

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 JOINT INTERVENOR
EXHIBITS 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), the NRC Staff files this Motion in Limine or in the alternative a Motion to Strike portions of Joint Intervenor exhibits INT-002 (Affidavit of Mark Quarles (January 23, 2012)), INT-003 (Second Affidavit of Mark A. Quarles (February 17, 2012)), INT-004 (Declaration of Mark A. Quarles in Support of Joint Intervenors' Answer to FPL's Motion for Summary Disposition of Joint Intervenors' Amended Contention 2.1 (August 3, 2012)), and INT-005 (Third Affidavit of Mark A. Quarles (February 2, 2016)). As explained below, the grounds for this request are that the

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

portions of the Joint Intervenor exhibits identified below address matters that have already been resolved in this proceeding or are otherwise beyond the scope of Contention 2.1.

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*).

II. The Issues Discussed in Certain Paragraphs of INT-002, INT-003, INT-004, and INT-005 Are Outside the Scope of Contention 2.1.

As explained in more detail below, Joint Intervenor exhibits INT-002, INT-003, INT-004, and INT-005 include arguments that the concentrations of ethylbenzene, heptachlor, toluene, and tetrachloroethylene (the Constituents) in the wastewater at issue in Contention 2.1 are not

accurate. This issue, however, has been resolved by “Joint List of Undisputed Facts” No. 41, which states, “41. The values listed in Table 3-5 of the FEIS for ethylbenzene, heptachlor, tetrachloroethylene, and toluene are conservative and reliable.” Further, this issue has been settled by the Board in LBP-16-03 and accordingly is not now before this Board. *Florida Power & Light Co.* (Turkey Point Units 6 & 7), LBP-16-03, 83 NRC 169, 185-86 (2016). Specifically, the matter was dispositioned when the Board granted FPL’s motion for summary disposition with respect to chemical concentrations. *Id.* In a motion filed December 15, 2015, FPL sought summary disposition of Contention 2.1. [FPL] Motion for Summary Disposition of Joint Intervenors’ Amended Contention 2.1 (Dec. 15, 2015) (ADAMS No. ML15349A987) (FPL Motion). On April 21, 2016, the Board issued an order granting in part and denying in part the FPL Motion. Turkey Point, LBP-16-03, 83 NRC at 185-86. Contention 2.1 contained two components in support of the Joint Intervenors’ claim that the Constituents in the wastewater that FPL plans to discharge into the Boulder Zone of the Lower Floridan aquifer will migrate to the Upper Floridan aquifer and degrade drinking water supplies. In its decision, the Board reformulated and narrowed the scope of Contention 2.1, and eliminated the contention’s chemical concentration component. *Id.* In light of the Board’s decision dispositioning the question of the concentrations of the Constituents and in light of the Joint List of Undisputed Facts, Item 41, the NRC Staff submits that the Board should strike the portions of Joint Intervenor Exhibits INT-002 (¶¶ 8-9), INT-003 (¶¶ 6-10), and INT-004 (¶¶ 23-28; ¶¶ 29-33; ¶¶ 36-37; and ¶¶ 40-56) that relate to chemical concentrations as outside the scope of Contention 2.1 as currently admitted, as all issues relating to these matters have been resolved in CLI-16-03. To accept these paragraphs of INT-002, INT-003, and INT-004 into evidence as exhibits could confuse the record, and would be contrary to 10 CFR § 2.337(a) (stating in part “Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable”).

Similarly, the Board narrowed Contention 2.1 as originally admitted to resolve any issues as to thallium and selenium. Memorandum and Order (Granting FPL's Motions to Dismiss Joint Intervenors' Contention 2.1 and CASE's Contention 6 as Moot) at 3-4 (unpublished) (Jan. 26, 2012) (ADAMS Accession No. ML12026A438). Yet INT-002 also discusses thallium and selenium. INT-002, ¶¶ 8, 9, 30-31. The Board should strike these paragraphs of INT-002 because all issues regarding thallium and selenium have been resolved.

Intervenor's exhibits also discuss chemicals that were never admitted as part of Contention 2.1 and are out of scope. See *Pilgrim*, CLI-10-11, 71 NRC at 309. Specifically, INT-002 refers to heptachlor epoxide, trichloroethylene, and vinyl chloride, which are not part of Contention 2.1. INT-002, ¶¶ 27-28. And INT-005 discusses "other volatile organic compounds," including "1, 4-dichlorobenzene and chloroform." INT-005, ¶¶ 50-53. The Joint Intervenors cannot broaden Contention 2.1 by offering exhibits into evidence regard "volatile organic compounds," and the Board should strike paragraphs 27-28 of INT-002 and paragraphs 50-53 of INT-005.

Finally, INT-005 (¶ 48) refers to "contamination in the Biscayne Aquifer," but this has never been part of Contention 2.1. Rather, Contention 2.1, as currently admitted, is limited to upwelling into the Upper Floridan aquifer. See *Turkey Point*, CLI-16-03, 83 NRC at 186. Under *Pilgrim* and *Vogtle* (CLI-10-5, 71 NRC at 100), the Board should exclude the paragraphs of INT-002, INT-003, INT-004, and INT-005 identified above.²

² 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 Joint Intervenors, City of Miami and FPL by telephone and e-mail to consult on this motion. NRC Staff counsel's efforts to resolve the issues raised in this motion have been unsuccessful. FPL indicated that it would support the motion. The City of Miami indicated that it would oppose the motion. NRC Staff counsel and Joint Intervenors counsel were unable to resolve the issues raised in this motion.

CONCLUSION

For the reasons set forth above, the portions of Joint Intervenor Exhibits INT 002, INT-003, INT-004, and INT-005 identified above should be excluded from the evidence in this proceeding or struck from the record.

Respectfully submitted,

/Signed (electronically) by/

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

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Dated at Rockville, Maryland
This 8th day of March, 2017.

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CERTIFICATE OF SERVICE

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

/Signed (electronically) by/

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