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Subject: [External_Sender] 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
Attachments: ML17135A430.pdf

As requested, sorry I got distracted with other issues yesterday.

Thanks
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"It is easy to be brave from a safe distance." ~ Aesop
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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 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

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), Applicant Florida Power & Light Company ("FPL") hereby answers and opposes the "Petition for Leave to Intervene in a Hearing on Florida Power and Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 and File a New Contention" ("Petition"), submitted on April 18, 2017, by the City of Miami, the Village of Pinecrest, and the City of South Miami (jointly "Petitioners") in the combined license ("COL") proceeding for the proposed Turkey Point Units 6 and 7 ("Units"). The Petition proffers one contention for consideration by the Atomic Safety and Licensing Board (the "Board"), which is purportedly prompted by Westinghouse Electric Company LLC's ("Westinghouse") bankruptcy and the subsequent impact on FPL's financial qualifications to construct Turkey Point Units 6 and 7.

As explained in detail below, the proposed contention should be dismissed because it is untimely under 10 C.F.R. § 2.309(c)(1). The proposed contention challenges the scope of the financial qualification information provided in FPL's combined construction permit and operating license application ("Application"). But challenges to the scope of the Application's financial qualification information could have been raised years ago; the financial qualification information at issue was submitted as part of the Application in 2009 and has not substantially changed in subsequent revisions.[1]

In addition, the Petitioners attempt to justify their late filing on the faulty premise that a FPL-Westinghouse Reservation Agreement ("Reservation Agreement") guaranteed that Westinghouse would construct Turkey Point Units 6 and 7. Westinghouse, however, never guaranteed construction of the Units, through the Reservation Agreement or otherwise. Accordingly, the alleged termination of the Reservation Agreement[2] and Westinghouse's bankruptcy are not material new developments providing good cause for the late filing.

As also explained below, the proposed contention fails to meet the Commission's standards for admissible contentions. The contention is replete with speculative assertions and assumptions that are unsupported by facts or expert opinion, as is required by 10 C.F.R. § 2.309(f)(1)(v). In addition, the proposed contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) because it raises prudency issues that are outside the scope of this proceeding. Finally, the contention also fails to provide sufficient information to show that a genuine dispute

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[1] *Compare* Part 1 – General and Financial Information, Application Rev. 0, *with* Part 1 – General and Financial Information, Application Rev. 8.

[2] Due to the complexities of bankruptcy law, the status of the Reservation Agreement is unclear. *See* 11 U.S.C. §§ 365(e), 541(c). Nevertheless, regardless of whether the Reservation Agreement is still in effect, has terminated, or will be terminated, the proposed contention is inadmissible for the reasons set forth in this Answer.

exists with the Application or the NRC Staff's Final Safety Evaluation Report ("FSER") on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

II. PROCEDURAL BACKGROUND

FPL submitted its Application for Turkey Point Units 6 and 7 on June 30, 2009. The Application included a statement of financial qualifications, as required by 10 C.F.R. § 50.33(f).[3] FPL has submitted several revisions to the Application since that initial filing. The current version of the Application's "General and Financial Information," which was submitted on August 26, 2016, is known as "Rev. 8." All of the revisions are available on the NRC's website.[4]

The NRC Staff reported on its review of FPL's statement of financial qualifications in the FSER, which was signed on November 10, 2016, and released to the public on November 14, 2016. In the FSER, the Staff found that "both FPL and NextEra Energy have sufficient financing capacity to fund this project from the following sources: internally generated operating cash flows, commercial paper and bank facilities, and long-term debt and equity capital markets; and will recover the cost of constructing the facility in accordance with Florida Statute 366.93 and Florida Administrative Code R.25-6.0423."[5] The Staff concluded that "the applicant has demonstrated that it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. Therefore, the NRC staff finds

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[3] *See* Part 1 – General and Financial Information, Application Rev. 0, at 4-6.

[4] *See* Combined License Application Documents for Turkey Point Units 6 and 7, *available at* http://www.nrc.gov/reactors/new-reactors/col/turkey-point/documents.html.

[5] Final Safety Evaluation Report for the Turkey Point Units 6 and 7 Combined License Application (Nov. 10, 2016) at 1-39 (ML16253A219).

that the applicant is financially qualified to construct the facilities."[6] This Board set a December 9, 2016 deadline for the filing of new or amended contentions based on the FSER.[7]

On April 18, 2017, Petitioners filed the petition to intervene at issue here. They summarize their contention as follows: "*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*."[8]

III. APPLICABLE LEGAL STANDARDS

A. CONTENTION ADMISSIBILITY STANDARDS

1. New Contentions Must Satisfy The Commission's Timeliness Standards Set Forth In 10 C.F.R. § 2.309(c)(1).

The NRC does not look with favor on new contentions that are submitted after a COL applicant's initial filing.[9] As the Commission has repeatedly stressed:

> our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners "who must examine the publicly available material and set forth their claims and the support for their claims at the outset." "There simply would be 'no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements'" and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our

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[6] *Id.*

[7] Final Scheduling Order at 2 (Nov. 15, 2016) (ML16320A248), *amended by* Order (Amending Final Scheduling Order) (Nov. 22, 2016) (ML16327A189).

