

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

DOCKETED 08/15/08

SERVED 08/15/08

William J. Froehlich, Chairman  
Thomas S. Moore  
Dr. Michael F. Kennedy

In the Matter of

Florida Power & Light Co.  
St. Lucie Nuclear Plant, Units 1 and 2

(Confirmatory Order)

Docket Nos. 50-335-CO and 50-389-CO

ASLBP No. 08-866-01-CO-BD01

August 15, 2008

**MEMORANDUM AND ORDER**

(Denying Request for Hearing)

**I. Introduction**

Before the Licensing Board is a request for hearing seeking to challenge a June 13, 2008, Confirmatory Order<sup>1</sup> issued by the Nuclear Regulatory Commission Staff (Staff) to Florida Power & Light Company (FPL or Licensee). That Confirmatory Order, which was made effective immediately, imposed a series of actions on FPL that the Staff and FPL agreed were necessary to remedy a violation of NRC access authorization regulations at FPL's St. Lucie Nuclear Plant. The Confirmatory Order provided an opportunity for persons adversely affected by the Order to request a hearing within twenty (20) days. In response to the Order, on July 3, 2008, Saporito Energy Consultants, by and through its President, Thomas Saporito (Petitioner or SEC), filed a timely request for hearing.<sup>2</sup>

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<sup>1</sup> Florida Power and Light Company, St. Lucie Nuclear Plant; Confirmatory Order (Effective Immediately), 73 Fed. Reg. 36,131 (June 25, 2008).

<sup>2</sup> Request for Hearing and Leave to Intervene (July 2, 2008) (ADAMS Accession No. ML081890119) [hereinafter SEC Request].

Both FPL and the Staff oppose the grant of the request for hearing.<sup>3</sup> For the reasons set forth below, we find that the Petitioner has failed to demonstrate that it has standing and has failed to proffer an admissible contention. Accordingly, we deny the request for hearing.

## II. Procedural History

FPL is the holder of Operating License Nos. DPR-67 and NPF-16, issued by the NRC, pursuant to 10 C.F.R. Part 50, on March 1, 1976, and April 6, 1983, respectively. The licenses authorize the operation of St. Lucie Nuclear Plant, Units 1 and 2 (St. Lucie or facility), located in Jensen Beach, Florida.

On or about March 10, 2005, two contractors documented their activities pursuant to a work order to indicate that they had used the torque wrench specified in the work order when, in fact, they had used a different torque wrench.<sup>4</sup> This was apparently done to conceal their “over-torquing” of a valve.<sup>5</sup> On April 2, 2008, the NRC sent FPL a letter detailing the results of an NRC Office of Investigations inquiry into that matter.<sup>6</sup> The letter documented two apparent violations associated with FPL’s initial review and investigation into the matter.<sup>7</sup> The first involved the deliberate creation by a Senior Plant Supervisor, Mechanical Maintenance, of an incomplete condition report. According to the Staff, the condition report did not document the falsified work order in violation of 10 C.F.R. § 50.9.<sup>8</sup> The Staff found this to be “material

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<sup>3</sup> Florida Power & Light Company’s Answer to Request for Hearing and Petition for Leave to Intervene of Saporito Energy Consultants (July 25, 2008) [hereinafter FPL Answer]; NRC Staff Response to SEC Request for Hearing and Leave to Intervene (July 28, 2008) [hereinafter Staff Answer].

<sup>4</sup> 73 Fed. Reg. at 36,131.

<sup>5</sup> Id.

<sup>6</sup> Letter from Kriss M. Kennedy, Director, NRC Division of Reactor Safety, to J.A. Stall, Senior Vice President, FPL (Apr. 2, 2008) (ADAMS Accession No. ML080930372) [hereinafter Kennedy Letter].

<sup>7</sup> Id. at 1.

