UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 BRIEF IN OPPOSITION TO THE CITY OF SOUTH MIAMI'S APPEAL OF LBP-17-06

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I. Introduction

Pursuant to 10 C.F.R. § 2.341(b)(3), Florida Power & Light, Co. ("FPL") submits this brief in opposition to "An Appeal from an Order of the Atomic Safety Licening [sic] Board" filed in this proceeding by the City of South Miami on Aug. 25, 2017[1] ("Appeal"). South Miami challenges the Atomic Safety and Licensing Board's ("Board") July 31, 2017 Memorandum and Order (Denying Petition to Intervene and File a New Contention, and Terminating Proceeding) ("LBP-17-06")[2] in the combined license application proceeding for Turkey Point Units 6 and 7.

As set forth below, in LBP-17-06 the Board properly denied a contention submitted by the City of Miami, the City of South Miami, and the Village of Pinecrest ("Petitioners").[3] FPL requests that the Commission reject South Miami's Appeal because it fails to identify any error or abuse of discretion in the Board's ruling. The Appeal merely repeats the claims made in the Petitioners' earlier pleadings before the Board, and utterly lacks any substantive explanation or argument regarding how the Board erred when it determined that the contention at issue failed to satisfy the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).

II. Statement of the Case

FPL submitted a combined license application (the "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)(1).[4] FPL has submitted several revisions to the Application since that initial filing. The current version of the Application's "General and Financial

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[1] South Miami's Initial Brief supporting the Appeal was submitted 3 days late at 1:52 PM on Monday, August 28, 2017. South Miami provided no explanation for this late filing and did not attempt to show good cause for its failure to timely file the Initial Brief.

[2] *Florida Power & Light, Co.* (Turkey Point Units 6 and 7), LBP-17-06, 85 N.R.C. __, slip op. (July 31, 2017).

[3] LBP-17-06, slip op. at 17.

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

Information," which was submitted on August 26, 2016, is set forth in the Application's "Rev. 8." All of the Application's revisions are available on the NRC's website.[5]

The NRC Staff reported on its review of FPL's statement of financial qualifications in its Final Safety Evaluation Report ("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."[6]

In the FSER, the Staff also 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 that the applicant is financially qualified to construct the facilities."[7] The Board set a December 9, 2016 deadline for filing new or amended contentions based on the FSER.[8]

On April 18, 2017, Petitioners City of Miami, City of South Miami, and the Village of Pinecrest filed a petition to intervene, asking the Board to admit one late-filed Contention. They summarized 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*

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[5] *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.

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

[7] *Id.*

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

source(s) of funds to cover these costs."[9] The Petitioners based this argument on a claim that Westinghouse Electric Company LLC's ("Westinghouse") March 29, 2017 bankruptcy filing[10] somehow made it impossible for FPL to recover funds to build Turkey Point Units 6 and 7 through the State of Florida's cost recovery statute.[11]

On May 15, 2017, FPL and the NRC Staff filed their answers objecting to the admission of the Contention on many grounds. FPL argued that the Contention was untimely and failed to meet the NRC's admissibility standards for new contentions.[12] Regarding timeliness, FPL explained that, among other things, Westinghouse's bankruptcy was not "materially different" information that would justify the late filing of the proposed Contention.[13] Regarding contention admissibility standards, FPL noted that (1) Petitioners provided no material support for their argument that a lack of a construction contract for Turkey Point Units 6 and 7 would result in a finding by the Florida Public Service Commission ("PSC") that such costs were imprudent and therefore not recoverable; (2) matters related to economic feasibility and predicting the outcome of Florida PSC proceedings were outside the scope of NRC review; and (3) the FSER's approval of FPL's financial qualifications did not rely on FPL's ability to recover its construction costs through Florida's cost recovery statute.[14]

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[9] Petition for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 and File a New Contention at 7 (Apr. 18, 2017) ("Petition").

[10] *See* Petition, Ex. A.

