UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

FLORIDA POWER & LIGHT COMPANY'S ANSWER OPPOSING CITY OF MIAMI'S APPEAL OF LBP-15-19

Respectfully submitted,

/Signed electronically by David R. Lewis/

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July 27, 2015

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FLORIDA POWER & LIGHT COMPANY'S ANSWER OPPOSING CITY OF MIAMI'S APPEAL OF LBP-15-19

Pursuant to 10 C.F.R. § 2.311(b), Florida Power & Light Company ("FPL") responds in opposition to the City of Miami's appeal[1] of the Atomic Safety and Licensing Board's Memorandum and Order[2] denying the City of Miami's petition to intervene but granting its request to participate as an interested local governmental party pursuant to 10 C.F.R. § 2.315(c). The City of Miami seeks review of the Board's decision denying admission of two of the City of Miami's three proffered contentions – Contention 2 and Contention 3.[3] As discussed below, the Commission should deny the appeal because the City of Miami has not identified an error of law or abuse of discretion on the part of the Board's rulings on its contentions, which are clearly correct. Rather than identifying any error or abuse of discretion, the City of Miami raises entirely new arguments, which are not allowed in an appeal.

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[1] City of Miami's Notice of Appeal of LBP-15-19 (July 2, 2015); Brief in Support of City of Miami's Appeal of LBP-15-19 (July 2, 2015) ("Brief").

[2] *Florida Power & Light Co.* (Turkey Point, Units 6 and 7), LBP-15-19, 81 N.R.C. ___, slip. op. (June 10, 2015)("LBP-15-19").

[3] Brief at 3.

STATEMENT OF THE CASE

FPL submitted an application to the NRC for a combined construction and operating license ("COL") for Turkey Point Units 6 and 7 ("Application") on June 30, 2009.[4] On June 18, 2010, the NRC Staff published a notice of hearing and opportunity to petition to intervene.[5] On August 17, 2010, Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association ("Joint Intervenors"), Citizens Allied for Safety Energy, Inc. ("CASE"), and the Village of Pinecrest petitioned to intervene. *Florida Power & Light Co.* (Turkey Point, Units 6 and 7), LBP-11-6, 73 N.R.C. 149, 164-65 (2011). The City of Miami did not seek to intervene or participate at that time.

The Board granted the Joint Intervenors' and CASE's intervention petitions and admitted several contentions. *Id.* at 251-52. However, the Board rejected, as insufficiently supported and failing to demonstrate a genuine dispute with the Application, Joint Intervenors' contention relating to the environmental impacts of FPL's proposed radial collector wells.[6] *Id.* at 173-86. Part of the rejected contention alleged that the Environmental Report's ("ER") reliance on groundwater modeling is misplaced, because the model's assumptions of steady state, constant-head boundary, and constant density do not represent actual conditions and, accordingly, cannot predict environmental impacts caused by operation of the radial collector wells. *Id.* at 178-80.

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[4] *See* Combined License Application Documents for Turkey Point, Units 6 and 7 Application, *available at* http://www.nrc.gov/reactors/new-reactors/col/turkey-point/documents.html#application.

[5] 75 Fed. Reg. 34,777 (June 18, 2010).

[6] As explained in the Board's decision on the initial intervention petitions,

> During normal operations of proposed Units 6 and 7, FPL intends to dissipate waste heat by mechanical draft cooling towers. Two sources of makeup cooling water will be available: (1) the primary source will consist of reclaimed water . . . that will be used after it is processed by the Miami-Dade Water and Sewer Department (MDWASD) and conveyed via pipelines to the Turkey Point site; and (2) the secondary source – which will be used when reclaimed water is inadequate in quantity or quality to meet the needs of the cooling system – will consist of four radial collector wells designed principally to withdraw seawater from under Biscayne Bay.

LBP-11-6, 73 N.R.C. at 173, *citing* ER at 5.2-1, 5.2-8.

The Board found that Joint Intervenors had failed to challenge the reasons underlying FPL's decision to employ model assumptions based on steady state, constant-head boundary, and constant density, as described and discussed in the Application.[7] *Id.* at 180.

