UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

FLORIDA POWER & LIGHT COMPANY'S MOTION TO STRIKE PORTIONS OF PETITIONERS' REPLY AND AFFIDAVIT OF MARK W. CRISP

I. INTRODUCTION

On April 18, 2017, pursuant to 10 C.F.R. § 2.309(c), the City of Miami, the Village of Pinecrest, and the City of South Miami (jointly "Petitioners") filed a 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 ("Petition") in the combined license ("COL") proceeding for Florida Power & Light Company's ("FPL") proposed Turkey Point Units 6 and 7.

On May 15, 2017, FPL and the NRC Staff filed Answers requesting that the Atomic Safety and Licensing Board (the "Board") reject the proposed new contention and petition to intervene. On May 22, 2017, Petitioners filed the 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 ("Reply").

In accordance with 10 C.F.R. § 2.323, FPL hereby moves to strike portions of Petitioners' Reply and its supporting evidence, including the entirety of the Mark W. Crisp Affidavit, all of the Petitioners' other Exhibits, Section II.B.3 of the Reply in its entirety, and certain other portions of the Reply. Petitioners' Reply and Exhibits are in flagrant violation of the Nuclear Regulatory Commission's ("Commission") Rules of Practice ("Rules") with respect to reply briefs at the contention admissibility stage. Contrary to those Rules, and as explained in detail below, the Reply impermissibly introduces new information and raises entirely new factual allegations and arguments that should have been included in the original Petition.

In the event the Board does not grant this Motion to Strike, FPL requests leave to answer the Reply because it introduces new information and arguments to which FPL has not had an opportunity to respond and which do not support an admissible contention.

II. LEGAL STANDARDS

As the last filing in the contention admissibility proceeding, the Reply is inherently limited in its scope. According to the Commission, contention admissibility and timeliness requirements

> demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer….[1]

The Commission has long held that a reply may not contain new information that was not raised in either the petition or the answers, and may not provide new arguments (which in

[1] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (internal quotation marks omitted).

essence amend the contention). "The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had the opportunity to address."[2] At a minimum, Petitioners must explain why new arguments could not have been made in the original Petition. "For any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier."[3] Petitioners are required to show good cause for the late filing of these facts or arguments.[4] The good cause factors, set forth in 10 C.F.R. § 2.309(c), require, in part, a showing that (i) the information was not previously available; and (ii) the information is materially different from information previously available.[5]

In addition, it is not appropriate for a reply to introduce new evidence to rehabilitate a contention that lacked appropriate support at the time of the initial petition. As the Commission has stated, "if the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions."[6] Further, "our rules do not allow … using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions."[7]

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[2] *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

[3] *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 147 (2015).

[4] *Id.*

[5] *See* 10 C.F.R. § 2.309(c)(i-ii).

[6] *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[7] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

III. DISCUSSION

Petitioners' Reply impermissibly raises new facts and arguments in an attempt to rehabilitate its inadmissible contention. The Reply provides no justification for why these facts and arguments were not provided with the original Petition, including no showing of good cause as required by 10 C.F.R. § 2.309(c).

A. The Reply Introduces New Timeliness Arguments That Should Be Stricken From The Record.

In Section II.A. of their Reply, Petitioners ostensibly respond to FPL's assertion that the Petition was untimely because it did not rely on information that was materially different from information previously available, as is required by 10 C.F.R. § 2.309(c)(ii). However in their Reply, Petitioners abandon their argument that the alleged termination[8] of the FPL-Westinghouse Reservation Agreement was the critical materially different information justifying their late filing, and instead attempt to justify their late filing based on other facts and arguments not raised in their initial Petition.

For example, Petitioners now claim that their contention was timely because Westinghouse's bankruptcy has altered the progress and cost of AP1000 reactors in Georgia and South Carolina, and that this somehow "eliminate[s] any prior reasonable assurances" of recovery under Florida's nuclear cost recovery statute.[9] Petitioners also now attempt to defend their late contention by referencing for the first time purported FPL representations to the Florida

[8] As FPL pointed out in its May 17 Answer, due to the complexities of bankruptcy law the current status of the Reservation Agreement is still unclear.

[9] Reply at 4.

Public Service Commission ("FPSC") in 2015 and 2016 regarding AP1000 nuclear reactors in Georgia and South Carolina.[10]

Leaving aside the issue of whether this information actually makes the original contention admissible as a substantive matter (it does not), none of these facts or arguments relate to the alleged termination of the Reservation Agreement between Westinghouse and FPL, which was the Petitioners' original justification for their late filing.[11] Moreover, Petitioners have not even attempted to satisfy their burden of showing that their new facts and arguments could not have been included in their initial Petition. Nor can Petitioners meet that burden. All of these facts and arguments could have been raised in the initial Petition. They are drawn from (1) FPL's COL Application dated August 26, 2016;[12] (2) representations FPL made in 2015 and 2016;[13] and (3) information about cost overruns that was publicly available prior to the time the Petition was filed.[14]

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[10] Reply at 3-4.

