November 6, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER OPPOSING C-10'S MOTION TO ADMIT ADDITIONAL EXHIBIT AND TESTIMONY

In accordance with 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission Staff files this answer to the C-10 Research and Education Foundation (C-10) motion to admit an additional exhibit and testimony (Motion).[1] The Staff opposes the Motion because admitting the proposed additional exhibit and testimony would cause unnecessary delay and would not add to the already voluminous record in this proceeding. Further, admitting the proposed additional evidence now—when C-10 has been aware of the report it seeks to introduce and discuss for nearly two years—would be patently unfair to the Staff and NextEra.

C-10 seeks to have admitted two additional exhibits: proposed Exhibit INT050, a report NextEra disclosed to C-10 and the Staff as part of its initial disclosures on January 4, 2018;[2] and proposed Exhibit INT049, the testimony of C-10's expert witness, Dr. Victor E. Saouma,

[1] C-10 Research and Education Foundation's Response to ASLB Memorandum and Motion to Submit Additional Exhibits Regarding Petrographic Observations and Analyses of ASR at Seabrook (Oct. 28, 2019) (non-publicly available; re-filed as publicly available on Oct. 31, 2019) (Motion).

[2] *See* Initial Scheduling Order at 2 (Nov. 29, 2017) (unpublished) ("Initial disclosures are due January 4, 2018."); Motion at 2 (stating that C-10 received the report "in early 2018").

which C-10 describes as "Dr. Saouma's explanation of the significance of" the report.[3] According to C-10, the report supports Dr. Saouma's prior testimony that the surface conditions of the concrete at Seabrook Station, Unit 1 "are not reliable indicators of the severity of [alkali-silica reaction (ASR)] within Seabrook structures, because the surface is drier than the interior of the concrete."[4] Other than noting the number of documents disclosed by NextEra in discovery and Dr. Saouma's limited time given his other professional obligations,[5] C-10 provides no information to explain why the report it now seeks to have admitted as Exhibit INT050 could not have been discussed in Dr. Saouma's already voluminous written and oral testimony.[6]

In its Memorandum dated October 16, 2019, the Board stated that if C-10 sought to admit this additional evidence, C-10 should "explain why good cause exists for permitting the extensive record already before the Board to be supplemented with further testimony."[7] Moreover, in its Order dated September 16, 2019, the Board, citing the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings (Policy Statement),[8] discussed factors relevant to its "good cause" review of C-10's previous motion to submit supplemental testimony.[9] In that Order, the Board considered whether admitting the supplemental testimony

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[3] Motion at 2.

[4] *Id*. at 6.

[5] *Id*. at 7.

[6] *See* Exhibits INT001-R-00-BD01, INT002-00-BD01, INT006-00-BD01, INT007-00-BD01, INT008-R-00-BD01, INT009-00-BD01, INT027-00-BD01, INT028-00-BD01, INT029-00-BD01, INT030-R-00-BD01, INT031-00-BD01, and INT032-00-BD01; Official Transcript of Proceedings, NextEra Energy Seabrook, LLC, Seabrook Station, Unit 1 (Sept. 24–27, 2019) (Tr.).

[7] Memorandum (Request for Clarification) at 3 (Oct. 16, 2019) (unpublished).

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

[9] Order (Granting C-10's Motion for Leave to File Supplemental Rebuttal Testimony) (Sept. 16, 2019) (unpublished) (Supplemental Testimony Order).

would delay the completion of an adjudication,[10] contribute to developing "an informed adjudicatory record that supports agency decision making,"[11] and be fair to the other parties.[12] As explained below, in its instant Motion, C-10 does not meet this good cause standard and, therefore, the Board should deny the Motion.

