June 5, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
NEXTERA ENERGY SEABROOK LLC	)	Docket No. 50-443-LA2
	)	
(Seabrook Station, Unit 1)	)	
	)	

NRC STAFF'S SUR-REPLY TO NEXTERA'S REPLY TO
NRC STAFF'S ANSWER TO C-10'S PETITION FOR LEAVE TO INTERVENE

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board ("Board") Order dated May 26, 2017,[1] and 10 C.F.R. § 2.323, the U.S. Nuclear Regulatory Commission ("NRC") staff ("Staff") files this response to the NextEra Energy Seabrook, LLC ("NextEra") reply ("NextEra Reply")[2] to the Staff's answer ("Staff Answer")[3] to the C-10 Research and Education Foundation, Inc. ("C-10") petition for leave to intervene ("Petition").[4] Contrary to the NextEra Reply, the Staff's suggestion in the Staff Answer that the Board reformulate C-10's proposed contentions[5] is not outside of the Staff's authority and is not unprecedented. As explained below, (1) under 10 C.F.R. § 2.309(f), the Staff has the authority to suggest, and has on numerous occasions in the

[1] Order (Granting NextEra's Motion to File a Reply) (May 26, 2017) (unpublished) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML17146A173).

[2] NextEra's Reply to NRC Staff's Answer to C-10's Petition for Leave to Intervene (May 12, 2017) (ADAMS Accession No. ML17132A285) ("NextEra Reply").

[3] NRC Staff's Answer to C-10 Research and Education Foundation, Inc. Petition for Leave to Intervene (May 5, 2017) (ADAMS Accession No. ML17125A304; Document Package No. ML17125A303) ("Staff Answer").

[4] C-10 Research and Education Foundation, Inc. Petition for Leave to Intervene: Nuclear Regulatory Commission Docket No. 50-443 (Apr. 10, 2017) (ADAMS Accession No. ML17100B013) ("Petition").

[5] Staff Answer at 26, 38-39.

past actually suggested, reformulating contentions and (2) a number of the contentions proposed by C-10 in its Petition are interrelated and, therefore, susceptible to reformulation as suggested by the Staff. Accordingly, NextEra's argument that, through the Staff Answer, the Staff is somehow inappropriately filing its own new or amended late-filed contention is without merit.

BACKGROUND

This proceeding concerns the August 1, 2016, NextEra license amendment request ("LAR") to adopt a methodology to account for the impacts of alkali-silica reaction ("ASR") on concrete structures at Seabrook Station, Unit No. 1 ("Seabrook").[6] On February 7, 2017, the NRC published a notice of opportunity to request a hearing on the LAR.[7] On April 10, 2017, C-10 filed its Petition, which requested a hearing on the LAR with respect to ten interrelated contentions.[8] On May 5, 2017, the Staff and NextEra filed answers opposing the granting of the requested hearing due to C-10's failure to establish standing in its Petition.[9] NextEra also opposed the granting of the requested hearing due to C-10's failure to plead an admissible contention;[10] whereas, the Staff had determined that, due to the interrelationship of a number of C-10's proposed contentions, these proposed contentions could be reformulated as a single,

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[6] License Amendment Request 16-03, Revise Current Licensing Basis to Adopt a Methodology for the Analysis of Seismic Category I Structures with Concrete Affected by Alkali-Silica Reaction (Aug. 1, 2016) (ADAMS Accession No. ML16216A240) ("LAR").

[7] Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving Proposed No Significant Hazards Considerations and Containing Sensitive Unclassified Non-Safeguards Information and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information, 82 Fed. Reg. 9601, 9604 (Feb. 7, 2017).

[8] *See* Petition at 2-3.

[9] Staff Answer at 1; NextEra's Answer Opposing C-10 Research & Education Foundation's Petition for Leave to Intervene and Hearing Request on NextEra Energy Seabrook, LLC's License Amendment Request 16-03, at 2-3 (May 5, 2017) (ADAMS Accession No. ML17125A289) ("NextEra Answer").

