February 28, 2012

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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| In the Matter of | ) | |
| | ) | |
| Florida Power & Light Company | ) | Docket Nos. 52-040-COL |
| | ) | 52-041-COL |
| (Turkey Point Units 6 and 7) | ) | |
| | ) | ASLBP No. 10-903-02-COL |
| (Combined License) | ) | |

**FLORIDA POWER & LIGHT COMPANY'S ANSWER TO CASE'S MOTION FOR LEAVE TO FILE A NEW CONTENTION AND NEW CONTENTION 9**

Pursuant to 10 C.F.R. § 2.309(h) and in accordance with the Atomic Safety and Licensing Board ("Board")'s Initial Scheduling Order and Administrative Directives (Prehearing Conference Call Summary, Grant of Joint Motion Regarding Mandatory Disclosures, Initial Scheduling Order, and Administrative Directives) of March 30, 2011 ("Initial Scheduling Order"), Applicant Florida Power & Light Company ("FPL") hereby responds to and opposes the admission of late-filed Contention 9 submitted by Citizens Allied for Safe Energy, Inc. ("CASE") in this proceeding.[1]

CASE Contention 9 challenges the contingency plan for onsite low-level radioactive waste ("LLW") storage (the "Revised LLW Management Plan"), which FPL provided in its December 16, 2011 third revision of its Combined License ("COL") Application ("COLA" or "Application"). Contention 9 alleges:

[1] Motion for Leave for Citizens Allied for Safe Energy to File a New Contention (dated February 2, 2012, actually filed on February 3, 2012) ("CASE Motion"); Case Contention 9: Florida Power & Light Company's Revised Long Term Low-Level Nuclear Waste from Turkey Point 6 and 7 is Inadequate to Protect Public Health and Safety All Circumstances [*sic*] (undated but filed on February 3, 2012) ("Contention 9").

> This new information [FPL's Revised LLW Management Plan] made available to CASE on January 3, 2012 reveals that the applicant's plan is not sufficient because it does not consider information that CASE offered in its original Petition To Intervene (Contention 5, Revised Petition, filed August 20, 2010) about the likelihood that the reactor site will be inundated by water, either routinely due to sea level rise, or intermittently due to storm surge related to hurricanes.

Contention 9 at (unnumbered) 1.

## BACKGROUND

In June, 2009, FPL submitted a COLA for two AP1000 pressurized water nuclear reactors to be located adjacent to the existing Turkey Point power plants, Units 1 through 5, at the Turkey Point site near Homestead, Florida. The proposed nuclear reactors would be known as Turkey Point Units 6 and 7 (the "Units 6 and 7"). The COLA incorporates by reference the information in the AP1000 Design Control Document ("DCD") codified by regulation (10 C.F.R. Part 52, App. D, § III.A) up through the recently approved amendment to Revision 19.[2] On September 4, 2009, the NRC staff ("Staff") accepted the Application for docketing. *See* 74 Fed. Reg. 51,621 (Oct. 7, 2009).

FPL's COLA, as originally filed, stated that FPL had signed a letter of intent with Studsvik, Inc., a licensed LLW treatment facility in Erwin, Tennessee to enter into negotiations for a contract under which Studsvik would accept and process, as well as take responsibility for storage and disposal of LLW produced by Turkey Point Units 6 and 7. COLA Rev. 0, FSAR at 11.4-2. CASE filed a Petition to Intervene and Request for a Hearing on August 17, 2010 raising eight contentions. CASE filed a revised petition ("Revised Petition") on August 20, 2010. CASE Contention 7 argued that, with the closure of the Barnwell facility in South Carolina to out-of-compact LLW, it is reasonably foreseeable that FPL will not have off-site storage or disposal capacity for

[2] Final Rule, AP1000 Design Certification Amendment, 76 Fed. Reg. 82,079 (Dec. 30, 2011).

LLW generated by Units 6 and 7. Revised Petition at 43-44. Contention 7 further argued that the Studsvik plan, which relied upon ultimate disposal at the Waste Control Specialists ("WCS") facility in Texas, is not sufficient because WCS is not yet licensed and, in any event, would not be allowed to import out-of-compact waste. *Id*. at 42-43.