[11] Petition at 7-12. *See also* FLA. STAT. § 366.93 (2017).

[12] 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 at 13-23 (May 15, 2017) ("FPL Answer").

[13] FPL Answer at 14-15.

[14] FPL Answer at 18-23.

On similar grounds, the NRC Staff also argued that the Contention failed to meet the NRC's admissibility standards.[15] According to the Staff, the Petition's allegations were speculative, and Petitioners failed to explain how Westinghouse's bankruptcy affected FPL's financial qualifications.[16] The Staff also agreed with FPL that there was an insufficient link between cost recovery at the state level and the Staff's approval of FPL's financial qualifications, because the Staff's financial assurance finding was not based on FPL's ability to recover its costs through Florida's cost recovery statute.[17]

On May 22, 2017, Petitioners filed a Reply,[18] including for the first time an affidavit from Mr. Mark W. Crisp ("Crisp Affidavit").[19] The Crisp Affidavit addressed topics that were not raised in the initial Petition.[20] Petitioners failed to explain why the Crisp Affidavit could not have been submitted with the initial Petition.

On June 1, 2017, the NRC Staff filed an unopposed motion for leave to file a response based on new arguments raised in Petitioners' Reply, and attached its additional response.[21] Also on June 1, 2017, FPL filed a motion to strike the Crisp Affidavit and other portions of Petitioners' Reply.[22]

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[15] NRC Staff Answer to Petition for Leave to Intervene and New Contention at 12-18 (May 15, 2017) ("NRC Staff Answer").

[16] NRC Staff Answer at 12-16.

[17] NRC Staff Answer at 17-18.

[18] *See generally* Petitioners' Reply to NRC Staff and FPL's Answers to Petition for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 and File a New Contention (May 22, 2017) ("Reply").

[19] Reply, Ex. 8.

[20] *Id.*

[21] NRC Staff's Unopposed Motion for Leave to File a Response to New Arguments Raised in Petitioners' Reply (June 1, 2017); NRC Staff's Response to New Arguments Raised in Petitioners' Reply (June 1, 2017).

[22] Florida Power & Light Company's Motion to Strike Portions of Petitioners' Reply and Affidavit of Mark W. Crisp (June 1, 2017) ("FPL Motion to Strike").

On June 6, 2017, the Board granted the NRC's motion for leave to file a response.[23] On June 13, 2017, Petitioners filed a response to FPL's motion to strike.[24] On June 20, 2017, the parties engaged in an oral argument on issues of interest to the Board.[25]

Following oral argument, on July 31, 2017, the Board issued the decision that is now before the Commission on appeal. The Board found the proposed Contention inadmissible, concluding that the Petitioners had not raised a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).[26]

This holding relied on two conclusions. First, the Board rejected Petitioners' argument 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.'"[27] Second, the Board rejected Petitioners' argument that Westinghouse's bankruptcy could impair FPL's ability to secure external funding for construction costs.[28]

According to the Board, these two conclusions were sufficient to render the Contention inadmissible.[29] However, the Board also added that FPL and the NRC Staff had raised additional arguments challenging the Contention's admissibility pursuant to Section 2.309(f)(1).[30] The Board noted that it "need not" address those arguments "[b]ecause

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[23] Order (Granting NRC Staff's Unopposed Motion) (June 6, 2017).

[24] Petitioners' Response to FPL's Motion to Strike Portions of Petitioners' Reply and Affidavit of Mark W. Crisp (June 12, 2017).

[25] *See* Oral Argument Transcript at 910-998 (June 20, 2017) (hereinafter Tr.).

[26] LBP-17-06, slip op. at 11-16. The Board rejected FPL's timeliness arguments, which are discussed further in Section IV.C of this Answer. *See* LBP-17-06, slip op. at 8-10.

[27] LBP-17-06, slip op. at 12 (quoting Petition at 11).

[28] LBP-17-06, slip op. at 15-16.

[29] LBP-17-06, slip op. at 11-12.

