LBP-16-06

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Michael F. Kennedy
Dr. William W. Sager

In the Matter of	Docket Nos. 50-250-LA and 50-251-LA
FLORIDA POWER & LIGHT COMPANY	ASLBP No. 15-935-02-LA-BD01
(Turkey Point Nuclear Generating, Units 3 and 4)	May 16, 2016

MEMORANDUM AND ORDER
(Denying Motion to Reopen and Dismissing Intervention Petition)

Before the Licensing Board are motions by the City of Miami (Miami) to reopen the record and for leave to file three new contentions.[1] In the alternative, Miami asks to participate in the proceeding as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c).[2] Because Miami has failed to satisfy the stringent requirements established by the Commission for reopening a closed record, we deny Miami's motion to reopen and as such need not reach its motion to admit new contentions. Additionally, with the record remaining closed regarding the sole admitted contention in this proceeding, we deny Miami's request to participate as an interested governmental entity.

[1] Petition by the City of Miami, Florida, for Leave to Intervene in a Hearing on Florida Power & Light Company's License Amendment Application for Turkey Point Units 3 & 4 Based on New Information, or, in the Alternative, to Participate as a Non-party Interested Local Government in Any Reopened Proceedings & Motion to Reopen the Record (Apr. 6, 2016) [hereinafter Motions].

[2] Id. at 18. Section 2.315(c) provides that the presiding officer will afford an interested local governmental body that has not otherwise been admitted as a party to the proceeding a reasonable opportunity to participate in a hearing. 10 C.F.R. § 2.315(c).

I. BACKGROUND

This proceeding concerns license amendments the Nuclear Regulatory Commission (NRC) issued to Florida Power & Light Company (FPL). The amendments increase the ultimate heat sink water temperature limit for the cooling canal system at Turkey Point Nuclear Generating Units 3 and 4. The background is set forth in detail in earlier Licensing Board orders.[3]

After a two-day evidentiary hearing in mid-January 2016 on the sole admitted contention proffered by intervenor Citizens Allied for Safe Energy (CASE),[4] the Board closed the record on February 17, 2016.[5] On March 11, 2016, the Board issued an order clarifying that a March 7, 2016 report by Miami-Dade County concerning an alleged increase in tritium in Biscayne Bay was not within the scope of the existing contention, and that the issue could come before us only as a new contention.[6] On April 6, 2016, Miami moved to reopen the record and for leave to file three new contentions.[7] In the alternative, Miami petitioned to participate as an interested government entity.[8] FPL and the NRC Staff oppose Miami's motions.[9]

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[3] See, e.g., LBP-15-13, 81 NRC 456, 459–61, aff'd, CLI-15-25, 82 NRC 389, 407 (2015); see also Notice of Hearing, 80 Fed. Reg. 76,324, 76,324 (Dec. 8, 2015).

[4] See Tr. at 259–571.

[5] Licensing Board Order (Adopting Transcript Corrections and Closing Evidentiary Record) (Feb. 17, 2016) at 2 (unpublished).

[6] Licensing Board Order (Clarifying Scope of Proposed Findings of Fact and Conclusions of Law and Amending Initial Scheduling Order) (Mar. 11, 2016) at 1, 4 (unpublished) [hereinafter March 11, 2016 Order] (citing Memorandum from Carlos A. Gimenez, Mayor of Miami-Dade County, to Honorable Chairman Jean Monestime and Members, Board of County Commissioners (Mar. 7, 2016), http://www.miamidade.gov/mayor/library/memos-and-reports/2016/03/03.07.16-Report-on-Recent-Biscayne-Bay-Water-Quality-Observations.pdf).

[7] Motions at 1, 3–13, 16–18.

[8] Id. at 18.

