May 2, 2016

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 ANSWER TO THE CITY OF MIAMI'S MOTION TO REOPEN THE RECORD, PETITION FOR LEAVE TO INTERVENE, AND REQUEST TO PARTICIPATE AS AN INTERESTED LOCAL GOVERNMENT

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i) and § 2.323(c), Florida Power & Light Company ("FPL") hereby answers the "Petition by the City of Miami, Florida, for Leave to Intervene in a Hearing on Florida Power & Light Company's License Amendment Application for Turkey Point Units 3&4 Based on New Information, or, in the Alternative, to Participate as a Non-party Interested Local Government in any Reopened Proceedings & Motion to Reopen the Record" ("Petition") filed in this proceeding on April 6, 2016. The Petition responds to the Board's March 11, 2016 Order, which amended the Initial Scheduling Order in this proceeding to set a 30-day deadline for motions to reopen the record and submit additional contentions. The Board's Order acknowledged a report that had been released by Miami-Dade County on March 7, 2016, "alleging that the Turkey Point cooling canal system may be contributing to an increase in tritium levels in Biscayne Bay" (the "Biscayne Bay Report") and noted that a party may seek

to reopen the record a file new contentions based on that report.[1] Because the Biscayne Bay Report became available on March 7, 2016 and the Board had established a 30-day deadline for contentions based on new information, it concluded that new contentions based on new information in the Biscayne Bay Report would be timely if filed by April 6, 2016.[2]

The City's Petition instead relies on a *different* Miami-Dade County report prepared by Dr. David Chin and published on February 17, 2016, 49 days before the City filed its Petition (the "Chin Report").[3] The Chin Report does not "alleg[e] that the Turkey Point cooling canal system may be contributing to an increase in tritium levels in Biscayne Bay," as did the report identified in the Board's March 11 Order. Because the City's Petition does not discuss the Biscayne Bay Report, it evidences a fundamental misunderstanding of the Board's March 11 Order. April 6, the date on which the City filed its Petition, has no special significance for the filing of contentions based upon the Chin Report, so the City's choice of filing date was arbitrary and the Petition is irredeemably late.

Under 10 C.F.R. § 2.309(c), the mere existence of a new report is not enough to support a contention filed after the deadline set under section 2.309(b). The information in the relied-upon report must: i) have been previously unavailable, and ii) be materially different from that which was previously available.[4] The Board's thirty-day deadline for determining the timeliness of new contentions under section 2.309(c)(iii) becomes relevant only once it has been determined that the information is both new and materially different under subparagraphs (i) and (ii). As

[1] Order (Clarifying Scope of Proposed Findings of Fact and Conclusions of Law and Amending Initial Scheduling Order), dated March 11, 2016 ("March 11 Order") at 1. The Board specifically cited the Biscayne Bay Report and provided a URL to the County website that published it.

[2] *Id*. at 4.

[3] Pet. Exh. B, Memorandum from C. Gimenez, Mayor, Miami-Dade County to the Honorable Chairman Jean Monestime and Members, Board of County Commissioners, "Cooling Canal Study at the Florida Power & Light Turkey Point Power Plant – Directive 151025, dated February 17, 2016." This memorandum forwards an undated study by Dr. David A. Chin, entitled "The Cooling-Canal System at the FPL Turkey Point Power Station."

[4] 10 C.F.R. § 2.309(c)(i, ii).

discussed in this Answer, even if the Board were to accept a petition filed 49 days after the publication of the Chin Report as timely, the City has not identified anything in the Chin Report that was "new" or not previously available. Essentially, instead of being merely nineteen days late, the City's Petition is seventeen months late. It should have been filed in October 2014.

Because the City's Petition is not timely, it has not met either the standards for contentions filed after the deadline under 10 C.F.R. § 2.309(c) or the standards for reopening the record under 10 C.F.R. § 2.326(a). Regardless, none of the City's Contentions are admissible under 10 C.F.R. § 2.309(f)(1) and the City has failed to demonstrate standing. Therefore, the City's Petition must be rejected.

II. BACKGROUND

Turkey Point Units 3 and 4 are pressurized water reactors located in Miami-Dade County, Florida, approximately 25 miles south of the City of Miami and bordering Biscayne Bay.[5] The nuclear units are co-located with three fossil-fueled units (Units 1, 2, and 5). The two nuclear units and fossil Unit 1 are cooled by a 6,100 acre closed loop Cooling Canal System ("CCS").[6] For the two nuclear units, the CCS serves as coolant for the circulating water system, which provides cooling to the secondary side main condensers, and acts as the ultimate heat sink ("UHS") for the safety-related intake cooling water ("ICW") system. Heated water discharges into the CCS at one end, flows through the canal system, and is withdrawn from the other end for

[5] Exh. NRC-009, Florida Power & Light Company, Turkey Point Units 3 and 4: Environmental Analysis and Finding of No Significant Impact, 79 Fed. Reg. 44,464, 44,465 col. 2. (July 31, 2014) ("UHS EA").

[6] Unit 2 was also cooled by the CCS but has been retired. Unit 5, a combined cycle natural gas fired plant, uses mechanical draft cooling towers for cooling, draws makeup water from the Upper Floridan Aquifer, and discharges its cooling tower blowdown to the CCS.

reuse as cooling water. Rainfall, stormwater runoff, and groundwater exchange replenish evaporative losses.[7]

In 2010, FPL applied for an extended power uprate ("EPU") for Units 3 and 4.[8] The NRC prepared an environmental assessment of the proposed uprate ("EPU EA") which concluded that the action would not have any significant environmental impacts.[9] Observing that the CCS water is hyper-saline (approximately twice the salinity of Biscayne Bay), the EPU EA specifically discussed the Florida Department of Environmental Protection's ("FDEP") regulation of saltwater intrusion.[10] The NRC explained that the FDEP approved the EPU under Florida's power plant site certification law, and imposed numerous Conditions of Certification ("CoC"), which require FPL to have a program to monitor and assess the potential direct and indirect impacts to ground and surface water from the proposed EPU, including saltwater intrusion.[11] This state-mandated "ongoing program" includes measuring water temperature and salinity in the CCS, and monitoring of the ground and surface water surrounding the Turkey Point site.[12] The CoC allows FDEP to impose additional measures if the data indicates degradation to aquatic resources, which may include methods to reduce and mitigate salinity levels in groundwater, operational changes to the CCS, and other actions in consultation with South Florida Water Management District ("SFWMD") and Miami-Dade County to reduce any potential environmental impacts.[13]

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[7] *See* UHS EA, 79 Fed. Reg. at 44,466 col. 3.
[8] *See* Exh. NRC-022, License Amendment To Increase the Maximum Reactor Power Level, Florida Power & Light Company, Turkey Point, Units 3 and 4; Final Environmental Assessment and Finding of No Significant Impact, 77 Fed. Reg. 20,059 (Apr. 03, 2012) ("EPU EA").
[9] *Id.* at 20,070, col. 1.
[10] *Id.* at 20,062, col. 2.
[11] *Id*.
[12] *Id*.
[13] *Id*. at 20,062 col. 2-3.

In the summer of 2014, environmental conditions, including extraordinary algae growth in the CCS and unseasonably dry weather, among other factors, resulted in UHS temperatures approaching the NRC's 100°F TS limit. Consequently, on July 10, 2014, FPL submitted the instant license amendment request ("LAR") asking the NRC to increase the UHS temperature limit in TS 3.7.4 based on an analysis demonstrating that the CCW system would continue to be able to provide sufficient heat removal to the ICW system following a postulated accident at the higher UHS temperature. FPL also took other steps outside the jurisdiction of the Commission to mitigate the rising CCS temperature, including obtaining permission from the FDEP for temporary use of chemical treatments to reduce the algae concentrations, obtaining permission from the SFWMD to withdraw a portion (approximately 5 MGD) of the Unit 5 withdrawal allowance from the Floridan Aquifer for use in the CCS, and obtaining temporary approval to withdraw 30 MGD from the shallower, saltwater Biscayne aquifer.[14]

On July 31, 2014, the NRC Staff published in the *Federal Register* an EA concluding that the LAR involved no significant environmental impact.[15] As the LAR EA explained:

> Under the proposed action, the CCS could experience temperatures between 100 °F and 104 °F at the TS monitoring location near the north end of the system for short durations during periods of peak summer air temperatures and low rainfall. Such conditions may not be experienced at all depending on site and weather conditions. Temperature increases would also increase CCS water evaporation rates and result in higher salinity levels. This effect would also be temporary and short in duration because salinity would again decrease upon natural freshwater recharge of the system (i.e., through rainfall, stormwater runoff, and groundwater exchange). *No other onsite or offsite waters would be affected by the proposed UHS temperature limit increase*.[16]

In addition, the UHS EA also discussed the temporary chemical treatments and aquifer withdrawals to determine whether the proposed action would have potentially detrimental

[14] *See* UHS EA, 79 Fed. Reg. at 44,468, col. 1-2.
[15] *Id*. at 44,464.
[16] *Id.* at 44,466-67 (emphasis added).

cumulative effects. The UHS EA concluded that the separately-permitted aquifer withdrawals would have the beneficial impact of reducing the salinity of the CCS and the potential to help moderate CCS temperatures over the long term.[17]

The NRC issued the UHS amendment, accompanied by a Safety Evaluation, on August 8, 2014.[18] On August 14, the NRC published a notice of issuance of the license amendment in the *Federal Register*, and due to a July 29 change to FPL amendment request, a supplemental notice of opportunity for hearing.[19] In response to the NRC's Hearing Notice, Citizens Allied for Safe Energy, Inc. ("CASE") requested a hearing on October 14, 2014, submitting four proposed contentions.[20] The City of Miami did not request a hearing or seek to participate in the litigation of CASE's contentions as an interested local government under 10 C.F.R. § 2.315(c). On March 23, 2015, the Licensing Board issued LBP-15-13, ruling that CASE had demonstrated standing and admitting CASE Contention 1 for hearing.[21] Specifically, Contention 1, as admitted alleges:

> 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.

