UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

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

CLI-16-01

MEMORANDUM AND ORDER

The City of Miami, Florida, has appealed the Atomic Safety and Licensing Board's ruling in LBP-15-19, in which the Board denied the City's petition to intervene in this combined license proceeding for failure to proffer an admissible contention.[1] For the reasons set forth below, the City's appeal is premature, and we therefore deny review at this time.

[1] *City of Miami's Notice of Appeal of LBP-15-19* (July 2, 2015); *Brief in Support of City of Miami's Appeal of LBP-15-19* (July 2, 2015) (Appeal); LBP-15-19, 81 NRC 815 (2015).

I. BACKGROUND

In June 2009, Florida Power & Light Company (FPL) applied for combined licenses for two new reactor units—Units 6 and 7—at the Turkey Point Nuclear Generating Station near Homestead, Florida.[1] The NRC Staff docketed the application and provided an opportunity for interested persons to request an adjudicatory hearing by filing a written petition for leave to intervene within sixty days.[2] The NRC received three intervention petitions, two of which were granted, but did not receive a petition from the City of Miami during this time.[3] Rather, the City filed its intervention petition in April 2015, following the Staff's publication of the Draft Environmental Impact Statement (DEIS) for public comment.[4]

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[1] Florida Power & Light Company; Notice of Receipt and Availability of Application for a Combined License, 74 Fed. Reg. 38,477, 38,477 (Aug. 3, 2009).

[2] Florida Power & Light Company; Acceptance for Docketing of an Application for Combined License for Turkey Point Units 6 & 7 Nuclear Power Plants, 74 Fed. Reg. 51,621, 51,621 (Oct. 7, 2009); Florida Power & Light Company, Combined License Application for the Turkey Point Units 6 & 7, Notice of Hearing, Opportunity To Petition for Leave 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, 34,778 (June 18, 2010).

[3] Petitions were submitted by Citizens Allied for Safe Energy (CASE), the Village of Pinecrest, Florida, and a group consisting of two individuals and two non-profit organizations (Joint Intervenors). The Board subsequently granted two of these petitions, admitting two of CASE's contentions and one of Joint Intervenors' contentions. LBP-11-6, 73 NRC 149, 164-65 (2011). The Board denied the Village of Pinecrest's petition but granted its alternative request to participate as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c). *Id.* One contention—Joint Intervenors' Amended Contention 2.1—remains pending before the Board. *See* Order (Granting Motion to Dismiss Joint Intervenors' Contention 2.1 and CASE Contention 6 as Moot) (Jan. 26, 2012), at 6-7 (unpublished) (dismissing Contention 2.1 as moot where the asserted omission had been cured but observing that Joint Intervenors had already filed a new contention challenging the adequacy of the measures taken to cure the omission); LBP-12-4, 75 NRC 213, 225 (2012) (granting motion for summary disposition of CASE Contention 7); LBP-12-9, 75 NRC 615, 632 (2012) (admitting amended version of Joint Intervenors' Contention 2.1); Order (Granting in Part and Denying in Part Motion for Summary Disposition of Amended Contention 2.1) (Aug. 30, 2012), at 10 (unpublished) (August 2012 Order).

[4] Combined License Application for Turkey Point Nuclear Plant, Unit Nos. 6 and 7, 80 Fed. Reg. 12,043 (Mar. 5, 2015).

In its petition, the City sought admission of three contentions.[5] In Contention 1, the City asserted that the DEIS did not identify the source data of various chemical concentrations in the plant's liquid waste streams.[6] In Contention 2, the City asserted that the DEIS failed to sufficiently evaluate the impact the plant's radial collector wells—which would pull water from the Biscayne aquifer as an alternative water source for non-safety-related system cooling—would have on the groundwater plume extending outwards from the existing industrial wastewater facility serving the Turkey Point facility.[7] And in Contention 3, the City claimed the DEIS was deficient because it did not address the percentage of water extracted by the plant's radial collector wells that could conceivably come from underneath the industrial wastewater facility.[8] In the alternative, the City requested to participate in the proceeding as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c).[9]

In March, the Board directed that "all petitions for admission of contentions based on new information in the DEIS" be filed by April 13, 2015.[10] The City filed its petition in apparent reliance upon the Board's order.[11] Both the Staff and FPL opposed the City's petition on the

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[5] *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* (Apr. 13, 2015), at 6-11 (Petition).