On February 28, 2011, this Board issued an order admitting CASE Contention 7. *Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-11-06, 71 NRC __ (2011). As admitted, CASE Contention 7 read as follows:

> FPL's COLA fails to provide information sufficient to enable the NRC to reach a final conclusion on safety matters regarding the means for controlling and limiting radioactive material and effluents and radiation exposures within the limits set forth in Part 20 and ALARA in the event FPL needs to manage Class B and Class C LLRW for an extended period.

LBP-11-06, slip op. at 112. The Board's decision also rejected other CASE contentions, including CASE Contention 5, which alleged that FPL's FSAR failed to consider "any scientifically valid projection for sea level rise through this century and beyond." *Id*. at 97. The Board rejected CASE Contention 5 because its underlying factual predicate, that the COLA contained no sea level rise analysis, was erroneous. *Id*. at 98. Likewise, the Board rejected CASE Contentions 1 and 2, which challenged the adequacy of the emergency plans for Units 6 and 7. *Id.* at 83-93.

On Dec. 16, 2011, FPL submitted to the NRC Revision 3 of its COLA ("COLA Rev. 3"). *See* Letter from M. Nazar to NRC Document Control Desk, "Submittal of the Annual Update of the COL Application - Revision 3" (Dec. 16, 2011). (ADAMS Accession No. ML11361A102). Among the revisions included in COLA Rev. 3 is a revision to Section 11.4 of the FSAR to include the Revised LLW Management Plan (Attachment 1). The Revised LLW Management Plan maintains its reliance on the initial

plan to contract with Studsvik for LLW management, storage, and disposal, but adds a contingency plan in case off-site disposal capacity is unavailable. The revised FSAR now states that:

> If additional storage capacity for Class B and C waste were required, further temporary storage would be designed, constructed, and operated in accordance with the design guidance provided in NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A. The change to the facility to provide additional onsite storage would be evaluated by performing written safety analyses in accordance with 10 CFR 50.59. If the acceptability of the proposed additional storage could not be demonstrated by 10 CFR 50.59 analyses, a license amendment would be sought to approve the proposed storage.

COLA Rev. 3, FSAR at 11.4-3.

Following the submittal of COLA Rev. 3, FPL filed a Motion for Summary Disposition, arguing that the Revised LLW Management Plan satisfied the applicable regulation, 10 C.F.R. § 52.79(a)(3), as a matter of law. Florida Power & Light Company's Motion for Summary Disposition of CASE Contention 7 (January 3, 2012) ("FPL Motion"). The NRC Staff filed an answer supporting FPL's Motion, stating that "the Applicant is entitled to a decision in its favor as a matter of law." NRC Staff Answer to "Florida Power & Light Company's Motion for Summary Disposition of CASE Contention 7" at 4. CASE also filed a timely answer to FPL's Motion in which it declined to oppose FPL's requested relief. Citizens Allied for Safe Energy, Inc. Response to FPL Motions To Dismiss CASE Contention 6 as Moot and for Summary Disposition of CASE Contention 7 (January 23, 2012) ("CASE Answer"). CASE now proffers new Contention 9, in which it argues that FPL's revised COLA does not, in fact, contain information sufficient to satisfy NRC regulations.

## ARGUMENT

CASE's Motion and new Contention 9 should be denied for a number of reasons. First, the Motion proffers a nontimely contention, yet fails to address the criteria for admission of such a contention. Second, Contention 9 is inadmissible because it does not satisfy the general contention admissibility criteria of 10 C.F.R. § 2.309(f)(1). It is not supported by fact or expert opinion, raises issues that are not material, and fails to present a genuine dispute with the application on a material issue of law or fact. Fundamentally, CASE Contention 9 amounts to (1) an improper attempt to relitigate the legal sufficiency of FPL's discussion of LLW storage contingency plans in Revision 3 to its FSAR, a matter upon which FPL has sought summary disposition that CASE chose not to oppose, and (2) yet another attempt to litigate CASE's emergency planning and sea level rise contentions, already rejected by the Board multiple times.[3] Finally, the Motion is not accompanied by the required certification of consultation – indeed, no such consultation took place.

