

**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))	October 10, 2018

**APPLICANT’S ANSWER OPPOSING PETITIONERS’ MOTION FOR LEAVE TO
FILE RESPONSE TO APPLICANT’S SEPTEMBER 20, 2018 SURREPLY**

In accordance with 10 C.F.R. § 2.323(c), Florida Power & Light Company (“FPL” or “Applicant”) files this Answer opposing the Motion for Leave to Respond to Applicant’s Surreply (“Motion for Leave”) filed by (1) Southern Alliance for Clean Energy (“SACE”) and (2) Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (“Joint Petitioners”) (collectively, “Petitioners”) on October 1, 2018.¹ As explained below, the Board should deny the Motion for Leave, and exclude Petitioners’ Response to Applicant’s Surreply (“Proposed Response”) from the adjudicatory record.² In support, Applicant states as follows:

1. FPL filed a subsequent license renewal (“SLR”) application (“SLRA”) with the NRC on January 30, 2018, to renew the Turkey Point Unit 3 and Unit 4 operating licenses for an additional 20-year period.³ As part of the SLRA and as required by 10 C.F.R. Part 51, FPL submitted an Environmental Report (“ER”) that considers the potential environmental impacts of

¹ Motion for Leave to Respond to Applicant’s Surreply (Oct. 1, 2018) (ML18274A410).
² Petitioners’ Response to Applicant’s Surreply (Oct. 1, 2018) (ML18274A411). Petitioners submitted errata and a corrected version of the Proposed Response on October 4, 2018.
³ 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). See also 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).

the requested subsequent license renewal.⁴ ER Table 1.0-1 lists the 10 C.F.R. Part 51 regulations that are applicable to the SLRA—including §§ 51.45(b)-(e), 51.53(c)(2), and 51.53(c)(3)—and the specific ER sections in which those regulatory requirements are addressed.⁵ Section 4.0 of the SLRA states 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.”⁶ Thus, the ER explicitly references and relies on the NRC’s generic impact evaluations for Category 1 issues, as analyzed in the GEIS and codified in Table B-1.

2. On June 20, 2018, SACE filed a motion seeking to extend the deadline for filing intervention petitions.⁷ In that motion, SACE noted that: (1) “FPL relies on Table B-1 throughout its Environmental Report;” (2) “[t]he applicability of Table B-1 is a significant and relevant legal issue in this proceeding;” and (3) “to file an admissible contention on the subject, SACE must either file a waiver petition or *demonstrate* that Table B-1 is inapplicable.”⁸

3. SACE filed its hearing request and intervention petition on August 1, 2018.⁹ That petition included two proposed contentions challenging the adequacy of certain discussions in the ER. Although SACE very briefly mentioned 10 C.F.R. § 51.53(c)(2) and (c)(3) in the “Legal

⁴ See SLRA Appendix E, Applicant’s Environmental Report – Subsequent Operating License Renewal Stage (Jan. 30, 2018) (ML18113A145). 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.”

⁵ See ER at 1-3 to 1-7 (Table 1.0-1, “Environmental Report Responses to License Renewal Environmental Regulatory Requirements”).

⁶ *Id.* at 4-1 to 4-2.

⁷ 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”).

⁸ *Id.* at 2-3 (emphasis added).

⁹ See Southern Alliance for Clean Energy’s Request for Hearing and Petition to Intervene (Aug. 1, 2018) (ML18213A529) (“SACE Petition”).

Framework” section of its petition,¹⁰ it never once mentioned the NRC’s 2013 “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (“GEIS”) or Table B-1, including its “Category 1” and “Category 2” issue designations and impact findings. It certainly never “*demonstrate[d]* that Table B-1 is inapplicable.”¹¹

4. Joint Petitioners also filed a hearing request and intervention petition on August 1, 2018.¹² In stark contrast to SACE’s petition, that petition directly discussed and challenged the GEIS, Table B-1, and specific NRC Category 1 and Category 2 impact findings vis-à-vis the ER. Specifically, Joint Petitioners framed each of their five proposed contentions as challenges to FPL’s compliance with requirements in Section 51.53(c)(3), and asserted that the existence of “new and significant information” allows them to challenge Category 1 determinations without filing a waiver request.¹³ Joint Petitioners only suggested in a brief footnote that the applicability of Section 51.53(c)(3) to this SLR proceeding is “unclear” given the regulation’s reference to “an initial renewed license.”¹⁴

5. On August 27, 2018, FPL and the NRC Staff timely filed their respective answers to SACE’s and Joint Petitioners’ intervention petitions.¹⁵ As germane here, those answers

¹⁰ See *id.* at 5.

