September 30, 2008

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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| In the Matter of | ) | |
| | ) | |
| FPL Energy Point Beach, LLC | ) | Docket Nos. 50-266-LA |
| (Point Beach Nuclear Plant, Unit 1) | ) | |
| | ) | |

**FPL ENERGY POINT BEACH, LLC'S MOTION**
**TO STRIKE SAPORITO'S REPLY AND FOR SANCTIONS**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), FPL Energy Point Beach, LLC ("FPLE") hereby moves to strike "Petitioner's Response to Answers by the Nuclear Regulatory Commission Staff and by the Florida Power and Light Company" ("Saporito's Reply") filed by Petitioners Thomas Saporito ("Saporito") and Saporito Energy Consultants ("SEC")[1] on September 20, 2008. Saporito's Reply impermissibly raises entirely new allegations and provides a new unsworn affidavit with testimony not found in his initial August 20, 2008 "Request for Hearing and Leave to Intervene" ("Saporito's Hearing Request"). Saporito has not sought leave to amend his contentions after his initial filing, as required by 10 C.F.R. § 2.309(f)(2). The amended contention in Saporito's Reply and the new arguments and affidavit in support thereof should be stricken.

[1] While the Hearing Request and Reply were ostensibly filed by Saporito Energy Consultants, the relief FPL seeks in this Motion directly involves Saporito and so we refer to Saporito throughout.

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 Seabrook, LLC ("FPLE-S") and Florida Power & Light Company ("FPL"); FPL is a direct subsidiary of FPL Group; FPLE and FPLE-S are indirect subsidiaries of FPL Group). These hearing requests are vexatious and amount to harassment and an abuse of the administrative process.

For this reason, FPLE also moves, pursuant to 10 C.F.R. §§ 2.319(l) and 2.323(f)(2), the Atomic Safety and Licensing Board ("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. *See* 10 C.F.R. § 2.314(c). Saporito's conduct cannot and should not be condoned.[2]

## PROCEDURAL BACKGROUND

This proceeding arises out of a license amendment request submitted by FPLE requesting the NRC's approval to a one cycle revision to the Point Beach Nuclear Plant ("Point Beach") technical specifications for Unit 1 only. Specifically, the proposed changes would "incorporate an interim alternate repair criterion [("IARC")] into the provisions for [Steam Generator ("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

[2] In an effort to resolve the issues addressed herein, Counsel for FPLE left two voicemail messages for Saporito, which he has not returned. Counsel did contact Saporito in the Turkey Point proceeding described below in an unsuccessful effort to resolve a similar motion. FPLE also contacted the NRC Staff. The NRC Staff authorized FPLE to represent that it supports the motion to strike Saporito's reply and does not oppose FPLE's motion for certification.

Inspection Report Interim Alternate Repair Criteria (IARC) for Steam Generator Tube Repair" (May 28, 2008) (hereinafter LAR).

This LAR is based upon similar requests submitted earlier this year by the licensees for Wolf Creek, Vogtle Units 1 and 2, and Braidwood Units 1 and 2. *Id*. It "requests approval of an IARC that requires full-length inspection of the tubes within the tubesheet but does not require plugging tubes if any circumferential cracking observed in the region greater than 17 inches from the top of the tubesheet is less than a value sufficient to permit the remaining circumferential ligament to transmit the limiting axial loads." LAR, Enclosure 1 at 2. FPLE is seeking this amendment "to preclude unnecessary SG tube plugging while still maintaining tube structural and leakage integrity." *Id*.

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, Saporito filed a timely Hearing Request.

On September 11, 2008 FPLE filed its "Answer of [FPLE] to Request for Hearing and Petition for Leave to Intervene of Saporito Energy Consultants" ("FPLE's Answer"). The NRC Staff filed its "Answer to Saporito Energy Consultants' Petition to Intervene and Request for Hearing" ("Staff Answer") on September 15. Both FPLE and the NRC Staff argued that Saporito failed to demonstrate standing or plead any admissible contentions. In response, Saporito filed his Reply. Saporito's Reply "*collectively* amend[s]" (emphasis in original) the four inadmissible contentions he initially filed by providing additional detail and an affidavit in

support of his new amended contention. *See* Saporito's Reply at 6. This, he claims to do "in accordance with the Commission's Rules of Practice for Domestic Licensing Proceedings at 10 C.F.R. 2.309". *Id*. Notwithstanding Saporito's claim that his actions are consistent with Part 2, his Reply impermissibly raises new issues without leave from the Board and should be stricken.

