LBP-17-06

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of FLORIDA POWER & LIGHT COMPANY (Turkey Point Units 6 and 7)	Docket Nos. 52-040-COL and 52-041-COL ASLBP No. 10-903-02-COL-BD01 July 31, 2017

MEMORANDUM AND ORDER
(Denying Petition to Intervene and File a New Contention, and Terminating Proceeding)

Pending before this Licensing Board is a petition to intervene challenging a combined license (COL) application filed by Florida Power & Light Company (FPL) for two AP1000 nuclear reactors, Turkey Point Units 6 and 7, to be located near Homestead, Florida. See Petition for Leave to Intervene in a Hearing on [FPL's] [COL] for Turkey Point Units 6 & 7 and File a New Contention (Apr. 18, 2017) [hereinafter Petition]. Three Florida municipalities—the City of Miami, the Village of Pinecrest, and the City of South Miami (referred to collectively as Petitioners)—allege that, in light of changed circumstances arising from Westinghouse Electric Company's (Westinghouse's) recent bankruptcy filing, FPL's COL application no longer demonstrates that FPL is financially qualified to cover the construction and fuel cycle costs for Units 6 and 7, as required by 10 C.F.R. § 50.33(f)(1). See Petition at 7.

For the reasons discussed below, we conclude that, although Petitioners have standing to intervene and have proffered a timely contention, their contention fails to satisfy the admissibility standards in 10 C.F.R. § 2.309(f)(1). We therefore deny their petition to intervene.[1]

I. BACKGROUND

A. In June 2009, FPL submitted a COL application to the NRC to construct two new AP1000 reactors (Units 6 and 7) at the Turkey Point site. Consistent with the requirements of 10 C.F.R. § 50.33(f)(1),[2] FPL's application included information to demonstrate that FPL was financially qualified to carry out the construction and first fuel loading of Turkey Point Units 6

[1] On July 10, 2017, this Licensing Board issued a decision that disposed of all pending matters in this contested proceeding with the exception of Petitioners' petition to intervene. See LBP-17-05, 85 NRC __, __, __ n.23 (slip op. at 3, 16 n.23) (July 10, 2017). Our denial of their petition terminates this proceeding at the Licensing Board level. The uncontested, mandatory adjudication of FPL's COL application remains pending before the Commission. See Florida Power and Light Company; Turkey Point, Units 6 & 7, 82 Fed. Reg. 34,995 (July 27, 2017).

[2] 10 C.F.R. § 50.33(f)(3) specifies that COL applicants must submit the financial qualification information described in section 50.33(f)(1), which states in relevant part:

> [T]he applicant shall submit information that demonstrates that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of the total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs.

10 C.F.R. § 50.33(f)(1); see also id. § 52.77 ("The [COL] application must contain all of the information required by 10 C.F.R. § 50.33.").

Appendix C to 10 C.F.R. Part 50 provides guidance regarding how a COL applicant should establish its financial qualification. "In determining an applicant's financial qualification," states Appendix C, "the Commission will require the minimum amount of information necessary for that purpose." 10 C.F.R. Part 50, App. C. If the applicant is an "established organization[]" such as FPL, it need only provide (1) an estimate of construction costs; (2) the source of construction funds; and (3) its most recent annual financial statement. See id. Regarding the source of construction funds, Appendix C states that

> [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.

Id.

and 7. See Turkey Point Units 6 & 7 COL Application, Part 1–General and Financial Information, Rev. 8, at 4–5 (ADAMS Accession No. ML16250A266) [hereinafter COL Application Part 1]. Specifically, FPL represented that the estimated total construction cost for Turkey Point Units 6 and 7 would range between $13,700,498,919.00 and $19,994,061,325.00. See id., App. 1A. FPL stated that "[t]he sources of long-term construction funding for Units 6 & 7 will be a mixture of internally generated cash and external funding. The external funding will come from a mix of debt and equity capital. FPL currently uses first mortgage bonds and equity contributions from NextEra Energy, Inc. to finance long-term utility assets." Id. at 5. NextEra Energy, Inc. is FPL's parent company. See id. at 4–5.

