UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
NEXTERA ENERGY SEABROOK, LLC	)	Docket No. 50-443-LA-2
(Seabrook Station Unit 1)	)	October 9, 2019

NEXTERA'S ANSWER OPPOSING C-10'S MOTIONS TO COMPEL PRODUCTION OF MINERALOGICAL DATA AND TO SUBMIT ADDITIONAL POST-HEARING TESTIMONY

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), NextEra Energy Seabrook, LLC ("NextEra") hereby timely files this answer to C-10 Research and Education Foundation's ("C-10") Motion to Compel Production of Mineralogy Data and Request for Opportunity to Submit Supplemental Written Testimony Regarding the Data.[1] C-10's pleading is comprised of two requests: (1) seeking to compel NextEra to produce some unspecified "document or documents containing data regarding the tested mineralogical components of aggregate in Seabrook concrete"[2] and "data regarding comparative mineralogy of Seabrook aggregate and LSTP test specimen aggregate"[3] ("Motion to Compel"), and (2) seeking leave to file post-hearing testimony ("Motion for Leave") (collectively, "Motions"). Both Motions should be denied for multiple independent reasons.

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1 C-10 Research and Education Foundation's Motion to Compel Production of Mineralogy Data and Request for Opportunity to Submit Supplemental Written Testimony Regarding the Data (filed and served Sept. 29, 2019; document dated Sept. 30, 2019) ("Motions").

2 *Id*. at 1.

3 *Id*. at 4.

First, the Motion to Compel is procedurally improper because such motions are only permissible in formal adjudications, whereas the instant proceeding is an informal adjudication. Second, the Motion to Compel is moot because NextEra *long ago* disclosed and produced to C-10 multiple documents containing relevant mineralogical information. Third, the Motions are untimely. Fourth, the purpose of the Motions—C-10's desire to advance a new argument on the comparability of mineral chemistry, conceived *during* the evidentiary hearing—is irrelevant to the Contention *as admitted for adjudication* by the Atomic Safety and Licensing Board ("Board") in this proceeding. And finally, the Motion for Leave is premature and lacks "good cause." Thus, the Motions should be denied for one or all of these reasons.

II. THE MOTION TO COMPEL SHOULD BE DENIED AS PROCEDURALLY IMPROPER

C-10's Motion to Compel seeks the production of documents. However, this proceeding is governed by the simplified hearing provisions of Subpart L,[4] which does not permit such motions.[5] In contrast, Commission regulations at 10 C.F.R. § 2.705(h) explicitly authorize the filing of a "Motion to compel discovery" in Formal Adjudications under Subpart G.[6] Thus, when the Commission has intended to permit such motions, it has done so clearly and expressly. Under basic tenets of statutory construction, the Commission's choice *not* to include an analogous provision in Subpart L must be interpreted as a purposeful decision.[7] Thus, C-10's

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4 *See* ASLB Order (Identifying hearing procedures, requesting information related to scheduling, and deferring deadlines for production of initial disclosures and the hearing file) at 1 (Oct. 26, 2017) (unpublished).

5 *See generally* 10 C.F.R. Part 2, Subparts C and L (containing no provision analogous to 10 C.F.R. § 2.705(h) for motions to compel discovery in informal adjudications).

6 *See* 10 C.F.R. § 2.705(h) (permitting a "Motion to compel discovery"); *id*. § 2.700 (limiting the applicability of § 2.705(h) to Formal Adjudications under Subpart G).

7 *Cf., e.g.*, *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so"; it did not use the words "aid" and "abet" in the statute at issue, and hence did not impose aiding and abetting liability); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances"); *FCC v. NextWave*

extra-procedural Motion should be denied as impermissible under the carefully-considered "simplified" hearing process established and codified by the Commission in 10 C.F.R. Part 2, Subpart L.

