

March 30, 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 A PORTION OF THE JOINT INTERVENORS'
REBUTTAL TESTIMONY OR IN THE ALTERNATIVE STRIKE PORTIONS THEREOF

On March 23, 2017, pursuant to 10 C.F.R. §§ 2.337(g)(2) and 2.1207(a)(2), and the Atomic Safety and Licensing Board's (Board) November 22, 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 Rebuttal Statements of Position and Rebuttal Testimony 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 a portion of Joint Intervenors' Rebuttal Testimony (Rebuttal Testimony of Mark A. Quarles Regarding Joint Intervenors' Contention 2.1 (March 23, 2017)(Rebuttal Testimony). As explained below, the grounds for this request are that a portion of Joint Intervenors' Rebuttal Testimony is beyond the scope of Contention 2.1, in that it raises new bases to support Contention 2.1 that were not previously raised.

¹ Order (Amending Final Scheduling Order) (November 22, 2016).

DISCUSSION

I. Legal Standards

Commission contention standards require petitioners to set forth their contentions, at the outset, “with particularity.” 10 C.F.R. § 2.309(f)(1); *see also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Station), CLI-10-11, 71 NRC 287 (2010) (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 426-28 (2003)). Contention rules require “‘reasonably specific factual and legal’ allegations at the outset” to assure that, among other things, issues admitted for adjudication provide notice to opposing parties of the issues they will need to defend against. *Id.* at 309 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC at 381, 383; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-35 (1999)). If an issue arises over the proper scope of a contention, “NRC opinions have long referred back to the bases set forth in support of the contention.” *Id.* at 308 (citing *McGuire/Catawba*, CLI-02-28, 56 NRC 373, 379 (2002); *Louisiana Energy Services, L.P.*, (National Enrichment Facility), CLI-05-28, 62 NRC 721, 727 (2005)).

The Commission has stated that the “reach of a contention necessarily hinges upon its terms *coupled with* its stated bases.” *Id.* at 309 (citing *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.); *Catawba/McGuire*, CLI-02-28, 56 NRC at 379, 383 (2002)). Accordingly, 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. *Id.* (citing *Catawba/McGuire*, CLI-02-28, 56 NRC at 386 & n.61). The Commission does not allow “new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their reasonably inferred bounds.” *Id.*

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).

II. An Issue Discussed in A19 of Joint Intervenors’ Rebuttal Testimony Is Outside the Scope of Contention 2.1

Mr. Mark A. Quarles, the witness for Joint Intervenors, introduces a new issue, regarding license termination, to his statements about the quality of the injected wastewater at the Turkey Point site and its potential impact on public health and safety. Mr. Quarles states,

In addition, the license term for the proposed Turkey Point Units 6 and 7 reactors is limited to 40 years. It is my understanding that after the license terminates, the goal of the NRC is that the site will be in a condition that it can be released for any type of public use. If that is the goal, it should include use of the groundwater beneath the site as a drinking water source.

Quarles Rebuttal Testimony, A19. Joint Intervenors’ concern, as articulated by Mr. Quarles, has not heretofore been raised as a basis for Contention 2.1 in this proceeding. This statement raises potential issues about decommissioning the proposed plant which have neither been developed sufficiently by Joint Intervenors nor addressed by the NRC Staff. The bases upon which Joint Intervenors have rested their contention have been clearly defined thus far to include potential vertical migration of injected wastewater into the Floridan Aquifer, and *not* the potential “use” or “condition” of the Turkey Point site at the end of its licensing term, or how the NRC “should” prescribe groundwater use. The NRC Staff has not had the opportunity to respond to Joint Intervenors’ new concern because no notice was given that Joint Intervenors intended to raise this argument.

To the extent Joint Intervenors intend to rebut the NRC Staff direct testimony regarding the foreseeable impacts of wastewater injection on groundwater quality, the Staff does not object to that testimony being admitted into the record. But Mr. Quarles’s Rebuttal Testimony goes beyond this by speculating about the condition and use of the Turkey Point site after

license termination and whether the groundwater under the site, which the Rebuttal Testimony does not limit to the Upper Floridan aquifer, will then be an Underground Source of Drinking Water. The NRC Staff has not submitted testimony regarding any future use of the Turkey Point site or any issues related to decommissioning the site, and has no jurisdiction over the classification of groundwater. As such, Mr. Quarles's testimony impermissibly expands the scope of Contention 2.1.

As the Board noted in its March 15, 2017 Order, to admit testimony at this point in the proceeding to expand the scope of Contention 2.1 "would not only violate NRC case law, but would also be fundamentally unfair to the other parties." Order (Ruling on Motions to Strike or Exclude) (March 15, 2017) at 5 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009); *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station Unit 1), ALAB-642, 13 NRC 881, 886 (1981)).

The addition of these added bases impermissibly expands the scope of Contention 2.1 beyond its "reasonably inferred bounds." *Pilgrim*, CLI-10-11, 71 NRC at 209 (2010). Mr. Quarles's statement has the potential to add new issues and objections to Contention 2.1 that are only being raised in this late stage of the proceeding. As such, in accordance with 10 C.F.R. § 2.319(d)-(e), this paragraph in A19 of Joint Intervenors' Rebuttal Testimony should therefore be excluded or, in the alternative, struck from the record.

CONCLUSION

For the reasons set forth above, the portion of Joint Intervenors' Rebuttal Testimony identified above should be excluded from the evidence in this proceeding or struck from the record.²

Signed (electronically) by/

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Dated at Frisco, Texas
this 30th day of March, 2017

² In accordance with 10 CFR § 2.323(b), counsel for NRC Staff consulted with the parties in a sincere effort to resolve the issue raised in this motion, and was unsuccessful. Joint Intervenors object to this motion. The applicant states that it supports this motion. The City of Miami and the Village of Pinecrest oppose this motion.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC Staff's MOTION IN LIMINE TO EXCLUDE A PORTION OF THE JOINT INTERVENORS' REBUTTAL TESTIMONY OR IN THE ALTERNATIVE STRIKE PORTIONS THEREOF have been served through the E-Filing system on the participants in the above-captioned proceeding, this 30th day of March, 2017.

Signed (electronically) by/

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Dated at Frisco, Texas
this 30th day of March, 2017