FPL's application also stated that FPL planned to recover the costs of constructing the facility via cost recovery in accordance with Florida Statute section 366.93 and Florida Administrative Code r. 25-6.0423. See COL Application Part 1 at 5.[3]

In November 2016, the NRC Staff issued the Final Safety Evaluation Report (FSER) in which it assessed FPL's financial qualification to construct Turkey Point Units 6 and 7. See Division of New Reactor Licensing, Office of New Reactors, [FSER] for [COLs] for Turkey Point Nuclear Plant Units 6 and 7, Ch. 1 at 1-39 (Nov. 10, 2016) (ADAMS Accession No. ML16253A219) [hereinafter FSER]. First, the NRC Staff found that the estimated total construction costs presented in FPL's COL application were reasonable. See id. at 1-37 to 1-38. Second, the NRC Staff found that FPL was "financially qualified to construct the facilities" because it had "demonstrated that it possesses or has reasonable assurance of obtaining the

[3] Pursuant to Florida Statute section 366.93, the Florida Public Service Commission can grant a utility's request for advanced nuclear cost recovery for preconstruction and construction activities if the utility shows that (1) "[t]he plant remains feasible;" and (2) "[t]he projected costs for the plant are reasonable." Fla. Stat. § 366.93(3)(e) (2016). To make a "feasibility" showing, a utility must demonstrate that "it has committed sufficient, meaningful, and available resources to enable the project to be completed and that its intent is realistic and practical." Fla. Admin. Code r. 25-6.0423(6)(c) (2014).

funds necessary to cover estimated construction costs and related fuel cycle costs." Id. at 1-39. With regard to its financial qualification finding, the NRC Staff stated that

> FPL expects to finance this project through a mixture of internally generated cash and external funding. The external funding will come from a mix of debt and equity capital. FPL currently uses first mortgage bonds and equity contributions from NextEra Energy, Inc. to finance long-term utility assets. The [NRC Staff] concludes 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 [section] 366.93 and Florida Administrative Code R. 25-6.0423.

Id. at 1-38 to 1-39.

B. In accordance with 10 C.F.R. Part 52, Appendix D, IV.A.2.a, FPL's COL application also incorporated Westinghouse's AP1000 design control document by reference. See Turkey Point, Units 6 & 7 COL Application, Part 2–Final Safety Analysis Report, Rev. 8 passim (ADAMS Accession No. ML16264A045). As the sole manufacturer for the AP1000 design, Westinghouse entered into a Reservation Agreement with FPL in May 2008 to reserve space for the manufacture of certain components for the construction of Turkey Point Units 6 and 7. See Petition, Ex. B, Reservation Agreement Between [Westinghouse] and [FPL] at 1 (May 22, 2008). The Reservation Agreement states that it is "not intended to be, and shall not be construed as, a contract for the purchase and sale of components." Id. at 2. Rather, it expresses FPL's and Westinghouse's intent to execute a "Definitive Agreement" for the purchase and sale of the components prior to the expiration or termination of the Reservation Agreement. See id. It also provides that the Reservation Agreement would automatically terminate if, among other things, Westinghouse were to file for bankruptcy. See id.

On March 29, 2017, Westinghouse filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York, see Petition, Ex. A, [Westinghouse] Voluntary Petition for Non-Individual Filing for Bankruptcy (Mar. 29, 2017), thereby terminating the Reservation Agreement between FPL and Westinghouse.

II. PROCEDURAL HISTORY

On April 18, 2017, Petitioners filed the petition to intervene that we now consider, arguing that, due to Westinghouse's bankruptcy and the corresponding termination of the Reservation Agreement, FPL is no longer financially qualified to construct Turkey Point Units 6 and 7. Specifically, their contention alleges:

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

Petition at 7.

