

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
FLORIDA POWER & LIGHT COMPANY)	Docket Nos. 50-250-LR
)	50-251-LR
(Turkey Point Nuclear Plant,)	
Units 3 and 4))	

NRC STAFF'S RESPONSE TO PETITIONER
MARK P. ONCAVAGE'S APPEAL OF LBP-01-06

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Counsel for NRC Staff

April 3, 2001

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Pursuant to 10 C.F.R. § 2.714a(a), the NRC Staff ("Staff") hereby submits its brief in response to petitioner Mark P. Oncavage's appeal¹ of the Memorandum and Order (Ruling on Petitioners' Standing and Contentions) (Feb. 26, 2001)² (LBP-01-06) issued by the Atomic Safety and Licensing Board (Board). For the reasons set forth below, the Staff submits that the Board's decision to deny the admission of Mr. Oncavage's contentions and deny his petition for leave to intervene should be affirmed.

BACKGROUND

On September 11, 2000, Florida Power & Light Company (FPL or Applicant) filed an application, pursuant to 10 C.F.R. Part 54, for renewal of the operating licenses for its Turkey Point Nuclear Plant, Units 3 and 4, located in Miami-Dade County, Florida. A notice of an opportunity for a hearing was published in the *Federal Register* on October 12, 2000. 65 Fed. Reg. 60,698 (2000). On October 24, 2000, Mr. Oncavage filed a timely petition for

¹Petitioner Mark P. Oncavage's Notice of Appeal and Brief (Mar. 19, 2001) (Appeal Brief).

²*Florida Power & Light Co. (Turkey Point Nuclear Plant, Units 3 and 4), LBP-01-06, 53 NRC ____, slip op. (Feb. 26, 2001).*

leave to intervene and request for a hearing, to which he attached seven enumerated contentions.³ Following the Staff's response addressing Mr. Oncavage's standing,⁴ Mr. Oncavage filed a supplemental letter dated November 22, 2000.

The Commission referred the matter for appointment of a Board on November 27, 2000.⁵ In accordance with a schedule set by the Board, Mr. Oncavage filed his amended contentions (reduced from his original seven contentions to contentions enumerated as 1, 2A, 2B, and 2C) on December 22, 2000,⁶ in response to which the Staff filed an answer.⁷ Following a pre-hearing conference on January 18, 2001, to hear oral argument on standing and proffered contentions, the Board issued its ruling in LBP-01-06. In its decision, the Board determined that Mr. Oncavage had standing, but held that he failed to proffer at least one admissible contention, and thus denied his petition. Specifically, the Board noted that Mr. Oncavage's contentions either impermissibly challenged the NRC's license renewal regulations, or were beyond the scope of the proceeding. See LBP-01-06,

³Another individual, Ms. Joette Lorion, also requested a hearing and petitioned for leave to intervene, and later filed contentions, none of which were admitted by the Board. She has not appealed LBP-01-06.

⁴NRC Staff's Response to Request for Hearing and Petition for Leave to Intervene Filed By Mark P. Oncavage (Nov. 13, 2001). FPL also filed a response. See FPL's Opposition to Request for Hearing and Petition for Leave to Intervene of Mark P. Oncavage (Nov. 9, 2000).

⁵*Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-00-23, 52 NRC 327 (2000).

⁶Amended Contentions of Mark P. Oncavage (Dec. 22, 2000) (Amended Contentions).

⁷NRC Staff's Answer to Contentions Filed By Ms. Joette Lorion and Mr. Mark Oncavage (Jan. 9, 2001) (Staff Contention Response). FPL also filed FPL's Response to Contentions of Mark P. Oncavage and Joette Lorion (Jan. 8, 2001) (FPL Contention Response).

slip op. at 30-35. Mr. Oncavage is now appealing the Board's decision, asking that the Commission reconsider the admissibility of his contentions. As set forth more fully below, the Staff submits that Mr. Oncavage has failed to state any basis upon which the Commission could conclude that the Board erred in LBP-01-06, in determining that he failed to submit any admissible contentions. Accordingly, Mr. Oncavage's appeal should be denied.

