UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

E. Roy Hawkens, Chair
Dr. Michael F. Kennedy
Dr. William C. Burnett

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040 and 52-041
	)	ASLBP No. 10-903-02-COL-BD01
Turkey Point,	)	
Units 6 and 7	)	March 11, 2013
	)	

JOINT INTERVENORS' REPLY TO FLORIDA POWER AND LIGHT COMPANY'S AND NUCLEAR REGULATORY COMMISSION STAFF'S ANSWERS TO JOINT INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING THE SITING AND ENVIRONMENTAL IMPACTS OF A RECLAIMED WATER TREATMENT FACILITY AND ASSOCIATED PIPELINES AT THE TURKEY POINT NUCLEAR POWER PLANT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(2) and Initial Scheduling Order and Administrative Directive, Turkey Point Units 6 and 7, LBP 10-903-02 (March 30, 2011), Southern Alliance for Clean Energy, National Parks Conservation Association, Dan Kipnis, and Mark Oncavage (collectively, "Joint Intervenors"), hereby file their Reply to Florida Power & Light Company's ("FPL") and Nuclear Regulatory Commission Staff's ("NRC Staff") Answers to Joint Intervenors' Motion for Leave to File a New Contention concerning the siting and environmental impacts of a reclaimed water treatment facility and associated pipelines at the Turkey Point Nuclear Plant. The contention complies with each of the requirements forth in 10 C.F.R. §§ 2.309(c)(1), (f)(1), and (f)(2) for new or amended contentions, and should therefore be admitted.

ARGUMENT

The contention is admissible because it meets each of the requirements set forth in 10 C.F.R. §§ 2.309(c)(1), (f)(1), and (f)(2). Joint Intervenors are timely under 10 C.F.R. §§ 2.309(c)(1) and (f)(2) because they filed the contention within thirty (30) days of the determination by the Miami-Dade County Board of County Commissioners ("County") to issue an unusual use approval for the reclaimed water treatment facility and associated pipelines at a location different than the location analyzed in FPL's Environmental Report (the "ER"). Contrary to FPL's and NRC Staff's Answers, there is adequate support for this contention of omission pursuant to 10 C.F.R. § 2.309(f)(1)(v) and there exists a genuine dispute of material fact or law pursuant to 10 C.F.R. § 2.309(f)(1)(vi).

I. Joint Intervenors' Contention Satisfies the Timeliness Requirements of 10 C.F.R. §§ 2.309(c)(1)(i–iii) and (f)(2) Because the Determination by the County Constitutes New Information That Is Materially Different from What Was Previously Available.

According to FPL, "one of the regulatory approvals to be obtained from State and local agencies in order to construct and operate the Turkey Point Units is a [County] 'unusual use approval' (zoning approval) to permit a nuclear power plant and ancillary structures and equipment to be constructed in the County." FPL Answer at 3 (citing Code of Miami-Dade County Florida §§ 33-13(3)(e) (Unusual Uses), 33-311(A)(3), and 33-314(C)(16)). As noted in Joint Intervenors' Motion, on January 10, 2013 the County granted such an unusual use approval in a different location than set forth in FPL's ER. Motion at 2-3. There is no reason to assume that FPL will defy this County mandate. Accordingly, the County's determination – and not the description in the ER – constitutes the best available information about the location of the reclaimed water treatment facility. Because Joint Intervenors raised the new contention, which concerns the environmental impacts associated with the new location, within thirty (30) days of

the County's determination, it is timely. *See* Initial Scheduling Order and Administrative Directive, Turkey Point Units 6 and 7, LBP 10-903-02, 8 (March 30, 2011); *see also* 10 C.F.R. §§2.309(c)(1) and (f)(2). Notably, NRC Staff does not dispute this conclusion. *See* NRC Staff Answer at 6.

FPL nevertheless argues that the contention is not timely because the Florida Siting Board *may* approve a location different than the County sometime in December 2013. *See* FPL Answer at 5. In addition, FPL assures this Atomic Safety and Licensing Board that *if* the Florida Siting Board instead approves the same location for the reclaimed water treatment facility that the County approved, it will then amend the ER. *Id*. Neither of these statements is persuasive.

New contentions must be brought within thirty (30) days of Joint Intervenors becoming aware of new information. Initial Scheduling Order, LBP 10-903-02, at 8. Joint Intervenors were accordingly compelled to act now – when a necessary regulatory approval changed the location of the reclaimed water treatment facility from the location set forth in FPL's ER. The location approved by the County may not be FPL's first choice, and FPL may still desire to construct the facility at its original location, but FPL's desires are of no relevance or consequence to the admissibility of the contention. At this time, the only permitted location of the reclaimed water treatment facility is at the location approved by the County, and the ER must be revised to reflect this new information.[1]

[1] Of course, *if* the Florida Siting Board eventually issues a site certification that includes the siting of the wastewater treatment facility at the location identified in the ER, that ruling could constitute new information, and Joint Intervenors could also file a new or amended contention at that time. Unless and until then, the site of the reclaimed water treatment facility is at the location approved by the County, and the ER must be revised to reflect this new information.

Likewise, FPL's promise to amend the ER sometime in the future is not compelling. There is simply no requirement that new information arises only when an ER is amended. *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 160-61 (2005). Indeed, to conclude as such would render all contentions of omission inadmissible.

Joint Intervenors' contention is therefore timely because it satisfies each of the requirements set forth in 10 C.F.R. §§ 2.309(c)(1) and (f)(2).