### I. CASE'S PROPOSED CONTENTION IS NOT TIMELY

The Board has specified, for the benefit of the parties, the requirements for filing new contentions in this proceeding. The Board wrote:

> A party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a *timely* new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file a *nontimely* new or amended contention under 10 C.F.R. § 2.309(c)(1) (or both), and the explanation for

[3] *See* LBP-11-06, *supra*; Memorandum and Order (Denying CASE's Motion to Admit Newly Proffered Contentions),LBP-11-15, 73 NRC __ (slip op.) (June 29, 2011) ("LBP 11-15"); Memorandum and Order (Denying CASE's Motion to Reconsider Rejection of Amended Contentions and to Admit Two Newly Proffered Contentions, and Denying FPL's Request to Impose Remedial Measures on CASE) (Sep. 21, 2011) ("Sep. 21, 2011 Memorandum").

> the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). A motion and proposed new or amended contention as specified above shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the motion should cover the three criteria of section 2.309(f)(2) and the eight criteria of section 2.309(c)(1) (as well as the six criteria of section 2.309(f)(1)).

Initial Scheduling Order at 8 (emphasis in original); *see also* LBP-11-15, slip op. at 3-5.

Thus, a proposed new or amended contention is to be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) only if it is filed within thirty days of the date when the new information upon which it is based "first becomes available." Initial Scheduling Order at 8. CASE argues that the new information upon which this contention is based was made available to it on January 3, 2012, the date FPL filed its Motion for Summary Disposition of CASE Contention 7.[4] CASE Motion at 2. But the relevant revisions to FPL's FSAR were made available to CASE prior to FPL's January 3, 2012 motion, rendering CASE's new proposed contention nontimely under 10 C.F.R. § 2.309(c), in accordance with the Initial Scheduling Order.

FPL submitted Revision 3 of its COLA to the NRC on December 16, 2011. By e-mail dated December 19, 2011, FPL's counsel informed CASE's representative of: (1) the submittal of Revision 3; (2) the changes to section 11.4 of the FSAR to provide a

[4] CASE's representative sent an e-mail containing a version of the Motion and Contention 9 to the Office of the Secretary and to counsel for the NRC Staff and FPL shortly after midnight on February 3, 2012, stating that he had encountered difficulty with the NRC's E-Filing System on the evening of February 2. CASE's Motion and a slightly modified version of Contention 9, were both served via the E-Filing System on the afternoon of February 3. Therefore, even assuming CASE is correct that the information upon which Contention 9 is based did not become available until FPL's January 3 Motion, its contention is still not timely. CASE did not seek an extension of time from the Board before filing what, by its own measure, is a nontimely contention. As CASE had time on February 3 to revise its pleading, it could also have added a statement describing its claimed E-Filing difficulties and offered a "good cause" argument to excuse its lateness but failed to do so.

contingency plan for on-site LLW storage; and (3) FPL's plans to file a motion for summary disposition, as required by 10 C.F.R. § 2.323(b). The NRC publicly released Chapter 11 of Revision 3 of FPL's FSAR in ADAMS on December 30, 2011 (ADAMS Accession No. ML11362A133). Due to the uncertainty surrounding the timing of the public release of Revision 3 in the NRC's ADAMS document management system, FPL agreed to mail a complete electronic copy of the public version of Revision 3 on a CD to CASE's representative. FPL sent the CD to CASE via U.S. mail on December 27, 2011.[5]

CASE has been on notice of the revision to FSAR Section 11.4 and its substance since FPL's December 19, 2011 e-mail and has had access to it via the NRC's website since December 30, 2011. To be timely under the Board's Initial Scheduling Order, CASE's new contention should have been submitted within thirty days of the public release of the document in ADAMS, which would have been Monday, January 30, 2012.[6] Since it was not, it "shall be deemed nontimely under 10 C.F.R. § 2.309(c)." Initial Scheduling Order at 8. In its Motion, CASE failed to address any of the timeliness criteria of section 2.309(f)(2) or the factors for admitting a nontimely filing in section 2.309(c) and so its motion to admit Contention 9 must be denied.[7]

[5] In response to an inquiry by FPL's counsel, CASE's representative confirmed receipt of the CD on the morning of January 2, 2012. Because mail was not delivered on January 1 or 2, the CD must have arrived by Saturday December 31, 2011.