[11] *See* Petition at 8-9, 12 (noting in part that "the information is materially different from information previously available because upon Westinghouse filing for bankruptcy, FPL's Reservation Agreement automatically terminated, FPL no longer has any guarantees that the nuclear reactors will be constructed, and FPL no longer can demonstrate that it possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated construction costs and related fuel cycle costs").

[12] *See* Part 1 – General And Financial Information, Application Rev. 8 at 4-5 (explaining the financial qualifications of FPL, including "a mixture of internally generated cash and external funding" as well as including a discussion of cost recovery).

[13] Petitioners cite FPL testimony from May 1, 2015 "explaining that the cost range estimate for Units 6 & 7 provided to the FPSC is reasonable because of the comparison costs provided by the lead projects in the United States." *See* Reply at 3, n. 4. Petitioners also claim that FPL failed to submit certain filings "during the 2016 docket." Reply at 4.

[14] Petitioners cite two news articles to arrive at their cited $6 billion figure with respect to cost overruns at the Summer and Vogtle Plants. The first article, noting $3 billion in cost overruns for the Summer Plant (Petitioners' Exhibit 2) is dated March 29, 2017. Therefore, it could have been used at the time the initial Petition was filed. The second article, noting $3 billion in cost overruns for the Vogtle plant, is dated in May 2017. Petitioners' Exhibit 3. However, cost overruns at Vogtle have been in the press much earlier. For example, a March 29, 2017 article noted that there were "billions" of cost overruns at Vogtle and that Toshiba and Westinghouse had to write down $6 billion combined for work at Summer and Vogtle. *See* Robert Walton, *Georgia Power's Vogtle nuclear units could hit construction delays*, Utility Dive (Mar. 29, 2017), http://www.utilitydive.com/news/georgia-powers-vogtle-nuclear-units-could-hit-construction-delays/439239/.

Petitioners cannot be permitted to change course in their Reply and provide a new justification for their late filing once their initial justification has been laid bare by FPL's and the NRC Staff's answers. Accordingly, the Board should strike the new arguments set forth in Section II.A. of the Reply.[15] The Board should also strike from the record Petitioners' Exhibits 1-6, upon which Petitioners' new timeliness arguments rely.

B. The Reply Improperly Introduces New Arguments And Information In An Effort To Rehabilitate Its Inadmissible Contention.

1. The Affidavit of Mark W. Crisp Should Be Stricken In Its Entirety.

In a thinly-veiled effort to provide the previously-missing required factual and expert support for its contention, the Reply contains an affidavit of Mark W. Crisp (Petitioners' Exhibit 8). Mr. Crisp's Affidavit should be struck in its entirety because by its very nature – a sworn affidavit from Petitioners' witness – it is new evidence offered during reply. The Board should not accept Petitioners' blatant attempt to circumvent the Commission's Rules by seeking to enter into the record at the reply stage the type of alleged support for its contention that FPL and the NRC Staff pointed out was absent from the original Petition. The Commission has routinely held that a participant "is confined to the contention as initially filed and may not rectify its deficiencies through its reply brief or on appeal."[16] When previously rejecting an affidavit entered in reply, the Commission stated that it "seek[s] wherever possible to avoid the delays

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[15] Petitioners also do not provide a basis for late filing their offhand comment that FPL has recovered more than $280 million dollars from its ratepayers to date. *See* Reply at 3. To the extent Petitioners are trying to make any substantive point with such information, it should also be stricken from the record as irrelevant. 10 C.F.R. § 2.319(d).

[16] *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009).

(such as an additional round of pleadings) caused by a petitioner's 'attempt to backstop elemental deficiencies in its original' petition to intervene."[17]

Moreover, the Crisp Affidavit is full of new factual allegations and information that Petitioners have not even attempted to justify as appropriate for inclusion at the reply stage. That alone is grounds for striking the affidavit in its entirety. As the Commission has held, "[f]or any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier."[18]

Further, an examination of Mr. Crisp's Affidavit shows that, even had Petitioners attempted to justify its late inclusion, those arguments would have been unconvincing. The facts and arguments in the Crisp Affidavit could (and should) have been made earlier. For example, Mr. Crisp's Affidavit discusses the Reservation Agreement and raises some new points regarding it.[19] Mr. Crisp, of course, could have made those points in an Affidavit submitted with the Petition. Indeed, Petitioners' original contention relied on claims that FPL no longer had a construction contract for Turkey Point due to the Reservation Agreement's alleged termination.[20] But Petitioners in their Reply now abandon those arguments (the Reply never even mentions the Reservation Agreement) presumably since in his Affidavit Mr. Crisp agrees with FPL that the

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[17] *Entergy Nuclear Operations, Inc., Entergy Nuclear Palisades, LLC, et al.* (Palisades Nuclear Plant, *et al.*), CLI-08-19, 68 NRC 251, 262 (2008) (refusing to consider an affidavit submitted with a reply brief).