[30] LBP-17-06, slip op. at 12 n.11.

Petitioners' failure to satisfy section 2.309(f)(1)(vi), standing alone, mandates the rejection of their contention."[31]

In addition to finding the Contention inadmissible, the Board struck the Crisp Affidavit in its entirety.[32] According to the Board, the Crisp Affidavit was an improper attempt to backstop elemental deficiencies in the original petition to intervene.[33]

III. Standard of Review

The Commission "give[s] substantial deference to the Board on issues of contention admissibility and will affirm admissibility determinations absent a showing of an error of law or abuse of discretion."[34] An appeal that does not point to an error of law or an abuse of discretion by the Board, but simply restates the contention with additional support, will not meet the requirements for a valid appeal:

> Our regulations allow unsuccessful petitioners to appeal the denial of their intervention petitions. But appellants must make some argument that an appeal is justified. [Petitioner] appears to intend her letter to be an appeal, since she calls it an "appeal" in the caption to her letter. However, her letter points to no error of law or abuse of discretion on the part of the Board — in fact, she does not address the Board's decision at all. Pointing out errors in the Board's decision is a basic requirement for an appeal. [Petitioner's] letter simply reformulates the same contention she presented to the Board . . . .

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[31] *Id.* While South Miami's Appeal should be denied, if the Commission is inclined to rule otherwise, at most the Commission should remand the matter to the Board for consideration of the additional grounds that the Board acknowledged it did not consider, and on which FPL and the NRC Staff challenged the Contention's admissibility.

[32] LBP-17-06, slip op. at 6-7.

[33] LBP-17-06, slip op. at 6 (quoting *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 N.R.C. 251, 262 (2008)).

[34] *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 N.R.C. 219, 228 (2016); *see also Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 N.R.C. 377, 379-80 (2012); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 N.R.C. 301, 307 (2012).

> Moreover, "[t]he purpose of an appeal to the Commission is to point out errors made in the Board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board."[35]

Further, an appellant's request for Commission review of a Board decision cannot consist merely of conclusory statements alleging errors of law or abuses of discretion; rather, the appellant "bears the responsibility of clearly identifying the errors in the decision [on appeal] and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for [its] claims."[36] An appellant's "failure to illuminate the bases" for an exception to a board's decision is "sufficient grounds to reject it as a basis for appeal."[37] In particular, "a mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.'"[38]

In addition, pursuant to 10 C.F.R. § 2.341(b)(4), a petition for review is granted only at the discretion of the Commission, "giving due weight to the existence of a *substantial question* with respect to the following considerations: (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) a substantial and important question of law, policy, or discretion has been raised; (iv) the

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[35] *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 N.R.C. 499, 503-504 (2007) (internal citations omitted).

[36] *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041) CLI-94-6, 39 N.R.C. 285, 297 (1994), *aff'd, Advanced Med. Sys., Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 639 n.25 (2004) (internal citation omitted).

[37] *Advanced Medical Systems*, CLI-94-6, 39 N.R.C. at 297.

[38] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 N.R.C. 192, 198 (1993) (citation omitted).

conduct of the proceeding involved a prejudicial procedural error; or (v) any other consideration which the Commission may deem to be in the public interest."[39]

IV. Argument

A. The Board Correctly Rejected Petitioners' Contention for Failing to Raise a Genuine Dispute on a Material Issue.

Petitioners' proposed Contention claimed that, in light of Westinghouse's bankruptcy, the Application no longer demonstrated FPL's financial qualifications to cover the construction and fuel cycle costs for Turkey Point Units 6 and 7, as required by 10 C.F.R. § 50.33(f)(1).[40] According to Petitioners, Westinghouse's bankruptcy eliminated FPL's ability to recover Turkey Point's construction costs under Florida's cost recovery statute, removing a major source of funding the construction.[41] Petitioners also claimed that Westinghouse's bankruptcy would reduce FPL's ability to secure external funding for construction costs.[42] As the Board concluded, the Petitioners' arguments did not raise a genuine dispute on a material issue of law or fact because the arguments did not challenge the Application and were speculative and insufficiently supported.[43] South Miami's Appeal does not substantively challenge this correct conclusion.