[6] *Id.* at 6.

[7] *Id.* at 8.

[8] *Id.* at 10-11.

[9] *Id.* at 12. As relevant here, 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] Order (Granting Motion for Additional Time) (Mar. 25, 2015), at 3 (unpublished). The Board's order responded to CASE's request for an extension of time to file an intervention petition based on the DEIS. CASE's participation in the proceeding was previously terminated. *See supra* note 3.

[11] Petition at 1 ("The filing deadline for contentions concerning the draft EIS is April 13, 2015.").

grounds that it satisfied neither the requirements for filing a hearing request after the deadline referenced in 10 C.F.R. § 2.309(c) nor the contention admissibility criteria.[12]

The Board concluded that the City had established standing, but found that it had not submitted an admissible contention. The Board rejected all three proposed contentions on timeliness grounds: it found Contention 1 to be "virtually identical" to a previous version of the remaining admitted contention in this proceeding (which the Board reformulated to its present form in August 2012),[13] without any new supporting information.[14] The Board rejected Contentions 2 and 3 because the City did not demonstrate that the contentions were based upon new information materially different from that which was previously available.[15] The Board, however, granted the City's unopposed request to participate in the proceeding as an

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[12] *NRC Staff Answer to "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"* (May 8, 2015), at 1-2; *Florida Power & Light Company's Answer Opposing City of Miami's Petition to Intervene in a Hearing on Florida Power & Light Company's Combined Construction and Operating License Application for Turkey Points Units 6 & 7* (May 8, 2015), at 1-2; *see* 10 C.F.R. §§ 2.309(c), 2.309(f).

[13] *See supra* note 3.

[14] LBP-15-19, 81 NRC at 822 (citing 10 C.F.R. § 2.309(c)). *Compare* LBP-12-9, 75 NRC 615, 629 (2012) ("The [FPL Environmental Report, or ER] is deficient in concluding that the environmental impacts from FPL's proposed deep injection wells will be 'small' because the ER fails to identify the source data of the chemical concentrations in ER Rev. 3 Table 3.6-2 for ethylbenzene, heptachlor, tetrachloroethylene, and toluene. Such information is necessary to ensure the accuracy and reliability of those concentrations, so it might reasonably be concluded that those chemicals will not adversely impact the groundwater by migrating from the Boulder Zone to the Upper Floridan Aquifer."), *with* Petition at 6 ("The [DEIS] is deficient in concluding that the environmental impacts from FPL's proposed deep injection wells will be 'small' because the [DEIS] fails to identify the source data of the chemical concentrations in [DEIS] Table 3-5 for ethylbenzene, helptachlor [sic], tetrachloroethylene, and toluene. Such information is necessary to ensure the accuracy and reliability of those concentrations, so it might reasonably be concluded that those chemicals will not adversely impact the groundwater by migrating from the Boulder Zone to the Upper Floridan Aquifer.").

[15] LBP-15-19, 81 NRC at 824, 826. The Board also rejected Contentions 2 and 3 for failing to raise an issue material to the findings the NRC staff must make, provide adequate support for the contention, or demonstrate a genuine dispute with the DEIS, as required by 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi), respectively. *Id.* at 825, 826-27.

interested local governmental body pursuant to 10 C.F.R. § 2.315(c).[16] The City's appeal followed.

II. DISCUSSION

Our procedural rule at 10 C.F.R. § 2.311 provides an interlocutory appeal as of right with respect to contention admissibility rulings in two specific circumstances: "(1) upon the denial of a petition to intervene and/or request for a hearing, on the question of whether it should have been granted; or (2) upon the grant of a petition to intervene and/or request for hearing, on the question of whether it should have been wholly denied."[17] If a litigant has been denied admission of certain contentions but still has other contentions pending in the proceeding, section 2.311 does not provide for immediate interlocutory review of the dismissal of those contentions.[18] Rather, this appeal as of right is reserved for situations where a petition is denied "in its entirety," therefore having the effect of wholly refusing a petitioner entry into a proceeding.[19]

Although none of the litigants have addressed the matter in their briefs, the circumstances here are governed by an earlier precedent that addresses the timing of appeals by an interested government.[20] In *Public Service Co. of New Hampshire, et al.* (Seabrook

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[16] *Id.* at 827-28.