[9] NRC Staff's Answer to [Miami's] Motion to Reopen the Record, Petition for Leave to Intervene, and Request to Participate as a Non-Party Interested Local Government (May 2, 2016); [FPL's] Answer to [Miami's] Motion to Reopen the Record, Petition for Leave to Intervene, and Request

II. DISCUSSION

A. Miami's Motion to Reopen and Proffered Contentions

Miami seeks to reopen the evidentiary record of this proceeding and the admission of three contentions. In Contention One, Miami contends that, contrary to FPL's claims, the requested license amendments will not allow for greater operational flexibility.[10] In Contention Two, Miami asserts that the Environmental Assessment performed by the NRC Staff does not adequately consider the impact of the license amendments on groundwater resources.[11] In Contention Three, Miami challenges FPL's claim that algae concentrations reduced the heat transfer capabilities of the cooling canal system.[12]

B. Legal Standards

In addition to other requirements,[13] motions to reopen a proceeding to introduce a contention not previously in controversy among the parties must satisfy 10 C.F.R. § 2.326. Pursuant to 10 C.F.R. § 2.326(a), a motion to reopen must (1) be timely; (2) address a significant safety or environmental issue; and (3) demonstrate that a materially different result would be, or would have been, likely had the newly proffered evidence been considered initially. The rule also allows a discretionary exception to its timeliness requirement if the motion

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to Participate as an Interested Local Government (May 2, 2016). Miami filed a reply to the FPL and NRC Staff Answers on May 9, 2016. [Miami's] Reply to the [NRC Staff] and [FPL's] Answers to the Petition by [Miami] for Leave to Intervene in a Hearing on [FPL's] License Amendment Application for Turkey Point Units 3 & 4 Based on New Information, or, in the Alternative, to Participate as a Non-party Interested Local Government in any Reopened Proceedings & Motion to Reopen the Record (May 9, 2016).

[10] Motions at 3–4.

[11] Id. at 7–8.

[12] Id. at 11.

[13] 10 C.F.R. § 2.309(c)(1) establishes requirements for any contention submitted after the deadline to request a hearing established by notice in the Federal Register. See also id. § 2.326(d). 10 C.F.R. § 2.309(f)(1) establishes the criteria that all contentions must meet to be admissible.

presents "an exceptionally grave issue."[14] Additionally, under 10 C.F.R. § 2.326(b), a motion to reopen must be accompanied by "affidavits that set forth the factual and/or technical bases for the movant's claim." Such affidavits must separately address each of the criteria in 10 C.F.R. § 2.326(a), along "with a specific explanation of why it has been met."[15]

Given the importance of finality in adjudicatory proceedings, the Commission's rules "place an intentionally heavy burden on parties seeking to reopen the record."[16] Otherwise, "'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings."[17] Accordingly, the Commission "consider[s] reopening the record for any reason to be an extraordinary action."[18]

C. Board Ruling

Looking to the first reopening requirement, we conclude that Miami's motion to reopen is untimely. In our March 11, 2016 order clarifying the present scope of this proceeding, the Board referenced a March 7, 2016 memorandum from Miami-Dade County that discussed an alleged increase in tritium in Biscayne Bay.[19] The Board specified that motions to reopen the record and to file new contentions based on this apparently new information should be filed on or before April 6, 2016—i.e. thirty days after the March 7, 2016 memorandum was published.[20]

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[14] Id. § 2.326(a)(1).

[15] Id. § 2.326(b).

[16] Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 2), CLI-15-19, 82 NRC 151, 155 (2015).

[17] Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 555 (1978)).

[18] Watts Bar, CLI-15-19, 82 NRC at 156 (internal quotation marks omitted).

[19] March 11, 2016 Order at 1, 4 (citing Memorandum from Carlos A. Gimenez, Mayor of Miami-Dade County, to Honorable Chairman Jean Monestime and Members, Board of County Commissioners (Mar. 7, 2016), http://www.miamidade.gov/mayor/library/memos-and-reports/2016/03/03.07.16-Report-on-Recent-Biscayne-Bay-Water-Quality-Observations.pdf).

[20] Id. at 4.