<sup>8</sup> “Information provided to the Commission by an applicant for a license . . . or required . . . to be

because it concealed the violation of a work procedure and the questionable trustworthiness of the two contract maintenance workers.”<sup>9</sup> For instance, had the condition report been complete and accurate, the Staff indicates that FPL’s procedures would have required an evaluation of the two contract workers’ suitability for continued unescorted access and possible entry into the Personnel Access Data System (PADS).<sup>10</sup>

The second apparent violation involved “the Mechanical Maintenance Senior Plant Supervisor’s deliberate failure to contact the appropriate site security manager in order to initiate an assessment of the trustworthiness and reliability of the two contract technicians.”<sup>11</sup> By failing to contact the site security manager, FPL did not meet the Access Authorization program objective in 10 C.F.R. § 73.56(b)(1), which provides high assurance that individuals granted unescorted access are trustworthy and reliable, “and do not constitute an unreasonable risk to the public health and safety, including a potential to commit radiological sabotage.”<sup>12</sup> Had the supervisor acted appropriately and contacted the site security manager, the information would have been considered in evaluating the suitability of two contract workers for continued unescorted access and possible entry into PADS.<sup>13</sup>

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maintained by the applicant or the licensee shall be complete and accurate in all material respects.” 10 C.F.R. § 50.9(a).

<sup>9</sup> Kennedy Letter at 1.

<sup>10</sup> Id. PADS is “a computer-based system for recording background information on employees who have worked with temporary access authorization at one or more nuclear power facilities. PADS provides a corps of ‘pre-approved’ nuclear employees whose unescorted access authorization can be granted by successive licensee employers who subscribe to PADS and who access it for a record of the applicant’s history in the industry.” SECY-98-110, Report on Inspection and Programmatic Findings relating to the Carl C. Drega Incident, attach. 1, at 4 (May 20, 1998) (ADAMS Accession No. ML992880019).

<sup>11</sup> Kennedy Letter at 2.

<sup>12</sup> Id.

<sup>13</sup> Id.

The NRC and FPL entered into an alternative dispute resolution (ADR) session on May 16, 2008, mediated by a professional, independent mediator.<sup>14</sup> An agreement was reached between the NRC and FPL at the ADR session, and the Confirmatory Order was issued pursuant to that agreement. The Order requires FPL to perform eleven corrective actions and enhancements (commitments) within six months of the date of issuance of the Order.<sup>15</sup> The Staff asserts in the Order that the agreed-upon commitments are necessary to ensure that various corrective actions, including conducting future trustworthiness and reliability assessments, will be implemented.<sup>16</sup> The Staff concluded that “with these commitments the public health and safety are reasonably assured.”<sup>17</sup>

The Federal Register notice states that “[a]ny person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance.”<sup>18</sup> The notice further specifies the issue to be considered at that hearing, stating “if a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.”<sup>19</sup> The Staff specified that any person submitting a request for hearing “shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 C.F.R. § 2.309 (d) and (f).”<sup>20</sup>

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<sup>14</sup> 73 Fed. Reg. at 36,131.

<sup>15</sup> Id. at 36,131-32. The eleven commitments encompass training, procedure revision, and reviews.

<sup>16</sup> Id. at 36,131.

<sup>17</sup> Id. at 36,132.

<sup>18</sup> Id. at 36,133.

<sup>19</sup> Id.

<sup>20</sup> Id. 10 C.F.R. § 2.309(d)(1) states the general requirements for standing and 10 C.F.R. § 2.309(f) addresses contention admissibility requirements.

On June 10, 2008, FPL consented to issuance of the Confirmatory Order. FPL further agreed that the Confirmatory Order would be effective upon issuance and that FPL was waiving its right to a hearing.<sup>21</sup>

### III. Request for Hearing

As noted above, the NRC received one request for hearing. The request was submitted by SEC on July 2, 2008.<sup>22</sup> On July 18, 2008, the Commission referred Petitioner's request for hearing to the Atomic Safety and Licensing Board Panel, which established this Licensing Board on July 24, 2008.<sup>23</sup> As NRC regulations provide, the Board will grant a request for hearing to any petitioner who establishes standing and raises at least one admissible contention pursuant to the standards outlined in the NRC's regulations.

This case involves a Confirmatory Enforcement Order. Under existing Commission precedent, the scope of this proceeding is exceedingly limited.<sup>24</sup> Pursuant to the holding in Bellotti v. NRC,<sup>25</sup> the scope of any hearing in this matter is expressly limited to the issue of "whether th[e] Confirmatory Order should be sustained."<sup>26</sup>

### IV. Standards Governing Standing

A petitioner's right to participate in a licensing proceeding stems from Section 189a of the Atomic Energy Act. That section provides for a hearing "upon the request of any person

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<sup>21</sup> 73 Fed. Reg. at 36,132. The Order was formally issued and became effective on June 13, 2008.

