

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Commission

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

**FLORIDA POWER AND LIGHT COMPANY'S BRIEF  
IN OPPOSITION TO APPEAL OF MARK P. ONCAVAGE**

As permitted by 10 C.F.R. § 2.714a, Florida Power and Light Company ("FPL") submits this brief in opposition to the appeal of Mark P. Oncavage.<sup>1</sup> Mr. Oncavage is appealing the Atomic Safety and Licensing Board's Memorandum and Order (Ruling on Petitioners' Standing and Contentions), LPB-01-06, dated February 26, 2001, which denied Mr. Oncavage's intervention petition and request for hearing based on Mr. Oncavage's failure to submit any contentions within the scope of the proceeding.<sup>2</sup> As discussed in this brief, the Licensing Board's decision was clearly correct and must be affirmed.<sup>3</sup>

The main issue presented by this appeal is whether a petitioner such as Mr. Oncavage is entitled to litigate issues that are outside the scope of the license renewal proceeding and that

<sup>1</sup> Petitioner Mark P. Oncavage's Notice of Appeal (March 19, 2001). Mr. Oncavage's brief accompanying the notice of appeal is in the form of a letter, but will be cited as "Pet. Br."

<sup>2</sup> The Licensing Board's Memorandum and Order also denied an intervention petition filed by Joette Lorion. Ms. Lorion has not appealed the Licensing Board's decision.

<sup>3</sup> The Licensing Board also ruled that Mr. Oncavage had standing based solely on the proximity of his residence to Turkey Point. LBP-01-06, slip op. at 3-11. For the reasons stated in FPL's Opposition to Request for Hearing and Petition for Leave to Intervene of Mark P. Oncavage (Nov. 9, 2000), and as a matter of policy, FPL believes that standing in license renewal

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challenge the NRC's rules defining the scope of that proceeding. This issue is particularly important in a license renewal proceeding, because the Commission has conducted extensive rulemaking proceedings to define specifically and limit the technical and environmental showing that an applicant must make and the NRC staff must review.

The rules in 10 C.F.R. Part 54 governing safety matters are intended to make license renewal a stable and predictable process. 60 Fed. Reg. 22,461, 22,463 (1995). To this end, the Commission has confined 10 C.F.R. Part 54 to those issues uniquely determined to be relevant to the public health and safety during the period of extended operation, leaving all other issues to be addressed by the existing regulatory processes. 60 Fed. Reg. at 22,463. This scope is based on the principle, established in the rulemaking proceedings, that with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operation, the existing regulatory processes are adequate to ensure that the licensing bases of currently-operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. Accordingly, the Commission has limited the scope of the safety review to the matters in 10 C.F.R. § 54.29(a)-(c) (management of aging of certain systems, structures, and components; review of time-limited aging evaluations; 10 C.F.R. Part 51 issues; and any issue admitted based on a waiver of the regulations). The Commission has stated explicitly that the scope of Commission review determines the scope of admissible contentions in a renewal hearing absent a Commission finding under 10 C.F.R. § 2.758. 60 Fed. Reg. at 22,482 n.2.

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proceedings should be demonstrated, and not based on presumptions, but FPL has elected not to address this issue further in this brief.

The regulations in 10 C.F.R. Part 51 governing environmental review of license renewal applications are similarly intended to produce a more focused and, therefore, more effective review. 61 Fed. Reg. 28,467 (1996). To accomplish this objective, the NRC prepared a comprehensive Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants (NUREG-1437) and made generic findings reflected in the GEIS and in Appendix B to 10 C.F.R. Part 51. Those issues that could be resolved generically for all plants are designated as "Category 1" issues and are not evaluated further in a license renewal proceeding (absent waiver or suspension of the rule by the Commission based on new and significant information). 61 Fed. Reg. at 28,468, 28,470, 28,474. The remaining "Category 2" issues that must be addressed in an applicant's Environmental Report ("ER") are defined specifically in 10 C.F.R. § 51.53(c).

