

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

FLORIDA POWER AND LIGHT
COMPANY

(Turkey Point Nuclear Plant,
Units 3 and 4)

)
)
)
)
)
)

Docket Nos. 50-250
50-251

NRC STAFF'S RESPONSE TO REQUEST FOR HEARING AND
PETITION FOR LEAVE TO INTERVENE FILED BY MARK P. ONCAVAGE

Steven R. Horn
Counsel for NRC Staff

November 13, 2000

November 13, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

FLORIDA POWER &
LIGHT COMPANY

(Turkey Point Nuclear Plant,
Units 3 and 4)

)
)
)
)
)
)
)

Docket Nos. 50-250
50-251

NRC STAFF'S RESPONSE TO REQUEST FOR HEARING AND
PETITION FOR LEAVE TO INTERVENE FILED BY MARK P. ONCAVAGE

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby submits its answer to the request for hearing and petition for leave to intervene ("Petition"), dated October 24, 2000, filed by Mr. Mark P. Oncavage ("Petitioner").¹ For the reasons set forth below, the Staff submits that the Petitioner has not demonstrated standing to intervene in this matter, as required by 10 C.F.R. § 2.714 (a). Accordingly, the Petition should be denied.

BACKGROUND

On September 11, 2000, Florida Power & Light Company ("FPL") submitted an application to renew Operating Licenses DPR-31 and DPR-41 for its Turkey Point Nuclear Plant, Units 3 and 4, for an additional 20-year period. The Units 3 and 4 licenses expire on July 19, 2012 and April 10, 2013, respectively.

¹The Petitioner included seven contentions with his Petition. Pursuant to an order dated November 6, 2000, the Commission stated that responses to these contentions may be deferred until an Atomic Safety and Licensing Board has been convened and a schedule for submitting and responding to contentions has been established. Accordingly, at this time, the Staff is addressing only the Petitioner's standing to intervene.

On September 26, 2000, the Staff published in the *Federal Register* a "Notice of Receipt of Application for Renewal of Facility Operating License Nos. DPR-31 and DPR-41 for an Additional Twenty-Year Period," which indicated that the FPL application is available for public inspection on the NRC website and in the NRC's Public Document Room. 65 Fed. Reg. 57,847 (2000). On October 12, 2000, the NRC published in the *Federal Register* a "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing Regarding Renewal of License Nos. DPR-31 and DPR-41 for an Additional Twenty Year Period." 65 Fed. Reg. 60,693-94 (2000) ("Hearing Notice"). The Hearing Notice provided that by November 13, 2000,

any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the renewal of the licenses in accordance with the provisions of 10 CFR 2.714.

Id. at 60,694. Pursuant to the Hearing Notice, the Petitioner timely filed his Petition.

DISCUSSION

I. Legal Requirements For Intervention

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing to do so. Section 189a(1) of the Atomic Energy Act of 1954, as amended ("Act" or "AEA"), 42 U.S.C. § 2239(a), states "[i]n any proceeding under this Act, for the granting, suspending, or amending of any license . . . , the Commission shall grant a hearing upon the request of any person whose interests may be affected by the proceeding, and shall admit any such person as a party to such proceeding." The Commission's regulations in 10 C.F.R. § 2.714(a)(2) provide that a petition to intervene, *inter alia*, "shall set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors set forth in [10 C.F.R. § 2.714(d)(1)]." Pursuant

to section 2.714(d)(1), in ruling on a petition for leave to intervene or a request for hearing, the Presiding Officer or Licensing Board is to consider:

- (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

Finally, a petition for leave to intervene must set forth "the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." 10 C.F.R. § 2.714(a)(2). An aspect must be within the scope of the proceeding to be valid. *Philadelphia Elec. Co.* (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986).

In determining whether a petitioner has established the requisite interest, the Commission applies contemporaneous judicial concepts of standing. See, e.g., *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 188 (1999); *Gulf States Util. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), review denied sub nom. *Environmental & Resources Conservation Org. v. NRC*, 996 F.2d 1224 (9th Cir. 1993).

In order to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest, and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. See, e.g., *Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-93-16, 38 NRC 25, 32 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991), citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). In Commission proceedings, the injury must fall within the zone of interests sought to be protected

by the AEA or the National Environmental Policy Act ("NEPA"). *Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 6 (1998); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985).

To establish injury in fact, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1988), citing *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988). A determination that the injury is fairly traceable to the challenged action does not depend "on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994). Finally, it must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71-72.