<sup>22</sup> SEC Request.

<sup>23</sup> Florida Power and Light Co., Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 44,290-91 (July 30, 2008).

<sup>24</sup> See Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC 399, 404 (2004); see also Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56-57 (2004).

<sup>25</sup> Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), aff'g Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 45-46 (1982).

<sup>26</sup> 73 Fed. Reg. at 36,133.

whose interest may be affected by the proceeding.”<sup>27</sup> The Commission’s regulations implementing that section of the AEA<sup>28</sup> require a licensing board, in ruling on a request for a hearing, to determine whether the petitioner has an interest potentially affected by the proceeding by considering (1) the nature of the petitioner’s right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner’s property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner’s interest.<sup>29</sup>

When assessing whether a petitioner has set forth a sufficient interest to intervene under 10 C.F.R. § 2.309, licensing boards apply judicial concepts of standing.<sup>30</sup> Judicial concepts of standing require the petitioner to show that (1) he or she has personally suffered, or will personally suffer in the future, a distinct and palpable harm that constitutes an injury in fact; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.<sup>31</sup> “If 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.”<sup>32</sup> Accordingly, “it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders.”<sup>33</sup> In the context of an enforcement proceeding, Commission precedent teaches that the scope of the proceeding is directly related to the issue of standing, in

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<sup>27</sup> 42 U.S.C. § 2239(a)(1)(A).

<sup>28</sup> 10 C.F.R. § 2.309(d).

<sup>29</sup> 10 C.F.R. § 2.309(d)(1).

<sup>30</sup> See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 552 (2004).

<sup>31</sup> See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing Steel Co. v. Citizens for a Better Env’t., 523 U.S. 83, 102-04 (1998); Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995)).

<sup>32</sup> Alaska Dep’t of Transp., CLI-04-26, 60 NRC at 405.

<sup>33</sup> Id. at 406 n.28.

that, an individual or organization requesting a hearing must show that the petitioner would be adversely affected by the enforcement order as it exists, rather than being adversely affected by the existing order as it might be compared to a hypothetical order that the petitioner asserts would be an improvement.<sup>34</sup>

#### **V. Standards Governing Contention Admissibility**

The Commission's regulations, 10 C.F.R. § 2.309(f)(1), set out the requirements that must be met if a contention is to be admitted in a NRC licensing or enforcement adjudication. An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.<sup>35</sup> In addition to the contention admissibility standards in Section 2.309(f), Section 2.335(a) prohibits petitioners from challenging NRC regulations.<sup>36</sup> The purpose of the contention rule is to "focus litigation on concrete issues and [should] result in a clearer and more

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<sup>34</sup> Id. at 406.

<sup>35</sup> Nuclear Fuel Services, Inc. (Special Nuclear Facility), LBP-07-16, 66 NRC 277, 285 (2007) (discussing the standards in 10 C.F.R. § 2.309(f)(1)(i)-(vi)).

<sup>36</sup> 10 C.F.R. § 2.335(a); see Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

focused record for decision.”<sup>37</sup> The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”<sup>38</sup> The Commission has emphasized that the rules on contention admissibility are “strict by design.”<sup>39</sup> Failure to comply with any of these requirements is grounds for the dismissal of a contention.<sup>40</sup>

## VI. Positions of the Parties

Thomas Saporito is President of SEC and timely filed the request for hearing. The request is brief – two pages in length – and outlines SEC’s grounds for standing and its three proposed contentions.

With respect to standing, SEC states that: (1) Thomas Saporito is a U.S. citizen, and therefore has an “inherent right under the Act to be made a party to the proceeding,” (2) its real and personal property “can be adversely affected” in the event of a radiological release, which “could forever compromise the environment where the requestor’s/petitioner’s reside, live, and do business”, and finally (3) a decision in SEC’s favor “could substantially protect the interests of the requestor’s/petitioner’s environment, property, and economic viability.”<sup>41</sup>

SEC’s first contention is that “the ‘root-cause’ of the licensee’s 10 CFR 2.309(d)(1), violation of 10 CFR 73.56(b)(1) . . . have not been adequately determined for corrective action.”<sup>42</sup> Therefore, SEC argues, the “Confirmatory Order regarding this violation is not

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<sup>37</sup> Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

<sup>38</sup> Id. at 2202.