## HISTORICAL BACKGROUND

FPLE is reluctantly filing this Motion with the Board following 20 years of abusive, vexatious, and meritless litigation against FPL Group's subsidiaries by Saporito (and more recently, SEC, the apparent alter ego of Saporito). A history of these proceedings is helpful to put this Motion into context. Because of the great length of that history, FPLE hereby incorporates by reference the "Historical Background" section of FPL's September 26, 2008 "Motion to Strike Saporito's Reply and for Sanctions" filed in the pending Turkey Point license amendment proceeding ("Turkey Point Motion"), which details Saporito's twenty-year campaign of harassing and vexatious litigation.

## DISCUSSION

### I. The Board Should Strike Saporito's Reply

Saporito's Reply fails to comply with the NRC's Rules of Practice. Instead of responding to FPLE and the NRC Staff, Saporito filed amended contentions in an impermissible attempt to cure his clearly inadmissible initial contentions. Saporito, however, failed to seek leave of the Board to file new or amended contentions. Requesting leave of the Board is a requirement for filing new or amended contentions after a petitioner's initial filing. 10 C.F.R.

§ 2.309(f)(2). Accordingly, Saporito's new contentions and the arguments and affidavit in support thereof should be stricken.

A. Saporito's Newly Provided Information

Saporito's Reply offers an expanded standing argument that goes far beyond the extremely limited scope of his initial Hearing Request. Saporito's initial Hearing Request barely addressed the NRC's standing requirement:

> Thomas Saporito and SEC have real property and personal property and financial interests through their prospective business partners and clients of which can be adversely affected should operations at the Florida Power & Light Company ("FPL") [*sic*] or licensee's, Point Beach Nuclear Plant cause a release of radioactive particles into the environment. Moreover, such and [*sic*] event could render the Petitioners' prospective business partners and clients' homes and property unavailable for human contact or use for many years or forever. Additionally, such and event could forever compromise the environment where the Petitioners prospective business partners and clients reside, live, and do business and therefore economically harm Petitioners.

Saporito Hearing Request at 2.

Now, in his Reply, Saporito raises the completely new specious argument that, even though he lives well over 1,000 miles from Point Beach, his "business involves the geographical area well within the NRC's 50-mile zone of interest," and that, as "President" of SEC, he "requires *physical access* to SEC's potential customer base located within" that area. Saporito's Reply at 3-4 (emphasis in original). He also mentions an SEC "business plan" for the first time. *Id*. This alleged "business plan" involves Saporito "travel[ing] to the greater area near and within 50-miles of the PBNP to ascertain a client base and to ascertain partnerships with existing businesses." *Id*. (citing Saporito's Affidavit). Notwithstanding the hypothetical nature of ascertaining a potential client base, these attempts to bolster his initial standing argument are impermissible in a reply.

Saporito then provides his "Amended Contention(s)" [*sic*]. Saporito's Reply at 9. Saporito announces that "Petitioners hereby *collectively* amend their 4-contentions previously submitted in the instant matter." *Id*. at 6 (emphasis in original). Saporito argues the LAR "makes assumptions with respect to the inspection of PBNP Steam Generator ('SG') tubes, degradation of the SG tubes, pull-out of SG tubes, cracking of SG tubes and plugging of the SG tubes which are less conservative and will result in operation PBNP with less of a degree of a margin of safety and therefore could result in an accident involving leakage of primary (radioactive water) to secondary SG water inventory and thereby release radioactive particles into the environment in and around the area where Petitioners conduct business." *Id*. at 7. Saporito then goes on to provide six separate contentions. Saporito supports these new contentions with an "affidavit" that claims to be signed before a notary, but is not actually notarized. *See* Saporito's Affidavit at 1, 4. Saporito's unsworn Affidavit simply repeats his new standing argument and the arguments made in support of his six new contentions. *Id*. at 1-3.

Saporito's new contentions all appear to be an attempt to provide support for his initial unsupported margin reduction contention. Saporito raised none of these arguments in his initial margin reduction contention, reproduced below in its entirety:

> Petitioners contend here that the proposed amendment involves a significant reduction in a margin of safety with respect to the required structural margins of the steam generator tubes for both normal and accident conditions through one or more failures of the tubesheet (i.e. Cracking, burst, pullout).

