

June 1, 2017

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S UNOPPOSED MOTION FOR LEAVE TO FILE  
A RESPONSE TO NEW ARGUMENTS RAISED IN  
PETITIONERS' REPLY

Pursuant to 10 C.F.R. § 2.323(a), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files this unopposed<sup>1</sup> motion for leave to file a response to "Petitioners' Reply to NRC Staff and FPL's Answers to Petition for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 and File a New Contention," dated May 22, 2017 ("Reply"). In their Reply, the City of Miami ("the City"), the Village of Pinecrest ("Pinecrest") and the City of South Miami ("South Miami") (collectively, "Petitioners") introduce new information and arguments that were not included in either the "Petition for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 and File a New Contention", filed April 18, 2017 ("Petition"), or the answers that Staff and Florida Power & Light Co. ("FPL") filed on May 15, 2017.<sup>2</sup>

Because Staff has not had an opportunity to respond to this new material, Staff is filing

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<sup>1</sup> Pursuant to 10 C.F.R. § 2.323(b), Counsel for the Staff certifies that it has made a sincere effort to contact other parties in the proceeding and resolve the issues raised in the motion, and that its efforts to resolve the issues have been successful in that the Petitioners do not object to Staff's request for leave to respond, and FPL supports the motion.

<sup>2</sup> "NRC Staff Answer to Petition for Leave to Intervene and New Contention", filed May 15, 2017 ("NRC Answer"); "Florida Power & Light Company's Answer Opposing City of Miami, Village of Pinecrest, and City of South Miami's Petition to Intervene and Request for Hearing Regarding the Combined Construction and Operating License Application for Turkey Point Units 6 & 7", filed May 15, 2017 ("FPL Answer").

this motion requesting leave to file a response to three particular issues the Petitioners raised for the first time in their Reply. For the sake of efficiency and the convenience of the Licensing Board and parties, the NRC response identifying and responding to the new arguments is attached to this motion.

It is well established in NRC proceedings that a reply brief cannot expand the arguments set forth in the original hearing request. *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *see, e.g., Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225, *petition for reconsideration denied*, CLI-04-35, 60 NRC 619 (2004) (“In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief”); *USEC, Inc.* (Am. Centrifuge Plant), 63 N.R.C. 433, 439 (2006) (“The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address”). Moreover, “our rules do not allow using reply briefs to provide, for the first time, the necessary threshold support for contentions.” *Louisiana Energy Servs., L.P.* (Nat'l Enrichment Facility), 60 N.R.C. 619, 623 (2004). As the Commission explained, “allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims.” *Palisades Nuclear Plant*, CLI-06-17, 63 NRC at 732.

Here, in the interest of fairness, Staff requests leave to file the attached response because Staff has not had the opportunity to address three issues Petitioners raised for the first time in their Reply.

CONCLUSION

For the above reasons, Staff respectfully requests that the Board grant Staff's motion.

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 1st day of June 2017

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IN PETITIONERS' REPLY

INTRODUCTION

The staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby submits this response to "Petitioners' Reply to NRC Staff and FPL's Answers to Petition for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 and File a New Contention," dated May 22, 2017 ("Reply"). As described below, in their reply, the City of Miami ("the City"), the Village of Pinecrest ("Pinecrest") and the City of South Miami ("South Miami") (collectively, "Petitioners") impermissibly introduce new information, bases, and arguments not included in either the "Petition for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 and File a New Contention", filed April 18, 2017 ("Petition"), or the answers that Staff and Florida Power & Light Co. ("FPL") filed on May 15, 2017 (collectively, "Answers").<sup>3</sup>

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<sup>3</sup> "NRC Staff Answer to Petition for Leave to Intervene and New Contention," filed May 15, 2017 ("NRC Answer") (ML17135A386); "Florida Power & Light Company's Answer Opposing City of Miami, Village of Pinecrest, and City of South Miami's Petition to Intervene and Request for Hearing Regarding the Combined Construction and Operating License Application for Turkey Point Units 6 & 7," filed May 15, 2017 ("FPL Answer") (ML17135A430).

The Petitioners proffered the following contention:

Contention 1: The FSER is deficient in concluding that FPL has demonstrated that it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs and FPL has failed to indicate source(s) of funds to cover these costs.

Petition at 7.

In its NRC Answer, the Staff fully explained why the proffered contention was inadmissible. In their Reply, the Petitioners made new arguments and requests beyond the scope of the Petition, the NRC Answer, and the FPL Answer. Below, the Staff responds to Petitioners' request for: (1) a license condition (Reply at 13); (2) a stay of Staff's review (*id.*); and (3) the staff to re-perform its safety review (Reply, Appendix 8, at 7).

