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)	)	January 7, 2019

APPLICANT'S RESPONSE TO THE NRC STAFF'S CLARIFICATION REGARDING THE ADMISSIBILITY OF PROPOSED COOLING TOWER CONTENTIONS

In accordance with the Atomic Safety and Licensing Board's ("ASLB" or "Board") verbal order at the December 4, 2018 oral argument in the above-captioned proceeding,[1] Florida Power & Light Company ("FPL") hereby timely files its Response to the U.S. Nuclear Regulatory Commission ("NRC") Staff's supplemental briefing regarding the admissibility of cooling tower contentions ("Clarification").[2] At issue are two proposed contentions ("Cooling Tower Contentions")—one submitted by Southern Alliance for Clean Energy ("SACE"), and the other by Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper (collectively with SACE, "Petitioners"). Together, they assert that FPL's environmental report ("ER")[3] does not comply with the National Environmental Policy Act of 1969 ("NEPA") and NRC environmental regulations in 10 C.F.R. Part 51 ("Part 51") because it does not evaluate

1 Transcript at 258 (Dec. 4, 2018) (ML18340A077) ("Tr.").
2 NRC Staff's Clarification of Its Views Regarding the Admissibility of Joint Petitioners' Contention 1-E and SACE Contention 2 (Alternative Cooling Systems) (Dec. 18, 2018) (ML18352B210).
3 *See* Letter from M. Nazar, FPL, to NRC, Turkey Point Units 3 and 4 Subsequent License Renewal Application, App. E (Jan. 30, 2018) (ML18037A824); 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 "ER").

mechanical draft cooling towers as a potential mitigation alternative to continued operation of the Cooling Canal System ("CCS").[4]

In its Clarification, Staff concludes that the Cooling Tower Contentions "appear" to be admissible.[5] However, as explained further below, Staff's conclusion is erroneous because it overlooks a fundamental tenet of NRC adjudicatory proceedings: contentions that do not identify a *failure to comply with a legal requirement* are inadmissible.[6]

I. PLEADING AND ORAL ARGUMENT BACKGROUND

In its Answers to the Petitions, FPL explained that the Cooling Tower Contentions are inadmissible because the ER *already* discusses in-depth, ongoing mitigation related to continued operation of the CCS, and Petitioners fail to demonstrate that FPL has a *further and overlapping* duty under Part 51 to evaluate cooling towers as a duplicative means of accomplishing that same mitigation.[7] More specifically, FPL noted that the Petitions failed even to acknowledge the relevant threshold legal standards applicable to such a duty, much less satisfy them with adequate support.[8] In short, the ER goes beyond the NEPA minimum requirement to merely consider mitigation; FPL has *actually implemented* extensive mitigation measures commensurate with impacts described in the ER. Therefore, FPL concluded in its Answer that Petitioners failed

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4 Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper at 15-30 (Aug. 1, 2018) (ML18213A418) (Proposed Contention 1-E); Southern Alliance for Clean Energy's Request for Hearing and Petition to Intervene at 29-32 (Aug. 1, 2018) (ML18213A529) ("SACE Petition") (Proposed Contention 2) (collectively, "Petitions").

5 Clarification at 8.

6 *See, e.g.*, *U.S. Dep't of Energy* (High-Level Waste Repository), CLI 09-14, 69 NRC 580, 588 (2009).

7 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 8-26 (Aug. 27, 2018) (ML18239A445); Applicant's Answer Opposing Southern Alliance for Clean Energy's Request for Hearing and Petition to Intervene at 45-51 (Aug. 27, 2018) (ML18239A450).