II. Joint Intervenors' Contention Satisfies the Requirements of 10 C.F.R. § 2.309(f)(1).

FPL and NRC Staff both assert that Joint Intervenors did not provide adequate support for the contention and failed to raise a genuine issue of law or fact. FPL Answer at 6–9; NRC Staff Answer at 6–9. To the contrary, Joint Intervenors provided adequate support for the contention because it is a contention of omission and raises a genuine issue regarding the legal adequacy of the ER.

A. Joint Intervenors' Contention Is a Contention of Omission and Is Adequately Supported as Required by 10 C.F.R. §§ 2.309(f)(1)(v–vi).

FPL and NRC Staff both argue that the contention is improperly supported by facts and expert opinions. FPL Answer at 7–8; NRC Staff Answer at 6–7. This argument fails because it overlooks the standard of admissibility for contentions of omission.

Joint Intervenors' contention is a contention of omission. Such a contention is appropriate when an intervenor believes part of an application "fails to contain information on a relevant matter as required by law." 10 C.F.R. § 2.309(f)(1)(vi). Currently, the only location approved for a reclaimed water treatment facility is the site approved by the County, and FPL's ER is missing information relevant to that site.

Because Joint Intervenors' contention is properly characterized as a contention of omission, the recitation of facts and expert opinions called for in FPL's and NRC Staff's Answers is unnecessary. *See* FPL Answer at 7–8; NRC Staff Answer at 6. The summary of facts and expert opinions typically required by 10 C.F.R. § 2.309(f)(1)(v) does not wholly apply to contentions of omission. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-09-4, 69 N.R.C. 170, 190 (2009) (quoting *Virginia Electric & Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 N.R.C. 294, 317 (2008)) (explaining that the requirements of 10 C.F.R. § 2.309(f)(1)(v) "are inapplicable to a contention of omission beyond identifying the regulatively required missing information'"). Instead, an intervenor must only show that the missing information should have been included in the application as required by law. *S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), LBP-09-03, Docket Nos. 52-025-COL & 52-026-COL (slip op. at 22) (March 5, 2009) (quoting *North Anna*, 68 N.R.C. at 317). Further, it does not take expert testimony to support the rather straightforward, simple proposition that because the facility will be constructed in a location different from the location identified in the ER, it will impact a different geographic area and with it a different set of habitats and resources. The extent of that impact is not relevant to the admissibility of the contention, nor (as explained below) is it Joint Intervenors' responsibility under the National Environmental Policy Act ("NEPA") to identify the impacts of the facility for the applicant or the agency. Instead, the site approved by the County should be included in the ER so that FPL and the NRC may analyze the environmental impacts of constructing and operating the reclaimed water treatment facility, as required by NEPA. *See* Joint Intervenors' Motion at 5 ("Because FPL will be required to construct the reclaimed water treatment facility and pipelines

in a different location, a new area (along with a new set of habitats and species) will be impacted by the proposed project").

Therefore, Joint Intervenors' contention of omission is adequately supported by facts as required by 10 C.F.R. §§ 2.309(f)(1)(v–vi) and should be admitted.

B. Joint Intervenors' Contention Raises a Genuine Dispute of Fact or Law as Required by 10 C.F.R. § 2.309(f)(1)(vi) Because It Challenges the Legal Adequacy of the ER.

NRC Staff also argues that Joint Intervenors have failed to prove that construction of the reclaimed water treatment facility on the site approved by the County will have an impact on the environment, or that the impact will be different from the impact addressed in the ER. NRC Staff Answer at 6–9. NRC Staff thus concludes that Joint Intervenors have failed to raise a genuine dispute. *Id.* To meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) for a NEPA contention, however, an intervenor only needs to show the *relevance* of the information missing from the NEPA analysis. *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 N.R.C. 720, 763–64 (2010). Joint Intervenors have ably met their burden. The environmental impacts of ancillary buildings, such as the reclaimed water treatment facility, are certainly relevant to any NEPA analysis; indeed, similar discussions are already a part of FPL's ER. *See e.g.* ER 4.3.1.2.

The burden of analyzing the environmental impacts of the new reclaimed water treatment facility location now falls on the NRC. "Settled" precedent shows that "the NRC has the burden of complying with NEPA." *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 N.R.C. 1041, 1049 (1983). Federal courts have consistently rejected agency attempts to impose the agency's NEPA burden on environmental plaintiffs. *See, e.g.*, *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) ("Compliance with NEPA is a

primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.").

Accordingly, Joint Intervenors' contention raises a genuine dispute of fact or law as required by 10 C.F.R. § 2.309(f)(1)(vi) and should be admitted.

CONCLUSION

For all the aforementioned reasons, the Board should admit Joint Intervenors' contention concerning the siting and environmental impacts of a reclaimed water treatment facility and associated pipelines at the Turkey Point Nuclear Power Plant.

Respectfully submitted this 11th day of March, 2013.

/signed (electronically) by/

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of FLORIDA POWER & LIGHT COMPANY (Turkey Point Units 6 and 7)	Docket Nos. 52-040-COL and 52-041-COL

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **JOINT INTERVENORS' REPLY TO FLORIDA POWER AND LIGHT COMPANY'S AND NUCLEAR REGULATORY COMMISSION STAFF'S ANSWERS TO JOINT INTERVENORS' MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING THE SITING AND ENVIRONMENTAL IMPACTS OF A RECLAIMED WATER TREATMENT FACILITY AND ASSOCIATED PIPELINES AT THE TURKEY POINT NUCLEAR POWER PLANT** were served upon the following persons by Electronic Information Exchange and/or electronic mail.

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