

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Dr. Michael F. Kennedy
Dr. Sue H. Abreu

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating Units 3 and 4)

Docket Nos. 50-250-SLR and 50-251-SLR

ASLBP No. 18-957-01-SLR-BD01

August 20, 2019

ORDER

(Granting FPL's Motion to Strike)

I. BACKGROUND

On June 24, 2019, Natural Resources Defense Council, Friends of the Earth, and Miami Waterkeeper (collectively, Joint Intervenors) filed a petition for waiver of 10 C.F.R. §§ 51.53(c)(3), 51.71(d), and 10 C.F.R. Part 51, Subpart A, Appendix B¹ in connection with their motion for new and amended contentions² based on the NRC Staff's Draft Supplemental Environmental Impact Statement (DSEIS) in the above-captioned proceeding.³ On July 19, 2019, Florida Power and Light Company (FPL) and the NRC Staff filed answers opposing Joint

¹ See [Joint Intervenors'] Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B (June 24, 2019).

² See [Joint Intervenors'] Motion to Migrate Contentions & Admit New Contentions in Response to NRC Staff's Supplemental Draft Environmental Impact Statement (June 24, 2019) (amended on June 28, 2019).

³ See Office of Nuclear Reactor Regulation, NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supp. 5, Second Renewal, Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 & 4, Draft Report for Comment (Mar. 2019) (ADAMS Accession No. ML19078A330) [hereinafter DSEIS].

Intervenors' waiver petition.⁴ Joint Intervenors filed a combined reply to FPL and the NRC Staff on July 26, 2019.⁵

FPL has moved to strike Joint Intervenors' reply as contrary to 10 C.F.R. § 2.335.⁶ Joint Intervenors filed a response opposing FPL's motion to strike.⁷

II. ANALYSIS

There is no dispute that Joint Intervenors' petition for waiver is explicitly permitted under 10 C.F.R. § 2.335(b). Nor is there a dispute that FPL's and the NRC Staff's responses to Joint Intervenors' petition for waiver are explicitly permitted under 10 C.F.R. § 2.335(b). The dispute arises over Joint Intervenors' reply to the responses filed by FPL and the NRC Staff. FPL argues that section 2.335 does not permit a party who petitions for waiver to file a reply. See FPL's Motion to Strike at 2–3. Joint Intervenors assert that section 2.335 is silent as to replies and therefore should not be construed as prohibiting a reply. See Joint Intervenors' Answer at 2.

We conclude that FPL is correct in its interpretation of 10 C.F.R. § 2.335. Based on the phrasing and structure of section 2.335, that section is reasonably construed as precluding the petitioning party from filing a reply.

⁴ See [FPL's] Answer to Intervenors' Petition for Waiver of Certain 10 C.F.R. Part 51 Regulations (July 19, 2019); NRC Staff's Answer to Joint Intervenors' (1) Amended Motion to Migrate or Amend Contentions 1-E and 5-E and to Admit Four New Contentions, and (2) Petition for Waiver (July 19, 2019).

⁵ See Reply of [Joint Intervenors] in Support of Petition for Waiver of 10 C.F.R. §§ 51.53(c)(3) and 51.71(d) and 10 C.F.R. Part 51, Subpart A, Appendix B as Applied to Application for Renewal of Licenses for Turkey Point Units 3 and 4 (July 26, 2019).

⁶ See [FPL's] Motion to Strike Intervenors' Reply to FPL's and NRC Staff's Answers to Their Waiver Petition (Aug. 2, 2019) at 2 [hereinafter FPL's Motion to Strike]. FPL represents that the NRC Staff does not oppose the motion to strike. See id. at 3.

⁷ See [Joint Intervenors'] Opposition to [FPL's] Motion to Strike Intervenors' Reply to FPL's and NRC Staff's Answer to Intervenors' Waiver Petition (Aug. 9, 2019) (corrected version filed on August 14, 2019) [hereinafter Joint Intervenors' Answer].

In describing the process for seeking the waiver of a Commission rule or regulation, section 2.335(b) states that a litigant seeking such a waiver shall file a petition with an accompanying affidavit, and it authorizes other participants to “file a response by counter-affidavit or otherwise.” 10 C.F.R. § 2.335(b). Section 2.335(b) does not mention, much less authorize, the filing of a reply by the petitioning party. Moreover, sections 2.335(c) and 2.335(d) describe with particularity “the basis” on which the Licensing Board will issue a ruling on the waiver petition; namely, the Licensing Board will consider the “petition, affidavit [accompanying the petition], and any response permitted under [section 2.335(b)].” *Id.* § 2.335(c), (d). Given the specificity of section 2.335(b) regarding what the parties may file, combined with the specificity of section 2.335(c) and (d) regarding what the Licensing Board will consider when issuing a ruling, we conclude that this regulation, by clear structural implication, precludes a party who petitions for waiver from filing a reply.

Our regulatory interpretation is consistent with prior Licensing Board case law.⁸ Moreover, this procedural arrangement comports generally with the regulatory process governing NRC motion practice, which does not accord a moving party an automatic right to reply.⁹

⁸ See, e.g., Licensing Board Order (Denying Motion for Leave to File a Reply to Waiver Petition and Directing the Filing of a Brief), Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Nos. 50-275-LR/ 50-323-LR (May 4, 2010) at 1 (unpublished) (relying on the rationale advanced by the NRC Staff and the applicant, who argued that 10 C.F.R. § 2.335, by structural implication, does not permit a petitioner seeking a waiver to file a reply).

⁹ See 10 C.F.R. § 2.323(c) (establishing that a “moving party has no right to reply” unless permission is granted in “compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply”).

FPL's motion to strike Joint Intervenors' reply to FPL's and the NRC Staff's Answers to Joint Intervenors' petition for waiver is therefore granted.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 20, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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FLORIDA POWER & LIGHT COMPANY)	Docket Nos. 50-250-SLR
)	50-251-SLR
(Turkey Point Nuclear Generating)	
Units 3 & 4)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Granting FPL's Motion to Strike)** have been served upon the following persons by Electronic Information.

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Turkey Point, Units 3 & 4, Docket Nos. 50-250 and 50-251-SLR
ORDER (Granting FPL's Motion to Strike)

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[Original signed by Herald M. Speiser ____]
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Dated at Rockville, Maryland,
this 20th day of August, 2019