The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. A petitioner must have a "real stake" in the outcome of the proceeding to establish injury in fact for standing. *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-79-10, 9 NRC 439, 447-48, *aff'd*, ALAB-549, 9 NRC 644 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual," "direct," or "genuine." LBP-79-10, 9 NRC at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requestor must allege some injury that will occur as a result of the action taken. *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 & 2), LBP-82-74, 16 NRC 981, 983 (1982), citing *Allied General Nuclear Services* (Barnwell Fuel Receiving & Storage Station), ALAB-328, 3 NRC 420, 422 (1976); *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 & 2), LBP-82-26, 15 NRC

742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *International Uranium Corp. (White Mesa Uranium Mill)*, CLI-98-6, 47 NRC 116, 117 (1998). A "generalized grievance" shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 333 (1983), *citing Transnuclear, Inc. (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations)*, CLI-77-24, 6 NRC 525, 531 (1977).

That a petitioner lives within a specific distance from the plant has been found, in the past, to be sufficient alone to confer standing on that petitioner in proceedings on construction permits, operating licenses, or significant amendments thereto. *Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2)*, CLI-89-21, 30 NRC 325, 329 (1989). Such cases have involved construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. *Id.* Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific injury-in-fact. *Id.* at 329-30. *Zion*, CLI-99-04, 49 NRC at 188.

Even in amendment proceedings in which there were findings that licensing actions involved an obvious potential for offsite consequences, thus presumptively establishing injury-in-fact through proximity, the Commission and Licensing Boards have nevertheless traced alleged concrete injuries to the requested actions in finding that petitioners have standing. *See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, CLI-93-21, 38 NRC 87, 93-95 (1993) (finding petitioner had standing based on proximity and claim that material withdrawal schedule was safety-related); *Vogtle*, CLI-93-16, 38 NRC at 35 (finding petitioner had an interest based on proximity, which was linked to the proposed license transfer amendment based on a concern regarding "non-safety-conscious management"); *General Public Util. Nuclear Corp. (Oyster Creek Nuclear Generating Station)*, LBP-96-23, 44 NRC 143, 159 (1996) (proximity in conjunction with

possible offsite consequences from a shield plug accident sufficient to establish standing); *but see Arizona Public Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-4, 33 NRC 153, 157 (1991) (proximity alone in the case of an operating license amendment proceeding can support standing to intervene).

While an argument can be made that a license renewal proceeding could be viewed as the functional equivalent of an operating license proceeding to the extent that, like an initial operating license, a renewed operating license conveys the authority without which a facility cannot operate, it differs in a way material to the issue of standing. In an initial licensing action, the Commission, for the first time, makes the findings of compliance and reasonable assurance needed to authorize operation. *See* 10 C.F.R. § 50.57(a). In a renewal action, on the other hand, fundamental operating parameters and associated safety findings are unaffected and unchanged, and, by virtue of the rulemaking action associated with the promulgation of 10 C.F.R. Part 54, are beyond the scope of the proceeding except to the very limited extent that they may be affected by aging-management considerations. *See* 10 C.F.R. § 54.21. The Commission has determined that, except for age-related matters, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide and maintain an acceptable level of safety for operation during the license renewal period, will not endanger the public health and safety and would not be inimical to the common defense and security. *See* "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22463 (1995); "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,950 (1991). In relation to the matter of standing, then, it is wholly appropriate, in the context of a license renewal proceeding, to inquire beyond the mere assertion of geographic proximity alone, to assess just what discernible injury there might be and how it might be redressed by adjudication of the matter.

II. Petitioner Has Failed To Establish Standing To Intervene

Petitioner has not established standing to intervene in this proceeding for two reasons:

(1) he has not shown an "injury in fact" to his interests that is fairly traceable to FPL's license renewal request, and (2) he has failed to identify an aspect within the scope of this license renewal proceeding.

A. Petitioner Has Not Shown An Injury In Fact To His Interests That Is Fairly Traceable To FPL's License Renewal Request

In order to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest, and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *Vogle*, CLI-93-16, 38 NRC at 32. Petitioner in this case merely states that his home in Miami-Dade County is approximately fifteen miles from the Turkey Point plant without making any attempt to trace this interest to the license renewal request. Petition at 1. As discussed above, proximity to a plant should only be considered as a factor in determining standing, and should be accorded limited weight here. It is incumbent upon the Petitioner to assert some "plausible chain of causation" as to how the license renewal would pose a "distinct new harm or threat" to him. *Zion*, CLI-99-04, 49 NRC at 192. Petitioner has failed to provide any such chain of causation, and accordingly, is not entitled to standing on the basis of proximity alone.