1. The Application Does Not Rely on Cost Recovery as a Source of Construction Funding.

As the Board correctly determined, Petitioners' claim that cost recovery is a "major source of funding the construction" of Turkey Point Units 6 and 7 was based on Petitioners'

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[39] 10 C.F.R. § 2.341(b)(4) (emphasis added).
[40] *See* Petition at 7-10.
[41] *See* Petition at 8-11.
[42] *See* Petition at 11-12.
[43] *See* LBP-17-06, slip op. at 12-16.

misunderstanding of the Application.[44] According to the Board, the Application "does not purport to rely on cost recovery to demonstrate that FPL is financially qualified to construct Units 6 and 7."[45] Instead, the Application states:

> 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.[46]

Based on this language, the Board concluded that "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."[47] 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)."[48] As a result, Petitioners' inaccurate claim that cost recovery is a "major source of funding the construction" of Turkey Point Units 6 and 7 does not form the basis for a valid contention.[49]

While the Board hinged its determination on the fact that Petitioners misinterpreted the Application, the Appeal does not challenge that conclusion. In fact, South Miami does not even address the content of FPL's Application, does not provide any substantive support or "cogent

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[44] *See* LBP-17-06, slip op. at 12-14.

[45] LBP-17-06, slip op. at 14.

[46] COL Application Part 1, Rev. 8 at 5 (emphasis added) (internal citations omitted).

[47] LBP-17-06, slip op. at 14. In the FSER, the NRC Staff found that FPL is financially qualified to fund the project from "internally generated operating cash flows, commercial paper and bank facilities, and long-term debt and equity capital markets." FSER at 1-39.

[48] LBP-17-06, slip op. at 14.

[49] LBP-17-06, slip op. at 14.

argument"[50] for its position, and does not cite to any error of law or abuse of discretion by the Board. Instead, South Miami simply asserts that cost recovery was "significant enough" to be included in the Application, so it "cannot be disregarded so cavalierly."[51]

This conclusory statement is not enough. South Miami "bears the responsibility of clearly identifying the errors in the decision below [on appeal]."[52] Indeed, board rulings are affirmed where the brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a board's decision.[53] South Miami's appeal falls far short of satisfying this fundamental standard.

Instead of addressing the Board's reasoning, South Miami continues to press the same factual allegations that it brought before the Board.[54] Indeed, the Appeal repeats three pages from the original Petition nearly verbatim.[55] For example, South Miami repeats its speculative and unsupported allegation that FPL will somehow be unable to recover costs through Florida's cost recovery statute because "the project is no longer feasible" given Westinghouse's bankruptcy.[56] South Miami even attempts to expand the scope of the proposed Contention on appeal, alleging new facts and arguments based on a FPL April 26, 2017 SEC filing that Petitioners had not previously raised below.[57] Of course, an appeal may only be based on facts

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[50] *Comanche Peak*, CLI-93-10, 37 N.R.C. at 198.

[51] South Miami Appeal at 9.

[52] *Advanced Medical Systems*, CLI-94-6, 39 N.R.C. at 297; *Millstone*, CLI-04-36, 60 N.R.C. at 639.

[53] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 N.R.C. 261, 265 (2000); *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 N.R.C. 111, 121 (2006) (noting that the Commission affords its Licensing Boards substantial deference on threshold issues, such as the admissibility of contentions).

[54] *See* South Miami Appeal at 10-13 (repeating the Petition at 8-11).

[55] *Id.*

[56] South Miami Appeal at 13.

