UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of FLORIDA POWER & LIGHT COMPANY (Turkey Point Nuclear Generating Units 3 and 4)	Docket Nos. 50-250-SLR 50-251-SLR

NRC STAFF'S BRIEF IN RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF LBP-19-8

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NRC STAFF'S BRIEF IN RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF LBP-19-8

INTRODUCTION

The staff of the U.S. Nuclear Regulatory Commission (Staff) hereby responds to the petition filed by Friends of the Earth, Natural Resources Defense Council and Miami Waterkeeper (collectively, Intervenors) on November 18, 2019,[1] seeking review of the Atomic Safety and Licensing Board's (Board) decision in LBP-19-8. In that decision, the Board denied the Intervenors' motion to migrate and admit new contentions,[2] denied their petition for waiver,[3] and terminated the adjudicatory proceeding before the Board.[4] As set forth below, the Staff submits that the Board carefully and thoroughly considered the Intervenors' contentions and

[1] [Intervenors'] Petition for Review of the Atomic Safety and Licensing Board's Ruling in LBP-19-8 (Nov. 18, 2019) (ADAMS Accession No. ML19322D623) (Petition for Review).

[2] [Intervenors'] Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's Supplemental Draft Environmental Impact Statement (June 24, 2019), as amended by "Errata" submitted on June 28, 2019 and re-filed as [Intervenors'] Amended Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's Supplemental Draft Environmental Impact Statement (June 28, 2019) (ML19179A316) (Amended Motion).

[3] [Intervenors'] Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B (June 24, 2019) (ML19175A311) (Waiver Petition).

[4] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-19-8, 90 NRC __ (Oct. 24, 2019) (slip op.).

Waiver Petition and did not commit any error of law or abuse of discretion in its decision. The Intervenors' petition for review should therefore be denied.

BACKGROUND

This proceeding concerns the subsequent license renewal application (SLRA) submitted by Florida Power & Light Company (FPL or Applicant), requesting an additional 20 years of operation for Turkey Point Nuclear Generating Unit Nos. 3 and 4.[5] The current renewed operating licenses for Units 3 and 4 expire on July 19, 2032 and April 10, 2033, respectively;[6] subsequent license renewal would extend their operation until July 19, 2052 and April 10, 2053.[7]

On May 2, 2018, the NRC published a notice of receipt of the SLRA[8] and a determination of acceptability for docketing, along with a notice of opportunity for hearing.[9] The Intervenors submitted a timely petition to intervene,[10] and petitions were also submitted by Southern Alliance for Clean Energy (SACE) and Mr. Albert Gomez. The Board was established to preside

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[5] *See* (1) Letter from Mano K. Nazar (FPL) to NRC Document Control Desk (Jan. 30, 2018) (ML18037A812); (2) Letter from William D. Maher (FPL) to NRC Document Control Desk (Feb. 9, 2018) (ML18044A653); (3) Letter from William D. Maher (FPL) to NRC Document Control Desk (Feb. 16, 2018) (ML18053A123); (4) Letter from William D. Maher (FPL) to NRC Document Control Desk (Mar. 1, 2018) (ML18072A224); and (5) SLRA, Rev. 1 (Apr. 10, 2018) (ADAMS Package Accession No. ML18113A132).

[6] The construction permits for Turkey Point Units 3 and 4 were issued on April 27, 1967; the initial operating licenses for Units 3 and 4 were issued on July 19, 1972 and April 10, 1973, respectively; and the licenses for both Units were renewed for an additional 20 years on June 6, 2002. SLRA Appendix E, Environmental Report, Subsequent Operating License Renewal Stage, at 1-1, 2-1 (ML18113A145) (ER).

[7] *Id.* The Turkey Point site is also occupied by two retired natural gas/oil steam-generating units (Units 1 and 2), which have been repurposed to support transmission reliability, but do not generate power or process water; and one operating 1,150 MW combined-cycle natural gas-fired steam-generating unit (Unit 5). *Id.* at 2-1. The NRC has also issued combined licenses (COLs) for two Westinghouse AP1000 (1,117 MWe) nuclear plants (Units 6 and 7) to be built at the site. Florida Power & Light Co.; Turkey Point Units 6 and 7; Combined licenses and record of decision; issuance, 83 Fed. Reg. 18,091 (Apr. 25, 2018).

[8] Florida Power & Light Co.; Turkey Point Nuclear Generating Unit Nos. 3 and 4; License renewal application; receipt, 83 Fed. Reg. 17,196 (Apr. 18, 2018).

[9] Florida Power & Light Co.; 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).

[10] Request for Hearing and Petition to Intervene Submitted by [Intervenors] (Aug. 1, 2018) (Petition).

over any hearing that may be held,[11] and on December 4, 2018, the Board conducted oral argument on contention admissibility.[12]

On March 7, 2019, the Board issued LBP-19-3, in which it, *inter alia*, granted the Intervenors' and SACE's petitions; revised and admitted four contentions;[13] denied the admission of all other contentions and contention subparts; and referred a portion of its decision to the Commission, concerning its ruling that 10 C.F.R. § 51.53(c)(3) applies to the preparation of ERs by SLR applicants.[14] Shortly thereafter, SACE withdrew from the proceeding.[15]

In March 2019, the Staff issued its draft supplemental environmental impact statement (DSEIS) for subsequent license renewal of Turkey Point Units 3 and 4, as a supplement to the GEIS.[16] Under the migration tenet,[17] Contentions 1-E and 5-E, which originally challenged

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[11] Establishment of Atomic Safety and Licensing Board; Florida Power & Light Co., 83 Fed. Reg. 40,360 (Aug. 14, 2018).

[12] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), Official Transcript of Proceedings (Dec. 4, 2018) (ML18340A077).

[13] The contentions filed by SACE and the Joint Petitioners challenged statements or omissions in the Applicant's Environmental Report (ER), which FPL submitted as SLRA Appendix E (Jan. 31, 2018) (ML18113A145). *See also*, letter from William D. Maher (FPL) to NRC Document Control Desk (Apr. 10, 2018) (ML18102A521) (transmitting supplemental information related to the ER).