[8] Petition at 7 (italics in original).

[9] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 636 (2004).

> expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.[10]

Accordingly, the Commission's rules of practice require that "[c]ontentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner."[11] 10 C.F.R. § 2.309(c)(1), in turn, requires that a late contention "not be entertained" absent a demonstration of good cause by showing that:

> (i) The information upon which the filing is based was not previously available;
>
> (ii) The information upon which the filing is based is materially different from information previously available; and
>
> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.[12]

As the proponent of an order admitting the proposed contention, Petitioners have the burden of demonstrating that they meet the good cause standards in 10 C.F.R. § 2.309(c)(1).[13] 10 C.F. R. § 2.309(c)(1) requires that the "participant has demonstrated good cause" by showing that the standards are met. The failure to comply with these pleading requirements constitutes sufficient grounds for rejecting the petition.[14]

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[10] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (citations omitted).

[11] 10 C.F.R. § 2.309(f)(2).

[12] 10 C.F.R. § 2.309(c)(1).

[13] *See* 10 C.F.R. § 2.325.

[14] *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, *et al.*), CLI-06-21, 64 N.R.C. 30, 34 (2006). *See also Nuclear Innovation North America LLC* (South Texas Project, Units 3 and 4), LBP-11-7, 73 N.R.C. 254, 279 (2011) ("Longstanding NRC practice dictates that an intervener's failure to affirmatively address the [former] section 2.309(c) factors serves as a sufficient basis for dismissal.") (citing *Calvert Cliffs*, CLI-06-21, 64 N.R.C. at 33-34 and *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347-48 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition)).

2. New Contentions Must Satisfy the Commission's Admissibility Standards Under 10 C.F.R. § 2.309(f)(1).

In addition, timely new contentions, including those based on NRC documents, must meet the admissibility standards that apply to all contentions under 10 C.F.R. § 2.309(f)(1). Specifically, new contentions must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
>
> (vi) In a proceeding other than one under 10 C.F.R. § 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[15]

These standards are enforced rigorously. "If any one . . . is not met, a contention must be rejected."[16] A licensing board is not to overlook a deficiency in a contention or assume the

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[15] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[16] *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); *see also USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) ("These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements." (citations and footnote omitted)).

existence of missing information.[17] Under these standards, a petitioner "is obligated to provide the analyses and expert opinion showing why its bases support its contention."[18] Where a petitioner has failed to do so, "the [Licensing] Board may not make factual inferences on [the] petitioner's behalf."[19]

Further, admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]."[20] In particular, this explanation must demonstrate that the contention is "material" to the NRC's findings and that a genuine dispute on a material issue of law or fact exists.[21] The Commission has defined a "material" issue as meaning one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding."[22] As the Commission has observed, this threshold requirement is consistent with judicial decisions, such as *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245 (D.C. Cir. 1980), which held that:

> [A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The

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[17] *See, e.g.*, *Palo Verde,* CLI-91-12, 34 N.R.C. at 155; *Oyster Creek*, CLI-09-7, 69 N.R.C. at 260 (noting that the contention admissibility rules "require the petitioner (*not the board*) to supply all of the required elements for a valid intervention petition" (emphasis added) (citation omitted)).

[18] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 N.R.C. 1, *aff'd in part*, CLI-95-12, 42 N.R.C. 111 (1995).

[19] *Id*. (citing *Palo Verde*, CLI-91-12, 34 N.R.C. at 149). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 180 (1998) (explaining that a "bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient;" rather, "a petitioner must provide documents or other factual information or expert opinion . . . to show why the proffered bases support [a] contention" (citations omitted)).

[20] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 359-60 (2001).

[21] 10 C.F.R. § 2.309(f)(1)(iv), (vi).

[22] Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (emphasis added).

> protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that "an 'inquiry in depth' is appropriate."[23]

A contention, therefore, is not to be admitted "where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts."[24] As the Commission has emphasized, the contention rules bar contentions where petitioners have "what amounts [only] to generalized suspicions, hoping to substantiate them later, or simply [a] desire [for] more time and more … information in order to identify a genuine material dispute for litigation."[25]

Therefore, under the NRC Rules of Practice, a statement "that simply alleges that some matter ought to be considered" does not provide a sufficient basis for a contention.[26] Similarly, a "[m]ere reference to documents does not provide an adequate basis for a contention."[27]

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[23] 627 F.2d at 251 (citation omitted); *see also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 41, *motion to vacate denied*, CLI-98-15, 48 N.R.C. 45, 56 (1998) ("It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions.").

[24] 54 Fed. Reg. at 33,171. *See also Duke Power Co., et al.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 N.R.C. 1041 (1983) ("[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a of the [Atomic Energy] Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.").

[25] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 424 (2003) (internal citations omitted).

[26] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), *review declined*, CLI-94-2, 39 N.R.C. 91 (1994).

[27] *Calvert Cliffs*, CLI-98-25, 48 N.R.C. at 348 (citation omitted).

B. FINANCIAL QUALIFICATION STANDARDS FOR CONSTRUCTION OF A NEW NUCLEAR POWER PLANT

1. Applicable Regulations

Petitioners' contention is based on NRC regulations that require an applicant for a combined license to demonstrate it has the financial qualifications necessary to carry out construction activities[28] pursuant to the license. 10 C.F.R. § 52.97 requires, in part, that "[t]he applicant is technically and financially qualified to engage in the activities authorized."[29] With respect to financial qualifications for combined licenses, the requirements described in 10 C.F.R. § 50.33(f)(1) apply.[30] That regulation requires the applicant to demonstrate that it possesses, or has reasonable assurance of obtaining, the funds necessary to cover estimated construction costs and related fuel cycle costs.[31]

Further guidance to the applicant is provided in Appendix C to 10 C.F.R. Part 50 ("Appendix C"). After acknowledging that "[t]he kind and depth of information described in this guide is not intended to be a rigid and absolute requirement," Appendix C states:

> In determining an applicant's financial qualification, the Commission will require *the minimum amount of information necessary for that purpose*….In many cases, the financial information usually contained in current annual financial reports, including summary data of prior years, will be sufficient for the Commission's needs.[32]

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[28] As an electric utility, FPL is not required to submit information demonstrating its financial qualifications to *operate* the Units pursuant to 10 C.F.R. § 50.33(f)(2)) and (3), nor are its financial qualifications to do so at issue in the proposed contention.

[29] 10 C.F.R. § 52.97(a)(1)(iv).

[30] *See* 10 C.F.R. § 52.77.

[31] 10 C.F.R. § 50.33(f)(1).

[32] 10 C.F.R. Part 50 Appendix C: A Guide for the Financial Data and Related Information Required to Establish Financial Qualifications for Construction Permits and Combined Licenses (emphasis added).

Appendix C also notes that the NRC regulations distinguish between applicants which are established organizations and those which are newly-formed entities organized primarily for the purpose of engaging in the activity for which the permit is sought.[33] With respect to "established organizations" (such as FPL) applying for a combined license, Appendix C describes the need for the applicant to provide: (1) an estimate of construction costs (with specified breakdowns for electric utilities), (2) the source of construction funds; and (3) the applicant's financial statements.[34] Regarding the source of construction funds:

> [t]he application should include a *brief statement* of the applicant's general financial plan for financing the cost of the facility, identifying the source or sources upon which the applicant relies for the necessary construction funds, e.g., internal sources such as undistributed earnings and depreciation accruals, or external sources such as borrowings.[35]

2. History and Purpose of Financial Qualification Requirement

The NRC has significant discretion in deciding whether an applicant is financially qualified to construct, own, and operate a nuclear power plant. Indeed, the threshold for demonstrating financial qualification is quite low because, as the Commission has recognized, there is at best a tenuous connection between financial qualifications and public health and safety.

The text of the Atomic Energy Act of 1954 (as amended),[36] its interpretation by U.S. Courts,[37] and NRC practice all make it clear that the NRC has complete discretion in evaluating

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[33] *Id.*

[34] *Id.*

[35] *Id.* (emphasis added).