In August 2010, during the environmental scoping process, similar issues were raised by the National Park Service, which commented: "The constant density assumption cannot adequately determine the effects of the hypersaline plume eastern migration and bay salinity impacts due to the operation of the RCWs and dewatering activities. . . . A coupled surface water and groundwater hydrologic model . . . is necessary to fully evaluate all of the associated impacts to Biscayne Bay."[8]

Subsequent revisions to the ER elaborated on the results of FPL's modeling. As reflected in ER Revision 3, Section 5.2.3.1.2, Radial Collector Wells (December 16, 2011),

> Operation of radial collector wells installed beneath Biscayne Bay would not impact the water quality of the bay. Although recharge would occur from the bay, it is estimated to be a small percentage of natural freshwater recharge. Additionally, although 1.9 percent of recharge (2.4 MGD) is predicted to originate from the cooling canals of the industrial wastewater facility, which are hypersaline, this recharge water drawn towards the radial collector wells will remain at depth within the aquifer due to the placement of the radial collector well laterals below the seabed and due to the higher density of this hypersaline water relative to seawater. Effects on salinity of the bay, based on the predicted amount of withdrawal versus the natural recharge, would be minimal.

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[7] FPL's ground-water model has been described in the Application from its initial submittal. *See* Florida Power & Light Company's Answer Opposing City of Miami's Petition to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7 (May 8, 2015)("FPL Answer") at 18, *citing* FSAR (Rev. 0), App. 2CC. Appendix 2CC of the FSAR has stated since that time that FPL's groundwater model is a "constant density" model, explaining that for the localized area of interest, the pressure influences of density variation are insignificant relative to the hydraulic gradient imposed by the pumping. *Id.*, *citing* FSAR (Rev. 0), App. 2CC, at § 3.3.5; FSAR (Rev. 6), App. 2CC at § 3.3.3. *See also* LBP-11-6, 73 N.R.C. at 180.

[8] FPL Answer at 19, *citing* Letter from M. Lewis and D. Kimball to NRC, Turkey Point Units 6 and 7 License Application Review Scoping Comments (Aug. 16, 2010) at 12 (ADAMS Accession No. ML102740617).

FPL Answer at 16, *quoting* ER (Rev. 3) at 5.2-22. The ER also found that potential impacts to ground water from the hypersaline plume would be minimal, because operation of the RCWs would draw the plume away from potable water supplies towards non-potable groundwater:

> As discussed above, any hypersaline water drawn into the aquifer from the cooling canals would not impact potable water supplies, which are further inland, due to the presence of brackish, non-potable water near the coast. Therefore, impacts to groundwater quality as a result of radial collector well operations would be SMALL and not require mitigation.

Id., *quoting* ER (Rev. 3) Section 5.2.3.2.3 (at 5.2-24). Each ER revision since has contained essentially the same information. *Id.*, *citing* ER (Rev. 6) at 5.2-22, 5.2-24.

The NRC Staff addressed the comments on modeling raised during the environmental scoping process, as it had committed to do[9] by commissioning an independent groundwater modeling effort performed by the U.S. Geological Survey ("USGS").[10] In February 2015, the NRC published the Draft Environmental Impact Statement ("DEIS") for Turkey Point Units 6 and 7.[11] DEIS Section 5.2 and Appendix G summarized the separate water modeling performed by FPL and USGS to evaluate the effects of RCW operation.[12] As discussed in the DEIS, "[t]he model used by the USGS is a sub-model of an existing regional scale (Miami-Dade County) coupled surface-water/groundwater model. . . ."[13] "The USGS model explicitly considered density effects on the flow within and between the groundwater and surface-water systems."[14] The DEIS presents the results of this independent modeling, including figures showing the

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[9] *Id.* at 19, *citing* Environmental Impact Statement Scoping Process, Summary Report, Turkey Point Units 6 and 7 Combined Licenses, Miami-Dade County, Florida (Nov. 2010) (ADAMS Accession No. ML103130612), at 69.

[10] The USGS report on this modeling was released in December 2014. M. Lohmann, USGS, Estimated Effects of Proposed Radial Collector Pumpage Near Turkey Point Nuclear Facility, available on ADAMS (Accession No. ML14345A290).

[11] Environmental Impact Statement for Combined Licenses (COLs) for Turkey Point Units 6 and 7, Draft Report for Comment, NUREG-2176 (Feb. 2015)(ADAMS Accession No. ML15055A103)("DEIS").

[12] FPL Answer at 20.

[13] FPL Answer at 21, *quoting* DEIS at G-26.