Miami filed its motions on April 6, 2016, but Miami's motions discuss neither the March 7, 2016 memorandum nor the issue of increased levels of tritium in Biscayne Bay. Instead, Miami bases its three contentions entirely on a February 17, 2016 study entitled, "The Cooling-Canal System at the FPL Turkey Point Power Station," by Dr. David A. Chin.[21]

In support of its motion to reopen, Miami repeatedly claims that the Board "invited petitions to raise possible contentions with respect to the Chin Study."[22] However, the Board never mentioned the Chin Study in any of its previous orders and certainly did not "invite" parties to file new contentions based on that study. Even if the Chin Study constituted significant new information, Miami should have filed its contentions by March 18, 2016, i.e., thirty days after the Chin Study was published.[23]

Moreover, the Chin Study also fails to fulfill the first reopening factor because it does not set forth information that is "materially different from what was previously available,"[24] as demonstrated by the fact that Miami's second proposed contention is essentially identical to the contention already admitted in this proceeding.[25] Specifically, both contentions point to the

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[21] In its motion to reopen, Miami states that the Chin Study was published on March 7, 2016. Motions at 14. However, Exhibit B to the Miami's motions, which contains the Chin Study, is dated February 17, 2016. Motions, Ex. B, Dr. David A. Chin, The Cooling-Canal System at FPL Turkey Point Power Station (Feb. 17, 2016) [hereinafter Chin Study].

[22] See Motions at 1, 4, 8, 12.

[23] See March 11, 2016 Order at 3 (amending the initial scheduling order to require that parties file new or amended contentions within thirty days from the date on which the new information became available).

[24] Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 498 (2012).

[25] Compare LBP-15-13, 81 NRC at 476 ("[T]he Board admits *Contention 1*, narrowed and reformulated to read as follows: The NRC's environmental assessment, in support of its finding of no significant impact related to the 2014 Turkey Point Units 3 and 4 license amendments, does not adequately address the impact of increased temperature and salinity in the [cooling canal system (CCS)] on saltwater intrusion arising from (1) migration out of the CCS; and (2) the withdrawal of fresh water from surrounding aquifers to mitigate conditions within the CCS."), with Motions at 7–8 ("The Chin Study demonstrates that operation of the cooling canals at increased temperatures following the May 2013 uprate has caused a significant increase in

migration of hypersaline water from the cooling canals into the surrounding groundwater as a basis for challenging the NRC Staff's conclusion in the Environmental Assessment that the license amendments will not have a significant environmental impact on groundwater resources.[26] The Chin Study does not present new information on saltwater migration that is materially different from the publicly available sources that have already been examined in the course of this proceeding.[27] As the Commission has made clear, "[t]here simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and

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evaporation and salinity concentrations within the canals, and that there is a resulting increase in the amounts of saline and radioactive effluent that have discharged from the canals into area ground and surface waters, including the Biscayne Aquifer . . . . Thus, the City challenges the NRC's conclusion that the license amendment would have no significant impact on groundwater resources.").

[26] See Motions at 7–11. In addition to its claims regarding saltwater migration, Miami also argues that an increase in the cooling canal system temperature "has been associated over time with . . . radioactive effluent leaching out of the canals and into area ground and surface waters." Id. at 8. However, Miami neither explains what it means by "radioactive effluent" nor provides any support for its assertion. In fact, in the 2014 Environmental Assessment, the NRC Staff addressed whether the license amendments would result in higher radioactive effluent releases. See Environmental Assessment and Final Finding of No Significant Impact, Issuance, 79 Fed. Reg. 44,464, 44,467 (July 31, 2014) ("The proposed action would result in no changes to radiation levels or the types or quantities of radioactive effluents (gaseous or liquid) that affect radiation exposures to members of the public or plant workers."); see also id. at 44,469 ("The NRC staff reviewed several years of radiation dose data contained in the licensee's annual radioactive effluent release reports for Turkey Point, and the data demonstrate that the dose to members of the public from radioactive effluents is within the limits of 10 CFR part 20 and 40 CFR part 190."). Nothing in Miami's motion to reopen calls into question this analysis. Moreover, even if we were to construe Miami's vague use of "radioactive effluent" to allege an increase in tritium, the Chin Study, upon which Miami's motion is based, only discusses tritium in the context of using it to trace the extent of saltwater migration from the cooling canals into the Biscayne Aquifer. See Chin Study at 2, 12. Consequently, Miami has failed to show how its vague and unsupported allegation that the license amendments will lead to an increased release of "radioactive effluent" presents information that is materially different from what was previously available.

