UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN OPPOSITION TO THE CITY OF MIAMI'S APPEAL FROM LBP-15-19

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July 27, 2015

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the Nuclear Regulatory Commission ("Staff") hereby files this brief in opposition to the City of Miami's appeal[1] from the decision of the Atomic Safety and Licensing Board ("Board")[2] denying the City of Miami's petition to intervene as a party in this proceeding (but granting its request to participate as an interested local governmental body).[3] As explained below, the Board properly found that the City of Miami did not proffer an admissible contention, and the appeal does not identify any error of law or abuse of the Board's discretion. Accordingly, the Commission should sustain the Board's Order and deny the appeal.

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

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

[3] *See* "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" (April 13, 2015) (ML15103A600) ("Petition").

BACKGROUND

On June 30, 2009, the Florida Power and Light Company ("Applicant" or "FPL"), pursuant to the Atomic Energy Act of 1954, as amended ("AEA") and the Commission's regulations, submitted an application for combined licenses ("COL") for two nuclear power reactors to be located adjacent to the existing Turkey Point Units 1 through 5, at the Turkey Point site near Homestead, Florida ("Application"). *See* Letter from M. K. Nazar, FPL, to M. Johnson, Office of New Reactors, NRC, dated June 30, 2009 (ADAMS Accession No. ML091830589). The Application designated the proposed units as Turkey Point, Units 6 & 7. Application Rev. 0, Part 1 at 1 (ML091870846). The Application includes an Environmental Report, which provides the Applicant's assessment of the environmental impacts of the proposed action, as required by the 10 C.F.R. §§ 52.80(b) and 51.50(c). *See* Application, Rev. 6, Part 3 ("ER") (ML14311A285)).[4]

On June 18, 2010, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding. *See* "Florida Power & Light Company, Combined License Application for the Turkey Point Units 6 & 7, Notice of Hearing, Opportunity for Leave to Petition to Intervene and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation," 75 Fed. Reg. 34,777 (June 18, 2010) ("Notice of Hearing").

In response to the Notice of Hearing, on August 17, 2010, Citizens Allied for Safe Energy, Inc. ("CASE") and Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and the National Parks Conservation Association ("Joint Intervenors") submitted separate

[4] The ADAMS Accession number for the ER depends on the revision number being cited. The most recent revision to the ER is Revision 6 (ML14311A285).

Petitions through which they sought to intervene in this proceeding. *See* Citizens Allied for Safe Energy, Inc. Petition to Intervene and Request for a Hearing (Aug. 17, 2010) (ML102300287); Joint Intervenors' Petition for Intervention (Aug. 17, 2010) (ML102300582). In addition, the Village of Pinecrest petitioned to intervene or, in the alternative, participate in the proceeding as an interested governmental entity. *See* Petition by the Village of Pinecrest, Florida, for Leave to Intervene in a Hearing on [FPL's] [COL] Application For Turkey Point Units 6 & 7, or in the Alternative, Participate as a Non-Party Local Government (Aug. 16, 2010) (ML102280601).

In a decision dated February 28, 2011, the Board admitted Joint Intervenors' Contention NEPA 2.1 and CASE Contentions 6 and 7, and admitted CASE and the Joint Intervenors as parties to this proceeding. *See Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-11-06, 73 NRC 149, 190-94, 226, 241-43, 244-46, 248 (2011). The Board also granted the Village of Pinecrest's request to participate in the proceeding under 10 C.F.R. § 2.315(c). *Id*. at 165, 251.[5]

On March 5, 2015, the NRC published a notice of availability of a draft Environmental Impact Statement ("DEIS") on the Application. 80 Fed. Reg. 12,043 (March 5, 2015). In response to the March 5 notice of availability of the DEIS, on April 13, 2015, the City of Miami submitted its Petition, which proposed three environmental contentions. On May 8, 2015, the Applicant and the NRC Staff filed their respective answers to the Petition.

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[5] The Board has since dismissed CASE's contentions and dismissed CASE from this proceeding. *Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-12-04, 75 NRC 213, 217; LBP-12-07, 75 NRC 503, 520 (2012). The Board has also admitted Joint Intervenors' amended Contention NEPA 2.1, as narrowed and reformulated. *See Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-12-09, 75 NRC 615, 632; *Florida Power & Light Co.* (Turkey Point Units 6 and 7), Memorandum and Order (Granting in Part and Denying in Part Motion for Summary Disposition of Amended Contention 2.1) (Aug. 30, 2012) (unpublished) (ML12243A323). The final EIS will include any additional information relating to Contention NEPA 2.1 developed in response to comments on the DEIS, and the Staff estimates that it will issue the final EIS in February of 2016. *See* Letter dated April 17, 2014, to M.K. Nazar, FPL, from F.M. Akstulewicz, NRC (ML14065A577). Accordingly, the Board has not yet scheduled a hearing on Joint Intervenors' admitted Contention NEPA 2.1, as amended.