Saporito's Hearing Request at 3.

Saporito's first new Contention, 3.1, questions the technical justification for the use of the IARC at Point Beach. Saporito acknowledges that FPLE's "technical justification was

developed as a bounding case for the affected plants with hydraulically expanded Alloy 600TT tubing, including Point Beach Unit 1." Saporito's Reply at 8. Saporito, however, ignores the term "bounding,"[3] and argues that Point Beach "operates with parameters which are different from the operating parameters of the nuclear plants relied upon in the licensee's technical justification in the development of the IARC for LAR-257." *Id*. Saporito provides no technical support for this assertion that the Point Beach operating parameters are beyond the IARC bounding analysis, only his bald and conclusory claim that FPLE's LAR "is flawed and should not be allowed" and further, that it could cause "significant leakage of highly radioactive primary water from within the tubes of the PBNP Unit-1 SG to the secondary water inventory and ultimately released into the environment." *Id*. at 8-9 (citing Saporito's Affidavit).

In contrast to Saporito's baseless assertions, a letter from Westinghouse is included in FPLE's LAR and plainly states, "[a]s a product of a jointly-funded effort among a number of utilities for the development of the IARC, the technical justification was developed as a bounding case for the affected plants with hydraulically expanded Alloy 600TT tubing, including Point Beach Unit 1. Therefore, the technical justification contained in these documents applies directly to Point Beach Unit 1." *See* Letter from H.O. Lagally, Westinghouse, to D. Peck, *et al.*, "Applicability of the IARC Technical Justification to Point Beach 1," (May 23, 2008) (attached as last page of Enclosure 4 to the LAR) ("Lagally Letter"). New Contention 3.1 fails to provide a basis for its allegations; is not supported by any alleged facts or expert opinions; and, does not

[3] As described in several places in FPLE's LAR, "'[b]ounding' means that the most challenging conditions from the plants with hydraulically expanded Alloy 600TT tubing are used." LAR, Enclosure 1 at 16; see also LAR Enclosure 4 "Interim Alternate Repair Criterion (ARC) for Cracks in the Lower Region of the Tubesheet Expansion Zone" at 1.

demonstrate that there is a genuine dispute with FPLE on an issue material to this proceeding. Therefore, new Contention 3.1 is inadmissible.

Saporito's new contention 3.2 is based on a portion of the proposed amendment to Technical Specification 5.5.8:

> For Unit 1 Refueling Outage 31 and the subsequent operating cycle, tubes with flaws having a circumferential component less than or equal to 203 degrees found in the portion of the tube below 17 inches from the top of the tubesheet and above 1 inch from the bottom of the tubesheet do not require plugging. Tubes with flaws having a circumferential component greater than 203 degrees found in the portion of the tube below 17 inches from the top of the tubesheet and above 1 inch from the bottom of the tubesheet shall be removed from service.

Proposed Technical Specification 5.5.8; LAR, Enclosure 2.

In new Contention 3.2, Saporito argues that "the operational parameters for the PBNP Unit-1 could cause any flaws discovered during an in-service inspection which have a circumferential component less than or equal to 203 degrees located in the tube section within 17-inches from the top of the tubesheet and above 1-inch from the bottom of the tubesheet require plugging" [*sic*]. *Id*. at 9. In effect, this contention identifies the Technical Specification provision for dealing with flaws below 17 inches from the top of the tubesheet and above 1 inch from the bottom of the tubesheet and raises the obvious question about those areas closer to the top and bottom of the tubesheet. Saporito ignores the paragraph following this proposed Technical Specification provision: "[t]ubes with service-induced flaws located within the region from the top of the tubesheet to 17 inches below the top of the tubesheet shall be removed from service[,]" and a later paragraph:

> When one or more flaws with circumferential components are found in the portion of the tube within 1 inch from the bottom of the tubesheet, and the total of the circumferential components found in the tube exceeds 94

> degrees, then the tube shall be removed from service. When one or more flaws with circumferential components are found in the portion of the tube within 1 inch from the bottom of the tubesheet and within 1 inch axial separation distance of a flaw above 1 inch from the bottom of the tubesheet, and the total of the circumferential components found in the tube exceed 94 degrees, then the tube shall be removed from service. When the circumferential components of each of the flaws are added, it is acceptable to count the overlapped portions only once in the total of circumferential components.