[14] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-19-3, 89 NRC __ (Mar. 7, 2019), slip op. at 63. Administrative Judge Abreu dissented, in part, from the Board's decision, insofar as the Board ruled that 10 C.F.R. § 51.53(c)(3) applies to subsequent license renewal. *See id.* FPL filed an appeal from LBP-19-3 pursuant to 10 C.F.R. § 2.311. *See* [FPL]'s Notice of Appeal of LBP-19-3; Brief in Support of [FPL]'s Appeal of LBP-19-3 (Apr. 1, 2019) (ML19091A302). As discussed *infra*, that appeal is now moot.

[15] Southern Alliance for Clean Energy's Notice of Withdrawal (Apr. 9, 2019) (ML19099A314) (Notice). FPL informed the Commission of SACE's withdrawal, noting that SACE's withdrawal extinguished its two admitted contentions and rendered moot a portion of FPL's appeal of LBP-19-3, concerning the admission of SACE's contentions. Notice Regarding SACE Withdrawal (Apr. 11, 2019) (ML19101A296), at 1.

[16] NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment (Mar. 2019) (ML19078A330) (DSEIS). The DSEIS supplemented the NRC's generic environmental impact statement (GEIS) for license renewal of nuclear power plants. NUREG-1437, Revision 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (June 2013) (ML13106A241) (GEIS).

[17] *See Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-15-17, 82 NRC 33, 42 n.58 (2015) ("[A] contention 'migrates' when a licensing board construes a contention challenging the environmental section of an application as a challenge to a subsequently issued Staff NEPA document without the petitioner amending the contention.").

FPL's ER, became challenges to the Staff's DSEIS.[18] FPL filed motions to dismiss these contentions as moot, stating that the DSEIS cured the omissions identified in Contentions 1-E and 5-E.[19] On July 8, 2019, the Board issued LBP-19-6, granting FPL's motions to dismiss.[20] The Intervenors filed a petition seeking Commission review of LBP-19-3 and LBP-19-6,[21] which is presently pending before the Commission.[22]

On June 24, 2019 (prior to the Board's dismissal of Intervenor Contentions 1-E and 5-E), the Intervenors filed their waiver petition and motion to migrate and/or amend those contentions and to admit four new contentions challenging the DSEIS. FPL and the Staff filed responsive answers;[23] the Intervenors replied;[24] and an oral argument on contention admissibility was

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[18] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), LBP-19-6, 90 NRC __ (July 8, 2019), slip op. at 3 (citing *Crow Butte, supra*).

[19] *See* FPL's Motion to Dismiss Joint Petitioners' Contention 1-E as Moot (May 20, 2019) (ML19140A355); FPL's Motion to Dismiss Joint Petitioners' Contention 5-E as Moot (May 20, 2019) (ML19140A356).

[20] LBP-19-6, 90 NRC at __ (slip op. at 1, 11). The Applicant informed the Commission of the Board's dismissal of Joint Intervenor Contentions 1-E and 5-E, noting that the dismissal of these contentions rendered moot the Applicant's appeal of LBP-19-3. Notice Regarding Dismissal of Contentions (July 15, 2019) (ML19196A337), at 1.

[21] Friends of the Earth's, Natural Resources Defense Council's, and Miami Waterkeeper's Petition for Review of the [Board's] Rulings in LBP-19-3 and LBP-19-6 (Aug. 9, 2019) (ML19221B677). *See also* (1) Florida Power & Light Company's Answer Opposing Intervenors' Petition for Review of LBP-19-3 and LBP-19-6 (Sept. 10, 2019) (ML19253E118); (2) NRC Staff Answer to Petition for Review of LBP-19-3 and LBP-19-6 (Sept. 10, 2019) (ML19253E051); and (3) Reply of [Intervenors] in Support of Petition for Review of the [Board's] Rulings in LBP-19-3 and LBP-19-6 (Sept. 20, 2019) (M19263D909).

[22] *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), Order (Dec. 4, 2019) (unpublished) (ML19338E390) (extending the time for review of Intervenors' petition for review of LBP-19-3 and LBP-19-6, pending further Commission order).

[23] *See* (1) Florida Power & Light Company's Answer to Intervenors' Petition for Waiver of Certain 10 C.F.R. Part 51 Regulations (July 19, 2019) (ML19200A298) (FPL's Answer to Waiver Petition); (2) Florida Power & Light Company's Answer Opposing Intervenors' Motion to Migrate or Amend Contentions 1-E and 5-E and to Admit New Contentions 6-E, 7-E, 8-E, and 9-E (July 19, 2019) (ML19200A297) (FPL's Answer to New Contentions); and (3) NRC Staff's Answer to Joint Intervenors' [ ] Amended Motion to Migrate or Amend Contentions 1-E and 5-E and to Admit Four New Contentions, and [ ] Petition for Waiver (July 19, 2019) (ML19200A300) (NRC Staff's Answer).

[24] Reply in Support of Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's [DSEIS] (July 26, 2019) (ML19207C092); Reply of [Joint Intervenors] in Support of Petition for Waiver [. . . .] (July 26, 2019) (ML19207C095). The Applicant filed a motion to strike the Intervenors' waiver petition reply, which the Board granted. *See* Order (Granting FPL's Motion to Strike) (Aug. 20, 2019) (ML19232A174).

conducted by the Board on September 9, 2019.[25] On October 24, 2019, the Board issued its decision in LBP-19-8, denying the Intervenors request for rule waiver and denying admission of their new and amended contentions. The Intervenors then filed the instant petition for review.[26]

On October 25, 2019, the Staff made publicly available its Final SEIS.[27] On December 4, 2019, the Staff issued the subsequent renewed licenses for Turkey Point Units 3 and 4,[28] having previously informed the Commission of its proposed action and having determined that issuance of the licenses would not foreclose or prejudice action by the Commission on the pending appeals or any subsequent petition for judicial review.[29]

DISCUSSION

In LBP-19-8, the Board thoroughly considered and addressed the intervenors' petition for rule waiver and motion to migrate and to admit new contentions to challenge the Staff's DSEIS. In the following discussion, the Staff addresses applicable legal principles, followed by an explication of the reasons why the Board's decision should be affirmed.

I. Legal Standards

A. Standards Applicable to Commission Review

Pursuant to 10 C.F.R. § 2.341(b)(1), within 25 days after service of a full or partial initial decision or any other decision or action by a presiding officer with respect to which a petition for

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[25] *See* Order Scheduling Oral Argument (Aug. 9, 2019) (unpublished) (ML19221B552); Official Transcript of Proceedings, Turkey Point Nuclear Generating Units 3 and 4 (Sept. 9, 2019) (ML19254E569) ("Tr.").