On May 15, 2017, FPL and the NRC Staff filed answers opposing Petitioners' request to intervene. See [FPL's] Answer Opposing [Petitioners'] Petition to Intervene and Request for Hearing Regarding the [COL] Application for Turkey Point Units 6 & 7 (May 15, 2017) [hereinafter FPL Answer]; NRC Staff Answer to Petition for Leave to Intervene and New Contention (May 15, 2017) [hereinafter NRC Staff Answer].

On May 22, 2017, Petitioners filed a reply to FPL's and the NRC Staff's answers. See Petitioners' Reply to NRC Staff and FPL's Answers to Petition for Leave to Intervene in a Hearing on [FPL's] [COL] Application for Turkey Point Units 6 & 7 and File a New Contention (May 22, 2017) [hereinafter Petitioners' Reply].

On June 1, 2017, the NRC Staff filed an unopposed motion for permission to file a response to Petitioners' reply, see NRC Staff's Unopposed Motion for Leave to File a Response to New Arguments Raised in Petitioners' Reply (June 1, 2017) [hereinafter NRC Staff Motion],

which we granted. See Licensing Board Order (Granting NRC Staff's Unopposed Motion) (June 6, 2017) (unpublished).

Also on June 1, 2017, FPL filed a motion seeking to strike portions of Petitioners' reply and an accompanying affidavit. See [FPL's] Motion to Strike Portions of Petitioners' Reply and Affidavit of Mark W. Crisp (June 1, 2017) [hereinafter FPL's Motion to Strike]. Petitioners opposed FPL's motion. See Petitioners' Response to FPL's Motion to Strike Portions of Petitioners' Reply and Affidavit of Mark W. Crisp (June 12, 2017) [hereinafter Petitioners' Response to FPL's Motion].

On June 20, 2017, this Board held oral argument on the parties' filings. See Licensing Board Order (Scheduling and Providing Instructions for Oral Argument) (June 8, 2017) (unpublished); see also Oral Argument Transcript at 910–98 (June 20, 2017) [hereinafter Tr.].

III. ANALYSIS

An entity seeking to intervene in an ongoing licensing proceeding must demonstrate standing and proffer a contention that is timely and that satisfies this agency's contention-admissibility standards. See 10 C.F.R. § 2.309(a)–(d), (f). As discussed below, we conclude that Petitioners have standing and that their contention is timely. Their contention fails, however, to satisfy the NRC's contention-admissibility standards.[4]

Before analyzing Petitioners' intervention request, we consider FPL's motion to strike portions of Petitioners' reply and the accompanying affidavit of Mark W. Crisp (Exhibit 8 to Petitioners' Reply). We agree with FPL that Mr. Crisp's affidavit should be struck in its entirety, see FPL's Motion to Strike at 6–7, because it improperly "attempt[s] to backstop elemental deficiencies in [Petitioners'] original petition to intervene." Entergy Nuclear Operations, Inc.

[4] In their reply, in addition to arguing that their contention should be admitted, Petitioners advanced for the first time several requests for relief, including requests to issue a license condition and to stay this proceeding. See Petitioners' Reply at 13; see also Tr. 917–18. We reject their requests as untimely and meritless. See NRC Staff Motion, attach., NRC Staff's Response to New Arguments Raised in Petitioners' Reply at 2–4.

(Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 262 (2008) (internal quotation marks omitted). "While a petitioner need not introduce at the contention phase every document on which it will rely in a hearing, if the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions." Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). Petitioners do not assert that Mr. Crisp's affidavit could not have been included as part of their original petition. See Petitioners' Response to FPL's Motion at 5–7. Accordingly, we will not consider the belated affidavit at this juncture.[5] We decline, however, to strike the other material identified in FPL's motion. See FPL's Motion to Strike at 4–6, 8–12. In our view, that material bears a sufficient nexus to the facts and arguments in the initial petition to warrant being included in Petitioners' reply.[6]

A. Petitioners Satisfy Standing Requirements

To participate in an NRC licensing proceeding, a petitioner must establish standing. See 10 C.F.R. § 2.309(a), (d). However, "[i]f the party or participant has already satisfied the requirements for standing . . . in the same proceeding in which the new or amended contentions are filed, it does not need to do so again." Id. § 2.309(c)(4). As defined in NRC regulations, a "participant" includes "any interested . . . local governmental body . . . that seeks to participate in

[5] Mr. Crisp's affidavit concerns the substance of Petitioners' contention by primarily discussing the construction problems and cost overruns experienced at other AP1000 reactor sites and how the Westinghouse bankruptcy exacerbated those issues. Thus, our decision to strike it does not run afoul of Commission precedent holding that a petitioner may, to an extent, use a reply brief to cure deficiencies in an original petition regarding a claim of standing. See, e.g., South Carolina Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, 71 NRC 1, 7 (2010).

[6] FPL states that if we do not grant in full its motion to strike, it "should be afforded an opportunity [to file a substantive answer] to demonstrate why nothing in [Petitioners'] reply renders the original contention admissible." See FPL's Motion to Strike at 12. FPL's request to file a substantive answer is rendered moot by our determination that Petitioners' proffered contention is not admissible.

a proceeding under § 2.315(c)." Id. § 2.4. Because the City of Miami and the Village of Pinecrest previously satisfied the requirements for standing in this proceeding, see LBP-15-19, 81 NRC 815, 818–19, 828 (2015); LBP-11-06, 73 NRC 149, 248 (2011), they "do[] not need to do so again." 10 C.F.R. § 2.309(c)(4).[7]

Regarding the City of South Miami, as stated supra note 7, in licensing actions involving COL applications, "we presume that a petitioner has standing to intervene if the petitioner lives within . . . . approximately 50 miles of the facility in question." Calvert Cliffs, CLI-09-20, 70 NRC at 915–16. Because the City of South Miami is located less than fifty miles from the Turkey Point site, see Petition at 5, it satisfies the requirements for standing pursuant to the agency's proximity, or geographic, presumption.

B. Petitioners' Contention Is Timely

Where, as here, a petitioner seeks to intervene in a licensing proceeding after the original deadline prescribed in 10 C.F.R. § 2.309(b) has lapsed, the petitioner must satisfy the "good cause" standard in section 2.309(c)(1) for its belated filing 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.

10 C.F.R. § 2.309(c)(1).

We agree with the NRC Staff that Petitioners' newly proffered contention satisfies the "good cause" standard. See NRC Staff Answer at 10–12. First, the information on which the

[7] The City of Miami and the Village of Pinecrest are located less than fifty miles from the Turkey Point site. See Petition at 4–5. Accordingly, even if they were required to make a fresh showing of standing, they could do so pursuant to the proximity, or geographic, presumption, which dispenses with the need for a petitioner who lives within fifty miles of the facility at issue to make an affirmative showing of injury, causation, and redressability in certain proceedings, including COL applications. See, e.g., Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915–16 (2009).

contention is based—i.e., Westinghouse's recent declaration of bankruptcy—"was not previously available." 10 C.F.R. § 2.309(c)(1)(i). Second, the fact that Westinghouse declared bankruptcy "is materially different from information previously available." Id. § 2.309(c)(1)(ii). Third, Petitioners submitted their contention "in a timely fashion based on the availability" of the new information. Id. § 2.309(c)(1)(iii). Specifically, they filed their petition on April 18, 2017, or twenty days after Westinghouse filed for bankruptcy on March 29, 2017. See Petition at 12–13. The timing of their filing comported with this Board's Scheduling Order, which specified that a newly proffered contention would be deemed timely if filed within thirty days of the date when the new and materially different information on which it is based became available. See Licensing Board Initial Scheduling Order and Administrative Directives (Prehearing Conference Call Summary, Grant of Joint Motion Regarding Mandatory Disclosures, Initial Scheduling Order, and Administrative Directives) (Mar. 30, 2011) at 8 (unpublished), amended by Licensing Board Notice (Granting Joint Motion to Modify Initial Scheduling Order) (Sept. 12, 2012) (unpublished).

