UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
NEXTERA ENERGY SEABROOK, LLC	)	Docket No. 50-443-LA-2
(Seabrook Station Unit 1)	)	December 4, 2017

NEXTERA'S ANSWER TO C-10'S *DE FACTO* MOTION TO STRIKE

On October 31, 2017, pursuant to 10 C.F.R. § 2.311, NextEra Energy Seabrook, LLC ("NextEra") filed a Notice of Appeal of LBP-17-7, along with its supporting brief ("Appeal").[1] On November 22, 2017, C-10 Research and Education Foundation, Inc. ("C-10") filed a response to that Appeal ("Response").[2] In its Response, C-10 requests the Commission to exclude, on procedural grounds, certain of NextEra's arguments from consideration. Specifically, C-10 argues NextEra's "confirmatory testing" arguments[3] are "untimely and waived," based on its erroneous assertion that such arguments were first raised at oral argument and that C-10 did not have "any" opportunity to review the materials or respond.[4] Regardless of the vehicle used to introduce this distinct prayer for relief,[5] it is appropriately viewed as a Motion

1 NextEra's Notice of Appeal of LBP-17-7 (Oct. 31, 2017); Brief in Support of NextEra's Appeal of LBP-17-7 (Oct. 31, 2017) (ML17304B075).

2 C-10 Research and Education Foundation, Inc. Response to NextEra's Appeal of LBP-17-7: Whereby the Atomic Safety and Licensing Board Granted Standing to C-10 Research and Education Foundation to Intervene in Docket No. 50-443-LA-2 and Admitted Five of Its Contentions (Nov. 22, 2017) (ML17326A710).

3 *Id*. at 2 (quoting Appeal at 5: "the LAR proposes to conduct confirmatory testing to empirically verify the similarity between Seabrook's concrete and the data collected as part of the [large-scale test program or] LSTP.").

4 *Id*. at 2-3; *see also id.* at 1, 7, & 8 (making similar assertions).

5 *Cf., e.g.*, *Power Auth. of the State of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 513 (2001) (finding certain portions of a statement of position were appropriately

to Strike.[6] Accordingly, pursuant to 10 C.F.R. § 2.323(c), NextEra files this timely Answer. As explained below, the Motion should be rejected.

NextEra's Confirmatory Testing Arguments Are Neither Untimely Nor Waived

NextEra has maintained—since the beginning of this proceeding—that C-10's Petition[7] failed to even acknowledge, much less challenge, any programmatic features of NextEra's license amendment request ("LAR")[8] aimed at ensuring "representativeness."[9] For example, NextEra's first pleading noted C-10:

> attacks the LSTP because it allegedly "sets no definitive parameters" for "representativeness" to Seabrook's concrete. Likewise, Petitioner alleges the LSTP lacks a "clear definition of the level of representativeness sought." But Petitioner's allegation ignores the very section of the LAR that discusses this topic. MPR-4273 includes an entire section titled, "Representativeness Objectives of Test Programs." This section describes the key features of its programmatic design for representativeness, and the subsequent sections of the report expand upon those features with additional details.[10]

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viewed as a "*de facto* appeal"); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), ASLB Order (June 1, 2012) (unpublished) (slip op. at 5 n.21) (ML12153A173) (declining to treat as timely an intervenor's request, in an answer pleading, to exclude certain "impermissible" arguments from consideration—a request the applicant characterized as an "out-of-time *de facto* motion in limine").

6 *See, e.g.*, *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003) (explaining that a motion to strike is the "appropriate mechanism for seeking the removal of information from a pleading or other submission."). *Cf.* FED. R. CIV. P. 7(b) ("A request for a court order must be made by motion").

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

8 *See* SBK-L-16071 (Aug. 1, 2016) (ML16216A240) ("Original LAR"); SBK-L-16153, (Sept. 30, 2016) (ML16279A048) ("LAR Supplement"). The Original LAR and LAR Supplement, and all enclosures and attachments, are collectively the "LAR."

9 *See, e.g.*, NextEra's Answer Opposing C-10 Research & Education Foundation's Petition for Leave to Intervene and Hearing Request on NextEra Energy Seabrook, LLC's License Amendment Request 16-03 at 49 (May 5, 2017) (ML17125A289) ("NextEra Answer") (noting C-10 "has not disputed the LAR on the subject of 'representativeness'" and failed to "even acknowledge, much less challenge" the relevant LAR provisions on this topic).