[14] *Id.*, *quoting* DEIS at G-31.

effects on groundwater salinity and discussion of the predicted effects on Biscayne Bay salinity.[15] The DEIS specifically addresses how RCW operation is predicted to influence the hypersaline plume that originates from the IWF cooling canals.[16]

On April 13, 2015, Miami filed its petition to intervene, seeking admission of three contentions ostensibly challenging the DEIS.[17] Contention 2 alleged that the DEIS is deficient because its evaluation of the operation of the radial collector wells ("RCW") does not preclude the possibility that the RCW will change the dynamics of the plume from the existing Industrial Wastewater Facility ("IWF"). [18] Petition at 8. Contention 3 alleged the discussion on page G-28 of the DEIS of the base case model's prediction that 1.9 percent of the water extracted by the RCW would come from the IWF was deficient because it does not address what percentage of water would come from under the IWF.[19] *Id.* at 10. The Petition did not address the timeliness of these contentions under 10 C.F.R. § 2.309(c)(1). The Petition also did not address the standards in 10 C.F.R. § 2.309(f)(1) or provide any documentary or expert support for the allegations. The NRC Staff and FPL filed answers opposing Miami's Petition.[20] Miami submitted no reply to these answers.

FPL opposed Contention 2 as untimely. FPL Answer at 15. FPL argued that Miami's failure to address the timeliness standards in 10 C.F.R. § 2.309(c)(1) required, by itself, that the

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[15] FPL Answer at 21, *citing* DEIS at G-40 to G-45.

[16] FPL Answer at 20-21, *quoting* DEIS at 5-15.

[17] Petition by the City of Miami, Florida, for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7, or in the Alternative, Participate as a Non-Party Local Government (Apr. 13, 2015)("Petition").

[18] The IWF consists of approximately 5,900 ac of cooling canals serving the existing nuclear units. DEIS at 2-7.

[19] The base case model discussed on G-28 of the GEIS is FPL's model.

[20] FPL Answer at 1; NRC Staff Answer to "Petition by the City of Miami, Florida, for Leave to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Point Units 6 & 7, or in the Alternative, Participate as a Non-Party Local Government," (May 8, 2015)("NRC Staff Answer").

contention be dismissed. *Id.* FPL further argued that the influence that RCW operation will have on the hypersaline plume originating from the IWF was addressed in its ER, which could have been challenged years ago. *Id.* at 15-16. Indeed, as FPL pointed out, Miami's discussion of its Contention 2 was taken nearly verbatim from a Statement of Issue provided to the NRC over four years ago. *Id.* at 16-17. Miami took this prior statement and changed the reference to "FPL's current modeling effort" to the "evaluation . . . presented in the draft EIS." *Id.* at 18. Miami also added a reference to Appendix G of the DEIS (without any specific citation) as indicating that "the current groundwater model" is inadequate because "a multi density hydrologic model with coupled surface and groundwater" is required to examine certain issues regarding the effect on the plume. *Id.*, *citing* Petition at 10. As FPL explained, Miami's challenge to the "current groundwater model" in Contention 2 referred to FPL's groundwater model that had been available for years. *Id.* at 18-19. As FPL pointed out, this allegation could not refer to the additional USGS groundwater modeling commissioned by the NRC Staff and discussed in the DEIS, because the model commissioned by the Staff is explicitly described in the DEIS as a coupled surface-water/groundwater model that considers both density effects and the surface water/groundwater interface. *Id.* at 18 n.10, *citing* DEIS at G-26, G-31 to G-32.

Both FPL and the NRC Staff opposed Contention 2 as failing to satisfy the admissibility standards in 10 C.F.R. § 2.309(f)(1). As both FPL and the NRC Staff argued, Contention 2 was immaterial because NEPA does not require the DEIS to "preclude" the possibility of impacts (FPL Answer at 19-20; NRC Staff Answer at 13-16); did not challenge or present any dispute with the independent USGS modeling presented in the DEIS (FPL Answer at 20-22; NRC Staff Answer at 18-19), and was not adequately supported with facts, expert opinion, or other

information demonstrating a genuine material dispute (FPL Answer at 23-24; NRC Staff Answer at 16-19).