[10] NextEra Answer at 2-3.

admissible contention.[11] On May 12, 2017, NextEra filed a motion seeking leave to reply to the Staff Answer, claiming that the Staff's suggested reformulation amounted to a request that the Board admit the Staff's own "New/Amended Contention."[12] NextEra also filed its Reply at the same time. On May 26, 2017, the Board granted the NextEra motion to file its Reply and stated that, should either the Staff or C-10 desire to submit a response to any arguments raised in the NextEra Reply, such a response should be filed no later than ten days together with a brief motion seeking leave to file the response.[13] Consistent with this order and 10 C.F.R. § 2.323, the Staff files this instant response to the NextEra Reply.

DISCUSSION

NextEra argues in its Reply that the Staff's suggestion in the Staff Answer that the Board reformulate C-10's proposed contentions amounts to the Staff's submission, itself, of a new or amended late-filed contention in this proceeding and that the Staff does not have the authority to itself submit new or amended contentions.[14] NextEra claims that the Staff's suggested reformulation is "unprecedented in the history of 10 C.F.R. Part 50 licensing proceedings."[15] NextEra even asserts that the Staff's suggested reformulation "could be viewed as [a Staff] effort to also address [issues related to the representativeness of NextEra's ASR testing

[11] Staff Answer at 26, 38-39 (suggesting a reformulation of C-10's Contentions A, B, C, D, G, and H to state that "The MPR/FSEL large-scale test program is not bounding of the Seabrook concrete because of the age of the Seabrook concrete, the length of time that ASR has propagated in the Seabrook concrete, the effect of water at varying levels of height and varying levels of salt concentration on the Seabrook concrete, the effect of heat on the Seabrook concrete, and the effect of radiation on the Seabrook concrete. As a result, the proposed monitoring, acceptance criteria, and inspection intervals are not adequate").

[12] NextEra's Motion for Leave to File a Reply to NRC Staff's Answer to C-10's Petition for Leave to Intervene, at 1-2 (May 12, 2017) (ADAMS Accession No. ML17132A284).

[13] Order (Granting NextEra's Motion to File a Reply) (May 26, 2017) (unpublished) (ADAMS Accession No. ML17146A173).

[14] NextEra Reply at 1-3.

[15] *Id*. at 2.

program] through litigation before the Board" instead of through the licensing process.[16] These NextEra arguments, though, are without merit because (1) the Staff, as a full party to NRC proceedings and "the representative of the public interest in these proceedings,"[17] has broad authority to suggest reformulations of petitioners' contentions and is not in any way limited in how it may respond to petitions to intervene and (2) the Staff's suggested reformulation was appropriate given the interrelationship of the underlying proposed contentions.

I. The Staff has Full Authority to Suggest, and has on Numerous Occasions in the Past Actually Suggested, the Reformulation of Contentions

The Commission's rules purposefully empower the Staff to be a full, co-equal participant in adjudicatory proceedings in order to help ensure the development of a sound record and the representation of the public interest.[18] This includes empowering the Staff to suggest the reformulation or narrowing of petitioners' contentions when the Staff believes that doing so is consistent with the contention admissibility requirements at 10 C.F.R. § 2.309(f). The NRC adjudicatory docket includes numerous examples of the Staff doing just this; therefore, to the extent that the NextEra Reply argues that the Staff did not have the authority to suggest to the Board that it reformulate C-10's contentions, this argument is contrary to both the Commission's regulations and NRC precedent.

A. The Staff is a Full Party to NRC Proceedings and May Suggest the Reformulation of Proposed Contentions

Under 10 C.F.R. § 2.309(i)(1), the Staff is given the same opportunity as the applicant/licensee or any "other parties to a proceeding" to file an answer to a hearing request,

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[16] NextEra Reply at 3-4.

[17] Rules of Practice for Domestic Licensing Proceedings; Role of NRC Staff in Adjudicatory Licensing Hearings, 51 Fed. Reg. 36,811, 36,812 (Oct. 16, 1986) (advance notice of proposed rulemaking; withdrawal).

