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 A PORTION OF THE SEPTEMBER 10, 2018 REPLY FILED BY SOUTHERN ALLIANCE FOR CLEAN ENERGY 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") files this motion to strike a portion of the "Southern Alliance for Clean Energy's ("SACE") Reply to Oppositions by Florida Power & Light and NRC Staff to SACE's Hearing Requests" ("Reply") filed on September 10, 2018. In its Reply, SACE presents a new argument that plainly could have been raised in its August 1, 2018 Petition to Intervene ("Petition") in this proceeding.[1] That argument, set forth in Section II.A of the Reply, concerns the purported inapplicability of the Nuclear Regulatory Commission's ("NRC") license renewal environmental framework ("LREF") to FPL's subsequent license renewal application ("SLRA") for Turkey Point Units 3 and 4 ("Turkey Point").[2] The LREF is the process codified in 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"). It pairs the generic resolution of "Category 1" issues in the NRC's 2013 "Generic Environmental

[1] *See* Southern Alliance for Clean Energy's Request for Hearing and Petition to Intervene (Aug. 1, 2018) (ML18213A529) ("Petition").

[2] *See generally* Reply at 3-9.

Impact Statement for License Renewal of Nuclear Plants," NUREG-1437, Rev. 1 (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").

In its Petition, SACE never once mentioned Table B-1, including its "Category 1" and "Category 2" impact findings, despite having prominently raised the issue of *Table B-1's applicability* to the SLRA in an extension request filed nearly six weeks before the Petition.[3] It now argues that because 10 C.F.R. § 51.53(c)(3) makes reference to "applicants seeking an initial renewed license," FPL cannot rely on the LREF and "must fully address . . . all environmental impacts designated by Table B-1 as Category 1."[4] SACE's decision to omit *any* reference to Table B-1 in its Petition is curious and perplexing.

Although SACE briefly discussed 10 C.F.R. 51.52(c)(2) and (c)(3) in the "Legal Framework" section of its Petition,[5] it never directly addressed, much less challenged, the applicability of Table B-1's "Category 1 exemptions" to the SLRA, as it now does in its Reply. Further, the NRC's background discussion of SLR proceedings on pages 18-23 of its Answer to SACE's Petition does not justify SACE's belated introduction of a new substantive legal argument in support of Contention 1. SACE's decision to do so in its Reply directly contravenes 10 C.F.R. § 2.309(f)(1), which requires petitioners to plead their proposed contentions with

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[3] *See* Southern Alliance for Clean Energy's Motion to Extend Deadline for All Hearing Requests Regarding Turkey Point Subsequent License Renewal Application, at 2-3 (June 20, 2018) (ML18171A406) ("SACE Extension Request") ("The applicability of Table B-1 is a significant and relevant legal issue in this proceeding. . . . In order to file an admissible contention on the subject, SACE must either file a waiver petition or demonstrate that Table B-1 is inapplicable.")

[4] Reply at 3, 9. Notably, the portion of SACE's Reply at issue (Section II.A.) appears under SACE's discussion of proposed Contention 1. *See* Reply at 2 (Section II of the Reply is titled "Discussion: Contention 1"). As proffered by SACE, Contention 1 contains a single reference to "10 C.F.R. § 51.53(c)" of the Petition. It never cites that regulation again. It also does not cite Table B-1, or mention "Category 1" or "Category 2" issues.

[5] *See* Petition at 5.

specificity and basis. It also disregards longstanding Commission precedent that prohibits such filings from expanding the scope of arguments set forth in an original hearing request.[6] Accordingly, FPL requests that the Board strike Section II.A of the Reply in its entirety.

Alternatively, if the Board declines to strike Section II.A of the Reply, then FPL respectfully requests leave to file its Surreply (attached hereto) addressing the new arguments contained therein.[7] 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 SACE's new arguments. Furthermore, permitting FPL to file the surreply will help ensure a complete record on what SACE is now attempting to make a threshold legal issue in this proceeding.

