

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of)	
)	Docket Nos. 52-040
Florida Power & Light Co.)	52-041
Turkey Point Units 6 & 7)	
)	
Combined Construction and License)	June 12, 2017
Application)	
_____)	

**PETITIONERS’ RESPONSE TO FPL’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, the City of Miami, the Village of Pinecrest, and the City of South Miami (collectively, “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 New Contention (“Petition” or “Petition to Intervene”). On May 15, 2017, NRC Staff and FPL filed their respective Answers to Petitioners’ Petition to Intervene. On May 22, 2017, Petitioners filed their Reply to NRC Staff and FPL’s Answers to Petitioners’ Petition to Intervene (“Reply”). On June 1, 2017 NRC Staff filed its Unopposed Motion For Leave to File a Response (“Unopposed Motion”). On the same day, FPL filed its Motion to Strike Portions of Petitioners’ Reply and Affidavit of Mark W. Crisp (“Motion to Strike”). On June 6, 2017, the Atomic Safety and Licensing Board (“Board”) issued its Order Granting NRC Staff’s Unopposed Motion. On June 8, 2017, the Board issued an Order Scheduling and Providing Instructions for Oral Argument on the admissibility of Petitioners newly proffered contention.

Pursuant to 10 C.F.R. § 2.323(c), Petitioners file their Response to FPL's Motion to Strike Portions of Petitioners' Reply and Affidavit of Mark W. Crisp.

II. PETITIONERS' REPLY RESPONDED TO LEGAL OR LOGICAL ARGUMENTS PRESENTED IN THE ANSWERS TO THE PETITION, IT LEGITIMATELY AMPLIFIED THE PETITION, AND IT DID NOT INTRODUCE NEW ARGUMENTS

Petitioners' Reply responded to various arguments and assertions made in FPL's and NRC Staff's Answers to Petitioners' original Petition. "[A] petitioner may respond to the legal or logical arguments presented in the answers to its hearing request"¹ Additionally, the Board should take into account any information in the reply brief that legitimately amplifies the issues presented by the Petitioners.² It is worth noting that NRC Staff only identified three (3) issues that it believes Petitioners' raised for the first time.³ While NRC Staff did not object to FPL's Motion to Strike,⁴ NRC staff chose to file its own Unopposed Motion to File a Response to a small number of issues in Petitioners' Reply that NRC Staff considered were not legal or logical arguments in response to NRC Staff's Answer unlike FPL's exaggerated and unsupported assertions of flagrant violations of the rules and blanket request to essentially strike Petitioners' Reply in its entirety.

Moreover, FPL continues to focus on the bankruptcy filing and the termination of the Reservation Agreement but fail to acknowledge or understand the main argument submitted by Petitioners as is recognized in the list of topics included in the Board's June 8, 2017 Order Scheduling and Providing Instructions for Oral Argument. Petitioners argue that the FSER is

¹ In the Matter of DTE Electric Co. (Fermi Nuclear Power Plant, Unit 2), 2015 WL 5268610 at *5 (N.R.C. September 8, 2015).

² In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility), 60 NRC 223, 224 (2004).

³ Unopposed Motion.

⁴ Motion to Strike at 13.

deficient because FPL will no longer be able to benefit from Advanced Nuclear Cost Recovery under Florida Statute 366.93 and Florida Administrative Code R.25-6.0423 as stated in the FSER or other external funding sources due to the bankruptcy filing, the termination of the Reservation Agreement, no certainty that the reactors will be built, the projected high-cost and risk of the project, and FPL's continuous failure to file feasibility studies. This was clear in Petitioners' initial Petition to Intervene and reasserted in Petitioners' Reply that responded to legal or logical arguments presented in NRC Staff's and FPL's answers and legitimately amplified the issues presented in the Petition.

a. PETITIONERS' DID NOT INTRODUCE NEW TIMELINESS ARGUMENTS

In its Motion to Strike, FPL argues that Petitioners introduce new timeliness arguments. It should be noted that the NRC Staff did not contend that Petitioners' filing was untimely.⁵ However, since FPL argues that Petitioners Contention is untimely, Petitioners reasonably must respond to FPL's legal or logical arguments and assertions.

