

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 52-029-COL
Progress Energy Florida, Inc.	)	52-030-COL
	)	
Combined License Application for	)	
Levy County Nuclear Plant, Units 1 and 2	)	ASLBP No. 09-879-04-COL

**Progress Energy Florida, Inc.’s Motion to Strike Intervenor’s Arguments  
And Testimony That Are Outside The Scope Of The Contested Hearing  
And That Raise a New, Untimely Contention**

Pursuant to 10 C.F.R. §§ 2.323 and 2.337, and the Atomic Safety and Licensing Board’s (the “Board”) Initial Scheduling Order dated August 27, 2009,<sup>1</sup> Progress Energy Florida, Inc. (“PEF”) hereby submits this Motion to Strike. As explained below, PEF asks the Board to strike arguments and testimony set forth in the Intervenor’s<sup>2</sup> direct and rebuttal filings that are outside the scope of this contested hearing and that raise a new, untimely contention challenging the analysis of alternatives to groundwater pumping set forth in Section 9.4.3 of the Final Environmental Impact Statement (“FEIS”) prepared in this proceeding by the Nuclear Regulatory Commission’s Staff (“Staff”).

During the March 29, 2012 telephone conference in this proceeding, the Board indicated its preference that parties use their rebuttal statements – rather than motions to strike or motions in limine – to raise objections they may have regarding arguments or evidence submitted in this proceeding that are outside the scope of Contention 4A or that the Board should not otherwise consider. March 29, 2012 Transcript at pp. 946-47. PEF followed the Board’s guidance and addressed a number of such issues in its rebuttal statement. However, the Board also stated that significant issues could be the subject of

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<sup>1</sup> Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640 (2009).

<sup>2</sup> The Intervenor in this case are: The Ecology Party of Florida and Nuclear Information and Resource Service.

motions to strike. Id. As set forth below, certain arguments and testimony presented by the Intervenor are outside the scope of this proceeding and raise a new contention challenging FEIS Section 9.4.3. PEF believes this issue merits a separate Motion to Strike.

## **I. BACKGROUND**

This proceeding involves the contested hearing regarding PEF's application (the "COLA") seeking combined licenses to construct and operate a proposed new nuclear power plant in Levy County, Florida ("LNP"). On June 26, 2012, PEF, the Staff, and the Intervenor each filed direct testimony, exhibits, and initial statements of position regarding Contention 4A. On July 31, 2012, PEF, the Staff, and the Intervenor each submitted rebuttal testimony, exhibits, and a rebuttal statement of position. A description of the relevant procedural history of this proceeding prior to June 26, 2012 is provided in PEF's Initial Statement of Position, and need not be repeated here.<sup>3</sup>

## **II. APPLICABLE LEGAL STANDARDS**

Pursuant to the NRC's regulations, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted" as hearing evidence. 10 C.F.R. § 2.337(a). If an otherwise admissible submission includes information that is immaterial or irrelevant, such information is to be "segregated and excluded so far as is practicable." Id. Accordingly, the Board in this proceeding has the power to "strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative." 10 C.F.R. § 2.319(d).<sup>4</sup> Because evidence is only

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<sup>3</sup> Progress Energy Florida, Inc.'s Initial Statement of Position in the Contested Hearing for Contention 4A (June 26, 2012) at pp. 2-7.

<sup>4</sup> Similarly, the presiding officer of an NRC hearing is expressly granted the power to strike any "argumentative, repetitious, cumulative, unreliable, immaterial, or irrelevant evidence." 10 C.F.R. § 2.333(b).

admissible if it is relevant, material, reliable, *and* not repetitious, submissions are to be rejected for failing to meet any one of those criteria.<sup>5</sup>

NRC evidentiary hearings are confined to the limited scope of the relevant contentions as admitted. The scope of a contention is constrained to its terms and bases as originally pled or admitted, and new complaints which would stretch “the scope of admitted contentions beyond their reasonably inferred bounds” are not permissible. Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010).<sup>6</sup> Information offered as evidence which falls outside the limited scope of an admitted contention is to be excluded from the hearing record as irrelevant and immaterial. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-10-05, 71 NRC 90, 99-102 (2010).<sup>7</sup>