II. PROCEDURAL HISTORY

FPL filed its SLRA with the NRC on January 30, 2018, to renew the Turkey Point operating licenses for an additional 20-year period.[8] As part of the SLRA (Appendix E) and as required by 10 C.F.R. Part 51, FPL also submitted an Environmental Report ("ER") that considers the potential environmental impacts of the requested subsequent license extension.[9] ER Section 4.0 describes the LREF applicable to the SLRA.[10] As specifically noted therein,

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6 *See, e.g.*, *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 146 (2015); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

7 Applicant's Surreply to New Arguments Raised in Reply Pleadings (Sept. 20, 2018) ("Surreply") (attached).

8 *See* Letter from M. Nazar, FPL, to NRC Document Control Desk, Turkey Point Units 3 and 4 Subsequent License Renewal Application (Jan. 30, 2018) (ML18037A824). On April 10, 2018, FPL submitted Revision 1 of the SLRA. *See* Letter from W. Maher, FPL, to NRC Document Control Desk, Turkey Point Units 3 and 4 Subsequent License Renewal Application – Revision 1 (Apr. 10, 2018) (ML18113A134) (part of package ML18113A132).

9 *See* SLRA Appendix E, Applicant's Environmental Report – Subsequent Operating License Renewal Stage (Jan. 2018) (ML18113A145) ("ER"). FPL submitted a supplement to the January 2018 ER on April 10, 2018. *See* L-2018-086, Letter from W. Maher, FPL, to NRC Document Control Desk, Appendix E Environmental Report Supplemental Information (Apr. 10, 2018) (ML18102A521). Collectively, the January 2018 ER and the April 2018 supplement constitute the "ER."

10 *See* ER at 4-1 to 4-4.

"NRC rules do not require analyses of Category 1 issues that were resolved using generic findings [10 CFR Part 51, Subpart A, Appendix B, Table B-1] as described in the GEIS."[11]

On May 2, 2018, the NRC published a notice in the *Federal Register* docketing the Turkey Point SLRA and providing an opportunity for interested persons to request a hearing on the SLRA by July 2, 2018.[12] SACE requested a 91-day extension of time, until October 1, 2018, to file its intervention petition.[13] In that request, SACE asserted that "[t]he *applicability of Table B-1 is a significant and relevant legal issue* in this proceeding," and that "SACE's counsel must conduct extensive and time-consuming legal research into the regulatory history of 10 C.F.R. Part 51 and the License Renewal GEIS [Generic Environmental Impact Statement]."[14] SACE specifically noted FPL's reliance "on Table B-1 throughout its Environmental Report," and stated that "to file an admissible contention on [a Category 1] subject, SACE must either file a waiver petition or demonstrate that Table B-1 is inapplicable."[15] It further stated that "[i]f Table B-1 is not applicable, then a significant number of issues, considered by FPL to be exempt from consideration under Table B-1, must be addressed" in the Environmental Report.[16]

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[11] *Id.* at 4-1 to 4-2. *See also* 10 C.F.R. § 51.53(c)(3)(i) ("The environmental report for the operating license renewal stage is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues in Appendix B to subpart A of this part."). Section II of the attached Surreply explains why the LREF applies to SLRAs.

[12] *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) ("Hearing Notice").

[13] *See* SACE Extension Request. The Natural Resources Defense Council and Friends of the Earth also sought an extension to time for filing their joint intervention petition.

[14] SACE Extension Request at 3 (emphasis added).

[15] *Id.* at 2, 3.

[16] *Id.* at 3.

In accordance with a one-month extension of time granted by the Acting Secretary of the Commission,[17] SACE and other petitioners filed their hearing requests and intervention petitions on August 1, 2018.[18] SACE submitted two proposed contentions challenging the adequacy of certain discussions in the ER.[19] Despite being given additional time by the Commission to evaluate such issues and frame its contentions, SACE did not directly and expressly address the issue of Table B-1's applicability to the SLRA in a specific contention. Yet, only six weeks earlier, it had highlighted the issue as "a significant and relevant legal issue in this proceeding" requiring further research.[20] Indeed, SACE's Petition does not contain a single reference to Table B-1 or the "Category 1" and "Category 2" generic environmental impact findings codified therein.[21] Instead, the "Legal Framework" section of SACE's Petition briefly states:

> Specific requirements for license renewal applications are set forth in 10 C.F.R. § 51.53(c). Section 51.53(c)(2) establishes general requirements for reactor license renewal applicants, and § 51.53(c)(3) establishes requirements for applicants "seeking an initial renewed license." Because FPL is seeking a subsequent renewed license, § 51.53(c)(2) applies in this proceeding. Section 51.53(c)(2) requires an operating license renewal applicant (other than an applicant for initial license renewal) to describe, *inter alia,* "the affected environment around the plant," the "environmental impacts of alternatives," and "any other matters described in § 51.45(a).[22]

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17 *See* Order (June 29, 2018).