[26] The Intervenors do not appeal from the Board's ruling on Contention 1-E. Petition for Review at 2 n.11.

[27] *See* Notification of Availability of FSEIS (10/28/19) (ML19301E597); NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Final Report (Oct. 2019) (ML19290H346) (FSEIS).

[28] *See* Notification of License Issuance (Dec. 5, 2019) (ML19339H994).

[29] *See* Notification of NRC Staff Communication with the Commission (Nov. 27, 2019) (ML19331A820) *and* attached Memorandum to the Commission from Ho K. Nieh, Director, Office of Nuclear Reactor Regulation (Subsequent Renewal of Renewed Full-Power Operating Licenses for Turkey Point Nuclear Generating Unit Nos. 3 and 4), at 2 (Nov. 26, 2019) (ML19331A821).

review is authorized, a party may file a petition for review with the Commission.[30] The petition may be granted in the discretion of the Commission,

> giving due weight to the existence of a substantial question with respect to the following considerations: (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding; (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) A substantial and important question of law, policy, or discretion has been raised; (iv) The conduct of the proceeding involved a prejudicial procedural error; or (v) Any other consideration which the Commission may deem to be in the public interest.[31]

On review, the Commission generally defers to a licensing board's threshold rulings on standing and contention admissibility unless it finds an "error of law or abuse of discretion"[32] and leaves to the board's judgment a determination whether a proposed contention has a sufficient factual basis to be admitted for hearing.[33] Therefore, a petition for review of a threshold determination that does not point to an error of law or abuse of discretion by the board but simply restates the appellant's prior positions and its general disagreement with the board's

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[30] The Board stated that its decision may be appealed in accordance with the provisions of 10 C.F.R. § 2.311(b). LBP-19-8, slip op. at 41. The Intervenors, however, cited § 2.341(b) in their appeal, not § 2.311. The Staff believes that the decision is properly appealable under § 2.341(b), inasmuch as the decision did not involve a determination as to whether a hearing request or petition to intervene should have been granted or wholly denied. *See* 10 C.F.R. §§ 2.311(c)-(d); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1) CLI-13-3, 77 NRC 51, 4 (2013). Regardless of whether review is conducted under § 2.341(b) or § 2.311, however, the standards for contention admissibility are the same. *See Luminant Generation Company, LLC* (Comanche Peak Nuclear Power Plant, Unit 3 and 4), CLI-12-7, 75 NRC 379, 380 (2012).

[31] 10 C.F.R. § 2.341(b)(4).

[32] *See, e.g.*, *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 710 (2012); *see also Calvert Cliffs 3 Nuclear Project, LLC* and UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914 (2009) ("We give substantial deference to our boards' determinations on threshold issues, such as standing and contention admissibility, and we will affirm decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion.") (internal quotation marks omitted).

[33] *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 574 (2016).

decision, with or without additional support, will not be granted.[34] For questions of law, the Commission's review is *de novo*.[35] The Commission may affirm a board's decision on any ground finding support in the record, whether previously relied upon or not.[36]

B. Contention Admissibility Standards

The legal requirements governing the admissibility of contentions are set forth in 10 C.F.R. § 2.309(f)(1)-(2). Specifically, contentions must satisfy the following requirements:

> (f) *Contentions*. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
>
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted…;
> (ii) Provide a brief explanation of the basis for the contention;[37]
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
> (iv) 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;
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/ petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;[38] [and]

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[34] *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017).

[35] *See, e.g.*, *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-16-18, 84 NRC 167, 171 (2016).

[36] *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005).

[37] The basis helps to define the contention's scope, as "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases." *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *accord Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

[38] The petitioner is obliged to present the facts and expert opinions necessary to support its contention. *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) (it is the petitioner's responsibility to satisfy the basic contention admissibility requirements; Boards should not have to search through a petition to "uncover" arguments and support for a contention, and "may not simply 'infer' unarticulated bases of contentions"). *See also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991).

> (vi) … [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must 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, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief ….
>
> (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report ….

These contention admissibility rules are highly pertinent to the Intervenors' petition for review. In this regard, it is well established that the rules exist to "focus litigation on concrete issues, and result in a clearer and more focused record for decision."[39] The Commission has explained that the rules governing the admissibility of contention are "strict by design."[40] Failure to comply with any of the requirements set forth in the regulations is grounds for the dismissal of a contention.[41] The rules require "a clear statement as to the basis for the contentions and the submission of … supporting information and references to specific documents and sources that establish the validity of the contention." "Mere 'notice pleading' does not suffice."[42] "A

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[39] *See, e.g.*, *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, NE), LBP-15-15, 81 NRC 598, 601 (2015) (citing "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004)).

[40] *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2) CLI-16-5, 83 NRC 131, 136 (2016) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) and *South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[41] *Indian Point*, CLI-16-5, 83 NRC at 136; s*ee also Duke Energy Corp.* (Oconee Nuclear Station), CLI-99-11, 49 NRC 328, 334-35 (1999) (the heightened contention admissibility rules are designed to preclude contentions "based on little more than speculation").

[42] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006) (footnotes omitted).

petitioner's issue will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[43] Further, although an intervenor does not have to prove its contention at the admissibility stage,[44] it must provide some support for the contention, either in the form of facts or expert testimony; "[f]ailure to do so requires that the contention be rejected."[45] Any supporting material provided by the intervenor is subject to Board scrutiny,[46] and the Board must confirm that the proffered material provides adequate support for the contention.[47]

C. Standards Governing Petitions for Waiver.

It is fundamental that NRC regulations are not subject to attack in an adjudicatory proceeding;[48] however, the application of a specific regulation may be waived or an exception may be made for a particular proceeding, upon the Commission's grant of a petition for waiver.[49] The sole ground for a waiver petition is that "special circumstances with respect to the subject

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[43] *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 192, 208 (2000)).

[44] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

[45] *Palo Verde*, CLI-91-12, 34 NRC at 155; *accord, Indian Point*, CLI-16-5, 83 NRC at 136. *See* "Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) ("This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.").

[46] *Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), LBP-10-7, 71 NRC 391, 421 (2010); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996).

[47] *Bellefonte*, LBP-10-7, 71 NRC at 421.

