UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 OPPOSING CASE'S PETITION FOR REVIEW OF LBP-16-08

William S. Blair
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, Florida 33408
william.blair@fpl.com
561-304-5238

Steven C. Hamrick
Florida Power & Light Company
801 Pennsylvania Avenue, N.W. Suite 220
Washington, DC 20004
steven.hamrick@fpl.com
202-349-3496

Counsel for
Florida Power & Light Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Cases

Commission Cases

Unpublished Orders

Regulations

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 OPPOSING CASE'S PETITION FOR REVIEW OF LBP-16-08

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), Florida Power & Light Company ("FPL") responds in opposition to the Petition for Review ("Petition") filed by Citizens Allied for Safe Energy ("CASE") on June 27, 2016. The Petition seeks review of the Atomic Safety and Licensing Board's Initial Decision in LBP-16-08, which ruled on CASE Contention 1, the sole admitted contention in this proceeding.[1] The contention challenged the NRC Staff's Environmental Assessment ("EA") of FPL's request to amend the licenses for Turkey Point Units 3 and 4 to allow a four-degree-higher ultimate heat sink ("UHS") temperature limit. As admitted, Contention 1 alleged:

> 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 [Cooling Canal System ("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.[2]

---

[1] *Florida Power & Light Company* (Turkey Point Units 3 and 4), LBP-16-08, 83 NRC __, (May 31, 2016).
[2] *Florida Power & Light Company* (Turkey Point Units 3 and 4), LBP-15-13, 81 NRC 456, 476 (2015).

CASE's Petition demonstrates its fundamental misunderstanding of the NRC's hearing process and its regulations implementing the National Environmental Policy Act ("NEPA"). The Board's decision followed a full evidentiary hearing during which CASE had ample opportunity to provide testimony or other reliable evidence relevant to its contention. It did not. Nevertheless, CASE now asks the Commission to overturn the Board's decision but fails to identify any factual, legal, or prejudicial procedural errors in it. The Board's decision is consistent with the evidentiary record developed during the hearing and is in keeping with longstanding Commission precedent regarding supplementation of NEPA documents via hearings.[3] Because CASE does not present a substantial question for review, the Commission should summarily deny its Petition.

II. STATEMENT OF THE CASE

A. Factual Background Regarding the Turkey Point Cooling Canal System

The Turkey Point CCS was constructed following a 1971 federal consent order, which instructed FPL to build a system to provide cooling water to Turkey Point Units 1-4 that would be closed to interaction with other surface waters.[4] The CCS provides heat removal capacity for Units 1, 3, and 4 and also serves as the ultimate heat sink for nuclear

---

[3] FPL disagrees with the Board's initial determination that the NRC's EA was insufficient. Because the Board ultimately concluded that the license amendment at issue will not exacerbate saltwater intrusion and NEPA documents must address environmental impacts in proportion to their significance, it seems clear that the NRC's EA did not need to address this issue in the detail expected by the Board. *See USEC, Inc.,* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 440 (2006). Nevertheless, there should be no question that the EA, as supplemented by the hearing record, is sufficient to satisfy NEPA.

[4] Initial Written Testimony of Florida Power & Light Company Witnesses Steve Scroggs, Jim Bolleter, and Pete Andersen on Contention 1" (Nov. 10, 2015) ("FPL Testimony") (Exh. FPL-001) at 11-12 (A21); "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") (Exh. NRC-001) at 19 (A11).

Units 3 and 4 in the Design Basis Accident analysis.[5] Heat from the plants that is released to the CCS is dissipated to the atmosphere primarily through evaporation.[6] The evaporated water leaves behind constituents, primarily sodium and chloride, which account for its salinity.[7] The evaporated water is replaced mostly by rainfall, with a smaller portion provided by saline groundwater inflow from beneath Biscayne Bay.[8] The process of evaporating salt water makes the cooling canals hypersaline, *i.e.*, more saline than seawater.[9]

The local groundwater system contains three major components: (1) the surficial aquifer system (Biscayne Aquifer); (2) an intermediate confining bed; and (3) the Floridan aquifer system.[10] Because of the confining bed, there is little or no interaction between the water of the Biscayne and Floridan Aquifers.[11] Due to the presence of Biscayne Bay and the Atlantic Ocean, the Biscayne Aquifer is saline offshore and near the coast.[12] The saltwater extends inland for several miles, with the greatest intrusion proportional to depth (because saltwater is dense and tends to sink).[13] The saltwater interface at the base of the aquifer is approximately 6 to 8 miles inland (west) of the Turkey Point area and preceded the construction of Turkey Point.[14] Drinking water for

---

[5] FPL Testimony at 12 (A21). Unit 2 has been retired.
[6] *Id*. at 14 (A25).
[7] *Id*.; NRC Staff Testimony at 27 (A29).
[8] FPL Testimony at 14 (A25). *See also* Hearing Transcript ("Tr.") at 367-68 (Andersen).
[9] FPL Testimony at 13-14 (A24, A25); NRC Staff Testimony at 27 (A29); Tr. at 460-461 (Andersen, Scroggs).
[10] FPL Testimony at 19 (A32); NRC Staff Testimony at 21 (A13), 24 (A19).
[11] NRC Staff Testimony at 24 (A19), 26 (A23); FPL Testimony at 19-21 (A32), 51 (A82); Tr. at 431-33 (Ford); Tr. at 434 (Andersen).
[12] FPL Testimony at 19-20 (A32); *see also* NRC Staff Testimony at 23-24 (A17).
[13] FPL Testimony at 20 (A32).
[14] *Id*.; *see also id.* at 21 (A34); NRC Staff Testimony at 24 (A18).