Contrary to FPL's assertions, Petitioners have not abandoned its initial argument for timeliness. Petitioners' have always asserted and continue to assert that the Westinghouse bankruptcy filing was the new information that created a genuine dispute as to whether FPL is still financially qualified to carry out the project.⁶ Petitioners in their Petition and Reply state that the bankruptcy filing terminated the Reservation Agreement and this will play a significant role

⁵ In the Matter of Florida Power & Light Company (Turkey Point Units 6 and 7) (NRC Staff Answer to Petition for Leave to Intervene and New Contention), ML17135A430 at 9 (May 15, 2017) (The Petition satisfies the 10 C.F.R. § 2.309(c) requirements for filings after the deadline")

⁶ Petition at 11 ("Therefore, despite the FSER's finding that FPL is financially qualified to carry out this project, as of March 29, 2017 [the date Westinghouse filed for bankruptcy], a genuine dispute exists as to whether FPL is still financially qualified to carry out this project."); Reply at 2 ("Petitioners assert that the bankruptcy has altered events such that the information originally supplied is no longer sufficient to provide the reasonable assurance required under the law.")

in their ability to acquire financing external funding sources due to a lack of construction agreements and that the project is already on the high-end of the cost range.

Furthermore, the Petition noted that the bankruptcy filing and the automatic termination of the Reservation Agreement affected FPL's ability to demonstrate or allow the FPSC to make a determination that continued expenditures in the project remain reasonable and prudent.⁷ As part of the original Petition, Petitioners explained that FPL had failed to file its feasibility studies in the Nuclear Cost Recovery proceedings before the FPSC and that FPL's failure to file feasibility studies eliminated any assurances that it would recover costs expended in furtherance of the project under Florida Statute 366.93 and Florida Administrative Code R.25-6.0423 as stated in the FSER.⁸ This same issue was raised in the Reply when Petitioners explained that FPL has failed to file any feasibility studies since the 2016 Nuclear Cost Recovery Docket eliminating any assurances that FPL may recover the costs of constructing Turkey Point Units 6 and 7 through advanced nuclear cost recovery.⁹

Finally, FPL continuously states that Petitioners failed to justify why these alleged new facts and arguments could not have been included in the initial Petition. The Petitioners were not required to make the showing or justification because these facts and arguments are not new. As

⁷ Petition at 11 (With no agreements for the construction of Turkey Point Units 6 and 7, the filing of bankruptcy by Westinghouse . . . , and reports that Westinghouse will not be constructing any new reactors in the U.S., it has become abundantly clear that as of March 29, 2017 the project is no longer feasible and that any further expenditures by FPL towards the construction of these units are no longer reasonable or prudent."); Reply at 4 ("Because FPL's application for its combined operating license was premised on recovery of the cost of construction under Florida's advanced nuclear cost recovery scheme, the bankruptcy has eliminated any prior reasonable assurances of covering those costs that FPL had provided to the NRC.")

⁸ Petition at 10 ("FPL failed to file a feasibility study in the 2016 Nuclear Cost Recovery Docket and subsequently requested to defer any cost recovery to the 2017 Nuclear Cost Recovery Docket and noted that it plans to file a feasibility analysis in the 2017 Nuclear Cost Recovery Docket.")

⁹ Reply at 4 ("FPL failed to submit the required filings to establish feasibility and reasonableness before the FPSC during the 2016 docket. Instead, FPL asked for a deferral until this year's docket. Now, in the face of the uncertainty created by the Westinghouse bankruptcy, FPL has again failed to file the required proof of feasibility and reasonableness.")

has been demonstrated, these alleged new facts legitimately amplified the issues originally raised by Petitioners and were made in response to FPL's legal or logical arguments and assertions.