[6] The new contention would also have been due on January 30 if the information first became available to CASE through its receipt of the Revised COL Application in the mail on December 31.

[7] The Initial Scheduling Order instructed that if a party "is uncertain [whether a newly proffered contention is timely or nontimely], it may file pursuant to both [regulatory sections], and the [pleading] shall cover the three criteria of section 2.309(f)(2) *and* the eight criteria of section 2.309(c)(1)." Initial Scheduling Order at 8 (emphasis in original). CASE failed to comply with this instruction.

## II. CASE CONTENTION 9 IS INADMISSIBLE UNDER 10 C.F.R § 2.309(f)(1)

### A. Contention 9 Does Not Identify a Material Issue to the Licensing Decision on the COLA

To proffer an admissible contention, a petitioner must 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." 10 C.F.R. § 2.309(f)(1)(iv). Admissible contentions "must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application]." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 359-60 (2001). The Commission has defined a "material" issue as one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding." Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989). CASE Contention 9 should be rejected because it does not raise a material issue.

#### 1. *NRC Regulations Do Not Require the Level of Design Detail Demanded by Contention 9*

CASE quotes an unnamed "expert" to the effect that the Turkey Point site could see a storm surge as high as 28 feet above mean low tide and so "[n]ow that FPL offers long term on-site LLW storage as a likely solution to the problem, we must be more concerned with the possibility of inundation of Turkey Point due to a combination of sea level rise, storm surge and hurricanes." Contention 9 at 3. Notably, neither CASE nor its anonymous "expert" identifies any mechanism by which the alleged flooding of a facility that houses drums of LLW would have an appreciable adverse impact on public health

and safety.[8] This Board came to a similar conclusion regarding the safety allegations made by CASE's original sea level rise contention:

> Moreover, even assuming the accuracy of [CASE's expert's] predictions regarding sea level rise, CASE fails to articulate why such a rise would make a difference to any specific aspect of FPL's evaluation of population trends, future power needs, nuclear safety, nuclear cooling systems, and nuclear accidents. CASE thus fails to demonstrate why its broad and unsupported assertions regarding the implications of sea level rise (CASE Rev. Pet. at 35) would be material to the NRC's analysis of the COLA, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

LBP-11-06 (slip op. at 99). The same analysis holds true here, as well. CASE must do more than simply allege that the contingent LLW storage facility may be susceptible to flooding, but must, at a minimum, point to a regulatory requirement with which the COLA has failed to comply.

Contention 9 states that "the applicant's plan for extended storage of LLW waste [*sic*] will not provide sufficient physical safety measures to cope with an aquatic environment" that would result from heightened storm surges due to sea level rise, and alleges without factual support that sufficiently elevating the contingent LLW storage facility would not be feasible. Contention 9 at 1. But as FPL established in its unopposed Motion for Summary Disposition of CASE Contention 7, 10 C.F.R. § 52.79(a)(3) does not require detailed design information, such as the flooding protection features of a contingent LLW storage facility.[9]

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[8] CASE certainly has not presented an adequate basis to support a challenge to FPL's emergency plan. *See* Contention 9 at 4. Even if a contingent LLW storage facility were built and subsequently flooded, CASE provides no reason why a local evacuation would be warranted, or any indication that such an evacuation, if necessary, could not be successfully carried out. Such a generalized contention is inadmissible for failing to raise a genuine dispute of material fact with a particular portion of the COLA. *See* LBP-11-06, slip op. at 93.

