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ADJUDICATIONS STAFF

Mark P. Oncavage
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Miami, FL 33176

March 19, 2001

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Florida Power and Light Company
(Turkey Point Units 3 and 4)

Docket No. 50-250/251 LR

ASLBP No. 01-786-03-LR

PETITIONER MARK P. ONCAVAGE'S NOTICE OF APPEAL

Dear members of the Atomic Safety and Licensing Appeal Board:

Under the provisions of 10 CFR § 2.714 a I am filing a Notice of Appeal. Please find enclosed a brief accompanying my Notice of Appeal.

Respectfully submitted,



Mark P. Oncavage

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Dear members of the Atomic Safety and Licensing Appeal Board:

Please consider this communication as Petitioner Mark P. Oncavage's brief accompanying his Notice of Appeal.

Standing

On February 26, 2001, an Atomic Safety and Licensing Board composed of Thomas S. Moore, Chairman, Dr. Richard F. Cole, and Dr. Charles N. Kelber determined that Petitioner Mark P. Oncavage has standing to intervene in the license renewal procedure for Turkey Point Nuclear Units 3 and 4.

Contention No. 1

A prehearing conference was held on January 18, 2001 for the purpose of oral argument concerning standing and admissibility of contentions. Petitioner Mark P. Oncavage asked the Licensing Board to study three problems which are at the heart of the petitioner's contentions. The Licensing Board did not discuss any of the three problems at the prehearing conference. In the MEMORANDUM AND ORDER, dated February 26, 2001, the Licensing Board failed to offer any answers or discussion to any of these three problems. I am requesting the Atomic

Safety and Licensing Appeals Board to study and discuss these legal problems. Petitioner Mark P. Oncavage believes that an accurate resolution of these three problems would reverse the Licensing Boards rulings and find both contentions admissible.

Are 10 CFR Part 51, 10 CFR Part 54 and the National Environmental Policy Act mutually exclusive? If Petitioner Mark P. Oncavage were to precisely follow all the rules set forth in Part 51 and 54, would he find his rights under NEPA unduly abridged? If he were to request that all provisions of NEPA be utilized in license renewal procedures, would he incur a violation of Commission rules? NEPA states: "... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -- (i) the environmental impact of the proposed action, (ii) any adverse environmental impacts which cannot be avoided should the proposal be implemented, ..." Yet, **10 CFR § 54.30 Matters not subject to a renewal review** drastically narrows the scope of NEPA by stating: "(b) The licensee's compliance with the obligation under Paragraph (a) of this section to take measures under its current license is not within the scope of the license renewal review."

With its termination of the safety hearing, the Licensing Board has chosen to violate crucial parts of NEPA in favor of 10 CFR § 54.29 (a)-(c). By its action, it appears that the Licensing Board has determined that Part 51 and 54 are mutually exclusive of NEPA. This violation of federal law is not even consistent with NRC practice and procedure.

"NRC has the burden of complying with NEPA. The adequacy of the NRC's environmental review as reflected in the adequacy of a DES or FES is an appropriate issue for litigation in a licensing procedure. Because the adequacy of those documents cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proffered at an early stage of the proceeding before the documents are available. That does not mean that no environmental contentions can be formulated before the Staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared..."

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041,

1049 (1983). See 10 CFR § 2.714 (b) (2) (iii), 54 Fed. Reg. 33168, 33180 (August 11, 1989), as corrected, 54 Fed. Reg. 39728 (Sept. 28, 1989).

Can 10 CFR Parts 51 and 54 restrict NEPA provisions ? In its dismissal of Petitioner's Contention No. 1, the Licensing Board relies on various elements of the Code of Federal Regulations.

10 CFR Part 51, Appendix B. The Licensing Board disagrees with the Petitioner's characterization of Category 2 groundwater conflict. Turkey Point is situated in a sheet flow hydrological pattern where freshwater becomes brackish, then flows to saltwater. Additionally, the plant has been constructed on top of the Biscayne Aquifer, a designated sole source aquifer, albeit the saltwater portion. Petitioner Mark P. Oncavage disagrees with the Licensing Board's interpretation of a groundwater conflict.