FPL also opposed Contention 3 as untimely. FPL Answer at 24. FPL again argued that Miami's failure to address the timeliness standards in 10 C.F.R. § 2.309(c)(1) required, by itself, that the contention be dismissed. *Id.* In addition, FPL pointed out that Contention 3 relates to "FPL's base case model" (*id.* at 25, *citing* Petition at 10), and the description of FPL's model and its results had been long available. *Id.* Moreover, none of Miami's statements regarding FPL's modeling were new. *Id.* at 25-27.

Both FPL and the NRC Staff opposed Contention 3 as failing to satisfy the admissibility standards in 10 C.F.R. § 2.309(f)(1). As both FPL and the NRC Staff argued, Contention 3 failed to address or challenge the additional USGS modeling that had been commissioned by the Staff and discussed in the DEIS, and therefore failed to demonstrate any genuine dispute with the DEIS. FPL Answer at 27-29; NRC Staff Answer at 21, 23-24. FPL and the NRC Staff also opposed Contention 3 as entirely unsupported. FPL Answer at 29; NRC Staff Answer at 22.

In LBP-15-19, the Board found all three of Miami's proposed contentions untimely and inadmissible, and therefore denied Miami's intervention request. However, the Board permitted Miami to participate in the pending proceeding (pertaining to a contention similar to Contention 1) as an interested governmental entity.

The Board denied Contention 2 as untimely because Miami had not shown it was based on new information that was materially different from that which was previously available. LBP-15-19 at 9. The Board found that none of the data to which Miami referred was new. *Id.* at 9-10.

The Board also held that Contention 2 failed to raise a material issue pursuant to 10 C.F.R. § 2.309(f)(1)(iv) because nothing in NEPA requires the NRC Staff's analysis to "preclude" any particular environmental impact (as the Contention asserted). *Id.* at 10-11. Further, the Board found that Miami had not supported its assertions with any documentary evidence or expert opinion support, and Miami's averments that each assertion "is believed" did not satisfy the 10 C.F.R. § 2.309(f)(1)(v) requirement for specific references in support of a petitioner's contention. *Id*. at 11. Finally, the Board found that Miami had failed to identify any specific deficiencies in the DEIS. Because Miami failed to acknowledge or challenge the additional USGS modeling and analysis in the DEIS, or provide any more specific identification of allegedly deficient portions of the DEIS, the Board concluded that Contention 2 failed to demonstrate a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi). *Id*. at 11-12.

The Board similarly denied admission of Contention 3 as untimely because Miami failed to show that the contention is based on materially different information from that which was previously available. *Id.* at 13. The Board found that the contention focused solely on FPL's base case groundwater model, which has been available for years. *Id*.

The Board also found that Contention 3 failed to raise an issue material to the findings that the NRC must make, as required by section 2.309(f)(1)(iv), because Miami never explained why the DEIS must identify the percentage of RCW water drawn from underneath the IWF. *Id.* In addition, the Board found that Miami failed to provide alleged facts or expert opinion to support admission of Contention 3, as required by section 2.309(f)(1)(v). *Id.* at 13-14. Finally, the Board ruled that Contention 3 failed to present a genuine dispute with the DEIS, as required

by section 2.309(f)(1)(vi), because Miami had failed to address the DEIS's extensive discussion of the additional USGS modeling. *Id*. at 14.

STANDARD OF REVIEW

"An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requester/petitioner on the question as to whether the request and/or petition should have been granted." 10 C.F.R. § 2.311(c). In ruling on such an appeal, the Commission gives "substantial deference" to Board determinations on contention admissibility.[21] The Commission will not sustain such an appeal unless the appeal shows that the Board committed a "clear error or abuse of discretion."[22]

Abuse of discretion is a "high standard of review."[23] A petitioner has a "heavy burden" on appeal to establish that reversal of a Board decision is warranted.[24] Consistent with this standard, "[t]he appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellants claims."[25]

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[21] *AmerGen Energy Co., LLC,* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 N.R.C. 111, 121 (2006); *South Carolina Elec. and Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 N.R.C. 1, 5 (2010).

[22] *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 N.R.C. 214, 220 (2011).

[23] *Andrew Siemaszko*, CLI-06-16, 63 N.R.C. 708, 718 (2006).

[24] *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-918, 29 N.R.C. 473, 482 (1989).

[25] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 & 3), CLI-04-36, 60 N.R.C. 631, 639 n.25 (2004) (*quoting Adv. Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 N.R.C. 285, 297 (1994)).

