

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of:

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating Station,
Units 3 and 4)

Docket Nos. 50-250-SLR-2 and
50-251-SLR-2

January 18, 2024

**FLORIDA POWER & LIGHT COMPANY’S MOTION TO STRIKE
PORTIONS OF THE REPLY FILED BY MIAMI WATERKEEPER**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a),¹ and the Atomic Safety and Licensing Board’s (“Board”) Initial Prehearing Order,² Florida Power and Light Company (“FPL”) moves to strike portions of the Reply in Support of Request for Hearing and Petition to Intervene (“Reply”) filed on January 8, 2024, by Biscayne Bay Waterkeeper, Inc. d/b/a Miami Waterkeeper (“Miami Waterkeeper” or “Petitioner”)³ related to its November 27, 2023, Request for Hearing and Petition to Intervene (“Petition”)⁴ and the Answers thereto filed by FPL and the U.S. Nuclear Regulatory Commission (“NRC”) Staff.⁵

¹ Pursuant to 10 C.F.R. § 2.323(b), counsel for FPL certifies that a sincere effort was made to contact the other participants in the proceeding and resolve the issues raised in this motion and those efforts to resolve the issues have been unsuccessful. The NRC staff does not oppose this motion. Petitioner opposes the motion.

² Licensing Board Memorandum and Order (Initial Prehearing Order) (Dec. 6, 2023) (ML23340A098).

³ Reply in Support of Request for Hearing and Petition to Intervene Submitted by Miami Waterkeeper (Jan. 8, 2024) (ML24008A293) (“Reply”).

⁴ Request for Hearing and Petition to Intervene Submitted by Miami Waterkeeper (Nov. 27, 2023) (ML23331A971) (“Petition”). The Petition was filed with 18 “exhibits.” (Package No. ML23332A301).

⁵ Florida Power & Light Company’s Answer Opposing Miami Waterkeeper’s Hearing Request and Petition for Leave to Intervene (Dec. 22, 2023) (ML23356A156) (“FPL Answer”); NRC Staff Answer Opposing Miami Waterkeeper Hearing Request (Dec. 22, 2023) (ML23356A162) (“NRC Staff Answer”) (collectively, “Answers”).

On December 19, 2023, the Board granted Petitioner a generous ten-day extension of time to prepare its Reply pleading.⁶ Compared to the NRC’s normal rules of practice and procedure,⁷ that extension more than doubled the amount of time Petitioner had to craft its pleading. But, in granting the extension, the Board also cautioned Petitioner not to abuse the extra time. Specifically, it reminded Petitioner that a reply must be “narrowly focused” on responding to arguments presented in the Answers.⁸

Here, Petitioner clearly disregarded that admonishment. On its face, the Reply contains an extraordinary 76 pages of argument, making it one of the lengthiest replies ever filed in a modern NRC adjudicatory proceeding (save a few outlier cases which, unlike here, involved many dozens or hundreds of contentions).⁹ In terms of substance, rather than merely amplifying prior arguments, the Reply presents multiple untimely new arguments and new theories of the case. And rather than *rebut* FPL’s and NRC Staff’s claims that certain pleading defects render the proposed contentions inadmissible, Petitioner seeks to proffer untimely supplemental information or arguments intended to *cure* those defects. As explained below, none of these things are permissible in a reply. Accordingly, those portions of the Reply should be stricken.

⁶ Licensing Board Memorandum and Order (Granting Motion for Extension of Time) at 1–2 (Dec. 19, 2023) (ML23353A147) (“Extension Order”).

⁷ See 10 C.F.R. § 2.309(i)(2) (providing 7 days to file a reply).

⁸ Extension Order at 2.

⁹ See generally *Web-based ADAMS, Electronic Hearing Docket*, <https://adams.nrc.gov/ehd> (using “Advanced Search” with Document Properties matching all of the following criteria: Document Title *contains* “reply,” and Document Title *not contains* “additional information,” “findings of fact,” “request for extension,” and “reply to RAI”) (on the header row of the results screen, click on the down arrow next to a column heading, click “Columns,” and select the checkbox for “Estimated Page Count”). Out of 1000 items returned in the results of a search conducted on January 18, 2024, only 25 have estimated page counts greater than 76 pages. Of those 25 documents: 13 pertain to the Yucca Mountain licensing or Indian Point license renewal proceedings, in which dozens or hundreds of contentions were filed; 10 are pleadings of fewer than 76 pages that contain other material (e.g., attachments, exhibits, tables of contents, or service lists); and otherwise, only two contain reply pleadings that are greater than 76 pages in length (ML110280487 and ML102740618).

