

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 9:18-cv-80118-DMM-DLB

FLORIDA POWER & LIGHT COMPANY,
NEXTERA ENERGY DUANE ARNOLD,
LLC, NEXTERA ENERGY POINT BEACH,
LLC, AND NEXTERA ENERGY
SEABROOK, LLC,

Plaintiffs,

v.

NUCLEAR ENERGY INSTITUTE, INC.,

Defendant.

/

**PLAINTIFFS' MOTION TO PRECLUDE DEFENDANT NUCLEAR ENERGY
INSTITUTE, INC. FROM PROFFERING FURTHER TESTIMONY
REGARDING THE NEGOTIATION OR INTERPRETATION
OF THE PADS AGREEMENT**

Plaintiffs Florida Power & Light Company, NextEra Energy Duane Arnold, LLC, NextEra Energy Point Beach, LLC, and NextEra Energy Seabrook, LLC (collectively, “NextEra”), by their undersigned counsel, respectfully submit this memorandum of law in support of their motion to preclude defendant Nuclear Energy Institute, Inc. (“NEI”) from presenting further testimony, beyond testimony already provided in depositions in this action, on a topic for which its Federal Rules of Civil Procedure 30(b)(6) designee provided incomplete responses pursuant to Federal Rules of Civil Procedure 30, 37 and Southern District of Florida Local Rule 26.1.

PRELIMINARY STATEMENT

NextEra brings this action to remediate NEI’s breach of an *Agreement of Participation in the Personnel Access Data System* (the “PADS Agreement”) that ensures access by the NextEra Companies to the Personnel Access Data System (“PADS”), a personnel database used by the nuclear power industry to facilitate the safe and efficient screening of workers at nuclear facilities across the country.

The question at the heart of this litigation is whether the PADS Agreement requires PADS users to maintain their membership status in NEI, a nuclear trade organization, to retain their “participation” rights in the PADS database. As the Court explained in its order denying NEI’s motion to dismiss the contract claim, resolving this dispute will require the Court to interpret the contract. (Dkt. No. 26 at 6.)

Accordingly, in discovery, NextEra sought corporate representative testimony from NEI concerning the drafting, negotiation, construction and interpretation of all versions of the PADS Agreement. NextEra specified in its Rule 30(b)(6) notice a non-exclusive list of terms and sections of the PADS Agreement central to this litigation that may be the subject of questioning. NEI designated an executive, Chief Financial Officer Phyllis M. Rich, to provide testimony concerning these topics. But Ms. Rich did not have answers to even the most basic questions concerning the PADS Agreement, such as who prepared the original drafts or why the parties

used certain terms, including terms specifically referenced in NextEra's Rule 30(b)(6) notice. (See Ex. B at 189:12-191:1.)

Where a Rule 30(b)(6) corporate representative does not have knowledge with respect to a designated subject, that lack of knowledge binds the corporate party and precludes further affirmative testimony on that topic. *See QBE Ins. Corp. v. Jorda Enters, Inc.*, 277 F.R.D. 676, 698 (S.D. Fla. 2012) ("[A] corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the questions 'will not be allowed effectively to change its answer by introducing evidence at trial.'"). Any other result would permit an unfair trial by ambush, which is precisely the result the liberal discovery standards embodied in the Federal Rules, and, most fundamentally, the corporate representative mechanism, are designed to prevent.

Because NEI's corporate designee repeatedly testified "I don't know" when asked even the most elementary questions concerning the interpretation or construction of the contract, NextEra respectfully requests that NEI be precluded from providing further testimony, aside from testimony already proffered at depositions in this action, concerning these topics.

BACKGROUND

On June 19, 2018, NextEra served on NEI a Notice of Taking Deposition Pursuant to Fed. R. Civ. P. 30(b)(6), identifying nineteen topics of examination ("Notice of Deposition"). Among those topics was a request for information concerning the interpretation and construction of the PADS Agreement. Specifically, Deposition Topic 1 ("Topic 1") sought corporate testimony concerning:

Any drafting, negotiation, construction and interpretation of any version of the Agreement to which any Plaintiff was a signatory or any drafts thereto, including, but not limited to, drafting, negotiation, construction and interpretation of the terms "participant," "PADS participant," "obligations" or "PADS obligations" and the section entitled "Termination of Membership."¹

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Exhibit A.