Furthermore, the Commission will not consider new information or new arguments on appeal.[26] A petitioner may "not . . . skirt [the Commission's] contention rules by initially filing unsupported contentions, and later recasting or modifying their contentions on appeal with new arguments never raised before the Board."[27] Raising new issues on appeal is especially inappropriate when "the issue and factual averments underlying it could have been – but were not – timely put before the Licensing Board."[28]

As discussed further below, the City of Miami not only fails to point to any error of law or abuse of discretion in the Board's decision, but also raises new issues for the first time on appeal. Therefore, their appeal should be denied and the Board's Memorandum and Order affirmed.

ARGUMENT

I. MIAMI IDENTIFIES NO ERROR OR ABUSE OF DISCRETION IN THE BOARD'S RULING ON THE UNTIMELINESS OF CONTENTION 2, BUT INSTEAD IMPROPERLY SEEKS TO RAISE NEW ARGUMENTS UNRELATED TO THE CONTENTION

The Board correctly dismissed Contention 2 as untimely because Miami (1) failed to address the timeliness standards in 10 C.F.R. § 2.309(c)(1), as was Miami's obligation, and (2) none of the data referred to in the Contention was new. On appeal, Miami does not deny or provide any excuse for its failure to have addressed the timeliness standards before the Board. Nor does it identify any error in the Board's ruling regarding prior availability of the data referred to in the Contention. Instead, Miami now attempts to justify the timeliness of a totally

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[26] *Virgil. C. Summer*, CLI-10-1, 71 N.R.C. at 5 n.20 ("We will not consider information that is introduced for the first time on appeal in an attempt to 'cure deficient contentions'"); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 N.R.C. 231, 234 (2008).

[27] *Millstone*, CLI-08-17, 68 N.R.C. at 234.

[28] *P.R. Elec. Power Auth.* (N. Coast Nuclear Plant, Unit 1), ALAB-648, 14 N.R.C. 34, 37 (1981).

reformulated contention relating to the USGS model never previously challenged based on data never previously discussed. This attempt to raise new issues and arguments for the first time on appeal is improper and provides no basis to disturb the Board's ruling.

The NRC does not look with favor on amended or new contentions filed after the initial filing. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 638 (2004).

> As [the Commission] has repeatedly stressed, our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners "who must examine the publicly available material and set forth their claims and the support for their claims at the outset." There simply would be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) (footnotes omitted).

Accordingly, the Commission's rules of practice require that "[c]ontentions 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." 10 C.F.R. § 2.309(f)(2). With respect to NEPA-related issues, contentions are to be based on the applicant's environmental report. *Id.* New or amended environmental contentions may be filed after the initial filing deadline – for example, based on a draft or final NRC environmental impact statement – only "if the contention complies with the requirements in paragraph (c) of this section." *Id.* 10 C.F.R. 2.309(c)(1), in turn, requires that the contention "not be entertained" absent a demonstration of good cause by showing that:

(i) The information upon which the filing is based was not previously available;

(ii) The information upon which the filing is based is materially different from information previously available; and

(iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(c)(1)(i)-(iii).

Further, the proponent of an order admitting the proposed contention has the burden of demonstrating that it meets the good cause standards in 10 C.F.R. § 2.309(c)(1). *See* 10 C.F.R. § 2.325. 10 C.F.R. § 2.309(c)(1) requires that the "*participant has demonstrated good cause*" by showing that the standards are met (emphasis added). The failure to comply with these pleading requirements constitutes sufficient grounds for rejecting the petition. *Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 N.R.C. 30, 34 (2006); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-14-11, 80 N.R.C. 167, 175-76 (2014) ("we do not consider hearing requests after the deadline in Section 2.309(b) has passed absent a determination that the petitioner has demonstrated good cause").

Because Miami made no attempt whatsoever to demonstrate that its Contention was based on new and materially different information, it failed to meet its burden of complying with the standards in 10 C.F.R. § 2.309(c)(1). Further, having made no such showing before the Board, it cannot now complain on appeal that the Board erred. *Phil. Electric Co*. (Limerick Generating Station, Units 1 & 2), ALAB-778, 20 NRC 42, 47-48 (1984) ("A party cannot be heard to complain later about a decision that fails to address an issue no one sought to raise").