¹¹ SACE Extension Request at 3 (emphasis added).

¹² Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Aug. 1, 2018) (ML18213A418).

¹³ *Id.* 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).

¹⁴ *Id.* at 16 n.71.

¹⁵ 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 SACE Petition”); Applicant’s Answer Opposing Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (Aug. 27, 2018) (ML18239A445) (“FPL Answer to Joint Petitioners’ Petition”); NRC Staff’s Corrected Response to Petitions to Intervene and Requests for Hearing by (1) Friends of

explained that 10 C.F.R. § 51.53(c)(3) and Table B-1 apply to the instant proceeding.¹⁶ They further explained that Category 1 issues are not subject to challenge in license renewal adjudicatory proceedings such as this one absent a waiver.¹⁷ The NRC Staff Answer also included a background section acknowledging the applicability of § 51.53(c)(3) to applications for an “initial renewed license,” and explaining that § 51.53(c)(3) also applies to SLRAs.¹⁸ The Staff noted that “the Commission has determined that the existing license renewal . . . environmental regulatory framework applies to subsequent license renewal”¹⁹

6. SACE and Joint Petitioners submitted their replies to FPL’s and the Staff’s answers on September 10, 2018.²⁰ In its reply, SACE argued—for the first time and over the course of 7 pages—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 Section 51.53(c)(3) and thereby rely on the Category 1 designations of Table B-1.²¹ It further asserted that the 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.”²² In their reply, Joint Petitioners similarly argued—also for the first time—that

the Earth, Natural Resources Defense Council and Miami Waterkeeper, and (2) Southern Alliance for Clean Energy (Aug. 27, 2018) (ML18239A458) (“NRC Staff Answer”).

¹⁶ See, e.g., FPL Answer to SACE Petition at 8-10; FPL Answer to Joint Petitioners’ Petition at 3-4; NRC Staff Answer at 18-28.

¹⁷ See, e.g., FPL Answer to SACE Petition at 12-15; NRC Staff Answer at 26-28;

¹⁸ See NRC Staff Answer at 18-23.

¹⁹ *Id.* at 20 n.76; see also *id.* at 20-23.

²⁰ See Southern Alliance for Clean Energy’s Reply to Oppositions by Florida Power & Light and NRC Staff to SACE’s Hearing Request (Sept. 10, 2018) (ML18253A282) (“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) (ML18253A280) (“Joint Petitioners’ Reply”).

²¹ SACE Reply at 3.

²² *Id.* at 4-5.

the language of Section 51.53(c)(3) is “unambiguous,” and that the regulation does *not* apply to this SLR proceeding.²³

7. In view of the new arguments advanced by SACE and Joint Petitioners in their replies, FPL filed Motions to Strike portions of those replies or, alternatively, for leave to file a surreply (which FPL attached to its motions).²⁴ In its Motions to Strike, FPL sought to strike portions of Petitioners’ reply pleadings that impermissibly introduce new arguments without satisfying the late-filing factors in 10 C.F.R. § 2.309(c). In its Surreply, FPL set forth the bases for its position that Petitioners’ new reply arguments are inconsistent with Part 51’s language, structure, requirements, and regulatory history, as well as more recent NRC Staff and Commission statements made in connection with the SLRA review process.²⁵

8. On October 1, 2018, Petitioners not only opposed FPL’s Motions to Strike, they also sought leave to respond to FPL’s Surreply in the form of their Proposed Response, which substantially expands and embellishes upon Petitioners’ previous arguments. Petitioners, now acting in unison and over the course of an additional 20 pages of pleadings, newly assert that “[i]f the NRC wishes to apply the Category 1 exemptions to subsequent license renewal applicants like FPL, it must first revise the 1996 GEIS and rule, and the 2013 Revised GEIS and amended rule, to comply with . . . NEPA and the Administrative Procedure Act.”²⁶ According to

²³ See Joint Petitioners’ Reply at 5, 11-12, 14-16.

²⁴ See 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” (Sept. 20, 2018) (ML18263A285); 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 (Sept. 20, 2018) (ML18263A284).

