UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket Nos. 50-250-SLR and 50-251-SLR
FLORIDA POWER & LIGHT COMPANY	ASLBP No. 18-957-01-SLR-BD01
(Turkey Point Nuclear Generating Units 3 and 4)	September 20, 2018

APPLICANT'S MOTION TO STRIKE PORTIONS OF THE SEPTEMBER 10, 2018 REPLY FILED BY FRIENDS OF THE EARTH, NATURAL RESOURCES DEFENSE COUNCIL, AND MIAMI WATERKEEPER OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE A SURREPLY

I. INTRODUCTION

In accordance with 10 C.F.R. §§ 2.319 and 2.323(a), Florida Power & Light Company ("FPL") hereby timely files this motion to strike portions of the "Reply in Support of Request for Hearing and Petition to Intervene" ("Reply") submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper ("Joint Petitioners") on September 10, 2018,[1] because those portions impermissibly introduce new arguments into the proceeding without satisfying the late-filing factors in 10 C.F.R. § 2.309(c).[2]

The Environmental Report ("ER")[3] submitted with FPL's Subsequent License Renewal Application ("SLRA") affirmatively asserted that the NRC's license renewal environmental framework ("LREF") is applicable to this proceeding. The LREF is the process codified in

[1] Reply in Support of Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Sept. 10, 2018) (ML18253A280).

[2] The impermissible new arguments are found in the Reply at pages 4 (first full paragraph); 5 (first two full paragraphs); 11-13 (all of Part II); and 53 (first full paragraph).

[3] Applicant's Environmental Report, Subsequent Operating License Renewal Stage, Turkey Point Nuclear Plant Units 3 and 4 (Jan. 2018) (ML18037A836). *See also* L-2018-086, Letter from W. Maher, FPL, to NRC Document Control Desk, Appendix E Environmental Report Supplemental Information (Apr. 10, 2018) (ML18102A521).

10 C.F.R. § 51.53(c)(3) and Table B-1 of Appendix B to Subpart A of 10 C.F.R. Part 51 ("Table B-1"), which pairs the generic resolution of "Category 1" issues in the NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," NUREG-1437 (the "GEIS"), with a plant-specific supplemental EIS ("SEIS") discussing "Category 2" environmental issues, to satisfy the requirements of the National Environmental Policy Act ("NEPA"). Joint Petitioners' Hearing Request and Petition to Intervene ("Petition")[4] did not propose a contention challenging this assertion in the ER. In fact, the Petition explains that the LREF is applicable here and repeatedly cites 10 C.F.R. § 51.53(c)(3)—the cardinal LREF regulation—as a *legal basis for its proposed contentions*. Now, for the first time, the Reply argues § 51.53(c)(3) is inapplicable to the instant proceeding.

This sudden reversal is both curious and perplexing. Moreover, it is far beyond the permissible scope of a reply. Rather, it effectively amends the five proposed contentions proffered in the Petition and, in fact, presents an entirely new *contention* to be adjudicated in this proceeding. Accordingly, because Joint Petitioners' new arguments fail to satisfy the late-filing factors in 10 C.F.R. § 2.309(c), they must be stricken from the Reply.

Alternatively, if the Board declines to strike these sections of the Reply, then FPL respectfully requests leave to file a surreply (attached hereto) addressing the new arguments contained therein. As demonstrated below, necessity and fairness weigh strongly in favor of granting this request, because FPL has not had a fair and full opportunity to respond to Joint Petitioners' new arguments. Furthermore, permitting FPL to file the surreply will help ensure a

[4] Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Aug. 1, 2018) (ML18213A418).

complete record on what Joint Petitioners are now attempting to make a threshold legal issue in this proceeding.