(Ex. A at 5.)

NEI did not at any time object to Topic 1. On June 19, 2018, NEI's counsel disclosed via email that NEI was designating Ms. Rich as its corporate representative on Topic 1. (*See Ex. C* (Email from F. Mack, dated June 19, 2018).)

On June 21, 2018, NextEra took Ms. Rich's deposition. At her deposition, Ms. Rich acknowledged that she had been designated as NEI's corporate representative with respect to Topic 1. (*See Ex. B* at 17:1-7 ("Q. You understand that you have been designated as a representative of NEI for purposes of this deposition for certain topics. A. Yes. Q. And one of those topics is the negotiation and origin of PADS. A. Yes, sir.").) Ms. Rich further testified that, to prepare for her deposition as a corporate representative, she "talked with a number of individuals within the organization, individuals who were responsible for the administration of PADS, individuals who were involved in the original agreement, individuals that worked on the billing of the assessments across the organization and then with my legal counsel." (*See id.* at 22: 6-16.) She stated that she reviewed financial information and the PADS Agreement (including certain amendments and related correspondence) and spoke with various executives and management-level employees at NEI, including John W. Pitesa, Joseph Pollock, Robert Dubrow, Maria Korsnick and Pamela Cowan. (*See id.* at 22:17-25:17.)

With respect to Topic 1, Ms. Rich testified that she did not know who drafted the "whereas" clause setting forth the intent of the parties, among other provisions of the PADS Agreement. (*See id.* at 188:15-189:23.) She further testified that she did not know why certain words were chosen, or who chose them—including the terms "signatory" and "participant," which are fundamental to this litigation. (*Id.* at 189:24-191:1.) Moreover, Ms. Rich testified that she "wouldn't surmise" as to the meaning of certain central provisions of the PADS Agreement. (*Id.* at 189:22-23, 190:2-5, 201:11.) When pressed as to who might have the requisite knowledge, she was unable to name anyone at NEI other than "perhaps someone in the past of NEI" who left in the 1990s but for whom she had no contact information. (*See, e.g., id.* 190:6-8, 191:18-192:20.)

Counsel to NEI acknowledged that Ms. Rich was unable to provide basic testimony responsive to Topic 1:

Q. I guess what I need help with from you or your lawyers. You were designated as the corporate representative to discuss drafting, negotiation, construction and interpretation of any version of the agreement in which any plaintiff was a signatory. So what I am trying to figure out is who is going to give me the answers to these questions if this is the corporate spokesperson? And if the answer is nobody, that's fine. There is a change of personnel, I get that. I just want to make sure that I don't hear at trial an answer to a question from somebody else that I am not hearing today.

MR. FINLEY: I understand. For the record, she already testified she can't answer that question.

(*Id.* at 201:24-202:16.) Counsel to NEI further represented that, to the extent NEI later sought to proffer another witness to testify as to Topic 1, NEI would notify NextEra beforehand. (*Id.* at 202:17-25.) NEI never provided NextEra with such a notice or produced a witness who could testify to NEI's knowledge with respect to Topic 1.

ARGUMENT

Under Rule 30(b)(6), a corporate party must "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; . . . persons designated must testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). The organization "has an affirmative duty to provide a witness who is able to provide binding answers on [its] behalf." *QBE Ins. Corp.*, 277 F.R.D. at 688.

Courts in this District have consistently held that, where a corporate designee disclaims knowledge with respect to a topic, her lack of knowledge is binding on the company. *See City of Miami Gardens v. Wells Fargo & Co.*, No. 14-22203-CIV, 2018 WL 3213488, at *6 (S.D. Fla. June 29, 2018) (holding that plaintiff was bound by testimony of Rule 30(b)(6) representative who "was unaware of any information providing a basis for" a central allegation); *Wausau Underwriters Ins. Co. v. Danfoss, LLC*, 310 F.R.D. 683, 687 (S.D. Fla. 2015) (precluding further testimony at trial "on any topics for which the corporate representative was unable to provide adequate deposition testimony"), *aff'd*, 310 F.R.D. 689 (S.D. Fla. 2015); *QBE Ins. Corp.*, 277