8 The Board's request that the parties identify the applicable threshold criteria at oral argument appears to acknowledge the absence of this information in the Petitions. *See* ASLB Order (Providing Oral Argument Topics) at 2 (unpublished) (Nov. 14, 2018) (ML18318A332) ("Order") (second bullet, item 2).

to adequately support their claims that the ER is materially deficient, contrary to 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

NRC Staff's Answer indicated that Staff did "not oppose the admission of" the Cooling Tower Contentions as contentions of omission,[9] but "expresse[d] no position regarding the environmental impacts of CCS operation or the need for further mitigation of those impacts beyond the measures currently in place or mandated by State and local regulatory authorities."[10] Staff's Answer did not articulate a basis for "not oppos[ing] the admission of" the Cooling Tower Contentions, and did not directly address the contention admissibility criteria in 10 C.F.R. § 2.309(f)(1).

At oral argument, Staff clarified that it did not believe the absence of a cooling tower mitigation alternative discussion in the ER constituted a material omission under NEPA or Part 51.[11] Staff further indicated that, as a matter of "discretion," rather than legal obligation under NEPA, it planned to evaluate a cooling tower mitigation alternative in its Supplemental Environmental Impact Statement ("SEIS").[12] Thus, Staff did not oppose admission of the Cooling Tower Contentions due to concerns about public perception—in other words, Staff "did not want to be in a position[] of telling [the Board] to reject a contention asserting the need to look at cooling towers," and then issue an SEIS that evaluates cooling towers.[13] But, as Staff

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9 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 29-30, 68 (Aug. 27, 2018) (ML18239A458).

10 *Id*. at 30 n.112.

11 Tr. at 156-59, 219-20. At one point, Staff mischaracterized FPL's position. Tr. at 158 ("If . . . the impacts of the [CCS] are small, then there would be no [m]itigation required, and that's the approach FP&L took"). However, FPL corrected this mischaracterization. *Id*. at 163 ("our argument is not that mitigation discussion is not required, [it] is that we have thoroughly considered mitigation and those mitigation results have small impacts and, therefore, there is no ancillary or extra requirement to consider another [means of] mitigation [*i.e.*,] cooling towers"). Staff acknowledged this clarification and stated that it did not disagree. *Id*. at 164.

12 *Id*. at 220.

13 *Id*. at 221.

explained, it is not "necessary . . . to admit" the Cooling Tower Contentions as a matter of law.[14] Petitioners then requested, and the Board granted, an opportunity for Staff to submit a clarification of its position on this issue, and for the other participants to respond thereto.[15]

II. DISCUSSION OF STAFF'S CLARIFICATION

The Clarification acknowledges Staff's position that it does not view the ER as materially deficient for omitting discussion of a cooling tower mitigation alternative.[16] In fact, Staff acknowledges that FPL *already* has "mitigation . . . measures currently in place or mandated by State and local regulatory authorities," and clearly states that "there is no statutory or regulatory requirement that alternative cooling systems be considered" in the ER.[17] But it also argues that the Cooling Tower Contentions "appear to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)."[18] The Staff, however, does not reconcile these inharmonious statements. If the presence or absence of a cooling tower mitigation alternative in the ER is not a material omission under NEPA or Part 51 (because the ER already discusses mitigation measures commensurate with the range of impacts), then it is unclear how the Cooling Tower Contentions could "demonstrate that the issue raised in the contention is material to the findings the NRC *must* make to support the action that is involved in the proceeding," as required by 10 C.F.R. § 2.309(f)(1)(iv).[19] Ultimately, this dissonance is irreconcilable.

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14 *Id*.
15 *Id*. at 258.
16 Clarification at 8.
17 *Id*. at 1
18 *Id*. at 8.
19 Emphasis added.

