisfy the reopening standards under 10 C.F.R. § 2.326.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 11, 2016

¹³ 10 C.F.R. § 2.309(i).

¹⁴ Memorandum from Carlos A. Gimenez, Mayor of Miami-Dade County, to Honorable Chairman Jean Monestime and Members, Board of County Commissioners (Mar. 7, 2016) (available at <http://www.miamidade.gov/mayor/library/memos-and-reports/2016/03/03.07.16-Report-on-Recent-Biscayne-Bay-Water-Quality-Observations.pdf>).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order (Clarifying Scope of Proposed Findings of Fact and Conclusions of Law and Amending Initial Scheduling Order)** have been served upon the following persons by Electronic Information Exchange.

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Turkey Point, Units 3 & 4, Docket Nos. 50-250 and 50-251-LA

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[Original signed by Clara Sola _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of March, 2016