[48] 10 C.F.R. § 2.335(a); *see also Dominion Nuclear Connecticut, Inc* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).A contention must be rejected if it constitutes an attack on applicable statutory requirements; challenges the basic structure of the Commission's regulatory process or is an attack on the regulations. *See Philadelphia Electric Co*. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)

[49] 10 C.F.R. § 2.335(a).

matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purpose for which the rule or regulation was adopted."[50]

If the presiding officer determines that the petitioner has not made "a *prima facie* showing" that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, the presiding officer may not further consider the matter.[51] Moreover, even if the presiding officer determines that a *prima facie* showing has been made, he or she is required, before ruling on the petition, to certify the matter directly to the Commission for a determination of whether application of the rule or regulation (or provision thereof) should be waived or an exception made.[52]

The Commission has established a four-factor test for waiver applications:

> (i) the rule's strict application 'would not serve the purposes for which it was adopted';
> (ii) the movant has alleged 'special circumstances' that were 'not considered either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;'
> (iii) those circumstances are 'unique' to the facility rather than 'common to a large class of facilities;' and
> (iv) a waiver of the regulation is necessary to reach a 'significant safety problem.'[53]

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[50] *Id.,* § 2.335(b). The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit "must state with particularity the special circumstances alleged to justify the waiver or exception requested." *Id*. Other participants may file a response by counter-affidavit or otherwise. *Id*

[51] *Id.*, § 2.335(c).

[52] *Id.*, § 2.335(d).

[53] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559–60 (2005) (internal citations omitted). The Commission has clarified that the fourth factor "also may apply to a significant environmental issue." *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-7, 78 NRC 199, 209 (2013).

Intervenors must satisfy all four factors to obtain a waiver.[54] The waiver standard is "stringent by design," and the waiver petitioner faces a "substantial burden."[55] Moreover, since the purpose of rulemaking is to "carv[e] out issues from adjudication for generic resolution[,] . . . to challenge the generic application of a rule, a petitioner seeking waiver must show that there is something extraordinary about the subject matter of the proceeding such that the rule should not apply."[56]

II. The Board Correctly Denied the Intervenors' Petition for Waiver.

In their Waiver Petition, the Intervenors (a) provisionally sought a waiver of the regulations in 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Appendix B, to allow the admission of Contention 6-E concerning a "new issue that is neither Category 1 nor 2 of water quality impacts on adjacent water bodies (plants with cooling ponds in salt marshes);"[57] and (b) sought a waiver of those regulations to permit the admission of Contention 7-E, concerning "new and significant" information in the DSEIS regarding the GEIS Category 1 issue of groundwater quality degradation (plants with cooling ponds in salt marshes).[58] FPL and the Staff agreed that a rule waiver is not required for litigation of Contention 6-E, concerning the new issue identified in the DSEIS;[59] they further agreed that a rule waiver *is* necessary for

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[54] *Millstone,* CLI-05-24, 62 NRC at 560.

[55] *Limerick,* CLI-13-7, 78 NRC at 207, 208.

[56] *Id.* at 207.

[57] The DSEIS identified new information concerning the current operation of Turkey Point Units 3 and 4, whereby the salinity of the Turkey Point cooling canal system (CCS) was found to affect water quality in the adjacent surface waters of Biscayne Bay via a groundwater pathway. Because this issue was not addressed in the GEIS, the Staff treated it as a Category 2 issue in the Turkey Point DSEIS. *See* LBP-19-8, slip op. at 17, citing DSEIS at 4-21 – 4-23. The Staff identified this as new and significant information for current operations (resulting in a SMALL to MODERATE impact) but found that the information is not significant for subsequent license renewal due, in part, to FPL's ongoing remediation efforts and continued regulatory oversight by the Florida Department of Environmental Protection (FDEP) and the Miami-Dade County Division of Environmental Resource Management (DERM). *See* DSEIS at 4-21 – 4-28.

[58] Waiver Petition at [unnumbered] 1, 3.

[59] *See* NRC Staff's Answer at 32 n.127; FPL's Answer to Waiver Petition at 9; Tr. at 270 (O'Neill; Turk).

litigation of Contention 7-E challenging the GEIS Category 1 issue of groundwater quality degradation (plants with cooling ponds in salt marshes)—but found the Intervenors had not made a prima facie showing that application of the rule would not serve the purposes for which it was adopted, as required by 10 C.F.R. § 2.335 and *Millstone*.[60]

In LBP-19-8, the Board agreed with FPL and the Staff and concluded that a rule waiver was not required for Contention 6-E because the contention did not challenge a Category 1 issue,[61] but a waiver was required for Contention 7-E.[62] The Board further found that the Intervenors had failed to satisfy the first *Millstone* factor, i.e., they had not shown that strict application of the rule "would not serve the purposes for which it was adopted."[63] In this regard, the Board observed that the NRC's purpose in designating this as a Category 1 issue in the GEIS reflected its expectation that its generic evaluation of this issue "as a Category 1 issue whose environmental impacts would be 'small' during the SLR period,'"[64] satisfied its obligations under NEPA.[65] Further, the Board found that the Intervenors had not shown the existence of significant new information that "would lead to a determination that the environmental impact during the SLR period will be greater than 'small,'"[66] such that strict application of this GEIS Category 1 designation would not serve the purpose for which the rule was adopted.[67] Accordingly, the Board denied the Waiver Petition and rejected Contention 7-E as an impermissible challenge to the regulations.[68]

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[60] NRC Staff's Answer at 57-58; FPL's Answer to Waiver Petition at 10-18.

[61] LBP-19-8, slip op. at 18.

[62] *Id.* at 30.

[63] *Id.*

[64] *Id.* at 29-30.

[65] National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. § 4321, *et seq.*

[66] LBP-19-8, slip op. at 30.

[67] *Id.*

[68] *Id.* (citing 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a)).

