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January 10, 1979

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In the Matter of
FLORIDA POWER & LIGHT COMPANY
(St. Lucie Nuclear Power Plant, Unit 2)
Docket No. 50-389

Gentlemen:

Copies of NUREG/CR-0400, "Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission" (the "Lewis Committee Report"), have been furnished directly to the Licensing and Appeal Board Panels for the use of the members of this Board. Under cover of copies of this letter, the NRC Staff is enclosing copies of the Lewis Committee Report for the information of the parties to the proceeding. The Commission is presently in the process of developing a policy statement concerning the report.

Sincerely,

William D. Paton
Counsel for NRC Staff

cc (w/encl.):

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

12/22/78

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY (St. Lucie Plant, Unit No. 2)	)	NRC Docket No. 50-389A

NRC STAFF'S RESPONSE TO APPLICANT'S OBJECTIONS TO DISCOVERY REQUESTS AND MOTION FOR A PROTECTIVE ORDER

By Motion of December 11, 1978, Florida Power and Light Company (Applicant or FP&L) has objected to several discovery requests contained in the First Joint Request by the NRC Staff, the Department of Justice and the Intervenors (the Joint Request). In connection with these discovery requests, Applicant also has moved for the entry of a protective order. In accordance with the Licensing Board's Order of November 14, 1978, Staff hereby files its response to Applicant's motions. 1/

I. APPLICANT'S OBJECTIONS TO THE TIME PERIOD ENCOMPASSED IN THE JOINT REQUEST

Applicant has objected that 14 items of the Joint Request impose a "substantial and unreasonable search burden on the Company" 2/ by requiring searches for documents back as far as 1950. The Company, therefore, has requested an order limiting discovery to 1972, with provisions for earlier discovery upon motion by the party seeking production. 3/

1/ As a result of meetings held between Applicant, Intervenors, the Department of Justice and the Staff of the Nuclear Regulatory Commission, numerous potential objections to discovery requests have been resolved.

2/ Applicant's Objections to Discovery Requests and Motion for a Protective Order (Motion) at 4.

3/ Id. at 8-9.

Staff notes that only 14 of the 89 Joint Requests require a search past the general production date of 1965. [4] Eight require a search to 1950; [5] four require a search to 1955; [6] and two require a search to 1960. [7] The limited number of these requests demonstrate that the Staff has sought to limit its discovery where possible. Only these 14 items request a document search past the date ordered in South Dade, upon which the Applicant states it has already started its document search. [8] Each request is based upon a belief that relevant material will be uncovered in a search back to the dates specified. And, as will be discussed, infra, Staff believes these requests are clearly within the scope of discovery.

A. SCOPE OF DISCOVERY

The scope of discovery in NRC proceedings is, of course, governed by 10 CFR §2.740(b)(1). Modeled after Federal Rule of Civil Procedure

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4/ The 1965 date is set forth in Part C of the Joint Request, "Scope of Production." This is the same general cutoff date ordered by the Board in the South Dade proceeding.

In its Motion Applicant suggests the Staff and other parties are being inconsistent in setting 1965 as the relevant period for discovery and then requesting earlier dates as certain items. (Motion at 3.) But the Joint Request itself careful sets forth:

> "Each paragraph contained below, unless otherwise specified, refers to all documents made, sent, dated or received from January 1, 1965 to date..." (Joint Request at 6, Emphasis added).

The 14 earlier requests simply fall within this exception language. There is no inconsistency.

5/ Joint Request Nos. 24,25,29,30,33,41,56, and 76.

6/ Joint Request Nos. 2,8,26, and 48.

7/ Joint Request Nos. 12 and 39.

8/ Motion at 5.

26(b),[9] that regulation provides:

> Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ... It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added).

Thus, the controlling standard for determining whether a discovery request is within the scope of discovery is whether it is relevant to the subject matter in the proceeding. "Subject matter", however, includes not only those matters admitted in controversy at the prehearing conference,[10] but also "the existence description, nature, custody, condition and location" of documents and people.

Both the courts[11] and the Commission have recognized the need for "liberal discovery" under the relevancy standard. As the Appeal Board

9/ FED.R.CIV.P. 26(b) 28 USC; In fact, the Appeal Board has recognized that 10 CFR 2.740 is modeled after Rule 26. Commonwealth Edison Company (Zion Station, Units 1 & 2), ALAB-196, 7 AEC 457, 460 (1974).

10/ 10 CFR 2.740(b)(1); Allied-General Nuclear Services et al. (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977).

11/ See e.g., Detweiler Bros., Inc. v. John Graham & Co., 412 F. Supp. 416 (E.D. Wash. 1976); La Chemise Lacoste v. Alligator Co., Inc., 60 F.R.D. 164 (D. Del. 1973).

Since 10 CFR 2.740(b) is patterned after FRCP 26, it has been held that "the legal authorities and Federal court decisions involving Rule 26 illiminates, and provide proper guidelines for interpreting the discovery standards set forth in the Commission's rules." Allied-General Nuclear Services et al, supra at 492.

said in Commonwealth Edison Company:[12/]

> Licensing boards are afforded considerable discretion and latitude as to the manner in which they will apply the discovery rules. (cites omitted). But despite this discretion and latitude, we think that the "broad, liberal interpretation" given to the Federal Rules must similarly be accorded the Commission's discovery rules.

The Staff believes its 14 document requests which require searches past 1965 meet the test of "relevancy" under the broad, liberal interpretation which is due 10 CFR §2.740(b)(1). Neither the Federal Rules, the Commission's Regulations, nor any Commission decision limits the definition of "relevancy" to a time period. If a demonstration of relevance has been shown, discovery should follow.

However, both the Federal Rules and the Commission's Rules of Practice provide for limiting discovery, so as not to impose an unreasonable burden on the party subject to discovery. Section 2.740(b) prefaces the earlier quoted section on the "general" scope of discovery by stating: "Unless otherwise limited by the presiding officer in accordance with this section..." (emphasis added).

12/ Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461 (1974). See also Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-185, 7 AEC 240 (1974).

Presumably the emphasized language in §2.740(b) requires that any limiting of the "general" scope of discovery be in accordance with the standards required for a protective order under §2.740(c). [13/] Thus, whether a Protective Order or simply a Motion to Limit Discovery is sought, the Board's decision will be governed by the analysis set forth in §2.740(c). [14/] That analysis would allow for a limiting of the "general" scope of discovery upon a showing of "annoynance, embarassment, oppression, or undue burden or expense." [15/] It should be noted, similarly, that whether styled as a Motion for a Protective Order or Motion to Limit Discovery, the burden of limiting the general scope of discovery rests upon the party seeking to restrict discovery.

In ruling upon the instant motion, therefore, the Board must balance the relevancy of the 14 Joint Requests against the burden claimed by the Applicant. Only if the burden outweighs the possible relevancy of the request is an order limiting discovery--or a Protective Order--properly granted. In its Motion for a Protective Order in the instant case, FP&L has demonstrated neither the lack of relevance of the Joint Requests, nor an undue burden in producing those documents.

13/ 10 CFR §2.740(c) is the only relevant section for limiting discovery, other than those provisions dealing with "Trial production materials" in 2.740(b)(2), which are not at issue here.

14/ It is not clear in what form Applicant's Motion is stated. Although styled "Applicant's Objections to Discovery Requests and Motion for a Protective Order," it could be argued that pertains only to §IV of the Applicant's paper. On the other hand, Applicant's submission in §I "that discovery and evidence in this proceeding should be limited to the period beginning January 1, 1972" (Motion at 8) could also be interpreted as a Motion for a Protective Order. If so, it clearly lacks the allegation of "good cause" required in 10 CFR 2.740(c).

15/ 10 CFR §2.740(c). Applicant has found the need for a limiting order upon such a basis by claiming the search would be "unreasonable" (p. 4), "expensive and time consuming." (p. 5).

B. RELEVANCE OF DOCUMENTS REQUESTED

The Applicant has not attempted an item-by-item discussion of the relevance of the objected-to document requests.[16] Rather, FP&L makes only broad statements as to the irrelevance of the requests, saying "(t)he burden of such a search would not be offset by the probative value of any documents produced;"[17] that "documents authored more than a quarter of a century ago are of dubious relevance at best to issues in this proceeding;"[18] and "When requests reach back more than a quarter of a century, their relevance cannot be assumed."[19]

The simple claim that documents are irrelevant is not the same thing as demonstrating that irrelevance. And while it is true that the Commission's Rules of Practice do not allow the relevance of requests to be "assumed," the Appeal Board has instructed that a "broad, liberal interpretation" be given to 10 CFR 2.740 in order to give effect to its purpose.[20] It is therefore equally erroneous to "assume" irrelevance.

16/ Notes 5-7, supra.

17/ Motion at 6.

18/ Id. at 7.

19/ Id. at 6.

20/ The Appeal Board has quoted with approval the Supreme Court's understanding of the purpose of modern discovery: "They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." Commonwealth Edison Co., supra, 7 AEC at 461, quoting United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

As discussed, supra, there is no time limit definition to relevant discovery. Documents "authored more than a quarter of a century ago" are as discoverable as those authored yesterday if relevant to the proceeding. There is nothing "dubious" about it.