[18] *See id*. at 36,811-12 (deciding that, after considering possible changes to the Staff's role as a full party in adjudicatory hearings, the Staff should continue to participate as a full party).

intervention petition, or motion for leave to file amended or new contentions filed after the deadline. If a hearing is granted and contentions are admitted, then the Staff also has the authority, at its discretion, to become a full party to a 10 C.F.R. Part 2, Subpart L, proceeding and may exercise this authority at any time during the course of the proceeding.[19] As a full party to a proceeding, the Staff "shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the [S]taff chooses to participate."[20] These rights and responsibilities include filing pleadings in support of or in opposition to, in whole or in part, any of the matters in controversy on which the Staff chooses to participate.[21]

In 1983, the Commission considered whether to modify or eliminate its regulations providing for the Staff's participation as a full party to NRC proceedings.[22] Ultimately, the Commission elected to retain the Staff as a full party, explaining that "the [S]taff's participation on all substantive issues is necessary to assist in the development of a sound record" and that "[t]he Commission and the adjudicatory boards rely heavily on the [S]taff's expertise" in making their determinations.[23] Moreover, the Commission found that "[t]he [S]taff's participation on procedural issues is desirable because it could reduce or even eliminate some of the substantive issues to be heard" and because "the [S]taff is often the best source of guidance for the adjudicatory boards on procedural matters."[24] In addition, the Commission affirmed that "the

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[19] 10 C.F.R. § 2.1202(b)(2).

[20] 10 C.F.R. § 2.1202(b)(3). The regulations consider the Staff's participation of such importance that the Staff's participation can be compelled by a presiding officer. *See* 10 C.F.R. § 2.1202(b)(1)(ii).

[21] *See, e.g.,* 10 C.F.R. § 2.323(c).

[22] Rules of Practice for Domestic Licensing Proceedings; Role of NRC Staff in Adjudicatory Licensing Hearings, 48 Fed. Reg. 50,550 (Nov. 2, 1983) (advance notice of proposed rulemaking).

[23] 51 Fed. Reg. at 36,811-12.

[24] *Id*. at 36,812.

[S]taff is the representative of the public interest in these proceedings" and that "the [S]taff should continue to present and defend the results of its objective evaluation of the application at the hearing for the benefit of the public."[25]

In 2003, the Commission again affirmed the Staff's role as a full party to its adjudicatory proceedings by rejecting a request by the Nevada Attorney General to prevent the Staff from acting as a "party advocate" during the Yucca Mountain High Level Waste Repository hearing.[26] The Commission explained that the Staff participates as a full party to its adjudicatory proceedings because of the Staff's independence and "extraordinary knowledge" of the related legal and technical issues.[27] The Commission concluded that "[i]t is difficult to imagine not putting that independence and knowledge to use in such an important hearing, where decisions need to be rooted in a comprehensive record that contains the testimony of the most knowledgeable experts."[28] The Commission later reaffirmed this determination in 2007.[29]

During a 2012 rulemaking to revise the NRC's adjudicatory process rules, the Commission received negative comments regarding the Staff's participation in NRC proceedings. In response to this criticism, several members of the Commission defended the Staff's role in their individual votes on the rulemaking. Then-Commissioner Svinicki observed that "the [S]taff's participation as a party is useful to the Atomic Safety and Licensing Board, the other parties, and the public as it will provide an independent regulatory perspective for the

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[25] 51 Fed. Reg. at 36,812.

[26] Letter from Edward McGaffigan, Acting Chairman, NRC, to Brian Sandoval, Attorney General, State of Nevada, Enclosure at 3-5 (July 8, 2003) (ADAMS Accession No. ML031631253).

[27] *Id*. at 5.

[28] *Id*.

[29] Letter from Dale Klein, Chairman, NRC, to Robert Loux, Executive Director, Agency for Nuclear Projects, State of Nevada (May 9, 2007) (ADAMS Accession No. ML071340263).

record."[30] Commissioner Apostolakis stated that "the [S]taff's perspective in adjudicatory matters is of high value to me and should be of value to the licensing boards, other parties, and the public" and that "[t]he NRC staff brings an independent perspective into the mix that is grounded in long experience with our procedural rules and extensive knowledge of related technical issues and licensing processes."[31]

Taken together, the Commission's regulations and statements demonstrate that the Staff is a full participant to this proceeding and may make any arguments within the scope of this proceeding, including arguing that C-10's interrelated contentions should be reformulated.[32]

B. The Staff has Previously Suggested the Reformulation of Proposed Contentions in NRC Proceedings

NextEra states that the Staff's proposal to reformulate C-10's interrelated contentions "appears to be unprecedented in the history of 10 C.F.R. Part 50 licensing proceedings."[33] However, because this statement is artificially restricted to "10 C.F.R. Part 50 licensing proceedings," it is potentially incomplete.[34] When the scope of this statement is appropriately

[30] Commission Voting Record, SECY-12-0004, Final Rule – 10 CFR Parts 2, 12, 51, 54, and 61, "Amendments to Adjudicatory Process Rules and Related Requirements," at 7 of 39 (unnumbered) (June 29, 2012) (ADAMS Accession No. ML121840015) (quoting Chairman Meserve).