On appeal, the Intervenors contend that the Board erred in denying their Waiver Petition. First, they assert that the DSEIS had identified "new and significant" site-specific information concerning the cooling canal system (CCS) and its effects on groundwater quality, resulting in a "moderate" finding for "current" operations, in contrast to the "small" impact predicted by the GEIS; and they claim that Contention 7-E had challenged "the Staff's new site-specific finding" rather than the GEIS's generic Category 1 determination.[69] Second, and "in the alternative," they assert that the Board erred in applying the *Millstone* test, in that (a) contrary to the Board's understanding, they had not argued that "any" new information would satisfy the first *Millstone* factor—rather, their position was that the information evaluated in the DSEIS satisfies that factor;[70] (b) the Board incorrectly required a showing "that new and significant information, unique to a particular plant, exists" under the first *Millstone* factor, rather than applying this principle to the overall requirements for rule waiver;[71] and (c) the Board incorrectly focused on one criterion underlying a GEIS Category 1 determination (whether a single "significance" level applies to all plants), and failed to consider a second criterion (whether "site-specific measures will be warrantless").[72]

The Intervenors' claims should be rejected. First, while Contention 7-E sought to challenge the DSEIS's finding that impacts during the SLR period of operation would be "small" (in part due to FPL's ongoing remediation efforts and regulatory oversight by the FDEP and DERM), the Intervenors were required to demonstrate the significance of new information in the DSEIS in order to set aside the GEIS Category 1 determination before their contention could be admitted for litigation. This, the Intervenors failed to do—as the Board correctly held.[73]

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[69] Petition for Review, at 19-20.

[70] *Id.* at 20-21; *see* LBP-19-8, slip op. at 29 n.39.

[71] Petition at 21.

[72] *Id.* at 21-22.

[73] *See* LBP-19-8, slip op. at 28-30.

Second, there is no basis for the Intervenors' claim that the Board misunderstood or misstated their position. As the Board observed, in their discussion of the first *Millstone* factor, the Intervenors argued that the DSEIS contained "new information" and that the Intervenors and the public "have not yet had an opportunity to review or challenge the sufficiency of this information."[74] Nowhere in their discussion of the first *Millstone* factor, however, did they assert that any of the new information in the DSEIS was "significant" for the SLR period of operation.[75] Accordingly, the Board's characterization of their argument was not erroneous.

Finally, there is no merit in the Intervenors' claims that the Board erred in (a) requiring a showing of "new and significant information" under the first *Millstone* factor; (b) not considering whether "site-specific measures will be warrantless;"[76] or (c) applying the rule in a manner that was "both too large and too narrow."[77] Significantly, the Intervenors provide no support for these claims of error, apart from their own *ipse dixit* assertions.[78] The Staff submits that the Board's ruling on the Waiver Petition is fully consistent with 10 C.F.R. § 2.335 and Commission caselaw and should be affirmed.

III. The Board Correctly Denied Intervenors' Request to Migrate or Amend Contention 5-E.

In their Amended Motion, the Intervenors requested to migrate or to amend Contention 5-E—which had originally challenged an omission in FPL's ER—to challenge the Staff's DSEIS.[79] The Intervenors asserted that Contention 5-E should automatically migrate to apply to

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[74] Waiver Petition at [unnumbered] 7; *compare* LBP-19-8, slip op. at 29 n.39.

[75] *See* Waiver Petition at [unnumbered] 7-8.

[76] Petition for Review at 21-22 (emphasis added).

[77] *Id.*

[78] *See id.* at 21-22.

[79] As admitted by the Board, Contention 5-E alleged, "The ER is deficient in its failure to recognize Turkey Point as a source of ammonia in freshwater wetlands surrounding the site, and in its failure to analyze the potential impacts of ammonia releases during the renewal period on threatened and endangered species and their critical habitat." LBP-19-3, slip op. at 63 n.82.

the DSEIS;[80] alternatively, they sought to migrate the contention by amending its language to challenge the DSEIS.[81] In renamed Contention 5-Eb, the Intervenors asserted, "[t]he DSEIS is deficient in its analysis of the potential impacts of ammonia releases during the renewal period on threatened and endangered species and their critical habitat."[82]

In LBP-19-8, the Board denied the Intervenors' request to migrate and/or amend Contention 5-E. [83] The Board carefully and thoroughly reviewed the DSEIS's evaluation of ammonia releases and their impacts on listed species and sensitive habitats under the Endangered Species Act (ESA).[84] The Board then rejected the Intervenors' sole challenge to the Staff's analysis – i.e., that the DSEIS included a more thorough analysis of the West Indian manatee than other species – in that this assertion failed to satisfy the contention admissibility standards in 10 C.F.R. §§ 2.309(f)(1)(v)-(vi):

> [D]ifferent analyses for different species based on different circumstances do not perforce equate to inadequate analyses, Rather, case law supports the conclusion that the NRC Staff acts reasonably—and, hence, consistent with NEPA—in analyzing the impact of ammonia in proportion to its potential impacts on threatened and endangered species and their habitats. *See* [*NRDC v. Morton,* 458 F.2d 827, 834 (D.C. Cir. 1972)] ("The agency may limit its discussion of environmental impact to a brief statement, when that is the case, that the alternative course involves no effect on the environment, or that [an] effect, briefly described, is simply not significant.").
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> In sum, Joint Intervenors fail to support their claim that different analytic treatment of species is not justified by the differing circumstances of the different species and their habitats, as required by 10 C.F.R. § 2.309(f)(1)(v), and they fail to demonstrate a genuine dispute of material law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Contention 5-Eb is therefore not admissible.[85]

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[80] Amended Motion at 7-8.

[81] *Compare* LBP-19-3, slip op. at 63 n.82 *with* Amended Motion at 20.

[82] Amended Motion at 21.

[83] LBP-19-8, slip op. at 11-16.

[84] 16 U.S.C. § 1531, *et seq*. *See* LBP-19-8, slip op. at 12-15.

[85] LBP-19-8, slip op. at 15-16 (footnote omitted). The Board further explained that the Intervenors erred in asserting, based on the Staff's Biological Assessment, that an evaluation of ammonia's impacts on ESA-

On appeal, the Intervenors do not contest the Board's reliance on the principle that different analyses may be performed for species based on different circumstances,[86] but assert instead that the Board ignored their evidence that the American crocodile "might be," "might conceivably be," or is "high[ly] like[ly]" to be exposed to ammonia and that the Board relied instead on other "erroneous and immaterial evidence."[87] These assertions should be rejected. First, the Intervenors provided no facts or expert opinion to support a claim that the DSEIS's evaluation of impacts to other species was deficient or that the American crocodile, in particular, should have received more attention. Nowhere in Contention 5-Eb or its supporting basis did they show that impacts to other species would be significant, or that the DSEIS omitted important information in its evaluation of impacts to such other species.

