

July 25, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
Florida Power & Light Company)	Docket Nos. 50-335
)	50-389
(St. Lucie Nuclear Plant, Units 1 and 2))	EA-07-321

**FLORIDA POWER & LIGHT COMPANY’S ANSWER TO
REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE
OF SAPORITO ENERGY CONSULTANTS**

INTRODUCTION

Pursuant to 10 C.F.R. §2.309 (h), Florida Power & Light Company (“FPL”), by its undersigned counsel, hereby opposes the Request for Hearing and Petition for Leave to Intervene filed by Saporito Energy Consultants (“SEC” or Petitioner) on July 3, 2008, concerning the U.S. Nuclear Regulatory Commission’s (NRC) issuance of a Confirmatory Order to FPL. *See* “Request for Hearing and Leave to Intervene” (“Hearing Request”). Petitioner has not demonstrated standing to intervene in this proceeding or identified any issue within the scope of this proceeding that would affect its interest, and, accordingly, none of Petitioner’s proposed contentions are admissible. Therefore, the Hearing Request must be denied.

BACKGROUND

The instant petition arises out of a Confirmatory Order issued by the NRC to FPL on June 13, 2008. *See* In the Matter of Florida Power and Light Co., St. Lucie Nuclear Plant; Confirmatory Order (Effective Immediately), 73 Fed. Reg. 36,131 (2008). In the Confirmatory Order, the NRC memorialized and imposed a series of actions that the NRC and FPL agreed

were necessary to remedy a violation of NRC access authorization regulations at FPL's St. Lucie Nuclear Plant (PSL). *See id.* at 36,131. In the Confirmatory Order, the NRC provided an opportunity for persons that could be adversely affected by the Order to request a hearing within 20 days of the Order. *Id.* at 36,133. Pursuant to the Order, on July 3, 2008, Petitioner filed a timely Hearing Request. By Notice dated July 24, 2008, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel established an Atomic Safety and Licensing Board (the "Board") to preside over this proceeding.

DISCUSSION

I. Standing

A. Legal Requirements for Standing

In order to obtain a hearing before the NRC, a petitioner must demonstrate its standing and file at least one admissible contention. *See* Atomic Energy Act §189a(1)(A), 42 U.S.C. §2239 (a)(1)(A) ("Act" or "AEA") (stating "In 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 interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."). To establish standing, the petitioner must comply with 10 C.F.R. § 2.309(d), which requires petitioners to plead "the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding[,] . . . the nature and extent of [the petitioner's] property, financial or other interest in the proceeding; and [t]he possible effect of any decision or order that may be issued in the proceeding on the [petitioner's] interest." 10 C.F.R. § 2.309(d)(1).

Notably, petitioners requesting a hearing in cases arising out of an enforcement order may only intervene upon a showing of injury from the contemplated action set out in the order.

See FirstEnergy Nuclear Operating Company (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 158 (2004). Moreover, the order and notice that provide the opportunity for a hearing define the scope of any potential proceeding. *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (holding the scope of issues that may be considered at hearing are set forth by the terms of the order). In the instant case, the NRC confined the scope of any a hearing on its order solely to the issue of whether the Confirmatory Order should be sustained. 73 Fed. Reg. at 36,133. In enforcement cases, the Commission’s unambiguous, long-standing practice is to deny hearing requests seeking different or stricter enforcement measures as lacking the requisite standing. *Alaska Dep’t. of Transp. and Public Facilities*, CLI-04-26, 60 NRC 399, 404 (2004); *see also Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-05, 59 NRC 52, 57-58 (2004). The Commission has reasoned that “[i]f the petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of standing.” *Alaska Dep’t. of Transp. and Public Facilities*, CLI-04-26, 60 NRC at 405. Furthermore, the Commission has explained that allowing petitioners to request a hearing on matters that are beyond the scope of the notice of opportunity to request a hearing risks “turning focused regulatory proceedings into amorphous public extravaganzas.” *Id.* at 404 (quoting *Bellotti v. NRC*, 725 F.2d at 1382).

Historically, the Commission has applied judicial concepts of standing in determining whether a petitioner has established the requisite interest. *See, e.g., Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994). A 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 Electric*

Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988)).

The injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A petitioner must have a “real stake” in the outcome of the proceeding to establish injury in fact for standing; while this stake need not be a “substantial” one, it must be “actual,” “direct” or “genuine.” *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-7910, 9 NRC 439, 447-48 (1979), *aff’d*, ALAB-549, 9 NRC 644 (1979). A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing. *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP-82-74, 16 NRC 981 (1982) (citing *Allied General Nuclear Services* (Barnwell Fuel Receiving And Storage Station), ALAB-328, 3 NRC 420, 422 (1976)). 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, 117-18 (1998).

B. Petitioner Has Failed to Establish Standing

As discussed above, an essential element of establishing standing is that the injury alleged by the petitioner can be redressed within the proceeding as noticed by the NRC. *See Alaska Dep’t. of Transp. and Public Facilities*, CLI-04-26, 60 NRC at 405. Also, as further explained above, the notice of opportunity for hearing in the instant case is limited in scope solely to the issue of whether the NRC’s Confirmatory Order to FPL should be sustained. 73 Fed. Reg. at 36,133. SEC, however, has failed to establish that any of its concerns can be redressed within the scope prescribed by the NRC in its notice of opportunity for hearing.

Therefore, SEC lacks the required standing to request a hearing. In fact, SEC attempts to do exactly what the NRC and the Court of Appeals have found impermissible in previous cases involving NRC enforcement orders—complain about the NRC enforcement process and demand additional sanctions and civil penalties. *Compare* Hearing Request at 2 (faulting the NRC’s order as insufficient to protect the public health and safety, asking for imposition of additional civil penalties and challenging the NRC’s authority to engage in alternate dispute resolution (ADR)) *with Bellotti v. NRC*, 725 F.2d at 1383 (rejecting the Massachusetts Attorney General’s request for a hearing to litigate the need for safety measures beyond those prescribed by an NRC order) *and Davis-Besse*, CLI-04-23, 60 NRC at 158-59 (holding that petitioners seeking additional measures beyond those set out in a disputed confirmatory order fail to establish an injury redressable within the scope of the hearing).

A close examination of SEC’s hearing request reveals that even though SEC expresses some fear that operations at PSL could have an effect on its interests; such concern is never tied to an issue within the scope of any potential proceeding noticed by the NRC. *See* Hearing Request at 1. Indeed, the issue noticed by the NRC for hearing—whether the Confirmatory Order should be sustained—is not even mentioned in SEC’s request. *Id. passim*. Moreover, the issues actually raised by SEC fall outside the scope of any potential proceeding.

First, SEC complains that the NRC’s Confirmatory Order in this case is not “sufficient to protect public health and safety” and that the NRC should have imposed a “significant civil penalty.” *Id.* at 2. SEC bases its assertion on a belief that root causes of the event redressed by the order “have not been adequately determined.” *Id.* These issues are well beyond the scope of the proceeding and challenge the sufficiency of the actions taken by the NRC and the factual underpinnings of the Confirmatory Order. The Commission has specifically addressed both

types of grievances in previous cases. With regard to SEC's claim that the order is not sufficient and that additional sanctions should have been imposed, the Commission has consistently ruled that petitioners may not seek to enhance the measures outlined in an enforcement order. *Alaska Dep't. of Transp. and Public Facilities*, CLI-04-26, 60 NRC at 405 (denying standing to petitioner based on their requests to impose different or additional enforcement measures). Additionally, the Commission has held that claims by a nonlicensee that facts or "root causes" underpinning a confirmatory order are not accurate are not cognizable in a proceeding concerning a confirmatory order. *Id.* at 408-09.

Lastly, SEC challenges the NRC's authority to engage in ADR. This issue is also beyond the scope of the notice of opportunity for hearing and, as such, cannot be redressed in a proceeding instituted pursuant to such notice. SEC's claim -- a bald assertion that the NRC lacks the authority to engage in ADR -- is baseless. The NRC has wide latitude in administering its enforcement program. *See Heckler v. Chaney*, 470 U.S. 821, 838 n.4 (1985) (noting that agencies are afforded wide latitude in discharging their enforcement obligations). As the Commission has stated:

In evaluating whether to pursue enforcement relief, and in considering various enforcement remedies, the NRC Staff acts like a prosecutor. Our adjudicatory process is not an appropriate forum for petitioners ... to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings.

Id. at 407. Consequently, SEC's assertion regarding the authority of the NRC Staff to engage in ADR is not redressable in the instant proceeding and may not be used to confer standing.