II. PROCEDURAL HISTORY

A. The ER Asserted That the LREF Applies to This Proceeding

FPL filed its SLRA with the NRC on January 30, 2018.[5] The ER, submitted as Appendix E to the SLRA, explains that the LREF applies to the SLRA. In fact, 10 C.F.R. § 51.53(c)(3) is mentioned on 131 separate occasions throughout the ER; the GEIS is mentioned 171 times; Table B-1 is mentioned 103 times; and the terms "Category 1" and "Category 2" appear 71 times and 33 times, respectively. Notably, the ER is replete with FPL's assertion and conclusion that 10 C.F.R. § 51.53(c)(3) applies to this proceeding, and that the ER "is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues" pursuant to 10 C.F.R. § 51.53(c)(3)(i).[6]

B. Joint Petitioners Did Not Proffer a Contention Challenging the ER's Assertion That the LREF Applies to This Proceeding

On August 1, 2018, Joint Petitioners filed the Petition seeking a hearing and proposing five contentions. The Petition's discussion of the regulatory requirements applicable to this proceeding explains as follows:

> The scope of the environmental review is defined by 10 C.F.R. Part 51, the NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," NUREG-1437 (May 1996) (the "GEIS"), and the initial hearing notice and order. Some environmental issues that might otherwise be germane in a license renewal proceeding have been resolved generically for all plants and are normally, therefore, "beyond the scope of a license

[5] *See* Letter from M. Nazar, FPL, to NRC, Turkey Point Units 3 and 4 Subsequent License Renewal Application (Jan. 30, 2018) (ML18037A824).

[6] ER at 4-2.

renewal hearing." These "Category 1" issues are classified in 10 C.F.R. Part 51, Subpart A, Appendix B.[7]

The Petition cites NRC regulations at 10 C.F.R. § 51.53(c)(3)(i) for the proposition that Category 1 issues are not subject to challenge in adjudicatory proceedings.[8] However, Joint Petitioners then (erroneously)[9] argue that § 51.53(c)(3)(iv) provides an exception to this general rule allowing petitioners to challenge Category 1 issues in adjudicatory proceedings by merely asserting the existence of "new and significant information" related to those issues.[10] Nevertheless, the Petition underscores the overarching objective of the LREF—that "[w]hen the GEIS and SEIS are combined [or here, the GEIS and the Environmental Report], they cover all issues that NEPA requires be addressed in an EIS for a nuclear power plant license renewal proceeding."[11] In other words, the Petition intrinsically and explicitly recognizes the applicability of the LREF—including 10 C.F.R. § 51.53(c)(3)—to the instant proceeding.

Joint Petitioners' five proposed contentions then argue that certain portions of the ER fail to satisfy various requirements in §§ 51.53(c)(3)(ii)-(iv):

- Proposed Contention 1-E alleges that Section 7.3 of the ER, "Alternatives for Reducing Adverse Impacts," fails to comply with §§ 51.45(c) and 51.53(c)(3)(iii) because it purportedly does not consider a cooling tower alternative. Joint Petitioners remark in a footnote that the applicability of § 51.53(c)(3) to this subsequent license renewal proceeding is "unclear" because the regulation states that it applies (though, not exclusively) to applicants for an "initial renewed license."[12] Nevertheless, Joint Petitioners' arguments related to Proposed

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7 Petition at 14 (internal citations omitted).

8 *Id*. at 14 n.65.

9 *See Mass. v. United States*, 522 F.3d 115, 120 (1st Cir. 2008); *see also* NRC Staff's Corrected Response to Petitions to Intervene and Requests for Hearing Filed by (1) Friends of the Earth, Natural Resources Defense Council and Miami Waterkeeper, and (2) Southern Alliance for Clean Energy at 55-56 (Aug. 27, 2018) (ML18237A458) ("Staff Answer"); Applicant's Answer Opposing Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper at 6, 23 n.95 (Aug. 27, 2018) (ML18239A445) ("FPL Answer").

10 Petition at 14-15.

11 *Id.* at 41 (quoting *Mass*., 522 F.3d at 120) (brackets in original).

12 Petition at 16 n.71.

Contention 1-E proceed on the working assumption that 10 C.F.R. § 51.53(c)(3) in fact applies—and that Section 7.3 of the ER fails to comply with its requirements.

- Proposed Contention 2-E alleges that Section 4.12 of the ER, "Cumulative Impacts," fails to comply with § 51.53(c)(3)(ii) because it does not consider cumulative impacts of increases in sea level and air temperature caused by climate change.

- Proposed Contention 3-E alleges that Chapters 3, "Affected Environment," and 5, "Assessment of New and Significant Information," of the ER fail to comply with § 51.53(c)(3)(iv)—which requires license renewal environmental reports to describe new and significant information regarding environmental impacts—because these sections purportedly do not analyze the effect of sea level rise caused by climate change.