A. Staff Fails to Explain How the Admissibility Criteria Purportedly Are Satisfied, Given That the Absence of the Requested Analysis from the ER Is Immaterial to Staff's Environmental Review

The basis for the Staff's assertion that the Cooling Tower Contentions appear to be admissible remains unclear, given that Staff: (1) agrees that FPL had no duty under NEPA or Part 51 to evaluate a cooling tower mitigation alternative in the ER,[20] and (2) offers no explanation as to how Petitioners satisfy all six of the "strict by design" contention admissibility criteria in 10 C.F.R. § 2.309(f)(1). Notably, neither the Clarification, nor Staff's discussion at oral argument, address the Board's request (in its order providing topics for oral argument) for an explanation of the "threshold criteria" under which such a duty could arise.[21] And granting a hearing to determine, in the first instance, *whether* Petitioners have raised a genuine dispute on a material issue would violate NRC regulations—particularly where Petitioners have ignored the extensive discussion of numerous mitigation actions already considered in the ER.[22]

As FPL explained at oral argument,[23] given the ER's *existing* robust consideration of mitigation,[24] a further duty to consider cooling towers as a mitigation alternative could arise only if: (1) there is a "reasonably likely,"[25] otherwise-unmitigated impact not bounded[26] by the existing mitigation discussion,[27] and (2) cooling towers would be a proportional response to that otherwise-unmitigated impact.[28] The bases for these criteria, which are rooted in NEPA's "rule

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20 Clarification at 1, 8.

21 Order at 2 (second bullet, item 2).

22 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi) (requiring from petitioners, as a prerequisite to admission of any contention, an affirmative, adequately-supported "demonstration" that a genuine material dispute has, in fact, been raised).

23 Tr. at 203-07.

24 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) ("a complete mitigation plan" that is "actually formulated and adopted" goes well beyond what is required by NEPA).

25 *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

26 *Methow Valley*, 490 U.S. at 352 (the alternatives discussion need only be "reasonably complete").

27 *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (if the ER "comes to grips with all important considerations," nothing more need be done).

28 *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-16-7, 83 NRC 293, 323 n.156 (2016) ("Under basic NEPA principles, it is reasonable to tailor the degree of mitigation analysis to the significance of the impact to be mitigated").

of reason," and which the Staff acknowledges, are explained further below. However, Staff's Clarification points to no information in the Petitions addressing or demonstrating satisfaction of either of these threshold criteria.

More specifically, as to the first element, Staff's Clarification acknowledges—in its background discussion—that NEPA does not require consideration of "all conceivable" alternatives.[29] Staff is absolutely correct. Federal courts have consistently held that "[A]n agency's consideration of alternatives is sufficient if it considers an *appropriate range* of alternatives, even if it does not consider *every available* alternative."[30] Staff's Clarification is silent, however, as to other important limitations bearing on the legal sufficiency of NEPA mitigation discussions. For example, NEPA does not impose on agencies a duty "to determine the *best* mitigation measures for a potential environmental harm."[31] And as the Commission affirmed merely five days before oral argument, an empirical demonstration of the *effectiveness* of a mitigation measure is not required to satisfy NEPA.[32] Taken together, legal precedent demonstrates that, to the extent a NEPA document describes mitigation activities covering the full range of impacts from the proposed action—which the ER does here[33]—it is legally

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29 Clarification at 3 (quoting *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 338 (2012)).

30 *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1181 (9th Cir. 1990), *reh'g en banc denied*, 940 F.2d 435 (1991) (emphasis added).

31 *Fla. Power & Light Co.* (Turkey Point Units 3 and 4), CLI-16-18, 84 NRC 167, 173 (2016).

32 *See Crow Butte Res., Inc.* (License Renewal for the *In Situ* Leach Facility, Crawford, Neb.), CLI-18-08, 88 NRC __, __ (Nov. 29, 2018) (slip op. at 9-11) (rejecting petitioners' claim that NEPA "requires 'analytical data demonstrating' how a mitigation measure" will adequately address "potential adverse impacts," *id*. at 9, because "NEPA does not require" such a demonstration, whereas an "established [mitigation] program, set forth in detail, and governed by prescriptive license [or permit] conditions," *id.* at 10-11, is legally sufficient).