[36] The basis for 10 C.F.R. § 50.33(f) is in Section 182.a of the Atomic Energy Act of 1954 (as amended), which states in relevant part that: "Each application . . . shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant . . . as the Commission may deem appropriate for the license." Atomic Energy Act of 1954 (as amended), 42 U.S.C. §§ 2011 et. seq.

whether an applicant is financially qualified to construct a new nuclear power plant. That discretion has been exercised through Appendix C, which establishes a more flexible financial qualification standard for NRC review than for many of the Commission's safety criteria.[38] In fact, Appendix C was adopted after another proposed guide for financial qualifications, which would have required much more detailed analyses from utilities, was rejected by the NRC as unnecessary.[39]

The NRC has accepted that the purpose of the financial qualification requirement is to protect the public health and safety.[40] But the NRC Staff and Commission have both been skeptical as to *whether* the financial qualification requirement protects the public health and safety at all. When implementing a final rule modifying the requirement in the 1980s, the NRC noted in the Federal Register that:

> [a] rule eliminating financial qualification review at all stages of the licensing proceeding is supportable, at least for regulated utilities, on the basis of the lack of any proven link between financial qualifications review and safety given the Commission's long experience in regulating utilities, the data in the [National Economic Research Associates] report, and the further public comment.[41]

More recently, as part of a justification to again relax the financial qualification requirement, the Staff explained to the Commission that "[i]n the 57 years since the initial promulgation of the

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[37] As the 1st Circuit of the U.S. Court of Appeals has recognized, "[t]he Act gives the NRC complete discretion to decide what financial qualifications are appropriate." *New England Coalition on Nuclear Pollution v. U.S. Nuclear Regulatory Commission*, 582 F.2d 87, 93 (1st Cir. 1978).

[38] *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 N.R.C. 1, 9 (1978). Further, given the history of the rule and the relatively modest implementing requirements in Appendix C, the Commission has stated that "'reasonable assurance' does not mean a demonstration of near certainty that an applicant will never be pressed for funds in the course of construction," but instead must merely "have a reasonable financing plan in the light of relevant circumstances." *Id*. at 18.

[39] *See Seabrook Station*, CLI-78-1, 7 N.R.C. at 10.

[40] *See, e.g.*, Part 50-Licensing of Production and Utilization Facilities: Financial Qualifications, 33 Fed. Reg. 9704 (July 4, 1968).

[41] Final Rule, Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants, 49 Fed. Reg. 35747, 35751 (Sep. 12, 1984).

financial qualifications demonstration rules, there does not appear to have been a clear demonstration of a direct relationship between the financial qualifications demonstration and plant safety."[42]

The Commission has apparently agreed, as it has solicited public comment on a draft regulatory basis to amend the current financial qualification requirements.[43] In the June 2015 Draft Regulatory Basis for the potential rule, the NRC notes that:

> [d]uring construction of the current operating fleet, multiple entities experienced substantial cost overruns, with the cost of construction vastly exceeding the construction cost estimates that were used to determine their [financial qualifications]. Due to rising costs, as well as other factors, multiple entities chose to suspend or cancel construction. *However, there is no evidence that cost overruns led to safety problems during construction*.[44]

Furthermore, the Draft Regulatory Basis clarified that, even historically, "the NRC review of [financial qualifications] was solely a review to determine if the applicant had enough capital to construct and operate the plant safely. It did not determine if the project was financially viable or if the project was likely to be completed."[45] As it explained:

> The NRC fully expects that applicants and financiers will perform extensive due diligence on the project and the corresponding financial arrangements. Indeed, financiers' views on the financial risk of the project will influence the terms of financing (e.g., interest rates, equity commitment). These are not the concerns of the NRC, because NRC's role is solely to ensure the plant is constructed to operate safely.[46]

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[42] *Policy Options for Merchant (Non-Electric Utility) Plant Financial Qualifications*, SECY-13-0124 at 15 (Nov. 22, 2013) (ML13057A006).

[43] Draft Regulatory Basis, Public Meeting and Request for Comment, Financial Qualifications for Reactor Licensing, 80 Fed. Reg. 34559, 34560 (June 7, 2015).

[44] *Financial Qualifications for Reactor Licensing Rulemaking*, Draft Regulatory Basis Document, NRC-2014-0161-0002 at 10 (June 2015) (emphasis added).

[45] *Id.* at 13.

[46] *Id.* at 13.

Therefore, economic considerations, outside of their impact on health and safety, are irrelevant to a financial qualification inquiry.

Of course, the financial qualification regulation remains in place. However, the health and safety purpose of the regulation, and the history described above, make it clear that Petitioners face a high burden in order to sustain a challenge to the Staff's exercise of its considerable discretion when making financial qualification determinations.

IV. PETITIONERS FAIL TO OFFER AN ADMISSIBLE CONTENTION

A. THE CONTENTION IS UNTIMELY

1. Challenges To The Type And Scope Of Information Provided In FPL's Application Are Untimely.

Petitioners' contention states in part that "FPL has failed to indicate source(s)" of funding necessary to cover estimated construction costs and fuel cycle costs.[47] To the extent that Petitioners' position is that the *types* or *scope* of information provided by FPL in its Application did not meet the requirements of 10 C.F.R. § 50.33(f)(1), that challenge is now untimely. The Application was publicly available when filed in 2009, and Petitioners had an opportunity at that time – or at any time until the Board's deadline for challenging the FSER – to raise a contention regarding the types and scope of information provided. Therefore, any such challenge is untimely pursuant to 10 C.F.R. § 2.309(c)(1).