much of southeast Florida is obtained from wells sunk into the Biscayne Aquifer, but these are some distance onshore, where the aquifer contains freshwater.[15] Below the Biscayne Aquifer and the underlying confining unit, is the Floridan Aquifer.[16] At Turkey Point, the top of this aquifer is approximately 1000 feet beneath land surface.[17] In this area, the Upper Floridan Aquifer is brackish.[18]

An exchange of water exists between the CCS and the Biscayne Aquifer because the canals are unlined.[19] In addition to groundwater inflows into the CCS, dense saline water in the CCS sinks down into the underlying portion of the aquifer.[20] Once the dense CCS water reaches the confining layer it can no longer continue down and so begins to spread out laterally.[21] In this way, some water that originated in the CCS has migrated to the west.[22] Because of the potential for CCS water to spread westward, FPL has long worked with the SFWMD and its predecessor agency to limit this movement.[23] More recently, state agencies reviewed FPL's 2008 application to uprate Units 3 and 4 and required the establishment of an "Uprate Monitoring Program" that would provide information to determine the vertical and horizontal effects, and extent, of saline CCS

---

[15] FPL Testimony at 20 (A32); NRC Staff Testimony at 23 (A16).
[16] FPL Testimony at 19-20 (A32).
[17] *Id*.
[18] FPL Testimony at 48 (A80).
[19] NRC Staff Testimony at 17 (A10); FPL Testimony at 35 (A57).
[20] FPL Testimony at 35 (A58); NRC Staff Testimony at 28 (A30).
[21] NRC Staff Testimony at 28 (A30), 24 (A19).
[22] FPL Testimony at 36 (A58); *see also* NRC Staff Testimony at 50 (A74).
[23] FPL Testimony at 25 (A40); NRC Staff Testimony at 19 (A11).

water on existing and projected surface and groundwater resources, and ecological conditions surrounding the Turkey Point Facility.[24]

In 2013, based on the results of the Uprate Monitoring Program, the SFWMD indicated in a letter to FPL that water from the CCS had migrated outside the geographic boundaries of the CCS.[25] This initiated a nearly two-year consultation period, which concluded with the issuance of an Administrative Order ("AO") by the Florida Department of Environmental Protection in December 2014.[26] The AO sought to abate the westward movement of hypersaline water from the CCS.[27] Modeling performed by FPL and the SFWMD indicated that reducing CCS salinities could moderate westward movement of CCS water.[28] Therefore, the AO required FPL to submit a salinity management plan that would enable it to reduce salinity in the CCS to at least 34 PSU within 4 years.[29] FPL did not challenge the AO and plans to comply with it by introducing up to 14 MGD of brackish water (significantly less salty than CCS water) from the Upper Floridan Aquifer into the CCS in order to reduce its salinity.[30]

---

[24] FPL Testimony at 26 (A42).

[25] FPL Testimony at 36 (A59); (citing Exh. FPL-026, Letter from SFWMD to FPL dated April 16, 2013 "Consultation Pursuant to the October 14, 2009 Fifth Supplemental Agreement between the SFWMD and FPL"). The movement of hypersaline CCS water west of the CCS into the already saline Biscayne Aquifer is related to but conceptually distinct from the movement of the interface between saline water and fresh water 6-8 miles inland. Tr. at 547 (Scroggs).

[26] FPL Testimony at 36 (A59); CASE Exhibit INT-004, Florida Dep't Env. Prot. Administrative Order.

[27] FPL Testimony at 37 (A60); AO at 4 ¶25-27, 6 ¶37.

[28] FPL Testimony at 41-43 (A69-A71); AO at 5, ¶28-32.

[29] FPL Testimony at 37 (A60); AO at 6, ¶37b. This is approximately the salinity of seawater.

[30] FPL Testimony at 37-38 (A61, A63). While awaiting final permitting authority to utilize Upper Floridan Aquifer water, FPL temporarily used saline water from the Biscayne Aquifer and excess stormwater from the L-31 E canal for CCS remediation.

B. FPL's License Amendment Application and the NRC's Environmental Review

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 100°F Technical Specification ("TS") limit. Consequently, on July 10, 2014, FPL requested the NRC to increase the UHS temperature limit in TS 3.7.4. Declining to exercise a categorical exclusion from NEPA, the NRC Staff decided to prepare an EA for the license amendment due to a "special circumstance," the presence of the American crocodile.[31] The NRC published the EA on July 31, 2014.[32] It concluded that the UHS license amendment would not have a significant environmental impact and so the NRC also included a formal finding of no significant impact for the NRC's action. Having also determined that the amendment involved no significant hazards considerations and that the criteria for exigent consideration were met, the NRC issued the amendment on August 8, 2014.[33]

CASE subsequently requested a hearing, submitting four contentions.[34] FPL and the NRC Staff opposed CASE's hearing request.[35] CASE filed a reply on November 17,

---

[31] NRC Staff Testimony at 38 (A36).

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

[33] 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). (Exh. NRC-006).