II. Contentions

A. *Contention Pleading Standards*

Beyond demonstrating that a petitioner has the required standing to participate in a hearing, a petitioner must provide at least one admissible contention in order to be admitted into an NRC proceeding. 10 C.F.R. §2.309(a). In order to be admissible, a contention must provide:

- a “specific statement of the issue of law or fact to be raised or controverted;”
- a “brief explanation of the basis for the contention;”
- a “concise statement of the alleged facts or expert opinions” supporting the contention together with references to “specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;” and
- “[s]ufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact,” which showing must include “references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.”

10 C.F.R. §§ 2.309(f)(1)(i), (ii), (v) and (vi). Notably, if a petitioner fails to comply with any one of these requirements the contention is inadmissible. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

The standards governing admissibility of contentions were promulgated as an amendment to 10 C.F.R. § 2.714, now § 2.309. Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989). The rule was intended “to raise the threshold for the admission of contentions.” *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999); *Palo Verde*, CLI-91-12, 34 N.R.C. at 155-56. The “contention rule is strict by design,”

having been “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 358 (2001) (citation omitted). “If any one [of the pleading standards] . . . is not met, a contention must be rejected.” *Palo Verde*, CLI-91-12, 34 N.R.C. at 155 (citation omitted). Licensing Boards are not allowed to supply their own information or to overlook any faults with proposed contentions. *Id.*

The Commission raised the threshold for contention admissibility to eliminate lengthy hearing delays caused in the past by contentions that had been admitted which were unsupported and loosely defined. *Oconee*, CLI-99-11, 49 N.R.C. at 334. When it incorporated the contention pleading standards into the new Part 2 rules, the Commission reemphasized that “[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.” 69 Fed. Reg. 2,182, 2,189-90 (Jan. 14, 2004).

B. SEC’s Contentions are Inadmissible

SEC filed three proposed contentions in its petition. The Contentions can be grouped into two categories: those requesting additional enforcement and one challenging the NRC’s administration of its enforcement program. *See* Hearing Request at 2. All of the contentions fail to meet the NRC’s strict pleading requirements. Consequently, even assuming *arguendo* that the Board were to find that SEC has standing in this proceeding, SEC’s request must be denied for failure to plead a single admissible contention.

1. SEC's Proposed Contentions 1 and 2 Impermissibly Raise Issues beyond the Scope of the Proceeding and Fail to Provide any Specificity or Basis for Their Allegations.

As explained above, SEC Proposed Contentions 1 and 2 are attempts to commence a proceeding as means to enhance the measures imposed by the NRC in the Confirmatory Order. Particularly, SEC complains that the NRC's Confirmatory Order is not "sufficient to protect the public health and safety" and suggests that the NRC impose a significant civil penalty on FPL. Hearing Request at 2. Moreover, SEC claims that unless the NRC acts as SEC demands, FPL will not be deterred from preventing the violations addressed in the Order from occurring in the future. *Id.* In its request, however, SEC fails to provide any basis for its assertions regarding the need for additional measures. Moreover, SEC does not point to a single statutory or regulatory requirement that would require any additional actions. Given that SEC Proposed Contentions 1 and 2 seek to impermissibly raise issues beyond the scope of the proceeding and do not provide any basis supporting its allegations, Proposed Contentions 1 and 2 are inadmissible.

2. SEC's Proposed Contention 3 Impermissibly Raises Issues beyond the Scope of the Proceeding and Challenges the NRC's Administration of its Enforcement Program.

SEC's Proposed Contention 3 alleges that the NRC lacks the authority to engage in ADR and that the NRC's reliance on the ADR process fails to protect the public health and safety. Hearing Request at 2. Notably, SEC fails to provide any legal or factual basis to support its challenge of the NRC's authority to administer its enforcement program. This contention is inadmissible. As explained above, SEC cannot use this proceeding to litigate issues concerning Staff's discharge of its regulatory functions. *Alaska Dep't. of Transp. and Public Facilities*, CLI-04-26, 60 NRC at 407. Not only are those issues beyond the scope of this proceeding; but,

the NRC Staff's conduct of its regulatory functions is an issue beyond the purview of the Board. *See First Energy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, n.2 (2004) (citing *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 74 n.23)(2004)).

III. Conclusion

For the reasons stated above, SEC's Hearing Request should be denied.

Respectfully Submitted,

/RA/

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