[17] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54 (2013).

[18] *Id.*; *see also Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000) (stating that such rulings must "abide the end of the case").

[19] *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Unit Nos. 2 and 3), CLI-08-7, 67 NRC 187, 191 (2008).

[20] We have reviewed Commissioner Baran's dissent, and it does not change our opinion that *Seabrook* is controlling precedent here. While in its 2004 Part 2 revision, the Commission clarified the distinction between the rights and responsibilities of parties and interested governments, it did not significantly alter those rights and responsibilities. Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2200-01, 2217, 2223 (Jan. 14, 2004). As such, in *Seabrook*, the Appeal Board considered circumstances similar to the ones before us, and its decision appropriately governs here.

Station, Units 1 and 2), the Atomic Safety and Licensing Appeal Board denied interlocutory review to Massachusetts, which was granted status as an "interested State" but which attempted to appeal the dismissal of particular issues it sought to litigate.[21] As the Appeal Board recognized, the denial of an interested government's contentions does not deprive it of the right to continue participating in the proceeding.[22] Rather, an interested government participating under section 2.315(c) is afforded the opportunity to participate on any admitted contentions.[23] Such a participant may introduce evidence, cross-examine witnesses where such cross-examination is permitted, advise the Commission without necessarily taking a position on the contention, file proposed findings in proceedings where findings are permitted, and petition for review under 10 C.F.R. § 2.341 at the conclusion of the proceeding.[24] As such, an entity that has been granted participant status as an interested governmental body is not in the same position as a prospective intervenor who has been wholly denied admission to a proceeding. An interested government has a real and substantial opportunity to litigate admitted

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[21] ALAB-838, 23 NRC 585, 588-91 (1986) (citing *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610-11 (1976)). Although the Commission abolished the Atomic Safety and Licensing Appeal Board Panel in 1991, its decisions still carry precedential weight. *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260 n.23 (2008).

[22] *Seabrook*, ALAB-838, 23 NRC at 589-90.

[23] 10 C.F.R. § 2.315(c); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 627 (2004). By the terms of the rule, the interested government must (among other things) identify those contentions on which it will participate in advance of any hearing held.

[24] 10 C.F.R. § 2.315(c). One point warrants further clarification. Among other restrictions on participation, section 2.315(c) provides that a participating government may only seek Commission review on admitted contentions. As indicated by our holding, we do not view this language as restricting the City's right to appeal the Board's denial of its proffered contentions under section 2.341 once the proceeding is over. Rather, we view this limitation in section 2.315 as applying only to the City's participation as an interested local government—it does not limit any other rights the City may have independent of that participation.

contentions as if they were its own, making interlocutory review of its rejected contentions premature.[25]

Here, none of the City of Miami's three contentions were admitted, but the Board granted its request to participate pursuant to 10 C.F.R. § 2.315(c).[26] The City does not have an appeal as of right under these circumstances.[27] We therefore consider the City's appeal as a petition for discretionary interlocutory review under 10 C.F.R. § 2.341(f).[28] Such a petition must demonstrate that the petitioner seeking interlocutory review faces "immediate and serious irreparable impact" which could not be alleviated through a petition for review of the presiding officer's final decision, or that the issue "affects the basic structure of the proceeding in a pervasive or unusual manner."[29] We have held repeatedly that routine contention admissibility decisions do not constitute serious and irreparable impact or affect the basic structure of a proceeding in a pervasive or unusual manner, particularly when avenues for participation

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[25] Here, while the City's rejected Contention 1 asserted that the "source data" for chemical concentrations of four identified effluents was missing from the DEIS, as an interested local governmental body the City will have the opportunity to participate with respect to Joint Intervenors' Amended Contention 2.1, concerning the accuracy and reliability of that source data for the same four effluents. *Compare* Petition at 6, *with* August 2012 Order at 10.