See [FPL's] Answer Opposing [Petition] (May 8, 2015). *See also* NRC Staff Answer to [Petition] (May 8, 2015). On June 10, 2015, the Board issued an Order denying the Petition on the grounds that the City of Miami failed to proffer an admissible contention, but granting the City of Miami's request to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c). LBP-15-19, 81 NRC __, __ (slip op.).

On July 2, the City of Miami appealed the Board's Order. Appeal at 1. In its appeal, the City of Miami has only challenged the denial of proposed Contentions 2 and 3. As noted by the City of Miami, the Board denied proposed Contention 1 as untimely under all three elements of 10 C.F.R. 2.309(c)(1). Appeal at 3. *See also* LBP-15-19, 81 NRC at __ (slip op. at 7). As the Board noted in the Order, the City of Miami's proposed Contention 1 was nearly identical to an admitted contention that has been part of this proceeding for more than three years. LBP-15-19, 81 NRC at __ (slip op. at 8).

The Staff files this brief in opposition to the City of Miami's Appeal.

THE LICENSING BOARD DECISION IN LBP-15-19

In its Contention 2, the City of Miami asserted that:

> The draft EIS is deficient because its evaluation of the operation of the radial collector wells does not preclude the possibility that the radial collector wells will change the plume dynamics of the Industrial Wastewater Facility/Cooling Canal contaminant plume.

Petition at 8. *See also* Appeal at 5. In the Order rejecting the Petition, the Board denied the admission of proposed Contention 2 as untimely under 10 C.F.R. § 2.309(c)(1) because, the Board held, the City of Miami did not show that the contention was based upon new information that was materially different from that which was previously available. LBP-15-19, 81 NRC at __ (slip op. at 9-12).

The Board specifically explained why the information relied on by the City of Miami was not new, citing the previously availability of the information related to aquifer testing (available since at least 2011); the power uprate of Turkey Point Units 3 and 4 (which occurred in 2012);

monitoring data (collected between June 2010 and May 2011); radial collector wells (June 2010); and the Applicant's requested diversion of water from the L-31 canal (which occurred on February 18, 2015). *Id*. at 9.

Finally, in disposing of proposed Contention 2, the Board noted that even if the City of Miami had shown good cause for its belated filing (which was not the case), the contention would still have been inadmissible because the City of Miami did not: (1) raise an issue material to the findings the NRC Staff must make, as required by 10 C.F.R. § 2.309(f)(1)(iv); (2) provide adequate support for the contention, as required by 10 C.F.R. § 2.309(f)(1)(v); or (3) demonstrate a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi). *Id*. at 12. In particular, the Board emphasized that although the contention appeared to assert deficiencies in FPL's groundwater model, the contention failed to acknowledge that precisely because the NRC staff found FPL's groundwater model to be inadequate, the NRC staff had commissioned additional groundwater modeling by the United States Geological Survey ("USGS"). *Id.* at 11-12. The description of the USGS model and its role in the NRC staff's analysis appeared in the same portion of the DEIS to which Contention 2 was directed, yet the City of Miami had alleged no deficiency in that analysis. *Id.* Accordingly, the Board rejected this contention.

In its Contention 3, the City of Miami asserted that:

> Concerning the radial collector wells, Appendix G, page G-28, of the draft EIS states that "[t]he base case model predicted that 1.9 percent of the water extracted by the [radial collector wells] would come from the industrial wastewater facility. A 'worst' case of 3.3 percent of the extracted water coming from the industrial wastewater facility was predicted by cutting the vertical conductivity of all layers in half." This portion of the draft EIS is deficient because it does not address what percentage of water would come from under the [industrial wastewater facility (IWF)]. Due to differences in vertical and horizontal transmissivity, it can be assumed that a greater quantity of water would come from deeper ground waters under the IWF, including the hypersaline plume, than from the surface waters in the IWF.

Petition at 10. *See also* Appeal at 11-12. The Board, in its Order, denied the admission of proposed Contention 3 as untimely under 10 C.F.R. § 2.309(c)(1)(i)-(iii), holding that the City of Miami failed to show that the contention was based on materially different information from that which was previously available. LBP-15-19, 81 NRC at __ (slip op. at 13-14). In particular, reiterating the rationale of a portion of its ruling on Contention 2, the Board held that the contention focused solely on asserted deficiencies in FPL's base case groundwater model, a model which has been available for years as a part of FPL's initial application.