As such, the Board should deny FPL's request to strike Section II.A since FPL has failed to specifically identify any information or arguments that are new, that do not legitimately amplify issues raised in the Petition to Intervene, or that do not respond to the legal or logical arguments presented in FPL's Answer.

b. THE AFFIDAVIT OF MARK W. CRISP DOES NOT INTRODUCE NEW ARGUMENTS OR INFORMATION

The Affidavit of Mark W. Crisp ("Crisp Affidavit") did not introduce new arguments and responded to the legal and logical arguments included in FPL's Answer. FPL cites *In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC, et al.* ("Entergy") to support its proposition that the filing of any affidavit in a reply should be rejected to avoid any delays or to cure elemental deficiencies in a Petition to Intervene.¹⁰ However, *Entergy* applied solely to authorization affidavits required to establish representational standing.¹¹ In *Entergy*, it was clear that the Petitioner failed to establish representational standing and then subsequently attempted to cure an elemental deficiency.

Petitioners in submitting the Crisp Affidavit did not do so to introduce new arguments or information but to respond to legal and logical arguments submitted by FPL and NRC Staff in their respective Answers. FPL alleges that Petitioners have abandoned arguments relating to the automatic termination of the Reservation Agreement, however, as has been noted, the termination of the Reservation Agreement is one of several issues submitted by Petitioners in its original Petition to Intervene. Arguments relating to the high cost and risk of constructing the

¹⁰ Motion to Strike at 7.

¹¹ *Entergy*, 68 NRC 251, 259-262 (2008).

nuclear reactors and its effect on FPL's ability to acquire external funding were raised in the initial Petition.¹² These arguments and issues were raised by Petitioners because they are relevant to the discussion of whether FPL will be allowed by the FPSC to recover construction costs under Florida's statutory and regulatory scheme.

In its Motion to Strike, FPL simply asserts that "the Crisp Affidavit is full of new factual allegations and information that Petitioners have not even attempted to justify as inclusion at the reply stage."¹³ It just makes a general assertion not recognizing or acknowledging that the Crisp Affidavit, in addition to the rest of the Petitioners' Reply, legitimately amplifies issues originally raised by the Petitioners' such as the automatic termination of the Reservation Agreement,¹⁴ the feasibility of constructing the nuclear units,¹⁵ and the ability of FPL to provide reasonable assurances that it can obtain funding and to construct these units through advanced nuclear cost recovery or from external funding sources,¹⁶ to name a few.

Additionally, FPL in its Motion to Strike acknowledges that the Crisp Affidavit responds directly to its Response.¹⁷ The Affidavit at certain points even identifies the arguments raised in the Answers that it is responding to.¹⁸ FPL's Motion to Strike is simply an attempt to tactlessly and improperly remove relevant information and arguments from the Board's consideration. At a minimum, it has been clearly demonstrated that the entirety of the Crisp Affidavit should not and

¹² Petition at 11.

¹³ Motion to Strike at 7.

¹⁴ Crisp Affidavit at ¶¶10, 12, 16, 17.

¹⁵ *Id.* at ¶¶19-21.

¹⁶ *Id.* at ¶¶15-16, 20, 26, 28.

¹⁷ Motion to Strike at 7-8 ("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 Reservation Agreement was not a construction contract, and also concurs with FPL that the status of the Agreement is uncertain.")

¹⁸ E.g., Crisp Affidavit at ¶19-20.

cannot be stricken because it contains legal or logical arguments submitted in response to the Answers submitted by FPL and NRC Staff.

As such, the Board should deny FPL's request to strike the Crisp Affidavit in its entirety since FPL has failed to specifically identify any information or arguments in the Crisp Affidavit that are new, that do not legitimately amplify issues raised in the Petition to Intervene, or that do not respond to the legal or logical arguments presented in FPL's Answer.

c. SECTIONS II.B.1 AND II.B.3 DO NOT INTRODUCE NEW ARGUMENTS OR INFORMATION RELATING TO THE FPSC OR ADVANCED NUCLEAR COST RECOVERY

As was noted earlier, FPL has failed to understand that Petitioners main argument is that the FSER is deficient because FPL will no longer be able to benefit from advanced nuclear cost recovery under Florida Statute 366.93 and Florida Administrative Code R.25-6.0423 as stated in the FSER or from other external funding sources due to the bankruptcy filing, the termination of the Reservation Agreement, no certainty that the reactors will be built, the projected high-cost and risk of the project, and FPL's continuous failure to file feasibility studies.