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

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

2014.[36] On March 23, 2015, the Licensing Board issued LBP-15-13, ruling that CASE had demonstrated standing and admitting CASE Contention 1 for hearing.[37] FPL and the NRC Staff appealed the Board's decision to the Commission.[38] Finding the decision a "close call," the Commission deferred to the Board's decision to admit the contention.[39]

C. Preliminary Matters and the Hearing

On September 19 and 20, 2015, approximately three weeks before its initial testimony was due to be filed, CASE's representative sent *ex parte* e-mails to members of the Board seeking advice on the proper method to request the issuance of a subpoena for testimony at the hearing.[40] The Board's law clerk informed CASE's representative that all requests to the Board must be made in the form of a motion.[41] CASE made no further effort to obtain written expert testimony prior to the deadline for its submittal. On October 9, 2015 CASE submitted its "Initial Statement Of Position, Testimony, Affidavits and Exhibits (For January, 2015 Evidentiary Hearing)." Though captioned as including testimony, it did not.[42]

Because CASE's submittal addressed issues beyond the scope of the contention, included technical exhibits without expert sponsorship, and included excerpts of

---

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

[37] *Turkey Point*, LBP-15-13, 81 NRC 456.

[38] NRC Staff's Notice of Appeal of LBP-15-13 (Apr. 17, 2015); Florida Power & Light Company's Notice of Appeal of LBP-15-13 (Apr. 17, 2015) ("FPL Appeal").

[39] *Florida Power & Light Company* (Turkey Point Units 3 and 4), CLI-15-25, 82 NRC ___, slip op. at 11 (Dec. 17, 2015).

[40] Email Exchange between Barry White and ASLB regarding Subpoena Request, dated September 21, 2015 (ADAMS Accession No. ML15265A500).

[41] *Id*.

[42] This was initially filed via email. CASE later e-filed versions of its statement and various exhibits on October 22 and October 26.

documents that were not provided as exhibits, FPL moved to strike much of CASE's submittal.[43] The NRC Staff supported the motion.[44]

On November 3, 2015, nearly a month after its initial written testimony was due and two months after the Board informed CASE's representative that a motion would be necessary in order to obtain a subpoena, CASE filed a motion asking the Board to subpoena four expert witnesses.[45] The Board denied this motion.[46]

On November 10, 2015, FPL submitted its Statement of Position,[47] the sworn prefiled testimony of Mr. Steve Scroggs, Mr. Jim Bolleter, and Mr. Pete Andersen, and supporting exhibits.[48] That same day, the NRC Staff submitted its Statement of Position,[49] the sworn prefiled testimony of Ms. Audrey Klett, Ms. Briana Grange, Mr. William Ford, and Mr. Nicholas Hobbs, and supporting exhibits.[50]

CASE filed its rebuttal statement of position on December 1, 2015.[51] Embedded within this statement was CASE's first witness testimony, that of Dr. Phillip Stoddard, a biologist. Following the submittal of CASE's Rebuttal Statement, the NRC Staff filed a

---

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

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

[45] "Motion Requesting Subpoenas for Expert Testimony for January, 2016 Evidentiary Hearing ," dated November 3, 2015.

[46] Order (Denying CASE's Application for Subpoenas) (Nov. 12, 2015) at 2. CASE has not sought review of this decision.

[47] Florida Power & Light Company's Initial Statement of Position (Nov. 10, 2015) ("FPL Position Statement").

[48] *See* Exhibits FPL-001 through FPL-037, including modified FPL-032R.

[49] NRC Staff's Initial and Rebuttal Statement of Position Regarding Contention 1 (Nov. 10, 2015) ("NRC Staff Position Statement").

[50] *See* Exh. NRC-001 through NRC-050, excluding NRC-023.

[51] "Citizens Allied for Safe Energy's Joint Rebuttal to NRC Staff's and FPL's Initial Statements of Position, Exhibit List and Exhibits," (Dec. 1, 2015) ("CASE Rebuttal") (Exh. CASE-076).

Motion to Strike portions of this submittal that raised issues beyond the scope of the contention (including the alleged failure to properly consult with other agencies, issues related to the NRC's considerations of alternatives and the speed of its review), and relied on testimony of an unqualified witness.[52] FPL supported the NRC Staff Motion.[53]

On December 9, 2015, nearly a month after the Board rejected its first motion to subpoena expert witnesses, and eight days after its rebuttal testimony was due, CASE filed yet another motion seeking to subpoena expert witnesses.[54] This time, CASE sought subpoenas for a total of five witnesses.[55]

On December 3, 2015, FPL moved for dismissal of Contention 1, or in the alternative, summary disposition.[56] Based on CASE's lack of relevant testimony, FPL argued that CASE had not demonstrated standing and had not provided evidence sufficient to satisfy CASE's "burden of going forward."[57] The NRC Staff supported FPL's Motion.[58] CASE filed a response in opposition, but did not provide an affidavit or testimony of an expert to rebut any of FPL's Material Facts.[59]

---

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

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

[54] CASE's "Second Motion Requesting Subpoenas for Expert Testimony for January, 2016," (Dec. 9, 2015).

[55] *Id*.

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

[57] *Id*. at 6, 8.

[58] NRC Staff Answer to Motion to Dismiss or in the Alternative Summary Disposition (Dec. 21, 2015).