33 *See, e.g.*, ER §§ 3.6 (providing a fulsome discussion of Water Resources, including the CCS and mitigation actions undertaken in coordination with state and local regulators); 4.5 (discussing the impacts and mitigating actions related to Water Resources); § 4.6 (discussing the impacts and mitigating actions related to Ecological Resources, including wetlands and endangered species); 9 (discussing permit compliance status and mitigation activities).

sufficient. Staff's acknowledgement that FPL had no *duty* under NEPA or Part 51 to evaluate a cooling tower mitigation alternative[34] appears to recognize the applicability of these limitations.

However, there is a clear disconnect in the Clarification between: (1) its *background* discussion, which acknowledges that not "all conceivable" alternatives need be discussed,[35] (2) its statement that Staff "expresses *no position* regarding . . . the need for further mitigation . . . beyond the measures" already described in the ER,[36] and (3) its *conclusion* that the Cooling Tower Contentions appear to be admissible.[37] Given that Petitioners do not even *attempt* to explain how the *range* of the existing mitigation discussion in the ER somehow is inadequate,[38] but instead suggest (without supporting legal authority) that FPL has a duty to engage in an academic exercise to evaluate their preferred cooling alternative based solely on allegations of feasibility or superiority,[39] Staff's conclusion simply does not follow.

In similar fashion (as to the second element of the threshold criteria), the background discussion in Staff's Clarification acknowledges the proportionality limitation.[40] As Staff explains, "[m]itigation alternatives should be considered in proportion to the significance of the

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34 Clarification at 8.

35 *Id*. at 3 (quoting *Seabrook*, CLI-12-5, 75 NRC at 338).

36 *Id*. at 8 (citing Staff Answer at 30 n.112 and Tr. at 256-57).

37 *Id*.

38 Neither SACE nor Joint Petitioners attempt to explain how the mitigation measures discussed throughout the ER purportedly do not satisfy the "reasonable range" standard. Indeed, Joint Petitioners expressly disavow any attempt to "prove that the ER's discussion of Category 2 issues is deficient," but instead incorrectly assert that "FPL cannot satisfy the obligation to consider alternatives for reducing environmental impacts by pointing to existing mitigation measures." Reply in Support of Request for Hearing and Petition to Intervene Submitted by Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper at 17-19 (Sept. 10, 2018) (ML18253A280).

39 *E.g.*, SACE Petition at 29 (incorrectly suggesting a duty to consider cooling towers arises merely because cooling towers purportedly are "feasible and cost-effective" and are a "superior" mitigation method).

40 Clarification at 5-6.

impact."[41] However, Staff's Clarification expresses no opinion as to how the proportionality limitation applies here.[42]

Staff identifies no place in the Petitions where Petitioners purportedly have demonstrated (with sufficient support, as required by 10 C.F.R. § 2.309(f)(1)(v)) satisfaction of this second threshold criterion. Such a showing is indispensable to any alleged "demonstrat[ion]" of materiality (as required by 10 C.F.R. § 2.309(f)(1)(iv)) or any purported articulation of *sufficient* "supporting reasons for [Petitioners'] belief" that the ER somehow is materially deficient (as required by 10 C.F.R. § 2.309(f)(1)(vi)). The Clarification does not acknowledge the *complete absence* of any argument in the Petitions that the proportionality criterion somehow has been satisfied. Thus, Staff's assertion that the Cooling Tower Contentions appear to be admissible remains incorrect.

Moreover, the Commission has long held that Petitioners, alone, bear the burden to meet the standards of contention admissibility,[43] and that presiding officers may not cure deficiencies (such as those identified above) by supplying assumptions, imputing a nexus between contentions not explicitly pled by petitioners, or filling gaps with any other information.[44] Thus, to the extent Staff's conclusion (that the Cooling Tower Contentions appear to be admissible) relies on such intercession or interpolation, it is contrary to the NRC's adjudicatory rules, and should be afforded no weight by the Board.

