

September 22, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
FPL Energy Seabrook, LLC) Docket No. 50-443-LA
(Seabrook Station, Unit 1))
)
(License Amendment))

**ANSWER OF FPL ENERGY SEABROOK, 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 Seabrook, LLC (“FPLE”) hereby opposes the Request for Hearing and Leave to Intervene filed by Saporito Energy Consultants (“SEC” or “Petitioner”) on August 29, 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 a license amendment request submitted by FPLE requesting the NRC’s approval of a revision to the Seabrook technical specifications. Specifically, the proposed change would “delete Surveillance Requirement 4.6.3.1, which specifies post-maintenance testing requirements for containment isolation valves.” *See* Letter

from Gene F. St. Pierre to NRC, “Seabrook Station License Amendment Request 07-04, ‘Application for Amendment to Delete Post-Maintenance Testing Surveillance Requirement for Containment Isolation Valves’” (February 8, 2008) (hereinafter LAR). In response to FPLE’s LAR, the NRC Staff issued a “Notice of Consideration of Issuance of Amendment[] to [a] Facility Operating License[], Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.” *See* 73 Fed. Reg. 50,356, 50,361 (Aug. 26, 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 50,357. On August 29, 2008, Petitioner filed a timely Hearing Request. By Notice dated September 8, 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-79-10, 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, 984 (1982); *see also 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. SEC simply "enumerate[es] the proposed license changes and alleg[es] without substantiation that the changes will lead to offsite radiological consequences[.]" a tactic the Commission finds insufficient. *Commonwealth Edison*, CLI-99-4, 49 NRC at 188.

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 Seabrook. Moreover, SEC offers no insight as to how an accident resulting from the proposed action would impact it (more than 1,200 miles from Seabrook). In the end, SEC's claim of injury is grounded on its belief that an accident at Seabrook 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 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 demonstration “that the issue raised in the contention is within the scope of the proceeding;”
- 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), (iii), (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). 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 but 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 three contentions in its Hearing Request. *See* Hearing Request at 3. All of the contentions fail to meet the NRC’s strict pleading requirements. Each contention impermissibly challenges the NRC’s proposed no significant hazards consideration (“NSHC”)

determination and none of the contentions provide any basis or specificity for SEC's assertions. *Id.* 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.

At the outset, each SEC contention is an impermissible challenge to the proposed NSHC finding. *See id.* The contentions merely reframe the 10 CFR § 50.92(c) standards governing findings of no significant hazards consideration as contentions and make bald assertions that those standards are not met. *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-91-7, 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."). SEC's three contentions are nothing more than a reformulation of the NRC Staff's three-pronged proposed NSHC determination—SEC simply took the Staff's NSHC determination language and either omitted or modified key phrases in an attempt to reach the opposite conclusion, and as such are beyond the scope of this proceeding. *Compare* Hearing Request at 3 *with* Proposed NSHC Determination, 73 Fed. Reg. at 50,361.

Specifically, in Contention 1, SEC claims that the "proposed amendment to the technical specifications removes the surveillance requirement related to post-maintenance testing of containment isolation valves," which "could lead to an accident; and consequently, the proposed change significantly increases the probability of an accident previously evaluated." Hearing

Request at 2. SEC asserts that “[t]he CIVs may not continue to be tested in a manner and at a frequency that demonstrates they remain capable of performing their intended safety function to the extent prior to the proposed amendment change.” *Id.* This, SEC argues, “alters the reliability of operability of CIVs.” *Id.* SEC provides no support for its assertion that the proposed change “could lead to an accident,” other than its speculative and equally baseless assertion that the testing *may* prove inadequate and insufficiently frequent. SEC fails to identify 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 impermissibly seeks to challenge the 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 1 is inadmissible.

In Contention 2, SEC alleges that the proposed action “appears to create the possibility of a new or different kind of accident from any previously evaluated” by “introduc[ing] new accident scenarios, failure mechanisms, or single failures.” *Id.* at 3. Additionally, SEC claims the proposed action will “modify or remove existing equipment reliability” and adversely affect the “ability of any operable equipment to perform its specified safety function”. *Id.* As with Contention 1, SEC makes several claims that are baseless and unsupported by fact or expert opinion. Contention 2 utterly fails to tie, in any way, the speculative scenario it presents to the proposed action. Akin to Contention 1, Contention 2 impermissibly seeks to challenge the 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 2 is inadmissible.

Lastly, Contention 3 alleges that “the proposed change involves a significant reduction in the margin of safety” because it “appears to alter the initial conditions or results of any accident analyses [sic].” *Id.* According to SEC, “[t]he operability requirements, performance, and design of the CIVs may not remain unchanged[,]” and the CIVs themselves “may not continue to meet the design bases for the containment isolation system.” *Id.* SEC concludes with the circular argument that the proposed license amendment “will not minimize unnecessary testing” because “the testing should continue unabated.” *Id.* at 3-4. Again, SEC fails to provide any support for its assertion and fails to tie its allegations, in any way, to the proposed action. Further, this contention impermissibly 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.

III. Conclusion

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

Respectfully Submitted,

/Signed (electronically) by/

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Dated: September 22, 2008

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FPL Energy Seabrook, LLC)	Docket No. 50-443-LA
(Seabrook Station, 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:

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Name of Party:	FPL Energy Seabrook, LLC

Executed in Accord with 10 CFR 2.304(d)

Mitchell S. Ross
Counsel for FPL Energy Seabrook, LLC

September 22, 2008

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(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:

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Respectfully submitted,

/Signed (electronically) by/

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(License Amendment))	

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 Steven Hamrick and NOTICE OF APPEARANCE for Mitchell S. Ross, dated September 22, 2008, have been served upon the following persons by the Electronic Information Exchange.

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Dated at Juno Beach, Florida
this 22nd day of September 2008