18 *See* SACE Petition; Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Aug. 1, 2018) (ML18213A418).

19 Contention 1 claims that the ER: (1) incorrectly minimizes the significance of the Turkey Point cooling canal system's ("CCS") environmental impacts on certain groundwater and surface water bodies (principally the Biscayne Aquifer and Biscayne Bay and habitat of the threatened American crocodile); (2) overstates the effectiveness of existing and planned mitigation measures to reduce and remove the "hypersaline plume" in the Biscayne Aquifer and ignores the negative impacts of those mitigation measures; and (3) does not adequately address the cumulative impacts of Turkey Point operations during the 20-year SLR period. *See* Petition at 17-29. Contention 2 asserts that the ER improperly excludes consideration of the mitigation alternative of installing mechanical draft cooling towers in place of the CCS at Turkey Point. *See id.* at 29-32.

20 SACE Extension Request at 3.

21 In contrast, 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.

22 Petition at 5.

Thus, SACE never directly addressed the applicability of Table B-1 to the SLRA, or directly controverted the ER's statement that it "is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues."[23] Nor did SACE provide a legal basis, with the requisite specificity, for its conclusion that § 51.53(c)(2) applies in this proceeding, rather than § 51.53(c)(3).

On August 27, 2018, FPL and the NRC Staff timely filed their respective answers to SACE's Petition.[24] FPL opposed SACE's proposed Contention 1 as inadmissible because it largely contests, without seeking a waiver under 10 C.F.R. § 2.335(b), certain "Category 1" environmental impact findings contained in the NRC's 2013 GEIS for license renewal and codified in Table B-1. To the extent it seeks to litigate any "Category 2" issues, FPL also opposed Contention 1 on the grounds that it lacks sufficient support and fails to raise any genuine, litigable dispute with the ER.[25] The Staff did not oppose the admission of Contention 1 insofar as it concerns alleged impacts to the American crocodile, "but oppose[d] the admission of all other portions of SACE Contention 1."[26]

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23 ER at 4-2.

24 *See* Applicant's Answer Opposing Southern Alliance for Clean Energy's Request for Hearing and Petition to Intervene" (Aug. 27, 2018) (ML18239A449) ("FPL Answer to Petition"); NRC Staff's Corrected Response to Petitions to Intervene and Requests for Hearing by (1) Friends of the Earth, Natural Resources Defense Council and Miami Waterkeeper, and (2) Southern Alliance for Clean Energy (Aug. 27, 2018) (ML18239A458) ("NRC Answer to Petition").

25 FPL opposed the admission of proposed Contention 2 for similar a reasons, noting that it improperly challenges, without a request for a waiver, the adequacy of the NRC's generically-applicable consideration of mitigation measures for several Category 1 environmental issues. FPL further argued that Contention 2 seeks analysis of a mitigation alternative that is not required under NEPA's "rule of reason" and related Commission precedent, and runs counter to the informed technical judgment and requirements of the relevant State permitting agency.

26 NRC Staff Answer to Petition at 67. The Staff did not oppose the admission of proposed Contention 2 as a contention of omission, but did "oppose the admission and litigation of the contention's assertions regarding the environmental impacts resulting from operation of the CCS or cooling towers." *Id.* at 69.

In accordance with the Board's Order dated August 29, 2018,[27] SACE and the other petitioners submitted their replies to FPL's and the Staff's answers on September 10, 2018.[28] In its Reply, SACE argues that the plain language of 10 C.F.R. § 51.53(c)(3) is "dispositive" and allows only "applicants seeking an initial renewed license" to apply for license renewal under § 51.53(c)(3) and thereby rely on the Category 1 designations of Table B-1.[29] It further asserts that the regulatory history of the NRC's 1996 Part 51 rulemaking and associated GEIS for license renewal "confirms that the Commission did not intend to expand the scope of [the Table B-1] findings beyond initial license renewal applications."[30] In making these arguments, SACE describes the NRC's 2013 revised GEIS as providing only a "limited" update to its 1996 precursor, and disregards more recent Commission-level documents addressing the SLRA review process because they are not formal rulemaking documents that "change the substantive terms of an existing regulation."[31]