[26] LBP-15-19, 81 NRC at 828.

[27] To be sure, the City's assumption that it should file its appeal pursuant to 10 C.F.R. § 2.311(b) is understandable; the Board directed the City to that provision. *Id.* at 828 ("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)."). Further, the situation presented here—interlocutory appeal of the denial of contentions by an entity also granted participant status—is rare in our jurisprudence. In circumstances such as this where appeal rights appear unclear, we will take the opportunity to clarify the matter. *See, e.g.*, *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-09-18, 70 NRC 859, 861-62 (2009) (clarifying that a necessary prerequisite for a section 2.311 appeal is that the Board first rule fully on an intervention petition).

[28] *See, e.g.*, *Pa'ina Hawaii, LLC* (Material License Application), CLI-06-18, 64 NRC 1, 4 (2006).

[29] 10 C.F.R. § 2.341(f)(2).

remain.[30] The appeal does not demonstrate circumstances that would cause us to deviate from our established practice of requiring a litigant in its position to wait until the conclusion of a proceeding to challenge the denial of its contentions. This conclusion reflects our longstanding disfavor of interlocutory, piecemeal review of Board rulings, barring extraordinary circumstances not present here.[31]

III. CONCLUSION

As discussed above, the City of Miami's appeal does not lie under 10 C.F.R. § 2.311 and does not satisfy the criteria for interlocutory review in 10 C.F.R. § 2.341(f)(2). We therefore *deny* review without prejudice. The City may renew its appeal at the end of this proceeding pursuant to 10 C.F.R. § 2.341(b).

IT IS SO ORDERED.

For the Commission

[NRC Seal]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of February, 2016.

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[30] *See, e.g.*, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC 681, 688 (2012); *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-16, 71 NRC 486, 491 (2010) (citing *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 365 (2009)); *Indian Point*, CLI-08-7, 67 NRC at 192.

[31] *Seabrook*, CLI-13-3, 77 NRC at 54. We may also exercise our inherent supervisory authority over adjudications to review on our own motion an issue not otherwise properly before us on appeal in sufficiently significant circumstances. *See, e.g.*, *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 489 (2010); *Entergy Nuclear Generation Co.* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 4-5 (2007). We decline to do so here; the Board's contention admissibility ruling does not present an issue that merits such review. *Id.*

Commissioner Baran, Dissenting:

I respectfully dissent from the majority opinion, which relies on the Atomic Safety and Licensing Appeal Board's decision in *Seabrook*.[1] Since 1986, when *Seabrook* was decided, the Commission has clarified that participation as a § 2.315(c) interested participant and as a § 2.309 party are not equivalent. Therefore, a core rationale for the holding in *Seabrook*—that a decision to deny a petition for § 2.309 party status but grant a petition for § 2.315(c) interested participant status does "'nothing to affect the [entity's] status in the proceeding'"[2]—is no longer valid. In the interest of procedural fairness, an appeal of such a decision should not be treated as a petition for discretionary interlocutory review under § 2.341(f). Instead, such an appeal should be treated as an appeal as of right under § 2.311(c). Like any other person denied § 2.309 party status, states, local governments, and tribes should be permitted to bring an appeal as of right under § 2.311(c). In my view, the Commission should issue an order recognizing that *Seabrook* is no longer applicable and addressing the merits of the City of Miami's appeal.

The Appeal Board in *Seabrook* relied on its 1976 decision in *River Bend*, which stated that "[t]he sole practical consequence of [denying the State of Louisiana's participation to intervene but granting its request to participate as an interested state] was that the scope of the health and safety hearing would not be further broadened to encompass the additional issues which the State sought to inject into it."[3] Accordingly, the Appeal Board in *Seabrook* found that,

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[1] *Public Service Co. of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585 (1986).

[2] *Id.* at 591 (quoting *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610-11 (1976)).