II. LEGAL STANDARDS GOVERNING THE SCOPE OF A REPLY

The Commission limits the scope of replies in adjudicatory proceedings. Commission rules “demand a level of discipline and preparedness on the part of petitioners,” who must fully set forth their claims in the original hearing request.¹⁰ That is because answering parties are “entitled to be told at the outset, *with clarity and precision*, what arguments are being advanced.”¹¹ It is “well established” that “a reply cannot expand the scope of the arguments set forth in the original hearing request.”¹² Instead, “[r]epplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.”¹³ Simply put, “[t]he Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address.”¹⁴ Although a reply may “legitimately amplif[y]” arguments from the original petition,¹⁵ or “focus narrowly” on responding to the answer pleadings,¹⁶ it may *not* be used as a vehicle to “cure” deficient contentions merely because those deficiencies were identified in the answers.¹⁷ As the Commission has explained, there would be “no end” to NRC licensing proceedings if petitioners were permitted to add “new bases or new issues” at will.¹⁸

¹⁰ *La. Energy Servs. L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *reconsideration denied* CLI-04-35, 60 NRC 619 (2004) (citation omitted).

¹¹ *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975) (emphasis added).

¹² *Nuclear Mgmt. Co. LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (citing *LES*, CLI-04-25, 60 NRC 223; *USEC Inc.* (Am. Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 (2006)).

¹³ *Palisades*, CLI-06-17, 63 NRC at 732.

¹⁴ *USEC*, CLI-06-09, 63 NRC at 439.

¹⁵ *See LES*, CLI-04-25, 60 NRC at 224.

¹⁶ *Palisades*, CLI-06-17, 63 NRC at 732.

¹⁷ *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 262 n.32 (2008) (citing *LES*, CLI-04-25, 60 NRC at 224–225) (emphasis added).

¹⁸ *Id.* at 225 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428–29 (2003)).

III. PORTIONS OF PETITIONER’S REPLY EXCEED THE PERMISSIBLE SCOPE OF A REPLY PLEADING AND SHOULD BE STRICKEN

As detailed below, the Reply presents at least six new arguments that exceed the permissible scope of a reply pleading and therefore should be stricken from the record.

A. New Argument That 2023 DSEIS Analyses of Impacts of the Proposed Action Are Deficient for Omitting Analyses of the Benefits of Alternatives

In its Reply, Petitioner presents for the first time a new argument and theory of Contention 1 alleging that the analyses of impacts from the proposed action to groundwater quality, groundwater use conflicts, and non-radiological contaminants on aquatic resources (as presented in Sections 2.8.3, 2.8.2.1, 2.8.2.2, and 2.10.4 of the draft Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, NUREG-1437, Supplement 5a, issued on August 31, 2023 (“2023 DSEIS”)),¹⁹ are deficient because they fail to consider the “positive effects” from discontinuing use of CCS.²⁰ Although the original Petition presented similar arguments in Contention 2 (alleging that the *alternatives* analysis was deficient for failing to include this information),²¹ it did not include such an attack in Contention 1 (as to impacts of the *proposed action*).²² And nothing in the Answers invited this new theory of the contention. Commission case law makes clear that new bases for a contention cannot be introduced in a reply brief.²³ Because these new arguments go beyond the permissible scope of a reply pleading, the following portions of the Reply should be stricken:

¹⁹ NUREG-1437, Supplement 5a, Second Renewal, Site Specific Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, Draft Report for Comment (Aug. 31, 2023) (ML23242A216) (“2023 DSEIS”).

²⁰ Reply at 13, 15–17.

²¹ Petition at 34–37, 44 (as to proposed Contention 2).

²² *See generally* Petition at 12–34.

²³ *Palisades*, CLI-06-17, 63 NRC at 732.

- Reply at 13, first sentence of first full paragraph (beginning “Yet, in its ultimate...”);
- Reply at 15, last sentence of first full paragraph (beginning “In its ultimate...”);
- Reply at 16–17, sentence breaking across these pages (beginning “It failed to compare...”).