Petitioners continue to explain, amplify, and logically respond to the pleadings filed by FPL and NRC Staff because they seem to misunderstand Advanced Nuclear Cost Recovery and the procedures and limitations as they are outlined in Florida Statutes 366.93 and Florida Administrative Code R.25-6.0423. These are all factors that are considered under Advanced Nuclear Cost Recovery and as such Sections II.B.1 and II.B.3 of Petitioners' Reply not only responds to FPL and NRC Staff's legal and logical arguments made in their respective Answers, they answer topics included in the Board's June 8, 2017 Order such as:

- Whether Westinghouse’s Bankruptcy raises a genuine dispute on a material issue if FPL’s ability to recover costs is not material to the NRC Staff’s determination of FPL’s financial qualifications;
- The feasibility of the Turkey Point project following Westinghouse’s Bankruptcy;
- The Effect on the petition of FPL’s May 1 representation to the Florida Public Service Commission to request a deferral of nuclear cost recovery; and
- The effect of the petition of FPL’s May 1 representation to the Florida Public Service Commission that the Turkey Point project in on a “pause”.¹⁹

Section II.B.3. clearly serves as an amplification of the Advanced Nuclear Cost Recovery mechanism afforded to FPL which it clearly asserts in its application and which the FSER unequivocally states that “FPL expects to recover the cost of constructing the facility in accordance with Florida Statute 366.93, ‘Cost Recovery for the Siting, Design, Licensing, and Construction of Nuclear and Integrated Gasification Combined Cycle Power Plants,’ and Florida Administrative Code R.25-6.0423, ‘Nuclear or Integrated Gasification Combined Cycle Power Plant Cost Recovery.’”.²⁰ It is a further amplification of FPL’s assertion in its application that it “will recover the cost of constructing the facility in accordance with Florida Statute 366.93, Cost recovery for the siting, design, licensing, and construction of nuclear and integrated gasification combined cycle power plants (Reference 1), and Florida Administrative Code R.25-6.0423, Nuclear or Integrated Gasification Combined Cycle Power Plant Cost Recovery (Reference 2).”²¹ The Advanced Nuclear Cost Recovery mechanism will clearly be affected by the Westinghouse bankruptcy filing, FPL is clearly

¹⁹ In the Matter of Florida Power & Light Co. (Turkey Point Units 6 and 7), Notice and Order (Scheduling and Providing Instructions for Oral Argument), ASLBP No. 10-903-02-COL-BD01 at 2 (June 8, 2017).

²⁰ Petition to Intervene at 8.

²¹ Reply at 6

affected by the bankruptcy filing in its decision to take a pause from applying for Advanced Nuclear Cost Recovery, and the Advanced Nuclear Cost Recovery mechanism does not contemplate FPL's current actions in the FPSC which makes it crucial for the Board to consider the Petitioners' Reply since it clearly responds to FPL's legal or logical arguments.

Therefore, the Board should deny FPL's request to strike Section II.B.3 in its entirety or portions of Section II.B.1 since FPL has failed to specifically identify any information or arguments that are new, that do not legitimately amplify issues raised in the Petition to Intervene, or that do not respond to the legal or logical arguments presented in FPL's Answer.

d. PETITIONERS' EXHIBITS SHOULD NOT BE STRICKEN IN THEIR ENTIRETY

In Section III.B.4 of FPL's Motion to Strike, FPL simply makes a generalized request to strike all of Petitioners' Exhibits without providing a legitimate reason or argument for their exclusion. FPL simply asserts that it is information that could have been presented with the initial Petition. However, FPL has failed to specifically identify any information or arguments that are new, that do not legitimately amplify issues raised in the Petition to Intervene, or that do not respond to the legal or logical arguments presented in FPL's Answer. As such, this generalized request to Strike all of Petitioners' Exhibits is baseless and should not be granted.