Proposed Technical Specification 5.5.8; LAR, Enclosure 2.

According to Saporito, the failure to plug flawed tubes "could result in substantial growth of the flaws due to the operational stresses imposed on the flawed tubes and thereby increase any leakage of highly radioactive primary water to the secondary water within the SG and ultimately released into the environment." *Id*. at 9-10 (citing Saporito's Affidavit). Saporito provides no evidentiary or technical support for these conclusory statements and ignores the proposed Technical Specification provisions that address his concerns. New Contention 3.2 fails to 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, new Contention 3.2 is inadmissible.

Saporito's new contention 3.3 is based on another aspect of the proposed amendment to Technical Specification 5.5.8:

> When more than one flaw with circumferential components is found in the portion of the tube below 17 inches from the top of the tubesheet and above 1 inch from the bottom of the tubesheet with the total of the circumferential components greater than 203 degrees and an axial separation distance of less than 1 inch, then the tube shall be removed from service. When the circumferential components of each of the flaws are added, it is acceptable to count the overlapped portions only once in the total of circumferential components.

Proposed Technical Specification 5.5.8; LAR, Enclosure 2.

Saporito argues that "it is not acceptable to count the overlapped portions only once in the total of circumferential components." Saporito's Reply at 10. Instead, he argues, the "flaws must be counted individually and additively applied to the total of circumferential components." *Id.* This contention is based on Saporito's indecipherable claim that the proposed amendment "would allow the licensee to ignore SG tube flaws in tubes found with overlapped portions to the extent that the total of circumferential components is artificially less than the actual and existing circumferential component total." *Id*. This leads Saporito to conclude, once again, that the LAR is "technically flawed and could cause a significant amount of highly radioactive primary water to enter the SG secondary water inventory and ultimately be released into the environment." *Id*. (citing Saporito's Affidavit). Saporito does not explain why, when adding the circumferential total of multiple flaws, the overlapping portions should be counted twice; he simply states his opinion without any evidentiary or technical support. New Contention 3.3 fails to 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, new Contention 3.3 is inadmissible.

In new contention 3.4, Saporito notes that Enclosure 4 to FPLE's LAR, a Westinghouse document titled "Interim Alternate Repair Criterion (ARC) for Cracks in the Lower Region of the Tubesheet Expansion Zone", explains that its bounding analysis "can be safely applied to any of the affected domestic plants identified in Table 4-1." LAR, Enclosure 4 at 2. Saporito notes that Table 4-1 "does not identify [Point Beach] as a domestic plant for which the technical justification relied upon by the licensee in LAR-257 was made." Saporito's Reply at 11. On this basis alone, Saporito concludes again that the LAR "is technically flawed and could therefore

cause highly radioactive primary water to leak from within the PBNP Unit-1 SG tubes to the secondary SG water inventory and ultimately be released into the environment." *Id*. (citing Saporito's Affidavit). Saporito fails to point out that *no* plant is listed on the publicly available, non-proprietary version of Table 4-1 because the entire table has been redacted. *See* LAR, Enclosure 4, Table 4-1; *see also* LAR at 2 (discussion of proprietary and non-proprietary versions of the Westinghouse supporting documentation). Saporito also ignores the Lagally letter described above, which plainly states: "the technical justification contained in these documents applies directly to Point Beach Unit 1." New Contention 3.4 fails to 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, new Contention 3.4 is inadmissible.

In new contention 3.5, Saporito raises concerns with SG tube performance criteria established by NEI-97-06. Specifically, NEI-97-06 provides a structural integrity performance criterion and an accident induced leakage performance criterion. *See* LAR, Enclosure 4 at 3. The structural integrity performance criterion "is based on ensuring that there is reasonable assurance that a steam generator tube will not burst during normal operation or postulated accident conditions." *Id*. This criterion "is inherently satisfied because the constraint provided by the tubesheet to the tube prohibits burst." *Id*. FPLE's LAR, however, interprets the structural integrity criterion to mean "that tube pullout from the tubesheet is equivalent to a tube burst and must, therefore, be prevented." *Id*. at 3-4. Saporito alleges that this expansive reading of the SG tube structural integrity performance criterion is somehow "too narrowly defined and could therefore cause highly radioactive primary water to leak from within the PBNP Unit-1 SG tubes to the secondary SG water inventory and ultimately be released into the environment."