Moreover, Miami does not identify any error in the Boards' ruling but instead improperly attempts to raise new grounds for a reformulated contention. Miami asserts for the first time on appeal that "the analyses of groundwater elevations near the Turkey Point site for the period

2005-2013 show that these elevations are statistically different from the baseline period of 1996-2004 used in the USGS model" and "[t]hese analyses were not previously available." Brief at 5. Contention 2 as presented to the Board did not challenge or even mention the USGS model, refer to any of the data used in the USGS model, or compare it with any groundwater elevation data from 2005-2013. For the same reason, Miami misses the mark in arguing that its Contention could not have been filed at the outset of this proceeding because the USGS model report was published in 2014. *Id*. at 5-16. As reflected in the Board's Memorandum and Order, Contention 2 addressed FPL's previously available modeling and failed to recognize the existence of the additional USGS analysis in the DEIS. Miami's attempt on appeal to recast its contention and justify its timeliness on grounds never presented to the Board is improper and provides no basis to disturb the Board's ruling.

II. MIAMI IDENTIFIES NO ERROR OR ABUSE OF DISCRETION IN THE BOARD'S RULING ON THE INADMISSIBILITY OF CONTENTION 2, BUT INSTEAD IMPROPERLY SEEKS TO REFORMULATE ITS CONTENTION

On appeal, the City of Miami identifies no error of law or abuse of discretion on the part of the Board in ruling that Contention 2 failed to meet admissibility standards. Indeed, the closest Miami comes to challenging any specific ruling is Miami's lone statement at the beginning of its brief that "expert opinion is not required as part of the admissibility standard." Brief at 2. The Board's finding, however, was that Miami had not supported its assertions "with ***any documentary or*** expert opinion support" and that merely averring that each assertion "is believed" is not sufficient to satisfy the 10 C.F.R. § 2.309(f)(1)(v) requirement "for ***specific references*** in support of a petitioner's contention."[29] LPB-15-19 at 11 (emphasis added). The

[29] As the Commission has explained, this rule requires "'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

Board's ruling is entirely consistent with 10 C.F.R. § 2.309(f)(1)(v), which requires each contention to be supported by a concise statement of the alleged facts or expert opinions which support the petitioner's position, "***together with references to the specific sources and documents***" on which the petitioner intends to rely to support its position on the issue (emphasis added).[30] Miami does not identify any ruling by the Board rejecting a contention solely for lack of expert opinion support.

Miami fails to discuss and identify any error in the Board's other rulings that Contention 2 was inadmissible. As previously discussed, the Board held that Contention 2 failed to raise a material issue pursuant to 10 C.F.R. § 2.309(f)(1)(iv) because nothing in NEPA requires the NRC Staff's analysis to "preclude" any particular environmental impact (as the Contention asserted). LBP-15-19 at 10-11. Miami attempts to dismiss the wording of its own contention as "[a] poor word choice" (Brief at 5 n.1) but identifies no error in the Board's interpretation of NEPA. The Board also ruled that because Miami failed to acknowledge or challenge the additional USGS modeling and analysis in the DEIS, or provide any more specific identification of allegedly deficient portions of the DEIS, Contention 2 failed to demonstrate a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi). *Id.* at 11-12. Miami does not discuss this ruling or identify any error or abuse of discretion in it.

Instead of identifying any error in the Board's ruling on the admissibility of Contention 2, Miami attempts, on appeal, to cure the deficiencies in its original Contention 2 by essentially replacing its basis in its entirety. Now, on appeal, the City of Miami impermissibly amends its

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validity of the contention.' 'Mere 'notice pleading' does not suffice.'" *Oyster Creek*, CLI-06-24 at 118-119 (emphasis added).

[30] Further, 10 C.F.R. § 2.309(f)(1)(vi) requires that a contention be supported by sufficient information to show a genuine dispute on a material issue.

proposed Contention 2 to do what it failed to do in its original Contention 2 – allege deficiencies in the independent USGS groundwater model. Rather than discussing its original Contention 2 or attempting to provide any explanation how that Contention was admissible, Miami's Brief attempts to address each of the contention admissibility standards in 10 C.F.R. § 2.309(f)(1) with entirely new statements challenging the sufficiency of the USGS model.[31] Not one of the issues identified in amended Contention 2 were raised in its original Contention 2. The USGS model is not mentioned even once in its initial petition – never mind specific critiques of the model. The City of Miami "cannot raise new contentions for the first time on appeal to the Commission." *Oyster Creek*, CLI-06-24, 64 N.R.C. at 124. Nor can it amend its originally proposed contention with new arguments never raised before the Board. *Millstone*, CLI-08-17, 68 N.R.C. at 234. "In recasting its contention on appeal and arguing only on the basis of that rewritten version, [the City of Miami] does not controvert the Board's decision rejecting the originally proposed version of this contention." *Oyster Creek*, CLI-06-24, 64 N.R.C. at 122. Accordingly, the Board's decision should be affirmed because the City of Miami has pointed to no error of law or abuse of discretion. *Id.* at 121.