Again, the City did not request to participate as an interested local government.

The Board held an evidentiary hearing on CASE Contention 1 in Homestead, Florida on January 11 and 12, 2016. The City still did not request to participate as an interested local government. FPL and the NRC Staff presented unrebutted testimony on matters relevant to

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[17] *Id*. at 44,468, col. 2.

[18] 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).

[19] 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") (Exhibit NRC-042).

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

[21] *Florida Power & Light Company* (Turkey Point Units 3 and 4), LBP-15-13, 81 NRC 456 (2015).

CASE Contention 1, each concluding that the license amendment would not result in a significant impact on the movement of hypersaline water out of the CCS into the local groundwater.[22] On February 17, 2016, the Board issued an order closing the record in the proceeding.[23]

III. APPLICABLE LEGAL STANDARDS

A. Standards Governing Motions to Reopen the Record

The Commission generally disfavors the filing of new contentions at the eleventh hour of an adjudication.[24] This policy recognizes the need for finality and "that at some point, an adjudicatory proceeding must come to an end."[25] Reopening the record for any reason is "an extraordinary action" and so the Commission has repeatedly emphasized that it places a "deliberately heavy" burden upon a participant seeking to reopen the record.[26]

To that end, the Commission's rules specify that a motion to reopen that record to consider additional evidence or new contentions will not be granted unless the following criteria are satisfied:

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[22] Initial Written Testimony of Florida Power & Light Company Witnesses Steve Scroggs, Jim Bolleter, and Pete Andersen on Contention 1 (Nov. 10, 2015) ("FPL Testimony") at 58 (A98-A99), at 60-62 (A102-104) (Exh. FPL-001); NRC Staff Testimony of Audrey L. Klett, Briana A. Grange, William Ford, and Nicholas P. Hobbs Concerning Contention 1 (Nov. 10, 2015) ("NRC Staff Testimony") at 52 (A80) (Exh. NRC-001).

[23] Order (Adopting Transcript Corrections and Closing Evidentiary Record) (Feb. 17, 2016).

[24] *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.,* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337-38 (2011).

[25] *Id*. (citing *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) ("Obviously, 'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings")); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc*., 435 U.S. 519, 555 (1978). *See also* Final Rule: "Criteria for Reopening Records in Formal Licensing Proceedings," 51 Fed. Reg. 19,535, 19,538 (applying "[p]rinciples of finality" to intervenors in the context of motions to reopen the record), 19,539 ('The purpose of this rule is ... to ensure that, once a, record has been closed and all timely-raised issues have been resolved, finality will attach to the hearing process. Otherwise it is doubtful whether a proceeding could ever be completed.") (May 30, 1986) (Criteria for Reopening Records).

[26] *Id*. *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009) (citing *Louisiana Power & Light Co*. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)).

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.[27]

The Commission has provided guidance outlining when an environmental issue is "significant" for the purposes of reopening a closed record, equating that standard to its standards for when an EIS is required to be supplemented -- there must be new and significant information that will "paint a 'seriously different picture of the environmental landscape.'"[28]

Section 2.326(b) further requires that:

> The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. *Each of the criteria must be separately addressed, with a specific explanation of why it has been met*. When multiple allegations are involved, the movant *must identify with particularity each issue it seeks to litigate* and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.[29]

As discussed later in this Answer, the City's Motion must be denied because it does not meet this "deliberately heavy" burden.

B. Standards Governing Contentions Filed After the Deadline

In addition, where a motion to reopen relates to a contention not previously in controversy among the parties, it must also satisfy the requirements for contentions filed after the

[27] 10 C.F.R. § 2.326(a).
[28] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 29 (2006) (finding that claimed additional environmental impacts were "not so significant or central to the FEIS's discussion of environmental impacts that an FEIS supplement (and the consequent reopening of our adjudicatory record) is reasonable or necessary")).
[29] 10 C.F.R. § 2.326(b) (emphases added).

deadline, found in section 2.309(c).[30] As with motions to reopen the record, the Commission looks with disfavor on "amended or new contentions filed after the initial filing."[31] Section 2.309(c) provides that motions for leave to file new or amended contentions submitted after the deadline "will not be entertained" absent a demonstration of good cause by showing that:

> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

An intervenor cannot wait until a document compiles and organizes certain pre-existing information into a single document.[32] To rule otherwise would allow a petitioner "to delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention."[33] And this would "turn on its head" the requirement to base new contentions on information *not previously available*.[34]

This is not simply a barrier erected to limit public participation. As the Commission explained in *Oyster Creek*:

> [O]ur 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

[30] 10 C.F.R. § 2.326(d).
[31] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).
[32] *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493 (2010).
[33] *Id*. at 496.
[34] *Id*.

> important that parties comply with our pleading requirements and that the Board enforce those requirements.[35]

The Commission's concern with endless proceedings is certainly fitting in this case, where the record had already been closed for over two months prior to the City's Petition. As discussed later in this Answer, the City's Petition must be denied because it does not show good cause for its failure to raise these issues earlier in the proceeding.

C. Standards Governing Contention Admissibility

Like all contentions, those filed after the close of the evidentiary record in a proceeding must also meet the admissibility standards in section 2.309(f)(1).[36] Under the NRC's Rules of Practice, "a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate."[37] Accordingly, a petition "must set forth with particularity the contentions sought to be raised."[38] Petitioners must provide "a clear statement as to the basis for the contentions and [submit] supporting information and references to specific documents and sources that establish the validity of the contention."[39] Specifically, "for each contention," the petition must:

> (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;

[35] *Oyster Creek*, CLI-09-7, 69 NRC at 271-72 (footnotes and internal quotation marks omitted).
[36] 10 C.F.R. § 2.309(c)(3).
[37] 54 Fed. Reg. at 33,171 (quoting *Conn. Bankers Ass'n v. Bd. Of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980)).
[38] 10 C.F.R. § 2.309(f)(1).
[39] *USEC, Inc*. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006) (*citing Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

(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) …[P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.[40]

Contentions that do not satisfy each of these six requirements, such as the City's three late contentions, must be rejected.[41]

D. Standards Governing Determinations of Standing in NRC Proceedings

Even if the City was able to overcome the deficiencies in its request to reopen the record, the untimeliness of its contentions, and the inadmissibility of its contentions—which it cannot—its motion should be denied for another reason as well. In order to obtain a hearing before the NRC, a petitioner must also demonstrate standing.[42] 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."[43]

The City, as the petitioner, bears the burden of providing facts sufficient to establish standing, which is a threshold issue.[44] In determining whether a petitioner has established the requisite interest, the Commission has traditionally applied contemporaneous judicial concepts of standing.[45] The petitioner must establish; (a) that he personally has suffered or will suffer a

[40] 10 C.F.R. § 2.309(f)(1).
[41] *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 NRC 317, 324 (2009).
[42] 10 C.F.R. § 2.309(c)(3). *See also* AEA § 189a, 42 U.S.C. § 2239(a).
[43] 10 C.F.R. § 2.309(d)(1).
[44] *U.S. Enrichment Corp*. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001).
[45] *See, e.g., Gulf States Utilities Co*. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994).