Second, the Intervenors provided no evidence to support a claim that the DSEIS's analysis of ammonia impacts was deficient. In this regard, the DSEIS and the Biological Assessment (BA) incorporated by reference therein,[88] provided a comprehensive discussion of ammonia in and near the CCS, including observations that (1) in the CCS, the concentration of ammonia is below the applicable water quality standard, (2) at the bottom of certain excavations next to the CCS and connected to Biscayne Bay, the concentration of ammonia is above the applicable water quality standard, and (3) in surrounding marshland and mangrove areas, ammonia has not been detected in soil pore water, and (4) wetlands near the CCS do not

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listed species must "consider '[s]everal water quality parameters, including pH, temperature, and salinity; the rate and duration of exposure; and a species' specific physiobiology[.]'" *Id.* at 16 n.26. In addition, the Board found that the Intervenors "fail[ed] to explain why a species that is not exposed to an elevated level of ammonia should be expected to experience ammonia toxicity." *Id.* The Intervenors do not challenge those determinations on appeal.

[86] Petition for Review at 4.

[87] *Id*. at 3, 4, 5.

[88] Biological Assessment for the Turkey Point Nuclear Generating Unit Nos. 3 and 4 Proposed Subsequent License Renewal (Dec. 2018) (ML18344A008); *see* DSEIS at 4-60.

exhibit different growth trends than wetlands further from the CCS.[89] The DSEIS evaluated this information in assessing impacts to species and critical habitats, along with their potential to contact ammonia. With respect to the American crocodile, the BA observed that there has been a reduction in American crocodile nesting and hatchling abundance due in part to a decrease in CCS water quality, but this adverse impact is expected to decrease in the future.[90] Further, for species that may feed in the CCS (including the American crocodile), the BA identified a reduction in prey resources due, in part, to an increase in nutrients in the CCS, but found this adverse impact is expected to lessen because of FDEP and DERM requirements (e.g., requiring that FPL develop and implement a nutrient management plan).[91]

In sum, the Intervenors failed to provide any facts or expert opinion to support their claim that the DSEIS should have afforded greater analysis of other species, and they failed to demonstrate a genuine dispute of material fact with the DSEIS as required by 10 C.F.R. § 2.309(f)(1)(v) and (vi). The Board's rejection of this contention should therefore be affirmed.

IV. The Board Correctly Rejected Intervenors' Contentions 6-E through 9-E.

In their Petition for Review, the Intervenors do not present a succinct challenge to the Board's ruling on any specific contention; rather, they argue that the Board "erred in denying Contentions 6-E through 9-E,"[92] effectively blending their challenges to the Board's rulings on all four new contentions into a single argument. While they argue that the Board erroneously "overlooked, misunderstood, or ignored important information," they do not present their arguments on a contention-by-contention basis.[93] Their Petition for Review therefore renders it

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[89] *See, e.g.,* DSEIS at 3-41, 3-42, 3-50—3-53; BA at 60.

[90] BA at 32-34, 36, 44.

[91] *Id.* at 36, 41-42, 53, 57.

[92] Petition for Review at 6.

[93] *Id*. at 7.

difficult to understand which arguments pertain to which specific contention. Further, the Petition for Review generally recites various facts and opinions that were presented in their contentions, without showing that the Board failed to consider the information.[94] A review of the Board's decision establishes, however, that the Board carefully considered the facts and arguments presented by the Intervenors, and their Petition for Review establishes only that they disagree with the Board's evaluation of their positions. It is well established that such arguments, even with additional support, will not suffice to overturn a decision.[95] For these and other reasons discussed below, the Intervenors' petition for review of the Board's rejection of these contentions should be denied.

A. Contention 6-E.

Contention 6-E stated:

> The DSEIS Fails to Take the Requisite "Hard Look" at the Impacts on Surface Waters via the Groundwater Pathway.[96]

In explaining this contention, the Intervenors asserted that the DSEIS's site-specific "evaluation of impacts on nearby surface waters via the groundwater pathway is inadequate," and its "conclusion that these impacts will be SMALL is unsupported by and contrary to the evidence and unlawfully substitutes the existence of permit requirements and oversite [sic] for a proper NEPA analysis."[97] They further claimed that "Section 4.5.1.1" of the DSEIS was deficient in

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[94] On appeal, the Intervenors also claim that FPL's Counsel "admitted" or "confirmed" certain alleged facts during oral argument. Petition for Review at 7, 8, 9. 15. The statements made by FPL's Counsel, however, are not inconsistent with the Staff's DSEIS analysis, and provide no additional grounds for the Intervenors' challenge to the DSEIS.

[95] *Shieldalloy,* CLI-07-20, 65 NRC at 503-05; *Turkey Point,* CLI-17-12, 86 NRC at 219.

[96] Amended Motion at 40. As discussed above, the Intervenors described this as a new site-specific issue that was identified by the Staff," *id.* at 42, citing DSEIS at 4-23, but nonetheless sought a waiver of the regulations for the contention to be admitted. As discussed above, a waiver of the regulations is not required for litigation of this site-specific issue.

[97] *Id.* at 40.

relying on FDEP's and DERM's regulatory oversight;[98] the Staff improperly relied on FPL's analysts' view that "more favorable climatic conditions should help to achieve the desired salinity;"[99] and "recent data" shows that the CCS "has degraded nearby surface waters and placed vital seagrass communities in jeopardy from phosphorus loadings attributable to the [CCS]," contrary to information presented in the DSEIS.[100]

The Board rejected Contention 6-E,[101] finding that (a) the Intervenors were incorrect in asserting that the Staff relied upon unreliable modeling in the DSEIS;[102] (b) they misunderstood the DSEIS's discussion of FPL's success in reducing salinity in the CCS (including the DSEIS statement regarding the potential effect of "more favorable climatic conditions in the future");[103] (b) they incorrectly asserted that the DSEIS relied solely on FDEP's and DERM's regulatory enforcement and oversight – and in any event, reliance on such regulatory oversight is not proscribed by NEPA;[104] (c) apart from their reference to a report by Dr. Fourqurean, they

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[98] *Id.* at 40-41. Regulatory oversight is exercised by the FDEP (*e.g.,* through its Consent Order) and the DERM (e.g., through its Consent Agreement with FPL). *See* LBP-19-3, slip op. at 35 n.54.

[99] Amended Motion at 41.

[100] *Id.* at 42, citing DSEIS at 4-23.