The relevance to this proceeding of the 1950, 1955, and 1960 document requests is simple: the U.S. Circuit Court of Appeals decision in Gainesville Utilities Dept. v. Florida Power & Light Co.[21] In that decision, the Fifth Circuit reversed the trial court's refusal to grant judgment n.o.v. on the existence of a conspiracy to divide the wholesale power market between FP&L and Florida Power Corporation.[22] Documents and evidence introduced in that case reach back to the early 1950's. For example, in an affadavit filed by Florida Cities' attorney Robert A. Jablon in the South Dade proceeding,[23] a letter from W.C. Gilman, President of Florida Power Corporation, to Richard Simpson of Monticello, Fla., dated January 30, 1951 appears.[24] The letter is indicative, according to Mr. Jablon's affadavit, of material showing "various anti-competitive actions of Florida Power & Light Company, including refusals to transmit, refusals to sell wholesale power, conspiracy to divide territory for wholesale power service, and monopolization."[25]

21/ 573 F.2d 292 (5th Cir., 1978), cert. denied, ___U.S.___, 47 USLW 3329 (No. 78-476) (November 14, 1978).

22/ 573 F.2d at 299.

23/ Florida Power & Light Company (South Dade Nuclear Units), NRC Dkt. No. P-636-A, Robert Jablon affadavit attached to Florida Cities Petition to Intervene, April 14, 1976.

24/ Id., Document No. 14 in the Jablon affadavit.

25/ Id., Jablon affadavit at 3 (unnumbered).

While the Staff makes no representations as to the value of that particular letter or to Mr. Jablon's assertions of its use in the South Dade proceeding, the fact that a relevant 1951 letter was obtained through discovery in the Gainesville case, [26] suggests that further discovery into that time period is necessary in the instant proceeding. If such discovery was deemed relevant by the U.S. District Court in Gainesville, the Staff believes its limited request for similar discovery in the St. Lucie 2 proceeding is consistent with its responsibilities of investigating whether granting the proposed license would "create or maintain a situation inconsistent with the antitrust laws as specified in subsection 105a." [27]

It is not an answer to the Gainesville-prompted requests that the "allegations were well-known by 1977, when the Board ruled on the South Dade discovery requests." [28] At the time of that ruling, the District Court jury had refused to find a conspiracy between FP&L and Florida Power Corporation and a motion for judgment n.o.v. had been denied. Thus, the parties could hardly have been expected to press the relevance of the Gainesville discovery period. However, with the decision of the Court of Appeals for the Fifth Circuit and the subsequent denial of certiorari by the Supreme Court, the Nuclear Regulatory Commission Staff could hardly overlook those allegations. Indeed, Section 105a of the Atomic Energy Act places independent authority in the Commission to "suspend, revoke or take such other action as it may deem necessary" [29]

26/ Id., Jablon affadavit at 3 (numbered).

27/ 42 USC §2135 c (5).

28/ Motion at 5, note 1 (unnumbered).

29/ 42 USC §2135a.

when there has been a finding of violation of the antitrust laws by a licensee.[30/]

The allegations growing out of the Gainesville case are certainly within the scope of the permissible Staff investigation in the instant proceeding. The NRC Staff has always maintained that its investigations are not limited to the time frame when the immediate unit under consideration was first proposed.[31/] To do so would be inconsistent with the prelicensing antitrust review process of Section 105c.

By authority of the Atomic Energy Act, the Commission is to determine "whether the activities under the license would create or maintain a situation inconsistent with the antitrust laws specified in subsection 105a."[32/] Among the laws specified in subsection 105a is the Sherman

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30/ As the Board is aware, the Commission now has under advisement the Gainesville decision and what action it should take with regard to FP&L. The Staff has urged the Commission to consolidate any 105a proceeding with the instant case. Although there are other possible routes for dealing with the Gainesville matter, it should be noted that if the Commission adopts the Staff recommendation of consolidation, all of the material directly relevant to the Gainesville allegations would come into this proceeding. Much of that could probably be accomplished by granting the Joint Document requests now at issue; otherwise, should the Commission order consolidation and the parties enter discovery requests based on that 105a matter, the "early" discovery requests will necessarily be repeated.

31/ As the Applicant here has alleged. See Motion at 2.

32/ 42 USC §2135c(5).

Act.[33] It is, of course, necessary in showing a violation of Section 2 of the Sherman Act to demonstrate not only monopoly power but the willful acquisition of such power or willful maintenance of monopoly power.[34] It would be impossible to do so without an investigation of the past of the alleged monopolist. Thus, in NRC proceedings, it would be impossible to "make a finding" as to whether certain conduct was inconsistent with Section 2 of the Sherman Act without allowing an investigation into the past conduct of the Applicant.

For purposes of determining what relief is necessary, should a finding be made that a situation inconsistent with the antitrust laws would develop if the license were granted without appropriate conditions, the NRC Staff must also evaluate the effects of past anticompetitive practices or structure. It is impossible to evaluate effects in a vacuum. Only by studying the past situation and comparing it with the present can the "effects" of anticompetitive practices and structure be measured for purposes of developing constructive relief. At the same time, the Staff does not contend it has a "fishing license" to conduct discovery.[35] The limited number of pre-1965 document requests demonstrate an attempt to limit discovery to those areas relevant to the Gainesville matter.[36]

33/ 15 U.S.C. §1 et. seq.

34/ United States v. Grinnell Corporation, 384 U.S. 563, 570-571 (1966).

35/ Motion at 16.

36/ Also relevant is the SERC matter, as detailed in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), LRP-77-24, 5 NRC 804 (1977).

The Applicant's suggestion of 1972 as the earliest date for discovery is objectionable for the reasons stated above. In fact, such a date would seriously impair the ability of some parties to formulate and present their case. For example, to limit discovery to 1972, "the year in which the Company first gave consideration to the construction of Unit No. 2 of the St. Lucie Plant as presently constituted", [37/] would foreclose the allegation of denial of access to nuclear with respect to all other planned projects of the Applicant.

C. BURDEN ON THE APPLICANT

The other side of the Protective Order/Limiting Order equation calls for balancing the demonstrated relevance of the discovery against the burden which would be imposed upon the party against whom discovery is sought. It is the party resisting discovery who must demonstrate and carry the burden of showing "annoyance, embarassment, oppression or undue burden or expense." [38/]

Again, FP&L has alleged undue burden without demonstrating that it actually exists. For example, the Applicant says this "massive task" would be "expensive and time consuming." [39/] But it is unclear just why that would be true. Presumably, most of these documents would have already been

37/ Motion at 2.

38/ 10 CFR 2.740(c).

39/ Motion at 6.

produced in preparation for the Gainesville case. Since the Joint Request contains only 14 items which seek discovery before the general 1965 date, 10 years difference in 14 categories is apparently the Applicant's definition of "massive."

Further, the Applicant gives us no means of evaluating whether, in fact, the 14 Joint Requests would be burdensome at all. Since we have not been instructed how the files are maintained, it is impossible to determine--from the material now before the Board--the time or expense that would be involved in meeting the requests. If, for example, FP&L's files are chronologically arranged, it would appear to be a relatively easy matter to "extend" the discovery request back 10 years. It may be that the Applicant's files are arranged in some other fashion, but the point is that cannot be assumed. Absent some demonstration and explanation of what the burden is, the Board cannot assume that it exists, simply on the assertions of the party seeking to limit discovery.

Some of the assertions of burden are difficult to reconcile with common sense. For example, Joint Request No. 2 requests "copies of annual reports issued to stockholders by Company for the years 1955-1977..." Unless these annual reports have been destroyed by fire, it is difficult to see the burden Applicant would have in locating and copying these reports. The "burden" is minimal.

These practical arguments aside, it is clear, as a legal matter, that merely the existence of "some burden" is not grounds for denying relevant discovery.[40/] Courts have held that the fact that production

40/ Hanover Shoe, Inc. v. United Shoe Machinery Corp. 207 F. Supp. 407 (N.D. Pa. 1962).

would be onerous or inconvenient is not per se grounds for denying a document request.[41] Under 10 CFR §2.740(c), the pertinent consideration is whether "justice requires" a limitation on discovery to prevent burdening an applicant. Mere size of the search or length of the relevant time period does not define burden; it is the demonstration of such hardship before the Board which is crucial.

However, the Applicant makes the argument that it performed "a substantial amount of work" in the South Dade proceeding and that its work, conducted "in reliance" on the Board's South Dade ruling, would have to be repeated if an earlier date is adopted.[42] Besides the fact the Applicant is inconsistent in its "reliance" on South Dade,[43] Staff contends that FP&L has no basis for placing such "reliance" in South Dade. It is true that the parties to the St. Lucie 2 proceeding have used the South Dade discovery procedures and matters in controversy as a basis to frame the issues and discovery in the instant proceeding. This is simply a matter of litigation efficiency, directed toward the goal of expediting the licensing process. However, the South Dade proceeding has been rendered moot by the cancellation of the planned units by FP&L.

41/ Rockaway Pix Theatre, Inc. v. Metro-Goldwyn-Mayer, Inc., 36 F.R.D. 15 (E.D.N.Y. 1964).

42/ Motion at 5.

43/ For example, he has not "relied" on the 1965 cutoff date set by the Board in that proceeding, but now rather requests a 1972 date.

Any discovery which FP&L will repeat in this proceeding from its earlier South Dade search is not a basis for limiting discovery which the Board might order here.

D. PROCEDURE FOR ANALYSIS

As has been discussed, the proper procedure for the Board to follow in ruling on FP&L's Motion for a Protective Order/Motion to Limit Discovery is to balance the shown relevancy of the documents against the demonstrated burden on the Applicant. The Staff believes it has shown both the relevance of the 14 Joint Requests and the lack of any demonstrated burden by FP&L, and therefore, the Motion of the Applicant should be denied.