III. THE BOARD SHOULD STRIKE SECTION II.A OF SACE'S REPLY

SACE's new argument that the "Category 1 exemptions in Table B-1" do not apply to the SLRA amounts to an untimely new proposed contention. SACE had an ample opportunity to proffer a contention in its Petition challenging any one of the hundreds of assertions in the ER that Table B-1's generic environmental impact findings apply to this proceeding. It did not do so. This new argument also amounts to an untimely attempt to amend SACE's original proposed contentions. Because SACE has neither requested nor been granted leave to file new or amended

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27 Board Order (Granting Unopposed Joint Motion for Extension of Reply Deadline) (Aug. 29, 2018) (ML18241A143).

28 *See* SACE Reply; 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).

29 SACE Reply at 3.

30 *Id.* at 4-5.

31 *Id.* at 6-7.

contentions, and cannot satisfy the late-filing requirements in 10 C.F.R. § 2.309(c), its new arguments must be stricken from Section II.A of the Reply.

A. SACE's Arguments in Section II.A. of Its Reply Constitute an Untimely New Contention—Not a "Legitimate Amplification" of a Previous Argument

1. Legal Standards Governing the Scope of a Petitioner's 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."[32] 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.[33] Otherwise, "[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.'"[34]

The Commission demands adherence to this requirement to "avoid unnecessary delays and increase the efficiency of NRC adjudication,"[35] because answering parties are "entitled to be told at the outset, *with clarity and precision*, what arguments are being advanced."[36] Thus, the permissible scope of a reply includes only information that: (1) legitimately amplifies upon

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

33 *La. Energy Servs., LP* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (internal quotation marks omitted), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004).

34 *LES*, CLI-04-25, 60 NRC at 225.

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

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

arguments presented in the original petition,[37] or (2) focuses narrowly on the legal or factual arguments first raised in the answers thereto.[38]

2. SACE's Arguments in Section II.A of the Reply Exceed the Proper Scope of a Reply Because They Constitute a New Legal Contention That SACE Did Not Plead with Specificity and Basis in Its Petition

SACE's argument that FPL may not rely on the LREF and must "fully address" "all environmental impacts designated by Table B-1 as Category 1" for the SLR period is an untimely new proposed contention.[39] Section 2.309(f)(1)(i) and (ii), respectively, require a petitioner to provide a specific statement of the issue of law or fact to be raised or controverted, and to provide a brief explanation of the basis for the contention. SACE does 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.[40] Section 2.309(f)(1)(vi) further requires the petitioner 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 each dispute." In short, a petitioner has an "ironclad obligation to review the Application thoroughly and to base [its] challenges on its contents."[41]

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

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

39 SACE Reply at 3, 9.

40 *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)).

41 *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 312 (2012) (internal quotation marks and citation omitted).

In light of the ER's specific contents, SACE failed to plead what amounts to a new legal contention with specificity and basis, as required by Section 2.309(f)(1)(i), (ii), and (vi). For example, ER Section 4.0 states explicitly that:

> NRC rules do not require analyses of Category 1 issues that were resolved using generic findings [10 CFR Part 51 Subpart A, Appendix B, Table B-1] as described in the GEIS. Therefore, an applicant may reference the GEIS findings for Category 1 issues, absent new and significant information.[42]

Similarly, ER Section 5.0 states:

> The NRC has resolved most license renewal environmental issues generically and requires an applicant to analyze only those issues the NRC has not resolved generically. While NRC regulations do not require an applicant's ER to contain analyses of the impacts of those Category 1 environmental issues that have been generically resolved [10 CFR 51.53(c)(3)(i)], the regulations do require that an applicant identify any new and significant information of which the applicant is aware. [10 CFR 51.53(c)(3)(iv)][43]

SACE had ample opportunity to proffer a *contention* in its Petition challenging the foregoing ER statements (among numerous other ER references indicating FPL's position that the LREF applies to the Turkey Point SLRA). It did not do so.[44] Instead, SACE chose to sweep this self-identified "significant legal issue" under the rug, and relegated any potentially-relevant discussion to the "Legal Framework" section of its Petition.[45] Whatever its motive, SACE has failed to meet its burden as a petitioner—especially one represented by experienced counsel. It should not be permitted to cure that failure by belatedly submitting six pages of new legal argument in its Reply.