As discussed later in this brief, it is axiomatic that a contention is only admissible if it addresses matters within the scope of the proceeding and does not attack the NRC's regulations governing the proceeding. The scope of a proceeding, and as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application and the pertinent regulations. Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 22 (1998). Since Mr. Oncavage seeks to raise issues that are beyond the scope of the proceeding, as defined by the NRC's regulations, his appeal must be denied. Mr. Oncavage's appeal should also be denied on the separate grounds that none of his contentions were supported by an adequate basis demonstrating a genuine dispute on a material issue.

### **STATEMENT OF THE CASE**

On September 11, 2000, FPL submitted an application to renew the operating licenses for Turkey Point Units 3 and 4. After a sufficiency review, the NRC published notice in the Federal

Register on October 12, 2000, determining that FPL's application was complete and acceptable for docketing, and providing notice of an opportunity for hearing. 65 Fed. Reg. 60,693 (2000).

On October 24, 2000, Mr. Oncavage submitted a Request for Hearing /Petition for Leave to Intervene.

On November 27, 2000, the Commission issued an Order Referring Petition for Intervention and Request for Hearing to the Atomic Safety and Licensing Board Panel. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 N.R.C. 327 (2000). The Commission's Order included the following instruction:

The scope of this proceeding is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses. See 10 C.F.R. §§ 54.21(a) and (c), 54.4; Nuclear Power Plant License Renewal; Revisions, Final Rule, 60 Fed. Reg. 22,461 (1995). In addition, review of environmental issues is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). See NUREG-1437, "Generic Environmental Impact Statement (GEIS) for License Renewal of Plant"; Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 61 Fed. Reg. 28,467 (1996), amended by 61 Fed. Reg. 66,537 (1996). The Licensing Board shall be guided by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii).

Id. at 329. Thereafter, on December 1, 2000, the Licensing Board issued a Memorandum and Order setting forth the schedule for submittal of contentions. The Licensing Board's Memorandum and Order, at page 3, cautioned the petitioners that each contention must be within the limited scope of this proceeding.

Mr. Oncavage submitted two proposed contentions on December 22, 2000. Amended Contentions of Mark P. Oncavage (Dec. 22, 2000). Both FPL and the NRC staff filed responses opposing the admission of these two contentions because they failed to raise any issue within the scope of the proceeding, and FPL further opposed the contentions because they were not

supported by any basis demonstrating a genuine dispute over a material issue. FPL's Response to Contentions of Mark. P. Oncavage and Joette Lorion (Jan. 8, 2001); NRC Staff's Answer to Contentions Filed by Ms. Joette Lorion and Mr. Mark Oncavage (Jan. 9, 2001).

After a prehearing conference held in Homestead, Florida on January 18, 2001, the Licensing Board issued its February 26, 2001 Memorandum and Order ruling that both of Mr. Oncavage's Contentions impermissibly challenged the Commission's regulations and were outside the scope of the proceeding. LBP-01-06, slip. op. at 30-35. Because Mr. Oncavage had failed to offer an admissible contention, the Licensing Board also denied his intervention petition, in accordance with 10 C.F.R. § 2.714(b)(1).

#### ARGUMENT

Mr. Oncavage attempts to frame his appeal in terms of broad "problems" questioning the Commission's compliance with the National Environmental Policy Act (NEPA), but the simple fact is that Mr. Oncavage's contentions were dismissed because they challenged the NRC's generic determinations and were outside the scope of the proceeding. It is well established that a contention is not admissible unless it falls within the scope of the proceeding for which the Licensing Board has been delegated jurisdiction.<sup>4</sup> It is also well established that a petitioner may not demand an adjudicatory hearing to attack the Commission's generic determinations or regulations.<sup>5</sup>

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<sup>4</sup> Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 N.R.C. 45, 54 (1998); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 N.R.C. 167, 170-71 (1976); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 N.R.C. 287, 289 n.6 (1979).

