

March 13, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

E. Roy Hawkens, Chair
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of)	
)	
Florida Power & Light Company)	Docket Nos. 52-040 and 52-041
)	
Turkey Point,)	ASLBP No. 10-903-02-COL-BD01
Units 6 and 7)	
_____)	

**JOINT INTERVENORS’ OPPOSITION TO NRC STAFF’S
MOTION TO EXCLUDE OR STRIKE PORTIONS OF JOINT
INTERVENORS’ EXHIBITS**

Pursuant to the Atomic Safety and Licensing Board’s (“ASLB’s”) Order (Amending Final Scheduling Order) (Nov. 22, 2016), Joint Intervenors hereby oppose the Nuclear Regulatory Commission (“NRC”) Staff’s Motion in Limine to Exclude Portions of the Joint Intervenor Exhibits or in the Alternative Strike Portions Thereof (Mar. 8, 2017) (“NRC Staff Motion”). The Staff asks the ASLB to either exclude or strike portions of affidavits and declarations previously submitted in this proceeding by Joint Intervenors’ expert witness Mark A. Quarles, which are attached as exhibits to his testimony: Pre-Filed Initial Testimony of Mark Q. Quarles Regarding Joint Intervenors’

Contention 2.1, submitted March 1, 2017.¹ The Staff seeks to exclude or strike portions of Mr. Quarles' affidavits and declaration which "address matters that have already been resolved in this proceeding or are otherwise beyond the scope of Contention 2.1." NRC Staff Motion at 2.

Joint Intervenors oppose the NRC Staff's motion, because it would impose an unnecessary and unfair burden on Joint Intervenors at a time when they need to focus their limited time and resources on preparation of rebuttal testimony. In support of their opposition, Joint Intervenors assert as follows:

1. The NRC Staff does not identify a single assertion in Mr. Quarles' testimony or Joint Intervenors' Initial Written Statement of Position (Mar. 1, 2017) that is outside the scope of Contention 2.1. Nor is there any implication in Mr. Quarles' testimony that he seeks to make assertions that are outside the scope of Contention 2.1. All of Mr. Quarles' references to his affidavits and declaration are directly tied to assertions in his testimony that are within the scope of Contention 2.1. Given the clarity and limits of Mr. Quarles' reliance on his affidavits and declarations, the Staff has no grounds for its claim that failing to exclude or strike portions of the affidavits and declaration "could confuse the

¹ These exhibits, listed in A4 of Mr. Quarles' testimony, are: (1) Affidavit of Mark A. Quarles (Jan. 23, 2012) (filed in response to the Environmental Report, Turkey Point Plant, Units 6 and 7, Revision 3 (ER) prepared by FPL) (hereinafter "First Quarles Aff.", attached as Exhibit INT002); (2) Second Affidavit of Mark A. Quarles (Feb. 17, 2012) (filed in response to FPL's Response to Joint Intervenor's Motion to Amend Contention 2.1 (Feb. 10, 2012)) (hereinafter "Second Quarles Aff.", attached as Exhibit INT003); (3) 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 (Aug. 3, 2012) (hereinafter "Quarles Dec.", attached as Exhibit INT004); and (4) Third Affidavit of Mark A. Quarles (Feb. 2, 2016) (filed in response to FPL's Statement of Material Facts As To Which No Genuine Issue Exists, in support of FPL's Motion for Summary Disposition of Intervenor's Amended Contention 2.1 (Dec. 15, 2015)) (hereinafter "Third Quarles Aff.", attached as Exhibit INT005).

record.” NRC Staff Motion at 3. To the contrary, what *would* confuse the record would be to alter these documents, which are part of the record of this proceeding, and which were correct and within the scope of Contention 2.1 at the time they were filed.

2. The cases cited by the Staff do not support the Staff’s request. In *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010), the Commission approved the exclusion of *testimony*, in addition to related exhibits. Similarly, in *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010), the Commission approved the exclusion of new *claims* by the Intervenors in a summary judgment proceeding. Here, in contrast to *Southern Nuclear Operating Co.* and *Entergy Nuclear Generation Co.*, the Staff does not seek exclusion of one jot of Mr. Quarles’ testimony, or any claims made by Joint Intervenors in their Statement of Position.

3. As the ASLB recognized in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 517 (2001), technical and complex evidence that is outside the scope of a contention is often intertwined with admissible evidence; and “striking words and lines would eliminate not just those parts, but much of the comprehension of the whole.” To strike portions of Mr. Quarles’ exhibits would adversely affect the reader’s comprehension of the documents in their entirety. For instance, the NRC proposes to exclude or strike references in Mr. Quarles’ First Affidavit (Exhibit INT002) to heptachlor epoxide, trichloroethylene, and vinyl chloride. NRC Staff Motion at 4. While these chemicals are not the same as the four chemicals that are the subject of the contention (ethylbenzene, heptachlor, toluene, and tetrachloroethylene), they are products of the breakdown of the subject chemicals (Quarles First Aff., ¶¶ 27-

