

March 8, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 52-040 & 52-041
)
(Turkey Point Units 6 and 7))

NRC STAFF MOTION IN LIMINE
TO EXCLUDE PORTIONS OF THE CITY OF MIAMI PREFILED TESTIMONY
OR IN THE ALTERNATIVE STRIKE PORTIONS THEREOF

On March 1, 2017, pursuant to 10 C.F.R. §§ 2.337(g)(2) and 2.1207(a)(1), and the Atomic Safety and Licensing Board's (Board) October 5, 2016, scheduling order,¹ the United States Nuclear Regulatory Commission staff (NRC Staff), Joint Intervenors, City of Miami and the Florida Power and Light Company, respectively, each submitted: Initial Statements of Position and Direct Testimony, together with supporting Affidavits, and Exhibits, regarding admitted Contention 2.1. Now in accordance with 10 C.F.R. §§ 2.323, 2.337(b), and 2.1204(a), NRC Staff files this Motion in Limine or in the alternative a Motion to Strike portions of COM-001, the Affidavit of Dr. Jean-Pierre Bardet (March 1, 2017) (ADAMS No. ML17060A884), as filed by the City of Miami, on the grounds that those portions of COM-001 address a matter that is beyond the scope of Contention 2.1.

¹ Order (Revising Initial Schedule) (October 5, 2016) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML16279A219).

DISCUSSION

I. Legal Standards

“Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.” 10 C.F.R. § 2.337(a). While the “strict rules of evidence do not apply to written submissions,” the Board may “on motion or on the presiding officer’s own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and may “[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments.” See 10 C.F.R. § 2.319(d)-(e). Additionally, NRC hearings are limited to the scope of the admitted contentions as the Commission has warned against allowing “distinctly new complaints to be added at will as litigation progresses, [and thereby] stretching the scope of admitted contentions beyond their reasonably inferred bounds.” *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis added) (*Pilgrim*). In this regard, it is well established that if an intervenor proffers testimony or evidence outside the scope of the admitted contentions, it will be excluded. See, e.g., *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010) (agreeing with the Staff that the licensing board had properly excluded the intervenors’ testimony and exhibits that were outside the scope of the admitted contention) (*Vogtle*).

Expert opinion is only admissible if the witness is competent to give an expert opinion and adequately states and explains the factual basis for the expert opinion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 81 (2005). An admissible expert opinion must be “based upon sufficient facts or data to be the product of reliable principles and methods that the witness applied to the facts of the case.” *Id.* at 80. The proponent of the testimony bears the burden of demonstrating that its witness is qualified to serve as an expert. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2),

CLI-04-21, 60 NRC 21, 27 (2004). “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 27-28 (internal quotation marks omitted, alteration in original).

II. The Issue Raised in COM-001, Affidavit of Dr. Jean-Pierre Bardet, is Outside the Scope of Contention 2.1.

The City of Miami filed COM-001- Affidavit of Dr. Jean-Pierre Bardet (March 1, 2017). COM-001 Affidavit of Dr. Jean-Pierre Bardet (March 1, 2017) (ADAMS No. ML17060A884). City of Miami Witness Dr. Jean-Pierre Bardet’s testimony is primarily directed at one issue – seismicity. COM-001 at 2, ¶¶8. In his affidavit, Dr. Bardet states that “an issue that has not been discussed is the potential risk of induced seismicity ...” *Id.* As explained below, induced seismicity is not within the scope of Contention 2.1, and cannot now be admitted for litigation in this proceeding. *See Pilgrim*, CLI-10-11, 71 NRC at 309 (“Intervenors . . . may not ‘freely change the focus of an admitted contention at will’ to add a host of new issues and objections that could have been raised at the outset.”).

Specifically, the Joint Intervenors did not mention “induced seismicity” in their original petition to intervene. *See* “Joint Intervenors’ Petition for Intervention” at 26-30 (Aug. 17, 2010) (ML102300582). Further, the City of Miami itself did not identify induced seismicity in its petition to intervene as a matter the City sought to admit as a contention. *See* “Petition by the City of Miami, Florida, for Leave to Intervene in a Hearing on [FPL’s] Combined Construction and Operating License Application for Turkey Point Units 6 & 7, or in the Alternative, Participate as a Non-Party Local Government” (Apr. 13, 2015). Induced seismicity is not within the scope of Contention 2.1, and cannot be litigated in this proceeding under *Pilgrim*. Accordingly, COM-001, ¶¶ 8-15, should be excluded from being admitted into evidence or should be struck, as should the portions of the City of Miami’s Statement of Position which rely thereon, including Statement of Position, Item II, at 4-6, and the last two lines of the Conclusion.

III. Arguments Unsupported by Qualified Testimony and Exhibits Should be Stricken.

Other than City of Miami Witness Dr. Jean-Pierre Bardet's testimony, the City of Miami has no testimony or witness sponsored exhibits for its arguments. Thus, the City of Miami's arguments on these unsupported issues should be excluded or stricken from the record. These arguments include induced seismicity (City of Miami Statement of Position, Item II, at 4-6), and the potential for upward migration of radioactive wastewater (City of Miami Statement of Position at 4).²

² The City of Miami does not seek admission of new contentions on induced seismicity or migration of radioactive wastewater at this late date, and does not address the contention requirements of 10 C.F.R. § 2.309(c) and (f)(1). That failure alone would be fatal to any proposed new contention. *See Florida Power & Light Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.)*, CLI-06-21, 64 NRC 30, 34 (2006); *Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2)*, CLI-14-11, 80 NRC 167, 175-76 (2014) ("we do not consider hearing requests after the deadline in Section 2.309(b) has passed absent a determination that the petitioner has demonstrated good cause").

CONCLUSION

For the reasons set forth above, City of Miami Witness Dr. Jean-Pierre Bardet's testimony should be excluded from the evidence admitted in this proceeding or struck, and the portions of the City of Miami's Statement of Position which relies thereon should be struck from the record.³

Respectfully submitted,

/Signed (electronically) by/

Anthony C. Wilson
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-114A44
Washington, DC 20555-0001
(301) 287-9124
Anthony.Wilson@nrc.gov

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

Robert M. Weisman
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-14A44
Washington, DC 20555-0001
(301) 287-9177
Robert.Weisman@nrc.gov

Dated at Rockville, Maryland
this 8th day of March, 2017

³ Pursuant to 10 C.F.R. §2.323 (b), in an effort to resolve the issues raised in this motion, NRC Staff counsel contacted counsel for the City of Miami and FPL by telephone and e-mail to consult on this motion. NRC Staff counsel subsequently contacted the Joint Intervenor's counsel by e-mail and phone. NRC Staff counsel's efforts to resolve the issues raised in this motion have been unsuccessful. The Joint Intervenor's counsel informed the NRC Staff counsel that they would take no position on this motion. FPL indicated that it would support the motion. The City of Miami indicated that it would oppose the motion.

March 8, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
)
FLORIDA POWER & LIGHT COMPANY) Docket Nos. 52-040 & 52-041
)
(Turkey Point Units 6 and 7))

CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE CITY OF MIAMI PREFILED TESTIMONY OR IN THE ALTERNATIVE STRIKE PORTIONS THEREOF" has been filed through the E-Filing system this 8th day of March, 2017.

/Signed (electronically) by/

Anthony Wilson
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-14 A44
Washington, D.C. 20555-0001
(301) 287-9177
(301) 415-3200 fax
Anthony.Wilson@nrc.gov

Dated at Rockville, Maryland
this 8th day of March, 2017