

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

**Florida Power and Light Company
(Turkey Point Nuclear Plant,
Units 3 and 4)**

**Docket Nos. 50-250/251-OLA
ALSBP No. 08-869-03-OLA-BD01
Date: 27-SEP-2008**

**PETITIONERS' OPPOSITION TO FPL'S MOTION TO
STRIKE SAPORITO'S REPLY AND FOR SANCTIONS**

On 26-SEP-2008, the licensee, Florida Power and Light Company ("FPL") filed FPL's Motion to Strike Saporito's Reply and for Sanctions ("FPL Motion"), in the above-captioned proceeding. For the reasons set-out below, the Atomic Safety and Licensing Board ("ASLB") should deny FPL's motion in its entirety.

A. The Atomic Safety and Licensing Board Lacks Authority to Grant FPL's Motion as a Matter of Law

In its motion FPL's states in relevant part that,

"This case is one of four NRC actions involving reactors owned by subsidiaries of FPL Group, Inc., on which Saporito has requested a hearing during the past few months (other requests were made in proceedings involving FPL Energy Point Beach, LLC ('FPLE-PB'), FPL Energy Seabrook, LLC ('FPLE-S'), as well as another FPL facility, the St. Lucie Nuclear Plant.; FPL, FPLE-PB, and FPLE-S are all indirect subsidiaries of FPL Group). These hearing requests are vexatious and amount to harassment and an abuse of the administrative process. . . FPL also moves . . . the Atomic Safety and Licensing Board . . . to certify to

the Commission the question whether to impose sanctions against Saporito and SEC, including but not limited to, barring him from filing further meritless hearing requests against FPL Group entities. . ."

Id. FPL Motion at 1-2. Thus, FPL seeks broad action on the part of the ASLB extending well beyond the jurisdiction and authority of the assigned ASLB in the present proceeding and where FPL seeks action on the part of the ASLB on matters outside the instant action regarding other adjudicatory proceedings. *See, Consolidated Edison Co. of New York, (Indian Point, Unit 2); Power Authority of the State of New York, (Indian Point, Unit 3),* CLI-82-15, 16 NRC 27, 31, 32 (1982). To the extent that FPL's Motion seeks action by the ASLB against Petitioners outside the jurisdiction and authority of the presiding ASLB, the ASLB must deny FPL's Motion as a matter of law.

B. Procedural History

The instant proceeding arises out of timely petition for hearing filed on 18-AUG-2008 by Saporito Energy Consultants ("SEC") through its President, Thomas Saporito ("Saporito"). SEC's petition challenges FPL's request to the U.S. Nuclear Regulatory Commission ("NRC") to delete certain notes from the Turkey Point Nuclear Plant ("TPN") Technical Specifications ("TS") which are the safety operating parameters for the TPN. In its motion, FPL makes a lengthy discussion of litigation

involving FPL, its subsidiaries and SEC's President encompassing a 20-years time frame. *See, FPL Motion* at 3-11. For the reasons stated above, the presiding ASLB lacks jurisdiction and therefore authority to entertain administrative proceedings beyond the instant proceeding. Therefore, Petitioners move the ASLB to strike FPL's Motion where its motion seeks action on the part of the ASLB outside the jurisdiction of the ASLB and to deny FPL's Motion in its entirety as a matter of law.¹

C. Discussion

1. The ASLB Should Grant SEC's Amended Contention(s)

In its motion, FPL argues in part that,

"Saporito's Reply fails to comply with the NRC's Rules of Practice. . . Saporito filed an amended contention to cure his clearly inadmissible initial contentions. Saporito . . . failed to seek leave of the Board to file new or amended contentions . . . Saporito's new contention and the arguments and affidavit in support . . . should be stricken."

Id. at 12. Here, FPL conveniently omits from this part its pleading that SEC's Reply was submitted "in accordance with the Commission's Rules of Practice for Domestic Licensing Proceedings at 10 C.F.R. 2.309" *Id.* Thus, to the extent that

¹ In NRC proceedings in which a hearing is not mandatory but depends upon the filing of a successful intervention petition, and "intervention" Licensing Board has authority only to pass upon the intervention petition. *See, Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1&2)*, LBP-78-23, 8 NRC 71, 73 (1978). *See also, Commonwealth Edison Co. (Byron Station, Units 1 and 2)*, LBP-81-30-A, 14 NRC 364, 366 (1981), citing *Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1)*, ALAB-400, 5 NRC 1175 (1977).

SEC's petition was brought under the Commission's Rules of Practice for Domestic Licensing, Petitioners have properly sought leave of the ASLB to amend their petition contentions accordingly. At all times relevant to the instant proceeding, FPL was well aware of Petitioners' status as a *pro se* litigant but none-the-less acted to otherwise mislead this ALSB to rule in its favor in sanctioning Saporito.² Notably, petitions drawn by counsel experienced in NRC practice must exhibit a high degree of specificity. In contrast, Licensing Boards are to be lenient in this respect for petitions drawn pro se or by counsel new to the field or to the bar. *See, Kansas Gas & Electric Co. (Wolf Creek Generating Station)*, ALAB-279, 1 NRC 559, 576-577 (1975). In the instant proceeding, Petitioners appear *pro se* for intervention and should not be held to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere in the petition to intervene. *See, Wisconsin Public Service Corp. (Kewaunee Nuclear Power Plant)*, LBP-78, 82 (1978). *See also, Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2)*, ALAB-136, 6 AEC 487, 489 (1973), cited in *Houston Lighting and Power Co. (Allens*

² This is not the first time that FPL has gone to great lengths to illegally prohibit Petitioners from participating in NRC licensing proceedings. *See, <http://saporitoenergyconsultants.com/NRC.html>* and select "10-SEP-2008 Whistleblower Seeks Fines Against FPL" shown at the left side of that screen.