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41 Clarification at 5 (quoting Regulatory Guide 4.2, Supp. 1, Rev. 1, Preparation of Environmental Reports for Nuclear Power Plant License Renewal Applications at 8-9 (June 2013) (ML13067A354)); *see also* NUREG-1555, Standard Review Plans for Environmental Reviews for Nuclear Power Plants, Supp. 1, Rev. 1 at 9 (June 2013) (ML13106A246); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-16-7, 83 NRC 293, 323 n.156 (2016).

42 Clarification at 8.

43 *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 325, 329 (2015); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 149 (2015).

44 *See Palisades*, CLI-15-23, 82 NRC at 329; *Fermi*, CLI-15-18, 82 NRC at 149; *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991).

B. Staff's Discretionary Decision to Evaluate a Cooling Tower Mitigation Alternative in the SEIS Due to Expressions of Interest from the Public Does Not Articulate Any Duty for FPL to Do the Same in Its ER

Finally, Staff notes that, out of 91 license renewal proceedings across the history of the agency, "it has only evaluated the impacts of alternative cooling systems three times in its (published) SEISs."[45] Staff asserts that these evaluations were prompted by "interest . . . expressed by members of the public or by other regulatory authorities."[46] Thus, Staff also plans to do so here, "due to the expressions of interest the Staff has received concerning this issue."[47] Staff characterizes this decision as being "for informational purposes"[48] as part of its broader secondary goal of "inform[ing] the public"—separate and apart from its obligation under NEPA to "consider every significant aspect of the environmental impact of a proposed action."[49] As Staff recognizes, its discretionary, belt-and-suspenders decision to evaluate a cooling tower mitigation alternative in its SEIS, in response to expressions of interest from the public,[50] articulates no legal duty for FPL to do the same in its ER. And no such legal duty exists.

Moreover, the three examples cited by Staff[51] are distinguishable from the instant proceeding. In all three cases, the cognizant Clean Water Act ("CWA") *regulatory agencies* each recommended evaluation of cooling towers as a possible mitigation alternative related to CWA performance standards.[52] But that clearly is not the case here. The Florida Department of Environmental Protection, the cognizant CWA regulatory agency, has not recommended

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45 Clarification at 9 n.29.
46 *Id*.
47 *Id*. at 9.
48 *Id*. at 1.
49 *Id*. at 3.
50 *Id*. at 9.
51 *Id*. at 9 n.29.
52 *See* NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supp. 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, vol. 1 at 8-1 to 8-3 (Dec. 2010) (ML103350405); Supp. 28 Regarding Oyster Creek Nuclear Generating Station, vol. 1 at 8-3, 8-26 (Jan. 2007) (ML070100234); Supp. 46 Regarding Seabrook Station, vol. 1 at 4-27, 8-34 (July 2015) (ML15209A575).

evaluation of cooling towers or indicated that cooling towers are even relevant to ensuring CWA compliance. Thus, *unlike* these three outlier cases, cooling towers are not integral to the proposed action here.

III. CONCLUSION

Staff's Clarification acknowledges that FPL had no duty to evaluate a cooling tower mitigation alternative in its ER, and points to no information suggesting Petitioners have demonstrated otherwise. Thus, the Clarification provides no basis for its implied conclusion that Petitioners purportedly have "demonstrated" that the omission of the requested evaluation from the ER would "make a difference in the outcome of the licensing proceeding."[53] Accordingly, Staff's assertion that the Cooling Tower Contentions "appear" to be admissible is unsupported.[54]

Respectfully submitted,

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Dated in Washington, D.C.
this 7th day of January 2019

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[53] *Cf. Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333-34 (1999)).

[54] In any event, as Staff correctly notes, its anticipated issuance of a draft SEIS evaluating cooling towers will clearly moot the Cooling Tower Contentions. *See* Clarification at 10 n.33.

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(Turkey Point Nuclear Generating Units 3 and 4)	)	January 7, 2019

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "Applicant's Response to the NRC Staff's Clarification Regarding the Admissibility of Proposed Cooling Tower Contentions" was 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
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