C-10 argues that there is good cause for the Board to admit the proposed additional exhibit and testimony because they allegedly contradict NextEra's and the Staff's testimony while supporting Dr. Saouma's testimony that surface cracking is not a "reliable indicator[]" of cracking inside the concrete structures at Seabrook.[13] However, since NextEra disclosed in January 2018 the report that C-10 now seeks to introduce, C-10 had all the information that it now seeks to address well before the August 23 and September 24, 2019 deadlines for filing testimony and for filing exhibits.[14] As such, C-10 had ample opportunity to present these arguments in a timely fashion.[15] And, in fact, C-10 did present extensive evidence on this very issue—surface versus interior cracking—in its filings and at the evidentiary hearing.[16] C-10's

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[10] *Id.* at 3 (noting that the Policy Statement "is primarily concerned with modifications of scheduling orders that would delay the completion of an adjudication").

[11] *Id.* at 4 (quoting *Policy Statement*, CLI-98-12, 48 NRC at 19).

[12] *Id.* ("[W]e must consider the Commission's objective of providing a fair hearing process.").

[13] Motion at 5–6.

[14] *See* Memorandum and Order (Revised Scheduling Order) at 3 (Feb. 15, 2018) (unpublished) (providing C-10 the opportunity to file written rebuttal testimony by August 23, 2019); *see, e.g.,* Memorandum (Regarding Submission of Non-Disclosure Agreements, Unredacted Version of a Certain Exhibit, Review of the Hearing Transcript, and Revised Hearing Room Layout) at 1–2 (Sept. 11, 2019) (unpublished); Tr. at 224–31.

[15] *See Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 729–30 (1985) (upholding the licensing board's rejection of intervenors' testimony on the ground of lateness because the intervenors "had ample notice of the filing requirements for this particular direct testimony," had participated in the proceeding "for several years and had reason to be knowledgeable about the Commission's general requirements for prefiling testimony," and because such cases are "complex proceedings that demand an orderly process").

[16] *See, e.g.*, Exhibit INT001-R-00-BD01 at 19–21; Exhibit INT028-00-BD01 at 21–24, 26–33; Tr. at 419, 425–26, 449–55, 490–94, 507, 521–522, 531, 534–535, 569–574, 600–601, 770–71, 890–891, 1024,

belated discovery of the report it now seeks to admit does not excuse an eleventh-hour attempt to supplement the already extensive record—after the completion of a four-day evidentiary hearing—with supplemental testimony based on a report disclosed nearly two years ago.[17]

Additionally, although C-10 attempts to demonstrate good cause by asserting its limited resources, the Commission's policy statements and case law do not excuse a party from fulfilling its hearing obligations on these grounds.[18] Specifically, C-10 attempts to demonstrate good cause by arguing that Dr. Saouma "did not have sufficient time to review" the report before the hearing because (1) he was not enlisted by C-10 until after it had received the report, (2) he is "a *pro bono* expert," (3) he is "employed full-time in research and teaching," and (4) the report was one of "350-plus documents" disclosed by NextEra.[19] C-10's arguments concerning limited resources are insufficient to demonstrate good cause. As the Commission has made clear, "the fact that a party may have personal or other obligations or possess fewer resources than others

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1093–94, 1102–03, 1108–09, 1161–63; *see also* Tr. at 1132 (Judge Trikouros stating that "over the past three days" of the evidentiary hearing, there had been "extensive discussion" of the potential for "cracking on the surface of the walls that is not representative of the cracking in the interior").

[17] *Cf. Tex. Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 70 (1992) ("The test for 'good cause' is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available and when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.").

[18] *See Policy Statement*, CLI-98-12, 48 NRC at 21 ("The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances."); *Statement of Policy on Conduct of Licensing Proceedings,* CLI-81-8, 13 NRC 452, 454 (1981); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157, 164 (2014) ("Regardless of a party's resources, '[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.'" (quoting CLI-81-8, 13 NRC at 454)).

[19] Motion at 7.

to devote to the proceeding does not relieve that party of its hearing obligations."[20] Therefore, C-10 has not demonstrated good cause to belatedly supplement its testimony.