[47] Petition at 7.

2. FPL Has Never Had A "Guarantee" That The New Units Would Be Constructed, So There Is Nothing Materially Different About The New Information Upon Which Petitioners Rely.

To justify the filing of their late contention, Petitioners argue that they have met the "good cause" requirements listed in 10 C.F.R. § 2.309(c)(1).[48] One of those requirements is that Petitioners rely upon information that is "materially different" from what was previously available.[49] According to Petitioners, they have met that requirement because "FPL's Reservation Agreement automatically terminated" when Westinghouse declared bankruptcy and therefore "FPL no longer has any guarantees that the nuclear reactors will be constructed."[50]

This justification completely misinterprets the Reservation Agreement. As explained below, the Reservation Agreement does not include a "guarantee" of construction, nor is it a construction contract. And Petitioners have not alleged, nor could they, that some other agreement had been reached to construct the Units. As Petitioners acknowledge, the Reservation Agreement is merely for the "reservation of manufacturing space for the manufacture of long lead time forgings."[51] It is not a contract to acquire or construct the reactors. While Petitioners note that "Paragraph 2 of the Reservation Agreement contemplates that FPL and Westinghouse will negotiate and execute a Definitive Agreement for the purchase and sale of the Components prior to the expiration of the Reservation Agreement,"[52] that same paragraph states:

> This Reservation Agreement is not intended to be, and shall not be construed as, a contract for the purchase and sale of Components. The validity and enforceability

[48] Petition at 12-13.
[49] 10 C.F.R. § 2.309(c)(1)(ii).
[50] Petition at 12.
[51] Petition at 8 (citing Reservation Agreement, Petitioners' Exhibit A).
[52] Petition at 9.

> of any agreement for the purchase and sale of Components between the Parties is subject to and conditioned upon the Parties' [sic] agreeing upon and reducing to a Definitive Agreement all terms and conditions deemed necessary or advisable by them. No contract for the purchase and sale of Components shall exist between the Parties unless and until the Parties negotiate, document, execute, and deliver a Definitive Agreement.[53]

Furthermore, even the potential Definitive Agreement, while contemplating the *purchase and sale* of components between the Parties, did not contemplate *construction*.[54] It is therefore completely inaccurate to say, as Petitioners do here, that the alleged termination of the Reservation Agreement would be a new development that removes a guarantee of construction. Such a guarantee never existed, did not exist at the time the NRC approved FPL's financial qualifications in the FSER, and was not part of the basis for the NRC's approval. Accordingly, Petitioners' contention regarding FPL's lack of a construction contract and its impact on the prudency of construction costs could have been made at the time the Application was filed or after the FSER was issued. For this reason the "new" information relied on by Petitioners to demonstrate good cause is not material to the contention and therefore does not support a late filing.

3. Petitioners Rely On A News Article From January 2017 As Evidence Of Its Premise That Westinghouse Will No Longer Construct The New Units.

As explained above, Petitioners cannot support their untimely filing by relying on claims relating to the Reservation Agreement. Petitioners also cite to a January 2017 news article titled "Toshiba to Exit Nuclear Construction Business: Facing billions of dollars in losses after ill-fated

[53] Reservation Agreement at para. 2 (emphasis added).
[54] *Id.*

bet, Westinghouse unit will limit future nuclear business to selling reactor designs."[55] Referencing the article, Petitioners claim that "[w]hile Toshiba and Westinghouse have indicated that they intend to complete the construction of the nuclear reactors currently under construction in Georgia and South Carolina, they have also indicated that Toshiba and Westinghouse's future involvement with nuclear plants will be limited to selling its designs."[56]

According to Petitioners, this information supports their position that Westinghouse's bankruptcy will disrupt FPL's ability to recover from its customers the costs of constructing Turkey Point Units 6 and 7. However, a contention relying on the January 2017 article is clearly untimely. In its Initial Scheduling Order, the Board clarified that late-filed contentions must be submitted within 30 days "of the date when the new and material information on which it is based first becomes available."[57] Petitioners filed the Petition on April 18, 2017, well beyond 30 days after the news article they cite for support.