Saporito's Reply at 13 (citing Saporito's Affidavit). According to Saporito, once again without any evidentiary or technical support, this conservative interpretation of the criterion is in fact an attempt to limit its scope: "the licensee admittedly interprets structural integrity to mean *only that* tube pullout from the tubesheet is equivalent to a tube burst." (emphasis added). *Id*. at 12. This is a complete distortion of the LAR, in which FPLE interpreted the tube burst criterion to also apply in the case of a tube pullout from the tubesheet. *See* LAR, Enclosure 4 at 3-4. Saporito's argument is without merit. New Contention 3.5 fails to 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, new Contention 3.5 is inadmissible.

Finally, Saporito raises new contention 3.6, in which he argues that "the licensee relies on three SG models for use of the IARC in its analysis of the PBNP Unit-1 SGs. Specifically; the licensee identifies SG models 'D', 'F', and '44F'". Saporito's Reply at 13-14. Saporito claims that FPLE "fails to state whether the PBNP Unit-1 SGs are identical in design and operation to the three models which were analyzed in LAR-257." *Id*. at 14. This contention is nonsensical because LAR-257 is the instant Point Beach license amendment request. Assuming Saporito means that FPLE fails to state that its SG models are identical to the models studied in the LAR's referenced IARC analysis, Saporito is still wrong. FPLE's LAR states clearly that "PBNP Unit 1 SGs are Model 44F." LAR, Enclosure 1 at 6. Saporito's claim is entirely without merit. New Contention 3.6 fails to 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, new Contention 3.6 is inadmissible.

In sum, each of Saporito's newly amended contentions is baseless. Saporito repeatedly distorts and takes out of context statements from the LAR in an attempt to generate a dispute with FPLE. In doing so, Saporito fails to demonstrate the existence of a *genuine* dispute on a material issue of law or fact. 10 C.F.R. § 2.309(9(f)(1)(vi). None of his contentions is admissible.

B. Petitioners May Not Raise New Arguments in Replies

In any event, the Board need not examine the admissibility of Saporito's six new contentions because Saporito failed to follow established Commission procedures for amending or filing new contentions. Under 10 C.F.R. § 2.309(h)(2), a petitioner may file a reply to any answer within seven days of service of that answer. The Statement of Considerations published with the NRC's 2004 revisions to its procedural regulations and Commission precedent make clear that replies should "be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,203 (Jan.14, 2004); *see also Louisiana Energy Services* (National Enrichment Facility) CLI-04-25, 60 NRC 223, 225 (2004) ("LES I"); *Nuclear Management Company* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it."). It is "well established" in NRC practice that a reply cannot expand the scope of the arguments set forth in a petitioner's original hearing request. *Palisades*, 63 NRC at 732.

In CLI-04-35, the Commission denied reconsideration of its holding in CLI-04-25. *Louisiana Energy Services,* CLI-04-35, 60 NRC 619, 623 (2004) ("LES II"). The Commission affirmed its reasons for not allowing petitioners to add new argument in replies:

> Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements," as the NRC Staff explains, "by permitting the intervenor to initially file vague,

> unsupported, and generalized allegations and simply recast, support, or cure them later." The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort. We believe that the 60-day period provided under 10 C.F.R. § 2.309(b)(3) for filing hearing requests, petitions, and contentions is "more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions." Under our contention rule, Intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.

*Id*. at 622-23 (footnotes omitted). Further, attempts to raise "new claims in a reply . . . unfairly deprive other participants of an opportunity to rebut the new claims." *Palisades*, CLI-06-17, 63 NRC at 732. Under 10 C.F.R. § 2.309(h), the licensee and NRC Staff are allowed to file an answer to a petition to intervene, the petitioner is allowed a reply, and "[n]o other written answers or replies will be entertained."