"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.[46] Moreover, this injury must be one within the "zone of interests" protected by the governing statute.[47]

The Commission often employs an analytical shortcut known as the "proximity presumption" for determining standing. This presumption rests on an NRC finding that persons living close to a facility "face a realistic threat of harm" if a release of radioactive material from the facility were to occur.[48] But as the Commission has explained, this presumption is generally applied only in construction permit and operating license cases which involve a new risk of accidental releases from a wholly new reactor, and which present an obvious, if incremental, increase in offsite risk.[49] However, in other licensing cases without an "obvious potential for offsite consequences," like the license amendment at issue in this proceeding, the Commission has placed a significant limitation on the use and applicability of this analytical shortcut, requiring a petitioner to allege some specific injury in fact.[50] Specifically, a petitioner in these types of license amendment challenges must show a plausible chain of events that would result in offsite radiological consequences posing a distinct new harm to the petitioner.[51]

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[46] *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).

[47] *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (citing *Cleveland Elec. Illuminating Co*. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)). The statutes generally articulating the relevant zone of interests in NRC proceedings are the Atomic Energy Act and the National Environmental Policy Act. *See Tennessee Valley Auth*. (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 23 (2002).

[48] *Calvert Cliffs,* CLI-09-20, 70 NRC at 915-16 (2009).

[49] *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

[50] *Id. See also Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 188, 191-92 (1999) (For license amendment requests without an obvious potential for offsite consequences, petitioners must assert an injury tied to the effects of the proposed amendment, not simply a general objection to the facility).

[51] *Zion*, CLI-99-04, 49 NRC at 192.

IV. ARGUMENT

A. The City Has Not Satisfied the Criteria to Reopen the Record

The City's motion to reopen the record (the "Motion") fails to abide by the standards outlined in 10 C.F.R. § 2.326 and reiterated by the Board in its March 11 Order and should be denied. As discussed above, the Motion is not timely under 10 C.F.R. § 2.326(a)(1) because it was filed 49 days after the release of the Chin Report and the Board recently set a 30-day standard for moving to reopen the record with new contentions in this proceeding. The only relief available under section 2.326(a)(1) for a movant with an untimely motion to reopen the record is if the issue it raises is "exceptionally grave." Since the City does not allege that the issues it presents are "exceptionally grave," there is no escaping the Motion's lateness. It must fail for this reason alone.

The City also fails to satisfy the other reopening criteria, each providing an independent reason to reject its Motion. For instance, it does not show that the environmental issues it raises are significant as required by 10 C.F.R. § 2.326(a)(2). Instead, it simply asserts that they are, without even attempting to explain why.[52] If the Commission considered every alleged NEPA deficiency to be "significant," there would be no need to include that term in the regulation. The Commission itself has made clear that the term "significant" has real meaning, equating that standard with the standard that governs whether supplementation of an EIS is required.[53] This is appropriate, because the City's contentions are essentially asking the NRC to supplement its August 2014 UHS EA with the information in the Chin Report, which was published *nearly twenty months later*. To require supplementation of a NEPA document, alleged new and

[52] Pet. at 17.
[53] *Private Fuel Storage,* CLI-06-03, 63 NRC at 29.

significant information must "paint a '*seriously* different picture of the environmental landscape.'"[54] In *PFS*, the Commission made clear that supplementation is required only when the alleged new and significant information raises a previously unknown environmental concern, "not necessarily when it amounts to mere additional evidence supporting one side or the other of a disputed environmental effect."[55]

But Contentions 1 and 3 do not even raise environmental issues, they simply raise alleged NEPA compliance issues (whether FPL's purpose and need for the project is futile, and whether algae can properly be blamed for the CCS temperature increases in 2014). While NEPA compliance is certainly important, alleged procedural NEPA deficiencies are not necessarily "significant environmental issues." Boards do not sit to "flyspeck" an EA or to add minor details or nuances to the analysis.[56] Nor should the Board reopen the record for such a purpose. Certainly, these contentions do not identify a previously unknown environmental concern that could necessitate supplementation of the UHS EA by presenting a seriously different picture of the amendment's environmental effects.

Only Contention 2 alleges an actual environmental *impact*. But even there, the Motion fails to demonstrate that the alleged impact is either significant or linked to the UHS license amendment.[57] Instead, it baldly asserts that "there is simply no argument in favor of the license amendment," as though no hearing had been held and no arguments had previously been made on this very issue.[58] And instead of identifying a specific significant environmental impact, the City just baldly asserts that "operating the cooling canal systems at increased temperatures over

[54] *Id*. at 28 (emphasis in original).
[55] *Id*.
[56] *Hydro Resources, Inc*. (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 71 (2001).
[57] *See* Pet. at 17.
[58] *Id*.

time, including after the May 2013 uprate, has caused significant environmental impacts."[59] The City does not elaborate further.

Regardless, instead of identifying a previously unknown environmental concern, as required by *PFS*, Contention 2 merely alleges that the Chin Report provides additional evidence supporting CASE's existing contention. Under *PFS*, this is insufficient to justify supplementation under NEPA, and by extension, a reopening of the record. If the City wished to participate in the litigation of that contention, it could have done so as a local government under 10 C.F.R. § 2.315 at any point in the past year and a half; it could have hired an expert to study the available facts and prepare a report as all other litigants are expected to do. This Board, following the Commission's established procedural rules, would have rightly welcomed its participation.[60] As an interested local government, the City would not have even needed to proffer an admissible contention of its own. But now is simply too late.

The City also glosses over the third enumerated factor for reopening the record, that it demonstrate that a different result would be likely had its information been considered initially.[61] In a recent case evaluating this standard, the Commission made clear that this standard (as are all the reopening standards) is "a heavy one."[62] Bare assertions and speculation are not sufficient; a movant must actually *demonstrate* that a different outcome is *likely*.[63] The information supporting this demonstration must be strong enough to survive summary disposition.[64] But the

[59] *Id*.
[60] The City is certainly aware of the avenues available to it under 10 C.F.R. § 2.315 as it has been participating in the Turkey Point 6&7 litigation at the NRC under that provision since last June, long before the evidentiary hearing in this proceeding. *See Florida Power & Light Company* (Turkey Point Units 6&7), Memorandum and Order (Denying the City of Miami's Petition to Intervene, But Granting its Request to Participate as an Interested Local Governmental Body) (June 10, 2015) (unpublished).
[61] 10 C.F.R. § 2.326(a)(3).
[62] *Vermont Yankee*, CLI-11-2, 73 NRC at 346.
[63] *See id*.
[64] *Id*.

City's consideration of this factor falls far short of this standard. The City's whole argument is as follows:

> The City asserts that the NRC would not have issued a FONSI if the Chin Study had been considered initially within the context of these proceedings. Now having the benefit of these findings, the City urges serious consideration of the environmental impacts that the cooling canal system, and its potential operation at even higher temperatures, will have on area ground and surface waters, as well as surrounding ecosystems.[65]

Nowhere does the City provide "the kind of substantive information and argument that would constitute a successful demonstration of 'likelihood' under section 2.326(a)(3)."[66] One sentence of bare assertion and speculation and one sentence requesting relief are surely not sufficient to withstand a motion for summary disposition. Nowhere in the entire petition does the City identify any link between the license amendment and any environmental impact. The Commission denied motions to reopen based on similarly conclusory assertions in both *Vermont Yankee* and *Oyster Creek*.[67] The same result should hold here.

In addition, the City also failed to meet the reopening requirements in paragraph (b) of section 2.326. Under that provision, the City's affidavit must set forth the factual and/or technical bases for the City's claim that the criteria have been satisfied. A "mere showing" of a possible issue is not enough.[68] The affidavits must address each of the criteria separately and the evidence contained therein must meet the Commission's admissibility standards. The Chin Declaration does not meet this requirement. Instead of addressing the standards for motions to reopen, it simply vouches for the facts asserted in the City's contentions. Because the Chin

[65] Pet. at 17-18.
[66] *See Vermont Yankee*, CLI-11-2, 73 NRC at 347.
[67] In fact, the City's arguments are less developed than the argument the Commission criticized as insufficient in *Vermont Yankee. See* CLI-11-2, 73 NRC at 346.
[68] *Oyster Creek*, CLI-08-28, 68 NRC at 670.

Declaration addresses only the contentions and does not address the reopening requirements or even mention the Motion to Reopen the Record, the City has not satisfied this standard.

B. The City Has Failed to Establish Standing

Separately, the City's hearing request must also be denied because it fails to establish standing. Its attempt to demonstrate standing is based exclusively on its location within 50 miles of the Turkey Point site. However, the City made no effort to meet its burden of showing that the NRC's "proximity presumption" applies in this proceeding.[69] It does not. As the Commission has explained, this shortcut is generally applied only in construction permit and operating license cases which involve a new risk of accidental releases from a wholly new reactor.[70] But in license amendment cases like this one without an "obvious potential for offsite consequences," the Commission has placed a significant limitation on the use and applicability of the presumption, requiring a petitioner to allege some specific injury in fact.[71] In other words, not every amendment made to a nuclear operating license is the kind of change that might reasonably infer an increased risk of radiological damage dozens of miles away, such that the Commission can reasonably skip a typical standing analysis.