10 CFR § 54.21 (a and c) This portion of the regulations deals with instructions to the licensee. This section does not deal with the NRC's obligations to NEPA (GEIS and SEIS) nor the NRC's obligation to write a accurate Safety Evaluation Report (SER). Contention No. 1 does not challenge the contents of the licensee's Environmental Report. This citation simply misses the point.

10 CFR § 51.71 (d) This portion of the regulations makes statements that appear contradictory. Among the contradictory statements are: "The draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; ..." which contradicts: "...will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1..." The next contradiction is contained in one sentence: "While satisfaction of Commission standards and criteria pertaining to radiological effects will be necessary to meet the licensing requirements of the Atomic Energy Act, the analysis will, for the purposes of NEPA, consider the radiological effects of the proposed action and alternatives."

10 CFR 51.95(c). This portion exemplifies the problem of Commission rules restricting NEPA provisions. The problem is not new. As Petitioner Mark P. Oncavage quoted from the previously mentioned Catawba case. "While all environmental contentions may, in a general

sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared..."

Contention No. 2

If the SER contains information that goes beyond the scope of Parts 51 and 54, how can a petitioner question or litigate those issues ? The Licensing Board has ruled as inadmissible Petitioner's Contention No. 2 as it relates to the storage of spent fuel at the plant site. This unduly dismisses the petitioner's rights under 10 CFR § 2.714 where the Petitioner's interest may be affected by a proceeding. The Licensing Board has already granted standing to Petitioner Mark P. Oncavage. The Licensing Board has, in effect, said, yes you have an interest to defend, but we won't let you defend your interest. The reason given by the Licensing Board is contained in 10 CFR 51.23, the Commission's Waste Confidence Rule. This rule, written in 1983 and amended in 1990, was written before the availability of important safety-related information. In 1990, there was no international, commercial airport planned for Homestead ARB whose runway is 4.9 miles from the Turkey Point site. The Commission did not have an opportunity to study the safety problems now facing onsite spent fuel storage. Petitioner Mark P. Oncavage believes the Commission, in both 1983 or 1990, would not have tolerated the flawed methodology nor the flawed data used by the Office of Nuclear Reactor Regulation for their Safety Assessment of June 19, 2000 concerning safety. The Licensing Board erred in ruling that Contention 2A and 2B does not involve issues of severe accident mitigation. Since the NRC has no control over the planned development of the international, commercial airport and no means to remove spent fuel from the site, severe accident mitigation is the only issue.

The Petitioner's difficulty with severe accident mitigation alternatives results from the inability of the NRC Staff to produce an SEIS or an SER in a timely manner. The Licensing Board views the absence of these documents as a flaw in the Petitioner's contentions. The Petitioner believes his rights to defend his interest have been unduly abridged by the Licensing Board's dismissal of the contentions many months before the SEIS and SER and due for publication. This action also abrogates any legitimate opportunity for the Petitioner to amend the contentions

upon the issuance of the SEIS and the SER. NRC case law agrees with Petitioner Mark P.

Oncavage:

“Should the subsequent issuance of the SER lead to a change in the FSAR and thereby modify or moot a contention based on that document, that contention can be amended or promptly disposed of by summary disposition or stipulation. However, the possibility that such a circumstance could occur does not provide a reasonable basis for deferring the filing of safety-related contentions until the staff issues its SER.”

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC at 1048 (1983).

Petitioner Mark P. Oncavages requests the Atomic Safety and Licensing Appeals Board to reverse the decisions by the Licensing Board and rule that Contentions 1, 2A, and 2B are admissible.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark P. Oncavage', written in a cursive style.

Mark P. Oncavage

March 19, 2001

Florida Power & Light Company
Turkey Point Units 3 and 4
Docket Nos. 50-250-LR
50-251-LR
ASLBP No. 01-786-03-LR

Certificate of Service

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I certify that copies of PETITIONER MARK P. ONCAVAGE'S NOTICE OF APPEAL and accompanying brief were deposited in the U.S. Mail by first class on March 19, 2001.

A handwritten signature in black ink, appearing to read "Mark P. Oncavage". The signature is fluid and cursive, with the first name "Mark" and last name "Oncavage" clearly distinguishable.

Mark P. Oncavage