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

On December 22, 2015, the Board issued an Order, in which it addressed several pending matters.[60] First, it denied CASE's second motion to subpoena expert witnesses.[61] Second, it denied FPL's Motion to Dismiss or for Summary Disposition, finding that CASE had met its burden of going forward and that its resources would be best served by reviewing the evidence more thoroughly at a hearing.[62] The Order also ruled on the two pending motions to strike. While the Board deferred judgment on FPL's motion to exclude technical exhibits offered by CASE with no expert sponsorship,[63] it excluded certain CASE arguments.[64] And in response to the NRC Staff's Motion to Strike portions of the CASE rebuttal, the Board struck discussion related to the NRC Staff's consultation with other agencies, among other topics.[65] But it could not "conclusively determine" that Dr. Stoddard's testimony would not be of assistance.[66]

The Board held an evidentiary hearing in Homestead, Florida on January 11 and 12, 2016. CASE, FPL, and the NRC Staff each put forward their identified witnesses for questioning by the Board.

D. The Board's Initial Decision in LBP-16-08

On May 31, 2016, the Board issued its Initial Decision, in which it ruled on the merits of CASE Contention 1. The Board concluded that NRC Staff's EA was deficient in its discussion of saltwater intrusion and aquifer withdrawals. Nevertheless, the Board

---

[60] Order (Denying Application for Subpoenas, Denying Motion for Summary Disposition, and Granting in Part and Denying in Part Motions to Strike) (Dec. 22, 2015) ("December 22 Order").
[61] *Id*. at 3. CASE has not sought review of this decision.
[62] *Id*. at 5.
[63] *Id*. at 11-12.
[64] *Id*. at 13-15.
[65] *Id*. at 16.
[66] *Id.*

found that those deficiencies had been adequately remedied by the record evidence developed during this proceeding and that its Initial Decision would supplement the EA, satisfying the NRC's obligation to take the requisite "hard look," and justify the NRC's finding of no significant environmental impact.[67]

With respect to the impact of increased temperatures, the Board found that, while the license amendment could allow higher temperatures in the CCS, which could increase salinity, these periods would be "limited to a few hours per day over the period of a few weeks."[68] And while this might lead to a "slight increase" in CCS salinity, that effect would be far less important than FPL's ongoing program to reduce salinity in the CCS, under the oversight of the Florida Department of Environmental Protection.[69]

The Board also considered the environmental impacts of FPL's withdrawal of water from various sources for use in the CCS.[70] The Board first addressed the Upper Floridan Aquifer, which is FPL's "long term solution" for CCS salinity management because it is relatively fresh compared to the water in the CCS, but still salty enough that it must be treated prior to use as a drinking water.[71] The use of this water, the Board found, would reduce salinity in the CCS to 34 psu, the salinity of seawater, and help to reduce the hypersaline plume in the Biscayne Aquifer.[72] These withdrawals would not

---

[67] LBP-16-08, slip op. at 56.

[68] *Id*. at 39.

[69] *Id*.

[70] FPL's water withdrawals are unrelated to the license amendment at issue, but the Board found that the increased temperatures allowed by the amendment may increase salinity in the CCS, which may lead FPL to withdraw more water than it otherwise would. LBP-16-08, slip op at 36. For this reason, the Board considered the environmental impacts of these withdrawals.

[71] *Id*. at 46 (citing Ex. FPL-001, FPL Testimony at 48 (A80)).

[72] *Id*. (citing Ex. FPL-027, FDEP Petition at 1, 3-4).

have negative impacts on the higher Biscayne Aquifer due to the confining layer between the two aquifers.[73] Nor would the withdrawals have a significant impact on the brackish Upper Floridan Aquifer.[74]

The Board also noted that FPL had withdrawn water from the Biscayne Aquifer for CCS remediation, but had since discontinued the practice.[75] While the surficial Biscayne Aquifer is an important source of drinking water further inland, it is salty in coastal areas like Turkey Point. The Board therefore held that FPL was not withdrawing freshwater from the Biscayne Aquifer and would not have a negative impact on the aquifer.[76] Therefore, unsurprisingly, the Board concluded that neither FPL's withdrawals from the confined brackish water aquifer nor its withdrawals from the saltwater portion of the surficial aquifer would affect freshwater resources, contrary to CASE's claims.

Finally, the Board noted that, after the EA was published, FPL had sought approval to withdraw excess stormwater from the L-31 E Canal system.[77] The Board found that the NRC erred by not addressing this potential outcome in the EA because it was reasonably foreseeable.[78] However, the Board concluded that FPL's use of this surface water would not negatively impact saltwater intrusion because the water that is withdrawn would otherwise flow to Biscayne Bay and would not serve to recharge

---

[73] *Id.* at 47 (citing Tr. at 434).
[74] *Id*. at 48 (citing Ex. FPL-027, Ex. FPL-030).
[75] *Id*. at 49-50.
[76] *Id*. at 50-51.
[77] *Id*. at 52-53.
[78] *Id*. at 53.

groundwater.[79] Thus, this issue, though not originally addressed in the EA, would not have a significant environmental impact.

Consistent with these findings, the Board concluded that neither the license amendment nor FPL's use of local water resources would impact saltwater intrusion and so FPL's license amendment would not have a significant environmental impact with respect to the issues raised in CASE Contention 1.

III. STANDARD OF REVIEW

The granting of a petition for review is at the discretion of the Commission.[80] The Commission gives due weight to the existence of a "substantial question" with respect to the following relevant considerations: (i) a finding of material fact that is "clearly erroneous" or conflicts with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion that is without governing precedent or contrary to established law; (iii) the raising of a substantial and important question of law, policy, or discretion; (iv) the conduct of the proceeding involved a prejudicial procedural error; or (v) the raising of any other consideration which the Commission may deem to be in the public interest.[81] Essentially, a petition must point to an error of law or an abuse of discretion by the Board, and cannot simply restate the contention.[82]

---

[79] *Id*. at 55.