[31] *Id*. at 26 of 39 (unnumbered).

[32] In addition to suggesting that the Staff did not have the authority to recommend to the Board that it reformulate C-10's proposed contentions, NextEra also seemed to suggest that, by doing so, the Staff was somehow acting improperly. Specifically, NextEra stated that the Staff's proposed reformulation "could be viewed as [a Staff] effort to also address [issues related to the representativeness of NextEra's ASR testing program] through litigation before the Board" instead of through the licensing process. NextEra Reply at 3-4. The Board should disregard this baseless suggestion of Staff impropriety. The Supreme Court and the Commission recognize the presumption that "governmental officials, acting in their official capacities, have properly discharged their duties" and the burden of proof to rebut this presumption involves the presentation of "clear evidence" to the contrary. *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-06-22, 64 NRC 37, 49 n.48 (2006) (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). NextEra has provided no such clear evidence that the Staff has somehow improperly engaged in its participation in this proceeding.

[33] NextEra Reply at 2.

[34] What parties can and cannot argue with respect to contention admissibility is a function of the contention admissibility requirements at 10 C.F.R. § 2.309(f) and not the specific part of the NRC's regulations governing the underlying licensing action. As NextEra itself states, "Submission of hearing

expanded to encompass all contention admissibility arguments under 10 C.F.R. § 2.309(f), and not artificially restricted to contention admissibility arguments in "10 C.F.R. Part 50 licensing proceedings," it becomes apparent that, contrary to NextEra's statement, the Staff has indeed suggested the reformulation or narrowing of petitioners' contentions on numerous occasions.

An example of the Staff suggesting the reformulation of a proposed contention under the contention admissibility requirements of 10 C.F.R. § 2.309(f) that is directly analogous to the Staff's suggestion of reformulating C-10's proposed contentions in the instant proceeding occurred in the license renewal proceeding[35] for the Davis-Besse Nuclear Power Station, Unit 1 ("Davis-Besse").[36] In that proceeding, the intervenors proposed a new Contention 5, which stated:

> Interveners contend that [the applicant's] recently-discovered, extensive cracking of unknown origin in the Davis-Besse shield building/secondary reactor radiological containment structure is an aging-related feature of the plant, the condition of which precludes safe operation of the atomic reactor beyond 2017 for any period of time, let alone the proposed 20-year license period.[37]

In support of this proposed new contention, the intervenors asserted that the Davis-Besse shield building structure was a feature requiring aging-management review, that the cracking must be addressed as part of the license renewal determination, and that the implications of the cracking must be analyzed within the supplemental environmental impact statement.[38] The Staff

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requests and contentions in adjudicatory proceedings is governed by 10 C.F.R. § 2.309." NextEra Reply at 3.

[35] As a license renewal proceeding, this could be considered a 10 C.F.R. Part 54 licensing proceeding, as opposed to a "10 C.F.R. Part 50 licensing proceedings." *See* NextEra Reply at 2. However, this distinction is irrelevant for the purposes of analyzing the Staff's authority under 10 C.F.R. § 2.309(f), which regulation applies equally in both instances.

[36] *See* NRC Staff's Answer to Motion to Admit New Contention Regarding the Safety Implications of Newly Discovered Shield Building Cracking (Feb. 6, 2012) (ADAMS Accession No. ML12037A200).

[37] *Id*. at 8.