C-10's Motion also fails to demonstrate how the proposed additional exhibit and testimony would "contribute to developing 'an informed adjudicatory record that supports agency decision making.'"[21] C-10 asserts that the proposed additional exhibit and testimony relate to the issue of surface cracking versus interior cracking in Seabrook concrete.[22] As indicated above, however, this exact issue was already discussed at length in C-10's filings and at the evidentiary hearing.[23] C-10 assets that the admission of proposed Exhibit INT050 is warranted because only this report "documents the observation of a higher level of internal ASR in a structure at the Seabrook plant itself."[24] Contrary to C-10's assertion, however, Dr. Saouma testified repeatedly, in both his written testimony and at the evidentiary hearing, that his concern about the reliability of surface cracking as an indicator of internal cracking was based on the conditions specific to Seabrook.[25] Therefore, the Board should reject C-10's proposed additional evidence as duplicative of C-10's already extensive testimony.[26]

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[20] CLI-81-8, 13 NRC at 454.

[21] Supplemental Testimony Order at 4 (quoting *Policy Statement*, CLI-98-12, 48 NRC at 19).

[22] Motion at 4–6.

[23] *See, e.g.*, Exhibit INT001-R-00-BD01 at 19–21; Exhibit INT028-00-BD01 at 21–24, 26–33; Tr. at 419, 425–26, 449–55, 490–94, 507, 521–522, 531, 534–535, 569–574, 600–601, 770–71, 890–891, 1024, 1093–94, 1102–03, 1108–09, 1161–63.

[24] Motion at 6.

[25] *See, e.g.,* Exhibit INT001-R-00-BD01 at 31 ("In Seabrook, the concrete has dried on the surface and there will be very little cracking as a result of ASR."); Exhibit INT028-00-BD01 at 43 ("The environmental conditions under which the [surface crack indexing] and through crack extension were measured in the laboratory do not correspond to the conditions at the Seabrook Plant.").

[26] *See* 10 C.F.R. § 2.319(e) (stating that the presiding officer has the power to "[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments"); *see also* Motion at 2 (stating that, as explained in proposed Exhibit INT049, proposed Exhibit INT050 "supports" the testimony previously provided by C-10's expert witness).

C-10's Motion also raises fundamental questions of fairness. In the instant proceeding, the Board imposed specific deadlines on the parties to ensure the orderly conduct of the proceeding. Consistent with the Board's schedule, the parties had almost two years to fulfill their obligations to develop their arguments and present them at the September 2019 evidentiary hearing. As a party to the proceeding represented by an experienced litigator, C-10 had an obligation to meet the deadlines in this proceeding and, thus, should have raised the issues now raised in its Motion prior to or, at the very least, at the adjudicatory hearing. To allow additional testimony from C-10 now, likely necessitating additional, supplemental testimony from the other parties as the deadline for proposed findings of fact and conclusions of law looms,[27] would be patently unfair.

Finally, the relief that C-10 seeks in its Motion would only serve to delay the closure of the record and the completion of this adjudication.[28] At some point, an evidentiary hearing must end and the evidentiary record must close. There would be little hope of completing an adjudication if, after the end of the evidentiary hearing, the parties could continually search the documents disclosed during discovery to further augment their position.[29]

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[27] *See* Tr. at 1181–82 (setting November 21, 2019 as the deadline for filing proposed findings of fact and conclusions of law).

[28] *See* Supplemental Testimony Order at 3 (noting that the Policy Statement "is primarily concerned with modifications of scheduling orders that would delay the completion of an adjudication.").

[29] *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 554–55 (1978) ("'If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.'" (quoting *ICC v. Jersey City,* 322 U.S. 503, 514 (1944))).

For the foregoing reasons, the Board should deny C-10's Motion.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER OPPOSING C-10'S MOTION TO ADMIT ADDITIONAL EXHIBIT AND TESTIMONY," dated November 6, 2019, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 6th day of November 2019.

/Signed (electronically) by/

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