FPL argues that the contention fails to satisfy the "good cause" standard because "Westinghouse's March 2017 bankruptcy is not material to the substance of the contention, and, therefore does not justify the Petitioners' late filing." FPL Answer at 16–17. Restated, FPL argues that the "materially different" standard in section 2.309(c)(1)(ii) requires Petitioners to show that the new information is material to the substance of their contention. See id.; see also Tr. at 943–45. We disagree.

FPL's argument is incompatible with the regulatory language, which does not require a petitioner to show that the new information is material to the contention. Rather, a petitioner satisfies section 2.309(c)(1)(ii) simply by showing that the new information upon which the contention is based is "materially different" from previously available information. "Materially" in this context describes the type or degree of difference between the new information and previously available information that a petitioner must establish, and it is synonymous with, for

example, "significantly," "considerably," or "importantly."[8] In arguing that section 2.309(c)(1)(ii) also requires a petitioner to show that the new information is material to the contention, FPL effectively asks this Board to engraft a new requirement onto the regulation. This we cannot do.[9]

C. Petitioners' Contention Is Not Admissible

1. The Six-Factor Contention-Admissibility Standard

For a contention to be admissible, it must satisfy the six-factor admissibility standard in section 2.309(f)(1), which requires a petitioner to

> (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;

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[8] See Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,566 (Aug. 3, 2012) (addressing concern that the good cause standard will allow petitioners to use old information re-packaged in a new document as a basis for a new contention by stating that petitioners must still show that "the new information . . . is 'materially' different from information that was previously available"); see also S. Nuclear Operating Co. (Vogtle Elec. Generating Plant, Units 3 & 4), LBP-10-01, 71 NRC 165, 183 n.9 (2010) (Materiality in the context of section 2.309(c)(1)(ii) "relates to the magnitude of the difference between previously available information and currently available information.").

[9] FPL advances a policy argument in support of its interpretation of section 2.309(c)(1)(ii), asserting that such an interpretation is necessary to prevent petitioners from filing new contentions "[j]ust because some new event occurred." Tr. at 944. FPL's policy argument ignores that (1) the new contention must be "based" on the new information, see 10 C.F.R. § 2.309(c)(1)(i), (ii); and (2) the "materially different" standard in section 2.309(c)(1)(ii) will itself act as a check to prevent petitioners from filing new contentions based on new information that is insignificantly different from previously available information. See supra note 8. Additionally, the NRC's strict contention-admissibility standard will prevent the admission of contentions that are not material to the findings the NRC Staff must make to support a licensing action. See 10 C.F.R. § 2.309(f)(1)(iv), (vi).

FPL advances several other arguments challenging the timeliness of Petitioners' contention. See FPL Answer at 13–17. None of them provides a basis for rejecting Petitioners' contention as untimely.

> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . ., together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . [P]rovide 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 . . . that the petitioner disputes and the supporting reasons for each dispute . . . .

10 C.F.R. § 2.309(f)(1). This standard is "strict by design," Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), and a licensing board must reject contentions that do not meet all six criteria. See USEC, Inc. (Am. Centrifuge Plant), CLI-06-09, 63 NRC 433, 437 (2006).