[38] *Id*.

interpreted these arguments as encompassing both a safety contention and an environmental contention.[39] The Staff then determined that a small portion of these arguments raised an admissible safety contention.[40] Therefore, the Staff "propose[d] that the contention be refined to clearly establish the scope of the contention" and reformulated it as:

> Is the Structures AMP adequate to address any aging effects for the shield building that are related to the cracks identified by FENOC during the October 10, 2011 reactor head replacement and subject to a root cause evaluation to be provided by FENOC on February 28, 2012 such that the shield building would be unable to perform its intended functions of: 1) protecting the steel containment from environmental effects, including wind, tornado, and external missiles, 2) providing biological shielding, 3) providing controlled release to the annulus during an accident, and 4) providing a means for collection and filtration of fission product leakage from the Containment Vessel following a hypothetical accident?[41]

The applicant in the Davis-Besse proceeding, like NextEra in the instant proceeding, moved for leave to file a reply to the Staff's answer, arguing that the Staff answer had "advance[d] arguments not pled by [the i]ntervenors themselves," and had "supplie[d] revised contention language."[42] The Board set the issue for oral argument.[43] Before the date of the oral argument, however, the applicant filed an amendment to its license renewal application, providing a new Aging Management Program ("AMP") for monitoring the Davis-Besse shield building.[44] Finding that this amendment had addressed its concerns, the Staff no longer

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[39] *Id*.

[40] *Id*. at 8-9.

[41] *Id*. at 9.

[42] FENOC'S Unopposed Motion for Leave to Respond to the NRC Staff's Answer to Proposed Contention 5 on Shield Building Cracking, at 1-2 (Feb. 9, 2012) (ADAMS Accession No. ML12040A170).

[43] Order Denying Unopposed Motion for Leave to Respond to NRC Staff's Answer to Proposed Contention 5 and Setting Proposed Contention 5's Admissibility for Oral Argument (Feb. 13, 2012) (ADAMS Accession No. ML12044A306).

[44] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-12-27, 76 NRC 583, 589 (2012).

supported the admission of its proposed reformulated version of Contention 5.[45]

In its ultimate ruling on contention admissibility, the board explicitly approved of the Staff's reformulation of Contention 5.[46] The board then compared the contention, as reformulated by the Staff, against the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), found that it met all of these requirements, and concluded that, "[t]herefore, Contention 5, as modified by the NRC Staff, would have been admissible."[47] However, the board also agreed with the Staff that this reformulated contention had been mooted by the applicant's subsequent submission of its shield building monitoring AMP.[48] Notably, the board did not in any way criticize the Staff's suggestion to reformulate Contention 5 or rule that making this suggestion was somehow outside of the Staff's authority in the proceeding.

It is also not uncommon for the Staff, in an answer to a petition, to identify any admissible portions of the contentions proposed in the petition and then suggest to the Board that it narrow these contentions to those admissible portions. For instance, in the license renewal proceeding for the Diablo Canyon Nuclear Power Plant, Units 1 and 2, the Staff stated that it had no objection to the admission of a limited portion of a proposed contention and, accordingly, proposed that the board admit a modified version of the contention,[49] the language

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[45] *Davis-Besse*, LBP-12-27, 76 NRC at 590.

[46] *Id*. at 609-610 ("[W]e agree [with the Staff] that although Contention 5 as originally proposed, was (and still is) largely inadmissible for the reasons discussed above, it nonetheless initially contained an admissible contention of omission challenging [the applicant's] failure to provide a plan to monitor and/or address the shield building cracking in its [license renewal application].").

[47] *Id*. at 610.

[48] *Id*.

[49] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 284-85 (2010), *aff'd in part, rev'd in part* CLI-11-11, 74 NRC 427, 411 (2011) (the admission of the narrowed version of this contention was affirmed by the Commission after further reformulation of the contention by the Commission).

of which the Staff provided in its answer.[50] Similarly, the Staff identified that a proposed contention in each of the Comanche Peak Nuclear Power Plant, Units 3 & 4, and South Texas Project, Units 3 & 4, combined license proceedings[51] could be narrowed to an admissible contention of omission.[52] Moreover, it is not uncommon for boards to agree with these Staff suggestions to narrow contentions by removing inadmissible arguments from them and reformulating them. For instance, in the Victoria County Station Site early site permit proceeding, the board agreed with the NRC Staff that a proposed contention was inadmissible in part and, consequently, reformulated the contention to eliminate its inadmissible portions and concluded that the contention, as revised, was admissible.[53]

These examples and others,[54] demonstrate that, not only does the Staff have the

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[50] *See* NRC Staff's Answer to the San Luis Obispo Mothers for Peace Request for Hearing and Petition to Intervene, at 29 (Apr. 16, 2010) (ADAMS Accession No. ML101060667) ("The Staff proposes the following language for EC-1: The [Severe Accident Mitigation Alternatives ("SAMA")] evaluation contained in the Environmental Report, at Attachment F to Appendix D omits a discussion of the impact, if any, the 'Shoreline Fault' might have on the SAMA evaluation.").