III. MIAMI IDENTIFIES NO ERROR OR ABUSE OF DISCRETION IN THE BOARD'S RULING ON THE UNTIMELINESS OF CONTENTION 3, BUT INSTEAD IMPROPERLY SEEKS TO RAISE NEW ARGUMENTS UNRELATED TO THE CONTENTION

The City of Miami's appeal of Contention 3 suffers the same shortcomings as its appeal of original Contention 2. This is necessarily so because it relies on the same totally rewritten

[31] *See, e.g.,* Brief at 6-7 ("Statement of the Issue of the Fact" alleging that "The USGS model has inadequate spatial resolution and is inadequately formulated to predict salinity redistribution at the Turkey Point site that will result from the operation of the radial collector wells"; "Brief Explanation of the Basis for the Contention" alleging that '[t]he individual cell sizes in the USGS model are too coarse to adequately resolve the groundwater response to the operation of the radial collector wells on the Turkey Point Site"; and "Facts alleged to support the Contention" alleging that [t]he USGS model does not adequately represent the presence of the cooling canals, which are major hydrologic features at the Turkey Point site").

contention presented for its appeal of Contention 2. Again, the City of Miami has submitted new information in support of its appeal of the dismissal of Contention 3 instead of pointing to errors of law or abuse of discretion in relation to the Board's decision on original Contention 3.

The Board correctly concluded that Contention 3 was untimely because it failed to show that it met the timeliness standards in 10 C.F.R. § 2.309(c)(1). Specifically, the Board found Contention 3 "focus[ed] solely on FPL's base case groundwater model, which has been available for years as part of FPL's initial application." LBP-15-19 at 13. The Board pointed out that "[h]ad Contention 3 focused on some alleged deficiency in the NRC's commissioned USGS modeling, Miami might have been able to show the requisite good cause for filing a late contention." *Id.* Miami has not identified any error or abuse of discretion in these findings.

Because Miami made no attempt whatsoever to demonstrate that its Contention was based on new and materially different information, it failed to meet its burden of complying with the standards in 10 C.F.R. § 2.309(c)(1). Further, having made no such showing before the Board, it cannot now complain on appeal that the Board erred. *Limerick*, ALAB-778, 20 NRC at 47-48 (1984)("A party cannot be heard to complain later about a decision that fails to address an issue no one sought to raise").

Rather than identifying a fault in the Board's decision, the City of Miami now attempts to base the timeliness of Contention 3 on the same alleged deficiencies in the NRC's USGS modeling raised for the first time in its appeal of Contention 2 (Brief at 12) – allegations that were never raised in its original Contention 2 or Contention 3. As the Board pointed out (and the City of Miami does not dispute), the original Contention 3 was not based on the USGS modeling (LBP-15-19 at 13). Therefore, the timing of when any alleged deficiencies with USGS model were revealed is irrelevant to the timeliness of the City of Miami's original Contention 3. Again,

the City of Miami improperly raises new grounds for a reformulated contention. As a result, the City of Miami has failed to identify any error of law or abuse of discretion as related to the Board's conclusion that original Contention 3 "must be rejected as inexcusably late." *Id.*

IV. MIAMI IDENTIFIES NO ERROR OR ABUSE OF DISCRETION IN THE BOARD'S RULING ON THE INADMISSIBILITY OF CONTENTION 3, BUT INSTEAD IMPROPERLY SEEKS TO REFORMULATE ITS CONTENTION

As with its appeal of Contention 2, the City of Miami does not point to any error or abuse of discretion in the Board's findings that Contention 3 failed to meet the admissibility standards and instead offers new arguments to address the Board's conclusions. Miami's brief simply lists the Commission's admissibility criteria, and in the text that follows, references back to its reformulated Contention 2.[32] It then follows on with unsupported conclusory statements about the inability of the USGS model to perform the analysis that the City of Miami "believes" is necessary. As the Board found, Miami's original Contention 3 focused solely on FPL's groundwater model. LBP-15-19 at 12. Miami's attempts to raise new issues related to the USGS model on appeal are improper and provide no basis to challenge the Board's admissibility rulings.