2. Petitioners' Contention Is Not Admissible Because Petitioners Fail To Show That A Genuine Dispute Exists On A Material Issue Of Law Or Fact

Petitioners' contention alleges that, in light of changed circumstances arising from Westinghouse's recent bankruptcy filing, FPL's COL application no longer demonstrates that FPL is financially qualified to cover the construction and fuel cycle costs for Units 6 and 7, as required by 10 C.F.R. § 50.33(f)(1). See Petition at 7.[10] Petitioners advance two arguments in

[10] As stated supra Part II, Petitioners' contention alleges:

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

Petition at 7. Pursuant to Commission case law, safety-related contentions must challenge the adequacy of a license application, not the adequacy of the NRC Staff's review of that application. See, e.g., Private Fuel Storage, LLC (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 472 (2001). Despite that rule, Petitioners' contention alleges a deficiency in the FSER, which is an NRC Staff review document. Although the NRC Staff states that this Board could summarily reject Petitioners' contention on this ground, see NRC Staff Answer at 10, the NRC Staff nevertheless treats the contention as a challenge to FPL's showing of financial qualification in its COL application. See id. We will do the same, because notwithstanding the contention's improvident reference to the FSER, it is clear that Petitioners are challenging whether FPL is entitled to a COL, not whether the NRC Staff's safety review of the COL application was adequate. Under these circumstances, to summarily reject Petitioners'

support of their contention. First, they assert that Westinghouse's bankruptcy has jeopardized FPL's ability to recover construction costs under Florida law, thereby casting doubt on whether FPL continues to be financially qualified to cover construction costs. See Petition at 10–11. Second, they assert that Westinghouse's bankruptcy casts doubt on FPL's ability to secure external funding for construction costs, thus raising a genuine dispute about whether FPL remains financially qualified. See id. at 11–12.

As discussed below, we agree with FPL and the NRC Staff that Petitioners' contention is not admissible because, contrary to 10 C.F.R. § 2.309(f)(1)(vi), neither of the arguments underlying the contention raises a genuine dispute on a material issue of law or fact. See FPL Answer at 22–23; NRC Staff Answer at 12–16.[11]

a. Petitioners' Claim that FPL Will Be Unable to Recover Construction Costs from Florida Does Not Raise a Genuine Dispute on a Material Issue Because FPL's COL Application Does Not Rely on Cost Recovery as Part of its Financial Qualification Statement. Petitioners assert that, as a result of Westinghouse's bankruptcy, "the ability for FPL to recover any costs . . . under [Florida Statute section 366.93] has vanished and a major source of funding the construction of the nuclear facilities has disappeared as well." Petition at 11. Petitioners therefore argue that "a genuine dispute exists as to whether FPL is still financially qualified to carry out this project." Id. We disagree.[12]

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contention based solely on its reference to the FSER would, in our judgment, constitute an overly formalistic application of NRC regulations. See Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-03, 7 AEC 7, 12 (1974) (stating that the Commission refuses to apply its rules of procedure in an "overly formalistic manner").

[11] Because Petitioners' failure to satisfy section 2.309(f)(1)(vi), standing alone, mandates the rejection of their contention, we need not address the other grounds advanced by FPL and the NRC Staff for rejecting Petitioners' contention as inadmissible. See FPL Answer at 18–22; NRC Staff Answer at 17–18.

[12] For a discussion of (1) the financial qualification standard established by NRC regulations; and (2) the cost recovery procedures in Florida Statute section 366.93 and its implementing regulations, see supra Part I.A.

Petitioners' argument is based on an erroneous interpretation of FPL's COL application, which—contrary to Petitioners' understanding—does not rely on cost recovery from Florida as a source of construction funding. FPL's COL application states in relevant part:

> FPL will recover the cost of constructing the facility in accordance with Florida Statute [section] 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 . . . .
>
> The sources of long-term construction funding for Units 6 & 7 will be a mixture of internally generated cash and external funding. The external funding will come from a mix of debt and equity capital. FPL currently uses first mortgage bonds and equity contributions from NextEra Energy, Inc. to finance long-term utility assets.