However, FP&L has suggested another method of analysis. Referencing the Manual for Complex Litigation, [44/] Applicant would have the Board set a general discovery date of 1972, with earlier requests possible

44/ Motion at 9.

upon some showing in "isolated circumstances."[45/] In one sense, this suggestion simply begs the issue. That is: where is the "general cut-off" date to be set: 1972, 1965, 1950, or some other year? But, closely read, this suggestion is also a means of shifting the burden to the party moving for discovery, rather than the party opposing discovery, as required by the Commission's Rules of Practice.

Under the Manual for Complex Litigation approach, as outlined by the Applicant on pages 8-9 of its Motion, "(t)he burden should be on the requesting party to set forth the reasons for each such exception (to the general cutoff date of 1972)." This is completely contrary to the provisions of 10 CFR 2.740, outlined earlier. That Commission Regulation, it will be recalled, follows Federal Rule of Civil Procedure 26 in allowing the discovery of "any matter, not privileged, which is relevant."[46/] It is only upon a Motion for a Protective Order[47/] or an order limiting the scope of discovery by the Board[48/] that this scope is reduced. What the Applicant is proposing is to turn this scheme upon its head, asking the Board to grant an order which would require a party seeking relevant documents to obtain Board approval, while failing to set forth what standard must be utilized.[49/] Staff opposes this attempt and perhaps states the obvious in saying that

45/ Motion at 8.

46/ 10 CFR 2.740(b)(1) (emphasis added).

47/ 10 CFR 2.740(c).

48/ 10 CFR 2.740(b).

49/ It is not clear from Applicant's Motion what showing the party seeking discovery in the "isolated circumstances" would have to show. The phrase "good cause" is mentioned. See Fed.R.Civ. P. 35(a). This would be a higher standard for a party seeking discovery than showing relevance, as set forth in 10 CFR §2.740(b)(1).

while the Board is held to follow the Commission's Rules of Practice, as set forth in 10 CFR, it has no responsibility to follow any scheme proposed in the Manual for Complex Litigation.

E. EVIDENTIARY CONCERNS

A careful reading of Applicant's motion reveals a request that the Board limit "discovery and evidence" in this proceeding to a 1972 date.[50/] As discussed previously, the Staff does not believe this is a realistic proposal. But even should the Board rule that 1950, 1955 and 1960 are not proper discovery dates, in their limited context, this ruling should not effect the evidentiary presentation of material gained through other proceedings.

For example, documents the parties have obtained through the Gainesville proceeding, which are relevant in an evidentiary sense,[51/] to the matters at controversy in the instant proceeding, should not be precluded from admission merely because they are earlier documents. It would be error, the Staff believes, for the Board to rule now that all evidence prior to 1972 (or whatever date is finally selected) is irrelevant. Under the definition of Federal Rule of Evidence 401: relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." There will be time enough for the Board to rule on such evidence when proferred at the hearing. Therefore, any ruling the Board will make in response to Applicant's present motion should be limited in terms of discovery only, under the applicable provisions of 10 CFR 2.740.

50/ Motion at 8.

51/ Fed.R. Evid., Rules 401, 402, 28 U.S.C.

II. APPLICANT'S OBJECTIONS TO DISCOVERY PERTAINING TO LEGISLATIVE ACTIVITIES

Applicant objects to interrogatory 58 of the Joint Request which requires the production of documents relating to Applicant's legislative activities. It objects to this type of discovery on the basis of what is commonly referred to as the Noerr-Pennington doctrine.[52/] This doctrine confers immunity from liability under the antitrust laws for actions, regardless of their anticompetitive intent or purpose, which merely involve seeking to influence the executive, legislative or judicial branches of government. Contrary to Applicant's assertions, there are a number of reasons why interrogatory 58 is a permissible discovery request.

A. 10 CFR 2.740(b)(1) of the Commission's Rules of Practice

Applicant's contentions regarding the Noerr-Pennington doctrine are at best premature since discovery of the type of documents called for in this request would be permissible even though the documents themselves might not be admissible at trial. In this regard, the Federal Rules of Civil Procedure 28 U.S.C. §26(b)(1) states in pertinent part -

> "...It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Comparable wording is incorporated into the Commission's Rules of Practice 10 CFR 2.740(b)(1).

52/ United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern Railraod Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1960).

The South Dade Licensing Board recognized the distinction between permissible discovery and inadmissible evidence for Noerr-Pennington type documents when it held that a similar discovery request in that case was permissible: 53/

> We are not of course, at this stage ruling upon the ultimate admissibility of evidence. Rather, in accordance with 10 CFR §2.740(b)(1), the test we apply is whether "...the information sought appears reasonably calculated to lead to the discovery of admissible evidence." * This is also the test under Rule 26 of the Federal Rules of Civil Procedure. The Board observes that the interrogatories objected to on the basis of Noerr-Pennington seem to be designed to lead to the discovery of admissible evidence, even if the legislative conduct thus demonstrated may not be the basis of a finding of a violation of the antitrust laws. 54/

B. Exceptions To Noerr-Pennington

In addition to the above discussed rules of discovery, there are other reasons why the Noerr-Pennington doctrine would not preclude the Applicant from producing documents pursuant to interrogatory 58. There are several well established exceptions to this doctrine to include the fact that legislative acts and practices may be used to show the purpose and character of particular transactions, even though in some cases they can not be the basis for a finding of a violation of the antitrust laws. 55/

53/ It should be noted that Joint Request No. 60 in South Dade was identical to the original October 31, 1978 Joint Request No. 58 in St. Lucie Unit 2 (This October 31st request was subsequently revised by the December 11, 1970 memo of understanding between the parties.)

54/ Second Prehearing Conference Order, In the Matter of Florida Power & Light Co. (South Dade Nuclear Units), Dkt. No. P-636A, February 22, 1977). Attachment G.

55/ United Mine Workers v. Pennington 381 U.S. 657, 670 (1965).

Also, to the extent that the documents disclose that the legislative activities of Applicant fall within the "sham" exception to the Noerr-Pennington doctrine, then such activities can provide the basis for a finding that the Applicant has created or maintained a situation inconsistent with the antitrust laws.[56/]

1. The Noerr-Pennington doctrine permits the introduction of evidence concerning the Applicant's legislative activities to show the purpose and character of the particular activities

In objecting to the production of legislative documents Applicant fails to recognize that although antitrust liability cannot be predicated on valid attempts to influence governmental actions, evidence of bonafide legislative activities is allowable in order to show "the purpose and character" of other activities. This was specifically made clear in footnote 3 of the Pennington decision where the Court points out that such evidence may be admissible "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."[57/] Since Pennington, other courts have applied this reasoning and have permitted the introduction of evidence as to "protected activities" in order to show the purpose and character of the activities in question.[58/]

56/ Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 144 (1960).

57/ United Mine Workers v. Pennington 381 U.S. 657, 670.

58/ See, for example, Household Goods Carriers' Bureau v. Terrell, 417 F.2d 47 (5th Cir.), rehearing en banc, 452 F.2d 152 (1971); Hayes v. United Fireworks, 420 F.2d 836 (9th Cir., 1969).

This exception was specifically cited by the South Dade Licensing Board in overruling the Applicant's Noerr-Pennington arguments. There, the Licensing Board specifically found that:

> The Staff urges that the purpose and character of the applicant's activities are relevant, and that this would be a permissible showing under Pennington, supra. The Board can envision other unprotected products of this discovery. For example, we may be aided in establishing the appropriate relevant geographic and product markets for antitrust analysis in this proceeding. 59/

2. Sham activities

The Noerr-Pennington doctrine does not apply to "sham" attempts to influence governmental acts. This exception was first referred to in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 144 (1960) where the Court stated that:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

According to this exception, to the extent it may be established that Applicant has engaged in legislative activities to interfere with the business relationships of others, Applicant's actions are a legitimate area of discovery and Joint Request 58 is appropriate to examine this possibility.

59/ Florida Power & Light Co., supra, note 54 at p. 3 n.1.

Applicant argues at pp. 14-15 of its brief that discovery in this case should not be allowed under the "sham" exception since, according to Applicant, there has been no allegation by the parties in this proceeding. Applicant goes on to conclude that it would be more appropriate for the Board to defer the matter until the other parties in the case have made a prima facie showing that a sham exception may exist. Staff cannot agree with Applicant's analysis. The short answer to this contention is that discovery will aid the parties in determining whether Applicant's legislative efforts fall within the sham exception. By its very nature, sham activity would be of a clandestive type that often would not be apparent without first having access to the files of the Applicant. The South Dade Licensing Board recognized this need for taking discovery in order to determine whether Noerr-Pennington doctrine, or any of its exceptions, would apply in NRC antitrust litigation. As the Board stated:

> Moreover, it will not be possible until after discovery for the Board to determine whether the activities in question are entitled to the constitutional protection recognized by the Noerr-Pennington cases, or whether they fall within "sham" or other possible exceptions to the doctrine. 60/

60/ Florida Power & Light Co., supra, note 54 at 3.

3. Previous NRC decisions regarding Noerr-Pennington

In its discussion of the Noerr-Pennington doctrine, Applicant has contended that "NRC Licensing Boards have split in their decisions" regarding whether to accept discovery for this classification of documents. Staff believes that a close reading of the various decisions discloses that Licensing Boards have in fact been amenable to allowing Noerr-Pennington type discovery.

Initially Applicant cites an Order issued by the Licensing Board in the Davis-Besse proceeding.[61/] Staff submits that the language quoted by Applicant does not necessarily preclude Noerr-Pennington documents since in the next sentence the Board stated that, "The Board might consider whether such activities [legislative] were part of a broader program to create or maintain a situation inconsistent with the antitrust laws...."[62/] In addition, in the very next interrogatory the Board pointed out that it would allow discovery with respect to other political activity if a sufficient degree of relevancy could be demonstrated[63/] and in the following interrogatory it allowed discovery with respect to documents pertaining to the "sham" exception of the Noerr-Pennington rule.

