

May 3, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

NEXTERA ENERGY SEABROOK, LLC

(Seabrook Station, Unit 1)

Docket No. 50-443-LA-2

NRC STAFF'S ANSWER TO NEXTERA'S MOTION *IN LIMINE*

In accordance with 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission staff files this answer to NextEra Energy Seabrook, LLC's motion *in limine*.¹

In its motion, NextEra requests that the Board exclude from the record all future testimony and exhibits that may be filed by the C-10 Research and Education Foundation purporting to challenge the portion of NextEra's license amendment request (LAR)² having to do with structure deformation monitoring.³ NextEra argues that the Board should issue this order because NextEra has a good faith belief that, although they have not yet, C-10 and its expert, Dr. Saouma, intend to submit such testimony and exhibits in this proceeding.⁴ The basis for

¹ NextEra's Motion *in Limine* to Exclude Testimony and Exhibits Regarding Structure Deformation Monitoring (Apr. 23, 2019) (ML19114A076) (Motion).

² License Amendment Request 16-03, Revise Current Licensing Basis to Adopt a Methodology for the Analysis of Seismic Category I Structures with Concrete Affected by Alkali-Silica Reaction (Aug. 1, 2016) (ML16216A240) (LAR).

NextEra supplemented the LAR on September 30, 2016 (ML16279A047), October 3, 2017 (ML17277A337) (the non-proprietary version of Enclosure 1 to this supplement is available at ML17291B136), December 11, 2017 (ML17345A641), and June 7, 2018 (ML18158A540).

³ Motion at 4.

⁴ *Id.* at 3.

NextEra's belief is that, in a separate proceeding, C-10 and Dr. Saouma raised challenges to structure deformation monitoring at Seabrook.⁵

The Staff opposes the issuance of the requested order *in limine* because it would be premature. Orders *in limine* are appropriate to exclude testimony or exhibits that are not relevant to a proceeding.⁶ And to properly assess the relevance of testimony or exhibits, the presiding officer must be able to ascertain their content.⁷ In the instant proceeding, however, C-10 has not yet submitted any testimony or exhibits that the Board may review for relevance to the admitted contention. Therefore, it would be premature for the Board to issue the requested order.

NextEra's motion also discusses the scope of the contention admitted in this proceeding and argues that there is "no doubt that the reformulated contention admitted by the Board was intended as a challenge to the [alkali-silica reaction (ASR)] Expansion Monitoring portion of the LAR, not the Structure Deformation Monitoring portion."⁸ To the extent that the motion seeks to verify that the scope of the contention is limited to ASR expansion monitoring,⁹ the Staff offers a short discussion of its views for the Board's consideration.

⁵ *Id.* at 2-3 (citing Emergency Petition by C-10 Research and Education Foundation for Exercise of Commission's Supervisory Authority to Reverse No Significant Hazards Determination and Immediately Suspend License Amendment and License Renewal Decisions (Feb. 13, 2019) (ML19044A768)).

⁶ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 374, 377-78 (2015) (ruling that a Board erred in denying motions *in limine* that sought to exclude testimony and exhibits regarding emergency planning issues as outside the scope of the license renewal proceeding).

⁷ See, e.g., *Bailey v. Formosa Plastics Corp., USA*, No. CIV. A. 94-1449, 1997 WL 417297, at *1 (E.D. La July 23, 1997) ("The Court finds that this motion in limine is premature in that defendant's concerns are speculative and may not be borne out by the witnesses' actual testimony."); *King v. Martin*, No. 10-1774, 2012 WL 6087536, at *1 (W.D. La. Dec. 6, 2012) ("As Tooley-Knoblett has not yet been deposed, this court cannot ascertain the content of her proposed testimony, and therefore, cannot determine whether she will attempt to offer inadmissible legal opinions solely on the basis of her expert report.").

⁸ Motion at 8-10.

⁹ See, e.g., *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296-97 (1998) (verifying, in response to the applicant's request, that the Board intended to limit two

The scope of an admitted contention is defined by its terms and by the bases addressed by a Board in making its admissibility decision.¹⁰ The terms of the contention admitted in this proceeding, as reformulated by the Board, are:

The large-scale test program, undertaken for NextEra at the FSEL, has yielded data that are not “representative” of the progression of ASR at Seabrook. As a result, the proposed monitoring, acceptance criteria, and inspection intervals are not adequate.¹¹

The bases addressed by the Board in developing this reformulated contention demonstrate that its use of the terms “monitoring, acceptance criteria, and inspection intervals” is specific to the ASR expansion monitoring portion of the LAR. For instance, in LBP-17-7, the Board discusses whether the large-scale test program (LSTP) supports combined cracking index, snap-ring borehole extensometers, and empirical calculations as valid means of determining ASR expansion at Seabrook (i.e., “monitoring”),¹² whether the LSTP supports that the ASR expansion limits in LAR Table 4 are applicable to Seabrook (i.e., “acceptance criteria”),¹³ and whether the ASR expansion monitoring intervals in LAR Table 5 are valid at Seabrook (i.e.,

paragraphs of an admitted contention to only the specific species identified, even though this “seemingly was clear from the Board’s action on the contention”).

¹⁰ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 309-10, 310 n.50 (2012) (“[A]n admitted contention is defined by its bases” and the Commission “assume[s] that any basis not addressed by the Board was not relied upon in making its admissibility decision.”); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (“The reach of a contention necessarily hinges upon its terms *coupled with* its stated bases.”) (internal quotation marks omitted)).

¹¹ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-17-7, 86 NRC 59, 127 (2017) (LBP-17-7).

¹² *Id.* at 98-102. See also *id.* at 93 (“C-10 contests the sufficiency of the methods proposed in the LAR for monitoring the anticipated progression of ASR at Seabrook.”).

¹³ *Id.* at 106. See also *id.* at 114 n.353 (“We understand that the phrase ‘acceptance criteria,’ as used by the Staff, refers to the expansion limits in LAR Table 4.”).

“inspection intervals”¹⁴—all of which are discussed in the ASR expansion monitoring portion of the LAR.¹⁵ The structure deformation monitoring portion of the LAR discusses different monitoring (i.e., finite element modeling of susceptible structures), different acceptance criteria (i.e., threshold monitoring limits that are specific to each structure), and different inspection intervals (i.e., as provided in LAR Table 6).¹⁶ The Board does not discuss these issues and, instead, indicates that they are outside the scope of the contention by noting that C-10 challenges the monitoring intervals in LAR Table 5 and not the monitoring intervals in LAR Table 6.¹⁷ Therefore, it is “seemingly ... clear from the Board’s action on the contention”¹⁸ that it had intended to limit the reformulated contention to only the ASR monitoring portion of the LAR.

For the foregoing reasons, the Board should deny the motion.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 3rd day of May, 2019

¹⁴ *Id.* at 124.

¹⁵ See LAR at 30-32 of 73 (unnumbered).

¹⁶ *Id.* at 23-27, 32-33 of 73 (unnumbered).

¹⁷ *Seabrook*, LBP-17-7, 86 NRC at 124.

¹⁸ *Private Fuel Storage*, LBP-98-10, 47 NRC at 296-97.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO NEXTERA'S MOTION *IN LIMINE*," dated May 3, 2019, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 3rd day of May, 2019.

/Signed (electronically) by/

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