[80] 10 C.F.R. § 2.341(b)(4); *Private Fuel Storage, L.L.C*. (Indep. Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 17 (2003).

[81] *Id*.

[82] *Shieldalloy Metallurgical Corp*. (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

The Commission generally will defer to the Board on factual matters absent a showing that its findings were "clearly erroneous."[83] This standard is a difficult one as the petitioner "must demonstrate that the Board's determination is 'not even plausible' in light of the record as a whole."[84] For this reason, the Commission is free to affirm a Board decision on any ground supported by the record, whether or not relied on by the Board.[85] But where the Board has reviewed an extensive record in detail, the Commission is "generally disinclined to upset [its] findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed."[86] The Commission reviews legal or policy questions *de novo*,[87] and will reverse a board's legal rulings only if they are "'a departure from, or contrary to, established law.'"[88]

IV. THE COMMISSION SHOULD DENY CASE'S PETITION FOR REVIEW

The Commission should deny CASE's Petition because it does not present any substantial question for Commission consideration. CASE points to no abuse of discretion, no legal conclusion that is a departure from or contrary to established law, and no finding of fact that is even suspect, much less clearly erroneous.

---

[83] *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility Possession and Use License) CLI-15-09, 81 NRC 512, 519 (2015) (citing *Honeywell International, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1, 18-19 (2013)).

[84] *Id*.

[85] *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision).

[86] *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-1, 63 NRC 1, 2 (2006).

[87] *Shaw Areva MOX Services*, CLI-15-09, 81 NRC at 519.

[88] *AmerGen Energy Co*. (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

Though CASE criticizes the Initial Decision, the Board repeatedly went out of its way in resolving both procedural and substantive legal issues to ensure CASE had an opportunity to participate in the adjudicatory process. At the outset, the Board reformulated and admitted CASE Contention 1 even though it was not a "model of clarity or organization."[89] The Board allowed CASE to demonstrate standing based upon the mischaracterizations and scientifically incorrect statements of its lay representative.[90] And the Board denied FPL's motion for summary disposition even though CASE failed to dispute any fact in FPL's "Statement of Material Facts on Which No Genuine Dispute Exists" with evidence beyond the assertions of its representative.[91] The Board afforded CASE every opportunity to make its case and show why the UHS license amendment may have a significant environmental impact. That CASE did not avail itself of its opportunity does not call the Board's decision into question.

A. CASE Identifies No Legal Error in the Board's Decision

CASE first argues that the Board improperly "approved" the license amendment even though it had found the NRC's EA wanting.[92] This is incorrect as a matter of law and so necessarily fails to present a substantial issue worthy of Commission review. An

---

[89] LBP-15-13, 81 NRC at 468 & n.65.

[90] Compare LBP-15-13, 81 NRC at 465 ("CASE has consistently claimed that the water drawn from these aquifers is fresh") with LBP-16-08, slip op. at 46 (determining that the brackish Upper Floridan Aquifer water is "salty enough that it must be treated prior to its use as drinking water") and at 50 (determining that the Biscayne Aquifer withdrawals "have a salinity equal to saltwater").

[91] December 22 Order, slip op. at 8 (denying FPL's motion for summary disposition based on "conflicting evidence" though CASE offered no evidence regarding the quality of the water in the aquifers or any evidence assessing the impact of the UHS amendment on CCS salinity and subsequent movement of CCS water into the aquifer). Each of the Board's ultimate findings in LBP-16-08 is consistent with the "Statement of Material Facts on Which No Genuine Dispute Exists" that accompanied Florida Power & Light Company's Motion for Summary Disposition. As CASE did not rebut any of these undisputed facts, a full evidentiary hearing was not strictly necessary.

[92] Pet. at 5.

EA is a concise public document that briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or instead issue a finding of no significant impact.[93] If a Board can determine, based on the evidence developed in a public hearing, that there will be no significant impact, then there is no reason to republish an EA. Accordingly, in LBP-16-08, the Board explained that it may uphold an NRC licensing action despite identified deficiencies in its NEPA documents if sufficient evidence is developed in the adjudicatory proceeding concerning the environmental impacts of the proposed action.[94]

CASE argues that the Board did not identify precedent for this approach other than "previous Board or regulatory rulings."[95] Instead, CASE expects the Board to rely upon "external citations of jurisprudence . . . to show that such a decision has precedence outside of the ASLB or another governmental entity."[96] Of course the Board cited to binding precedents from the Commission, the Commission's former Appeal Board, and a United States Court of Appeals to support its action.[97] And these are not hoary outdated precedents. The Board relied upon the Commission's reasoning in its 2015 *Indian Point*

---

[93] 40 C.F.R. § 1508.9. An EA requires less depth of consideration and less detail than an environmental impact statement. *Pa'ina Hawaii, L.L.C.,* CLI-10-18, 72 NRC 56, 75 (2010).

[94] LBP-16-08, slip op. at 38.

[95] *Id*. The Commission can reject this argument because CASE has not previously challenged the Board's authority to supplement an EA. 10 C.F.R. § 2.341(b)(5). It certainly could have, as FPL explicitly addressed this process in its position statement. FPL Initial Statement of Position (Nov. 10, 2015) at 6-7.

[96] *Id*.