[101] The Board ruled in favor of the Intervenors, however, concluding (a) that a waiver was not required to permit litigation of Contention 6-E, and (b) the "good cause" standard in 10 C.F.R. § 2.309(c) was satisfied. LBP-19-8, slip op. at 16-19.

[102] *Id.* at 20-23.

[103] *Id.* at 22-23.

[104] *Id.* at 23-25. The Commission has long recognized that an agency may acceptably rely on a presumption that other regulatory agencies will perform their duties. *See U.S. Dep't of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC 580, 606 (2009) (noting "the longstanding 'presumption of regularity,' under which adjudicatory bodies presume, absent strong and concrete evidence otherwise, that government agencies and their employees will do their jobs honestly and properly"); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-308, 3 NRC 20, 30 (1976) (rejecting intervenors' argument that an applicant's proposal did not conform to the terms of a State permit and stating that "[i]t is for the [State agency] to … enforce the terms of its own permit"); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 40 (1974) (applying the presumption of regularity to State officials)*; see also Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-*2,* 57 NRC 19, 29 (2003) ("We have long declined to assume that licensees will refuse to meet their obligations under their licenses or our regulations."); *Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-17-5, 86 NRC 1, 29 (2017).

"fail[ed] to specify any 'new report' (much less a specific statement in a new report) to support the contention's assertion"—and Dr. Fourqurean's report was based on "speculation" and did not establish the factual support required by § 2.309(f)(1)(v), or raise a genuine dispute with the DSEIS on a material issue of law or fact, as required by § 2.309(f)(1)(vi).[105]

The Intervenors' petition for review generally recites various facts and opinions that were presented in support of their four new contentions, including Contention 6-E, without showing that the Board failed to consider that information. A review of the Board's decision establishes, however, that the Board carefully considered the facts and arguments presented by the Intervenors, and their Petition for Review establishes only that they disagree with the Board's evaluation of their positions.[106] As discussed above, such arguments, even with additional support, will not suffice to overturn a decision.[107] The Intervenors' arguments do not show that the Board failed to consider or misunderstood any evidence that might render its decision on Contention 6-E erroneous. The Board's ruling should therefore be affirmed.

In addition, the Board's rejection of Contention 6-E should be affirmed for another reason, not cited by the Board[108]—the Intervenors generally failed to cite any specific facts or

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[105] LBP-19-8, slip op. at 25-26.

[106] For example, the Intervenors contend that the Staff's reliance on regulatory oversight by the FDEP's and DERM's regulatory oversight and FPL's compliance with their requirements contravenes NEPA, citing *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (D.C. Cir. 2017). Petition for Review at 17 and 18-19. The Board, however, squarely addressed these claims. *See* LBP-19-8, slip op. at 24-25, 34-35. As the Board found, the Staff did not rely solely on FPL's compliance with State and County regulatory requirements; rather, the Staff also considered FPL's groundwater modeling and modeling results, the operation of FPL's hypersaline groundwater recovery well system, and FPL's groundwater monitoring program. *See id.* at 34-35. Unlike the situation remarked upon in *Sierra Club*, the DSEIS did not rely upon "the existence of permit requirements overseen by . . . [a] state permitting authority" as a "substitute for a proper NEPA analysis." Given the DSEIS's comprehensive evaluation of groundwater issues, there is no basis for Intervenors' claim that the DSEIS's consideration of the FDEP's and DERM's regulatory oversight and groundwater remediation requirements violated NEPA, or that the Board erred in its consideration of the Intervenors' assertions.

[107] *Shieldalloy,* CLI-07-20, 65 NRC at 503-05; *Turkey Point,* CLI-17-12, 86 NRC at 219.

[108] As stated above, the Commission may affirm the Board's decision for any reason supported by the record, even if not relied upon by the Board. *Private Fuel Storage,* CLI-05-1, 61 NRC at 166.

specific expert opinion statements to support Contention 6-E or their other new contentions;[109] rather, for each contention, they made generalized statements and cited Section IV.B of their Amended Motion as support.[110] Section IV.B of their motion, however, consists of an undifferentiated, six-page (largely single-spaced) summary of administrative litigation filings, technical reports, expert witness reports, and other references, some of which the Intervenors did not even file before the Board. Nor did the referenced documents directly challenge the DSEIS. Instead of providing specific support for each contention, the Intervenors apparently expected the Board and parties to sift through (and even obtain) those documents and construct their own basis statement for the contention. It is insufficient, however, for a petitioner to provide materials or documents as a basis for a contention, without explaining its significance to support the admission of the contention.[111] Further, if a petitioner neglects to provide the requisite support for its contentions, the Board is not to make assumptions of fact that favor the petitioner, or search for or supply information that is lacking.[112] Thus, the Board could have rejected Contention 6-E for failing to satisfy 10 C.F.R. § 2.309(f)(1)(v) (requiring "a concise statement of the alleged facts or expert opinions" that support the contention, along with "references to the specific sources and documents"), or § 2.309(f)(1)(vi) (requiring petitioners to show a genuine dispute of material fact).[113]

B. Contention 7-E.

Contention 7-E stated:

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[109] In contrast, the Intervenors did provide specific support for Contention 9-E. *See infra* at 24.

[110] Amended Motion at 41, regarding Contention 6-E (citing unidentified "new reports and expert opinions provided by Intervenors"). *id.* at 42 nn.175 and 176 (citing Section IV.B in explaining the basis required by 10 C.F.R. § 2.309(f)(1)(ii)); *id.* at 43, 44 (citing Section IV.B.in discussing 10 C.F.R. § 2.309(f)(1) (v)-(vi)).

[111] *See Fansteel*, CLI-03-13, 58 NRC at 205.

[112] *See American Centrifuge Plant*, CLI-06-10, 63 NRC at 457.

[113] Indeed, the Board cited these provisions in finding that Contentions 8-E and 9-E were inadmissible. See LBP-19-8, slip op. at 32 n.41 (Contention 8-E) and 38 n.46 (Contention 9-E).

> The DSEIS Fails to Take the Requisite "Hard Look" at Impacts to Groundwater Quality.[114]

As discussed *supra* at 11-14, Contention 7-E challenged new information in the DSEIS, concerning a GEIS Category 1 issue (groundwater quality degradation (plants with cooling ponds in salt marshes)), for which the Intervenors have sought a waiver of the regulations. The Board rejected Contention 7-E on the grounds that it constituted an impermissible challenge to the regulations,[115] finding that the Intervenors had not shown the existence of significant new information that "would lead to a determination that the environmental impact during the SLR period will be greater than 'small,'"[116] and that "strict application of the Category 1 issue being challenged in Contention 7-E would not serve the purpose for which it was adopted."[117] As discussed above, the Board correctly denied the Intervenors' Waiver Petition and dismissed Contention 7-E as an impermissible challenge to the regulations. The Intervenors' petition for review of the Board's dismissal of Contention 7-E should therefore be denied.