[9] 10 C.F.R. § 52.79(a)(3) requires an applicant's FSAR to include:

In its Motion for Summary Disposition of CASE Contention 7, FPL argued that its FSAR, as amended in Revision 3, meets the regulatory requirements of 10 C.F.R. § 52.79(a)(3) because it provides information sufficient to enable the Commission to reach a final conclusion regarding FPL's means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in 10 C.F.R. Part 20 with respect to the potential onsite storage of LLW. FPL Motion at 1-2. As FPL explained in its Motion, nothing in 10 C.F.R. § 52.79(a)(3) or the two Commission decisions interpreting that rule indicate that it requires detailed design, location, and health impacts information. *See Southern Nuclear Generating Company* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC __ (slip op. at 13-14) (May 19, 2010) (*discussing Southern Nuclear Generating Company* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009) *and Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC __ (slip op. at 24-25) (2010)).

CASE chose not to contest FPL's Motion, effectively conceding that FPL's FSAR is sufficient as a matter of law. *See* CASE Answer at 1. CASE now seeks to relitigate the issue it has conceded, arguing that the description of LLW contingency plans in FPL's revised FSAR is deficient. This tactic of agreeing to the dismissal of a contention, only to later file a replacement contention, would perhaps have been appropriate had FPL filed a motion to dismiss Contention 7 as moot. *See, e.g.,* Memorandum and Order (Granting FPL's Motions to Dismiss Joint Intervenors' Contention 2.1 and CASE's

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> information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license . . . [regarding t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter . . .

Contention 6 as Moot) at 6 (Jan. 26, 2012) (granting CASE 15 days to file a new contention challenging the revision to FPL's environmental report that rendered moot CASE Contention 6). But FPL did not argue simply that its FSAR revisions mooted CASE's claim. Instead FPL demonstrated that its revised FSAR is sufficient as a matter of law to meet the applicable regulatory requirement. FPL Motion at 1-2.

CASE's new Contention 9 is, in effect, a late-filed and unacknowledged response to FPL's Motion for Summary Disposition because it argues that the revisions to the FSAR are not, in fact, sufficient to meet NRC regulations. But CASE passed on its opportunity to argue that FPL's revised FSAR is legally deficient. If CASE disagreed and wished to litigate whether FPL's onsite LLW contingency plan is adequate to comply with 10 C.F.R. § 52.79(a)(3), the time to raise that argument was in its response to FPL's motion for summary disposition.

Because it demands the inclusion of detailed design information that is not required by regulation, Contention 9 fails to raise a material issue and must be rejected.

2. *The Availability of Off-Site LLW Storage is No Longer a Material Issue*

CASE also offers the interesting argument that FPL's recent revisions to its FSAR reveal its belief that "off-site storage will [not] be available in the short term and, probably, in the long term either."[10] Contention 9 at 2. But FPL's FSAR revision was made *in response to CASE's contention* and does not, in any way, represent a considered

[10] CASE provides, in support of its challenge to the availability of offsite storage, a Declaration of Diane D'Arrigo ("D'Arrigo Declaration") that is similar to that which CASE submitted two years ago in support of its Petition to Intervene. The D'Arrigo Declaration clearly misrepresents the COLA, stating that "[r]evisions to the Turkey Point Units 6 and 7 application commit to providing for on-site storage for 'low-level' radioactive waste for 2 years and plan that there will be offsite disposal after that." D'Arrigo Declaration at 2, ¶ 5. In fact, the Revised LLW Management Plan provides for onsite storage as a contingency plan in case offsite capacity is unavailable when the initial design storage capacity is exhausted. The Revised LLW Management Plan provides for onsite storage for an unlimited period of time as a contingency plan.

forecast that offsite LLW disposal capacity will not be available for Turkey Point Units 6&7. Regardless, as FPL explained, the availability of offsite LLW storage or disposal capacity is no longer material in light of FPL's recent revision to its COL Application. *See* FPL Motion at 4-5. If FPL's initial LLW storage capacity proves inadequate, its Revised LLW Management Plan identifies the means through which FPL would increase that capacity. Given the existence of FPL's contingency plan, CASE's discussion of the availability of off-site disposal capacity (provided in both Contention 9 and the D'Arrigo Declaration) is not material because the NRC need not reach a finding that offsite storage will be available in order to issue the COL. 10 C.F.R. § 2.309(f)(1)(iv).