DISCUSSION

To be admitted as a party to a license renewal proceeding, a petitioner for intervention must proffer at least one admissible contention for litigation. 10 C.F.R. § 2.714(b)(1); *see Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a contention to be admitted, it must meet the standards set forth in 10 C.F.R. § 2.714(b)(2), which, in summary, provide that each contention must consist of a "specific statement of the issue of law or fact to be raised or controverted," and must be accompanied by a brief explanation of the bases of the contention; a concise statement of the alleged facts or expert opinion that support the contention; and sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2). Additionally, a contention must also be dismissed where "the contention, if proven, would be of no consequence . . . because it would not entitle [the] petitioner to relief." 10 C.F.R. § 2.714(d)(2)(ii). The failure to present at least one contention which satisfies these requirements is grounds for dismissing the contention. 10 C.F.R. § 2.714(d)(2)(i); *see Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

With specific regard to license renewal, the Commission, in its “Statement of Policy on Conduct of Adjudicatory Proceedings,” CLI-98-12, 48 NRC 18 (1998), emphasized that under the governing regulations in 10 C.F.R. Part 54, “the review of license renewal applications is confined to matters relevant to the extended period of operation requested by the applicant. The safety review is limited to the plant systems, structures, and components (as delineated in 10 C.F.R. § 54.4) that will require an aging management review for the period of extended operation or are subject to an evaluation of time-limited aging analyses.” CLI-98-12, 48 NRC at 22, *citing* 10 C.F.R. §§ 54.21(a) and (c), 54.29 and 54.30. The Commission continued, noting that the review of environmental issues too “is limited by rule by the generic findings in NUREG-1427, ‘Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants.’ ” *Id.*, *citing* 10 C.F.R. §§ 5[1].71(d) and 51.95(c). Absent a showing of special circumstances, if a contention attempts to raise issues beyond the scope of these regulations, it is an impermissible attack on “generic determinations established by NRC rulemakings” and thus, not admissible. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 383, 391 (1998), *aff’d*, CLI-99-11, 49 NRC 328 (1999); *see* 10 C.F.R. § 2.758.

I. Contention 1

Mr. Oncavage’s first contention alleged that “the aquatic resources of Biscayne National Park will become contaminated with radioactive material, chemical wastes, and herbicides during the license renewal term which will endanger the health and safety of the members of the public who consume aquatic food products that originate in the waters of Biscayne National Park and Card Sound.” Amended Contentions at 1. Mr. Oncavage relied upon both intentional and unintentional disposal of material into the cooling canals

and seepage of the material into Biscayne Bay and Card Sound, ultimately resulting in alleged accumulation of radioactive material in various biota in the water systems as the bases for this contention. *Id.*

The Board agreed with the Staff and FPL that Mr. Oncavage's first contention impermissibly challenged the Commission's regulations.⁸ In its decision the Board explained:

To the extent Mr. Oncavage's first contention purports to raise a health and safety issue, it presents a challenge to 10 C.F.R. § 54.21 because the contention does not raise any aspect of the Applicant's aging management review or evaluation of the plant's systems, structures, and components subject to time-[limited] aging analysis. If, on the other hand, Mr. Oncavage's first contention seeks to raise an environmental issue, it presents a challenge to 10 C.F.R. § 51.53(c) and 10 C.F.R. Part 51, [Subpart A], Appendix B by raising issues beyond the limited scope of those provisions.

LBP-01-06, slip op. at 31-32. The Board's reasoning is clear and in his Appeal Brief, Mr. Oncavage points to no error in the Board's decision.

Instead, Mr. Oncavage's appeal only clarifies that his discontent is not with the Board's decision, but, in fact, with agency regulations. Citing 10 C.F.R. § 51.71(d), Mr. Oncavage states that the NRC regulations make "statements that appear contradictory" and that 10 C.F.R. § 51.95(c) "exemplifies the problem of Commission rules restricting NEPA provisions." Appeal Brief at 3. In fact, Mr. Oncavage offers no other argument in his Appeal Brief other than suggesting that by following the agency's license renewal regulations, the Board's determination constituted a "violation of federal law." Appeal Brief at 2. Consequently, Mr. Oncavage has stepped outside the bounds of appropriate contentions in the license renewal context.

⁸See Staff Contention Response at 21; FPL Contention Response at 9-10.