The Commission in *Zion* explained that a "petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences."[72] The City does not even go that far. Instead, it simply assumes that the proximity presumption applies.[73] The City nowhere claims that the amendments to the Turkey Point TSs result in any appreciable increased risk of radiological injury. The City does mention a risk of routine and

[69] Pet. at 2-3
[70] *St. Lucie*, CLI-89-21, 30 NRC at 329.
[71] *Id. See also Zion*, CLI-99-4, 49 NRC at 188.
[72] *Zion*, CLI-99-4, 49 NRC at 192.
[73] Pet. at 2.

accidental releases of radioactive materials. But it does not associate that risk with the license amendment at issue in this proceeding, and those risks presumably preceded the amendment. Because the City did not provide any evidence in the record to support a finding of increased offsite risk associated with the challenged LAR, nor even address the issue, it has not met its burden of establishing standing though the application of the proximity presumption.

If the proximity presumption does not apply, the City must revert to the traditional standing demonstration of injury-in-fact, traceability, and redressability.[74] Here the City fails absolutely. It identifies no injury at all traceable to the license amendment. It does allege that the operation of the cooling canal system at increased temperatures pursuant to the license amendment may impact the quality of water available to it.[75] But the City does not explain how the license amendment could impact water quality. In fact, the City states that its water is sourced from "*the Floridan Aquifer*."[76] Expert testimony in this proceeding has already established that the operation of the CCS cannot directly impact the Floridan Aquifer because there is a confining unit between the deeper Floridan Aquifer and the surficial Biscayne Aquifer, with which the CCS interacts.[77] The City does not dispute this testimony and identifies no mechanism by which the license amendment may impact the Floridan Aquifer.

But even assuming the City actually uses the Biscayne Aquifer (which would be an inappropriate assumption because the burden of demonstrating standing lies with the Petitioner), the City still has not indicated why this amendment would cause it an incremental injury. Where are the City's water supply wells located? Are they in south Miami-Dade County where they could plausibly be impacted by saltwater intrusion in the Homestead area? If they are, are they

[74] *Yankee*, 48 NRC at 195.
[75] Pet. at 1-2.
[76] *Id*. at 15 (emphasis added).
[77] FPL Testimony at 51 (A82).

in a location that may be impacted by this license amendment but would not otherwise have been impacted by preexisting saltwater intrusion unrelated to the amendment? The Petition does not say.[78]

Earlier in this proceeding, this Board found that CASE had demonstrated standing to challenge this license amendment, but that determination was based on CASE's (since discredited) argument that the license amendment would lead FPL to withdraw fresh groundwater from aquifers.[79] By contrast, the City does not address FPL's water withdrawals at all. The only injury the City alleges is that continued operation of the reactors may impact the quality and quantity of water available to it.[80] But the unrebutted expert testimony of the FPL and NRC Staff witnesses in this proceeding has already established that the license amendment will not have a significant impact on CCS temperature, CCS salinity, or the movement of hypersaline water out of the CCS.[81] To overcome these established facts, the City would need to provide facts and specificity, which are entirely lacking from its standing discussion.

Because the City has not identified—or even alleged—any increased risk of offsite consequences associated with the amendment sufficient to justify application of the proximity presumption and instead alleged only an ephemeral environmental injury that is not traceable to the challenged NRC licensing action or redressable by this Board, it has failed to established standing.[82] For this reason, the City's Petition must be denied.

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[78] The Recommended Order issued by an Administrative Law Judge following the City's challenge to the Florida Department of Environmental Protection ("FDEP")'s Administrative Order to FPL, concluded that the City of Miami does not have "any water use permits." Recommended Order at 20 ¶60.
[79] LBP-15-13, slip op. at 11.
[80] Pet. at 1-2.
[81] *See* FPL Proposed Findings of Fact and Conclusions of Law at 38-40.
[82] 10 C.F.R. § 2.309(d).

C. The City Does Not Show Good Cause for Filing After the Deadline

As established above, the City filed its Petition 49 days after Miami-Dade County published the Chin Report. This is not timely under the Board's March 11 Order, and provides the Board a sufficient basis to reject the City's contentions as untimely under section 2.309(c)(1)(iii), just as it was too late to justify reopening the record under section 2.326(a)(1). In addition to its untimely submission, the City's contentions also fail to meet the Commission's other standards for demonstrating good cause for contentions filed after the deadline.

At the outset, it should be noted that the City does not cite to the Commission's current standards for evaluating contentions filed after the deadline. Instead, the City discusses the eight factors for determining whether there is good cause to excuse an untimely contention that were contained in 10 C.F.R. § 2.309(c) prior to 2012.[83] But in 2012, the Commission replaced those factors with the factors previously found in section 2.309(f)(2).[84] However, even under the the previous rules, the City was required to address the three factors now found in section 2.309(c).[85] It did not address those factors at all. Analysis of those criteria demonstrate that the City's Petition is not based on new information that is materially different from information that was available previously and was, in any event, not filed in a timely manner.

Each of the City's contentions are based on the Chin Report, but that report itself is not based on new information but instead simply "collects, summarizes and places into context" facts that have long been known or alleged.[86] According to the Chin Report itself, it

[83] Pet at 13-15.
[84] Final Rule, "Amendments to Adjudicatory Process Rule and Related Requirements," 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012).
[85] Based on this rule change, FPL refers to the three new contentions as "contentions filed after the deadline." When FPL refers to these contentions as "nontimely," it is in the context of the timeliness standards in 10 C.F.R. §§ 2.309(c)(1)(iii) and 2.326(a)(1), and specifically because they were submitted 49 days after the release of the Chin Report, and so therefore do not meet the Board's 30-day timeframe for raising contentions based on new information, set in its March 11, 2016 Order.
[86] *Prairie Island*, CLI-10-27, 72 NRC at 496.

"summarizes what is currently known about the CCS, summarizes key findings from previous related investigations, regulatory reports and reviews, provides new analyses, and gives suggested pathways forward."[87] Only its "new analyses" could even conceivably present new information. But these new analyses are based on "CCS temperature and salinity data for the four-year interval of 9/1/10-12/7/14," information that has long been available.[88] Thus, the City cannot show that it is materially different from information that was previously available.

Because the Chin Report is not based on new, materially different information, the City's contentions should be barred even if the Petition had been filed within thirty days of the report's publication. "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.'"[89] Consequently, an intervenor may not delay filing a contention until a document becomes available that collects, summarizes, or places in context the facts supporting that contention.[90] By the same reasoning, a petitioner should not be allowed to wait twenty months to hire an expert to create a "new" report after the record has closed, when it could have hired the same expert to perform the same study more than a year ago.[91] If a new contention had been filed at this late date that was supported by an expert's affidavit describing his or her criticisms of the UHS EA, it would unquestionably be viewed as late. The City should not be able to circumvent this clear Commission policy by relying on the support of a proffered expert's report as "new" information. The two situations are essentially identical.

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[87] Chin Report at 6.
[88] *Id.* at 1, 18.
[89] *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).
[90] *Prairie Island*, CLI-10-27, 72 NRC at 496.
[91] That the Chin Report was commissioned by Miami-Dade County and not the City should not fundamentally alter this analysis. At the end of the day, the City could have commissioned this or a similar study in 2014. It did not.

The lack of new information supporting Contention 2 is particularly glaring because it is essentially a repeat of CASE Contention 1, which was initially submitted in October 2014. The City states that the Chin Report "concludes that an increase in cooling canal system temperature has been associated over time with increased saline and radioactive effluent leaching out of the canals."[92] But this is not new. It again simply "collects, summarizes and places into context" facts that have long been known or alleged.[93] For instance, the Chin Report explains that "[b]ased on available documentation and data summaries contained in numerous reports prepared by FPL, SFWMD, and DERM, there is little doubt that seepage from the CCS into the Biscayne Aquifer has caused salinity increases within the aquifer, and this impact extends several miles inland from the CCS."[94] Both FPL's and the NRC Staff's experts testified about these issues at the evidentiary hearing already held in this proceeding.