Creek Nuclear Generating Station, Unit 1 and 2), LBP-82-63, 16
NRC 571, 578 (1982).

Thus, to the extent that Petitioners seek Intervention as *pro se* litigants, the ASLB should accept their amended contention(s) and grant them a hearing on the merits of the disputed issues in this matter accordingly. Notably, even where a petitioner has not expressly requested a hearing on its petition, but where it seems clear from the petition as a whole that a hearing is what the petitioner desires, the Commission will not dismiss that petition solely on the basis of such a technical pleading defect. *See, Yankee Atomic Electric Co., (Yankee Nuclear Power Station)*, CLI-96-1.43 NRC 1, 5 (1966).

FPL continues in its motion to apparently argue matters related to the merits of the petition itself and which should be reserved for the hearing. *See, FPL Motion at 12-19*. Thus, Petitioners move the ASLB to strike that portion of FPL's Motion accordingly.

2. The ASLB Should Deny FPL's Request to Certify to the Commission the Question of Whether to Sanction Saporito for His Abuse of the NRC Adjudicatory Process

In its motion, FPL makes a lengthy argument why this ALSB should ". . . certify to the Commission the question of whether to employ a solution similar to that utilized in *Millstone*. . . FPL's concern is not limited to this single proceeding, but

extends to other proceedings before other Licensing Boards, and more importantly, to countless potential future proceedings involving facilities operated by subsidiaries of FPL Group. . . .
" *Id.* at 24.

As stated earlier, the presiding ALSB lacks jurisdiction and authority beyond the instant proceeding to entertain FPL's Motion to sanction Petitioners by certifying to the Commission the question of whether to employ a solution similar to that utilized by *Millstone*. Even more discerning is FPL's request that the presiding ALSB reach far beyond its jurisdiction in the instant proceeding and sanction Petitioners for bringing hearing requests before the Commission in other proceedings outside the jurisdiction and authority of the present ASLB. Notably, FPL requests that this ASLB sanction Petitioners for supposed potential future hearing requests by Petitioners. Clearly, it is FPL that is abusing the Government's adjudicatory process and not Petitioners. Indeed, FPL's Motion is clearly an illegal attempt by a NRC licensee to prohibit a stakeholder from participating in NRC proceedings.³

³ FPL's actions in seeking sanctions against Petitioners for participating in a public NRC forum and to prohibit Petitioners from such participation will be redressed through a filing with the Florida Bar and with the NRC's Office of Enforcement accordingly.

Although the requirements of 10 C.F.R. §2.309 must ultimately be met, every benefit of the doubt should be given to the potential intervenor in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects. *See, Sequoyah Fuels Corp., (Gore, Oklahoma Site Decontamination and Decommissioning Funding)*, LBP-94-8, 39 NRC 116 (1994). As such, petitioners will usually be permitted to amend petitions containing curable defects. *See, Virginia Electric & Power Co., (North Anna Power Station, Units 1 & 2)*, ALAB-146, 6 AEC 631 (1973). *See, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, LBP-91-1, 33 NRC 15, 40 (1991); *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, LBP-91-7, 33 NRC 179, 195 (1991); *Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site)*, LBP-94-19, 40 NRC 9, 15 (1994).

D. General Policy on Intervention Before the Atomic Safety and Licensing Board

Public participation, like that sought by SEC in the instant proceeding, is a positive factor in the licensing process and that intervenors perform a valuable function and are to be complimented and encouraged. (Emphasis added). *See, e.g., Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2)*, ALAB-256, 1 NRC 10, 18 n.9 (1975); *Consolidated Edison Co.*

Docket Nos. 50-250/251-OLA
ASLBP No. 08-869-03-OLA-BD01
Florida Power and Light Company
Turkey Point Nuclear Plant, (Units 3 and 4)
Page 8 of 11

*of N.Y., Inc. (Indian Point Nuclear Generating Station, Unit 2),
ALAB-229, 8 AEC 425 (1974); Gulf States Utilities Co. (River
Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222 (1974).*

CONCLUSION

For all the foregoing reasons, and to protect Petitioners' right to participate in NRC licensing proceedings, and to protect public health and safety through public intervention in NRC licensing proceedings, the ALSB should deny FPL's Motion in its entirety as a matter of law.

Respectfully submitted,

/Signed electronically by/

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Docket Nos. 50-250/251-OLA
ASLBP No. 08-869-03-OLA-BD01
Florida Power and Light Company
Turkey Point Nuclear Plant, (Units 3 and 4)
Page 10 of 11

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Docket Nos. 50-250/251-OLA
ASLBP No. 08-869-03-OLA-BD01
Florida Power and Light Company
Turkey Point Nuclear Plant, (Units 3 and 4)
Page 11 of 11

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