COL Application Part 1 at 5. Petitioners infer from the above paragraphs that FPL intends to rely on costs recovered from Florida pursuant to Florida Statute section 366.93 as a source of funding for construction costs. See Petitioners' Reply at 6–7. Based on this premise, Petitioners assert that, as a result of Westinghouse's bankruptcy, FPL's ability to recover construction costs from Florida is now in jeopardy and, accordingly, FPL's financial qualification to cover construction costs is questionable. See Petition at 10–11.

But FPL's COL application, properly construed, does not represent that FPL will rely on cost recovery from Florida as a source of construction funding. As explained supra Part I.A, NRC regulations state that an established organization (such as FPL) can demonstrate financial qualification by including in its COL application a brief statement identifying the sources of funds that the applicant will rely on for construction, namely, "internal sources such as undistributed earnings and depreciation accruals, or external sources such as borrowings." 10 C.F.R. Part 50, App. C; see supra note 2. The second paragraph of the above-quoted portion of FPL's COL application explicitly addresses "sources of long-term construction funding for Units 6 & 7," and it mirrors Appendix C's requirements, stating that such funding "will be a mixture of internally generated cash and external funding." COL Application Part 1 at 5. This paragraph does not

identify cost recovery from Florida as a source of construction cost funding for purposes of demonstrating financial qualification. FPL's application states that FPL intends to use Florida Statute section 366.93 as a source of construction cost recovery, not as a source of construction cost funding. See id.

We observe that Appendix C does not prohibit applicants from endeavoring to rely on cost recovery as a source of construction cost funding for purposes of demonstrating financial qualification. The salient point here is that, as explained above, FPL's COL application does not purport to rely on cost recovery to demonstrate that FPL is financially qualified to construct Units 6 and 7. See COL Application Part 1 at 5; see also Tr. at 951–52; FPL Answer at 22–23.[13]

In short, because FPL does not purport to rely on cost recovery from Florida as a source of construction funding, Petitioners' claim that FPL will be unable to recover construction costs from Florida does not controvert FPL's statement in its COL application regarding FPL's sources of construction funding. Thus, FPL's ability to recover such construction costs is not material to FPL's financial qualification pursuant to 10 C.F.R. § 50.33(f)(1). Because Petitioners' argument neither controverts FPL's COL application nor casts doubt on FPL's financial qualification, it does not create a genuine dispute on a material issue of law or fact. Petitioners' contention is therefore inadmissible pursuant to section 2.309(f)(1)(vi) to the extent it is grounded on that argument.

[13] Notably, although the FSER acknowledges that FPL plans to recover the cost of constructing Units 6 and 7 pursuant to Florida Statute section 366.93, it determines that FPL's financial qualification to fund this project is unrelated to FPL's ability to recover construction costs from Florida. See FSER at 1-38 to 1-39. Rather, as the FSER concludes, "both FPL and NextEra Energy have sufficient financing capacity to fund this project from . . . internally generated operating cash flows, commercial paper and bank facilities, and long-term debt and equity capital markets." Id. at 1-39; see also Tr. at 965–66, 970. Although the FSER is not at issue here, see supra note 10, its conclusion that FPL's financial qualification is independent of FPL's ability to recover construction costs from Florida undercuts Petitioners' argument that FPL's COL application relies on cost recovery as part of its financial qualification statement.

b. Petitioners' Claim that Westinghouse's Bankruptcy May Impair FPL's Ability to Secure External Funding for Construction Costs Does Not Raise a Genuine Dispute on a Material Issue. Petitioners also argue that, as a result of Westinghouse's bankruptcy and the termination of the Reservation Agreement, it can reasonably be inferred that FPL's ability to secure external funding for construction costs will be impaired. See Petition at 11.[14] In support of their argument, Petitioners cite to a January 31, 2017 newspaper article stating that Westinghouse is moving away from construction activities in the United States; specifically, that "Westinghouse will continue to design nuclear reactors . . . and it is expected to complete construction work at two U.S. nuclear facilities . . . in Georgia and South Carolina," but that going forward it would "let other companies handle the risk of building the facilities." See Petition, Ex. C, Wall St. J., Toshiba to Exit Nuclear Construction Business at 2 (Jan. 31, 2017). Petitioners allege that, with no current foreseeable way to construct Turkey Point Units 6 and 7, it will be more difficult for FPL to secure external sources of funding. See id. at 11–12.