B. CASE Provides No Factual or Expert Support for Its Sea Level Rise Projections

Each contention must "[p]rovide a concise statement of the alleged facts or expert opinions which support [the 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 petitioner] intends to rely to support its position in the issue." 10 C.F.R. § 2.309(f)(1)(v). A petitioner's failure to present the factual information or expert opinions necessary to support its contention adequately requires that the contention be rejected. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996); *Arizona Public Service Co*. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). The core of Contention 9 is CASE's claim that the contingent LLW storage facility may be "inundated by sea water, either routinely due to sea level rise, or intermittently due to storm surge related to hurricanes." Contention 9 at 1. This claim is based not upon fact,

but upon a projection—an opinion—which must be supported by an identified expert. But CASE proffers no expert opinion to support its sea level rise projection.

In its original Petition, CASE proffered an affidavit from a consultant claiming expertise in support of its sea level rise contention. Revised Petition at 33. But here, CASE simply quotes, without identifying, "one of CASE's experts." Contention 9 at 3. This unnamed "expert" argues that "we must be more concerned with the possibility of inundation of Turkey Point due to a combination of sea level rise, storm surge, and hurricanes" now that FPL has offered onsite LLW storage as a contingency plan. *Id*. Quoting an alleged expert without providing the document reflecting the expert's opinions and setting forth his or her name and qualifications is "most unreliable." *Tennessee Valley Authority* (Hartsville Nuclear Plant Units 1A, 2A, 1B and 2B), ALAB-367, 5 NRC 92, 121 (1977). The Commission has held that conclusory statements, even when provided by an expert, are insufficient to demonstrate that further inquiry is appropriate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion. *USEC* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006). By the same token, a statement of an alleged expert that is accompanied by neither that expert's name nor his credentials also deprives the Board of any method of assessing that opinion. CASE's failure to identify its unnamed expert or to provide the unnamed expert's qualifications renders its contention inadmissible. 10 C.F.R. § 2.309(f)(1)(v).

C. CASE Fails to Demonstrate the Existence of a Genuine Dispute With the COLA on a Material Issue of Law or Fact

Each contention must "provide sufficient information to show that a genuine dispute exists with the applicant . . . on a material issue of law or fact." 10 C.F.R.

§ 2.309(f)(1)(vi). The NRC's pleading standards require a petitioner to read the pertinent portions of the COL application and supporting documents, including the FSAR, state the applicant's position and the petitioner's opposing view, and explain why it has a disagreement with the applicant. 54 Fed. Reg. at 33,171; *Millstone*, CLI-01-24, 54 NRC at 358. Petitioners must make specific reference to the relevant facility documentation; a contention should be rejected if it inaccurately describes an applicant's proposed actions or ignores or misstates the content of the licensing documents. *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2076 (1982); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-107A, 16 NRC 1791, 1804 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1504-05 (1982). Contention 9 ignores the flood protection analysis that will be required by the Revised LLW Management Plan and misrepresents the maximum flood and storm surge analysis in the FSAR. As a result, Contention 9 fails to demonstrate the existence of a *genuine* dispute with the COL Application and should be rejected. 10 C.F.R. § 2.309(f)(1)(vi).

1. *FPL's Revised LLW Management Plan Discusses the Safety Analysis That Must Be Performed Prior to Constructing an Onsite LLW Storage Facility, Which Includes Demonstrating Adequate Flood Protection*

The Revised LLW Management Plan explains that, if necessary, FPL would design, construct, and operate an on-site storage facility following the design guidance in NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A. COLA Rev. 3, FSAR at 11.4-3. FPL would evaluate this change by performing a safety evaluation under 10 C.F.R. § 50.59, and if necessary, seek a license amendment. *Id*. NUREG-0800 describes the factors that would be a part of this review:

> Before implementing any additional onsite storage capacity, licensees should conduct substantial safety review and environmental assessments to assure adequate public health and safety protections and minimal environmental impact. The acceptance criteria and performance objectives of any proposed storage facility or area will need to meet minimal requirements in design, operations, safety considerations, policy considerations, and compliance with other applicable Federal, State, and local regulations governing any other toxic or hazardous properties of radioactive wastes . . .
>
> *Facility design and operation should assure that radiological consequences of design basis events (e.g., fire, tornado, seismic occurrence, and flood) do not exceed a small fraction (10 percent) of 10 CFR Part 100 dose limits (i.e., no more than a few sieverts whole body dose).*

NUREG-0800, Standard Review Plan 11.4, Appendix 11.4-A at 11.4-25 (emphasis added). *See also id*. at 11.4-29 ("Licensees must evaluate . . their ability to protect the facility from design basis events (e.g., fire, flooding, tornadoes) unless otherwise justified.").