[97] LBP-16-08 at 38 (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-15-6, 81 NRC 340, 388 (2015); *Friends of the River v. Fed. Energy Regulatory Comm'n*, 720 F.2d 93, 106 (D.C. Cir. 1983); *Phila. Electric Co*. (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 197 n.54 (1975).

decision, which it reiterated just last month in *Strata Energy*.[98] In *Indian Point*, the Commission explained that there is "good reason" to deem a NEPA document supplemented by the hearing record.[99] The Commission's hearing procedures "[allow] for additional and a more rigorous public scrutiny of the [FSEIS] than does the usual 'circulation for comment.'"[100] There is no question that the Board's supplementation of the EA is in keeping with longstanding Commission precedent, as FPL and the NRC Staff argued before the Board.[101] CASE's argument that the Board must rely on some precedential authority other than the Commission or the Court of Appeals is wholly without merit and does not warrant Commission review.[102]

In *Indian Point*, the Commission explained that the fact that the intervenor "had months to marshal its evidence for hearing, had the opportunity to respond to the Staff's and [licensee's] evidence, and had the benefit of extensive Board questions to party witnesses" demonstrated that the Board's supplementation did not amount to an end run around NEPA.[103] That CASE was unable or unwilling to exploit this same opportunity

---

[98] *Strata Energy, Inc.* (Ross In Situ Recovery Project), CLI-16-13 83 NRC __, (slip. op. at 39) (Jun. 29, 2016).

[99] *Indian Point,* CLI-15-6, 81 NRC at 388.

[100] *Id*. (citing *Phila. Electric Co*. (Limerick Generating Company, Units 1 and 2), ALAB-819, 22 NRC 681, 707 (1985), *aff'd in part*, CLI-86-5, 23 NRC 125 (1986), *remanded in part on other grounds sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3rd Cir.) (1989)).

[101] FPL Proposed Findings of Fact and Conclusion of Law at 16-17 (citing *Indian Point*, CLI-15-6, 81 NRC 340; *Louisiana Energy Servs.* (National Enrichment Facility), LBP-05-13, 61 NRC 385, 404 (2005); and *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 526 & n.87 (2008)). NRC Staff Proposed Findings of Fact and Conclusions of Law at 24 (citing *Strata Energy, Inc.* (Ross In Situ Recovery Project), LBP-15-3, 81 NRC 65, 82 (2015) (citations omitted); and *Diablo Canyon*, CLI-08-26, 68 NRC at 526).

[102] This method is also appropriate in reviewing an EA. *Diablo Canyon*, CLI-08-26, 68 NRC at 526.

[103] *Indian Point,* CLI-15-6, 81 NRC at 388.

explains its dissatisfaction with the result but does not justify reversing the Board's well-reasoned and legally supported decision to supplement the EA with the hearing record.

CASE's misunderstanding of the law runs through several of its additional arguments. For instance, CASE argues that the Board's mere "rhetorical review" of the EA does not suffice and the NRC must afford a "permanent administrative change."[104] Of course, the NRC's generally applicable environmental review procedures are not at issue this hearing, which is focused solely on the particular license amendment request identified in the NRC's hearing notice. CASE's generalized concerns about future NRC reviews are not cognizable in an individual licensing proceeding.[105]

CASE also argues that the NRC must preclude the potential for an injury to CASE.[106] But NEPA, as a procedural statute, does not afford CASE substantive relief from any injury.[107] Instead, it merely ensures that the agency has reasonably evaluated the potential environmental impacts associated with its action. Of course, as the Board decided here, there will be no significant environmental impacts associated with the UHS license amendment and so no injury to CASE in need of remedying.[108]

---

[104] Pet. at 7.

[105] *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-11-14, 74 NRC 801, 813, n. 70 (2011) (citing *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 (2009) ("[L]icensing boards lack authority to direct the Staff's nonadjudicatory actions")).

[106] Pet. at 7. CASE made no effort to indicate that it ever raised this issue before the Board. To the best of FPL's knowledge, it did not.

[107] *See Indian Point,* CLI-11-14, 74 NRC at 813 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 n.16 (1989)).

[108] The Board's ultimate finding of fact, that there will be no significant environmental impact associated with the license amendment, shows why CASE does not have standing. Though CASE need not prove an injury at the contention admissibility stage (*see* CLI-15-25, slip op. at 10, n.49), at the hearing stage it became clear that CASE will suffer no injury and the Board could have dismissed the case on that basis. *See* FPL Proposed Findings at 67-71 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Further, CASE argues that the NRC has "delegated [its] authority to the [Florida Department of Environmental Protection]" in a "bifurcated system," and that the Staff improperly consulted with Florida officials.[109] The Commission has already concluded that the state consultation issue is not within the scope of Contention 1.[110] And the rest of CASE's argument is wildly off base. That FPL is subject to state and local environmental regulation has nothing to do with any abrogation of the NRC's responsibilities.[111] State and local agencies maintain environmental jurisdiction independent of the NRC's authority over nuclear power. These agencies in Florida have held extensive public hearings on these very issues over the past two years, hearings in which CASE could have participated.[112] CASE instead chose to raise a NEPA challenge at the NRC. Its dissatisfaction with the procedural relief afforded under NEPA does not present a substantial question for Commission review.

Finally, CASE argues that because state agencies have issued notices of violation against FPL, it is inappropriate to assume that FPL will comply with any "required measures, directives, and planned actions."[113] But of course the NRC may properly assume that a licensee will comply with concrete and enforceable conditions and

---

[109] Pet. at 9-10 (citing LBP-15-13, 81 NRC 475, n.115).