Westinghouse's bankruptcy might, as Petitioners allege, impact some external funders' decisions to finance the project. However, the mere allegation that the external funding might be impacted is insufficient to raise a genuine dispute as to whether FPL is financially qualified to construct Units 6 and 7—that is, whether FPL "possesses or has reasonable assurance of obtaining the funds necessary to cover estimated construction costs and related fuel cycle costs." 10 C.F.R. § 50.33(f)(1).

In the context of section 50.33(f)(1), 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." Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), CLI-78-01, 7 NRC 1, 18 (1978). Petitioners' claim that Westinghouse's bankruptcy

[14] For a discussion of the now-terminated Reservation Agreement between FPL and Westinghouse, see supra Part I.B.

might jeopardize some external sources' willingness to fund the construction of Units 6 and 7 is insufficient to impugn the reasonableness of FPL's financial plan, which contemplates that the sources of construction funding will be (1) internally generated cash; and (2) external funding from a mix of debt and equity capital, including first mortgage bonds and equity contributions from its parent company, NextEra Energy, Inc. See COL Application Part 1 at 5. Petitioners have not presented direct support—by factual affidavits, expert declarations, or documentary evidence—for their assertion that Westinghouse's bankruptcy will necessarily jeopardize FPL's external sources of funding. Instead, they rely on "bare assertions and speculation" to support their proffered contention. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 208 (2000). "This is not enough to trigger an adversary hearing on [FPL's] financial qualifications." Id.[15]

In short, Petitioners have not provided adequate facts to cast legitimate doubt on the reasonableness of FPL's financing plan or FPL's ability to implement that plan. Accordingly, their speculative claim that Westinghouse's bankruptcy will potentially impair FPL's ability to secure external funding for construction costs does not raise a genuine dispute on a material issue of law or fact.[16]

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[15] In its answer, the NRC Staff correctly states that "Petitioners fail to demonstrate the existence of a nexus between Westinghouse's bankruptcy and the financial capability of FPL." NRC Staff Answer at 17. In particular, Petitioners do not provide any credible facts to support a conclusion that Westinghouse's bankruptcy will impair the financial capacity of FPL or its parent company, NextEra Energy, Inc. Any argument challenging FPL's financial capacity is particularly deficient in light of the assumed financial stability of established utilities under NRC regulations. See 10 C.F.R. Part 50, App. C at I.A.2; Seabrook Station, CLI-78-01, 7 NRC at 10 & n.14.

[16] To the extent that new and materially different information were to come to light casting legitimate doubt on FPL's financial qualifications to construct Units 6 and 7, Petitioners would not be foreclosed from seeking to reopen the record. See 10 C.F.R § 2.326. Alternatively, if FPL's COL application is ultimately granted, Petitioners may raise any concerns about putative safety deficiencies through a 10 C.F.R. § 2.206 petition. See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 230 (2015) ("[S]ection 2.206 provides a process for stakeholders to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted.") (internal quotation marks omitted).

IV. CONCLUSION

For the foregoing reasons, this Board denies Petitioners' request to intervene and file a new contention, thereby terminating this proceeding at the Board level. See supra note 1.

Petitioners may file an appeal of this Memorandum and Order with the Commission within twenty-five days of service of this order. Any party opposing the appeal may file a brief in opposition within twenty-five days after service of the appeal. See 10 C.F.R. § 2.311(b).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. William C. Burnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 31, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the **MEMORANDUM AND ORDER (Denying Petition to Intervene and File a New Contention, and Terminating Proceeding)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31th day of July, 2017