[18] *Fermi*, CLI-15-18, 82 NRC at 147 (*citing Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 548-49, 568-70 (2009)). *See also Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-89, 16 NRC 1355, 1357 (1982) ("If intervenors find that they must make new factual or legal arguments, they should clearly identify this new material and give an explanation of why they did not anticipate the need for this material in their initial filing.").

[19] *See* Crisp Affidavit at ¶¶10, 17.

[20] *See* Petition at 9, 12.

Reservation Agreement was *not* a construction contract, and also concurs with FPL that the status of the Agreement is uncertain.[21]

Mr. Crisp's Affidavit also discusses financial issues at the Summer and Vogtle AP1000 plants, in support of Petitioners' new argument that the costs of constructing those plants will result in higher than anticipated costs at Turkey Point Units 6 and 7.[22] But the anticipated costs for Turkey Point Units 6 and 7 have long been a matter of public record, as have the financial issues at other AP1000 plants. Mr. Crisp's views on this issue could have been raised the initial Petition.

For these reasons, Mr. Crisp's Affidavit should be stricken from the record.[23]

2. Section II.B.3 Of The Reply Should Be Stricken In Its Entirety.

In Section II.B.3 of the Reply, Petitioners purport to respond to FPL's and the NRC Staff's arguments that "Petitioners have not provided support for their speculative assertion that the FPSC would deny FPL advanced nuclear cost recovery based on the recent Westinghouse bankruptcy."[24] In so doing, Petitioners again have attempted to rehabilitate their contention by introducing new facts and arguments.

In the first part of Section II.B.3, Petitioners use quotes from a FPL state regulatory filing to argue, for the first time, that FPL will not be seeking to recover from the FPSC costs for its nuclear reactors "anytime soon" or "anytime in the near future," until FPL makes a decision to

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[21] *See* Crisp Affidavit at ¶¶10, 17.

[22] *See* Crisp Affidavit at ¶¶ 11-15, 25.

[23] FPL understands that the Petitioners intend to move to admit Mr. Crisp's CV as an addition to the Affidavit. In the event Petitioners submit such a motion, FPL also moves to strike the CV as part of the Affidavit.

[24] Reply at 5.

initiate "preconstruction work."[25] Whether or not FPL will *seek to* recover costs in the near future is (1) completely irrelevant and unrelated to Petitioners' contention that FPL will be *unable to* recover its construction costs sometime in the future when they are incurred; (2) not related to any argument that FPL or the NRC Staff made in their answers regarding whether the costs will at some point be recoverable; and (3) therefore, not the proper subject of a reply.[26]

Second—in a misguided attempt to cure deficiencies in the original Petition—Petitioners also introduce (1) information in FPSC filings (including filed testimony from 2015 noting, in part, that "progress in other nuclear industry milestones (i.e., AP1000 U.S. construction) continues to provide positive indicators for the long term feasibility of new nuclear plant development")[27] that purportedly suggests that FPL's ability to recover costs is linked to the progress of the AP1000 reactors in Georgia and South Carolina; and (2) information from media reports that discuss the significant cost overruns affecting those reactors.[28] This argument for the first time claims that FPL's costs will be greater than the "high-end" estimates previously discussed in the Petition.[29] The Petition, however, did not challenge the amount of FPL's construction cost estimate. New facts and arguments such as these cannot be admitted at the reply stage to strengthen or amend an inadequately-supported contention.[30] Also, Petitioners have made no effort to make the required justification for the late inclusion of these facts and

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[25] Reply at 9-10.

[26] *See* 10 C.F.R. § 2.319(d) (allowing presiding officer to strike material that is irrelevant).

[27] Reply at 11-12 (citing Exhibit 1).

[28] Reply at 12 (citing Exhibits 2, 3).

[29] *Compare* Reply at 13, *with* Petition at 11.

[30] *See Palisades*, CLI-06-17, 63 NRC at 732.

arguments[31] which, as discussed in the timeliness section above, could have been made in the initial Petition.

For these reasons, all of Section II.B.3 should be stricken from the record, as should Exhibits 2, 3, 6, 8, 9, and 10 on which the Petitioners' new arguments rely.