Thus, prior to constructing an onsite LLW storage facility, FPL will be required to review the very safety questions CASE raises in Contention 9. CASE ignores this portion of the COL Application and so fails to demonstrate the existence of a genuine dispute.

2. *CASE's "Expert" Misrepresents the FSAR Storm Surge Analysis*

CASE's unnamed "expert" also fails to demonstrate a genuine dispute with the application because he misrepresents the FSAR:

> FPL starts with mean low tide but this is a best case estimate. Prudence would require beginning at a worst case scenario of mean high tide which could be 5 feet higher. Storm surge experienced at Turkey Point is usually estimated at 10 to 20 feet (3 to 6 meters) for a slow moving major storm. Sea level rise over the next 60 years is estimated at 2 to 3 feet. So, taking this together we could expect an event which would see a storm surge at 28 feet above mean low tide. This figure must be compared to the planned

> platform for Turkey Point 6 & 7 and to the level of all current plant and equipment at Turkey Point.[11]

Contention 9 at 3-4.

The unnamed "expert" then explains that because "FPL starts with mean low tide" its estimates are imprudent, and should instead start with a prudent worst-case scenario or mean high tide. *Id*. However, in the development of the COL Application, FPL followed NRC Regulatory Guide 1.59 and used the 10 percent exceedance high spring tide with initial rise, 2.6 feet NAVD 88, as the antecedent water level for its storm surge flooding analysis. *See* FSAR at § 2.4.5.2.2.1. This level is 4.5 feet above mean low water (thus mean low water is at -1.9 feet NAVD 88). *Id*. at 2.4.5-5. The claim of CASE's unnamed "expert" that FPL started its analysis with mean low tide is mistaken.

CASE's unnamed "expert" also claims that FPL should have then added twenty feet to account for storm surge and three feet to account for sea level rise and so "should expect an event which would see a storm surge at 28 feet above mean low tide." Contention 9 at 3-4. As FPL explained in its Answer to CASE's original Petition, FPL adjusted this antecedent water level to account for expected sea level rise over the design life of the plant. FSAR at 2.4.5-5 – 2.4.5-6. FPL took the long-term trend in sea level rise in the Miami area, 0.78 foot per century, and conservatively rounded the value up to a full foot per century. *Id*. at 2.4.5-6. FPL added this one-foot sea level rise factor to the 2.6 feet NAVD 88 initial water level condition, generating a 3.6 feet NAVD 88 sea-level-rise adjusted water level. FPL used this adjusted 3.6 feet NAVD 88 water level as the initial water level condition in FPL's simulations using the National Oceanic and Atmospheric

[11] To the extent this claim represents a challenge to the "current plant and equipment at Turkey Point" or the planned platform for Turkey Point Units 6 & 7" it is beyond the scope of this proceeding or already addressed in the Board's decision rejecting CASE Contention 5. LBP-11-06, slip op. at 96-99.

Administration's (NOAA) SLOSH model, which is used to forecast hurricane storm surges. *Id*. The SLOSH model produced a probable maximum storm surge (PMSS) elevation of 21.1 feet NAVD 88. *Id*. at 2.4.5-10. Combining this PMSS elevation with the 3.7 feet maximum wave run-up, FPL concluded that the maximum water level due to a probable maximum hurricane (adjusted to account for sea level rise) would be 24.8 feet NAVD 88. *Id*. at 2.4.5-12. The plant area final elevation was designed based on this analysis such that the elevations of floor entrances and openings of all safety-related structures are at 26 feet NAVD 88 (27.9 feet, i.e., roughly 28 feet, above the mean low tide). FSAR at 2.4.10-1. Thus, CASE's worst-case argument that FPL should be prepared for a "28-foot" storm surge is satisfied by the proposed plant design.