The Board noted that had proposed Contention 3 focused on some alleged deficiency in the NRC's commissioned USGS modeling, the City of Miami might have been able to show the requisite good cause for filing a late contention. *Id*. The Board concluded that the proposed contention was grounded on information that had long been available and, therefore, must be rejected as inexcusably late. *Id*. Moreover, in the Order. the Board noted that even if proposed Contention 3 were timely, the Board would deny its admission because the City of Miami did not: (1) raise an issue material to the findings the Staff must make, as required by 10 C.F.R. § 2.309(f)(1)(iv); (2) provide adequate support for the contention, as required by 10 C.F.R. § 2.309(f)(1)(v); or (3) demonstrate a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi). *Id*. at 14. In particular, the Board emphasized, as it had done with respect to Contention 2, that the NRC staff had found FPL's groundwater model to be inadequate and had commissioned additional modeling by the USGS, and that the City of Miami had failed to address the DEIS's "extensive discussion of the USGS model[.]" *Id.* at 14. Thus, the Board rejected Contention 3.

LEGAL STANDARDS

A. Legal Standard for Interlocutory Appeal of a Board Order

A licensing board order wholly denying a petition to intervene or request for hearing is appealable under 10 C.F.R. § 2.311(c), which provides:

> An order denying a petition to intervene, and/or request for hearing, or request for access to information … is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.

10 C.F.R. § 2.311(c). A petitioner is limited to the contentions as initially filed and may not rectify its deficiencies through an appeal. *See USEC, Inc*. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006); *Cf. Louisiana Energy Services*, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004) (regarding new matter raised in a reply brief).

The Commission has explained that "absent extreme circumstances, [it] will not consider on appeal 'either new arguments or new evidence supporting the contentions, which the Board never had the opportunity to consider.'" *USEC*, CLI-06-10, 63 NRC at 458 (quoting *Private Fuel Storage*, CLI-04-22, 60 NRC 125, 140 (2004)). Such new claims on appeal are prohibited because "[a]llowing petitioners to file vague, unsupported contentions, and later on appeal change or add contentions at will would defeat the purpose of [the NRC's] contention-pleading rules." *Id.* (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004)).

Absent an error of law or abuse of discretion, the Commission generally defers to the board's rulings on contention admissibility. *See Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-12-19, 76 NRC 377, 379-80 (2012).

B. Legal Standards for the Admission of Contentions

To be admissible, a newly proffered contention must satisfy: (1) the timeliness standards in 10 C.F.R. § 2.309(c)(1) for new and amended contentions; and (2) the general contention admissibility standards in 10 C.F.R. § 2.309(f)(1). *See Florida Power and Light Co.* (Turkey Point, Units 6 & 7), LBP-11-15, 73 NRC 629, 633 (2011).[6] New or amended

[6] The Commission has consolidated its requirements for filing contentions after the deadline set in the Notice of Hearing in 10 C.F.R. § 2.309(c)(1). *See* Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,591 (Aug. 3, 2012).

contentions filed after the initial filing period may be admitted only with leave of the presiding officer upon a showing that:

> (i) The information upon which the amended or new contention 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) (modifying requirements of former 10 C.F.R. § 2.309(f)(2)).

In addition to satisfying the requirements in 10 C.F.R. § 2.309(c)(1) for a new or amended contention filed after the deadline, the petitioner must set forth with particularity the reasons why the proposed contention satisfies the 10 C.F.R. § 2.309(f)(1) general contention admissibility requirements, which are that the contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) 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;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/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 requestor/petitioner intends to rely to support its position on the issue; and
>
> (vi) . . . provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.. . . .

10 C.F.R. § 2.309(f)(1).

The 10 C.F.R. § 2.309(f)(1) requirements should "focus litigation on concrete issues and result in a clearer and more focused record for decision." Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (final rule). The Commission has stated

that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." *Id*. The Commission has emphasized that the rules on contention admissibility are "strict by design.' *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Attempting to meet these requirements by "[m]ere 'notice pleading' does not suffice." *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

DISCUSSION

A. The Board was Correct in Finding Proposed Contention 2 Inadmissible

For the reasons set forth below, the Board Order correctly held that the City of Miami's proposed contention 2 was both untimely and otherwise inadmissible because it failed to satisfy the requirements of 10 C.F.R. § 2.309(c) and (f)(1). LBP-15-19, 81 NRC at __ (slip op. at 9-12). The City of Miami in its Appeal has not shown that the Board erred or abused its discretion. Moreover, with the Board having correctly found that the challenges to the FPL groundwater model were not admissible, the City of Miami now attempts on appeal to challenge the USGS groundwater model used by the NRC staff. Because these claims are raised for the first time on appeal, when they could have been raised in the Petition before the Board, the Commission should not consider them. *USEC*, CLI-06-10, 63 NRC at 458 ("The purpose of an appeal to the Commission is to point out errors made in the Board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board."). Accordingly, the Commission should sustain the Board's Order.

