

September 11, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FPL Energy Point Beach, LLC) Docket No. 50-266-LA
(Point Beach Nuclear Plant, Unit 1))
)
(License Amendment))

**ANSWER OF FPL ENERGY POINT BEACH, LLC
TO REQUEST FOR HEARING AND
PETITION FOR LEAVE TO INTERVENE
OF SAPORITO ENERGY CONSULTANTS**

INTRODUCTION

Pursuant to 10 C.F.R. §2.309 (h), FPL Energy Point Beach, LLC (“FPLE”) hereby opposes the Request for Hearing and Leave to Intervene filed by Saporito Energy Consultants (“SEC” or “Petitioner”) on August 20, 2008, concerning a license amendment request submitted by FPLE. *See* “Request for Hearing and Leave to Intervene” (“Hearing Request”). Petitioner has not demonstrated standing to intervene in this proceeding or identified any admissible contentions. Therefore, the Hearing Request must be denied.

BACKGROUND

The instant petition arises out of an LAR submitted by FPLE requesting the NRC’s approval to a one cycle revision to the Point Beach technical specifications for Unit 1 only. Specifically, the proposed changes would “incorporate an interim alternate repair criterion into the provisions for SG tube repair for use during the Unit 1 2008 fall refueling outage and the

subsequent operating cycle.” See Letter from James H. McCarthy to NRC, “License Amendment Request 257, Technical Specifications 5.5.8 and 5.6.8, Steam Generator Program & Steam Generator Tube Inspection Report Interim Alternate Repair Criteria (IARC) for Steam Generator Tube Repair” (May 28, 2008) (hereinafter LAR). In response to FPLE’s LAR, the NRC Staff issued a “Notice of Consideration of Issuance of Amendments to a Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.” See 73 Fed. Reg. 45,479, 45,481 (Aug. 5, 2008). In the notice, the NRC provided an opportunity for persons that could be adversely affected by the license amendment to request a hearing within 60 days of the Notice. *Id.* at 45,480. On August 20, 2008, Petitioner filed a timely Hearing Request. By Notice dated August 28, 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, 42 U.S.C. §2239 (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).

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

In NRC proceedings, a petitioner who suffers only economic injury unrelated to potential radiological or environmental effects lacks standing to challenge an agency action under NEPA or the AEA. *See International Uranium (USA)* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998). (“The appropriate party to raise safety objections about a specific licensing action is the party who, because of the licensing, may face some radiological harm. . . . As such, it has long been [NRC practice] to reject standing for petitioners asserting a bare economic injury, unlinked to any radiological harm.”) 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, 983 (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).

Lastly, in cases involving the construction or operation of a nuclear power reactor, the NRC created a presumption that persons having regular physical contacts within a 50-mile proximity of the reactor are assumed to have established the requisite injury, causation, and redressability elements of the judicial test for standing. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). However, in cases involving LARs the Commission has made clear that petitioners must (1) assert an injury tied to the effects of the proposed LAR, not simply a general objection to the proposed action; and (2) if the petitioner fails to show that the LAR increases the potential for offsite consequences, show a plausible chain of events that would result in offsite radiological consequences posing a distinct new harm to the petitioner. *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188, 191-92 (1999) (“A petitioner cannot seek to obtain standing in a license amendment proceeding simply by enumerating the proposed license changes and alleging without substantiation that the changes will lead to offsite radiological consequences.”).

B. Petitioner has Failed to Establish Standing

SEC's injury claim is contrary to the Commission's application of judicial concepts of standing, which serves the purpose of assuring that parties aiming to participate in the Commission's proceedings have interests that are cognizable under the Atomic Energy Act. The Commission, in discharging its responsibilities to protect the public's health and safety, allows persons to request a hearing only when they may face radiological harm. *See Receipt of Material from Tonawanda, New York*, CLI-98-23, 48 NRC at 265. In the instant case, SEC has failed to demonstrate that it could face any such harm.

At the outset, SEC merely provides bald assertions that its business interests could be adversely affected by a radioactive release. Hearing Request at 2. SEC offers not a scintilla of evidence linking it to the area around Point Beach.¹ Moreover, SEC offers no insights as how an accident resulting from the proposed actions would impact it (more than 1,500 miles from Point Beach). In the end, SEC's claim of injury is grounded on its belief that an accident at Point Beach could "compromise the environment where the Petitioners prospective business partners and clients reside, live, and do business and therefore economically harm Petitioners." Hearing Request at 2. As discussed above, however, in order to successfully request a hearing before the NRC, SEC must demonstrate that it has a "real stake" in the outcome of the proceeding and that its interests are not hypothetical. *See Lujan*, 504 U.S. at 560; *White Mesa Uranium Mill*, CLI-98-6, 47 NRC at 117-18. Also, the Commission has made very clear that requests for a hearing asserting a bare economic injury must be rejected. *See Receipt of Material from Tonawanda, New York*, CLI-98-23, 48 NRC at 265. Without a doubt, SEC's claim of injury fails to

¹ Both of the addresses listed by SEC are in Jupiter, Florida, which is more than 1,500 miles from Point Beach.

demonstrate that the proposed action in any way will affect interests protected by the Atomic Energy Act.

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). Moreover, 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, 2,189-190 (Jan. 14, 2004).