As previously discussed, the Board found that Contention 3's failure to explain why the DEIS must identify the percentage of RCW water drawn from underneath the IWF renders the contention inadmissible under 10 C.F.R. 2.309(f)(1)(iv). LBP-15-19 at 13. Miami does not address this finding at all. Instead, it states that Contention 3 "raises an issue material to the findings because the USGS model does not provide an accurate representation of the hydrologic response to the operation of the radial collector wells." Brief at 13. This statement does not

[32] *E.g.*, "The NRC's commissioned USGS modeling is deficient as mentioned in the Contention 2 analysis." Brief at 12. "The basis for the support for Contention 3 is derived mostly from the previously described limitations of the USGS model relating to Contention 2." *Id.*

demonstrate an error or abuse of discretion on the part of the Board because Contention 3 never challenged the USGS model and this statement does not address the Board's finding that Contention 3 failed to explain the materiality of the percentage of RCW water drawn from underneath the IWF. Later in its Brief, under "Facts Alleged to Support Contention", the City states "[t]he USGS model is not capable of determining what percentage of the water pumped from the radial collector wells is derived from the cooling canals. This percentage is relevant since the cooling canals are the primary source of hypersaline water to the aquifer and therefore have the potential to significantly affect the distribution of salinity in the groundwater that will result from the operation of the radial collector wells." *Id*. But its original Contention 3 challenged *FPL's base case* model because "it does not address what percentage of water would come from *under* the IWF." Petition at 10 -11 (emphasis added). The City of Miami's attempt on appeal to recast its contention to challenge the USGS model, rather than FPL's model, and to focus on the percentage of water pumped from the cooling canals, rather than from underneath the IWF, is impermissible. The City cannot "recast[] or modify[] their contentions on appeal with new arguments never raised before the Board." *Millstone*, CLI-08-17, 68 N.R.C at 234 (footnotes omitted).

Likewise, Miami cannot use new challenges to the DEIS to cure the Board's finding that Contention 3 failed to present a genuine dispute with the DEIS (LBP-15-19 at 14). As the Board found, the DEIS contains extensive discussion of the USGS model, "none of which is addressed by Miami," thus rendering Contention 3 inadmissible pursuant to 10 C.F.R. § 2.309(f)(vi)). *Id.* The City of Miami does not dispute this finding or identify anywhere in its original contention where the USGS modeling was addressed. Instead, the City of Miami now, for the first time on

appeal, criticizes the USGS model. Again, the City of Miami cannot support an appeal by raising issues never raised before the Board. *Millstone*, CLI-08-17, 68 N.R.C at 234.

Miami does not challenge the Board's conclusion that it failed to provide documentary or expert opinion to support its contention as required by 10 C.F.R.§ 2.309(f)(v). Even a cursory review of original Contention 3 shows that the Board's conclusion is correct. There is not one reference cited in Contention 3 to support the City's assertions. There are no scientific analyses, no cites to reports, no cites to technical papers -- not one scintilla of support. And on appeal, the City of Miami makes no attempt to show that its original Contention 3 had adequate support to demonstrate that a genuine dispute exists.

Because the City of Miami's appeal fails to identify an error of law or abuse of discretion related to the Board's ruling on Contention 3, its appeal should be denied.

V. CONCLUSION

The Board correctly concluded that the City of Miami's original Contention 2 and Contention 3 were inexcusably untimely and failed to meet the Commission's admissibility requirements. The City of Miami's appeal has failed to identify any error of law or abuse of discretion related to the Board's decision and instead impermissibly amends its contentions in an attempt to cure the deficiencies. Accordingly, the City of Miami's appeal should be denied.

Respectfully submitted,

/Signed electronically by David R. Lewis/

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July 27, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Florida Power & Light Company's Answer Opposing City of Miami's Appeal of LBP-15-19 have been served through the E-Filing system on the participants in the above-captioned proceeding, this 27th day of July, 2015.

/Signed electronically by Kimberly A. Harshaw/

Kimberly A. Harshaw