61/ Order on Objections to Interrogatories and Document Requests, In the Matter of The Toledo Edison Company and the Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Unit 1), Dkt. Nos. 50-346A, 50-440A, October 11, 1974. Attachment A.

62/ Id. at 6.

63/ Id. at 7.

Applicant also cites a decision of the Consumers Board to support its argument.[64] Although in that case the Board had disallowed discovery of certain documents relating to the Applicant's political activities on the basis of relevancy,[65] an examination of the transcript discloses that the Board did in fact subsequently permit examination of a witness whose testimony was objected to on the basis of Noerr-Pennington.[66]

The third ruling cited by the Applicant is that of the Duke Board.[67] There the Board stated that it would consider discovery of political material and grant such requests upon the showing "of prerequisites required by law."[68] Staff believes that since the proper prerequisites will have been shown in this case, the Duke ruling stands in favor of granting the Joint Request.

Finally, the Applicant cites the decision of the Louisiana Board.[69] It is Staff's position that the well-reasoned opinion in Louisiana is

64/ Order Ruling on Applicant's Objections to Document Requests,.... In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), Dkt. Nos. 50-329A, 50-330A, November 28, 1972. Attachment B.

65/ Id. at 2 and 3.

66/ Record, 6 February 1974, at 5625 et seq., In the Matter of Consumers Power Company (Midland Plant, Units 1 and 2), Dkt. Nos. 50-329A, 50-330A. Attachment C.

67/ Prehearing Order Number Two of Atomic Safety and Licensing Board, In the Matter of Duke Power Company (Oconee Units 1, 2 & 3; McGuire Units 1 & 2) Dkt. Nos. 50-269A, et al, November 27, 1972. Attachment D.

68/ Id. at 3.

69/ Memorandum and Order with Respect to Objections on Discovery Requests and Interrogatories, In the Matter of Louisiana Power and Light Co. (Waterford, Unit 3), Dkt. No. 50-382A, April 19, 1974. Attachment E.

persuasive as to why discovery should be granted in this case. There the Board granted discovery with respect to certain legislative information. As in the instant case, the Applicant argued that such discovery was precluded by the Noerr-Pennington doctrine. The Board stated:

> First, Rule 26 of the Federal Rules of Civil Procedure and the AEC Rules and Regulations permit discovery calculated to lead to the production of admissible evidence even though the actual subject matter of the discovery may itself be ruled inadmissible at the time of the hearing. Thus, it remains to be seen whether the information sought by these interrogatories will lead to the production of admissible evidence even if the Board upholds Applicant's contentions with respect to the applicability of the Noerr-Pennington doctrine.
>
> Second, the doctrine and the extent of the doctrine's coverage cannot be tested in a specific context without the proper development of evidentiary facts. That is to say, that although Applicant might claim extensive immunity based on the asserted applicability of the doctrine, the immunity ultimately determined to be available may be substantially narrower than that claimed. Without the development of a factual basis upon which to consider the doctrine, there is no way for the trier of facts to gauge the scope of the immunity.
>
> Third, we note that it cannot be ascertained presently which activities Applicant itself may claim to be immunized by the doctrine; and surely, the other parties are entitled to know the factual basis upon which Applicant will argue the applicability of the doctrine. It would be most unfair if a party, merely by citing the catch phrase "Noerr-Pennington" could thereby relief itself of the responsibility of producing data in response to discovery which data might be outside of the scope of the doctrine. In short, there must be a way to test claims of privilege based on the doctrine, and the only way to make such a test valid is through the production of data of the type sought through these interrogatories.

A case which the Applicant has failed to refer to but which was one of the more recent NRC Licensing Board decisions where Noerr-Pennington discovery has been allowed occurred is the Alabama proceeding.[70] The most recent decision regarding Noerr-Pennington is the above referred to South Dade decision.[71] Staff believes that the reasoning employed by the Louisiana, Alabama, and South Dade Boards is conclusive in overruling the Applicants' arguments in the present matter and mandate a positive finding with respect to interrogatory 58 of the Joint Request.

Applicant attempts to distinguish earlier NRC decisions regarding the Noerr-Pennington documents by contending that the decision in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), 46 U.S.L.W. 4371 (April 25, 1978) somehow makes a difference with respect to access to discovery documents. Staff does not see how Bellotti has any effect upon the rationale employed by the previously referred to NRC Licensing Board rulings for allowing discovery. Bellotti merely stands for the proposition that the First Amendment rights of freedom of speech which apply to private individuals also apply to such entities as commercial corporations.

70/ Order Granting In Part and Denying In Part Motion to Compel Production, In the Matter of Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), Dkt. Nos. 50-348A, November 1, 1973. Attachment F.

71/ Second Prehearing Conference Order, In the Matter of Florida Power & Light Company (South Dade Nuclear Units), Dkt. No. P-636A, February 22, 1977. Attachment G.

One other area which Applicant has tried to emphasize in its arguments concerns the alleged "chilling effect" upon the exercise of constitutionally protected rights if Noerr-Pennington type documents are allowed discovery. The Licensing Board in Alabama found such a defense by an Applicant to be unpersuasive [72] and Staff sees no distinction here.

III. APPLICANT'S OBJECTIONS RELATING TO OVERBROAD REQUESTS

At page 25 of its brief, Applicant objects to Joint Requests Nos. 79-82 on the basis that these interrogatories are overly broad and extend to subjects which are not relevant to this proceeding. Applicant first objects on the basis that these interrogatories are unnecessary. Specifically, it contends that even though these interrogatories are relevant to the fuel supply question, such information is unnecessary since the fuel supply subject is sufficiently covered by Joint Requests 54 and 55 (plus several interrogatories contained in Florida Cities' requests). Second, Applicant objects on the basis that the requested information pertains to a proceeding which is pending before the Federal Energy Regulatory Commission. And third, Applicant contends that providing this information would substantially lengthen and complicate the discovery process in this proceeding.

Staff disagrees that all the information necessary with respect to the fuel supply question can be obtained solely from Joint Requests 54

[72] Those cases cited by Applicant regarding a "chilling effect" appear to involve more extreme situations than are present in this case. For example, Applicant cites at page 12 in support of the "chilling effect" NAACP v. Alabama 357 U.S. 449 (1958). In that case the Court stated at 462: "Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank and file members has exposed those members to economic reprisal, loss of employment, threat of physical coersion, and other manifestations of public hostility." Staff does not believe that disclosure of the information requested by the Joint Interrogatories reaches this standard.

and 55. Document requests 54-55 may not provide information in sufficient detail to establish the competitive situation with respect to natural gas. Among other things, Joint Requests 79-82 are necessary to provide copies of contracts and documents pertaining to pricing and availability of gas supply.

Another important reason why Joint Requests 54 and 55 are not sufficient is that, contrary to Applicant's assertion, we are interested in more than just the question of fuel availability. Staff seeks to know whether Applicant has conspired with others to monopolize the gas supply in the State of Florida or whether it has unfairly acted alone or in concert with others to curtail the gas supply of smaller utilities. Joint Requests 79-82 are designed to provide this type of information.

Staff disagrees that discovery for Joint Requests 79-82 would substantially lengthen and complicate the discovery process in this proceeding. Since, as Applicant concedes, these discovery requests have already been the subject of discovery in a FERC proceeding, the search for these documents by Applicant should not be an undue burden.

Applicants' objection that the natural gas question should not be handled in this forum because it is already the subject of a FERC proceeding is unfounded. There is no element of primary jurisdiction involved here concerning the antitrust aspects of the natural gas question which would preclude the NRC from acting upon this matter.

IV. APPLICANTS' REQUEST FOR A PROTECTIVE ORDER

Applicant contends that much of the discovery information in this proceeding is of a confidential nature which is entitled to a general protective order. It has furnished a proposed protective order which in effect allows Applicant, in its sole discretion, to designate any discovery information as confidential. Staff does not quarrel with the fact that there might be some discovery materials which are entitled to confidential treatment. However, we cannot envision the necessity for the blanket type of protection which Applicant at this time seeks.

Staff believes that 10 CFR §2.740(c) regarding protective orders applies when a party seeks protection for certain specific documents for confidentiality,[73/] but not for an unlimited power to allow for all documents to be marked confidential at the discretion of the requesting party. The party who seeks the protection has the burden of showing why the documents should be confidential and not vice versa. Under Applicant's proposed arrangement, the roles are reversed and other parties will have the burden of demonstrating why specific documents should not be confidential. Staff believes this arrangement subverts both the letter and spirit of 10 CFR §2.740(c) which provides that a protective order will only be granted to a requesting party "for good cause shown."

Staff does not believe that Applicant has shown that a blanket protective order is warranted with respect to all those materials over which it can potentially claim confidentiality. Applicant's blanket protective order is even broader than a requested protective order which

73/ See 10 CFR 2.790(b)(1), as referenced by 10 CFR 2.740(c)(6), allowing the withholding of "a document or a part."

was rejected by an NRC Licensing Board in the Stanislaus proceeding.[74] There the Applicant requested an order requiring that intervenors give advance notice and an opportunity for objection before using documents produced in that proceeding for other purposes. In denying this request, the Licensing Board ruled that

> PGE has not attempted to list or describe with specifity any documents whose use in other fora would unreasonably compromise trade secrets or other identified competitively sensitive information. No good cause has been shown requiring the entry of a protective order for prior notice of other use of documents, and such a requirement would impose a substantial burden on the other parties.[75]

Just as in the Stanislaus proceeding, the Applicant here has not attempted to list and describe which documents should have confidential treatment. Under our rules this burden is demanded of the party who requests confidentiality. Even assuming the Staff could accept the shift of burden implicit in Applicant's proposed Protective Order for "proprietary", confidential, and trade secret information,[76] there are specific problems with the Order as drafted.