28), and therefore their presence and toxicity is relevant and admissible. In fact, the majority of the sections that the NRC proposes to strike are about the four chemicals subject to Contention 2.1, with only brief mentions of other chemicals. The evidence is apparently so intertwined that NRC itself could not identify only the portions that are specifically not about the four Contention 2.1 chemicals. Similarly, it would be inappropriate to exclude or strike ¶¶ 50-53 of the Third Quarles Declaration on the sole ground that these paragraphs mention volatile organic chemicals. NRC Staff Motion at 4. Three of the four chemicals of Contention 2.1 are in fact volatile organic chemicals (ethylbenzene, toluene, and tetrachloroethylene), and so these paragraphs contain relevant and admissible evidence that should be not stricken. While 1,4-dichlorobenzene and chloroform are not the subject of Contention 2.1, they are only briefly mentioned within this larger discussion. And, as Mr. Quarles explains, one reason that the presence of ethylbenzene, heptachlor, toluene, and tetrachloroethylene in injectate is significant is that those chemicals are indicators of the presence of other volatile organic compounds. Again, this is relevant and admissible evidence that should not be stricken. By the same token, it would be inappropriate to exclude or strike a reference to the Biscayne Aquifer in Mr. Quarles' Fourth Declaration. NRC Staff Motion at 4. As recognized in the FEIS, the Biscayne Aquifer lies directly above the Floridan aquifer. FEIS 2-47 (Exhibit NRC008). Therefore, while the Biscayne Aquifer is not directly a subject of Contention 2.1, its presence and relationship to the Floridan Aquifer is relevant and admissible.

4. To strike portions of Mr. Quarles' affidavits and declaration would also be unnecessary, as the ASLB is capable of disregarding any portions of Mr. Quarles' exhibits that are irrelevant to his testimony. *Entergy Operations, Inc.* (Indian Point, Units

2 and 3), LBP-13-13, 78 NRC 246, 529 (2013). As the ASLB explained in *GE-Hitachi Global Laser Enrichment, LLC* (GLE Commercial Facility), LBP-12-12, 76 NRC 218, 248 n.171 (2012), the “elaborate protocol” of excluding or striking evidence is not necessary to comply with 10 C.F.R. § 2.337(a)’s prohibition against consideration of irrelevant evidence:

The bedrock principle that underlies much of the modern law of evidence is set forth in Fed. R. Evid. 403: ‘The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.’ In licensing board cases, however, excluding evidence will seldom achieve these objectives. Written prefiled testimony and exhibits are typically submitted well in advance of the evidentiary hearing, and in our most common types of hearings, the licensing boards themselves – not the parties – orally examine the witnesses. 10 C.F.R. § 2.1207. Therefore, rulings excluding evidence have, as a practical matter, little effect in eliminating delay, waste of time, or the needless presentation of cumulative evidence in the record. On the contrary, briefing and consideration of motions to exclude evidence may result in considerable delay and wasted time. If a licensing board deems prefiled evidence to be of little or no value, it simply need not ask about it at the evidentiary hearing, and is free to accord such evidence little or no weight. Likewise, because the members of the licensing boards themselves must read challenged testimony to determine whether its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues, excluding evidence on this ground also seems to have little practical effect. In a jury trial, the presiding judge reviews the evidence to determine whether the ultimate fact finder – the jury – should see it at all. A similar process in NRC proceedings would require creating one licensing board to review the evidence for purposes of admissibility and a second licensing board to weigh the admitted evidence for the purpose of ruling on the merits. No such elaborate protocol, it is well-recognized, is necessary in administrative proceedings. See 2 Robert J. Pierce Jr., *Administrative Law Treatise* § 10.1 at 910 (5th ed. 2010).

Here, the ASLB’s rulings on the scope of Contention 2.1 are quite clear, and there is no jury in this proceeding that could be misled by failure to strike information from Mr. Quarles’ exhibits.

5. In addition, Joint Intervenors already have stipulated that the values listed in Table 3-5 of the FEIS for ethylbenzene, heptachlor, toluene, and tetrachloroethylene “are conservative and reliable.” Joint List of Undisputed Facts, ¶ 41; NRC Motion at 4. Furthermore, neither Joint Intervenors’ Statement of Position nor Mr. Quarles’ testimony makes any claim with respect to the presence of or testing for selenium and thallium in wastewater. Thus, no purpose would be served by striking references to those elements from the First Quarles Affidavit, ¶¶ 8, 9 and 30-31 (Exhibit INT002); NRC Motion at 4.

6. The NRC Staff’s proposed exclusions/redactions would be unduly burdensome to Joint Intervenors, at a time when they must evaluate position statements, two sets of testimony, and a large number of exhibits, for purposes of preparing rebuttal testimony and a responsive position statement. The Staff has not proposed any specific redactions, and it would be difficult and time-consuming for Joint Intervenors to sift through Mr. Quarles’ five documents to make the requested deletions. This is not necessarily a simple matter, as recognized in *Private Fuel Storage, L.L.C.* As discussed above, because of the intertwined nature of the evidence, the NRC’s requests are overbroad and include evidence that is clearly within the scope of Contention 2.1. For example, NRC requests Exhibit INT-003 ¶ 6 to be stricken because it relates to chemical concentrations. NRC Motion at 3. However, this paragraph is a broad summary of Mr. Quarles opinion regarding the potential of the contaminants to contaminate the underground aquifer. It is much more complex than the NRC Staff presents, and the Staff is pushing the burden of clarifying this onto Joint Intervenors.

Accordingly, Joint Intervenors respectfully submit that the Staff's motion should be denied.

Respectfully submitted this 13th day of March, 2017.

/signed electronically by/
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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2017, JOINT INTERVENORS' OPPOSITION TO NRC STAFF'S MOTION TO EXCLUDE OR STRIKE PORTIONS OF JOINT INTERVENORS' EXHIBITS was posted on the NRC's Electronic Information Exchange System.

 /signed electronically by/
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