[57] *See* South Miami Appeal at 6, 9.

and arguments raised below.[58] South Miami cannot rely on factual assertions that could have been, but were not, timely put before the Board.[59]

In any event, all of South Miami's claims are irrelevant to the Board's findings. As noted above, the Board determined that FPL did not rely on cost recovery as a source of construction funding to demonstrate FPL's financial qualifications in the Application.[60] South Miami has provided no reason for the Commission to reject this ruling, because South Miami failed to even address the Board's reasoning and does not allege an abuse of discretion or error of law.[61]

2. The Impact of Westinghouse's Bankruptcy Does Not Raise a Genuine Dispute on a Material Issue.

The Board also correctly determined that South Miami did not sufficiently support its claim that Westinghouse's bankruptcy would impair FPL's ability to obtain external funding to construct the plants. As the Board determined, South Miami did not provide "adequate facts to cast legitimate doubt on the reasonableness of FPL's financing plan or FPL's ability to implement that plan,"[62] particularly considering the requirement that FPL "merely 'have a reasonable financing plan in the light of relevant circumstances.'"[63] Indeed, under the Commission's regulations "an established organization (such as FPL) can demonstrate financial qualification by including in its COL application a brief statement identifying the sources of

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[58] *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 N.R.C. 239, 242 (1980).

[59] *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-648, 14 N.R.C. 34, 37-38 (1981).

[60] LBP-17-06, slip op. at 14.

[61] *Nuclear Mgmt Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 729 (2006).

[62] LBP-17-06, slip op. at 16.

[63] LBP-17-06, slip op. at 15 (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-78-01, 7 N.R.C. 1, 18 (1978)).

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.'"[64]

As the Board found, "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."[65] Accordingly, Petitioners' "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."[66]

South Miami's Appeal does not challenge or identify any errors in this ruling. In fact, rather than relying on Westinghouse's bankruptcy,[67] South Miami constructs new arguments from new evidence,[68] improperly attacks the Staff's FSER,[69] and attempts to shift the burden to FPL and the NRC Staff.[70] But none of these attacks address the Board's actual finding that the original Contention lacked sufficient factual or expert support to establish a link between Westinghouse's bankruptcy and FPL's statement of financial qualifications. For these reasons, the Commission should deny South Miami's Appeal.

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[64] LBP-17-06, slip op. at 13 (citing 10 C.F.R. Part 50, App. C).

[65] LBP-17-06, slip op. at 16.

[66] LBP-17-06, slip op. at 16.

[67] South Miami Appeal at 15 (claiming that Westinghouse's bankruptcy "brought to Petitioners' attention the mounting difficulties that FPL now faces").

[68] South Miami Appeal at 13-14. As noted above, South Miami is improperly attempting to expand the scope of the contention on appeal by introducing FPL's SEC filings. *See supra* Section IV.A.1.

[69] South Miami Appeal at 14-15. While the Board determined that the Contention challenged the adequacy of the Application (LBP-17-06, slip op. at 11 n.10), the Appeal instead improperly focuses on the NRC Staff's analysis in the FSER. *See* South Miami Appeal at 13-15 ("[T]he FSER is deficient in concluding that…."). In its Appeal, South Miami does not challenge the Board's determination that the Contention challenged the Application and not the FSER, waiving any arguments now by South Miami to the contrary. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 N.R.C. 370, 383 (2001) (noting that the Commission deems waived any arguments not clearly articulated in the petition for review).

[70] *See* South Miami Appeal at 14 (stating that the FSER makes a "speculative finding" as "no evidence has been submitted, and the FSER lacks sufficient information to demonstrate" reasonable assurance of funding).