- Proposed Contention 4-E alleges that Chapters 4, "Environmental Consequences of the Proposed Action and Mitigating Actions," 6, "Summary of License Renewal Impacts and Mitigating Actions," and 8, "Comparison of the Environmental Impact of Subsequent License Renewal with the Alternatives," of the ER fail to comply with §§ 51.53(c)(3)(ii) and (iii) because Chapter 3, "Affected Environment," of the ER fails to describe the "reasonably foreseeable" future climate-change affected environment.

- Proposed Contention 5-E alleges that the ER (without pointing to a particular chapter or section) fails to comply with §§ 51.53(c)(3)(ii)(E) and (O) because it fails to consider certain impacts on certain species and habitats.

In sum, the Petition fully recognizes the applicability of the LREF to the instant proceeding. Joint Petitioners explicitly cite 10 C.F.R. § 51.53(c)(3) as a basis for all five of their proposed contentions, and seek a hearing to challenge the ER's compliance with that regulation.

C. The FPL and Staff Answers Agree with the ER and the Petition That the LREF Applies to This Proceeding

On August 27, 2018, FPL and the U.S. Nuclear Regulatory Commission ("NRC") Staff filed Answers to the Petition.[13] Both of those Answers likewise acknowledged that the LREF, including 10 C.F.R. § 51.53(c)(3), applies to the instant proceeding.[14] Both Answers also

[13] *See generally* Staff Answer; FPL Answer.

[14] *See, e.g.*, Staff Answer at 18-28; FPL Answer at 3-4.

explain—as did the Petition[15]—that Category 1 issues are not subject to challenge in license renewal adjudicatory proceedings such as this.[16] The Staff's Answer further included a background section acknowledging the applicability of § 51.53(c)(3) to applications for an "initial renewed license," and explaining—consistent with the Petition's working assumption—that § 51.53(c)(3) also applies to subsequent license renewal applications. The Staff explained that "the Commission has determined that the *existing* license renewal . . . environmental regulatory framework *applies to subsequent license renewal*."[17] Ultimately, neither Answer contradicted the Petition's working assumption that the LREF applies here.

D. The Reply Asserts, for the First Time, That 10 C.F.R. § 51.53(c)(3) *Does Not* Apply to This Proceeding

Joint Petitioners filed their Reply on September 10, 2018. In stark contrast to their original arguments, the Reply affirmatively argues, for the first time, that § 51.53(c)(3) *does not apply* to this proceeding.[18] Specifically, their original position and working assumption was that § 51.53(c)(3) applied here and provided a legal basis for their contentions; and their backup argument was that other regulations supported their arguments "even if" the Board found the LREF inapplicable here due to the potentially "unclear" prefatory language of the regulation (indicating it applied to "initial" license renewal applications).[19] Now, in their Reply, Joint Petitioners assert that the prefatory language of the regulation has become—apparently sometime between August 1, 2018, when the Petition was filed, and September 10, 2018, when they filed their Reply—"unambiguous," and that § 51.53(c)(3) does not apply to this proceeding.

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15 *See* Petition at 14.

16 *See, e.g.*, Staff Answer at 26-28; FPL Answer at 23.

17 Staff Answer at 20 n.76 (emphasis added); *see also id*. at 20-23.

18 *See* Reply at 5, 11-12, 14-16.

19 Petition at 16 n.71.

III. THE BOARD SHOULD STRIKE PORTIONS OF JOINT PETITIONERS' REPLY

Joint Petitioners' new argument that 10 C.F.R. § 51.53(c)(3) does not apply to this proceeding amounts to an untimely new proposed contention. Joint Petitioners had an ample opportunity to proffer a contention in their Petition challenging any one of the hundreds of assertions in the ER that 10 C.F.R. § 51.53(c)(3)—and the entire LREF—applies to this proceeding. They did not do so. This new argument also amounts to an untimely attempt to amend Joint Petitioners' original proposed contentions. Because Joint Petitioners have neither requested nor been granted leave to file new or amended contentions, and cannot satisfy the late-filing requirements in 10 C.F.R. § 2.309(c), these new arguments must be stricken from the Reply.