<sup>5</sup> Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's

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## I. MR. ONCAVAGE'S CONTENTIONS ARE INADMISSIBLE

### A. Oncavage Contention 1

Oncavage Contention 1 is inadmissible because it challenges the NRC's rules limiting the scope of this proceeding. Contention 1 alleged that the aquatic resources of the Biscayne National Park will become contaminated with radioactive material, chemical wastes, and herbicides that will endanger the health and safety of the public. The Board correctly concluded that Oncavage Contention 1 raised no issue within the scope of 10 C.F.R. Part 54, because the contention did not challenge any aspect of FPL's aging management review or evaluation of the plant's systems, structures, and components subject to time-limited aging analysis. LPB-01-06, slip op. at 31-32. Since the scope of 10 C.F.R. Part 54 is limited to a demonstration that the aging of certain systems, structures, and components will be adequately managed, and that certain time-limited aging analyses have been adequately addressed, as the Commission had explained in its November 27, 2000 Order, the Licensing Board's ruling was clearly correct. Mr. Oncavage failed to identify any system, structure, or component whose aging was not being adequately managed, or any time-limited aging analysis alleged to be incorrect. Indeed, in his

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regulatory process." Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff'd in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974). A contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. 10 C.F.R. § 2.758; Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974).

discussion of Contention 1, Mr. Oncavage did not mention or address any portion of FPL's Integrated Plant Assessment<sup>6</sup> or evaluation of time-limited aging analyses.

While on its face this contention appeared to raise a safety issue, the Licensing Board considered not only whether the contention might be admissible under 10 C.F.R. Part 54, but also whether it might be admissible as an environmental contention under 10 C.F.R. Part 51. The Board correctly ruled that, to the extent Oncavage Contention 1 might be raising environmental issues, it was a challenge to the regulations in 10 C.F.R. Part 51. LBP-01-06, slip op. at 32. As the Board explained, radiation exposure to the public during the renewal term, the discharge of chlorine and other biocides, and the discharge of sanitary wastes and minor chemical spills are all Category 1 issues (see 10 C.F.R. Part 51, App. B, Table B-1) barred from further consideration in license renewal proceedings. LBP-01-06, slip op. at 32.

The Licensing Board also correctly rejected Mr. Oncavage's attempt to characterize his Contention 1 as involving a "groundwater conflict" designated as a Category 2 issue in the GEIS and Table B-1 of Part 51. LBP-91-06, slip op. at 32. As the Licensing Board explained, all Category 2 groundwater conflict issues deal with the issue of withdrawal of groundwater by an applicant when there are competing groundwater users. *Id.* Table B-1 of Part 51 and Section 4.8.1 of the GEIS make this abundantly clear, describing the "groundwater use conflict" issues as relating to plants that use more than 100 gallons of groundwater per minute, plants with cooling towers that withdraw makeup water from a small river, and plants that use Rainey wells. None of these issues apply to Turkey Point. The scope of the groundwater use conflict issues is also

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<sup>6</sup> The Intergrated Plant Assessment (IPA) is the portion of the license renewal application which, pursuant to 10 C.F.R. § 54.21(a), demonstrates that aging of structures and components will be adequately managed.

reflected in 10 C.F.R. § 51.53(c), which defines specifically each issue that a renewal applicant must address. None of these Category 2 issues relate to alleged radiological or chemical contamination of aquatic resources.

In his brief, Mr. Oncavage asserts that he disagrees with the Licensing Board's interpretation of a groundwater conflict (Pet. Br. at 3), but he provides no meaningful discussion of this disagreement or explanation why the Board erred. A person challenging a Licensing Board's ruling must at least give some reason why he thinks it is erroneous. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-469, 7 N.R.C. 470, 471 (1978). Clearly, the Licensing Board committed no error.