III. THE MOTION TO COMPEL SHOULD BE DENIED AS MOOT

As noted above, the Motion to Compel seeks the disclosure and production of unspecified "document or documents containing data regarding the tested mineralogical components of aggregate in Seabrook concrete,"[8] and "data regarding comparative mineralogy of Seabrook aggregate and LSTP test specimen aggregate."[9] But, in addition to the information provided in NextEra's hearing exhibits,[10] much of which Dr. Saouma simply failed to review,[11] NextEra *already* disclosed and produced numerous documents to C-10 providing further relevant mineralogical and petrographic information as to both Seabrook and the LSTP more than a year and a half ago, including the following:

- Simpson Gumpertz & Heger Inc., Document No. 120109-RPT-01 (Apr. 2012).[12]
- Simpson Gumpertz & Heger Inc., Document No. RPT-100502.02-7 (July 2011).[13]
- Simpson Gumpertz & Heger Inc., Document No. 110594-RPT-02 (Jan. 2012).[14]
- Simpson Gumpertz & Heger Inc., Document No. RPT-100502-2 (Aug. 2010).[15]

Personal Communications, Inc., 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly").

8 Motions at 1.

9 *Id*. at 4.

10 *See, e.g.*, MPR-4262, App. K (NER022-R); MPR-3727 (NER026).

11 Tr. at 1078 (Dr. Saouma indicating he had not reviewed, because he could not find, Appendix K in NER022-R).

12 Letter from P. Bessette to N. Hildt-Treat, "Initial Disclosures Pursuant to 10 C.F.R. § 2.336; NextEra Energy Seabrook, LLC (Seabrook Station Unit 1), Docket No. 50-443-LA-2," Encl. 3 at 1 (item no. 12) (Jan. 4, 2018) ("Initial Disclosures"); Letter from P. Bessette to N. Hildt-Treat, "NextEra Energy Seabrook, LLC (Seabrook Station Unit 1), Docket No. 50-443-LA-2" (Mar. 20, 2018) ("Initial Production").

13 Initial Disclosures, Encl. 2 at 4 (item 37); Initial Production.

14 Initial Disclosures, Encl. 2 at 11 (item 120); Initial Production.

15 Initial Disclosures, Encl. 2 at 3 (item 24); Initial Production.

- Simpson Gumpertz & Heger Inc., Document No. RPT-100502-4 (Aug. 2010).[16]
- Simpson Gumpertz & Heger Inc., Project No. 130064 (Mar. 2013).[17]

Thus, to the extent the Motion alleges NextEra has not disclosed or has refused to "voluntarily produce"[18] relevant mineralogical documents, C-10 simply appears to be unaware that it already possesses the aforementioned information. Thus, the Motion is meritless and should be dismissed as moot.

IV. THE MOTIONS SHOULD BE DENIED AS UNTIMELY

C-10 fails to address—or even acknowledge—the timeliness requirement in 10 C.F.R. § 2.323(a)(2), which requires motions to be filed "no later than ten (10) days after the occurrence or circumstance from which the motion arises." Both Motions plainly fail to demonstrate satisfaction of that requirement. Moreover, under the applicable standard, the Motions are demonstrably untimely.

The purported impetus for C-10's Motions is Dr. Saouma's new assertion that "information about aggregate mineralogy in NextEra's exhibits was insufficiently detailed or quantitative."[19] More specifically, Dr. Saouma's statement appears to criticize the level of "detail" in the aggregate summary provided in Section 4.3.2 of MPR-4262.[20] The exhibit providing that summary was served upon C-10 on July 24, 2019.[21] Moreover, as noted above, a

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16 *Id*. (both reports included in the same document).

17 Initial Disclosures, Encl. 2 at 7 (item 80); Initial Production.

18 Motions at 3.

19 *Id*. C-10's unawareness of mineralogical and petrographic information already in its possession is perhaps explained by the fact that Dr. Saouma never raised this issue until well into the hearing.

20 Tr. at 1076 ("DR. SAOUMA: I'm interested in knowing the mineralogy of the aggregate used at Seabrook and the mineralogy used in the LSTP"); *id*. at 978 ("MR SIMONS: . . . The comparison of the coarse aggregate from the quarry in New Mexico to the coarse aggregate that we had procured from Maine, and that was used at Seabrook . . . is documented in an SGH petrography report and that is discussed in MPR-4262 Section . . . Section 4.3.2").

21 The subject information in MPR-4262 (§ 4.3.2) was included in the original exhibit (NER022) filed on July 24, 2019. The exhibit was subsequently revised (NER022-R), but that revision did not affect § 4.3.2.

trove of documents related to relevant mineral properties was *disclosed and produced* to C-10 over a year and a half ago. Thus, C-10 had ample opportunity to review and submit testimony on such documents well before the start of the evidentiary hearing, but it failed to do so. That is the fault of C-10, not NextEra. And if C-10 desired more "detail" in the record, it had every opportunity to submit those documents as exhibits itself. At bottom, any motion—to compel, to file testimony, or otherwise—is long overdue and must be denied as untimely pursuant to 10 C.F.R. § 2.323(a)(2).