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42 ER at 4-1 to 4-2.

43 *Id.* at 5-1.

44 As FPL noted in its Answer, in addition to ignoring the important dichotomy between Category 1 and Category 2 issues, SACE never expressly claims that it has presented "new and significant information."

45 *See* SACE Petition at 5.

Even assuming *arguendo* that SACE did not have an obligation to proffer a separate legal contention, its reply arguments go well beyond legitimate amplification of previous arguments made in support of Contention 1. In that contention, SACE alleged that the ER violates 10 C.F.R. § 51.53(c) by underestimating or ignoring the environmental impacts of continued use of the CCS on surrounding water resources. Significantly, SACE did not attempt to draw any distinction between Sections 51.53(c)(2) and 51.53(c)(3), or explain why the ER may not reference the GEIS and Table B-1 findings for Category 1 issues. In fact, there is no reference to the GEIS or Table B-1 in its entire Petition—a striking omission given the centrality of the GEIS and Appendix B to the NRC's license renewal environmental review regulations in Part 51, and SACE's own references to Table B-1 in its June 20, 2018 Extension Request.[46] As a result, SACE's parsing of 10 C.F.R. 51.53(c)(3), probing of the regulatory history of the NRC's 1996 Part 51 rulemaking, and discussion of the scoping notice and report for the 2013 revised GEIS are more than permissible elaborations upon SACE's original arguments.

B. SACE Has Not Satisfied, or Attempted 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, new supporting legal arguments and theories "essentially constitute[] untimely attempts to amend [the] original petition[]," or amount to "entirely new *contentions*."[47] 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).[48] That

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[46] *See*, *e.g.*, 10 C.F.R. 51.71(d) ("The draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part.").

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

[48] *Id*.

regulation explicitly states that such arguments "will not be entertained" absent a determination by the presiding officer that the petitioner has demonstrated good cause by showing that: (1) the information upon which the filing is based was not previously available; (2) the information upon which the filing is based is materially different from information previously available; and (3) the filing has been submitted in a timely fashion based on the availability of the subsequent information.[49] Otherwise, the appropriate remedy is to strike new arguments and legal theories offered in a reply pleading.[50]

2. SACE Has Not Established Good Cause for Its Late-Filed Legal Contention Challenging the Applicability of Table B-1 to the SLRA

SACE makes no attempt to seek leave from the Board to file a new or amended contention, nor does it claim to satisfy the late-filing requirements. Nor could it. Contrary to 10 C.F.R. § 2.309(c)(1), nothing prevented SACE from raising its new arguments in the original Petition.[51] The ER—which describes the LREF in detail—first became publicly available on February 14, 2018.[52] And the Hearing Opportunity Notice for this proceeding, issued on May 2, 2018, explicitly noted the availability of the SLRA, including the ER, approximately three months before SACE filed its Petition on August 1, 2018.[53] Accordingly, it would be impossible

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49 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.").

50 *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).

51 10 C.F.R. § 2.309(c)(1); *Fermi*, CLI-15-18, 82 NRC at 147.

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

53 *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).

for SACE to satisfy the first element of the late-filing requirements (requiring a demonstration that "the information upon which the filing is based was not previously available").

As discussed above, SACE's June 20, 2018 Extension Request underscores that SACE could have presented its argument concerning the alleged inapplicability of Table B-1 to the SLRA in its Petition. In the Extension Request—filed nearly six weeks before its Petition—SACE stated as follows:

> FPL relies on Table B-1 throughout its Environmental Report, and therefore apparently considers it to be applicable here. . . . The applicability of Table B-1 is a significant and relevant legal issue in this proceeding. If Table B-1 is not applicable, then a significant number of issues, considered by FPL to be exempt from consideration under Table B-1, must be addressed. In order to file an admissible contention on the subject, SACE must either file a waiver petition or *demonstrate that Table B-1 is inapplicable.*[54]

Thus, SACE was aware of this threshold legal issue before it filed its Petition, but chose not to address it head-on in the Petition, either as a separate contention or within the context of its two proffered contentions. It instead sought to evade the issue by cursorily discussing Section 51.53(c) in the legal standards section of its Petition, and by omitting any reference to Table B-1. Moreover, the documents discussed by SACE in its Reply, including the 1996 Part 51 license renewal rulemaking and the 1996 GEIS, were available to SACE when it filed its Petition. SACE, in fact, mentioned the 1996 rulemaking and GEIS in its Extension Request. SACE thus meets none of the late-filing criteria in Section 2.309(c)(1), because its 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)).