The rejection of Mr. Oncavage's Contention 1 should also be upheld on the separate ground, advanced by FPL before the Licensing Board,<sup>7</sup> that the proposed contention is not supported by any basis demonstrating a genuine dispute concerning a material issue, as required by 10 C.F.R. § 2.714(b)(2). Mr. Oncavage provided no information whatsoever to show that there has been any appreciable or significant radiological or chemical contamination of the Biscayne Bay during the over 25-year period of plant operation, and he provided no information to show that any such contamination might be likely during a renewal term. He provided no expert opinion or references to show there is any genuine risk of radiological or chemical contamination of the Biscayne Bay.<sup>8</sup> Therefore, even if Oncavage Contention 1 were within the

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<sup>7</sup> A party prevailing before the Licensing Board may defend its favorable result on any ground that is supported by the record. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 N.R.C. 347, 357 (1975); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 N.R.C. 135, 141 (1986), rev'd in part on other grounds, CLI-87-12, 26 N.R.C. 383 (1987).

<sup>8</sup> For a full discussion of the lack of basis for Oncavage Contention 1, see FPL's Response to Contentions of Mark. P. Oncavage and Joette Lorion (Jan. 8, 2001) at 10-12.

scope of the proceeding – and it is not – the contention would still be inadmissible for its failure to meet minimal pleading requirements.

**B. Oncavage Contention 2**

Oncavage Contention 2 is inadmissible because it is outside of the scope of this proceeding. Contention 2 alleged that the location of Turkey Point poses unusual and severe challenges to the integrity of spent fuel, whether in spent fuel pools or in dry cask storage (despite the fact that FPL has no dry cask storage at Turkey Point); and in three subsections (designated 2A, 2B, and 2C), Mr. Oncavage referred to the effects of hurricanes, air crashes, and hypothetical attacks by Cuban military aircraft.<sup>9</sup> The Licensing Board considered whether this contention was admissible under either 10 C.F.R. Part 54 or 10 C.F.R. Part 51, and found it was not.

The Licensing Board determined that the allegation that Turkey Point's spent fuel pool facility cannot withstand a beyond design basis hurricane was not admissible under Part 54, because the issues concerning adequacy of the current licensing basis are not within the scope of license renewal. LBP-01-06, slip op. at 34. Similarly, Mr. Oncavage's allegations concerning air crashes challenged the design-basis for external hazards. *Id.* at 35. Contention 2 did not relate to the management of the aging of systems, structures, and components within the scope of Part 54, or to the time-limited aging analyses, and contained no discussion of or references to the Integrated Plant Assessment or evaluation of time-limited aging analyses. Mr. Oncavage does not appear to challenge this ruling on appeal.

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<sup>9</sup> At the prehearing conference, Mr. Oncavage withdrew the portion of his contention concerning Cuban military air strikes. Tr. 42; LBP-01-06, slip op. at 35 n.12.

With respect to admissibility under 10 C.F.R. Part 51, the Licensing Board correctly ruled that the issue of onsite spent fuel storage is a Category 1 issue. Indeed, in the Oconee license renewal proceeding, the Commission previously held:

Category 1 issues include the radiological impacts of spent fuel and high-level waste disposal, low-level waste storage and disposal, mixed waste storage and disposal, and on-site spent fuel. See Table B-1, Part 51, Subpart A, Appendix B. The Commission's generic determinations governing onsite waste storage preclude the Petitioners from attempting to introduce such waste issues into this adjudication.

Oconee, supra, CLI-99-11, 49 N.R.C. at 343.

The Licensing Board also ruled that Oncavage Contention 2 is barred by the Commission's Waste Confidence Rule, 10 C.F.R. § 51.23(a). LBP-96-01, slip op. at 33-34. The Waste Confidence Rule states:

The Commission has made a generic determination that, if necessary, spent fuel generated at any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations.