[51] As a combined license proceeding, this could be considered a 10 C.F.R. Part 52 licensing proceeding, as opposed to a "10 C.F.R. Part 50 licensing proceedings." *See* NextEra Reply at 2. However, this distinction is irrelevant for the purposes of analyzing the Staff's authority under 10 C.F.R. § 2.309(f), which regulation applies equally in both instances.

[52] NRC Staff's Answer to Petition for Intervention and Request for Hearing at 25-28 (May 1, 2009) (ADAMS Accession No. ML091210636); NRC Staff's Answer to Petition for Intervention and Request for Hearing at 16-17 (May 18, 2009) (ADAMS Accession No. ML091380469). Subsequently, the applicants amended their combined license applications and the boards determined that this had rendered the potentially admissible portion of the proposed contentions moot. *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-10-05, 71 NRC 329, 339 (2010); *S. Tex. Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), LBP-09-21, 70 NRC 581, 595-96 (2009).

[53] *Exelon Nuclear Tex. Holdings, LLC* (Victoria County Station Site), LBP-11-16, 73 NRC 645, 666-68 (2011).

[54] *See, e.g., Fla. Power & Light Co.* (Turkey Point, Units 6 & 7), LBP-11-06, 73 NRC 149, 238 (2011) (stating that "[w]e agree with the NRC Staff that Contention 6 is admissible in part"); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 NRC 227, 271-72 (2009) (agreeing with the Staff's answer that a portion of a proposed contention amounted to an admissible contention of omission); *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-03, 65 NRC 237, 259-261 (2007) (agreeing with the Staff's answer, in part, and admitting a reformulated contention); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 252 (2004) (admitting a narrowed contention consistent with the Staff's answer in NRC Staff's Response to Petitioners' Contentions Regarding the Early Site Permit Application for the Clinton Site, at 22-23 (May 28, 2004) (ADAMS Accession No. ML041530604)).

authority to suggest the reformulation of contentions, but that it has exercised this authority in numerous previous proceedings and that the presiding officer in those proceedings did not question the Staff's authority to make such suggestions. Therefore, the Staff's suggestion in this proceeding that the Board remove all of the inadmissible arguments from C-10's proposed contentions and reformulate the remaining, interrelated arguments into a single, admissible contention, is both within the Staff's authority and consistent with the Staff's past practice.

II. The Staff Correctly Argued that C-10's Contentions Are Interrelated and May Be Reformulated

Contrary to NextEra's assertions, the Staff's proposed reformulated contention was fully within the scope of its authority and within the Commission's regulations at 10 C.F.R. § 2.309(i)(1), which state that answers to petitions should address, at a minimum, the factors set forth in 10 C.F.R. § 2.309(a)-(h), as applicable. As explained below and in the Staff Answer, based on the Staff's evaluation of the Petition against the 10 C.F.R. § 2.309(f) contention admissibility requirements, the Staff understood Contentions A, B, C, D, G, and H as containing interrelated arguments. Accordingly, "[d]ue to the interrelationship of these proposed contentions" and "in order to improve clarity," the Staff Answer suggested that the Board consolidate these arguments into a single, admissible contention.[55] In doing so, the Staff Answer did not supply new or missing information. Therefore, NextEra's assertions that the Staff's proposed reformulated contention should be considered a new or amended late-filed contention are without merit and should be dismissed.

A. The Staff's Reformulated Contention Consolidates Admissible Portions of Interrelated Contentions

As explained above, the Commission has affirmed that the Staff is "the representative of the public interest in these proceedings" and should "present and defend the results of its

[55] Staff Answer at 38.

objective evaluation of the application at the hearing for the benefit of the public."[56] Keeping this in mind, in support of its Answer, the Staff carefully evaluated the C-10 Petition and its contentions challenging the LAR, and, consistent with 10 C.F.R. § 2.309(i)(1), compared the Petition's arguments to the standing and contention admissibility requirements in 10 C.F.R. § 2.309(d) and (f), respectively. This evaluation led the Staff to conclude that a number of C-10's proposed contentions were interrelated and, therefore, that their arguments were susceptible to combination as a single, admissible contention.