As explained below, the new arguments raised in the Reply do not alter the fact that the contention is inadmissible.

### DISCUSSION

First, Petitioners state, "Petitioners request that the NRC condition the issuance of the license at issue on FPL's demonstrated ability to collect advanced nuclear cost recovery dollars under proceedings before the [Florida Public Service Commission (FPSC)]...." Reply at 13. This statement constitutes a request for relief not raised in the original Petition and Answers.

NRC regulations require FPL to demonstrate that it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction, operation and related fuel-cycle costs. See 10 C.F.R. § 50.33(f)(3). The Petitioners' have not explained how the suggested license condition, which would be redundant to the Commission's existing regulations, presents a litigable issue. Furthermore, as already discussed at length in Staff's Answer, the issue of FPL's ability to recover costs does not raise a material dispute with the application and is not material to the findings the NRC must make under 10 C.F.R. § 52.97. As such, a license condition in the Turkey Point COL on FPL's cost recovery would not resolve any material issues.

Second, Petitioners request that “these proceedings should take a correlating ‘pause’ to the one taken by FPL in the FPSC proceedings, prior to license issuance here.” Reply at 13. This request for relief is also new information not included the original Petition and Answers. The requested pause would be contrary to 10 CFR § 2.1202(a) (stating that during the pendency of the hearing, the NRC staff is expected promptly to issue its approval or denial of the application). And, there is not yet any action to be stayed or paused, inasmuch as the staff has not taken action. After the staff takes an action, a stay of the effectiveness of the NRC staff’s action is governed by 10 C.F.R. §2.1213. In determining whether to grant or deny an application for a stay of the NRC staff’s action, the following factors are considered: (1) Whether the requestor will be irreparably injured unless a stay is granted; (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) Whether the granting of a stay would harm other participants; and (4) Where the public interest lies. 10 C.F.R. §2.1213(d). Irreparable injury is the most important of the Commission’s stay requirements. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994). A stay is considered an “extraordinary remedy” that is rarely granted in NRC practice. *Crow Butte Res., Inc.* (License Renewal for the in Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 NRC 33, 38 (2015). Petitioners have not addressed the stay factors, and accordingly have not shown that a stay is warranted. See, e.g., Crawford in Situ Leach Facility, CLI-15-17, 82 NRC at 42 (Commission denied a stay application for failure to demonstrate the factors specified in 10 C.F.R. §2.1213(d)).

Finally, Petitioners request that the NRC re-open the analysis in the FSER. In particular, the Affidavit states, “It is certainly questionable and worthy of a reopening of the FSER if not the [Combined Operating License (COL)] itself to determine the escalated costs for the unfinished Vogtle and Summer units, the effect on rates, and most importantly, what is the financial markets appetite to fund bonds and at what interest rate to cover FPL’s construction of Turkey Point Units 6 & 7.” Reply at Appendix 8, page 7. Again, this request is new information not included in the original Petition and Answers.

To the extent Petitioners request the Staff to “re-open” the Vogtle and Summer COLs, this request is clearly outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii). Regarding the request to re-open the FSER analysis for Turkey Point, Staff pointed out in its Answer that challenges to the FSER are not cognizable. NRC Answer at 10. The NRC “has not, and will not, litigate claims about the adequacy of the Staff’s safety review in licensing adjudications.” *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station) *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Unit Nos. 2 & 3) *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station) *Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-08-23, 68 NRC 461, 476 (2008). As the Commission stated, “the adequacy of the applicant’s license application, not the NRC staff’s safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the SER are not cognizable in a proceeding.” Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182; 2202 (Jan. 14, 2004) (citing *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121-122, and prior agency rulings holding same). The Petitioners’ request to re-open the FSER builds upon the incorrect premise that Petitioners have the right to litigate the adequacy of Staff’s review in licensing adjudications. *Oyster Creek*, CLI-08-23, 68 NRC at 476.

CONCLUSION

The three requests identified above compose new information not previously included in the Petition or the Answers. For the foregoing reasons, new information does not make proffered Contention 1 admissible.

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 1<sup>st</sup> day of June, 2017

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CERTIFICATE OF SERVICE

I hereby certify that “NRC STAFF’S UNOPPOSED MOTION FOR LEAVE TO FILE A RESPONSE TO NEW ARGUMENTS RAISED IN PETITIONERS’ REPLY” and “NRC STAFF’S RESPONSE TO NEW ARGUMENTS RAISED IN PETITIONERS’ REPLY” were filed through the E-Filing system this 1<sup>st</sup> day of June, 2017.

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 1<sup>st</sup> day of June, 2017