10 C.F.R. § 51.23(a) (emphasis added).

Mr. Oncavage argues on appeal that the Waste Confidence Rule was written in 1983 and amended in 1990, before there was an "international, commercial airport planned for Homestead AFB whose runway is 4.9 miles from the Turkey Point site." Pet. Br. at 4. This argument is meritless for several reasons. First, the NRC's Waste Confidence Rule was reaffirmed in December 1999. 64 Fed. Reg. 68,005. Second, and more importantly, the Air Force issued a Record of Decision, a copy of which was provided to the Licensing Board at the prehearing conference (Tr. 58-59), deciding that the Homestead Air Force Base will not be developed as a commercial airport. See 66 Fed. Reg. 12,930 (2001). It is remarkable that Mr. Oncavage failed

to inform the Commission of this fact in his brief. Third, Mr. Oncavage submitted no petition to waive the Waste Confidence Rule in this proceeding.

Mr. Oncavage also quarrels with the Licensing Board's ruling that Oncavage Contention 2 did not raise any issue involving severe accident mitigation alternatives (SAMAs). Pet. Br. at 4. He argues that since the NRC has no control over the planned development of the international airport and no means to remove spent fuel from the site, mitigation is the only alternative. Since there is no longer any international airport planned for Homestead, his argument is meaningless. In any event, Oncavage Contention 2 did not refer to SAMAs anywhere, did not discuss or question FPL's SAMA analysis in section 4.20 of the ER, and did not allege that any additional SAMA needed to be considered. Mr. Oncavage's current suggestion that Contention 2 involves SAMAs is baseless.

Moreover, like Contention 1, the rejection of Oncavage Contention 2 should also be upheld on the separate ground, advanced by FPL before the Licensing Board, that the proposed contention is not supported by any basis demonstrating a genuine dispute concerning a material issue. In section 2A of his contention, Mr. Oncavage asserted that the spent fuel storage facilities would be vulnerable to a category 5 hurricane "due to inadequate construction practices and having no 'defense in depth,'" but he did not identify or provide any evidence of inadequate construction practices or provide any basis for his assertion that there is no defense in depth. He provided no discussion of the Class I spent fuel pool and the Class I auxiliary building in which the spent fuel pool is located, nor any discussion of the aging or aging management of these structures, or of the sections of FPL's application addressing their aging management. In section 2B, Mr. Oncavage challenged a safety assessment that had been performed when the Air Force

was considering whether to develop Homestead Air Force Base as a commercial airport, but since the Air Force has rejected this proposal, the entire subject matter is irrelevant.<sup>10</sup>

## II. MR. ONCAVAGE'S QUESTIONS REFLECT A MISUNDERSTANDING OF THE NRC'S REGULATIONS AND NEPA AND ARE IRRELEVANT

As stated earlier, Mr. Oncavage devotes most of his brief to three questions, which he asserts that he asked during the prehearing conference. These three questions are (1) whether 10 C.F.R. Part 51, 10 C.F.R. Part 54 and NEPA are mutually exclusive; (2) can 10 C.F.R. Parts 51 and 54 restrict NEPA provisions; and (3) if the safety evaluation report (SER) contains information that goes beyond the scope of Parts 51 and 54, how can a petitioner question or litigate those issues. Pet. Br. at 2, 3, and 4.

Mr. Oncavage's argument is very hard to follow. Mr. Oncavage does not identify where in the prehearing conference transcript these questions are raised, and he does not explain the relevance of these questions to the Licensing Board's rulings dismissing his contentions. His attempt to pose rhetorical questions without any meaningful or coherent discussion of how they relate to the Licensing Board's rulings on the contentions is extremely confusing. An appellant bears the responsibility of ensuring its brief contains cogent argument alerting the parties and the Commission to the precise nature of appellant's claims; and where inadequate briefing makes arguments impossible to resolve, the appeal may be dismissed. Advanced Medical Systems, Inc., CLI-94-6, 39 N.R.C. 285 (1994), *aff'd*, Advanced Medical Systems v. NRC, 61 F.3d 903 (6<sup>th</sup> Cir. 1995); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 N.R.C. 952, 956 (1982). In any event, Mr. Oncavage's questions appear

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<sup>10</sup> For a full discussion of the lack of basis for Oncavage Contention 2, see FPL's Response to Contentions of Mark. P. Oncavage and Joette Lorion (Jan. 8, 2001) at 13-17.

simply to reflect a basic misunderstanding of the NRC's regulations and NEPA, and raise no infirmity in the Licensing Board's decision.