74/ Order Regarding PG&E's Motion for Notice on Notice of Use of Documents, In the Matter of Pacific Gas & Electric Co., (Stanislaus Nuclear Project, Unit 1), Dkt. No. P-564A (June 15, 1978).

75/ Id., p. 3.

76/ Proposed Motion at 1.

Paragraph one of the proposed Order states: "This order shall govern all answers, documents and other discovery materials produced by the parties..," etc. While it may be assumed the Order is designed only to apply during the discovery phase of the proceeding, 77/ that is not clearly stated in this paragraph. This ambiguity and inconsistency is a recurring problem in the order, as proposed. As will be discussed, infra, the Staff is reluctant to add as an issue to the prehearing phase of this proceeding the meaning of the terms of the Protective Order.

Paragraph five of the proposed Order states: "with respect to the government parties to this proceeding, Staff attorneys and their regularly employed consultants shall not be prohibited by this Section 5 from access..." (emphasis added). Because of the peculiar wording of this caveat to paragraph five, NRC Staff counsel would be unable to show discovery documents marked as confidential to any of their technical support people. On the one hand, Staff counsel's retained experts may not be hired on a "regularly employed" basis. On the other hand, the technical Staff of the NRC, which serves the dual role of advisor and client, may not be properly classified as "consultants."

The Staff sees several problems with paragraph six. In the first place, it is drafted so ambiguously that the Staff is not sure whether it falls within paragraph six's provisions, or has been completely dealt with in paragraph five. If within paragraph six, the Staff would object

77/ Cf. Motion at 30; Paragraph 15 of Proposed Protective Order.

that this restriction prevents it from showing marked documents to fact witnesses. Such disclosure may be necessary, for example, to refresh recollections and thereby obtain information sought.

Perhaps the most serious objection of the Staff is to paragraph 10, which provides: "No person shall make use of any confidential information obtained pursuant to discovery in this proceeding other than for purposes of this proceeding." By its literal terms, this provision would present the NRC from using information obtained in the St. Lucie 2 discovery process in subsequent cases dealing with that license, the licensee, or other related matters.

For example, paragraph 10 would prevent the Staff from using information gained in this proceeding in a 105a [78/] action against Florida Power & Light Company, even if relevant to the matter under litigation. This would be a clearly unacceptable restriction of the Staff's responsibilities. It might be reemphasized that at the present time, a 105a matter involving the Applicant is pending before the Commission. Should the Commission order that matter to proceed in a separate proceeding, the information the Staff receives in the instant case would certainly be relevant and pertinent to a 105a matter. [79/]

78/ 42 U.S.C. 2135a.

79/ See note 30 and text accompanying.

The Staff finds objectionable the additional requests and special handling procedure which would be required by the proposed Order. For example, paragraph four requires that trial briefs filed with the Board comply with the sealed envelope procedure of that provision of the Protective Order. The Staff believes this will seriously encumber the hearing process.[80/] More importantly, it is the NRC Staff's position that--to the largest extent possible--hearings on NRC license applications should be open to the public. If there is a significant need to restrict public access to certain documents the Board can make appropriate orders. In preparing a brief for the Board the parties should not be restricted in the presentation of documents which substantiate their allegations.[81/]

Furthermore, Staff would note that the procedures dictated in the proposed order have the potential of lengthening the discovery phase of this proceeding. By the terms of the Protective Order, the parties will be forced to argue before the Board many issues: the proper "classification" of a document (par. 13); an independent expert's "need to know" (par. 6); as well as ambiguities in terms of the Protective Order (e.g., pars. 5,6).

The Staff respectfully submits that it would be a more efficient use of the Board's--and all parties'--time if the Applicant would simply move the Board for a Protective Order on those selected documents which

80/ As worded, even the briefs would have to be enclosed in sealed envelopes if they "comprise or contain material marked as confidential, or information taken therefrom..."

81/ The Staff is also concerned that the restrictive provisions of the proposed order will make it impossible to create an adequate record to preserve all matters for appeal.

it feels most sensitive and requiring a Protective Order. Certainly, it is more logical to spend time before the Board arguing over the terms of a relevant document than such abstract factors as the definition of "outside counsel" or "regularly employed consultants."

CONCLUSION

For the above stated reasons, Staff urges the Licensing Board to take the following action with respect to Applicant's objections to the Joint Request:

1. Deny Applicant's objection to the 14 Joint Requests which seek discovery to dates earlier than 1965, and order that such discovery may be had, without reference to evidentiary restrictions;

2. Deny Applicant's objections based upon the Noerr-Pennington doctrine and order discovery under the terms of Joint Request 58;

3. Deny Applicant's objections of overbreadth with regard to Joint Requests 79-82 and order production in light of the need shown;

4. Deny Applicant's proposed Protective Order as contrary to the Commission's Rules of Practice; ambiguous as written; and potentially burdensome; and

5. Grant all other relief deemed appropriate to move this proceeding forward.

Respectfully submitted,

Lee Scott Dewey
Counsel for NRC Staff

Fredric D. Chanania
Counsel for NRC Staff

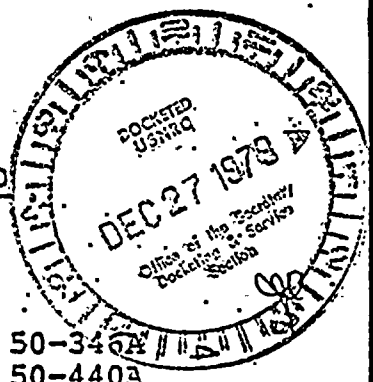
David J. Evans
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22nd day of December 1978.

Attachment A

Shipman Exhibit C.C

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
The Toledo Edison Company and The Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Unit 1)	)	Docket Nos. 50-346A 50-440A 50-441A
The Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2)	)	

definitions Q.3

ORDER ON OBJECTIONS
TO INTERROGATORIES AND DOCUMENT REQUESTS

A. Preliminary

Pursuant to schedule set for motions on discovery, each of the parties[1/] objected on various grounds to various interrogatories and document requests filed pursuant to 10 CFR 2.740(b) and 2.741 by other parties. Specifically, (a) Applicant, Cleveland Electric Illuminating Company (CEI), objected to the interrogatories and document requests of the City of Cleveland (City), (b) Applicants (Toledo Edison Company, Pennsylvania Power Company, Ohio Edison and Duquesne Light Company) objected to City's interrogatories and document requests, (c) Applicants

1/ Except American Municipal Power-Ohio (AMP-O)

or director, and all public utilities or electrical supply or construction companies as to which the CEI director serves as an officer or director.

5. CEI objects to document request 16(d) relating to legislation and constitutional revision affecting the ability of electric utilities to own, finance and construct facilities and to sell electricity. CEI contends that these documents are irrelevant to the proceedings and that it would be placed under a severe burden to conduct a search for such documents. The objection is sustained on the basis that CEI's activities, if any, in the areas of legislation or constitutional revision do not possess the requisite degree of relevance to these proceedings. Assuming that CEI did undertake legislative activities directed to the enactment of statutes which would affect the competitive position of the City, these activities nonetheless would not constitute antitrust violations in and of themselves. The Board might consider whether such activities were part of a broader program to create or maintain a situation inconsistent with the antitrust laws, but under the doctrine of Parker v. Brown, 317 US 341, (1942), legislative judgments with respect to legislative structure may not be considered as antitrust violations even though they have an effect upon commerce.

6. CEI objects to document request 16(f) which calls for materials relating to municipal elections claiming burden, and further claiming that political activities are immunized from antitrust attack. CEI contends that the Noerr Doctrine prevents discovery relating to political matters. The Board does not agree that the blanket assertion of the Noerr Doctrine precludes all such discovery, and on that basis the objection would be overruled. However, the City thus far has failed to demonstrate the relevance of the information sought under this request to the issues admitted in this proceeding and on that basis the objection is sustained. In the event relevance is clearly demonstrated, the Board may reconsider its ruling.

7. CEI objects to document request 16(g) pertaining to litigation documents because it calls for privileged materials and is unduly broad. CEI also claims that certain activities covered by this request may be immunized from antitrust challenge since they would not fall within the "sham" lawsuit exception as set forth in California Motor Transport Company v. Trucking Unlimited, 404 U.S. 508 (1972). The City cited an example of one lawsuit which it contends has anticompetitive overtones. The City further indicated that it would be difficult, without discovery, to gauge the number of lawsuits to determine whether the "sham" exception applied. The Board agrees that it is impossible to determine if the "sham" exception applies

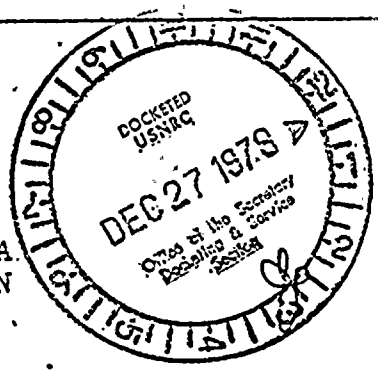
without permitting the discovering party to ascertain the extent of such litigation. Also, with respect to Applicant's claim that the request is unduly broad, we note that it is limited to litigation in opposition to the construction of competing generation or transmission facilities. Accordingly the objection is overruled with regard to litigation that may have been initiated by CEI and discovery is permitted thereto except where CEI asserts an "attorney-client" privilege which shall be handled in accordance with the provisions of Section H below. The objection of CEI is sustained with respect to litigation that may have been initiated by other entities.