[27] See, e.g., Ex. FPL-026, Letter from Melissa L. Meeker, Executive Director, South Florida Water Management District, to Barbara Linkiewicz, Senior Director, Environmental Licensing & Permitting, FPL & NextEra Energy Resources, Consultation Pursuant to the October 14, 2009 Fifth Supplemental Agreement between South Florida Water Management District and [FPL] at 1 (Apr. 16, 2013) (notifying FPL that hypersaline water from the cooling canals had migrated westward of the Turkey Point plant in violation of FPL's agreement with local regulatory authorities).

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."[28]

Miami's other two contentions challenge FPL's assertions regarding the necessity of the license amendments for operational flexibility and the impacts of algae in the cooling canals.[29] Essentially, Miami challenges the accuracy of statements made in FPL's license amendment application.[30] However, Miami failed to demonstrate that it could not have raised these issues regarding the content of FPL's application as a timely challenge when FPL first requested the license amendments in 2014.[31] Moreover, the time to raise a challenge to the accuracy of FPL's application is well past, considering that the NRC Staff has since granted the license amendments and published its Environmental Assessment.[32] Given the well-settled precept that petitioners have an "'iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention,"[33] these contentions cannot provide the basis for a timely reopening request. Moreover, as we noted above, because Miami has not shown how the Chin

[28] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271–72 (2009) (footnotes and internal quotation marks omitted).

[29] Motions at 3–4, 11.

[30] Id.

[31] See Ex. FPL-008, Letter from Michael Kiley, Vice President, Turkey Point Nuclear Plant, to NRC, License Amendment Request No. 231, Application to Revise Technical Specifications to Revise Ultimate Heat Sink Temperature Limit (July 10, 2014);

[32] See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-12-11, 75 NRC 731, 737 (2012) ("To the extent Petitioners criticize the accuracy of statements in Entergy's [Environmental Report], the time for challenging the [Environmental Report] passed when the NRC Staff released its draft supplemental [Environmental Impact Statement].").

[33] N. States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 496 (2010) (quoting Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993)).

Study provides materially different information, this recent publication does not excuse Miami from waiting until now to seek to reopen the record so as to bring its contentions into this proceeding.

Nor has Miami shown that the untimeliness of its motion to reopen should be excused on the theory that it has raised an "exceptionally grave issue."[34] With respect to Contention One, Miami argues that the license amendments were a "futile exercise" because FPL would need to operate at even higher temperatures to achieve operational flexibility.[35] When FPL applied for the license amendments, the ultimate heat sink temperature limit was 100 °Fahrenheit, a limit FPL had already approached and exceeded in the month prior to the issuance of the amendments.[36] Thus, the NRC Staff determined the proposed license amendments were needed to prevent FPL from having to place Units 3 and 4 in cold shutdown.[37] Nothing in Miami's motion to reopen calls into question the NRC Staff's analysis in the Environmental Assessment of the need for the license amendments. Nor do we find anything in Contention Two that meets this standard, particularly given that it simply mirrors an issue already before us.

Finally, with respect to Contention Three, Miami asserts that FPL's claim that reducing algae in the cooling canals will improve the canal's heat transfer capabilities is "unsupported."[38] However, Miami fails to tie this assertion to any deficiency in the NRC Staff's environmental review. The Commission has made clear that the exceptionally grave issue provision is a "narrow exception [and] will be granted rarely and only in truly extraordinary circumstances."[39]

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[34] The reopening rule permits the consideration of an "exceptionally grave issue even if it is untimely presented." 10 C.F.R. § 2.326(a)(1).

[35] Motions at 7.

[36] 79 Fed. Reg. at 44,466.

[37] Id.

[38] Motions at 11.

[39] Pilgrim, CLI-12-21, 76 NRC at 501 n.67 (internal quotation marks omitted).

The issues raised in Miami's proffered contentions clearly do not reach the level of extraordinary circumstances.