3. Section II.B.1 of the Reply Should Be Stricken In Part.

In Section II.B.1 of the Reply, Petitioners purport to respond to FPL's and the NRC Staff's assertions that "there is no nexus between the Westinghouse bankruptcy and FPL's financial qualifications, because FPL has identified additional sources of funding for the project."[32] Petitioners put forward a new argument that cost recovery through the FPSC process is the "only source of funding for the construction of the new reactors."[33] In addition to being obviously incorrect, this new argument is wholly inconsistent with Petitioners' earlier position. Although the Petitioners now claim that cost recovery under the Florida statute is the *only* source of construction funding, the original Petition recognized that FPL relied on various sources of funding to demonstrate its financial qualifications.[34] This argument, therefore, should be stricken from the record as improper for inclusion in a reply.

Petitioners then state that Westinghouse's bankruptcy "completely change[d] the landscape of FPL's ability to recover before the FPSC."[35] To the extent that this sentence relies only on arguments in the original Petition, it is appropriate to include. However, this sentence

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[31] *See Fermi*, CLI-15-18, 82 NRC at 146-47.

[32] Reply at 5.

[33] Reply at 7.

[34] Petition at 11 (acknowledging "four funding sources" and noting that cost recovery is only "a major source of funding").

[35] Reply at 7.

cites Mr. Crisp's Affidavit[36] at paragraph 16, which in turn argues for the first time that there is "insufficient information available to determine the effect of the bankruptcy filing on the continued construction, the cost to finish construction, final dollars [sic] to be included in [the] rate base that will burden FPL customers."[37] This new argument regarding "insufficient information" could have been raised in the initial Petition and therefore should now be stricken from the record. It should also be stricken because, as described above, the Crip Affidavit should be stricken on other grounds.

4. Petitioners' Exhibits Should Be Stricken In Their Entirety.

As set forth above, to the extent that certain portions of the Reply are stricken from the record, Petitioners' Exhibits cited by those sections should also be stricken. But even if the related sections of the Reply are not stricken, all of Petitioners' Exhibits should be. Most of the Exhibits offer information that could have been presented in the Petition and, in fact, pre-date the Petition's filing.[38] But, more importantly, Petitioners have offered no justification for failing to include these new documents in their original Petition, as is required.[39] For these additional reasons, all of Petitioners' Exhibits should be stricken from the record in this proceeding.

C. The Reply Improperly Introduces A New Argument In Its Prayer For Relief That Should Be Stricken.

Petitioners' use of new information extends to their request for relief. Petitioners now request for the first time that "the NRC condition the issuance of the license at issue on FPL's

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[36] *Id.* A separate argument as to why the Crisp Affidavit should be excluded essentially in its entirety is in Section III.B.1 above.

[37] Crisp Affidavit at ¶16.

[38] These include Exhibits 1, 2, 4, 5 and 7.

[39] *See Fermi*, CLI-15-18, 82 NRC at 147.

demonstrated ability to collect advanced nuclear recovery dollars under proceedings before the FPSC."[40] This is also a new argument that is not permitted in the Reply, as it is the final filing in this contention admissibility proceeding. Instead, the Reply "should be narrowly focused on the legal or logical arguments presented in the applicant or NRC staff answer."[41] Petitioners' request for a license condition should therefore be stricken from the record.

IV. CONCLUSION

For the foregoing reasons, the Crisp Affidavit, all of Petitioners' other Exhibits, Section II.B.3 of the Petition in its entirety, and certain other Sections of the Petition should be stricken from the record as outside the scope of a proper Reply.

In the event the Board does not grant this Motion to Strike, FPL requests that the Board permit FPL to file a substantive answer to the Reply. As set forth above, the Reply clearly introduces new arguments and documents. At a minimum, if this information is to be included in the record, FPL should be afforded an opportunity to demonstrate why nothing in the Reply renders the original contention admissible. Otherwise, by allowing new claims in a reply without a response, the Board "not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims."[42]

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[40] Reply at 13.

[41] *National Enrichment Facility*, CLI-04-25, 60 NRC at 225.

[42] *Palisades*, CLI-06-17, 63 NRC at 732.

V. CERTIFICATION

As required by 10 C.F.R. § 2.323(b), FPL has consulted with the NRC Staff and the City of Miami (representing Petitioners). The NRC Staff does not object to FPL's Motion. The Petitioners have stated that they object to the Motion.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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June 1, 2017

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Strike Portions of Petitioners' Reply and Affidavit of Mark W. Crisp has been served through the EFiling system on the participants in the above-captioned proceeding this 1st day of June, 2017.

/signed electronically by Anne R. Leidich/
Anne R. Leidich