In addition, to the extent the Petitioners' good cause argument could be read more broadly as relying on Westinghouse's March 2017 bankruptcy filing, the contention is still untimely. The contention alleges that FPL cannot demonstrate that its construction costs are prudent because FPL does not have in place an agreement to construct the Units. As stated above, however, FPL *never* had a construction contract with Westinghouse (or any vendor), so Petitioners' contention could have been raised years ago. Accordingly, Westinghouse's March

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[55] Russell Gold and Takashi Mochizuki, *Toshiba to Exit Nuclear Construction Business*, Wall St. J. (Jan. 31, 2017), http://www.wsj.com/articles/toshibatoexitnuclearconstructionbusiness145887107 (Petitioners' Exhibit C).

[56] Petition at 9.

[57] *See* Initial Scheduling Order and Administrative Directives (Prehearing Conference Call Summary, Grant of Joint Motion Regarding Mandatory Disclosures, Initial Scheduling Order and Administrative Directives) at 8 (Mar. 30, 2011) (ML110890768), *amended by* Notice (Granting Joint Motion to Modify Initial Scheduling Order) (Sept. 12, 2012) (ML12256A835).

2017 bankruptcy filing is not material to the substance of the contention and, therefore, does not justify the Petitioners' late filing.

For these reasons, the Board should reject Petitioners' proposed new contention as untimely under 10 C.F.R. § 2.309(c)(1).

B. THE CONTENTION FAILS TO MEET THE ADMISSIBILITY REQUIREMENTS OF 10 C.F.R. § 2.309(F)(1).

In the event the Board finds that Petitioners have shown good cause for submitting a late-filed contention, the contention is otherwise inadmissible because it fails to satisfy the Commission's requirements under 10 C.F.R. § 2.309(f)(1).

Petitioners argue that (1) Westinghouse's bankruptcy allegedly terminated the Reservation Agreement, which (2) makes it impossible for Westinghouse to construct the reactors, which (3) makes it impossible for FPL to enter into any construction contract for Turkey Point Units 6 and 7, which (4) makes it impossible for FPL to recover costs with the Florida Public Service Commission ("FPSC") because such costs are not reasonable or prudent, which (5) renders the NRC's FSER deficient. This linking of events requires the Board to accept a wide range of "bald assertions" and "generalized suspicions," none of which contain the factual support or expert opinion needed to justify admitting a contention for public hearing.[58] It also requires the Board to address issues outside the scope of this proceeding.

[58] *Independent Spent Fuel Storage Installation*, LBP-98-7, 47 N.R.C. at 180; *McGuire Nuclear Station*, CLI-03-17, 58 N.R.C. at 424 (internal citations omitted).

a. Petitioners Provided No Material Support For Their Position That, Absent A Construction Contract With Westinghouse, FPL's Costs To Construct The New Units Will Not Be Prudent.

Petitioners argue that, upon termination of the Reservation Agreement, there would no longer be a "guarantee" that Turkey Point Units 6 and 7 will be constructed.[59] Setting aside the fact that the Reservation Agreement provides no such guarantee and is not a construction contract, Petitioners' argument asks the Board to assume that its termination, along with Westinghouse's bankruptcy and Westinghouse's prior public statements in the press, would mean that Westinghouse would be unwilling or unable to construct the Units. Petitioners do not support this assumption with factual allegations or expert opinion. Of course, Westinghouse or a successor company could emerge from bankruptcy and agree to build the Units.

The contention also asks the Board to assume that, without Westinghouse's "guarantee" to construct Turkey Point Units 6 and 7, the Units could not be built by someone else. Again, Petitioners provide no factual or expert support for their speculation. Petitioners appear to be under the misimpression that, because Westinghouse designed the AP1000, it would be the only vendor available to supply and construct such a design. But as Petitioners themselves acknowledge, Westinghouse may sell its design.[60] And Petitioners have offered no reason why another vendor could not build the Units. Even assuming that termination of the Reservation Agreement also would terminate a Westinghouse "guarantee" to construct the Units, it does not follow that FPL would be unable to enter into a construction contract with another vendor. Petitioners have not supported their contention with factual or expert opinion addressing the possibility of third-party construction.

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[59] *See* Petition at 12.

[60] Petition at 9.

Next, Petitioners speculate that "[w]ithout any agreements for the construction of Turkey Point Units 6 and 7, FPL will be unable to recover any costs for the construction of these nuclear units."[61] This is another wholly unsupported, bald assertion. Petitioners merely state, as though it is obvious, that the absence of a construction agreement would necessarily lead to a determination by the FPSC that construction costs incurred by FPL would not be reasonable or prudent. But FPL could, for example, hire its own work force and still demonstrate to the FPSC that its construction costs are prudent.[62]

For these reasons, Petitioners' contention contains many bald, speculative assertions that lack the factual or expert witness support required under 10 C.F.R. §2.309(f)(1)(v), and does not raise a genuine dispute with the Application or the FSER as required under 10 C.F.R. §2.309(f)(1)(vi).

b. Matters Related To Economic Feasibility And Predicting The Outcome Of Future Prudency Hearings Conducted By The FPSC Are Outside The Scope Of This Proceeding.