The City also notes that the Chin Study used tritium as a tracer to show that CCS water has affected the Biscyane Aquifer.[95] But this has long been known as well. In fact, one of FPL's own exhibits in this very proceeding (FPL-025) was an excerpt from the 2015 Turkey Point Annual Post-Uprate Monitoring Report Tritium Addendum. As presented visually in Figure 2.1-2, "Pre- and Post-Uprate Tritium Isopleths at each Well Depth," of that report, it is clear that the use of the tritium tracer has shown the movement of water that originated in the CCS into the

[92] Pet. at 8.
[93] *Prairie Island*, CLI-10-27, 72 NRC at 496.
[94] Chin Report at 2.
[95] Pet. at 10.

groundwater in the Biscayne Aquifer outside of the CCS.[96] CASE was aware of this as far back as October 2014.[97]

And the City claims that while it has long suspected the CCS impacted the westward movement of hypersaline water, FPL has long denied it, only to have the Chin Report confirm it. This characterization is baseless and inconsistent with the past several years of NRC and FDEP proceedings. Exhibit FPL-014, FPL's 2012 Comprehensive Pre-Uprate Monitoring Report explained four years ago that "Groundwater results immediately adjacent to the CCS indicate the presence of CCS water. Further west from the CCS, there is some influence of CCS water in decreasing concentrations at depth out approximately three miles."[98] FPL-024, FPL's 2014 Annual Post-Uprate Monitoring Report continued to make this point in Section 5.2 "Extent of CCS Water."[99]

Further, by citing the Hughes paper, the City acknowledges that the relationship between the CCS and salinity intrusion has been known since at least 2010.[100] And perhaps most importantly, the Florida Department of Environmental Protection ("FDEP") issued an Administrative Order (Exh. INT-004) in December 2014, which explained that it had "determined that the CCS is one of the contributing factors in the western migration of CCS saline water," and that the "migration of the saline water must be abated to prevent further harm to the waters of the State."[101] The City cannot claim ignorance of this fact, as it participated as a party-challenger in the state administrative challenge to the Administrative Order during 2015

[96] *See also* FPL Testimony (FPL-001) at 28-29 (A44-A46) ("Based on tritium and other groundwater samples under and immediately adjacent to the CCS indicate the presence of hypersaline CCS water at depth. Farther west of the CCS (out approximately 3 miles), CCS water in decreasing concentrations at depth is intermixed with historic marine water.").
[97] *See* Exh. INT-002 (Slides 8 and 10, "Contours Based on Deep Well Tritium Results"). These same slides were included as part of CASE's Petition Exhibit 1, filed in October 2014.
[98] FPL-014A, Executive Summary at ES-2.
[99] *See*, *e.g.*, FPL-024G at 5-3.
[100] *See* Pet. at 10 (citing Pet. Exh. C).
[101] Exh. INT-004 at 4, ¶25.

and 2016.[102] Also, Miami-Dade County issued FPL a Notice of Violation in October 2015 because levels of chloride in groundwater wells outside the CCS exceeded water quality, and "using tritium as a tracer, the county determined that the water originated in the CCS.[103] Contrary to the City's allegations, FPL did not oppose the FDEP's Administrative Order, which clearly reflects FPL's longstanding cooperation with FDEP and the South Florida Water Management District. And FPL entered into a Consent Agreement with Miami-Dade County in response to its NOV.[104] The idea that the City could have brought its contentions earlier if not for obfuscation or stonewalling on the part of FPL is specious.

In Contention 3, the City cites to Dr. Chin's criticisms that FPL has not produced any modeling, documentation, engineering analyses, or environmental analyses to support its claims regarding the role of algae in the functioning of the CCS.[105] But if FPL lacks support for its claims (which FPL disputes), then it lacked support in October 2014 and the contention should have been raised at that time. To the extent this assertion is true today, it "was equally true" when FPL filed its license amendment request in 2014, an argument the Commission found "most significant" in *Vermont Yankee*.[106] Therefore, this information is not "materially different" from the information that was available previously and cannot support an otherwise untimely contention.

[102] *See* Recommended Order, February 15, 2016, *overruled by City of Miami v. FPL*, OGC CASE No. 14-0741, DOAH CASE No. 15-1746, 15-1747 Florida Department of Environmental Protection (Apr. 21, 2016) (Final Order Approving Administrative Order issued on December 23, 2014). FPL provided a copy of this Final Order in "Florida Power & Light Company's Third Notice to the Board Regarding State Administrative Proceeding," dated May 2, 2016.
[103] Exh. INT-005 "Notice of Violation and Orders for Corrective Action," Oct. 2, 2015.
[104] Exh. INT-006, "Consent Agreement between Miami-Dade County and FPL," Oct. 6, 2015.
[105] Pet. at 11.
[106] *Vermont Yankee*, CLI-11-2, 73 NRC at 341.

D. The City's Contentions Are Inadmissible

The City proffered three contentions, each ostensibly based upon the Chin Report. The contentions allege that:

1. FPL's request to amend its license to increase the UHS temperature limit will be futile because temperatures will necessarily rise higher than the new limit;

2. The higher UHS temperature limit allowed by the license amendment will lead to increased saltwater intrusion; and

3. The algae bloom experienced in the CCS in 2014 did not have any impact on the rising temperatures the CCS experience in 2014 and addressing the algae cannot help alleviate CCS temperatures.

Not one of these assertions is contained in, or supported by, the Chin Report. As a result, none of these contentions can be admitted under 10 C.F.R. § 2.309(f)(1)(v) because they do not have expert support. This, and the other reasons that the contentions are inadmissible are described below.

1. Contention 1, "Impact on Operational Flexibility," is Not Admissible

In Contention 1, the City argues that the premise of FPL's license amendment application is erroneous because a four-degree increase in the ultimate heat sink temperature limit will not be enough to afford FPL operational flexibility.[107] According to the City, the Chin Report concludes that the extended power uprate increased the average intake temperature in the CCS by 4.7ºF.[108] Thus, the City maintains that a mere four-degree increase will not actually afford FPL enough operational flexibility to account for the uprate.[109] Importantly, the Chin Report never says this. Instead, the Chin Report says:

> As a result of the increased heat addition to the CCS, the average temperature in the intake zone (Zone4) has increased by approximately 2.6°C (4.7°F).

[107] Pet. at 3.
[108] *Id*. at 6.
[109] *Id*.

> Interestingly, this measured increase in average temperature is slightly greater than the increase in the maximum allowable operating temperature at the intake location of 2.2°C (4.0°F) approved by the Nuclear Regulatory Commission in 2014. Therefore, the increased maximum allowable operating temperature has not reduced the probability of the intake temperatures exceeding the threshold value, and might have slightly increased the probability of exceeding the threshold temperature. This serves as a cautionary note regarding further increases in power generation beyond 2014 levels without providing a supplementary system to cool the water in the CCS.[110]

Contrary to the representations of the City, the Chin Report says nothing about the futility of the UHS amendment. Beyond the fact that the Chin Report does not support the City's claim, the City's contention suffers from a number of additional legal and logical flaws.

First, Dr. Chin compared the operating margin available after the UHS amendment with the margin before *both the UHS amendment and the uprate*. While this may be of academic interest to Dr. Chin, it is not a material issue in this proceeding. The margin available before the uprate is simply not relevant to the NRC's evaluation of the UHS amendment. The relevant comparison would be between the margin available after the UHS amendment with that available before it. It is undisputable that the UHS amendment provided four additional degrees of operating margin. Even when making the inapt comparison to pre-uprate margin, Dr. Chin can only say that the cumulative amendments have "not reduced the probability" of temperatures exceeding the limit, and "might have slightly increased" the chance that it would. This does not mean that the UHS amendment was futile. Thus, contrary to the City's claims, Contention 1 is not based on facts or expert opinion, as so is not admissible.[111]

Second, the Chin Report, which the City relies on as new information, is in fact, already out of date. The Chin Report's 4.7 degree increase was based on data through the end of

[110] Chin Report at 27-28.
[111] 10 C.F.R. § 2.309(f)(1)(v).

2014.[112] But FPL has already testified in this proceeding that the temperatures in 2015 were considerably lower than in 2014 ("On average, CCS temperatures are approximately 2.5 to 3ºF lower in 2015 as compared to the same time period in 2014").[113] Including this lower temperature data from 2015 would necessarily reduce the 4.7 degree average temperature increase that Dr. Chin found. Essentially, the City seeks to reopen the record for this Board to consider out-of-date temperature data reflecting a trend that has already been arrested, as established in sworn testimony that has already been presented.