**A. 10 C.F.R. Part 51, 10 C.F.R. Part 54, and NEPA Are Not Mutually Exclusive**

With respect to the first question, nothing in the NRC's regulations or the Licensing Board's rulings in this proceeding suggests that 10 C.F.R. Part 51, 10 C.F.R. Part 54, and NEPA are mutually exclusive. Indeed, the NRC's regulations in 10 C.F.R. Part 51, governing the environmental review under NEPA, require an applicant in its ER and the NRC staff in its environmental impact statement (EIS)<sup>11</sup> to evaluate issues that exceed the scope of Part 54. The requirement to consider SAMAs is a prime example. While the regulations in Part 54 presume that the plants' current licensing basis is adequate to ensure an acceptable level of safety, the regulations in 10 C.F.R. Part 51 require an applicant to evaluate both design and procedural changes to determine whether severe accident risk can be further reduced in a cost-beneficial manner. Moreover, in denying a recent petition for rulemaking, the Commission rejected the argument that Part 54 should constrain its environmental review. 66 Fed. Reg. 10,834 (2001). Thus, limitations on the scope of review under Part 54 do not limit the review under Part 51 and NEPA. The environmental review in an individual license renewal proceeding is limited only by the Commission's generic determinations in the GEIS, the rules in Part 51 codifying those generic determinations, and of course the scope of the proposed action (license renewal) itself.

The crux of Mr. Oncavage's argument appears to be that 10 C.F.R. § 54.30 "drastically narrows the scope of NEPA." Pet. Br. at 2. Mr. Oncavage does not provide any explanation of

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<sup>11</sup> For license renewal, the NRC staff prepares an environmental impact statement which is a supplement to the GEIS. 10 C.F.R. § 51.95(c).

how the scope of Part 54 narrows NEPA review. Nor does Mr. Oncavage show that this “problem” had any bearing on the inadmissibility of his contentions. To the extent that his contentions raised environmental issues, those contentions were dismissed because they challenged the generic determinations in the GEIS, and not because of any limitation imposed by Part 54 on the scope of NEPA review.

During the prehearing conference, Mr. Oncavage questioned whether NEPA and the Commission’s regulations are mutually exclusive apparently to suggest that he could raise any issue without regard to the scope established by the NRC’s regulations, simply by characterizing the issue as a contention invoking NEPA. See Tr. 43. Again, NEPA requires no broader review than the review established by the Commission’s implementing regulations in 10 C.F.R. Part 51, and Mr. Oncavage’s attempt to suggest that NEPA gives him the right to ignore the limits established by the NRC’s regulations is incorrect as a matter of law and must be rejected.

**B. 10 C.F.R. Parts 51 and 54 Do Not Restrict NEPA**

With respect to the second question, Part 51 implements NEPA. It does not modify, amend, or restrict that statute. Nor does Part 54 restrict NEPA review, as discussed above.

The generic findings that the NRC has made in its GEIS do restrict the additional environmental review that an applicant and the NRC staff must conduct in an individual license renewal proceeding, but this entire approach – generic findings with supplemental review of certain site-specific issues – is a permissible means of implementing NEPA, and not a restriction on the statute. As a legal matter, the ability of an agency to consider and resolve environmental issues generically is well established. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 539-40 (1978) (upholding NRC’s rule generically quantifying the environmental effects of the fuel cycle); Baltimore Gas & Electric Co. v. Natural

Resources Defense Council, 462 U.S. 87, 100-01 (1983); Natural Resources Defense Council v. NRC, 539 F.2d 824, 838-40 (2d Cir. 1976), vacated on other grounds, 434 U.S. 1030 (1978); Minnesota v. NRC, 602 F.2d 412, 416-17 (D.C. Cir. 1979).