The Petition also asks the Board, under the guise of a financial qualification challenge, to predict today whether the FPSC will find that construction costs – *which have not yet been incurred* – will be imprudent when FPL in the future seeks to recover them under Section 366.93

[61] Petition at 10.

[62] In fact, construction contracts are not a prerequisite to obtaining a COL. Earlier this year the NRC granted another utility a COL to build a plant in Florida despite the fact that the utility had previously canceled its engineering, procurement, and construction contract for the plants being licensed. *See* Letter from Francis M. Akstulewicz, Director, Division of New Reactor Licensing, Office of New Reactors, to Christopher M. Fallon, Vice President, Nuclear Development, Duke Energy Florida, Inc. re Issuance of Combined Licenses for Levy Nuclear Plant Units 1 and 2 (Oct. 26, 2016), ML16176A200; Duke Energy Corp. and Duke Energy Florida, Inc., Form 8-K, United States Securities and Exchange Commission (Jan. 28, 2014), *available at* https://www.sec.gov/Archives/edgar/data/37637/000110465914004574/a14-4266_28k.htm ("On January 28, 2014, Duke Energy Florida, Inc. ("DEF"), a wholly-owned subsidiary of Duke Energy Corporation, terminated the Engineering, Procurement and Construction Agreement dated December 31, 2008 between DEF and a consortium consisting of Westinghouse Electric Company LLC and Stone & Webster, Inc. …, for two Westinghouse AP1000 nuclear units to be constructed in Levy County, Florida….").

of the Florida nuclear cost recovery statute (the "Florida Statute"). Not only is this an impossible task (since nobody at this stage can possibly know what those construction costs will be, much less whether they will be found to be prudent), but making such a prudency determination would be outside the scope of the financial qualification requirement, combined licensing proceedings generally, and the Commission's jurisdiction over public health and safety.

The purpose of the financial qualification regulation is not for the Commission to judge whether a project will be economically successful, which is essentially what the proposed contention asks this Board to do.[63] The purpose of the requirement is to protect public health and safety.[64] In order for the Board to determine whether the FPSC will deem a project "reasonable and prudent," the Board would have to perform a deep dive into highly speculative construction cost projections and then try to predict FPL's ability to satisfy the FPSC that the project is financially viable.[65] This is contrary to the purpose of the financial qualification requirements, contrary to the requirements of Appendix C, and therefore a contention asking the Board to make such a determination is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) as outside the scope of this proceeding.

Moreover, Petitioners do not explain how a prudency decision by state regulators would have any effect on protecting health and safety, which is the sole purpose of the NRC's

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[63] *Financial Qualifications for Reactor Licensing Rulemaking*, Draft Regulatory Basis Document, NRC-2014-0161-0002 at 13.

[64] *Id.*

[65] Neither the NRC nor this Licensing Board has the authority or the expertise to attempt to divine the outcome of an FPSC prudency determination that is years away from adjudication. *See* Proposed Rule, Elimination of Financial Qualifications of Electric Utilities in Operating License Reviews and Hearings for Nuclear Power Plants, 49 Fed. Reg. 13044, 13046 (Apr. 2, 1984) ("Nor is it clear that the Commission has the capability to act on a wise and informed basis in making judgments of financial qualification. Such matters, in every case, ultimately remain within the purview of the state and local public utility commissions; no matter what finding the Commission might make in judging financial capability of a utility, the public utility commissions have final authority to render a Commission finding meaningless and inaccurate.").

regulations at 10 C.F.R. § 50.33. Not once do Petitioners make any allegation, let alone provide support for such an allegation, that FPL's inability to recover its construction costs through the Florida Statute would place the public health and safety at risk.[66]

In addition, the information that Petitioners use to support its position that the FPSC will deny FPL's recovery of its construction costs on prudency grounds is immaterial and also outside the scope of this proceeding. Petitioners note that "FPL failed to file a feasibility study in the 2016 Nuclear Cost Recovery Docket" and that because of this, "as of 2016 there has been no determination that the costs incurred by FPL for this project are reasonable or prudent, or is there any indication that the project remains feasible."[67] This is an incorrect conclusory statement and misleading at best. For costs incurred each year from 2008 through 2016, the FPSC has determined that FPL's project costs were reasonable and/or prudently incurred. The FPSC in Order No. PSC-16-0266-PCO-EI granted deferral of cost recovery issues presented in the 2016 docket. Moreover, the Petitioners' statement wrongly suggests that FPL has to prove to the NRC, as part of a financial qualification showing, that the project is feasible in the eyes of state regulatory authorities. FPL is not required to make such a showing here. Instead, pursuant to 10 C.F.R. § 50.33(f)(1), FPL only has to provide the Commission with reasonable assurance that it will obtain necessary funding to construct the Units.[68]