While the reopening motion's untimeliness alone is fatal,[40] Miami also fails to satisfy the affidavit requirements of 10 C.F.R. § 2.326(b). Under that subsection, a motion to reopen the record must be accompanied by affidavits that specifically address the criteria of 10 C.F.R. § 2.326(a) and explain why each has been met.[41] However, because the affidavit of Dr. Chin does not even mention the reopening standards in § 2.326(a),[42] it fails to satisfy the requirements of § 2.326(b).[43] This Board is not empowered to rehabilitate that failure. As the Commission has stated, "[w]e do not expect boards to search the pleadings for information that would satisfy our reopening requirements."[44] Accordingly, the failure of Dr. Chin's affidavit to address the reopening criteria is fatal to Miami's reopening request as well.[45]

Because Miami's motion to reopen this proceeding fails to satisfy 10 C.F.R. §§ 2.326(a)(1) and (b), we find it unnecessary to analyze any of the other regulatory requirements applicable to Miami's intervention request. Miami's motion to reopen the record is denied.

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[40] See id. at 498–99, 502.

[41] 10 C.F.R. § 2.326(b).

[42] Dr. Chin's statement merely provides that he is "responsible for the factual content and expert opinions expressed in Petitioner's contentions." Motions, Ex. A, Decl. of Dr. David A. Chin in Support of [Miami's] Contentions at 2 (Apr. 6, 2016).

[43] See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 145 n.86 (2012) (noting that an affidavit that merely states that the declarant has "read and reviewed the . . . contention and fully support[s] all [of] its statements" fails to meet the affidavit requirements in 10 C.F.R. § 2.326(b)).

[44] Id.

[45] See S. Nuclear Operating Co. (Vogtle Elec. Generating Plant, Units 3 & 4), CLI-11-8, 74 NRC 214, 222 (2011) ("The August 2010 Pleading could have been rejected solely on the basis of the Appellants' failure to comply fully with section 2.326(b).").

D. Petition to Participate as an Interested Government Entity

Miami requests permission to participate in this proceeding as an interested local government body pursuant to 10 C.F.R. § 2.315(c) if its contentions are deemed inadmissible, and "if the Board reopens the proceedings to consider any new contentions submitted by any other party."[46] Given that the record remains closed in this proceeding, the Board denies Miami's request. Because the Board has already held a hearing on the sole admitted contention in this proceeding, Miami's request to participate is untimely.[47]

Although Miami is thus not a participant in this proceeding, it may, in the Commission's discretion, file an amicus brief pursuant to 10 C.F.R. § 2.315(d) should there be an appeal from the Board's forthcoming initial decision on CASE Contention One.[48] In addition, Miami may raise concerns about current or ongoing safety deficiencies at the Turkey Point plant at any time through a 10 C.F.R. § 2.206 petition.[49]

III. ORDER

For the reasons stated, Miami's request to reopen the record is denied and the Board need not address the sufficiency of the motion to admit three new contentions. Miami's

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[46] Motions at 18.

[47] See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), CLI-86-20, 24 NRC 518, 519 (1986), aff'd sub nom., Ohio v. NRC, 814 F.2d 258 (6th Cir. 1987) (denying a state's petition to intervene as an interested governmental entity as untimely when the state's petition was filed after the close of the adjudicatory record and on the eve of the Commission's licensing decision); see also Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980) ("A tardy petitioner with no good excuse may be required to take the proceeding as it finds it."). We note also that, in addition to the absence of any request to participate as an interested governmental entity relative to CASE's admitted Contention One, the time for filing proposed findings of fact and conclusions of law had already passed when Miami submitted its request.

[48] See 10 C.F.R. § 2.315(d); see also Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-583, 11 NRC 447, 449 (1980).

[49] See Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 230 (2015) ("[S]ection 2.206 provides a process for stakeholders to advance concerns and obtain full or partial relief, or written reasons why the requested relief is not warranted.") (internal quotation marks omitted)).

alternative request to participate as an interested government entity is denied as well. The record of this adjudicatory proceeding remains closed. Miami may file an appeal from this Memorandum and Order within twenty-five (25) days of service of this decision by filing a notice of appeal and an accompanying supporting brief pursuant to 10 C.F.R. § 2.311(b). Any party opposing an appeal may file a brief in opposition to the appeal. All briefs must conform to the requirements of 10 C.F.R. § 2.341(c)(3).

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

/RA/

Dr. William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 16, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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	)	
	)	
(Turkey Point Nuclear Generating Units 3 & 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to Reopen and Dismissing Intervention Petition) – (LBP-16-06)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of May, 2016