10 NextEra Answer at 46 (citations omitted).

One of those "subsequent sections"[11] describes the proposed confirmatory testing—which is but one feature of the LAR's programmatic design for representativeness. In direct response to Board questions at oral argument, NextEra described this *particular* feature of the LAR in greater detail.[12] Therefore, contrary to C-10's assertion, NextEra's argument that C-10 failed to identify or dispute any feature—whatsoever—of the LAR's "programmatic design for representativeness" was raised in its answer and not "first raised" at oral argument.[13]

Likewise, C-10 offers nothing to support its conclusory assertion that NextEra's arguments are somehow "untimely and waived." C-10 cites no authority for the proposition that an applicant's answer highlighting a gaping deficiency in an intervenor's petition must further supply a comprehensive listing of each missing sub-argument; and cites no authority suggesting that details of previously-made arguments discussed at oral argument—in direct response to Board questions—are somehow banned from arguments on appeal. Nor could it, as no such authority exists.

Moreover, C-10's claims that it "did not have any opportunity to review the materials or respond," and that "serious due process concerns" are implicated here, ring hollow.[14] NextEra's "materials" have been publicly-available since August 2016;[15] C-10's opportunity to "respond" was in their original Petition, yet they failed to address NextEra's materials; and this is precisely

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11 *See* Original LAR, Encl. 3 § 6.1.5; *see also id*. at vii (summarizing the recommendations in § 6.1.5).

12 *See* Transcript of Oral Argument at 103, 108, 115, 123 (June 29, 2017).

13 *Compare* NextEra Answer at 46 (filed May 5, 2017) *with* Response at 1 (alleging the issue was first raised June 29, 2017). Also, contrary to C-10's assertion, NextEra never stated in its Appeal that it raised the representativeness issue "for the first time" at oral argument. *See* Response at 2 (citing Appeal at 19). Rather, NextEra simply stated that it had discussed confirmatory testing at oral argument in direct response to Board questions. *See* Appeal at 19.

14 Response at 2, 3.

15 MPR-4273 was included as an attachment to the Original LAR. Indeed, C-10 even selectively quoted portions of § 6.1.5 in its original Petition (but ignored the "confirmatory testing" provisions on the very same page). *See* Petition at 9.

the fundamental deficiency NextEra flagged in its first pleading.[16] Ultimately, C-10's arguments only further support NextEra's position that C-10 has failed to meet its burden of submitting an admissible contention.

The Motion Is Untimely And Was Filed Without Prior Consultation

C-10's Motion also should be rejected on procedural grounds. By any measure, considering any possible triggering "occurrence or circumstance," C-10's Motion is untimely.[17] Additionally, 10 C.F.R. § 2.323(b) states that any motion "*must* be rejected" if it fails to include a consultation certification. C-10's Response includes no such certification; nor did C-10 contact NextEra for such purposes. Accordingly, the Motion to Strike should be rejected for these additional reasons.[18]

Conclusion

The Commission should reject C-10's *de facto* Motion to Strike because it is untimely, procedurally deficient, and fails to identify any valid basis for excluding NextEra's confirmatory testing arguments.

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16 C-10 admits it "responds to the [confirmatory testing] argument here for the first time." Response at 2. However it is far too late to cure this fatal defect, which was raised long ago by NextEra. Even assuming, *arguendo*, its response is somehow timely, C-10's primary complaint—that confirmatory testing is merely a "recommendation," rather than a commitment—has been mooted by NextEra's response to the NRC's first set of RAIs, in which it committed to perform the recommended testing. *See* Letter from E. McCartney, NextEra, to NRC Document Control Desk, "Non-Proprietary Enclosure 1 to SBK-L-17156" (Oct. 17, 2017) (ML17291B136).

17 It was not filed within 10 days of the prehearing conference (June 29, 2017), service of the transcript from the prehearing conference (July 17, 2017), or service of the Appeal (Oct. 31, 2017), as required by Commission regulations at 10 C.F.R. § 2.323(a)(2).

18 The requirement to consult other parties prior to filing a motion is a *substantive obligation*, not a matter of pleading format. Accordingly, even *pro se* petitioners are required to comply. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-15-25, 82 NRC 389, 397 n.53 (2015) ("To be sure, although we afford some leniency to *pro se* petitioners . . . we expect parties to our proceedings to fulfill the obligations imposed by our rules.")

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 4th day of December 2017

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, the foregoing "NextEra's Answer to C-10's *De Facto* Motion to Strike" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Ryan K. Lighty

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