8. CEI objects to document request 16(i) calling for information regarding labor union negotiations on the basis that this information is irrelevant to any issue in this proceeding. The objection is sustained.

9. CEI objects to document request 16(j) which seeks fossil fuel supply contracts, on the basis that the information is irrelevant and confidential. As to confidentiality, data otherwise discoverable may not be withheld from attorneys, or economic and technical advisors employed by a party even though the request does involve information considered by a party to be confidential business information. However, the Board will assist the parties in protecting arguably confidential business information from

CONFIDENTIAL DATA

ATTACHMENT B



UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
CONSUMERS POWER COMPANY	)	
	)	50-330A
(Midland Plant, Units 1 and 2)	)	

ORDER RULING ON APPLICANT'S OBJECTIONS TO DOCUMENT REQUESTS, THE DEPARTMENT OF JUSTICE'S MOTION TO COMPEL THE PRODUCTION OF FOUR CATEGORIES OF DOCUMENTS, AND APPLICANT'S MOTION FOR PROTECTIVE ORDERS

Before ruling on the specific matters raised by the parties, a brief statement by this Board dealing with the appropriate scope of discovery would be apropos. The Department of Justice is given 180 days during which to obtain facts from which it can draw conclusions for transmittal to the Atomic Energy Commission in the form of a "Letter of Advice". The Commission's Rules of Practice contemplate that the Board in the first prehearing conference will reach agreement with the parties as to the relevant matters in controversy and will set them forth in the prehearing conference Order. Under Section 2.740 of the Restructured Rules, discovery with regard to such relevant matters in controversy may be had by the parties. It is not the purpose of discovery to explore matters not

in controversy. With these principles in mind, we now turn to the specific items before us.

Applicant's first objection is to request no. 2 -- file indexes and documents describing Applicant's filing system. Unless we take the position that all of Applicant's files are relevant to the matters in controversy, a position we do not take, then this request calls for irrelevant material. The Department of Justice argues that the data requested will enable it to locate relevant material. We do not agree. With the issues clearly drawn, the Department should be able to frame requests appropriately limited to relevant material. Accordingly, Applicant's objection to this request is sustained.

Applicant next objects to requests for documents relating to Applicant's political activities (Request 3(e)). The Department argues that under the guise of appropriate political activities, the Applicant may have practiced a mere sham to engage in forbidden activities. Whether or not Applicant has engaged in unfair practices through political maneuvers is a matter not relevant to the issues in controversy; more particularly, issues pertaining to

coordination. Under the Commission's Notice of Antitrust Hearing, dated April 11, 1972, this Board may not address itself to matters not in controversy. Consequently, we agree with Applicant's arguments concerning the invalidity of the request. The objection is sustained.

The next matter relates to request no. 4, calling for minutes of pooling and coordination committee meetings. All parties agree that the requested documents include many which are irrelevant. The Department of Justice argues that it cannot tell what is relevant without examining all of the files. This type of argument, if carried to its logical conclusion, would give the Department of Justice access to all of Applicant's documents, a procedure forbidden by Section 2.740. The request is hereby limited to those documents which deal with Applicant's power to grant or deny access to coordination, and those documents dealing with the use of this power against smaller utility systems. As so limited, Applicant is required to produce the documents.

Applicant objects to the production of documents relating to its gas operations on the ground that they are not relevant. Possibly, Applicant may have used its gas operations to

MR. VERDISCO: No questions, your Honor.

CHAIRMAN GARFINKEL: Mr. Watson?

MR. WATSON: No questions, your Honor.

CHAIRMAN GARFINKEL: Mr. Jablon?

MR. JABLON: No questions, your Honor.

CHAIRMAN GARFINKEL: The witness is excused, and we want to thank the witness for his time. The Board is hopeful that the witness does not take it personally that certain of the previous testimony in writing was stricken.

THE WITNESS: No, sir, I certainly do not.

CHAIRMAN GARFINKEL: Okay. You're excused.

(Witness excused.)

Now the Board is prepared at this time to make a ruling with respect to the motion to quash the subpoena, and with that, we will take a two-minute recess and we'll be right back.

5625

ATTACHMENT C 2/6/74 TRANSCRIPT CONSUMERS POWER CO.

(Brief recess.)

CHAIRMAN GARFINKEL: We'll be back on the record.

Not to keep anybody in suspense, the motion to quash itself is going to be denied. However, there's going to be substantial limitations.

Now we will go into the analysis.

The first analysis that the Board wishes to make is, number one, we will deal with the subpoena itself in this respect.

eb7

The subpoena is directed to an individual. Therefore, the only information that the Joint Intervenors are entitled to, if they are entitled to anything, is information in the possession of this particular witness, and only information in the possession of this witness.

With respect to the question of -- and that will be as of the date of the subpoena.

With respect to the question of the First Amendment, it is true that no one can challenge an individual's beliefs, an individual's right to petition the legislature, an individual's right with respect to freedom of the press. That guarantee is basically a guarantee against action by either the Federal Government or the State Government through the Fourteenth Amendment. It's a perfect right.

However, it is not an absolute right, and the courts have made it clear that the First Amendment does not give absolute rights with respect to conduct. That is, conduct is subject to inquiry where it does violate a public policy of the government.

The classic example is you cannot yell "Fire" in a crowded movie, and things like that. If the action violates the antitrust laws, the First Amendment does not bar inquiry into that question.

Now there is a right for this Board to see data and hear information regarding certain conduct, especially

eb8

under the Noerr, Pennington doctrine which relates to the question of a sham, if it was truly a sham.

Now with respect to the question of discovery as against the subpoena, the Applicant has made the point that this is merely a subterfuge for obtaining discovery at a time when discovery was closed.

There is a difference between discovery and a subpoena at trial. Discovery merely seeks relevant material in order to adduce evidence that would be admissible at a trial, but that does not bar an individual from ignoring the discovery method or the discovery mode and seeking the production of documents that are admissible in evidence at a trial.

However, it bars him from two things:

It bars him from inspecting and making copies of that and seeking further information. The documents do not leave the possession of the party who is producing the documents. If the documents are in the courtroom, they are truly under the possession of the individual subpoenaed. They may be shown, but if they are not used, actually being admitted into evidence, they must be forthwith returned.

And in many situations, a party does not like to use the discovery method because he does not want to tip his case, so therefore, one party may seek the subpoena route at trial and gamble that the information will be furnished right then and there.

eb9

Now the Board did not issue an order that specifies every exact bit of evidence will be identified and summarized for the benefit of opposing Counsel prior to trial. That was not the case. There is clear indication in the transcript of the prehearing conferences that there may be a time when witnesses will have to be identified at the trial and testimony be taken at that time.

Now let's get to the particular issue in question.

The Board did issue a ruling with respect to the question of petitioning the legislature and what-have-you, political activity, as not being relevant to the issues in this case, and those issues were specifically indicated at a prehearing conference, and the Board ruled that political activity was not within the issues of this proceeding originally.

However, the question of the 25-percent provision has come to issue in this proceeding. Mr. Brand is, of course, the party that initiated it. The Board did ask some questions with regard to the 25-percent rule, and the Board does deem the 25-percent matter as being within the issue of coordination and the competitive effect of coordination.

4C

brb 1

Consequently, if the Board is going to face the issue of the 25 percent provision in an official decision somewhere along the way, or even if it ignores it and makes a finding that it is not relevant; nevertheless it's going to be faced with that issue. Therefore, we think we should allow some inquiry with respect to the 25 percent issue.

The Board wishes the parties to understand that if this is a change in the Board's position of prior rulings, then we have changed our position with regard to the 25 percent and political activity.

Now, with respect to the 25 percent and the political activity, let's get to the actual subpoena. But, before I do, I would like to ask one question:

Was the amount of money for transportation and what have you furnished together with the subpoena?

MR. JAELON: No, it was not, your Honor.

We spoke to Mr. Watson and I think we made an arrangement -- maybe Mr. Pollock can better speak to it -- that they will accept service and that there would be mutuality.

But let Mr. Pollock speak to the questinn, because he spoke to Mr. Watson.

MR. POLLOCK: Yes, that is correct.

I spoke to Mr. Watson. He agreed to accept service of the subpoena for Mr. Land, subject to our accepting

service of his subpoenas to our people, should he make them.

Now, we contemplate, of course, paying Mr. Land for his day in court and his transportation, should he be produced. But by this we save the bookkeeping that would have been involved had the motion been quashed. So we stand ready to give our just proceeds when it is deemed necessary, your Honor.

MR. WATSON: We have no objection to that.

CHAIRMAN GARFINKEL: All right.

Because, automatically, outside of the Federal government personnel, a subpoena is defective without the submission of the fees with the subpoena.

MR. WATSON: We don't intend to add a Section 8, your Honor, as long as we lost under 7.

CHAIRMAN GARFINKEL: My colleague Dr. Leeds wants me to emphasize that if it's treated as overruling our prior ruling, our prior ruling is only being overruled -- our prior ruling only with respect to the 25 percent and political activity with the 25 percent. Period. Nothing else. The ruling stays into effect with anything else.

Now, with respect to the subpoena, the subpoena must stand on its own. It may not stand in connection with any application. That is, all that a party receiving a subpoena has to do is rely on the four pages of the documents involved in the schedule of the subpoena -- the four corners

of the page, that is.

On the attachment to the subpoena duces tecum, Article 4 and Article 5 are totally defective, because it was not limited in any way to the 25 percent rule, and therefore no compliance is required, clearly, with 4 and 5.