²⁵ See generally Applicant’s Surreply to New Arguments Raised in Reply Pleadings (Sept. 20, 2018) (ML18263A286) (“FPL’s Surreply” or “Surreply”). During consultations with FPL, Petitioners stated that they would oppose FPL’s Motions to Strike portions of their replies, but that they would not oppose FPL’s alternative motion for leave to file its Surreply.

²⁶ Proposed Response at 19.

Petitioners, this would require: (1) a new scoping process; (2) preparation of a draft GEIS for public comment, and (3) publication of revised NEPA regulations (also for public comment) that make the requirements of Table B-1 binding in SLR proceedings.²⁷

9. To summarize, Petitioners' references to the legal issue at hand (*i.e.*, the applicability of Section 51.53(c)(3) and Table B-1 to SLRAs) in their intervention petitions was cursory at best, despite Petitioners' current description of those regulations as "integral to the NRC's adjudication of subsequent license renewal applications."²⁸ In their reply pleadings, Petitioners sought to substantially augment their initial, scant references to this legal issue. Now, in their Proposed Response, Petitioners seek yet *another* opportunity to present even more arguments on an issue that they could and should have addressed in their intervention petitions.²⁹

10. Contrary to Petitioners' claim, necessity and fairness do not justify their submittal of yet another 20 pages of additional briefing—in the form of the Proposed Response. Petitioners accuse FPL of making a "new argument" in its Surreply,³⁰ but, clearly, it is Petitioners who failed to meet their initial pleading burden. The Commission has emphasized that "10 C.F.R. § 2.309(f)(1) specifically permits petitioners to present contentions that raise issues of law."³¹ Thus, it was incumbent upon Petitioners to directly contest—within the context of a proposed contention—FPL's position in the ER that it "is not required to contain analyses of the environmental impacts of the license renewal issues identified as Category 1 issues."³² They

²⁷ *See id.* at 19-20.

²⁸ Motion for Leave at 2.

²⁹ SACE Extension Request at 3.

³⁰ Motion for Leave at 2.

³¹ *Waste Control Specialists, LLC* (Consolidated Interim Storage Facility), CLI-17-10, 85 NRC 221, 223 (2017).

³² ER at 4-2. *See Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-17-4, 85 NRC 59, 63 (2017) ("A request for a hearing and petition to intervene must set forth the specific contentions that the petitioner seeks to have litigated."); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station),

did not do so. Nor did they pursue other possible procedural vehicles available to them.³³

Petitioners should not be permitted to cure their threshold, substantive pleading failure through multiple expanded filings and continually-morphing legal arguments. Any perceived prejudice is the result of Petitioners' actions in this proceeding—not those of FPL or the NRC Staff.

11. Petitioners' argument that they must be given the opportunity to address “new” arguments by FPL in order to ensure a “complete record” lacks force.³⁴ Indeed, it was Petitioners' belated attempts to raise new arguments in their September 10, 2018 reply pleadings that necessitated and justified FPL's filing of its Motions to Strike or, alternatively, for leave to file its Surreply. Answering parties are “entitled to be told at the outset, with clarity and precision, what arguments are being advanced”³⁵ Thus, it was reasonable and necessary for FPL to seek leave from the Board to present appropriate counterarguments, including its own arguments based on principles of regulatory construction. Not doing so would have resulted in an incomplete record and prejudice to FPL.

12. Conversely, it was *not* reasonable or necessary for Petitioners to seek leave to file another 20-page legal brief—in effect giving them a third “bite at the apple.” In their Proposed Response, Petitioners seek to further bolster arguments made in their replies, and to present *new* arguments centering on the NRC's alleged failure to comply with NEPA and the Administrative Procedure Act. Specifically, they assert that FPL “must petition for a rulemaking and ask the

CLI-06-24, 64 NRC 111, 119 (2006) (“Mere notice pleading does not suffice.”) (internal quotation marks omitted).

³³ For example, Petitioners could have submitted waiver requests (*see* 10 C.F.R. § 2.335(b)), petitioned the Board to certify the legal question at issue to the Commission for early review (*see* 10 C.F.R. § 2.341(f)(2), and/or filed a petition for rulemaking (*see* 10 C.F.R. § 2.802).

³⁴ Motion for Leave at 2-3.