F.R.D. at 698 (precluding further testimony where corporate representative lacked knowledge). The purpose in binding an organization to a professed lack of knowledge at a 30(b)(6) deposition “is for all practical purposes a variation on the rule and philosophy against trial by ambush.” *QBE Ins. Corp.*, 277 F.R.D. at 690. “It would be fundamentally unfair if [plaintiff] proclaimed a lack of its own knowledge [in its Rule 30(b)(6) depositions], . . . then at trial [took] affirmative positions on these topics.” *Id.*

NEI designated Ms. Rich to provide answers on its behalf regarding the drafting, negotiation, construction and interpretation of all drafts and versions of the PADS Agreement to which any Plaintiff was a signatory. (*See* Ex. C.) As Ms. Rich’s testimony demonstrated, NEI has extremely limited knowledge concerning these topics. Indeed, Ms. Rich repeatedly answered questions addressed to the interpretation of the contract with: “I don’t know.” (*See* Ex. B at 189:12-191:1.) Further, Ms. Rich testified that she was unaware of any available individual who would, in fact, have knowledge concerning Topic 1. (*See id.* at 190:6-8, 191:18-192:20.)

NEI is bound by this professed lack of knowledge. *See Wausau Underwriters*, 310 F.R.D. at 687 (applying “the general rule that a Rule 30(b)(6) deponent’s answers bind the entity that the deponent is representing” and holding that a corporate representative’s ““I-don’t-know”” answers” are “deemed fully binding”). In other words, NEI “may not change its deposition answers—or proffer new explanations or assertions—later as evidence” or provide additional witness testimony on this topic. *Id.* at 687; *see also QBE Ins. Corp.*, 277 F.R.D. at 698 (party cannot “take a position at trial—including the introduction of testimony and exhibits—on the topics [] on which [corporate designee] did not provide 30(b)(6) testimony”). Any other result would sanction “unfair sandbagging” and should not be countenanced. *QBE Ins. Corp.*, 277 F.R.D. at 690, 700 n.18.

CONCLUSION

For the foregoing reasons, NextEra respectfully requests that the Court preclude NEI from proffering additional testimony concerning Topic 1 other than testimony provided by Ms. Rich at her deposition or other NEI witnesses at their depositions before the close of discovery.

LOCAL RULE 7.1 CERTIFICATION

Pursuant to Local Rule 7.1(a)(3), undersigned counsel has conferred with counsel to NEI regarding the relief sought in this motion. NEI's counsel does not agree with the relief sought herein.

DATED: July 16, 2018

Respectfully submitted,

/s/ Joseph Ianno, Jr.

Joseph Ianno, Jr.

Florida Bar No. 655351

jianno@carltonfields.com

jmeehan@carltonfields.com

wpbecf@cfdom.net

CARLTON FIELDS JORDEN BURT, P.A.

525 Okeechobee Boulevard, Suite 1200

West Palm Beach, Florida 33401-6350

Tel.: (561) 659-7070

Fax: (561) 659-7368

George A. Zimmerman (admitted pro hac vice)

New York Bar Registration No. 277278

george.zimmerman@skadden.com

Lauren E. Aguiar (admitted pro hac vice)

New York Bar Registration No. 2763654

lauren.aguiar@skadden.com

Shaud G. Tavakoli (admitted pro hac vice)

New York Bar Registration No. 5059308

shaud.tavakoli@skadden.com

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Four Times Square

New York, New York 10036

Tel.: (212) 735-3000

Fax: (917) 777-3546

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, I filed the foregoing document with the Clerk of the Court via CM/ECF and a true and correct copy of the foregoing was served on all counsel or parties of record on the attached Service List by the method indicated.

/s/ Joseph Ianno, Jr.

Joseph Ianno, Jr.

SERVICE LIST

Counsel for Defendant
Christopher R.J. Pace
Freddi Mack
Christina T. Mastrucci
Marc A. Weinroth
Jones Day
600 Brickell Avenue, Suite 3300
Miami, Florida 33131
crjpace@jonesday.com
fmack@jonesday.com
cmastrucci@jonesday.com
mweinroth@jonesday.com
Via CM/ECF

Counsel for Defendant
Joseph E. Finley
Jones Day
1420 Peachtree St., N.E., Suite 800
Atlanta, GA 30309
jfinley@jonesday.com
Via CM/ECF

Counsel for Defendant
John M. Majoras
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001
jmmajoras@jonesday.com
Via CM/ECF