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<sup>5</sup> See Nuclear Innovation North America LLC (South Texas Project Units 3 and 4), Order (Ruling on Motions in Limine) (July 14, 2011) (excluding testimony determined by board to be irrelevant) (unpublished); Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station) Order (Rulings on Motion to Strike and Motions in Limine) (July 16, 2008) at 3 (excluding information board determined to be “simply not relevant” to proceeding) (unpublished); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-824, 22 NRC 776 (1985) (affirming licensing board exclusion of proffered evidence that it determined was immaterial to proceeding); Illinois Power Co. (Clinton Power Station, Units 1 and 2), LBP-75-59, 2 NRC 579, 588 (1975) (striking testimony which licensing board determined was “irrelevant, immaterial, and unreliable within the meaning of the Commission’s rules and would serve no useful purpose in the record.”), aff’d, ALAB-340, 4 NRC 27 (1976).

<sup>6</sup> See also Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Order (Granting in Part and Denying in Part Applicant’s Motions In Limine) (March 6, 2012), at 3-4 (unpublished).

<sup>7</sup> See also Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site) Memorandum and Order (Ruling on In Limine Motions) (Feb. 23, 2009) (excluding evidence determined to be irrelevant and outside the scope of the contention as admitted) (unpublished); Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site) Memorandum and Order (Ruling on In Limine Motions) (Jan. 26, 2009) (striking testimony and exhibits which concerned matters outside the scope of the contention as omitted) (unpublished).

### III. DISCUSSION

#### A. The Intervenors' Challenges To The FEIS's Analysis Of Alternative Sources Of Fresh Water Supply For The LNP Are Outside The Scope Of Contention 4A And Impermissibly Raise A New, Untimely Contention

The Intervenors' "Response Statement" claims, as one of its five principal arguments, that the FEIS failed to adequately analyze alternatives to groundwater pumping for the supply of fresh water to the LNP. Intervenors' Response Statement of Position Regarding Contention 4 (July 31, 2012) at pp. 4, 6, 27-29. The Intervenors' June 26, 2012 Initial Statement did not make that argument, but the direct testimony of Mr. Still (INT101R at pp. 7-9) and Dr. Bacchus (INT301R at p. 70) raise similar claims. In addition, the rebuttal testimony of Mr. Still (INT701 at pp. 6, 12-13) and Dr. Bacchus (INT801 at p. 5) make arguments implying that the FEIS failed to adequately analyze alternatives to groundwater withdrawal. Arguments regarding the sufficiency of the FEIS's analysis of alternatives to groundwater pumping are outside the scope of the admitted contention and, therefore, are irrelevant and immaterial. Accordingly, the Board should strike those arguments from the hearing record.

Contention 4A as admitted in this proceeding challenges whether the FEIS has adequately discussed and appropriately characterized the direct, indirect, and cumulative environmental impacts of groundwater pumping (i.e., active dewatering) and passive dewatering at the LNP, as well as the environmental impacts of salt drift. Challenging the FEIS's evaluation of potential alternatives to groundwater pumping is a separate, distinct, and new issue. Contention 4A and its bases do not even mention the DEIS's or the FEIS's discussion of such alternatives, as set forth in Section 9.4.3 (Service-Water System Alternatives) of each of those documents. Nor do the Contention and its bases infer or imply that the DEIS's or the FEIS's analysis of those alternatives is inadequate. The Board should exclude from this proceeding all such arguments set forth in the Intervenors' direct and rebuttal submissions, because they are clearly outside the scope of the admitted contention. See Vogtle, CLI-10-05, 71 NRC at 99-102.

Moreover, allowing the Intervenor to argue that the FEIS's analysis in Section 9.4.3 is insufficient would permit Intervenor to raise a new, untimely contention, without the required justification or support. Although the direct testimony of Dr. Bacchus and Mr. Still briefly criticize that analysis, Intervenor's Response Statement is the first pleading in which the Intervenor challenges Section 9.4.3.<sup>8</sup> It is well-established that parties are prohibited from raising new arguments in reply briefs, especially when those arguments amount to new contentions. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004).