Although it is very difficult to determine from his brief just how Mr. Oncavage believes NEPA is restricted, Mr. Oncavage appears to view the initial focus on FPL's ER as a restriction on NEPA. See Pet. Br. at 3. He states that his Contention 1 does not challenge FPL's ER and appears to suggest that his issue deals with the NRC's obligations under NEPA.<sup>12</sup> Id. This is a distinction without a difference, since the scope of the applicant's review and the scope of the NRC staff's review are the same. Both rely on the NRC's generic determinations to resolve Category 1 issues. Compare 10 C.F.R. § 51.53(c) with 10 C.F.R. § 51.95(c). In any event, the Commission's regulations require a petitioner to plead its contentions based on an applicant's ER. 10 C.F.R. § 2.714(b)(2)(iii); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 338 (1999). If subsequent NRC staff documents provide significantly different data or conclusions, the NRC's rules allow the filing of late-filed contentions. Id. See also 54 Fed. Reg. 33,168, 33,172 (1989); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1050 (1983).

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<sup>12</sup> During the prehearing conference, Mr. Oncavage's question appeared to relate to his view that he could ignore the limitations on the scope of the safety review under Part 54 or the environmental review under Part 51 simply by characterizing his issues as invoking NEPA rather than the NRC's regulations. See Tr. 43. In essence, Mr. Oncavage's first and second questions appear to be the same, and indeed they were both raised on the same page of the prehearing conference transcript. Id.

**C. The NRC's SER Will Not Exceed the Scope of Part 54, but if the SER Report Raises Significant New Information, a Petitioner May File a Late-Filed Contention.**

Mr. Oncavage's third question is based on an incorrect assumption – that the NRC staff's SER may raise information beyond the scope of Parts 54 and 51. Since the staff's SER is merely the document that reflects the staff's review of the information submitted by an applicant pursuant to 10 C.F.R. Part 54 and provides the basis for the NRC staff's findings pursuant to 10 C.F.R. § 54.29, the document will not exceed the scope established by 10 C.F.R. Part 54. The staff's SER similarly cannot change the nature of the proposed action (license renewal) determining the scope of environmental review under NEPA.

It is, of course, possible that an SER (or staff's EIS) could disclose new and significant information affecting a Category 1 or Category 2 issue, or could provide the basis for a new safety contention. In this event, the NRC's rules allow a petitioner to file a late-filed contention. Mr. Oncavage appears to believe that his rights are abridged by the dismissal of his contentions many months before the SEIS and SER are issued (Pet. Br. at 4; see also Tr. 20-22), but the courts have specifically upheld the NRC's procedures requiring petitioners to base contentions on the application and applying the late-filing criteria to subsequent contentions based on staff documents. Union of Concerned Scientists v. NRC, 920 F.2d 50, 55-56 (D.C. Cir. 1990). See also National Whistleblower Ctr. v. NRC, 208 F.3d 256, 265 (D.C. Cir. 2000), rehearing en banc denied (June 15, 2000), cert. denied, 121 S. Ct. 758 (2001). Consequently, Mr. Oncavage's rights were not abridged.

## CONCLUSION

In sum, Mr. Oncavage's contentions were properly dismissed because they raised no issues within the scope of the proceeding and were in any event unsupported by an adequate basis. Mr. Oncavage identified no error in the Licensing Board's rulings. For these and the other reasons stated above, the Licensing Board's decision in LBP-01-06 should be affirmed.

Respectfully Submitted,



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Dated: April 2, 2001

April 2, 2001

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing "Florida Power and Light Company's Brief in Opposition to Appeal of Mark P. Oncavage," dated April 2, 2001, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by e-mail or hand delivery, this 2nd day of April, 2001.

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Adjudication  
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