[3] *River Bend*, ALAB-329, 3 NRC at 611.

despite denial of the Attorney General of Massachusetts' sole contention, his "right to participate fully in this proceeding remains wholly unaffected."[4]

In NRC's 2004 rulemaking to revise 10 C.F.R. Part 2, the Commission explained the distinction between a § 2.315(c) interested participant and a § 2.309 party:

> [T]he Commission intended to maintain the distinction between a State, local governmental body, or Indian Tribe participating as parties under § 2.309, versus their participation in a hearing as an "interested" State, local governmental body or Indian Tribe under § 2.315(c)…. A State, local governmental body or Indian Tribe admitted as a party is entitled to the rights and bears the responsibilities of a full party, including the ability to engage in discovery, initiate motions, and take positions on the merits. By contrast, an "interested" State, local governmental body or Indian Tribe may participate in a hearing by filing testimony, briefs, and interrogating witnesses if parties are permitted by the rules to cross-examine witnesses, as provided in § 2.315(c). However, such participation is dependent on the existence of a hearing independent of the interested State, local governmental body or Indian Tribe participation, and such participation ends when the hearing is terminated.[5]

This statement makes clear, contrary to the analysis of the Appeal Board in *Seabrook*, that the participation of a § 2.315(c) interested participant is distinct from that of a § 2.309 party.

Embedded in the legal question of whether the City is entitled to an immediate appeal as of right with respect to the denial of its petition to intervene as a full-fledged party is a policy question of whether it is fair to treat a state, local government, or tribe differently than every other entity that is denied party status. Notably, the City petitioned to intervene as a § 2.309 party and, then only if that petition were denied, to participate as a § 2.315(c) interested participant. Thus, when faced with the mutually exclusive options of § 2.309 party status or § 2.315(c) interested participant status, the City made its preference for § 2.309 party status

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[4] *Seabrook*, ALAB-838, 23 NRC at 591.

[5] Changes to the Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2200-01 (Jan. 14, 2004).

clear.[6] In the interest of procedural fairness, we should decide on the City's appeal of the Board's denial of that petition now—which would, if granted, afford the City a different set of rights and responsibilities in the proceeding—rather than wait until the end of the proceeding to consider the issue. The City should not have to wait an undetermined and possibly lengthy amount of time before receiving a ruling on the Board's decision.

The only argument against treating the City's appeal as a § 2.311(c) petition for interlocutory review as of right is a concern that it could undermine the interlocutory appeal rule. I do not see this as a realistic problem. Interlocutory appeals of Board decisions in which an entity is denied party status but granted interested participant status are rare. In fact, these circumstances appear to have arisen only three times in the agency's history: in 1976, 1986, and here.[7] There is no plausible risk that providing states, local governments, and tribes an interlocutory appeal as of right in these unusual circumstances will open the flood gates to a wave of interlocutory appeals. Furthermore, if we endorse the *Seabrook* approach of denying states, local governments, and tribes an immediate appeal as of right of the complete denial of their hearing requests, they could easily bypass the ruling to obtain both immediate review and interested participant status if that appeal is unsuccessful. Avoiding the *Seabrook* restriction would simply require the state, local government, or tribe to petition to intervene as a § 2.309 party and *not* petition, in the alternative, to intervene as a § 2.315(c) interested participant. If the Board wholly denied the entity's § 2.309 petition to intervene, the entity could seek review under § 2.311(c). If that appeal failed, the entity could then request § 2.315(c) interested participant status, having already obtained immediate interlocutory review of the denial of its

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[6] The Commission decided in *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619 (2004), that, as used in § 2.315(c), the phrase "that has not been admitted as a party under § 2.309" means that an entity cannot be admitted as an interested participant under § 2.315(c) if it is already admitted as a party under § 2.309.

[7] *See Seabrook*, ALAB-838, 23 NRC at 591 (quoting *River Bend*, ALAB-329, 3 NRC at 610-11).

petition to intervene as a party. The rarity of these particular circumstances and the ease with which a state, locality, or tribe could bypass the *Seabrook* restriction weigh in favor of allowing an interlocutory appeal as of right in circumstances such as these.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **COMMISSION MEMORANDUM AND ORDER (CLI-16-01),** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by R. Giitter]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of February, 2016