With respect to 1, 2, and 3, since it's the Board's discretion with respect to a subpoena duces tecum at the trial, and only because we are interested in adducing admissible evidence, as against discovery evidence, and taking into account the fact that the witness that was called by the Joint Intervenors -- or by the Department of Justice, rather. Wasn't it the Department of Justice? I think it was Mr. Brand's witness.

MR. BAMNAN: Mr. Brush.

CHAIRMAN GARFINKEL: Yes.

--who testified he found nothing wrong with the activities of the Applicant in regard to the 25 percent, we will allow only the production of documents which in any way relate or indicate activities that foreclose a change in the 25 percent rule, or activities which disclose an attempt to maintain the 25 percent rule.

Now, with respect to the Board's indication that this subpoena was limited only to Mr. Land in his individual capacity, this Board will not entertain a subpoena against Consumers Power for the same information, unless Mr. Land,

on oral examination, under oath before this Board, clearly indicates to this Board that the activities that he engaged in is the type of activities which would come within the scope of Noerr Pennington case of a sham.

Now, with that ruling, the Board expects Mr. Land to be produced under the conditions outlined here; and it's a question now of whether the Joint Intervenors are still desirous of calling Mr. Land as limited herein.

And the Board would like to be apprised by tomorrow morning whether the Joint Intervenors are still desirous of calling Mr. Land, and when we may expect Mr. Land to be present, assuming you don't appeal, Mr. Watson, this Board's ruling on the subpoena.

MR. WATSON: Mr. Chairman, I find nothing in the Board's order in that particular regard that disturbs me greatly.

However, Mr. Ross is presently out of the country and will not be here until late tonight; and I would ask for three of four more hours from the Board -- say, through lunch tomorrow -- so that we may have a chance to apprise him of the Board's ruling today, because I would assume the Board does not plan to issue a written order, but that the transcript will suffice for the order.

CHAIRMAN GARFINKEL: Yes.

MR. WATSON: Therefore he won't have a chance to

examine it until lunchtime tomorrow.

MR. JARLON: No objection.

CHAIRMAN GARFINKEL: All right. There's no objection to that.

All exceptions, of course, to the Board's ruling are herewith made a part of the record; and no exception has to be noted specifically.

If anybody feels they were adversely treated, their exception is automatically noted.

The only thing is, if you do take an appeal, we'd like to know that.

MR. WATSON: You'll be among the first to know, your Honor.

CHAIRMAN GARFINKEL: Okay.

You're the only one, when I say "you", Mr. Watson. Your client is the only one who can make an appeal. For every other party it's an interlocutory ruling.

MR. WATSON: Mr. Land is a non-party.

CHAIRMAN GARFINKEL: That's right.

And any subpoena, of course, is a subpoena that may be appealed, because it's the type of thing that involves enforcement by the Commission.

But to any other party that's interlocutory, and they have no right of appeal at this time.

MR. WATSON: Thank you, sir.

b 5

MR. JABLON: As a convenience, I was just going to pose that, if it is acceptable to the Board, we have ironed out our difficulties with regard to the admission of our documents, except for two particular exhibits which Mr. Pollock will argue tomorrow.

Would it be acceptable, just to that we know when he can be here and we can be here, if we move our other exhibits into evidence and the deposition material, say, at two o'clock tomorrow?

CHAIRMAN GARFINKEL: Well, tomorrow we have one witness who may take all day, and we've reserved, if necessary, Friday or on notice. That is, if we finish early we'll phone you and call you in. Therefore, Mr. Pollock does not have to stay around tomorrow.

MR. JABLON: Okay.

I appreciate it.

CHAIRMAN GARFINKEL: We'll have it. We'll reserve Friday, if necessary, to make sure we get everything in, Mr. Jablon.

MR. JABLON: I would not want to convene the Board specially. I'd be perfectly happy -- Ijust wanted to do this at a time convenient to the parties.

If it suited the parties' convenience, I would just as soon do it when Mr. Aymond comes. I just preferred not to have to have Mr. Pollock sitting --

arb 6

CHAIRMAN GARFINKEL: We have to get rid of the witness of the Regulatory Staff. If that could be finished at an early time, then immediately we will request that either you, if you are here tomorrow morning, or we will call Mr. Pollock to advise him that we have the time and we can do it, say, tomorrow afternoon or Friday.

But clearly, we're going to get it in before we put on the case of the Applicant.

MR. JABLON: I appreciate that coursesy very much, your Honor.

CHAIRMAN GARFINKEL: Very well.

With that, we are in recess until tomorrow morning at 9:00 a.m..

(Whereupon, at 5:35 p.m., the hearing in the above-entitled matter was recessed, to reconvene at 9:00 a.m., Thursday, 7 February 1974, in the same place.)

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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	Docket Nos. 50-269A
	)	50-270A
DUKE POWER COMPANY	)	50-287A
	)	50-369A
(Oconee Units 1, 2, and 3;	)	50-370A
McGuire Units 1 and 2)	)	

PREHEARING ORDER NUMBER TWO
OF ATOMIC SAFETY & LICENSING BOARD

A second prehearing conference was held before this Board, pursuant to Notice dated November 3, 1972, on November 17, 1972 at Washington, D. C. Counsel for all parties were present and the following action is taken:

A. DISCOVERY

1. In view of the representations by counsel for long periods of time desired for completion of discovery IT IS ORDERED THAT each of the parties shall report, bi-monthly, to the Board, the number of documents that have been produced, the number of responses to requests that have been completed, and the number of requests remaining to be completed, commencing December 15, 1972.

B. APPLICANTS OBJECTIONS AND MOTIONS TO LIMIT JOINT REQUEST FOR DOCUMENT PRODUCTION AND FOR PROTECTIVE ORDERS

2. By motion dated October 12, 1972, answered by the Department of Justice on October 25, 1972, and, by permission, replied to by applicant on November 10, 1972; applicant sought relief from specified portions of the Joint Document Request filed September 6, 1972 by the Justice Department and the intervenors. After hearing extensive argument and endeavoring to secure agreement of the parties, the following disposition is made of said joint requests which for convenience are listed under the headings adopted by applicant in its motion:

(a) "1. Applicant's Filing System"

Joint Request #2 is limited to the production of a document showing the present method of filing documents.

(b) "2. Applicant's Political Activity"

Applicant's objection to joint requests number 4(f), 4(h) and 4(l); 6(f)(3), 6(i) and 6(p); 16, 37 and 38 are sustained

without prejudice to a renewal thereof on the showing of prerequisites required by law.

(c) "3. State-Ordered Territorial Arrangements" Applicant's objection to joint-request 6(e) is sustained except as to documents indicating that territorial divisions properly negotiated in regard to retail sales were used to create territorial divisions in wholesale sales.

(d) "4. Municipal and State Elections" Applicant's objection to joint request 16 is sustained without prejudice to a renewal thereof on the showing of prerequisites required by law.

(e) "5. Request for All Documents in Certain Files" Applicant's objections to joint requests 13 and 17 are sustained, except insofar as items contained in the wholesale customer files which refer to, or relate to, the ability to compete at retail or to the

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UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
LOUISIANA POWER & LIGHT COMPANY	)	Docket No. 50-382A
	)	
(Waterford Steam Generating Station, Unit No. 3)	)	

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MEMORANDUM AND ORDER WITH RESPECT TO OBJECTIONS ON DISCOVERY REQUESTS AND INTERROGATORIES

I. INTRODUCTION

The parties to this proceeding have filed their first requests for the production of documents and interrogatories and various objections have been presented to this Board with relief requested.[1/] The Board has considered all these

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1/ Position of Louisiana Power & Light Company with Respect to, and Objections to, Requests by Joint Discoverers, March 11, 1974; (Atomic Energy Commission, Regulatory) Staff's Motion in Opposition to Certain Discovery Requests by Applicant, the Intervenors and the Department of Justice, March 11, 1974; Objection of Louisiana Municipal Association Utilities Group to Joint Interrogatories to Joint Interrogatories to Intervenors, March 4, 1974; Motion (by Cajun Electric Power Cooperative, Inc.) to Limit Discovery, March 11, 1974. Objections (by the Cities of Lafayette and Plaquemine) Pursuant to Order of Board, March 11, 1974. These parties will hereafter be referred to respectively as: Applicant, Staff, LMA, Cajun, and Cities. The latter four parties and the Department of Justice (Justice) are the Joint Discoverers.

Nos. 13, 14 and 15 - Applicant's objections to these requests are overruled without prejudice to their renewal when stipulated facts are available.

Nos. 16 and 17 - To the extent that the information herein sought is of a trade-secret nature, the Protective Order, detailed heretofore is applicable. The objections are overruled.

Interrogatories

Nos. 1-4 - The objections to these interrogatories are overruled, except that Nos. 2 and 4 are limited to documents which otherwise would have to be produced.

Nos. 5-7 and 15-18 - The objections to these interrogatories are overruled except that answers shall be for the time period since January 1, 1960.

Nos. 20-24 - These interrogatories are objected to on grounds that they are subject to the "Noerr-Pennington privilege and the First Amendment to the U.S. Constitution." In addition, interrogatory 20 is objected to as irrelevant and immaterial which objection is overruled.

Applicant's objection based on the Noerr-Pennington doctrine is overruled. This doctrine, broadly stated, holds that joint activities arguably subject to the restraints of the antitrust laws and particularly to Section 1 of the Sherman Act, may not be proscribed or sanctioned when these joint activities are directed to influencing legislative or administrative agency action. The basis for the non-application of the antitrust law to these activities rests in the constitutional guarantee of the right of free assembly and the right jointly to petition for redress of grievances.