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[66] The only rationale that the NRC has ever recognized in linking financial qualification requirements for construction costs to human health and safety is that presumably higher than expected construction costs could result in utilities cutting corners during construction that would ultimately risk the health and safety of the public. *See, e.g., Generic Issue of Financial Qualifications: Licensing of Production and Utilization Facilities*, SECY-79-299, at 6 (Apr. 27, 1979) (ML12236A723). But as seen in Section III(B)(2) above, the Staff, who made the determination in the FSER at issue here, has largely rejected that argument and has recently suggested a rulemaking to reflect its new position.

[67] Petition at 10-11.

[68] *See Public Service Co. of New Hampshire*, CLI-78-1, 7 N.R.C. at 18 (noting that "'reasonable assurance' does not mean a demonstration of near certainty that an applicant will never be pressed for funds in the course of construction," but instead must merely "have a reasonable financing plan in the light of relevant circumstances").

For the above reasons, the contention raises prudency issues that are outside the scope of this proceeding and, therefore, is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).[69]

c. The FSER Did Not Rely On Cost Recovery In Its Decision To Approve FPL's Financial Qualifications.

According to the Petitioners, if the FPSC denied cost recovery under the Florida Statute because it decided that FPL's actual construction cost expenditures were not reasonable or prudent, such a decision would render the FSER deficient in its analysis of FPL's financial qualifications to build the plant.[70] But even if the Board agrees with Petitioners that Westinghouse's bankruptcy will result in an adverse prudency determination from the FPSC, the FSER did not state or imply that its financial qualification conclusion was dependent upon FPL's ability to recover its construction costs under the Florida Statute.

Cost recovery under the Florida Statute was described in the FSER's analysis, but was not one of the bases for its conclusion. Petitioners quote the Staff's conclusion from the FSER as follows:

> The NRC Staff ultimately concluded that FPL had sufficient capacity to fund this project through "internally generated operating cash flows, commercial paper and bank facilities, and long-term debt and equity capital markets*; and* will recover the cost of constructing the facility in accordance with Florida Statute 366.93 and Florida Administrative Code R.25-6.0423."[71]

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[69] In addition, to the extent Petitioners are relying on FPL's actions in 2016, that information has been available for some time. Any claim based on it is therefore untimely pursuant to 10 C.F.R. § 2.309(c)(1) and this Board's Scheduling Order. *See* Initial Scheduling Order and Administrative Directives (Prehearing Conference Call Summary, Grant of Joint Motion Regarding Mandatory Disclosures, Initial Scheduling Order and Administrative Directives) at 8 (Mar. 30, 2011) (ML110890768), *amended by* Notice (Granting Joint Motion to Modify Initial Scheduling Order) (Sept. 12, 2012) (ML12256A835).

[70] Petition at 10-12.

[71] Petition at 8 (emphasis added) (citations omitted).

The Staff clearly found that FPL's "capacity to fund" the project was based on its ability to obtain funding from a variety of sources: FPL's internally generated operating cash flows, commercial paper and bank facilities, and long-term debt and equity capital markets. While cost recovery under the Florida Statute is mentioned, there is no reason to believe that, without such a cost recovery mechanism, the Staff would have found that FPL could not fund construction. Nor does anything in the Application's financial qualification information or the FSER state or imply that such a conclusion is accurate. Petitioners have again failed to allege any facts or expert opinion supporting their claim that recovery under the Florida Statute was essential to the NRC's determination regarding FPL's financial qualifications to build the Units.

For these reasons, the contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi), because it fails to raise a genuine dispute with the Application or the FSER, and under 10 C.F.R. § 2.309(f)(1)(v), because it lacks the required support.

V. CONCLUSION

For the foregoing reasons, FPL respectfully requests that the Board reject the Petition because: (1) the proposed contention is untimely; and (2) the proposed contention does not satisfy the Commission's standards for admissibility.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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May 15, 2017

Counsel for FLORIDA POWER & LIGHT COMPANY

May 15, 2017

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing 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, has been served through the EFiling system on the participants in the above-captioned proceeding this 15th day of May, 2017.

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