<sup>39</sup> Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), pet. for reconsideration denied, CLI-02-1, 55 NRC 1 (2002).

<sup>40</sup> 69 Fed. Reg. at 2221; see also Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

<sup>41</sup> SEC Request at 1-2.

<sup>42</sup> Id. at 2.

sufficient to protect public health and safety.”<sup>43</sup> Second, SEC asserts that “[t]he NRC’s failure to take enforcement action by imposing a significant civil penalty to the licensee does nothing to protect public health and safety because the licensee will not be adequately deterred for recurrence of this violation in the future.”<sup>44</sup> Third, SEC claims that “[t]he NRC does not have requisite jurisdiction and/or authority to adjudicate or resolve licensee violations through utilization of an [ADR] program. Therefore, the NRC’s reliance and use of such a program in this instance fails to adequately protect public health and safety.”<sup>45</sup>

In its Answer, FPL asserts that SEC has not demonstrated standing nor “identified any issue within the scope of this proceeding that would affect its interest.”<sup>46</sup> Accordingly, FPL concludes none of SEC’s proposed contentions is admissible and therefore, SEC’s Request must be denied.

Specifically, FPL argues that 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.”<sup>47</sup> FPL asserts that the notice of opportunity for hearing is limited to the issue of whether the NRC’s Confirmatory Order to FPL should be sustained.<sup>48</sup> FPL states that SEC has failed to demonstrate standing and has not adequately established that any of its concerns can be redressed within the scope prescribed by the NRC in its notice of opportunity for hearing.<sup>49</sup> FPL states that SEC attempts to do exactly what the NRC and the Court of Appeals have found

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<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> FPL Answer at 1.

<sup>47</sup> Id. at 4 (citing Alaska Dep’t of Transp., CLI-04-26, 60 NRC at 405).

<sup>48</sup> Id.

<sup>49</sup> Id. at 4-5.

impermissible in previous cases involving NRC enforcement orders by only complaining about the NRC enforcement process and demanding additional sanctions and civil penalties.<sup>50</sup>

In its Answer, the Staff states that SEC's Request should be denied because SEC "has failed to establish standing, is seeking to litigate concerns that are outside the scope of the issues which may be raised in a hearing on the Order it challenges, and fails to meet the contention admissibility requirements."<sup>51</sup>

The Staff asserts that while SEC does refer to the requirements of 10 C.F.R. § 2.309(d)(1), SEC "does not demonstrate how its interests can be affected by the issues before the Commission."<sup>52</sup> Instead, according to the Staff, SEC's statements attempt to show that due to its proximity to St. Lucie, any problem at the plant could adversely affect its interests.<sup>53</sup> The Staff states that to the extent SEC attempts to base its standing on proximity, it "has not demonstrated any nexus between the subject of the Order and potential radiological-release."<sup>54</sup> The Staff argues that SEC has failed to demonstrate any redressable injury-in-fact and therefore, has not demonstrated standing and the SEC Request should be denied.<sup>55</sup>

SEC did not file a Reply to the Answers filed by FPL and the Staff.

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<sup>50</sup> Id. at 5.

<sup>51</sup> Staff Answer at 1.

<sup>52</sup> Id. at 7.

<sup>53</sup> Id. The Staff notes that the address SEC provided in its Request appears to be a post office box located in Jupiter, Florida. Id. at 7 n.34. The Staff argues that a "licensing board has previously found that writing from a post office box and failing to provide a residential home address constituted part of the basis to deny standing in a petition to intervene." Id. (citing Int'l Uranium (USA) Corp. (White Mesa Uranium Mill; Alternate Feed Material), LBP 97-12, 46 NRC 1, 8 (1997), aff'd, CLI-98-6, 47 NRC 116 (1998)). On July 27, 2008 SEC filed a Notice of Address Change in which it submitted a different address that appears to be a residence. Petitioner's Notice of Address Change (July 27, 2008).