A. Joint Petitioners' New Arguments Exceed the Proper Scope of a Reply

1. Legal Standards Governing the Scope of a Reply

"The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address."[20] Rather, NRC contention admissibility and timeliness requirements "demand a level of discipline and preparedness on the part of petitioners, who must . . . set forth their claims . . . at the outset" of the proceeding.[21] As the Commission has explained, "[t]here simply would be 'no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements' and add new bases or new issues that 'simply did not occur to [them] at the outset.'"[22]

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[20] *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

[21] *La. Energy Servs., LP* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (internal quotation marks omitted), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004).

[22] *LES*, CLI-04-25, 60 NRC at 225.

The Commission demands adherence to this requirement to "avoid unnecessary delays and increase the efficiency of NRC adjudication,"[23] because answering parties are "entitled to be told at the outset, *with clarity and precision*, what arguments are being advanced."[24] Thus, as the Commission has explained, the permissible scope of a reply includes only information that: (1) "legitimately amplifie[s]" arguments presented in the original petition,[25] or (2) "focus[es] narrowly on the legal or factual arguments first . . . raised in the answers [thereto]."[26]

2. Joint Petitioners' Attempt to Challenge the LREF's Applicability to This Proceeding Constitutes a New and Untimely Legal Contention Not Pleaded In the Petition

The ER asserts that the LREF, including 10 C.F.R. § 51.53(c)(3), applies to the SLRA. A few rudimentary text searches of the ER reveal more than 500 separate references to the LREF and its various regulatory provisions and concepts. Indeed, FPL explains—unequivocally—that its ER "is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues" pursuant to 10 C.F.R. § 51.53(c)(3)(i).[27] Accordingly, if Joint Petitioners wanted to challenge the underlying applicability of the LREF or 10 C.F.R. § 51.53(c) to this proceeding, they had an "ironclad obligation"[28] to do so, and a codified burden to identify the "specific portions of the application (including the applicant's environmental report

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23 *LES*, CLI-04-35, 60 NRC at 622-23.

24 *Kan. Gas & Elec. Co. & Kan. City Power & Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975) (emphasis added).

25 *LES*, CLI-04-25, 60 NRC at 224-25.

26 *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

27 *See, e.g.*, ER at 4-2.

28 *Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009) (referring to intervenors' "ironclad obligation to . . . diligently search publicly available NRC or Applicant documents for information relevant to their [c]ontention" (internal quotation marks and citation omitted)).

. . .)" that they dispute,[29] on the basis of their own regulatory analysis at the "outset" of this proceeding. They failed to do so. Undeniably, the Petition proffered *no contention* challenging the fundamental applicability of 10 C.F.R. § 51.53(c)(3), the GEIS, or any other aspect of the LREF to this proceeding; and proffered *no contention* challenging the hundreds of statements throughout the ER affirmatively asserting the applicability of the LREF here.

NRC regulations mandate that Joint Petitioners' untimely attempt to raise this new argument at the eleventh hour "will not be entertained" in this proceeding absent an affirmative determination by the Board that the late-filing requirements in 10 C.F.R. § 2.309(c) have been satisfied. Joint Petitioners do not satisfy, or even acknowledge, these requirements, further underscoring the need to strike their new arguments.

3. Joint Petitioners' New Arguments Are Not a "Legitimate Amplification" of Arguments Advanced in the Petition

All five of Joint Petitioners' proposed contentions are framed as challenges to FPL's compliance with the requirements in 10 C.F.R. § 51.53(c)(3).[30] Joint Petitioners' legal theory was that § 51.53(c)(3) *does* apply to this proceeding and purportedly has not been satisfied. However, the Reply turns this theory on its head. Joint Petitioners now argue, for the first time, that § 51.53(c)(3) *does not* apply to this proceeding.[31] Such a complete reversal goes far beyond a "legitimate amplification" of Joint Petitioners' original arguments—it is a wholesale replacement of them.

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[29] 10 C.F.R. § 2.309(f)(1)(vi).

[30] Petition at 16 (citing § 51.53(c)(3)(iii) as a legal basis for Contention 1-E), 30-31 (citing § 51.53(c)(3)(ii) as the sole legal basis for Contention 2-E), 39 (citing § 51.53(c)(3)(iv) as the sole legal basis for Contention 3-E), 47 n.200 (citing § 51.53(c)(3)(iii) as a legal basis for Contention 4-E), and 59 n.259 (citing §§ 51.53(c)(3)(ii)(E) & (O) as the sole legal bases for Contention 5-E).