C. Contention 8-E.

Contention 8-E stated:

> The DSEIS Fails to Take the Requisite "Hard Look" at Cumulative Impacts on Water Resources.[118]

In this contention, the Intervenors asserted that the Staff's DSEIS was deficient in its evaluation of cumulative impacts on water resources,[119] citing the Staff's conclusions in DSEIS

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[114] Amended Motion at 44.

[115] LBP-19-8, slip op. at 30 (citing 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a)).

[116] *Id.* at 30.

[117] *Id.* The Board did not decide whether Contention 7-E satisfied the Commission's other contention admissibility standards in 10 C.F.R. § 2.309(f)(1). Accordingly, the Intervenors' claims the Board committed legal error in its consideration of their factual assertions in this contention are without merit. *See* Petition for Review at 7, 13.

[118] LBP-19-8, slip op. at 47.

[119] *Id.*

Section 4.16.2.1.[120] In particular, they took issue with the Staff's determinations that "the Applicant's recovery well system will be 'successful' in retracting the hypersaline plume before the end of the current license period and 'result in beneficial impacts on groundwater quality within the Biscayne aquifer . . . .'"[121] Similarly, they contested the Staff's expectation that FPL's "freshening system," together with "proper operation and maintenance" of the CCS will result in "no substantial contribution to cumulative impacts" on groundwater quality or associated impacts on surface water quality during the SLR period.[122]

As in the case of their other contentions, the Intervenors reassert various facts and opinions presented in their contentions and express their general disagreement with the Board's decision. Again, a review of the Board's decision establishes that the Board carefully considered their facts and arguments, and their petition for review establishes only that they disagree with the Board's evaluation of their positions. As stated above, such arguments, even with additional support, will not suffice to overturn a decision.[123] The Intervenors' arguments do not show that the Board failed to consider or misunderstood any evidence that might render its decision erroneous. Moreover, as the Board noted, Contention 8-E was inadmissible for failing to satisfy 10 C.F.R § 2.309(f)(1)(v) (requiring "a concise statement of the alleged facts or expert opinions" that support the contention, along with "references to the specific sources and documents").[124] The Board's ruling should therefore be affirmed.

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[120] *Id.* at 48 and 49.

[121] *Id.* at 48 (citing DSEIS at 4-116 – 117).

[122] *Id.*

[123] *Shieldalloy,* CLI-07-20, 65 NRC at 503-05; *Turkey Point,* CLI-17-12, 86 NRC at 219.

[124] LBP-19-8, slip op. at 32 n.41.

D. Contention 9-E.

Contention 9-E stated:

> The DSEIS Fails to Take the Requisite "Hard Look" at Impacts to Groundwater Use Conflicts.[125]

In this contention, as in Contentions 6-E, 7-E and 8-E, the Intervenors claimed that the Staff's DSEIS conclusions regarding impacts to the Biscayne aquifer and Upper Floridan aquifer are unsupported, contrary to Intervenors' "evidence," and improperly rely on state and county oversight.[126] Contention 9-E relied, in part, on the Intervenors' assertions in Contention 6-E, and it contests the Staff's conclusions in Section 4.5.1.2 of the DSEIS that groundwater use conflicts will be SMALL for the Biscayne aquifer and MODERATE for the Floridan aquifer.[127] The contention further incorporated by reference arguments in Contentions 6-E and 7-E.[128]

In contrast to their pleading of Contentions 6-E, 7-E and 8-E, in Contention 9-E the Joint Intervenors cited a specific supporting document (the Declaration of Mr. E.J. Wexler).[129] The Board carefully and fully considered Mr. Wexler's Declaration, and ruled that it did not establish a genuine dispute of material fact with the DSEIS.[130]

In their petition for review of the Board's ruling on this contention, the Intervenors again reassert various facts and opinions presented before the Board and express their general disagreement with the Board's decision. A review of the Board's decision establishes that the Board carefully considered their facts and arguments, and their petition for review establishes

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[125] Motion at 50.

[126] *Id.*

[127] *Id.* at 51.

[128] *Id.* Notwithstanding their citation of those contentions, the Intervenors state that the issue raised in this contention is a site-specific Category 2 issue. *Id.* The Intervenors did not seek a waiver of Commission regulations in filing this contention.

[129] Declaration of E.J. Wexler in Support of the Friends of the Earth, Natural Resources Defense Council & Miami Waterkeeper (Wexler Declaration) (revised June 28, 2019) (ML19179A314).

[130] LBP-19-8, slip op. at 37-40.

only that they disagree with the Board's evaluation of their positions. As stated above, such arguments, even with additional support, will not suffice to overturn a decision.[131] The Intervenors' arguments do not show that the Board failed to consider or misunderstood any evidence that might render its decision erroneous. Moreover, as the Board stated, Contention 9-E was inadmissible for failing to satisfy 10 C.F.R. § 2.309(f)(1)(vi) (requiring petitioners to show a genuine dispute of material fact).[132] The Board's ruling should therefore be affirmed.

CONCLUSION

For the reasons set forth above, the Commission should deny Intervenors' petition for review of LBP-19-8.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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Dated at Rockville, MD
this 13th day of December 2019

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[131] *Shieldalloy,* CLI-07-20, 65 NRC at 503-05; *Turkey Point,* CLI-17-12, 86 NRC at 219.

[132] LBP-19-8, slip op. at 38 n.46.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of FLORIDA POWER & LIGHT COMPANY (Turkey Point Nuclear Generating Units 3 and 4)	Docket Nos. 50-250-SLR 50-251-SLR

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF IN RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF LBP-19-8," dated December 13, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 13th day of December 2019.

Copies of the foregoing have also been sent by e-mail to Richard E. Ayres, Esq. (for Friends of the Earth, Inc.) at ayresr@ayreslawgroup.com, this 13th day of December 2019.

/Signed (electronically) by/

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Dated at Rockville, MD
this 13th day of December 2019