B. New Arguments Regarding “Preemption” and “Holistic” NRC Authority

In its Reply, Petitioner presents a new line of argument and theory of Contentions 1 and 2 suggesting that the NRC’s authority to regulate radiological safety under the Atomic Energy Act of 1954, as amended, gives it a broader “holistic” authority to determine compliance with the Clean Water Act under Constitutional principles of “preemption.”²⁴ These arguments, and corresponding citations to documents purporting to support them,²⁵ simply were not presented in the original Petition. As noted above, “[t]he Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address.”²⁶ Neither FPL nor the NRC Staff had an opportunity to address these (patently incorrect) assertions in their respective Answer pleadings. Accordingly, the following portions of the Reply should be stricken:

- Reply at 19, first full paragraph (beginning “Next, the NRC...”);
- Reply at 21–22, beginning with first full paragraph on 21 (beginning “Moreover the Environmental...”) through the next to last sentence on the first full paragraph on 22 (ending “...authorities on that issue.”);

²⁴ Reply at 19, 21–22, 42–44.

²⁵ “[I]f the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it during the time frame for initially filing contentions.” *Palisades*, CLI-06-17, 63 NRC at 732.

²⁶ *USEC*, CLI-06-9, 63 NRC at 439.

- Reply at 42–44, second full paragraph on 42 (beginning “Finally, the most direct...”) through the end of first partial paragraph at top of 44 (ending “...license for decades.”).²⁷

C. New Arguments That Certain Analyses Are Deficient For Failing to Provide “Quantitative” Analyses or Are Not Based on “Best Available Science”

In the original Petition, Contention 1 presented certain theories claiming that the NRC Staff’s analyses of impacts from the proposed action (to groundwater quality, groundwater use conflicts, and non-radiological contaminants on aquatic resources) were allegedly deficient.²⁸ Likewise, Contention 2 presented certain theories claiming that the NRC Staff’s analysis of the cooling tower alternative was deficient.²⁹ For the first time in its Reply pleading, Petitioner now seeks to insert a new legal theory as a basis for both contentions—namely, that the respective analyses are deficient because they failed to provide *quantitative* analyses or use “best available science” as allegedly required by NEPA.³⁰ But that was not an original basis presented by Petitioner for either Contention 1 or Contention 2. Commission case law makes clear that new bases for a contention cannot be introduced in a reply brief.³¹ Simply put, FPL and the NRC Staff “have not had an opportunity to address” these new arguments.³² Accordingly, the following portions of the Reply should be stricken:

- Reply at 23–24, first sentence of last partial paragraph on 23 (beginning “To begin, NEPA...”) through the words “data and science” in the first sentence of the first full paragraph on 24;
- Reply at 33, last partial sentence, the words “or attempt to quantify”;

²⁷ Miami Waterkeeper cited the 1972 EIS in its original Petition, but did not use it to advance any arguments related to Constitutional preemption. *See* Petition at 16, 25.

²⁸ *See generally* Petition at 12–34.

²⁹ *See generally id.* at 34–45.

³⁰ Reply at 23–24, 33–34, 36–40.

³¹ *Palisades*, CLI-06-17, 63 NRC at 732.

³² *See USEC*, CLI-06-09, 63 NRC at 439.

- Reply at 36, first sentence of last paragraph, the words “and quantify”;
- Reply at 37, first paragraph, last sentence, the words “using best available science”;
- Reply at 37–40, Section B.1.b under Contention 2, beginning with the section heading on 37 (“b. The analysis of...”) through the end of that section on 40 (ending “required by NEPA.”).

D. New Arguments Related to Air Temperature

In the original Petition, Petitioner framed Contention 3 as a challenge to the NRC Staff’s consideration of “cumulative impacts” of climate change with respect to, among other things, potential future increases in ambient air temperature.³³ In its Reply, however, Petitioner offers several new criticisms of various analyses of impacts of the *proposed action* (as opposed to cumulative impacts) as additional bases for Contention 3.³⁴ However, Petitioner’s attempt to expand its proposed Contention 3 to include newfound criticisms and challenges to new portions of the 2023 DSEIS exceeds the permissible scope of a reply pleading because parties are “entitled to be told at the outset, *with clarity and precision*, what arguments are being advanced.”³⁵ Accordingly, the following portion of the Reply should be stricken:

- Reply at 61–62, first full paragraph, beginning with second to last full sentence on 61 (beginning “The discussion of rising...”) through end of the partial paragraph at the top of 62 (ending “...this past summer.”).