<sup>54</sup> Staff Answer at 7.

<sup>55</sup> Id.

## VII. Board Ruling on SEC Request

SEC's Request for Hearing must be denied. The Board finds that SEC has failed to establish standing, seeks to litigate concerns that are outside the scope of the issues that may be raised in a hearing on a Confirmatory Order, and has failed to proffer at least one admissible contention.

The issue of standing in an enforcement proceeding and whether a request for hearing raises allegations that are within the scope of the proceeding are closely related.<sup>56</sup> A petitioner requesting a hearing must show that the request is within the scope of the proceeding by demonstrating that the petitioner will be adversely affected by the existing terms of the enforcement order. Any purported adverse effects caused by the Confirmatory Order's failure to include revised or additional provisions sought by a petitioner shall be deemed irrelevant for this purpose.<sup>57</sup> If the petitioner fails to show the adverse effects of the Confirmatory Order, the hearing request will be denied.<sup>58</sup>

SEC's argument that it has standing because Mr. Saporito lives in the general vicinity of the facility<sup>59</sup> is insufficient to meet the standing requirements. Although Licensing Boards have used a proximity presumption when resolving issues of standing for cases involving reactor

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<sup>56</sup> See Alaska Dep't of Transp., CLI-04-26, 60 NRC at 405; see also NFS, LBP-07-16, 66 NRC at 285.

<sup>57</sup> Alaska Dep't of Transp., CLI-04-26, 60 NRC at 406.

<sup>58</sup> See 10 C.F.R. § 2.309(a) (“[T]he . . . Board designated to rule on the request for hearing and/or petition for leave to intervene will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section.”).

<sup>59</sup> As stated in note 53 above, SEC filed a revised address with the Commission on July 27, 2008. The original address submitted, a Post Office address, is insufficient to establish standing. The Board assumes his revised address is his residence and further notes that based on Mapquest (<http://www.mapquest.com>) the revised address is located approximately 30 miles from the facility. Proximity alone, however, is insufficient to show standing in an enforcement proceeding. See FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-04-11, 59 NRC 379, 385 (2004).

licensing,<sup>60</sup> in a case involving an enforcement order, such as this one, the standing requirement is based on the Confirmatory Order itself, and the petitioner must show that he will be adversely affected by the terms of the Confirmatory Order.<sup>61</sup>

FPL and the Staff are correct in pointing out that SEC has not sufficiently addressed how it will be adversely affected by the Confirmatory Order. Even though SEC claims that its property will be adversely affected by FPL's operations at St. Lucie,<sup>62</sup> the SEC Request does not show how it will be harmed by the corrective and preventative terms of the Confirmatory Order (i.e., the SEC Request fails to address how the measures instituted by the NRC are contrary to the public health and safety), which, as Bellotti and Alaska Department of Transportation instruct, is the fundamental issue when determining standing and contention admissibility in a proceeding involving an enforcement order.<sup>63</sup> Therefore, something more than proximity to the facility (i.e., a link between the Confirmatory Order and the alleged harm to the individual) is necessary to establish standing.<sup>64</sup> As described above, this Board finds that SEC has not made the appropriate connection between the Confirmatory Order and any alleged harm.

Additionally, even assuming SEC was able to demonstrate standing, its request for hearing fails because it has not raised an admissible contention. The Commission's regulations, 10 C.F.R. § 2.309(f)(1), list six factors for contention admissibility that must be met

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<sup>60</sup> See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 14-15 (2007); see also Sequoyah Fuels, CLI-94-12, 40 NRC at 75 n.22.

<sup>61</sup> Alaska Dep't of Transp., CLI-04-26, 60 NRC at 406.

<sup>62</sup> SEC Request at 1.

<sup>63</sup> Alaska Dep't of Transp., CLI-04-26, 60 NRC at 405 (citing Bellotti, 725 F.2d at 1381).