Saporito filed his hearing request fifteen days after the NRC noticed the opportunity for a hearing in the *Federal Register*. As a result, his Reply and its amended contentions were filed within the sixty-day timeframe for requesting a hearing. Under 10 C.F.R. § 2.309(f)(2), however, "contentions may be amended or new contentions filed *after the initial filing* only with leave of the presiding officer . . ." (emphasis added). Thus, the requirement to seek Board permission to file new or amended contentions is not limited to untimely contentions, but extends to *any* new or amended contention filed after the petitioner's initial filing. Prior to the 2004 amendment of NRC's procedural rules, petitioners were free to amend their petitions without prior approval of the presiding officer at any time up to fifteen days prior to the first prehearing conference. *See* 10 C.F.R. § 2.714(a)(3) (2004). Only after the prehearing conference did petitioners need leave of the presiding officer to amend their petitions. *Id*. The

new Part 2 regulations amended that previous adjudicatory structure. The plain language of the new provision requires approval of the presiding officer for any new or amended contention (other than certain specific environmental contentions) filed after the initial filing. 10 C.F.R. § 2.309(f)(2).

C. Saporito's New Arguments and Contentions Should be Stricken

Even though the time for requesting a hearing had yet to pass, Saporito's September 20 contention amendment was procedurally defective because he failed to seek leave of the Board to file a new or amended contention. In order to amend his contentions after his initial filing, Saporito must seek leave of the presiding officer upon a showing that-

> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2). Ignoring this requirement, Saporito failed to even attempt such a showing. *See* Saporito's Reply at 6. Consequently, Saporito's new standing argument, amended contentions, and new affidavit should be stricken.

The Commission "does not look with favor on amended or new contentions filed after the initial filing." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004) (internal citations omitted). Petitioners, Saporito included, have an "ironclad obligation" to examine publicly available material with sufficient care to uncover any information in support of their contentions. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982). In this proceeding (and in

the Turkey Point and Seabrook license amendment proceedings), Saporito chose not to assume this responsibility, but instead chose to submit a string of hearing requests with no support. The Commission, however, "demand[s] a level of discipline and preparedness on the part of petitioners [who must] set forth their claims and the support for their claims at the outset." *LES I*, 60 NRC at 225 (internal quotations omitted). By contrast, Saporito's initial filing was nothing but "vague, unsupported and generalized allegations." *See LES II*, 60 NRC at 622.

The Commission's "60-day period provided under 10 C.F.R.§ 2.309(b)(3) is ample time for potential intervenors to review an application and develop contentions." *USEC, Inc.*, (American Centrifuge Plant) CLI-06-10, 63 NRC 451, 458 (2006). But Saporito chose not to avail himself of that full time period and instead chose to quickly file an unsupported petition. The Board must not reward Saporito's pattern of baseless, rapid-fire intervention petitions by allowing him to attempt to cure his unsupported initial contentions, after both the licensee and the NRC Staff have had to file answers. The 10 C.F.R. § 2.309(f)(2) requirement that petitioners seek leave to amend contentions after their initial filing provides for just this scenario. "Supporting information," the Commission has held, "is to be provided at the time the contention is filed, not at a later date . . ." *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility) CLI-07-20, 67 NRC 499, 504 (2007). Allowing Saporito to amend his initial filing without leave of the Board would only serve to undermine the Commission's attempts to increase the efficiency of its adjudicatory process. *See LES II,* 60 NRC at 625. If Saporito wishes to file contentions early without providing the requisite support, he must abide by the procedural consequences of that decision.

Saporito's submittal of a Reply containing new contentions, a new affidavit, and new standing arguments is not permitted by Commission procedural regulations and precedent.

Accordingly, Saporito's new contentions (including all arguments in support thereof in his Reply and in his new affidavit, as well as the new standing argument) should be stricken.

## II. The Board Should Certify to the Commission the Question of Whether to Sanction Saporito for His Abuse of the NRC Adjudicatory Process

Saporito's failure to abide by the Commission's rules governing replies is hardly his first procedural violation. It is only the latest example of Saporito's disregard of procedural rules.[4] For this reason, FPLE also incorporates by reference its motion for certification from FPL's Turkey Point Motion. FPLE specifically requests the Board to certify to the Commission the question whether the Commission should direct the Office of the Secretary to summarily reject any non-conforming pleadings under the authority granted by 10 C.F.R. § 2.346(h) and not refer them to either the Atomic Safety and Licensing Board Panel or the Commission. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3) CLI-06-04, slip op. at 7, 2006 WL 1704521 (2006).