For example, Contention A challenges the representativeness of the large-scale test program conducted by MPR Associates ("MPR") in collaboration with the Ferguson Structural Engineering Laboratory ("FSEL") specifically with respect to the LAR's reliance on visual inspections, crack width indexing, and extensometer deployment,[57] whereas Contention D challenges the representativeness of the MPR/FSEL large-scale test program in general.[58] To the extent that both Contentions A and D challenge the representativeness of the MPR/FSEL large-scale test program, the Staff recommended consolidating these arguments for efficiency.[59]

Likewise, C-10's arguments in Contention B with respect to the prestressing effect on concrete are interrelated with portions of its arguments in Contentions C and D.[60] As the Staff notes in its Answer, Contentions B and C raise similar arguments with respect to the prestressing effect on concrete.[61] Contention D, which challenges the representativeness of the MPR/FSEL large-scale test program also raises similar arguments regarding the prestressing

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[56] 51 Fed. Reg. at 36,812.

[57] Petition at 3-4.

[58] *Id*. at 8-11.

[59] Staff Answer at 27-28, 30.

[60] *Compare* Petition at 5 *and* Petition at 6-8 *with* Petition at 8-11.

[61] Staff Answer at 34 (citing Petition at 7, 8).

effect.[62] Therefore, to the extent that Contentions B, C, and D all challenge the representativeness of the MPR/FSEL large-scale test program in this respect, the Staff proposed consolidating these arguments for efficiency.[63]

Similarly, C-10's arguments in Contention C regarding the necessity of petrographic analyses are also raised in portions of Contentions B, C, D, and H.[64] Therefore, to the extent that these arguments are admissible and challenge the representativeness of the MPR/FSEL large-scale test program, the Staff recommended consolidating these arguments for clarity and efficiency.[65] Likewise, to the extent that C-10's arguments in Contention G regarding the LAR's omission of the "tipping point" concept challenge the representativeness of the MPR/FSEL large-scale test program, the Staff suggested that the arguments be combined with Contention D.[66] Finally, Contention H questions the sufficiency of the LAR's inspection intervals with respect to the representativeness of the MPR/FSEL large-scale test program.[67] Thus, to the extent that both Contentions H and D challenge the representativeness of the MPR/FSEL large-scale test program, the Staff recommended consolidating these arguments for efficiency.[68]

As explained above, the Staff has the authority to suggest the reformulation of contentions in its answers to petitions. The Staff exercised this authority in this proceeding because its evaluation, under 10 C.F.R. § 2.309(i)(1), of C-10's Petition against the contention admissibility requirements of 10 C.F.R. § 2.309(f) revealed that numerous of C-10's proposed contentions were interrelated with respect to C-10's challenge to the representativeness of the

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[62] Petition at 8-11.

[63] Staff Answer at 33, 34, and 35.

[64] Petition at 5, 6-8, 8-11, and 15.

[65] Staff Answer at 35, 38.

[66] *Id*. at 37, 38-39.

[67] Petition at 15.

[68] Staff Answer at 38.

MPR/FSEL large-scale test program. Therefore, the Staff's suggestion in its Answer to reformulate these interrelated arguments regarding representativeness into a single, admissible contention was both within the Staff's authority and a proper exercise of the Staff's authority under 10 C.F.R. § 2.309(i)(1).

B. The Staff's Reformulated Contention Does Not Supply New or Missing Information

Contrary to NextEra's assertions, the Staff Answer does not supply, as the requisite basis for an admissible contention, information that is new to the Petition or that was missing from the Petition. The Staff Answer simply determined that the Petition and its cited references had provided the requisite basis for an admissible contention regarding the representativeness of the MPR/FSEL large-scale test program and sought only to reformulate this existing information for purposes of clarity and efficiency and not to add to this information.

NextEra argues that the Staff created an entirely new assertion from "whole cloth" by stating that "[t]he MPR/FSEL large-scale test program is not bounding of the Seabrook concrete."[69] This Staff statement, though, is not a new argument; it is a restatement of C-10's assertion that the MPR/FSEL large scale test-program "is not representative" of the Seabrook concrete.[70] To the extent that NextEra faults the Staff for using the word "bounding" in this restatement instead of the word "representative,"[71] this is a distinction without a difference because interchanging the words "bounding" and "representative" would have no effect on the relevant question of contention admissibility.[72] Therefore, the Staff's suggested reformulation of

[69] NextEra Reply at 8 (citing Staff Answer at 26).