V. THE MOTIONS SHOULD BE DENIED BECAUSE "CHEMICAL COMPOSITION" DATA IS IRRELEVANT

As Dr. Saouma explained for the first time at the hearing, the particular "mineralogical" data he seeks to compare is related to "chemical composition" (not "physical propert[ies]") in order to determine "how reactive" the aggregates are.[22] The Motion to Compel does not use this specific "chemical composition" terminology; but, to the extent it can be read to request this type of information *in addition* to the petrographic and mineralogical information already disclosed and produced, C-10 simply has not demonstrated how it would be relevant to the admitted contention.

C-10's counsel claims that the requested information is relevant to the instant proceeding and necessary for a complete record because NextEra's experts allegedly "compared the data regarding the Seabrook aggregate and the LSTP aggregate, and have concluded the [chemical] characteristics are *sufficiently alike to ensure the validity of the LSTP*."[23] To the contrary, NextEra's witnesses testified that the chemical composition of the aggregate was intentionally *excluded* as a design parameter (*i.e*. was not a representativeness goal) of the LSTP, and that the

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22 Tr. at 1076.

23 Motions at 3 (emphasis added).

LSTP intentionally and conservatively used aggregate that is *more* reactive than Seabrook.[24] Ultimately, C-10's counsel misrepresents the record and otherwise fails to explain how some (unspecified) "chemical composition" information C-10 demands—which was neither relied on by NextEra as part of the LAR, nor reviewed by the NRC Staff in granting the LAR—somehow could be relevant to this proceeding.

Nevertheless, C-10's counsel attempts to shoehorn this issue into the admitted Contention by further arguing that it "falls within the scope of the admitted contention because it affects the 'length of time ASR has propagated.'"[25] (The "length of time ASR has propagated" is a topic within the scope of the original Contention.[26]) However, C-10's counsel's assertion that this measure of "time" somehow is equivalent to chemical composition is simply nonsensical—and entirely unexplained by Dr. Saouma himself. In Dr. Saouma's three written testimony submissions and four days of oral argument testimony, he never once suggested any connection between these disparate concepts. Ultimately, C-10's counsel's unsupported scope argument falls flat. Thus, C-10's Motions should be denied for this additional reason.

VI. THE MOTION FOR LEAVE SHOULD BE DENIED AS PREMATURE

Finally, even if the Board grants the Motion to Compel, C-10 fails to demonstrate "good cause" for its Motion for Leave. More specifically, to the extent C-10 *assumes* that, after reviewing the (unspecified) information requested in the Motion to Compel, Dr. Saouma will have some meaningful commentary, relevant to the admitted Contention, that would contribute

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[24] Tr. at 1082 ("MR. SIMONS: . . . we're focusing on expansion. We aren't focusing on the chemical makeup of the gel. That's really irrelevant with regard to the structural performance. That is part of the chemical mechanics, but it's not part of the structural performance"); *id*. at 290 (Mr. Simons acknowledging that the LSTP intentionally used coarse and fine aggregate that is *more* reactive than that at Seabrook "in the interest of getting expansions, which is what matters for structural implications"). *See also generally* MPR-3757 (NER026).

[25] Motions at 2.

[26] *Seabrook*, CLI-18-4, 87 NRC at 104.

to "an informed adjudicatory record that supports agency decision making,"[27] its assumption is purely speculative and premature. C-10's conjecture falls short of the "good cause" standard. And to the extent C-10 now reviews information in its possession since early 2018 and attempts to use that as a basis to file additional testimony, such arguments should be soundly rejected. Accordingly, the Motion for Leave should be denied for this additional reason.

VII. CONCLUSION

For all of the reasons stated above, C-10's Motions should be denied.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, DC
this 9th day of October 2019

[27] *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, the foregoing "NEXTERA'S ANSWER OPPOSING C-10'S MOTION TO COMPEL PRODUCTION OF MINERALOGICAL DATA AND TO SUBMIT ADDITIONAL POST-HEARING TESTIMONY" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Ryan K. Lighty

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