The Intervenor had ample opportunity to timely raise a new contention asserting that alternatives to groundwater pumping should have been considered in more detail. Intervenor could have raised that issue when they submitted their original contentions in February 2009. Intervenor's Contentions 4.O, 9, 10, and 11 all argued in some form that PEF's COLA did not properly consider alternatives to the LNP for generating power.<sup>9</sup> Intervenor, however, did not also claim in those or any other of their original contentions that alternatives to groundwater pumping were not adequately evaluated.

The August 6, 2010 Draft Environmental Statement ("DEIS") prepared by the NRC Staff in this proceeding presented another opportunity for the Intervenor to submit a new contention regarding alternatives to groundwater pumping. Section 9.4.3 of the DEIS specifically discussed the NRC Staff's consideration of alternatives to the LNP's proposed groundwater withdrawals. DEIS, Section 9.4.3, at pp. 9-251 through 9-252. On November 15, 2010, the Intervenor sought to amend Contention 4 to challenge certain portions of the DEIS.<sup>10</sup> The Intervenor's amended contention and supporting documents, however, did not mention Section 9.4.3, nor did they otherwise challenge the DEIS's water

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<sup>8</sup> Intervenor quote extensively from FEIS Section 9.4.3 in their Response Statement. Response Statement at pp. 28-29.

<sup>9</sup> Petition to Intervene and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida and Nuclear Information and Resource Service (Feb. 6, 2009), at pp. 65-67, 97-102. The Board did not admit those contentions. Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 131-38 (2009).

<sup>10</sup> See "An Amended Contention 4," filed by the Ecology Party of Florida, Green Party of Florida, Nuclear Information and Resource Service Motion (Nov. 15, 2010) ("Amended Contention 4").

supply alternatives analysis.<sup>11</sup> Finally, when the FEIS was issued on April 27, 2012, the Intervenor had yet another chance to propose a new contention challenging Section 9.4.3, as revised. They did not.

When the Board admitted Contention 4A, it found untimely and not admissible the assertions in Dr. Bacchus's supporting affidavit that the DEIS failed to consider alternatives to the LNP that would avoid all environmental impacts. Licensing Board Memorandum and Order (Admitting Contention 4A) (Feb. 2, 2011) (unpublished), slip op. at 17. Intervenor's rebuttal arguments regarding alternatives for groundwater supply similarly are untimely and inadmissible. Accordingly, PEF respectfully requests that the Board strike from the hearing record the Intervenor's arguments and testimony to the extent they challenge the FEIS's analysis of alternatives to groundwater pumping as a source of fresh water supply for the LNP.<sup>12</sup>

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<sup>11</sup> The Intervenor's request for an amended contention argued that there was no alternative fresh water supply plan in place for the LNP. Amended Contention 4 at p. 7. That argument, however, is not the same as challenging the sufficiency of the DEIS's analysis in Section 9.4.3 regarding fresh water supply alternatives. PEF's rebuttal statement addresses Intervenor's claim that the LNP must have in place an alternative water supply plan. Progress Energy Florida, Inc.'s Rebuttal Statement of Position in the Contested Hearing for Contention A (July 31, 2012), at pp. 24-25.

<sup>12</sup> PEF requests that the Board strike from the record those portions of the Intervenor's arguments on pages 4, 6, and 27-29 of their Response Statement that state or imply that the FEIS's analysis of alternatives to groundwater withdrawals is inadequate. PEF also requests that the Board strike from the record those portions of Dr. Bacchus's direct testimony (INT301R, A.50 at p. 70), Mr. Still's direct testimony (INT201R, A.16 at pp. 7-9), Dr. Bacchus's rebuttal testimony (INT801, A.6 at p. 5), and Mr. Still's rebuttal testimony (INT701, A.9 at p. 6, A.17 at p. 12, and A.18 at p. 13), which state or imply that the FEIS's analysis of alternatives to groundwater withdrawals is inadequate.

#### **IV. CERTIFICATION**

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this Motion, and to resolve those issues, and I certify that my efforts to resolve those issues have been unsuccessful.

Respectfully Submitted,

/Signed electronically by Michael G. Lepre/

John H. O'Neill Jr.

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Dated: August 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “Progress Energy Florida, Inc.’s Motion to Strike Intervenor’s Arguments and Testimony that are Outside the Scope of the Contested Hearing and that Raise a New, Untimely Contention,” dated August 10, 2012, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding this 10th day of August 2012.

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/Signed electronically by Michael G. Lepre/

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