[31] *See* Reply at 5, 11-12, 14-16.

Furthermore, there is no evidence in the Petition that Joint Petitioners intended to *affirmatively* argue that 10 C.F.R. § 51.53(c)(3) is inapplicable to this proceeding. To be sure, (as to Contention 1-E *only*) Joint Petitioners remark only in a footnote that the applicability of § 51.53(c)(3) to the instant proceeding is somewhat "unclear."[32] Nevertheless, all five contentions are thereafter pled and premised on the working assumption that the regulation in fact applies—and that certain portions of the ER fail to comply with its corresponding requirements. Joint Petitioners' hard-turn away from their original legal theory does not simply "amplify" their original arguments. It presents a new, revised, and untimely theory of the contentions altogether.

To the extent Joint Petitioners' cursory statement in that footnote—*i.e.*, that, in the event their primary legal theory is incorrect, they "hereby rely" on §§ 51.53(c)(1)-(2)—can be interpreted as an alternative theory of the contention, they fail entirely to marshal any substantive arguments explaining the purported equivalence between § 51.53(c)(3) and §§ 51.53(c)(1)-(2). They do not provide the requisite bases and specificity in support of such an alternative legal theory of their case as otherwise required by 10 C.F.R. §§ 2.309(f)(1)(i)-(ii). A "generalized reference" does not satisfy the NRC's contention rules requiring "reasonably specific factual and legal" allegations at the outset.[33] Furthermore, 10 C.F.R. § 2.309(f)(1)(vi) requires the petition to "include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes *and* the supporting reasons for

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[32] Petition at 16 n.71.

[33] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 381 (2002) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001)).

each dispute."[34] Ultimately, Joint Petitioners' new arguments in Reply can hardly be viewed as "amplifying" arguments they never meaningfully advanced in the Petition itself.

4. Joint Petitioners' New Arguments Rebut Their Original Legal Theory, Which Was Not "First Raised" in Staff's Answer

Joint Petitioners attempt to justify the introduction of their new arguments by couching them as a rebuttal to the NRC Staff's Answer to their Petition.[35] Staff's Answer merely confirms—consistent with Joint Petitioner's original legal theory—that the LREF, including 10 C.F.R. § 51.53(c)(3), applies to the instant proceeding.[36] In their Reply, Joint Petitioners inexplicably deride this position as a "curious argument" that purportedly is "entirely unsupported."[37]

Joint Petitioners take particular exception to Staff's acknowledgement that the ER is not required to contain analyses of the environmental impacts of Category 1 issues, pursuant to 10 C.F.R. § 51.53(c)(3)(i).[38] Nevertheless, *the Petition itself* explains this exact proposition and cites this exact regulation.[39] In fact, all five of Joint Petitioners' proposed contentions argue that certain portions of the ER fail to comply with various subsections of 10 C.F.R. § 51.53(c)(3). Indeed, compliance with that regulation is explicitly what Joint Petitioners sought to challenge in a hearing. Thus, if Joint Petitioners' new arguments rebut anything, it is their own original legal theory—which clearly was not "first raised"[40] by Staff in its Answer.

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34 Emphasis added.

35 *See generally* Petition at 4-5.

36 *See* Staff Answer at 20-23.

37 Reply at 4.

38 *Id*.

39 Petition at 14.

40 *Cf. Palisades*, CLI-06-17, 63 NRC at 732.

Because Joint Petitioners' new arguments and theories go beyond the permissible scope of a reply, the Board must apply the standards in 10 C.F.R. § 2.309(c) to determine whether good cause exists for Joint Petitioners' late filing.[41]

B. Joint Petitioners Do Not Satisfy, or Attempt to Address, the Late-Filing Requirements of 10 C.F.R. § 2.309(c)

1. Legal Standards Governing Late-Filed Contentions

In a reply pleading, arguments and theories beyond this narrow focus "essentially constitute[] untimely attempts to amend [the] original petition[]," or amount to "entirely new *contentions*."[42] Accordingly, petitioners wishing to advance such new arguments or theories must seek leave from the presiding officer and address the late-filing factors in 10 C.F.R. § 2.309(c)(1).[43] This regulation explicitly states that such arguments "*will* not be entertained" absent a determination by the presiding officer that:

> (i) The information upon which the filing is based was not previously available;
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> (ii) The information upon which the filing is based is materially different from information previously available; and
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> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.[44]

Otherwise, the appropriate remedy is to strike new arguments and legal theories offered in a reply pleading.[45]

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41 *See Fermi*, CLI-15-18, 82 NRC at 147.