The Petition does not identify any other particular, concrete injury in order to establish standing. The only issue Petitioner could claim he has raised is found in the first paragraph of the Petition. There, in very vague terms, Petitioner requests that a Licensing Board be convened "to decide whether the licensee and the NRC are proposing operations detrimental to the health and safety of the public." Petition at 1. Again, this concern is not linked by the Petitioner in any plausible way to the license renewal request. Petitioner's statement that a Licensing Board should decide if the license renewal is detrimental to public health and safety is unparticularized and could

be shared in substantially equal measure by all or a large class of citizens. Petitioner fails to make a specific assertion that the proposed action will be detrimental to him personally. Accordingly, under *TMI* and *Transnuclear*, this assertion should be viewed as a generalized grievance insufficient to support standing.

B. Petitioner Has Failed To Identify An Aspect Within The Scope Of The License Renewal Request

Pursuant to 10 C.F.R. § 2.714(a)(2), a petitioner is required to state the "specific aspect or aspects of the subject matter of the proceeding" as to which it wishes to intervene. The purpose of this requirement is not to judge the admissibility of the issues, but to determine whether the petitioner specifies "proper aspects" for the proceeding. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978). The requirement is satisfied by identifying general potential areas of concern that are within the scope of the proceeding. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 89 (1990).

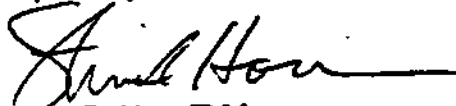
The only possible aspect asserted by Petitioner is that there will be an increased risk of adverse health effects occasioned by extension of the Units 3 and 4 operating periods. This assertion is not linked in any way to issues which are related to license renewal. Consequently, Petitioner's concern fails as an aspect within the scope of the license renewal request. "The burden of setting forth a clear and coherent argument for standing and intervention is on the Petitioner." *Zion*, CLI-99-04, 49 NRC at 194. Thus, neither the Licensing Board, the Staff, nor FPL is required to look to Petitioner's assertions to try and divine an aspect not advanced by the Petitioner himself. *Id.* Consequently, Petitioner has not identified an aspect within the scope of this proceeding.

CONCLUSION

Because proceedings on license renewal applications under 10 C.F.R. Part 54 are of limited scope, proximity to the facility should be considered as just one factor in determining whether a

petitioner has standing to intervene. Under this standard, the Petitioner has failed to allege a sufficient "injury in fact" to a valid interest. The Petitioner has also failed to set forth any aspect of the renewal application with respect to which Petitioner wishes to intervene. Therefore, the Petition should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven R. Horn", written over a horizontal line.

Steven R. Horn/RA/
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of November 2000

BEFORE THE COMMISSION

**Docket Nos. 50-250
50-251**

Dated at Rockville, Maryland
this 3rd day of November, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

FLORIDA POWER AND LIGHT
COMPANY

(Turkey Point Nuclear Plant,
Units 3 and 4)

)
)
)
)
)
)

Docket Nos. 50-250
50-251

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE FILED BY MARK P. ONCAVAGE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 13th day of November 2000.

Office of the Secretary*
ATTN: Rulemaking and Adjudications
Staff
Mail Stop: T-3F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

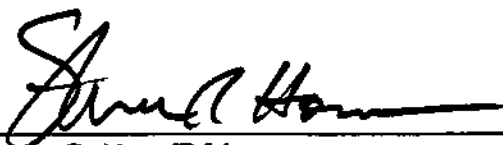
Mitchell S. Ross
Florida Power & Light Company
Law Department
700 Universe Boulevard
P.O. Box 14000
Juno Beach, FL 33408-0420
E-mail: Mitch_Ross@FPL.com

Office of the Commission Appellate
Adjudication*
Mail Stop: O 16-C-1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

David R. Lewis
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037
E-mail: david.lewis@shawpittman.com

Atomic Safety and Licensing Board Panel*
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F-23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mark P. Oncavage
12200 S.W. 110th Avenue
Miami, FL 33176-4520
E-mail: oncavage@bellsouth.net


Steven R. Horn/RA/
Counsel for NRC Staff