Third, Dr. Chin's projection assumes static operation and management of the CCS, where the testimony in this case has already established that FPL has spent the past two years working to reestablish the proper functioning of the CCS, including by additions of fresher water, removal of sedimentation, and control of algae.[114] These efforts have allowed FPL to maintain the maximum intake temperature in the CCS at 98.5ºF in 2015, and brought salinity down to 36 parts per thousand by the time of the evidentiary hearing in January, 2016.[115] Instead of the simple arithmetic the City proposes, it is clear that the CCS is impacted by various environmental factors and FPL's management activities have helped to "make the radiator work better" and allowed FPL to stabilize the thermal situation.[116]

Fourth, even if it was accurate, Dr. Chin's 4.7 degree prediction does not carry the implication set forth by the City. The City's claim rests on the implicit assumption that, prior to the uprate, the CCS routinely experienced UHS temperature maximums of at least 99.3ºF, such that an average 4.7 degree increase would not leave FPL any operational margin, because temperatures would be expected to routinely exceed the new 104 degree limit. But Dr. Chin

[112] Chin Report at 18, 26.
[113] FPL Testimony at 19 (A31) (citing Exhs. FPL-011 and FPL-012).
[114] *Id*. at 16-18 (A27, A30)
[115] *Id*. at 19 (A31); Tr. at 479 (Scroggs).
[116] Tr. at 480 (Scroggs); FPL Testimony at 40 (A68). *See also* FPL Testimony at 59-60 (A101).

never says this in his report and the City does not even attempt to provide any evidence that this is true. There is, however, documentary evidence in the record of this proceeding disproving the City's theory. Exhibit NRC-025, FPL's Root Cause Evaluation Report explains that, prior to the UHS amendment, UHS maximum temperatures were 97.23ºF in 2010, 96.17ºF in 2011, 95.5ºF in 2012, and 96.16ºF in 2013.[117] Even assuming that Dr. Chin's out-of-date 4.7ºF projection is correct, each of these pre-UHS amendment maximum temperatures is more than 4.7º below the new 104ºF limit. Thus, contrary to the City's claims, the added 4 degrees from the UHS amendment still provides FPL with operating margin compared to these prior year high temperatures plus 4.7 degrees. In fact, Exhibit FPL-012 shows that the CCS temperature at the Intake Cooling Water inlet had not exceeded 100ºF since August of 2014.[118] The City's claim that UHS temperatures necessarily reflect an additional 4.7ºF from pre-uprate maximums simply cannot account for this result.

Based on the 98.5ºF maximum intake temperature recorded in 2015, FPL enjoyed a margin of approximately 5.5 degrees, a margin that cannot be reconciled with the City's interpretation of Dr. Chin's predictions. Nevertheless, had the maximum temperatures been 1.5 degrees higher, the operational flexibility afforded by the UHS license amendment would have proved useful indeed. Obviously, the license amendment has not been a "futile exercise" and FPL has in fact obtained additional helpful operational margin. Therefore, Contention 1 is inadmissible because it does not present a genuine dispute with the NRC's UHS EA.

Fifth, Contention 1 appears to challenge speculative future license amendment requests that are beyond the scope of this proceeding and have no basis in fact. The City argues that "the operational flexibility that FPL desires can only be achieved while operating at the post-uprate

[117] Exh. NRC-025, (Root Cause Report, "Canal Temperature Exceeded 100 degrees F") at 4.
[118] Exh. FPL-012 ("ICW Maximum Temperatures").

levels with a license amendment for a far higher temperature, the environmental impacts of which have not been studied."[119] As established above, this is plainly incorrect. But even if true, it would not present a genuine dispute with the NRC's evaluation of *this license amendment*. The City argues that "in order to increase the operational flexibility, the maximum allowable UHS temperature would need to be increased to a higher temperature than 104ºF and the consequent environmental impacts of the higher maximum temperature assessed."[120] Of course, if FPL were to request a second license amendment to further increase the UHS temperature limit (which it has not sought to do) the NRC would assess the environmental impacts of such a change at that time.[121] There is no basis for the NRC to evaluate the environmental impacts of a speculative UHS maximum temperature increase that is not pending before it when approving a more limited increase. Such a request is beyond the scope of this proceeding, which is strictly limited to consideration of this license amendment.[122]

NEPA requires only a discussion of reasonably foreseeable impacts as it is subject to the "rule of reason."[123] The Commission has explained that "to bring NEPA into play, a possible future action must at least constitute a 'proposal' pending before the agency (i.e., ripeness), and must be in some way interrelated with the action that the agency is actively considering (i.e., nexus)."[124] FPL has not proposed a further increase in the UHS temperature limit and so there is no reason for the NRC to have evaluated one. By the same token, the different argument presented in the Chin Report, that "caution should be exercised" before further increasing power

[119] Pet. at 4.
[120] *Id*. at 6.
[121] That assumes that a UHS amendment to allow "a far higher temperature" limit could even survive the scrutiny of the NRC's safety analysis. The City does not appear to understand that the UHS amendment is ultimately a safety-analysis-based change of a safety-related technical specification. FPL cannot simply seek an increase in the UHS limit whenever it wants one, regardless of the environmental impact.
[122] 10 C.F.R. § 2.309(f)(1)(iii).
[123] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002).
[124] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295-96 (2002) (*citing Kleppe v. Sierra Club*, 427 U.S. 390 (1976)).

generation beyond 2014 levels" is also misplaced.[125] If FPL were to seek another uprate or to add an additional reactor that would discharge heat to the CCS, as Dr. Chin counsels against (and FPL has not sought to do), the NRC would assess the environmental impacts of such a change at that time. That is not within the scope of this proceeding.

Sixth, even if Contention 1 did present a genuine dispute with FPL and the NRC Staff, the City has not shown how the issue is material. The Commission has defined a "material" issue as one where "resolution of the dispute would make a difference in the outcome of the licensing proceeding."[126] Here the City has failed to address the materiality of its claim – how its argument regarding operational flexibility could make a difference in the proceeding regarding the ultimate question of whether the amendment will have a significant environmental impact necessitating an environmental impact statement. The City has not explained how resolution of the operational flexibility issue could make a difference in this proceeding.

Finally, the City does not explain why a "futile" amendment would violate NEPA. It has long been established that "NEPA merely prohibits uninformed-rather than unwise-agency action."[127] And under longstanding caselaw, it is up to FPL to determine why and whether it needs to seek an amendment of its operating license to gain operating margin. The NRC appropriately defers to an applicant's stated purpose in a NEPA evaluation.[128] NEPA "does not

[125] Chin Report at 44.
[126] Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).
[127] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).
[128] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 339, n. 222 (citing *City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1506 (D.C. Cir.); *Citizens Against Burlington*, 938 F.2d 197-98), cert. denied, 513 U.S. 1043 (1994); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (When reviewing a discrete license application filed by a private applicant, a federal agency may appropriately accord substantial weight to the preferences of the applicant)).

substantively constrain an agency's choice of objectives[.]"[129] Following the City's logic, no project that accomplished part of a goal would ever be allowed under NEPA.

Even if UHS temperatures eventually exceed the new limit (which there is no reason to expect) that would still afford FPL a real benefit and allow it the operational flexibility to operate at times when temperatures are within the 100 to 104ºF range, when it would otherwise not be allowed to operate, conditions that have already existed in the summer of 2014. In fact, the operational flexibility that the NRC approved in 2014 was the flexibility to operate in the conditions that actually occurred in 2014. This, on its face, is not futility and so does not present a material issue for resolution in this proceeding, nor a genuine dispute with the UHS EA.

2. Contention 2, "Impact on Groundwater Resources," is Not Admissible

Contention 2 is best captured in the following passage from the Petition:

> . . . the increased rate of increase of salinity caused by increased operational temperatures will lead to increased salinity intrusion in the Biscayne Aquifer and hence increased degradation of the groundwater resources in the surrounding aquifer.[130]

As noted earlier, the City's Contention 2 is essentially a restatement of CASE Contention 1 (albeit without reference to FPL's water withdrawals), which alleged that the increased temperatures allowed by the UHS amendment could lead to increased CCS water entering the local groundwater. Each of these concepts has already been considered by FPL's experts, the NRC Staff's experts, and CASE. The City's contention adds nothing to the serious consideration already given this claim in this proceeding.

Just like CASE Contention 1 before it, Miami Contention 2 has no relevant expert support. The Chin Report does not provide any support for the specific claims in the City's Contention. The report blames the average increases in CCS temperature increases on "the

[129] *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999).
[130] Pet. at 10.

increased heat addition to the CCS" from the uprate.[131] It does not blame the UHS amendment at all. Of course, the uprate license amendment is beyond the scope of this proceeding, as clarified by the Commission.[132] And while Dr. Chin discusses the movement of water out of the CCS into the surrounding aquifer and also discusses the increased temperatures in the CCS that he blames on the uprate, *he never discusses* a link between increased CCS temperatures attributable to the UHS license amendment and any increased movement of hypersaline water into the aquifer.[133] The City claims, without citation, that Dr. Chin makes this assertion, but he does not do so anywhere in his report.[134] His report does state that increased temperatures lead to increased evaporation, which leads to increased salinity, but he simply does not allege that *the UHS license amendment* will cause CCS temperatures to increase enough to have a noticeable effect on salinity.[135] The temperature issue identified in the Chin Report is independent of the license amendment.