Additionally, Mr. Oncavage's reliance on *Duke Power Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041 (1983) (*see* Appeal Brief at 2) with respect to this matter is misplaced. The *Catawba* language quoted by Mr. Oncavage simply reaffirms that, because the NRC has the burden of complying with NEPA, the adequacy of a Draft Environmental Impact Statement (DES) or Final Environmental Impact Statement (FES) is an appropriate issue for litigation, and that contentions which raise factual aspects of particular issues regarding the inadequacy of these documents can be proffered prior to the availability of the documents. Appeal Brief at 2.

Contrary to Mr. Oncavage's reasoning, however, the Board did not deny his contention because he raised issues prior to preparation of the DES; rather Mr. Oncavage's contention was denied because it challenges the regulations governing the license renewal process. The Board's decision to deny admission of this contention on the grounds that it impermissibly challenged NRC regulations was entirely proper and Mr. Oncavage has offered no argument to contradict the Board's sound reasoning. Therefore, the Board's decision to deny admission of Mr. Oncavage's first contention should be affirmed.⁹

⁹ Mr. Oncavage additionally repeats his argument that the concerns raised in his first contention should be categorized as "ground water use conflicts" and thus are a 10 C.F.R. Part 51, Subpart A, Appendix B, Category 2 issue which requires additional analysis beyond the evaluation in the GEIS according to 10 C.F.R. Part 51, Subpart A, Appendix B. However, as the Staff previously noted (*see* Staff's Contention Response at 21), the concerns raised in Mr. Oncavage's first contention relate generally to offsite radiological releases, a Category 1 issue, and are more directly addressed under other Appendix B topics such as: radiation exposure to the public during license renewal; the discharge of chlorine and other biocides; and the discharge of sanitary waste and minor chemical spills -- all of which are delineated as Category 1 issues. Moreover, a review of the categories identified as "ground-water use conflicts" in Appendix B reveals that this topic involves the withdrawal of ground water by the Applicant when there are competing ground water uses. *See* 10 C.F.R. Part 51, Subpart A, Appendix B. As the Board observed, the situation of competing ground water uses is "far different from Mr. Oncavage's allegation."
(continued...)

II. Contention 2

Mr. Oncavage's second contention contained multiple parts, all dealing with the issue of spent fuel.¹⁰ In his second contention, Mr. Oncavage asserted that the location of Turkey Point poses unusual challenges to the safe storage of spent fuel, that wet or dry storage of spent fuel would be particularly vulnerable to a category 5 hurricane, and that the Safety Evaluation Report (as yet not drafted) for the Turkey Point license renewal is fatally flawed because it relies upon an inadequate safety analysis performed by the NRC regarding the safety implications of developing an airport 4.9 miles from the reactor site. Amended Contentions at 2-4.

The Board, in its decision, essentially accepted the arguments raised by the Staff or FPL as to why Mr. Oncavage's second contention should not be admitted.¹¹ The Board explained that the multiple parts comprising this contention relating to the issue of onsite spent fuel storage raised a 10 C.F.R. Part 51, Subpart A, Appendix B, Category 1 issue which is not subject to further examination in a license renewal proceeding. Additionally, the Board concluded that each of the various parts of the contention were "barred by the Commission's Waste Confidence Rule, 10 C.F.R. § 51.23(a), in which the Commission found that spent fuel could be stored safely onsite during and after the renewal term." LBP-01-06, slip op. at 33, *citing Oconee*, CLI-99-11, 49 NRC at 343. Finally, Mr.

⁹(...continued)
LBP-01-06, slip op. at 32; see Appeal Brief at 3. While Mr. Oncavage restates this argument in his Appeal Brief, he offers no further discussion other than to note his general disagreement with the Board.

¹⁰Amended Contention 2C was withdrawn by Mr. Oncavage at the January 18, 2001 prehearing conference.

¹¹See Staff Contention Response at 22-25; FPL Contention Response at 12-16.

Oncavage's concerns regarding the impact of a Category 5 hurricane and the siting of an airport facility 4.9 miles from the reactor site on spent fuel storage were noted by the Board to be impermissible challenges to the design basis for external hazards at Turkey Point since issues involving the current licensing basis for a facility are not within the scope of review of license renewal. LBP-01-06, slip op. at 33. Mr. Oncavage presents no argument on appeal that would render the Board's reasoning in error, but only restates his allegation challenging the foundation of the Waste Confidence Rule.