42 *LES*, CLI-04-25, 60 NRC at 224 (emphasis in original).

43 *Id*.

44 10 C.F.R. § 2.309(c)(1); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 147 (2015) ("For any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier.").

45 *See, e.g.*, *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198-199 (2006), *rev'd on other grounds*, CLI-07-16, 65 NRC 371 (2007); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 404, 429 (2008), *rev'd on other grounds*, CLI-09-3, 69 NRC 68 (2009).

2. Joint Petitioners Have Not Established Good Cause for Their Late-Filed Legal Contention Challenging the Applicability of the LREF to FPL's SLRA or Their Late-Filed Amendments to Their Five Existing Contentions

Joint Petitioners make no attempt to seek leave from the Board to file new or amended contentions, nor do they claim to satisfy the late-filing requirements. Nor could they. Contrary to 10 C.F.R. § 2.309(c)(1), nothing prevented Joint Petitioners from raising these new arguments in the original Petition.[46] The ER—which describes the LREF in detail and asserts the applicability of the LREF to this proceeding—first became publicly available on February 14, 2018.[47] And the Hearing Opportunity Notice for this proceeding, published on May 2, 2018, explicitly noted the availability of the SLRA, including the ER, approximately three months before Joint Petitioners filed their Petition on August 1, 2018.[48] Accordingly, it would be impossible for Joint Petitioners to satisfy any of the late-filing requirements in Section 2.309(c)(1), because its new argument is not based on any previously-unavailable and materially-different information (*see* § 2.309(c)(1)(i)-(ii)), and therefore it is not timely submitted based on such new information (*see* § 2.309(c)(1)(iii)).

IV. IF THE BOARD DOES NOT STRIKE JOINT PETITIONERS' NEW ARGUMENTS, THEN IT SHOULD GRANT FPL LEAVE TO FILE A SURREPLY

If the Board declines to strike Joint Petitioners' new and untimely arguments from their Reply, then necessity and fairness require an opportunity for FPL to respond to them. Accordingly, FPL requests leave to file a surreply pursuant to 10 C.F.R. § 2.323.

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[46] 10 C.F.R. § 2.309(c)(1); *Fermi*, CLI-15-18, 82 NRC at 147 ("For any new arguments or new support for a contention, a petitioner must, among other things, explain why it could not have raised the argument or introduced the factual support earlier.").

[47] The NRC's Web-based ADAMS shows that the "Date Added" property of the ER (ML18037A836) is "02/14/2018 08:36 AM EST."

[48] *See* Florida Power & Light Company; Turkey Point Nuclear Generating, Unit Nos. 3 and 4; License Renewal Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene, 83 Fed. Reg. 19,304 (May 2, 2018).

The Commission has explained that "extra filings," such as surreplies that are not explicitly permitted by NRC regulations, may be considered on a case-by-case basis and are permissible "where necessity or fairness dictates."[49] Here, necessity and fairness weigh strongly in favor of providing FPL an opportunity to respond to the new arguments in Joint Petitioners' Reply because: (1) FPL has not had a fair opportunity to respond to Joint Petitioners' new arguments, and (2) such a response is necessary for a complete record.

The Commission's Statement of Policy on the Conduct of Adjudicatory Proceedings emphasizes the importance of ensuring a fair and thorough hearing process and establishing a full, fair, and adequate record.[50] Here, FPL has not had a fair opportunity to respond to Joint Petitioners' assertion that the entire LREF, including 10 C.F.R. § 51.53(c)(3), does not apply to this proceeding. It is not enough that a party be placed on general notice of possible arguments.[51] The regulations afford applicants the absolute right to be presented with contentions that are "set forth with particularity"[52] and with "specific" statements of law or fact for which a petitioner seeks a hearing.[53] NRC regulations further provide applicants the absolute right to respond thereto.[54] Here, where the Reply presents a new contention—and amends Joint Petitioners' five original contentions—to which FPL has not had a full and fair opportunity to

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49 *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008).