B. The Board Correctly Struck Mr. Crisp's Affidavit from the Record.

South Miami also briefly argues that the Board was mistaken when it struck Mr. Crisp's Affidavit from the record.[71] South Miami's argument in support of this position, which consists of one sentence and a string cite of licensing board decisions, simply notes—without elaboration—that (1) the Crisp Affidavit was a "legitimate amplification of the new contention that has been timely filed" and (2) a "reply may be used to provide 'legitimate amplification' to a proffered contention."[72]

South Miami's argument is woefully inadequate—it raises no substantial question as to whether the Board reached a "necessary" legal conclusion that is "without governing precedent" or "contrary to established law."[73] It does not even address the Board's legal basis for striking the Affidavit. Nor does South Miami's argument in any way challenge the Board's application of the case law. "[A] mere recitation of an appellant's prior positions in a proceeding or a statement of his or her general disagreement with a decision's result 'is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below.'"[74]

While the above deficiencies are sufficient to dismiss South Miami's argument, Commission review would not be warranted even if South Miami specifically contested the Board's reasoning. The Board correctly concluded that the information included within the Crisp Affidavit "improperly 'attempt[s] to backstop elemental deficiencies in [Petitioners'] original petition to intervene.'"[75] The Board also recognized that (1) the Crisp Affidavit was not filed with Petitioners' original Contention; and (2) Petitioners did not explain why the Affidavit

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[71] South Miami Appeal at 15-16.
[72] *Id* (citations omitted).
[73] *See* 10 C.F.R. § 2.341(b)(4)(ii).
[74] *Comanche Peak*, CLI-93-10, 37 N.R.C. at 198 (citation omitted).
[75] LBP-17-06, slip op. at 6-7 (citation omitted).

could not have been submitted at that time.[76] Therefore, as the Board further explained, '"[w]hile 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 filling contentions."'[77]

Because South Miami failed to raise any substantive argument contesting the Board's conclusions, and because the Board correctly applied the law, the Commission should deny South Miami's appeal of the Board's decision to strike the Crisp Affidavit.

C. The Board Was Incorrect in Failing to Reject Petitioners' Contention as Untimely.

Although the Board denied the Contention solely on the grounds that Petitioners failed demonstrate a genuine dispute with the Application, FPL is permitted to defend that decision on any ground advanced below.[78] Therefore, as an additional basis for rejecting the Appeal, FPL reiterates its position before the Board that the proposed Contention should have been dismissed because it was untimely.[79]

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[76] *Id.*

[77] LBP-17-06, slip op. at 7 (quoting *Palisades*, CLI-06-17, 63 N.R.C. at 732).

[78] *See Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 N.R.C. 1591, 1597 n.3 (1984); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 N.R.C. 135, 141 (1986), *rev'd in part on other grounds*, CLI-87-12, 26 N.R.C. 383 (1987); *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 and 2), ALAB-573, 10 N.R.C. 775, 789 (1979), *vacated in part on other grounds*, CLI-80-8, 11 N.R.C. 433 (1980); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-691, 16 N.R.C. 897, 908 n.8 (1982) (*citing Black Fox*, ALAB-573, 10 N.R.C. at 789).

[79] *See* FPL Answer at 13-17. The discussion in this brief addresses one of the three timeliness arguments that FPL raised in its Answer. The other two arguments were summarily rejected by the Board without discussion. *See* LBP-17-06, slip op. at 10 n.9. By doing so, the Board rejected FPL's argument that to the extent the Petition was challenging the type and scope of information in FPL's Application, it was untimely. *See* FPL Answer at 13. The Board also summarily rejected FPL's argument that the Petition was untimely because it relied on a January 2017 news article that was available months before the Petition was filed. *See* FPL Answer at 15-17. FPL reiterates those timeliness arguments now based on the discussion FPL provided in its Answer.

The Contention was filed on April 18, 2017, more than four months after the deadline established by the Board for contentions relating to the FSER. South Miami attempted to justify the late filing on the basis that Westinghouse's bankruptcy occurred on March 29, 2017. FPL, however, demonstrated that the alleged consequence of Westinghouse's bankruptcy—the inability to "guarantee" the construction of the new reactors—was irrelevant to the Contention, which challenged FPL's financial qualifications to build Turkey Point Units 6 and 7.[80] As FPL argued, Westinghouse's bankruptcy had no impact on whether FPL is able to construct the reactors (since FPL never had a construction guarantee even prior to Westinghouse's bankruptcy), and such a guarantee was irrelevant to whether FPL was financially qualified to build the plant.[81] Because it was not material to the Contention, FPL contended that Petitioners could not rely on Westinghouse's bankruptcy as good cause for filing late. The Board found otherwise, concluding that Westinghouse's bankruptcy was a significant, considerable, or important event sufficient to justify a late filing.[82]