III. THE BOARD HAS A DEMONSTRATED INTEREST IN HAVING A FULLY DEVELOPED RECORD IN DETERMINING THE ADMISSIBILITY OF PETITIONERS' NEWLY PROFFERED CONTENTION

On June 6, 2017, the Board granted NRC Staff's Unopposed Motion to File a Response.²² In its order granting NRC Staff's Unopposed Motion to File a Response, the Board concluded "that granting the NRC Staff permission to file a response will result in a more fully developed

²² Unopposed Motion.

record that will, in turn, assist this Board in considering the admissibility of Petitioners' newly proffered contention."²³ Similarly, denying FPL's Motion to Strike, a motion that impermissibly seeks to strike properly submitted logical and legal arguments, will result in a more fully developed record that will assist the Board in considering the admissibility of the Petitioners' newly proffered contention.

Moreover, the Board issued an Order scheduling an oral argument concerning contention admissibility.²⁴ The Board identified seven (7) non-exclusive topics it wishes for all parties to address.²⁵ The issues and topics listed in the Order were identified and developed based on the Board's review of the Petition and subsequently filed related pleadings, including Petitioners' Reply.²⁶ Granting FPL's Motion to Strike would go against the Board's demonstrated interest to have a fully developed record to determine the admissibility of Petitioners' newly proffered contention. Further, Petitioners' Reply, along with Petitioner's initial Petition, helped develop the seven (7) topics that will be argued on June 20, 2017 and as such provide facts and legal arguments relevant to the Board's determination of contention admissibility.

IV. PETITIONERS DO NOT OPPOSE FPL'S ALTERNATIVE REQUEST TO FILE A SUBSTANTIVE ANSWER TO PETITIONERS REQUEST FOR A LICENSE CONDITION BUT OPPOSE FPL'S ALTERNATIVE REQUEST TO FILE A SUBSTANTIVE ANSWER FOR ANY OTHER ISSUES RAISED IN FPL'S MOTION TO STRIKE

Petitioners do not oppose FPL's request to file a Substantive Answer in Response to Petitioners' request for a license condition as it did not oppose NRC Staff's similar request. However, given that an Oral Argument has been scheduled on contention admissibility for

²³ *Id.* at 1.

²⁴ In the Matter of Florida Power & Light Co. (Turkey Point Units 6 and 7), Notice and Order (Scheduling and Providing Instructions for Oral Argument), ASLBP No. 10-903-02-COL-BD01 (June 8, 2017).

²⁵ *Id.* at 2.

²⁶ *See id.* at 2, fn.3.

Tuesday, June 20, 2017, Petitioners respectfully request that the Board require FPL to file its Substantive Answer to the license condition at least three (3) business days prior to the June 20, 2017 hearing so that Petitioners have adequate time to review the filing in preparation for the hearing.

In regards to any of the other issues raised in FPL's Motion to Strike, Petitioners oppose FPL's request to file a Substantive Answer. If the Board grants FPL's Motion to file a Substantive Answer on any other issues raised in its Motion to Strike, Petitioners respectfully request that the Board require FPL to file its Substantive Answer at least five (5) business days prior to the June 20, 2017 hearing so that Petitioners have adequate time to review the filing in preparation for the hearing.

V. CONCLUSION

For the aforementioned reasons, Petitioners respectfully request that FPL's Motion to Strike be denied in its entirety. Petitioners do not oppose FPL's request to file a Substantive Answer in Response to Petitioners' request for a license condition and further request that the Board require that FPL file its Substantive Answer to the license condition at least three (3) business days prior to the June 20, 2017 hearing so that Petitioners have adequate time to review the filing in preparation for the hearing. In regards to any of the other issues raised in FPL's Motion to Strike, Petitioners oppose FPL's request to file a Substantive Answer. If the Board grants FPL's Motion to file a Substantive Answer on any other issues Raised in its Motion to Strike, Petitioners respectfully request that the Board require FPL to file its Substantive Answer at least five (5) business days prior to the June 20, 2017 hearing so that Petitioners have adequate time to review the filing in preparation for the hearing.

Respectfully submitted this 12th day of June, 2017.

Signed electronically by: /s/ Xavier E. Albán

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2017, I electronically filed the foregoing petition with the electronic filing system of the U.S. Nuclear Regulatory Commission and that persons and parties of record were electronically served.

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