[70] *See* Staff Answer at 26, 32, 37, and 39.

[71] NextEra Reply at 8.

[72] Moreover, although it does not use the word "bounding," the Petition does cite to a sentence in the LAR that uses the word "bound." Petition at 14 (citing LAR at 16 of 73 (unnumbered)). That sentence in the LAR specifically states: "The specimens used in the large-scale test programs experienced levels of ASR that bound ASR levels currently found in Seabrook structures (i.e., are more severe than at

C-10's contentions is, in fact, a reformulation of C-10's existing arguments and does not add to C-10's existing arguments.

Similarly, NextEra argues that the Staff, in its evaluation of Contention G, "invents a new claim (without citation to support)" that "the limits imposed by the LAR are derived from, and, in turn, determined to be conservative by the MPR/FSEL large-scale test program."[73] However, NextEra fails to note that in the Staff Answer, the Staff actually made an equivalent statement only two paragraphs above the quoted statement.[74] Moreover, the Staff's citation for that assertion is the same page of the LAR that is referenced by C-10 in its Contention G argument.[75] NextEra mistakes the Staff's summarizing (albeit using somewhat different terms) of a concept from C-10's Petition and its references as an independent Staff argument.

For these reasons, the Staff Answer, which suggests that the Board consolidate admissible portions of interrelated arguments spread across multiple contentions into a single reformulated contention, does not rise to the level of the Staff itself supplying the requisite basis for an admissible contention or submitting a new or amended late-filed. NextEra's arguments to the contrary are without merit and should be dismissed.[76]

Seabrook), but the number of available test specimens and nature of the testing prohibited testing out to ASR levels where there was a clear change in limit state capacity." LAR at 16 of 73 (unnumbered).

[73] NextEra Reply at 8 (quoting Staff Answer at 37).

[74] *See* Staff Answer at 36-37.

[75] *Compare* Staff Answer at 37 n.161 (citing LAR at 31 of 73 (unnumbered)) *and* Petition at 14 (citing "LAR160-04 (sic) Section 3.5.1., Table 4") *with* LAR at 31 of 73 (unnumbered).

[76] Similarly, to the extent that NextEra asserts that the Staff's proposed reformulated contention is somehow untimely and that the Staff should have requested leave from the Board or demonstrated good cause in accordance with 10 C.F.R. § 2.309(c), these arguments should be dismissed in as much as the Staff filed its answer in a timely manner.

CONCLUSION

Contrary to the NextEra Reply, the Staff's suggestion in its Answer to reformulate C-10's contentions is not unprecedented and does not amount to the Staff's pleading of a new or amended contention. Accordingly, the Board should find that the NextEra Reply is without merit.

Respectfully submitted,

/Signed (electronically) by/

Jeremy L. Wachutka
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O14-A44
Washington, DC 20555
Telephone: (301) 287-9188
E-mail: Jeremy.Wachutka@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Brian G. Harris
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O14-A44
Washington, DC 20555
Telephone: (301) 287-9120
E-mail: brian.harris@nrc.gov

Executed in Accord with 10 CFR 2.304(d)

Anita Ghosh
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O14-A44
Washington, DC 20555
Telephone: (301) 287-9175
E-mail: Anita.Ghosh@nrc.gov

Dated at Rockville, Maryland
this 5th day of June, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
NEXTERA ENERGY SEABROOK LLC	)	Docket No. 50-443-LA2
	)	
(Seabrook Station, Unit 1)	)	
	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S SUR-REPLY TO NEXTERA'S REPLY TO NRC STAFF'S ANSWER TO C-10'S PETITION FOR LEAVE TO INTERVENE," dated June 5, 2017, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 5th day of June, 2017.

/Signed (electronically) by/

Jeremy L. Wachutka
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O14-A44
Washington, DC 20555
Telephone: (301) 287-9188
E-mail: Jeremy.Wachutka@nrc.gov

Dated at Rockville, Maryland
this 5th day of June, 2017