[110] CLI-15-25, 82 NRC __, slip op. at 23, n. 110.

[111] The jurisdictional distinction is similar to that considered by the Supreme Court in *Robertson v. Methow Valley*, where state and local agencies had direct authority over environmental mitigation measures and the relevant federal agency simply must address issues "in sufficient detail to ensure that environmental consequences have been fairly evaluated." 490 U.S. at 353.

[112] *See*, *e.g.*, LBP-16-8, slip op. at 13-14, 45-46, 52-54.

[113] Pet. at 12.

requirements imposed by competent federal, state, or local governmental entities.[114] And while state agencies have identified violations of certain permit requirements, CASE has offered no evidence that FPL willfully violated any environmental standard. CASE's continuing denigration of FPL's corporate character is not only irrelevant, but baseless.

B. The Board's Factual Determinations Regarding Environmental Impacts are Fully Supported by Record Evidence

CASE also challenges several of the Board's factual findings regarding the environmental impacts raised in Contention 1. But because the Commission defers to the Board on factual matters unless its findings were "clearly erroneous," CASE faces an uphill climb.[115] It "must demonstrate that the Board's determination is 'not even plausible' in light of the record as a whole."[116] Here, the Board ultimately agreed with the opinions of the expert witnesses offered by the NRC Staff and FPL regarding the environmental impact of the license amendment and of FPL's use of local water resources. CASE cannot show that the Board's findings are "not even plausible" in light of the record as a whole when the Board's findings are based on, and consistent with, the unrebutted testimony of the only experts offered in the case. As each of these contested factual findings is fully supported by the record, Commission review is not warranted.

First, CASE argues that the Board made contradictory statements regarding FPL's withdrawal of freshwater from the Biscayne Aquifer.[117] But the Board's statements are

---

[114] *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-13-14, 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)).

[115] *Shaw Areva MOX Services, LLC*, CLI-15-09, 81 NRC at 519.

[116] *Id*.

[117] Pet. at 14 (citing LBP-16-08, slip op. at 51, 55).

not contradictory at all. CASE's first quote from LBP-16-08 refers to FPL's use of wells to withdraw saline groundwater from the Biscayne Aquifer at Turkey Point. Because that aquifer is saline in that area, the groundwater that FPL utilized from the Biscayne Aquifer was not fresh.[118] The second statement refers to FPL's redirection of certain excess storm water from the L-31 E canal to the CCS. Because this was essentially rainwater, it was fresh.[119] But because it was on the surface as opposed to underground, it was not groundwater and was not part of the aquifer. CASE has continually conflated these two resources, calling the surface water in the L-31 E canal part of the Biscayne Aquifer, but that does not make it so.[120]

The Board pointed out that CASE offered no evidence to support its claim that the groundwater FPL withdrew from the Biscayne Aquifer was fresh.[121] In its attempt to rebut that statement, CASE quotes from the argument of its representative at the January 14, 2015 prehearing conference as "testimony."[122] Of course the transcripts of the prehearing conference were not offered as evidence at the hearing, and even if they were, the statements of CASE's lay representative would be afforded little weight, if any. But his statement only addressed the undisputed point that the water in the L-31 E canal was fresh. It does not explain why the surface water in the L-31 E canal would be considered part of the aquifer or how that would materially affect the Board's consideration of the environmental impacts. There can be no dispute that the Board's decision clearly

---

[118] FPL Testimony at 19-20 (A32).
[119] FPL Testimony at 51(A83-A84).
[120] *See*, *e.g.,* CASE Reply at 9-10.
[121] LBP-16-08, slip op. at 51.
[122] Pet at 14.

identified the existence of the L-31 E water withdrawals, properly characterized that water as fresh, and accurately assessed the impact of its use on saltwater intrusion.

Second, CASE argues that the Board failed to address the loss of freshwater on wildlife in the area.[123] That issue is beyond the scope of Contention 1. Contention 1 alleges a failure to adequately address saltwater intrusion, essentially the impact of the license amendment on the groundwater to the west (inland) of Turkey Point. CASE's concern about wildlife in Biscayne Bay address impacts to surface water to the east. Such impacts to the bay cannot reasonably be called "saltwater intrusion." This issue is immaterial to Contention 1. Regardless, the Board did explain that FPL's authorization to utilize excess storm water from the L-31 E canal was conditioned to prevent FPL from taking any water until the flow from the canal had already met the amounts reserved by law for fish and wildlife in Biscayne Bay.[124] Though CASE points to evidence that certain fish in the Bay rely upon the influx of freshwater, it never offered any evidence to show that the freshwater reservation levels provided by state law are insufficient to protect wildlife in the Bay. Thus, even if this issue were within the scope of Contention 1, CASE has pointed to no evidence in the record that there would be any environmental impact whatsoever resulting from FPL's approved use of ***excess*** stormwater.[125]

---

[123] Pet. at 15.

[124] LBP-16-08, slip op. at 53 (citing Ex. FPL-031, 2014 Emergency Order at 14).

[125] FPL maintains that its application to withdraw water from the L-31 E canal, which postdates the EA by over a month need not be addressed, because, as the Board found, it does not have a significant environmental impact and so cannot be "new and *significant*" information sufficient to require supplementation of the EA. *See* FPL Proposed Findings at 79.