As discussed above, FPL's Revised LLW Management Plan does not contain specific design detail (including design elevation) of the contingent storage facility, because it is not required by 10 C.F.R. § 52.79(a)(3), so the above discussion of the plant area design elevation is offered just to demonstrate the erroneous nature of CASE's claim that it would not be feasible to elevate the auxiliary extended waste storage structure. Contention 9 at 1. CASE provides no support for this assertion and there is no basis for it in the record. The Revised LLW Management Plan explains that the LLW storage facility would be located onsite.[12] COLA Rev. 3, FSAR at 11.4-3. And FPL's Revised LLW Management Plan commits to follow the guidance in NUREG-0800, which, recommends that the facility be located within the protected area. NUREG-0800 at 11.4-27. Given that the contingent facility would be located on a site which has been significantly built up to support the design elevation of the safety-related structures, and

[12] The Units 6 & 7 plant area will be built up to higher elevations from the adjacent grade and is surrounded by a retaining wall structure with the top of the wall elevation varying from 20 feet to 21.5 feet NAVD 88. FSAR at 2.4.10-1.

that the safety analysis for the contingent facility would address flood protection, there is no basis in the record to support CASE's unsupported assertion that it would not be feasible to elevate the facility. Nor is there any basis to support CASE's insinuation that FPL would build (and the NRC would allow the construction of) a facility that failed to demonstrate adequate protection from flooding risks and which would be contrary to the NRC guidance in NUREG-0800. CASE's claim that constructing a contingent LLW storage facility with a design elevation high enough to protect it from anticipated storm surges is not feasible thus fails to demonstrate the existence of a genuine dispute with the application. 10 C.F.R. § 2.309(f)(1)(vi).

## III. CASE'S MOTION DOES NOT INCLUDE THE REQUIRED CONSULTATION CERTIFICATION

Finally, CASE's Motion should be summarily rejected because CASE failed to certify that it made a sincere effort to resolve the issues raised therein, as required by 10 C.F.R. § 2.323(b). In fact, CASE failed to contact counsel for FPL prior to filing its Motion.[13] The purpose of the NRC's consultation requirement is "to maximize the early resolution of issues without Board intervention." Initial Scheduling Order at 9. As the Board made clear in its Initial Scheduling Order, "motions will be summarily rejected if they are not preceded by a sincere attempt to resolve the issues and include the certification specified in 10 C.F.R. § 2.323(b)." *Id*. CASE's motion and accompanying new contention should be so rejected.[14]

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[13] There is a statement in its Answer to FPL's Motion for Summary Disposition that "CASE will review FPL's filings on January 3, 2012 and will file new contentions in a timely manner based on new information provided in those filings as warranted." CASE Answer at 1. CASE's warning of its plans to file new contentions "as warranted" is clearly insufficient to satisfy the consultation requirement.

[14] CASE's representative is fully aware of the consultation requirement. In addition to the Board's admonition in the Initial Scheduling Order, CASE has complied with the rule at earlier stages of this proceeding, acknowledging that the certification of consultation was "[r]equired by 10 C.F.R. § 2.323(b).

## CONCLUSION

For all of the foregoing reasons, the Motion should be denied and CASE Contention 9 should be rejected.

Respectfully Submitted,

/Signed electronically by Steven Hamrick/

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February 28, 2012

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*See* CASE Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Da-Ichi Accident, at 2, 8 (August 11, 2011). *See also* Sept. 21, 2011 Memorandum at 14 (emphasizing that, although the Board holds *pro se* litigants to less stringent standards when construing their pleadings, they do not have license to disregard procedural rules that are applicable to all parties and designed to promote efficient adjudication).

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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| In the Matter of | ) | |
| | ) | |
| Florida Power & Light Company | ) | Docket Nos. 52-040-COL |
| | ) | 52-041-COL |
| (Turkey Point Units 6 and 7) | ) | |
| | ) | ASLBP No. 10-903-02-COL |
| (Combined License) | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Florida Power & Light Company's Answer to CASE's Motion for Leave to File a New Contention and CASE Contention 9" were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, this 28th day of February, 2012.

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