In its Petition, the City of Miami asserted deficiencies in the FPL model, yet the City of Miami's appeal consists entirely of challenges to the USGS model used by the Staff. *See*

Petition at 8-10. *See also* Appeal at 6-11. These challenges include, for example, critiques of the groundwater elevations used in the USGS model, the USGS model's spatial resolution, and its representation of the hydrologic features and baseline conditions at the Turkey Point site. *See, e.g.*, Appeal at 5-10. The City of Miami did not raise any of these claims in its Petition. Indeed, in LBP-15-19, the Board noted the City of Miami's failure to challenge the Staff USGS model in its Petition:

> [The City of Miami's claims in Contention 2] fail[] to acknowledge that because the NRC Staff found FPL's groundwater model to be inadequate, "[t]he NRC commissioned the U.S. Geological Survey (USGS), to conduct additional modeling to help identify the potential effects of [radial collector well] pumping. Having failed to recognize the existence of this additional analysis in the DEIS, and in the absence of any more specific identification by Miami of allegedly deficient portions of the DEIS, we conclude that Contention 2 fails to demonstrate a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(vi).

LBP-15-19, 81 NRC at __ (slip op. at 11–12). The City of Miami is limited to the contentions as initially filed and may not rectify its deficiencies through an appeal. *USEC*, CLI-06-10, 63 NRC at 458. Therefore, the City of Miami cannot attempt to cure the defects correctly identified by the Board by challenging the USGS model now in its appeal.

Because the City of Miami appeal consists solely of new claims not presented to the Board (and indeed does not even discuss the standard of review applicable to LBP-15-19), it fails to establish that the Board erred or abused its discretion in denying the admission of Contention 2. Accordingly, the Commission should sustain the Board's denial of Contention 2.

B. The Board was Correct in Finding Contention 3 Inadmissible

For reasons similar to those explained above in regard to Contention 2, the Board also found Contention 3 untimely because it focused solely on FPL's base case groundwater model, which had "long…been available" as a part of FPL's initial application.

LBP-15-19, 81 NRC at __ (slip op. at 13). The Board also emphasized, as it had done with respect to Contention 2, that even if the contention had been timely, it would not have been admissible. Specifically, the Board observed that the NRC staff had found FPL's groundwater model to be inadequate and had commissioned additional modeling by the USGS, but the City of Miami had failed to address the DEIS's "extensive discussion of the USGS model[.]" *Id.* at 14.

As with Contention 2, the City of Miami's appeal of Contention 3 identified no error or abuse of discretion in the Board's reasoning – rather, this portion of the appeal likewise consists entirely of new challenges to the Staff-commissioned USGS model, which the City of Miami did not present to the Board. The Contention 3 portion of the appeal reiterates (or simply refers to) the new claims about the USGS model in the Contention 2 portion of the appeal, such as whether the USGS model can accurately determine "what percentage of the water pumped from the radial collector wells will be derived from the cooling canals." Appeal at 12-13.

But like the claims in the Contention 2 portion of the appeal, these challenges to the USGS model were not presented to the Board. As arguments that could have been raised before the Board but were not, they are not appropriate grounds for an appeal. *USEC*, CLI-06-10, 63 NRC at 458. Accordingly, the City of Miami fails to establish that the Board erred or abused its discretion, and the Commission should sustain the Board's denial of proposed Contention 3.

CONCLUSION

As stated above, the Board properly found that the City of Miami did not proffer an admissible contention, and the City of Miami has failed to show an error of law or abuse of the Board's discretion. Accordingly, the Commission should sustain the Board's Order and deny the City of Miami's Appeal of LBP-15-19.

Respectfully submitted,

/Signed (electronically) by/
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Dated at Rockville, Maryland
this 27th day of July, 2015

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CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF'S BRIEF IN OPPOSITION TO THE CITY OF MIAMI'S APPEAL FROM LBP-15-19" has been filed through the E-Filing system and has been served upon the following person by electronic mail (e-mail) this 27th day of July, 2015.

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Dated at Rockville, Maryland
this 27th day of July, 2015