Third, CASE argues that adding any saline water to the CCS "only adds more salt to the CCS."[126] Here, CASE confuses the amount of salt in the CCS with its salinity, a ratio of the total amounts of salt and water. The Board's decision, resting on the testimony of FPL's expert water modeler and the regulatory decisions of the Florida Department of Environmental Protection ("FDEP"), concluded that adding less saline water to the hypersaline CCS in order to dilute or "freshen" it would reduce the spread of the hypersaline plume in the Biscayne Aquifer.[127] CASE's argument is seemingly intuitive, but it ignores the relationship between salinity and density, which governs the interaction between the CCS and surrounding groundwater. As the Board explained in its Order, the higher the salinity in the CCS, the higher its density, and the more its water is driven out into the surrounding aquifer.[128] Reducing the salinity in the CCS will reduce that phenomenon.[129] CASE has shown that the Board's findings are incompatible with its lay understanding of the local groundwater. But the Board's findings are entirely compatible with the expert opinions that form the evidentiary record in the case and are certainly "plausible."

Fourth, CASE argues that FPL's withdrawal of brackish water from the Upper Floridan Aquifer will lead to a cone of depression and increase salinity in that aquifer.[130]

---

[126] Pet. at 16.

[127] LBP-16-08 (slip op. at 42) (citing Ex. FPL-027, FPL Request for Site Certification Modification ("FDEP Petition"), app. A, at 1, 3–4; Upper Floridan Aquifer Order at 17); *see also* Ex. FPL -001, FPL Testimony at 42 (A70), 59-60 (A101).

[128] *See* LBP-16-08, slip op. at 10 (citing Tr. at 310; FPL Proposed Findings ¶ 59). *See also* FPL Testimony at 45 (A76); Tr. at 501 (Scroggs) (the addition of low salinity groundwater to the CCS can reduce the total amount of salt in the CCS because it helps to prevent the inflow of salty seawater).

[129] *See* LBP-16-08, slip op. at 46 (citing Ex. FPL-027, FDEP Petition at 7, app. A., at 1, 3–4).

[130] Pet. at 20.

But FPL's experts and the Board addressed the impacts of UFA withdrawals on that aquifer.[131] FPL's expert water modeler testified that UFA withdrawals would cause only minor, if any, drawdown effects offsite and these would not have a significant impact on other users.[132] He also testified that there would be only a minor increase in salinity in the Upper Floridan Aquifer, which will be minimal, localized to the FPL production well field, and not affect the aquifer regionally.[133] The Board's finding is consistent with the testimony and is more than "plausible."

Fifth, CASE challenges the Board's conclusion that the withdrawals from the Upper Floridan Aquifer will not impact the Biscayne Aquifer.[134] Once again, this finding is based on the testimony of FPL's expert witness. CASE argues that the Commission should overturn this finding on the basis of a summary of a report prepared by its lay representative that discusses the potential for injected water to move between different groundwater layers.[135] Though this summary is hearsay and of little evidentiary value, it does not support CASE's position. It discusses potential movement between the Lower Floridan Aquifer (where wastewater is often discharged) and the Upper Floridan Aquifer. The unrebutted testimony in this case is that there is no significant communication between the Upper Floridan Aquifer and the overlying Biscayne Aquifer due to the

---

[131] *See* LBP-16-08, slip op. at 48.

[132] FPL Testimony at 48-50 (A81-82); *see also* Exh. FPL-030, Nov. 2014 Drawdown Memorandum at 10.

[133] FPL Testimony at 50 (A82).

[134] Pet. at 21.

[135] Pet. at 22 (citing INT-046). "INT-046" is a reference to a portion of a page of CASE Exhibit INT-001, in which CASE's representative summarized a report on deep-well injection of wastewater into the Lower Floridan Aquifer at Miami-Dade County's South District Wastewater Treatment Plant.) While the Board declined FPL's motion to strike unsponsored exhibits, including this one, the Board acknowledged that they are hearsay and valued accordingly. December 22 Order at 11.

confining layer between them.[136] Regardless, the potential for pathways through the confining layer *below* the Upper Floridan Aquifer has no bearing on the potential for pathways through the confining layer *above* the Upper Floridan Aquifer.[137] CASE's claim is based on a basic misunderstanding of the geology of the region and so does not call into question the Board's findings.

V. CONCLUSION

For the foregoing reasons, CASE's Petition for Review of LBP-16-08 should be denied. CASE has not identified a substantial question warranting Commission review.

Respectfully Submitted,

Signed (electronically) by Steven Hamrick

Steven C. Hamrick
Florida Power & Light Company
801 Pennsylvania Avenue, N.W. Suite 220
Washington, DC 20004
steven.hamrick@fpl.com
202-349-3496

William S. Blair
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, Florida 33408
william.blair@fpl.com
561-304-5238

Counsel for
Florida Power & Light Company

July 22, 2016

[136] FPL Testimony at 51 (A82); Tr. at 431-34 (Ford, Andersen).

[137] *See* FPL Reply Findings of Fact and Conclusions of Law, dated April 12, 2016, at 8.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 Opposing CASE's Petition for Review of LBP-16-08" were provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding.

Signed (electronically) by Steven Hamrick

Steven C. Hamrick
Florida Power & Light Company
801 Pennsylvania Avenue, N.W. Suite 220
Washington, DC 20004
steven.hamrick@fpl.com
202-349-3496

Dated at Washington, DC
this 22nd day of July, 2016