³³ Petition at 45–63.

³⁴ Reply at 61 (citing page 2-22 of the 2023 DSEIS regarding Staff’s conclusion as to “Groundwater Use Conflicts and Groundwater Quality Degradation Resulting from Water Withdrawals” in Section 2.8.2, and arguing that it is “cursory and general”); *id.* at 61–62 (citing pages 2-35 and 2-34 to 2-36 of the 2023 DSEIS regarding Staff’s analysis of “Cooling System Impacts on Terrestrial Resources” in Section 2.9.2, and also citing pages 2-34 to 2-36 (sic) of the 2023 DSEIS regarding Staff’s analysis of “Effects of Cooling Water Discharge on Dissolved Oxygen, Gas Supersaturation, and Eutrophication” in Section 2.10.3 (which is actually presented at pages 2-43 to 2-46) and alleging that these discussions “fail[] to analyze” certain issues).

³⁵ *Wolf Creek*, ALAB-279, 1 NRC at 576 (emphasis added).

E. New Argument Related to “Important Plant and Animal Habitats”

In the original Petition, proposed Contention 4 alleged that the 2023 DSEIS “fails to take a hard look at impacts to endangered species.”³⁶ Yet, in its Reply, Petitioner seeks to expand the scope of proposed Contention 4 to allege that the 2023 DSEIS is deficient for a different reason—because it allegedly “completely fails” to consider the impact of continued operations on “important plant and animal habitats.”³⁷ But these are entirely separate issues, and were evaluated separately in the NRC Staff’s review.³⁸ It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request.³⁹

Accordingly, the following portion of the Reply should be stricken:

- Reply at 66, entire page, from first full paragraph (beginning “NEPA regulations do not...” through end of third full paragraph (ending “...Quality’s NEPA regulations.”).

F. New Argument Regarding Sufficiency of NRC Consideration of “New Meteorological Information”

In the original Petition, proposed Contention 5 argued that the 2023 DSEIS “fails to consider the effects of climate change on accident risk.”⁴⁰ But, as noted in the FPL and NRC Staff Answers, Petitioner failed even to identify any specific portion of the 2023 DSEIS presenting or omitting the discussion of “accident risk” that Petitioner was purporting to challenge.⁴¹ Nevertheless, FPL identified the 2023 DSEIS discussion of “new meteorological

³⁶ Petition at 63.

³⁷ Reply at 66.

³⁸ See, e.g., 2023 DSEIS at 2-4, tbl. 2-2 (noting that the issue of “Threatened, endangered, and protected species and essential fish habitat” was analyzed in Section 4.8.1 of the 2019 FSEIS, whereas the issue of “Effects on terrestrial resources (non-cooling system impacts)” was analyzed in Section 4.6.1 of the 2019 FSEIS).

³⁹ *Palisades*, CLI-06-17, 63 NRC at 732.

⁴⁰ Petition at 70.

⁴¹ See, e.g., FPL Answer at 49–51; NRC Staff Answer at 51.

information” (in the context of the Severe Accidents issue) as presenting information potentially relevant to this vague contention, and noted that Petitioner failed to challenge that discussion, which obviously had not been omitted as Petitioner ostensibly claimed.⁴² Now, for the first time in its Reply, Petitioner acknowledges that discussion and purports to offer new criticisms thereof as an additional basis for Contention 5.⁴³ But that exceeds the scope of a reply. A petitioner is confined to its contentions as initially filed and may not rectify deficiencies (such as a failure to dispute relevant portions of document being challenged) through a reply brief.⁴⁴ Accordingly, the following portion of the Reply should be stricken:

- Reply at 72, last full paragraph (beginning “FPL also argues...” through “...required by NEPA.”).

IV. CONCLUSION

The portions of Petitioner’s Reply discussed above exceed the permissible scope of a reply pleading. Accordingly, the Board should strike those portions of the Reply.

⁴² See, e.g., FPL Answer at 51–52.

⁴³ Reply at 72.

⁴⁴ *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009).

Respectfully submitted,

Signed (electronically) by Scott D. Clausen

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Dated in Washington, D.C.
This 18th day of January 2024

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Florida Power & Light Company’s Motion to Strike Portions of the Reply Filed by Miami Waterkeeper” was served on the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned docket.

Signed (electronically) by Scott D. Clausen

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