50 Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 18-19 (1998); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-81-08, 13 NRC 452, 453 (1981).

51 *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006) (explaining that Notice Pleading is not sufficient in NRC adjudicatory proceedings).

52 10 C.F.R. § 2.309(f)(1).

53 10 C.F.R. § 2.309(f)(1)(i). *See also Wolf Creek*, ALAB-279, 1 NRC at 557 ("The applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced").

54 10 C.F.R. § 2.309(i)(1). *See also Fermi*, CLI-15-18, 82 NRC at 146 (citing *Wolf Creek* and explaining litigants should not be "taken by surprise" and should be "accorded an appropriate opportunity to respond to new arguments").

respond, fairness demands the provision of such an opportunity, and necessity commands the establishment of a full record.

Accordingly, if the Board declines to strike Joint Petitioners' new and untimely arguments, FPL respectfully requests that the Board grant FPL leave to file a surreply, and accept for the Board's consideration its proposed Surreply, attached hereto.

V. CONCLUSION

Joint Petitioners' new arguments in their Reply neither legitimately amplify arguments presented in the original petition, nor focus narrowly on legal arguments first raised in an answer; instead, they raise new challenges to assertions in SLRA documents that were available long before the hearing request deadline. Because Joint Petitioners have neither requested nor obtained leave from the Board to file new or amended contentions, and cannot satisfy the late-filing requirements, the appropriate remedy is to strike the untimely arguments. For these reasons, FPL requests that the following portions of the Reply be stricken: Reply at 4 (first full paragraph); 5 (first two full paragraphs); 11-13 (all of Part II); and 53 (first full paragraph). In the alternative, FPL requests leave to file the attached Surreply.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)
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Dated in Washington, D.C.
this 20th day of September 2018

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of	)	Docket Nos. 50-250-SLR and 50-251-SLR
FLORIDA POWER & LIGHT COMPANY	)	ASLBP No. 18-957-01-SLR-BD01
(Turkey Point Nuclear Generating Units 3 and 4)	)	September 20, 2018

CERTIFICATE OF CONSULTATION

Counsel for Florida Power & Light Company ("FPL") certifies, under 10 C.F.R. § 2.323(b), that the movant has made a sincere effort to contact Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (collectively, "Joint Petitioners"), and the U.S. Nuclear Regulatory Commission ("NRC") Staff to resolve the issues raised in this Motion. Counsel for Joint Petitioners represented that Joint Petitioners oppose FPL's Motion to Strike portions of their Reply, but that they do not oppose FPL's alternative Motion for Leave to File a Surreply. Counsel for the NRC Staff indicated that the Staff does not oppose either FPL's Motion to Strike or its Motion for Leave to File a Surreply. Staff counsel further stated that if the Board grants FPL leave to file its Surreply, and subsequently allows surrebuttal to that Surreply, then the Staff requests a brief opportunity to respond.

Respectfully submitted,

Signed (electronically) by Ryan K. Lighty

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Counsel for Florida Power & Light Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-250-SLR and 50-251-SLR
FLORIDA POWER & LIGHT COMPANY	)	ASLBP No. 18-957-01-SLR-BD01
(Turkey Point Nuclear Generating Units 3 and 4)	)	September 20, 2018

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the: (1) "Applicant's Motion to Strike Portions of the September 10, 2018 Reply Filed by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper or, in the Alternative, for Leave to File a Surreply" and (2) "Applicant's Surreply to New Arguments Raised in Reply Pleadings" were served upon the following persons by Electronic Information Exchange (the NRC's E-Filing System) and by electronic mail as indicated by an asterisk (*), in the above-captioned docket.

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
E. Roy Hawkens, Chairman
Sue Abreu, Administrative Judge
Michael F. Kennedy, Administrative Judge

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Sherwin E. Turk, Esq.
Jeremy L. Wachutka, Esq.
Esther R. Houseman, Esq.

Natural Resources Defense Council
Geoffrey H. Fettus, Esq.

Southern Alliance for Clean Energy
Diane Curran, Esq.

Miami Waterkeeper, Inc.
Edan Rotenberg, Esq.

Friends of the Earth
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