Additionally, regarding his second contention, the Board dismissed Mr. Oncavage's argument that an accident involving spent fuel is an issue potentially subject to litigation in a license renewal proceeding in accordance with 10 C.F.R. Part 51, Subpart A, Appendix B, Category 2, explaining that only severe accident mitigation alternatives may be considered for license renewal Category 2 issues. In his Appeal Brief, Mr. Oncavage responds, arguing that his failure to raise any issue involving mitigation alternatives is due to the staff's "inability to produce a [supplemental environmental impact statement (SEIS) or a safety evaluation report (SER)] in a timely manner," and that the dismissal of his contention prior to the publication of these documents "abrogates any legitimate opportunity for the Petitioner to amend the contentions upon the issuance of the SEIS and SER." Appeal Brief at 4-5. Mr. Oncavage concludes by again citing *Catawba* which asserts that there is no reason to defer contentions until issuance of the SER, but instead the contentions should be based upon the Applicant's Final Safety Analysis Report, and if the subsequent issuance of the SER then leads to changes, the contentions can be amended or promptly disposed of. Appeal Brief at 5.

Once again, however, Mr. Oncavage has misinterpreted the Board's ruling and the case law. The Board did not dismiss his second contention because it was based upon premature -- or as yet inconclusive -- information. Instead, Mr. Oncavage's second contention, just as his first, was appropriately dismissed because it improperly challenged NRC regulations. All of Mr. Oncavage's concerns raised in his second contention have been generically addressed by rulemaking and are, therefore, outside the scope of a license renewal proceeding. See *Oconee*, CLI-98-33, 48 NRC at 391. The language cited by Mr. Oncavage only reaffirms the fact that access to the SEIS and SER are unnecessary for the framing of original contentions, which instead, are to be based upon information submitted by the Applicant, and that had Mr. Oncavage filed a proper contention, establishing a genuine dispute with the Applicant on a material issue of law or fact, he would have later had an opportunity to attempt to amend his contention, if necessary, based upon subsequently acquired information. See 10 C.F.R. §§ 2.714(a)(3) and (b)(2)(iii). Mr. Oncavage's failure to proffer admissible contentions was not due to the lack of information, but was instead based upon his apparent misunderstanding of the Commission's license renewal regulations. Rather than presenting a genuine dispute regarding the Applicant's submission, Mr. Oncavage instead submitted contentions which do nothing more than assert his perceived inadequacies in the license renewal regulations themselves, and as such were properly dismissed by the Board.¹²

¹²Furthermore, to the extent his second contention contests not the information submitted by the Applicant, but instead, the structure of the Commission's adjudicatory process which requires petitioners to come forward with contentions now, rather than later, he is essentially requesting generic changes in the adjudicatory rules. The Commission has previously explained that such changes "can be accomplished only through the
(continued...)

In sum, Mr. Oncavage has failed to show any grounds for reversal of the Board's decision. On the contrary, in his Appeal Brief, Mr. Oncavage only reaffirms that he is not challenging the Board's disposition of his petition, but instead seeks to impermissibly challenge agency regulations and limitations on issues within the scope of license renewal.

CONCLUSION

For the reasons set forth above, the Commission should deny Mr. Oncavage's appeal of LBP-01-06.

Respectfully submitted,

/RA/

Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of April 2001

¹²(...continued)
rulemaking process, not through individual adjudications." *Oconee*, CLI-99-11, 49 NRC at 342.

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Unit Nos. 3 and 4))	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Name of Party:	NRC Staff

Respectfully Submitted,

/RA/

Angela B. Coggins
Counsel for NRC Staff

Date of Rockville, Maryland
this 3rd day of April, 2001

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO PETITIONER MARK P. ONCAVAGE'S APPEAL OF LBP-01-06" AND "NOTICE OF APPEARANCE FOR ANGELA B. COGGINS, COUNSEL FOR NRC STAFF" in the above-captioned proceeding have been served on the following with email addresses noted by email, and on all of 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 3rd day of April, 2001.

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