New or amended contentions filed after the initial filing period may be admitted only with the leave of the presiding officer upon a showing that, among other things, "the information upon which the filing is based is *materially different* from the information previously available."[83] FPL continues to maintain that the phrase "materially different" must be viewed relative to the contention being proposed. In other words, "the 'materially different' standard in

[80] *See* FPL Answer at 14-15.
[81] *Id.*
[82] LBP-17-06, slip op. at 9-10.
[83] *See* 10 C.F.R. 2.309(c)(1)(ii) (emphasis added).

section 2.309(c)(1)(ii) requires Petitioners to show that the new information is material to the substance of their contention."[84]

In 2005, and as a matter of first impression, an Atomic Safety and Licensing Board decision interpreted the "materially different" standard in a manner consistent with FPL's position. After a thorough analysis that examined analogous NRC regulations, that board concluded that "new information … cannot be 'materially different' … if it does not raise a genuine dispute on a material issue of law or [f]act."[85]

The Board in this proceeding relied on a separate ASLB decision, which held that the materiality standard in evaluating timeliness should be viewed differently than the materiality standard used in the contention admissibility standards at 10 C.F.R. 2.309(f)(1).[86] According to the Board, '"[m]ateriality' in [the timeliness] 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.'"[87]

Respectfully, FPL submits that the Board's position is untenable. As FPL explained during oral argument, finding that the basis for a late filing need not be material to the substance of the contention would improperly broaden the scope of admissible late-filed contentions. [88] The words "important," "significant," and "considerable" are all terms that must be viewed in relative context to something else. Defining an event in such terms without a requirement that it

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[84] LBP-17-06, slip op. at 9 (citing FPL Answer at 16-17).

[85] *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 N.R.C. 134, 163 (2005).

[86] LBP-17-06, slip op. at 9-10. *See S. Nuclear Operating Co.*, (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-1, 71 N.R.C. 165, 183 n.9 (2010); *see also* NRC Staff Answer at 11-12; Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46562, 46566 (Aug. 3, 2012).

[87] LBP-17-06, slip op. at 9-10.

[88] Tr. at 943-945.

be "important" or "significant" *to the contention being pled* effectively asks adjudicators to make arbitrary determinations with respect to the significance of events, using whatever standard they deem appropriate. Moreover, it would allow parties, as in this case, to introduce new contentions merely because a board determined that a significant, considerable, or important event occurred, even if that event was not material to the actual contention.[89] Indeed, both the Board and the NRC Staff acknowledged in this case that '"Petitioners fail[ed] to demonstrate the existence of a nexus between Westinghouse's bankruptcy and the financial capability of FPL."'[90] Absent such a nexus, Petitioners' Contention should have been dismissed as untimely.

Accordingly, FPL respectfully requests that the Commission find Petitioners' Contention untimely, because the basis for its late filing (Westinghouse's bankruptcy) was not material to the proposed Contention.

[89] This interpretation could allow intervenors to circumvent timeliness requirements by introducing late-filed contentions with extremely tenuous connections to an event that was deemed "important" merely because that event was newsworthy.

[90] LBP-17-06, slip op. at 16 n.15 (quoting NRC Staff Answer at 17).

V. Conclusion

For the foregoing reasons, FPL requests that the Commission deny South Miami's Appeal.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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September 19, 2017

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September 19, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 Brief in Opposition to the City of South Miami's Appeal of LBP-17-06, has been served through the EFiling system on the participants in the above-captioned proceeding this 19th day of September, 2017.

/signed electronically by Anne R. Leidich/

Anne R. Leidich