B. SEC’s Contentions are Inadmissible

SEC proposed four contentions in its Hearing Request. All of the contentions fail to meet the NRC’s strict pleading requirements. The contentions merely reframe the 10 CFR § 50.91(a) standards as contentions and make bald assertions that the standards are not met. *See Hearing*

Request at 2-3. Further, none of the contentions provide any basis or specificity for SEC's assertions. *Id.* Additionally, the contentions are a challenge the NRC's proposed no significant hazards consideration findings. *See id.* It is well settled that such challenges cannot constitute a proper basis for requesting a hearing request. *See* Atomic Energy Act § 189.a(2)(A), 42 U.S.C. § 2239.a(2)(A); 10 CFR 50.58(b)(6) (The NSHC determination is "subject only to the Commission discretion, on its own initiative, to review the determination."); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-621, 33 N.R.C. 179, 183 ("Commission regulation is very clear that a Licensing Board is without authority to review Staff's significant hazards consideration determination. ... Staff's significant hazards consideration determination is beyond the scope of the hearing on the proposed amendment."). Consequently, even if the Board were to find that SEC has standing in this proceeding, its request must be denied for failure to plead any admissible contentions.

Specifically, in Contention 1, SEC argues that "the proposed amendment ... could eject one or more steam generator tubes resulting in a [loss of coolant accident]" and "therefore increases the probability or consequences of an accident previously evaluated." Hearing Request at 2. Notwithstanding its assertion that the proposed change could directly cause a LOCA and increase the likelihood and consequences of an accident, SEC never provides which any support for how this accident would occur or how the proposed change would cause such an occurrence. Further, SEC fails to reference any regulatory requirements that would bar the NRC from issuing the proposed change. In sum, Contention 1 fails to provide any specific fault with the proposed action; does not provide a basis for its allegations; is not supported by any alleged facts or expert opinions; and, does not demonstrate that there is a genuine dispute with FPLE on an issue material to this proceeding. Therefore, Contention 1 is inadmissible.

In Contention 2, SEC alleges that the proposed actions:

“may result in an operational variance outside the parameters considered in a safe shutdown earthquake (SSE) because the Model F steam generators may experience an unacceptable amount of loading on the tubes and result in their failure and/or pullout. Moreover, the margin of burst pullout could possibly fail during normal and postulated accident conditions. Thus, the proposed amendment may result in a significant increase in the probability or consequence of a SGTR and therefore a possible significant increase in the probability or consequences of an accident previously evaluated.”

Id. at 2-3. As with Contention 1, SEC makes several claims that are baseless, unsupported by fact or expert opinion and seek to challenge the NRC’s NSHC determination. Contention 2 raises issues concerning operational limits imposed by the SSE, the “margin of burst pullout,” and an alleged increase in the possibility of a steam generator tube rupture; however, SEC utterly fails to tie, in any way, the speculative scenario it presents to the proposed action. Akin to Contention 1, Contention 2 fails to provide any specific fault with the proposed action; does not provide a basis for its allegations; is not supported by any alleged facts or expert opinions; and, does not demonstrate that there is a genuine dispute with FPLE on an issue material to this proceeding. Therefore, Contention 2 is inadmissible.

Contention 3 argues that “the proposed change may result in a tube ejection which from a loss of tube bundle integrity” [sic] and therefore creates “a new or different accident from any accident previously evaluated.” *Id.* at 3. In addition to being unintelligible, the contention seeks to challenge the NRC’s NSHC determination; fails to provide any specific fault with the proposed action; does not provide a basis for its allegations; is not supported by any alleged facts or expert opinions; and, does not demonstrate that there is a genuine dispute with FPLE on an issue material to this proceeding. Therefore, Contention 3 is inadmissible.

Lastly, Contention 4 alleges that “the proposed amendment involves a significant reduction in a margin of safety.” SEC, again, fails to provide any support for its assertion and fails to tie its allegations, in any way, to the proposed action. Further, the contention seeks to challenge the NRC’s NSHC determination; fails to provide any specific fault with the proposed action; does not provide a basis for its allegations; is not supported by any alleged facts or expert opinions; and, does not demonstrate that there is a genuine dispute with FPLE on an issue material to this proceeding. Therefore, Contention 4 is inadmissible.

III. Conclusion

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

Respectfully Submitted,

/signed (electronically) by/ _____
Antonio Fernández

FPL Energy Point Beach, LLC
Law Department
700 Universe Boulevard
P.O. Box 14000
Juno Beach, FL 33408-0420

Phone: (561) 304-5288
Fax: (561) 691-7135
E-mail: antonio.fernandez@fpl.com

Dated: September 11, 2008

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(Point Beach Nuclear Plant, Unit 1))	
)	
(License Amendment))	

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. § 2.314(b), the following information is provided:

Name:	Antonio Fernández
Address:	FPL Energy, Point Beach, LLC 700 Universe Blvd Mail Stop: LAW/JB Juno Beach, FL 33408
Telephone:	(561) 304-5288
Fax Number:	(561) 691-7135
E-mail Address:	antonio.fernandez@fpl.com
Admissions:	Court of Appeals of Maryland
Name of Party:	FPL Energy, Point Beach, LLC

Respectfully submitted,

/signed (electronically) by/ _____
Antonio Fernández
Counsel for FPL Energy, Point Beach, LLC

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ANSWER TO REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE and, NOTICE OF APPEARANCE for Antonio Fernández, dated September 11, 2008, have been served upon the following persons by the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
E-mail: wjf12@nrc.gov

Thomas S. Moore
Administrative Judge
E-mail: tsm2@nrc.gov

Mark O. Barnett
Administrative Judge
E-Mail: mob1@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001

OCAA Mail Center
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001

Marcia Simon, Esq.
E-mail: mjs5@nrc.gov
Lloyd Subin, Esq.
E-mail: lbs3@nrc.gov
OGC Mail Center
E-mail: OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001

Hearing Docket
E-mail: hearingdocket@nrc.gov

Saporito Energy Consultants
Post Office Box 8413
Jupiter, Florida 33468-8413

Thomas Saporito
E-mail: saporito3@gmail.com

/signed (electronically) by/_____
Antonio Fernández

Dated at Juno Beach, Florida
this 11th day of September 2008