For these reasons, SACE has not shown that good cause exists for its belatedly-presented arguments concerning the applicability of Table B-1 to the Turkey Point SLRA. Section

[54] SACE Extension Request at 2-3 (emphasis added).

2.309(c) and controlling Commission precedent require that, "[f]or 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."[55] SACE has not done so here.

IV. IF THE BOARD DOES NOT STRIKE SECTION II.A OF SACE'S REPLY, THEN IT SHOULD GRANT FPL LEAVE TO FILE A SURREPLY

For the above reasons, the Board should strike Section II.A of the Reply. If the Board declines to do so, then FPL respectfully requests that Board grant it leave to file the attached Surreply. NRC regulations provide that only the participant who filed the hearing request under 10 C.F.R. § 2.309 may file a reply to an answer thereto.[56] However, the Commission has explained that "extra filings," such as reply briefs 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."[57] Moreover, 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.[58] FPL has not had an opportunity to respond to SACE's assertion that Table B-1, as a matter of law, does not apply to the SLRA. It is not enough that a party be placed on general notice of *possible* arguments.[59] The regulations afford applicants the absolute right to be presented with contentions that are "set forth with

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55 *Fermi*, CLI-15-18, 82 NRC at 147; *see also* 10 C.F.R. § 2.309(c)(1).

56 10 C.F.R. § 2.309(i)(2)-(3).

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

58 *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).

59 *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).

particularity"[60] and with "specific" statements of law or fact for which a petitioner seeks a hearing.[61] NRC regulations further provide applicants the absolute right to respond thereto.[62]

In this case, necessity and fairness justify granting FPL the opportunity to file a surreply to SACE's Reply. SACE's new argument concerning Table B-1's applicability to the SLRA goes well beyond any argument made by SACE in support of its two proposed contentions and, in effect, challenges the adequacy of virtually the entire ER. If accepted as valid (which it is not), that argument could have significant implications for the scope and orderly disposition of this proceeding as well as future SLRA proceedings. FPL has not had a full and fair opportunity to respond to SACE's new argument. That argument overlooks key aspects of the LREF as well as recent Staff and Commission statements confirming its applicability to SLRAs. Thus, fairness demands the provision of such an opportunity, and necessity commands the establishment of a full record.[63] The attached Surreply will ensure a full record upon which the Board can base its ruling on SACE's Petition.

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60 10 C.F.R. § 2.309(f)(1).

61 10 C.F.R. § 2.309(f)(1)(i). *See also Wolf Creek*, ALAB-279, 1 NRC 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"). In this regard, FPL could not have anticipated that SACE would devote six pages of its Reply to trying to justify why the word "initial" in 10 C.F.R. § 51.53(c)(3) should be read to produce an illogical result and upend the NRC's longstanding environmental review framework for license renewal applications—a framework which, for reasons explained in FPL's Surreply, both the Commission and Staff clearly intend to apply to SLRAs.

62 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").

63 *See 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"); *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").

V. CONCLUSION

SACE's new arguments in its Reply neither legitimately amplify arguments presented in the original Petition, nor focus narrowly on legal arguments first raised in an answer, and raise new challenges to assertions in SLRA documents that were available long before the hearing request deadline. Because SACE has 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 Section II.A of the Reply be stricken. In the alternative, if the Board decides not to strike Section II.A. of the Reply, then FPL respectfully seeks leave to the file the attached Surreply.

Respectfully submitted,

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

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Counsel for Florida Power & Light Company

Dated in Washington, D.C.
this 20th day of September 2018

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

CONSULTATION CERTIFICATION

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 Southern Alliance for Clean Energy ("SACE"), and the U.S. Nuclear Regulatory Commission ("NRC") Staff to resolve the issues raised in this Motion. Counsel for SACE represented that SACE plans to oppose FPL's Motion to Strike Section II.A of its Reply, but that SACE does 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.

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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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 a Portion of the September 10, 2018 Reply Filed by Southern Alliance for Clean Energy 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
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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
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Miami Waterkeeper, Inc.
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Signed (electronically) by Ryan K. Lighty

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