³⁵ *Kan. Gas & Elec. Co. & Kan. City Power & Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975).

NRC to prepare a new or revised License Renewal GEIS” if it wishes Table B-1 to apply to its SLRA, and that “the NRC must comply with NEPA and the Administrative Procedure Act by publishing, for public comment, revised NEPA regulations which make the requirements of Table B-1 binding in subsequent license renewal proceedings.”³⁶ These new arguments flow from Petitioners’ (unfounded) belief that the NRC improperly failed to “use[] its scoping process to expand the scope of the 1996 GEIS in the 2013 Revised GEIS.”³⁷

13. These new arguments clearly are untimely. As noted above, the ER explicitly references and relies upon Table B-1 and the 2013 GEIS. If Petitioners believe that a new Part 51 rulemaking and revised GEIS are necessary to make Table B-1 applicable to SLRAs, then they could have advanced that argument in their intervention petitions (and submitted their own rulemaking petition). Nothing in FPL’s Surreply constitutes a necessary trigger or prerequisite to Petitioners’ proffering of this argument. The mere fact that the argument did not occur to Petitioners at the outset of this proceeding does not justify its belated presentation in their Proposed Response.³⁸

14. Petitioners’ new argument also is substantively flawed. Petitioners fail to explain why a Part 51 scoping process initiated in 2003, and a related scoping report issued in 2009, necessarily should have included explicit discussion of SLRAs. (Petitioners themselves, moreover, do not appear to have raised the issue during the scoping process.) In any event, for the reasons explained in FPL’s Surreply, there is no basis to conclude that the NRC intended the

³⁶ Proposed Response at 17, 19.

³⁷ *Id.* at 15.

³⁸ *La. Energy Servs., LP* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004) (“There 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.’”) (citations omitted).

2013 revised GEIS or associated Part 51 amendments to be limited to “initial” license renewal applications, or to otherwise foreclose application of current Table B-1 to SLRAs. Indeed, the NRC Staff 2009 scoping summary report mentioned in SACE’s September 10, 2018 reply and Petitioners’ Proposed Response specifically provides that:

- “The NRC regulations allow owners of nuclear power reactors to seek license renewal for up to an additional 20 years *with no limitations on the number of times the license may be renewed*. . . . The NRC bases its license renewal decision on whether the facility will continue to meet the requirements for safe operation and whether the protection of the environment can be assured.”³⁹
- “The NRC’s current plan is to apply the revised GEIS to *all license renewal applications* submitted after the date the Record of Decision for the revised GEIS is printed in the *Federal Register*.”⁴⁰
- “A site-specific environmental impact statement that analyzes the environmental impacts of license renewal at that particular site is prepared *each and every time a licensee submits an application for license renewal*. Category 1 issues are not excluded from the site-specific environmental impact statement. The conclusions in the GEIS relative to each Category 1 issue are reviewed for appropriateness to the specific plant being evaluated.”⁴¹

15. In conclusion, the Board should deny Petitioners’ Motion for Leave. SACE and Joint Petitioners presented arguments in their reply pleadings that were not raised in their intervention petitions—but which plainly could have been raised in those petitions—thereby necessitating FPL’s filing of its Motions to Strike and alternative request to file its Surreply. No further opportunity to address these issues is warranted or proper under NRC’s rules and

³⁹ Environmental Impact Statement Scoping Process, Summary Report: Update of the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, at 64 (May 2009) (ML082960910) (emphasis added).

⁴⁰ *Id.* at 67 (emphasis added).

⁴¹ *Id.* at 72 (emphasis added).

precedent, as Petitioners have not shown that “necessity or fairness” or other compelling circumstances justify the filing of the Proposed Response.⁴²

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Respectfully submitted,

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

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Dated in Washington, D.C.
this 10th day of October 2018

⁴² See *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008) (“The Licensing Board and the Commission should permit extra filings only where necessity or fairness dictates.”). Cf. 10 C.F.R. § 2.323(c) (stating that replies may only be granted in “compelling circumstances”).

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FLORIDA POWER & LIGHT COMPANY))	ASLBP No. 18-957-01-SLR-BD01
(Turkey Point Nuclear Generating Units 3 and 4)))	October 10, 2018

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the “Applicant’s Answer Opposing Petitioners’ Motion for Leave to File Response to Applicant’s September 20, 2018 Surreply” 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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