Contention 2 also assumes that UHS temperatures will routinely exceed the previous limit of 100ºF. This is also not supported by the Chin Report and ignores the unrebutted expert testimony already provided in this proceeding that the times when the CCS will enter this newly allowed temperature range will be temporary if experienced at all and result in a negligible increase in CCS salinity.[136] The City tries to generate a dispute with the UHS EA's discussion of these temporary temperature increases by focusing on increases in temperature "since 2013 as a

[131] Chin Report at 1.
[132] CLI-15-25, slip op. at 13, n. 66.
[133] In fact, it concludes that "[t]emperature dynamics in the CCS are a concern primarily because operation of the power-generating units will be impacted if the temperature of the cooling water at the intake exceeds 104ºF." Chin Report at 43.
[134] Pet. at 7-8 ("Dr. Chin concludes that any license amendment that would permit FPL to run the cooling canal system at an even hotter temperature would exacerbate the salinity intrusion into the aquifer.").
[135] Chin Report at 2.
[136] *See e.g.*, FPL Proposed Findings of Fact and Conclusion of Law at 39, ¶ 75.

result of the Unit 3 and 4 uprates."[137] But of course the uprates are not the subject of this proceeding. And more importantly, the UHS EA did not address temperature increases resulting from the uprate, but simply noted that the time periods during which UHS temperatures might exceed the previous limit would be temporary.[138] The City is disputing an argument that the UHS EA did not make and presents no dispute with the statements it did make.

The City also argues that the rate of rainfall will not change and so the long term CCS salinity trend must inexorably climb higher and higher.[139] But this is directly contradicted by the Chin Report, which clearly notes that rainfall rates can change and that "[o]ver prolonged periods with no rainfall, the salinity in the CCS will generally increase as fresh water is evaporated and the evaporated fresh water is replaced by saline water from the surrounding aquifer."[140] In fact, Dr. Chin blames a "prolonged period with no rainfall" as the "primary cause for the unusually high salinities" observed in the summer of 2014.[141] And he notes that "[r]ecent spikes in salinity in the CCS are a normal consequence of a prolonged rainfall deficit."[142] And of course, Dr. Chin's understanding of the rainfall deficit as a main driver of the 2014 issues is consistent with the testimony in this proceeding.[143] Obviously some time periods will have lower than average rainfall. Regardless, the City ignores FPL's ongoing efforts to manage the CCS salinity by adding water to it, which Dr. Chin discusses extensively and acknowledges will reduce salinity.[144]

Miami Contention 2 also suffers from an additional fundamental defect—it seeks to require supplementation of the UHS EA, which was completed almost two years ago, based on a

[137] Pet. at 9.
[138] Exh. NRC-009, 79 Fed. Reg. 44,466-67.
[139] Pet. at 10.
[140] Chin Report at 2.
[141] *Id*. at 2.
[142] *Id*. at 44.
[143] FPL Testimony at 15 (A26), 55 (A93).
[144] *See* Chin Report at 35, 39.

report published a year and a half later. Of course, agencies "need not supplement an EIS every time new information comes to light after the EIS is finalized," which "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."[145] Supplementation of NEPA documents is not required unless there is a major federal action yet to occur and "new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered."[146] The City argues that the Chin Report justifies reopening not only the record in this proceeding, but also the nearly two-year-old UHS EA for additional analysis. Such an action could only be necessary if the Chin Report painted a seriously different picture of the environmental impacts.[147] It does not. Essentially, the Chin Report argues that CCS salinity can impact the westward movement of saline groundwater. This is broadly consistent with the NRC's historic environmental assessments involving the cooling canals that were incorporated into the UHS EA and also with the testimony already given in this proceeding. The Chin Report does not paint a seriously different picture of the environmental impacts of the UHS EA.

Further, if the Chin Report were to be used to supplement the UHS EA, other facts that arose during the years since the NRC's action would also need to be considered. Chief among these is the FDEP's Administrative Order, issued in late 2014, which requires FPL to reduce the average annual CCS salinity to or below 34 PSU.[148] Following an administrative challenge brought by the City of Miami itself, an Administrative Law Judge issued a Recommended Order,

[145] *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989).
[146] *Id*. at 374 (internal quotations omitted).
[147] *Private Fuel Storage*, CLI-06-3, 63 NRC at 29.
[148] Exh. INT-004, Florida Department of Environmental Protection, Administrative Order, (December 23, 2014).

suggesting that the Administrative Order should be rescinded or revised.[149] Nevertheless, the Administrative Order was recently upheld by FDEP and issued as a Final Order.[150] Appropriately, the NRC presumes that licensees will comply with regulatory obligations and this one should be no different.[151] For the city to argue that the Chin Report paints a seriously different picture of the salinity impacts of the UHS license amendment, it must first grapple with this legally binding Final Order directing FPL to maintain average annual CCS salinity at or below 34 PSU.[152] But the City ignores the Administrative Order and so fails to offer any theory by which potentially higher UHS temperatures can lead to runaway CCS salinity while FPL is maintaining average annual salinity at a level barely a third of that experienced in 2014 when FPL requested this license amendment.[153]

Because the City fails to dispute the testimony already in the record addressing the potential impact of CCS temperature increases on salinity in local groundwater and fails to acknowledge the legally binding requirement for FPL to maintain salinity at lower levels, the City failed to show a need to supplement the UHS EA or, in fact, to show a genuine dispute with the UHS EA.

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[149] Order (Taking Official Notice and Ordering Briefing), Feb. 26, 2016. This Order attached the Recommended Order, *Atlantic Civil, Inc. v. Fla. Power & Light Co. & Dep't of Envtl. Prot*., Fla. Admin. Orders Nos. 15-1746 & 15-1747 (Fla. Div. of Admin. Hearings Feb. 15, 2016).

[150] *City of Miami v. FPL*, OGC CASE No. 14-0741, DOAH CASE No. 15-1746, 15-1747 Florida Department of Environmental Protection (Apr. 21, 2016) (Final Order Approving Administrative Order issued on December 23, 2014).

[151] *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-13-4, 77 NRC 107, 217-18 (2013) (*citing Pacific Gas and Electric Co*. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003)).

[152] Because the City was a party to this Administrative challenge, it certainly is now aware that a Final Order overturning its objections has been issued.

[153] Both FPL and the NRC Staff recently argued that the "anticipated" Administrative Order was only one factor in the NRC Staff's 2014 analysis CCS salinity impacts. That remains the case. But now, in light of a motion to reopen the record and submit new contentions, it is appropriate to understand the full context, including the recently approved and final Administrative Order, which precludes the very type of runaway CCS salinity the City projects.

3. Contention 3, "Impact of Reducing Algae Concentrations," is Not Admissible

In Contention 3, the City challenges whether "algae concentrations within the cooling canal system *have any impact* on the heat transfer capabilities of the cooling canal system," and the "conclusion that reducing the algae concentrations within the canals will improve heat transfer capabilities within the system."[154] Once again the City overstates what the Chin Report actually says. The Chin Report never says that algae does not "have any impact." In fact, Dr. Chin explains that the algae can lead to higher absorption of solar energy by reducing albedo and lowering the amount of solar energy that is reflected.[155] The Chin Report concludes that the increased rate of heating of the CCS due to reduced reflection of solar energy attributable to increased algae is around 400 MW.[156] Dr. Chin says that this 400 MW, though real, is "a relatively small heating effect" compared to the typical heat rejection rate at Turkey Point.[157]

But neither the NRC, nor FPL ever argued that the increasing algae concentrations were the sole cause of the increased CCS temperatures. In the excerpt from FPL's testimony below, it is clear that FPL considered the algae to be a contributor to the high temperatures experienced in 2014, but does not blame the entire rise on algae, noting specifically a "negatively reinforcing cycle" initiated by lack of precipitation:

> **Q26. Why has salinity in the CCS increased in recent years?**
>
> A26. (SS) Salinity in the CCS is a result of a number of factors, including ambient weather conditions that affect evaporation (e.g., temperature, precipitation, relative humidity, cloud cover, wind speed/direction) and CCS water quality parameters that affect heat transfer and heat capacity (e.g., algae concentration, total suspended solids). These factors determine the rate at which heat is absorbed and released from the CCS and the associated evaporation rate. The rate of evaporation (or water leaving the system) must be balanced with water additions,

[154] Pet. at 11 (emphasis added).
[155] Chin Report at 11, 19, 25.
[156] *Id*. at 25.
[157] *Id*. (noting that 400 MW is only 7% of the 5700 MW normal heat rejection rate).