Such a sanction is authorized and appropriate under the circumstances, as the Office of the Secretary has already been delegated the authority to deny any hearing request that fails to comply with the Commission's pleading requirements and fails to set forth an arguable basis for further proceedings. *See* 10 C.F.R. § 2.346(h). The NRC Staff expressed a similar idea with respect to Saporito's pleadings recently in the Seabrook proceeding, noting that "[t]his continuing disregard for the Commission's regulatory and case law pleading requirements should warrant summary rejection. In fact, the Secretary, pursuant to 10 C.F.R. § 2.346(h), has the authority to deny requests for failing 'to comply with the Commission's pleading

[4] FPLE affirms its position outlined in its Answer in this proceeding, as well as the Answers of FPL and FPLE-S, that Saporito failed to establish standing or proffer any admissible contentions.

requirements . . . and fail[ing] to set forth an arguable basis for further proceedings.' The resources and efficiencies of the Staff, the Board, and Applicant should not be continuously tested by clearly deficient petitions." NRC Staff's Answer to [Saporito's] Petition to Intervene and Request for Hearing (Seabrook) at 2 n.3 (Sept. 23, 2008).

Based on the foregoing, FPL moves the Board, pursuant to 10 C.F.R. §§ 2.319(l) and 2.323(f)(2), to certify to the Commission the question of whether to employ a solution similar to that utilized in *Millstone*.[5] The Office of the Secretary's review of Saporito's filings should also extend to any of his various alter ego organizations, such as SEC, the National Environmental Protection Center,[6] the National Litigation Consultants,[7] or any other group[8] Saporito creates to pursue his objectives.

FPLE is mindful that this request for relief could be viewed by some as an attempt to prevent a stakeholder from participating in NRC proceedings. However, the record with respect to Saporito's actions, as was painstakingly outlined in FPL's Turkey Point Motion, clearly demonstrates that extraordinary measures are appropriate with respect to Saporito based on his 20-year campaign of meritless litigation and regulatory filings against the FPL Group companies.

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[5] The Commission "encourage[s boards] to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding." Policy on Conduct Of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998). While this motion does not involve admitted issues, it certainly raises an important Commission policy issue.

[6] *See, e.g., Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit 1), unpublished Licensing Board Order, 2002 WL 31688821 (Nov. 22, 2002); *see also* Fax from Thomas Saporito, "Executive Director," National Environmental Protection Center, to William Travers, Executive Director for Operations, NRC, forwarding "Petitioners' Supplemental Petition under 10 C.F.R. 2.206" (June 30, 2004).

[7] *See, e.g., Florida Power & Light,* DD-98-10, 48 NRC 245.

[8] *See, e.g., Arizona Public Service Co.* (Palo Verde Nuclear Generating Station), DD-96-8, 43 NRC 344 (1996) (Saporito participating as "Florida Energy Consultants").

## CONCLUSION

Based on the foregoing, and in accordance with Commission policy, rules, and precedent, FPLE respectfully requests the Board to strike Saporito's Reply. Further, FPLE moves the Board to certify to the Commission the question whether it should direct the Office of the Secretary to screen Saporito's filings to ensure compliance with procedural rules and not accept for filing or docketing any pleading signed by Saporito that does not conform to the NRC's Rules of Practice.

Respectfully Submitted,

***Signed (electronically) by,***

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***Executed in Accord with 10 C.F.R. § 2.304(d)***

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Dated: September 30, 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 Nos. 50-266-LA |
| (Point Beach Nuclear Plant, Unit 1) | ) | |
| | ) | |
| | ) | |

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: | Steven Hamrick |
| Address: | FPL Energy Point Beach, LLC<br>801 Pennsylvania Avenue, NW<br>Suite 220<br>Washington, D.C. 20004 |
| Telephone: | (202) 347-7082 |
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| E-mail Address: | steven.hamrick@fpl.com |
| Admissions: | Court of Appeals of Maryland |
| Name of Party: | Florida Power & Light Company |

Respectfully submitted,

***Signed (electronically) by,***

Steven Hamrick
Counsel for FPL Energy Point Beach, LLC

September 30, 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 Nos. 50-266-LA |
| (Point Beach Nuclear Plant, Unit 1) | ) | |
| | ) | |
| | ) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION TO STRIKE SAPORITO'S REPLY AND FOR SANCTIONS and NOTICE OF APPEARANCE OF STEVEN HAMRICK, dated September 30, 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: wjf1@nrc.gov

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

Mark O. Barnett
Administrative Judge
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Office of the General Counsel
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***Signed (electronically) by,***

Steven Hamrick

Dated at Juno Beach, Florida
this 30th day of September 2008