<sup>64</sup> Id. at 406 (determining that the injury must be "attributable to the Confirmatory Order" to establish standing).

for the Board to admit a contention. The scope of the proceeding issue, just as it is intertwined with the standing issue, is also relevant to the issue of contention admissibility.<sup>65</sup> Section 2.309(f)(1)(iii) requires the petitioner to “[d]emonstrate that the issue raised in the contention is within the scope of the proceeding.”<sup>66</sup> As defined in the Federal Register notice, the scope of the hearing and the issue to be considered is whether the Confirmatory Order should be sustained.<sup>67</sup> SEC does not meet this contention admissibility factor because none of its three proposed contentions are within the scope of this proceeding.

Proposed Contentions 1 and 2 are essentially requests that the NRC take additional enforcement action against FPL. As such, these contentions are outside the scope of this proceeding. The Commission has consistently and unequivocally ruled that petitioners may not seek to enhance the measures outlined in an enforcement order.<sup>68</sup> Additionally, the Commission has held that claims by a nonlicensee to the effect that the root causes or facts underpinning a Confirmatory Order are inaccurate, are not valid claims in a proceeding concerning a Confirmatory Order.<sup>69</sup>

Proposed Contention 3 challenges the NRC’s authority to engage in ADR. This contention is also beyond the scope of this proceeding.<sup>70</sup> Supreme Court precedent establishes that agencies have wide latitude in administering their enforcement program.<sup>71</sup> Indeed, the

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<sup>65</sup> See 10 C.F.R. § 2.309(f)(1)(iii).

<sup>66</sup> Id.

<sup>67</sup> 73 Fed. Reg. at 36,133.

<sup>68</sup> Alaska Dep’t of Transp., CLI-04-26, 60 NRC at 405.

<sup>69</sup> Id. at 408-09.

<sup>70</sup> See 10 C.F.R. § 2.309(f)(1)(iii).

<sup>71</sup> See Heckler v. Chaney, 470 U.S. 821, 837-38 (1985) (noting that agencies are afforded wide latitude in discharging their enforcement obligations).

Administrative Dispute Resolution Act of 1996<sup>72</sup> requires each federal agency to promote the use of ADR. 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.”<sup>73</sup> 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 or to meet the requirements for the admission of a contention.

### **VIII. Conclusion**

Because SEC’s hearing request fails to (1) demonstrate standing as required by 10 C.F.R. § 2.309(d), and (2) fails to proffer an admissible contention as required by 10 C.F.R. § 2.309(f), the Board must deny the hearing request and terminate this proceeding.

For the foregoing reasons, it is on this fifteenth day of August 2008, ORDERED that:

1. The hearing request of Saporito Energy Consultants by and through its President, Thomas Saporito, regarding the June 13, 2008 Confirmatory Order issued by the NRC Staff to FPL is denied.<sup>74</sup>

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<sup>72</sup> 5 U.S.C. §§ 571-584.

<sup>73</sup> Alaska Dep’t of Transp., CLI-04-26, 60 NRC at 407.

<sup>74</sup> In dismissing this Hearing Petition the Board reiterates the sentiment expressed by the Licensing Board in NFS that “serious consideration should be given to revising the language of hearing notices in these cases to go beyond the somewhat euphemistic reference to the scope of the proceeding as being ‘whether this Confirmatory Order should be sustained.’” NFS, LBP-07-16, 66 NRC at 325-26 n.339. Putative intervenors should be informed more clearly in the hearing notice of the very limited opportunity to obtain a hearing on such confirmatory orders.

2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon intervention petitions, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>75</sup>

*/RA/*

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William J. Froehlich, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Thomas S. Moore  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Michael F. Kennedy  
ADMINISTRATIVE JUDGE

Rockville, MD  
August 15, 2008

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<sup>75</sup> A copy of this Memorandum and Order was sent this date by the Agency's E-Filing System to: (1) Counsel for the NRC Staff; (2) Counsel for FPL; and (3) Thomas Saporito.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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FLORIDA POWER & LIGHT CO. ) Docket Nos. 50-335-CO  
(Saint Lucie Nuclear Plant Units 1 and 2) ) 50-389-CO  
)  
(Confirmatory Order) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (DENYING REQUEST FOR HEARING) (LBP-08-14), dated August 15, 2008, have been served upon the following persons by the Electronic Information Exchange.

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Dated at Rockville, Maryland  
this 15<sup>th</sup> day of August 2008