> such as rainfall and groundwater exchange. Historically, the rate of evaporation has been roughly balanced with an equivalent volume of additions.
>
> Salinity varies seasonally, decreasing in the rainy season and increasing in the dry season. When there have been several below average precipitation years in sequence, average annual salinity is elevated. In 2013 and the first half of 2014 the South Miami-Dade region experienced below average rainfall, and consequently, above average evaporation. This ambient weather phenomenon contributed to above normal salinity in the CCS. The above normal salinity aided the growth and persistence of a blue-green algae bloom; a type of algae that thrives in warm, hypersaline environments. *The combined effect of low precipitation, high evaporation, and degraded water quality due to the algal bloom (e.g., high turbidity, high total suspended solids)resulted in an imbalance in historic salinity levels*. When salinity increases due to a lack of sufficient water to replace evaporation, water quality degradation can occur, further exacerbating the heat transfer capability and elevating temperatures. This elevation of temperatures increases evaporation and therefore increases salinity, creating a negatively reinforcing cycle.[158]

Similarly, the NRC Staff considered the algae to be a contributor: "[t]he algae bloom absorbed heat and impacted the CCS's capability to dissipate heat."[159] However, as the Staff testified, "[m]eteorological conditions also significantly affect CCS temperatures," which drop significantly when it rains.[160] The Staff went on to explain that "in 2013 and 2014, lower-than-usual rainfall amounts have been measured at the CCS, leading to the temperature exceeding 100°F for a few days in 2014."[161] According to the Staff, this period was concurrent with an algae bloom, which "increased the temperatures in the CCS above what the CCS would have experienced without the high concentration of algae."[162]

The Chin Report does not contradict this testimony. Dr. Chin also blames the CCS temperature issues on a rainfall deficit (experiencing more evaporation than rainfall),[163] with a

[158] FPL Testimony at 14-15 (A26) (emphasis added).
[159] NRC Staff Testimony at 40 (A44).
[160] *Id*. at 40 (A45).
[161] *Id*.
[162] *Id*.
[163] Chin Report at 44; *see also id*. at 2.

lesser contribution (on the order of 400 MW) from algae.[164] While 400 MW may be small relative the CCS as a whole, it can still play a role in the problem. Dr. Chin never said that it does not play a role, and in fact, carefully shows that it does.[165] And Dr. Chin certainly never states that this 400 MW change from the status quo could not play a role in the type of "negatively reinforcing cycle" described in FPL's testimony. As a result, the City's claims regarding algae simply do not present a genuine dispute with the UHS EA and cannot support an admissible contention.[166]

Even if Contention 3 did present a genuine dispute with the UHS EA, the City has not shown how the issue is material. The Commission has defined a "material" issue as one where "resolution of the dispute would make a difference in the outcome of the licensing proceeding."[167] Here the City has failed to address the materiality of its claim – how its argument regarding operational flexibility could make a difference in the proceeding regarding the ultimate question of whether the amendment will have a significant environmental impact necessitating an environmental impact statement. The City has not explained how resolution of the algae issue could make that sort of difference.

Regardless of the cause of the high temperatures in the CCS, the NRC Staff and FPL witnesses have already established in this case that the simple act of raising the authorized UHS temperature by 4ºF will not have a significant environmental impact. None of the testimony on the ultimate effect of the amendment on the movement of saltwater in the aquifer relied on algae being the cause of the 2014 temperature peaks and the City has not identified any reason to doubt that testimony.

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[164] *Id*. at 25, 44.
[165] *Id*. at 25.
[166] 10 C.F.R. § 2.309(f)(1)(vi).
[167] Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989)

Finally, as noted earlier, the City's claim that FPL has not performed modeling to support the blame it assigns to algae is inexcusably late. But of course, FPL's license amendment request (Exh. FPL-008) makes clear that it did perform an "[e]ngineering and environmental analysis," which "determined that the cooling water heat transfer capability [was] diminished due to the presence of a higher than normal algae content."[168] Whether FPL has disclosed those analyses at this point is not relevant. FPL does not have any disclosure obligation to the City prior to the admission of its contention. Whether FPL has disclosed material to the City is just not a material issue.

V. ADDITIONAL MATTERS

A. The City's Request to Participate as an Interested Government is Moot

The City ends its Petition with a prayer for alternative relief, asking to be admitted as an interested local government under 10 C.F.R. § 2.315(c), in the event that its petition is rejected but the proceedings are reopened on the motion of another party. But no other party has requested to reopen the record. And under longstanding NRC practice, a late-entering interested local government must "take the proceeding as it finds it."[169] The City finds this proceeding all but over. Because the City does not state a desire to participate on CASE Contention 1, its request to participate as a local government should be rejected as moot.

B. The City Did Not Consult Regarding Its Motion

The Commission's general rule regarding motions requires a movant to certify that it made a sincere effort to contact other parties in the proceeding and resolve the issues raised in the motion.[170] A motion that does not contain this certification "must be rejected."[171] The

[168] Exh. FPL-008 at 4 of 17.
[169] *Pacific Gas and Electric Co*. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB–600, 12 NRC 3, 8 (1980).
[170] 10 C.F.R. § 2.323(b).
[171] *Id*.

Board's Initial Scheduling Order in this proceeding also holds that motions that do not include this certification "will be rejected."[172] Requests for hearing submitted after the deadline in section 2.309(b) have been specifically exempted from this requirement under section 2.309(c)(2)(ii). Therefore, the consultation certification requirement is not applicable to the City's new contentions. But it is applicable to its motion to reopen the record. Motions to reopen the record were not excluded from this requirement under section 2.309(c)(2)(ii). The fact that motions to reopen the record are submitted pursuant to a separate regulatory section does not mean that the section 2.323 requirements are inapplicable. Motions for leave to file new contentions are also filed under a separate regulation (section 2.309(c)) and yet the Commission still determined that a specific exclusion was necessary to relieve interveners of this obligation.[173] Because the section 2.323 consultation requirement applies to motions to reopen the record, the City's failure to consult prior to filing its Motion requires that it be rejected.

C. Selection of Hearing Procedures

Commission rules require the Atomic Safety and Licensing Board designated to rule on a petition to intervene to "determine and identify the specific procedures to be used for the proceeding" pursuant to 10 C.F.R. §§ 2.310. The regulations are explicit that "proceedings for the . . . licensee-initiated amendment . . . of licenses subject to [10 C.F.R. Part 50] may be conducted under the procedures of subpart L."[174] The regulations permit the presiding officer to use the procedures in 10 C.F.R. Part 2, Subpart G ("Subpart G") in certain limited circumstances.[175] It is the proponent of the contentions, however, who has the burden of demonstrating "by reference to the contention and bases provided and the specific procedures in

[172] Initial Scheduling Order (May 8, 2015) at 12.
[173] 10 C.F.R. § 2.309(c)(2)(ii).
[174] 10 C.F.R. § 2.310(a).
[175] 10 C.F.R. § 2.310(d).

subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures."[176] Though this proceeding has already been conducted pursuant to Subpart L procedures, the City incorrectly referenced Subpart G in the sections of each of its contentions that discussed the scope of the proceeding.[177] And though the City referenced the regulation discussing the credibility of eyewitnesses, it did not state that it was applicable in this proceeding or identify any eyewitness whose testimony may reasonably be called into question. The City, therefore, did not satisfy its burden to demonstrate why Subpart G procedures should be used in this proceeding. Accordingly, any hearing arising from the Petition should continue to be governed by the procedures of Subpart L.

VI. CONCLUSION

For the foregoing reasons, neither the City's motion to reopen the record nor its three new contentions were submitted in a timely manner. The motion to reopen the record should be denied due to its lack of timeliness as well as the City's inability to identify a significant environmental issue or to demonstrate a likelihood of a materially different result. Finally, the City's hearing request does not demonstrate good cause for its late filing, does not demonstrate standing, and does not present an admissible contention. For these reasons, the City's hearing request should be denied.

[176] 10 C.F.R. § 2.309(g).
[177] *See*, e.g. Pet. at 4.

CERTIFICATION OF COUNSEL

I hereby certify that I am unaware of any attempt on the part of the City of Miami to contact me or any other attorney for FPL to discuss this Motion prior to its filing.

Respectfully Submitted,

Signed (electronically) by,

Steven C. Hamrick
Counsel for Florida Power & Light Company

Florida Power & Light Company
801 Pennsylvania Avenue, NW
Suite 220
Washington, D.C. 20004

Executed in Accord with 10 C.F.R. § 2.304(d)

William S. Blair
Counsel for Florida Power & Light Company

Florida Power & Light Company
Law Department
700 Universe Blvd.
Juno Beach, FL 33408

Dated: May 2, 2016

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Florida Power & Light Company's Answer to the City of Miami's Motion to Reopen the Record, Petition for Leave to Intervene, and Request to Participate as an Interested Local Government" were provided to the E-Filing system for service to those individuals on the service list in this proceeding.

Signed (electronically) by,

Steven C. Hamrick
Florida Power & Light Company
801 Pennsylvania Avenue, N.W. Suite 220
Washington, DC 20004

Dated at Washington, DC
this 2nd day of May, 2016