It may well prove that activities within the ostensible scope of these interrogatories ultimately are shielded from claim of antitrust law violation by virtue of the applicability of the Noerr-Pennington doctrine. In overruling this objection, the Board does not foreclose any argument Applicant may wish to make at the time of hearing with respect to the protection to be afforded these activities. The fact of the activity, if any, is, however, subject to discovery.

No First Amendment threat is perceived in receiving evidence as to the occurence of joint legislative or judicial activities. Indeed, consistent with the First Amendment, such activities should not be hidden from scrutiny.

First, Rule 26 of the Federal Rules of Civil Procedure and the AEC Rules and Regulations permit discovery calculated to lead to the production of admissible evidence even though the actual subject matter of the discovery may itself be ruled inadmissible at the time of hearing. Thus, it remains to be seen whether the information sought be these interrogatories will lead to the production of admissible evidence even if the Board upholds Applicant's contentions with respect to the applicability of the Noerr-Pennington doctrine.

Second, the doctrine and the extent of the doctrine's coverage cannot be tested in a specific context without the proper development of evidentiary facts. That is to say, that although Applicant might claim extensive immunity based on the asserted applicability of the doctrine, the immunity ultimately determined to be available may be substantially

narrower than that claimed. Without the development of a factual basis upon which to consider the doctrine, there is no way for the trier of facts to gauge the scope of the immunity.

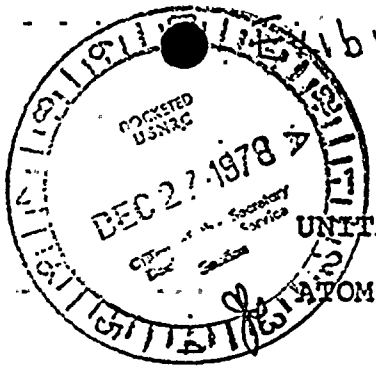
Third, we note that it cannot be ascertained presently which activities Applicant itself may claim to be immunized by the doctrine; and, surely, the other parties are entitled to know the factual basis upon which Applicant will argue the applicability of the doctrine. It would be most unfair if a party, merely by citing the catch phrase "Noerr-Pennington" could thereby relieve itself of the responsibility of producing data in response to discovery which data might be outside of the scope of the doctrine. In short, there must be a way to test claims of privilege based on the doctrine, and the only way to make such a test valid is through the production of data of the type sought through these interrogatories.

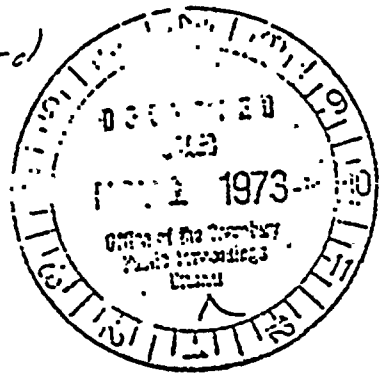
Finally, we note an exception to the Noerr-Pennington doctrine based on "sham" actions or actions not taken in good faith before governmental regulatory agencies. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). One test of whether joint activities before governmental agencies are taken in earnest or in sham is their frequency and the substance of the positions advanced. If Applicant successfully resists producing information as sought in these interrogatories, there will be no basis upon which other parties can attack the asserted non-applicability of the antitrust laws.

No. 25 and 26 - These objections are sustained.

No. 27 - The objection is overruled.

No. 30 - This interrogatory is objected to on grounds that it calls for a legal conclusion. The objection is overruled. United States v. Continental Can Co., Inc., 22 FRD, 241, 1 FR Serv 2d 33,333 (S.D.N.Y 1958), 4 Moore, Federal Practice ¶26.56[3], (2d ed. 1974).





UNITED STATES OF AMERICA
BEFORE THE
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	
ALABAMA POWER COMPANY	)	Docket Nos. 50-348A
(Joseph M. Farley Nuclear	)	50-364A
Plant-Units 1 and 2)	)	

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL PRODUCTION

The Joint Discoverers, by Motion dated October 1, 1973, have moved to compel the production by Applicant of certain documentary material demanded in the "Amended Joint Discoverers' Second Joint Request for the Production of Documents," also dated October 1, 1973. The documents requested in the nine paragraphs of the Amended Request can be generally placed in the following categories, taking the least complicated first, with our discussion and rulings following thereafter.

A. Paragraph 9 seeks documents "necessary to identify each category" of Applicant's operations that Applicant contends is subject to "pervasive regulation" by the state or Federal Government.

These documents are sought to establish the "factual context" to which Applicant's claim (that it is subject to pervasive governmental regulation) relates. The motion to compel production of these documents is denied. Discovery on the support for Applicant's claim of "pervasive" regulation or seeking instances where Applicant may have made inconsistent statements is more properly made, at least initially, by

specific interrogatories rather than a non-specific request for documents, particularly where, as here, the regulatory statutes, regulations and decisions (which are the ultimate source of information as to what is and is not regulated) are equally available to the Applicant and to the Joint Discoverers.

B. Paragraphs 2, 3 and 4 demand documentation relating to certain activities of the Applicant or its affiliated companies with regard to the customer-supplier relationship between competitors of Applicant and their government-owned suppliers or customers. The motion to compel production of these documents is granted. Applicant has objected to these requests, citing the so-called Noerr-Pennington doctrine, which we shall discuss in detail in Section C below. Suffice it to say here that we agree with the Joint Discoverers when they point out that whatever applicability that doctrine may have insofar as attempts to influence governmental policy are concerned, it has little or no applicability when applied to proprietary, or commercial affairs of a governmental body, where the public as customer or supplier is presumed to act in a manner consistent with maximizing competition. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970).

C. Paragraph 1 demands documents relating to Applicant's, or the Southern Company's (the Applicant's parent corporation), efforts to influence or affect certain specified items of legislation by the state and federal legislatures,

and/or administrative regulations. Paragraphs 5, 6, 7 and 8 demand similar documentation relating, it appears, to similar activity of Applicant, or its affiliated companies, to influence or affect other positions taken by other governmental bodies or courts, in their capacities as such.

These paragraphs are very strongly resisted by Applicant on several grounds, the most serious being that the evidence toward which the requests are obviously directed is not relevant to the issues to be decided; since, among other things, the doctrine enunciated by the Supreme Court in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965), the so-called Noerr-Pennington doctrine, prohibits "antitrust scrutiny" of efforts to influence governmental activity. (Applicant's Objections, hereinafter "Objections," October 11, 1973, p. 3).

While we recognize, of course, the teaching of the Noerr and Pennington cases, and their progeny, of the principle that certain conduct relating to the actual or attempted influencing of governmental action is protected from antitrust prosecution (and presumably from being the subject of an adverse finding under the statute we are charged with construing, Section 105(c) of the Atomic Energy Act, as amended), we are not prepared to say that all activity in this area is protected from scrutiny or that documentary material relating thereto is protected from discovery. That,

in our view, would amount to the creation of a privilege more pervasive than the attorney-client or doctor-patient privilege. We regard as frivolous Applicant's further argument that, should it be required to produce the documents in question, it will have a "chilling effect" on Applicant's First Amendment right of petitioning its government.

The language of Noerr and Pennington, followed by California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), and United States v. Otter Tail Power Co., 360 F. Supp. 451 (D. Minn. 1973), and others, makes it clear that the "doctrine" has no clearly defined outlines, and exceptions to its applications do exist. We see no basis, therefore, for completely prohibiting discovery into the area by the Joint Discoverers. Any evidence which is to be offered must in any event pass muster under the Noerr doctrine (and its exceptions), as well as under the more general tests of admissibility before it will be received in evidence in this proceeding.

In granting this motion to compel, however, we are given pause by the feeling that we are very near to the fine line between what constitutes a "fishing expedition" and legitimate discovery, but if we are to err, we must err on the side of liberality in discovery, particularly since the statute we are charged with interpreting has never been applied to a factual situation.

IT IS SO ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD

By: Michael L. Glaser
Michael L. Glaser

By: Carl W. Schwarz
Carl W. Schwarz

By: Walter W. K. Bennett
Walter W. K. Bennett

Dated: November 1, 1973

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ATTACHMENT G

Class I

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Corrections or modifications by March 4

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
USNRC BETHESDA
FLORIDA POWER AND LIGHT COMPANY) Docket No. P-636A
(South Dade Nuclear Units))

SECOND PREHEARING CONFERENCE ORDER

On January 31, 1977 the Board conducted the second prehearing conference in this proceeding to consider objections to discovery requests. During the prehearing conference certain rulings on objections were made and additional rulings are set forth below.

Time Period

The relevant period for litigation in this proceeding and for discovery begins January 1, 1965. Requests for exceptions to this period will be entertained by the Board but only to the extent that information to be produced from prior to January 1, 1965 relates substantially to events or situations after that date. Requests for exceptions must be factually specific and are to be made to the Board by March 15, 1977. Requests for exceptions filed after March 15, must set forth a good reason for late filing.

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Legislative Activities

Applicants object to Interrogatory No. 60 of the Joint Request and to Interrogatories 21(e) and 26(5) and (6) of the Florida Cities' Request to Applicants, relating to Applicants' legislative activities on the basis of the Noerr-Pennington doctrine* and on the basis of excessive breadth.

Similarly, Applicants have requested discovery against Cities concerning their respective legislative activities.** Cities do not object to interrogatories to them concerning legislative activities but insist upon parity with Applicants in this respect. Applicants and Cooperatives have agreed in their Memorandum of Understanding dated February 8, 1977 with respect to Cooperatives' legislative activities (Interrogatories to Cooperatives Nos. 177 and 178).

*See p. 7 et seq. of Applicants' Objections to discovery citing Eastern Railroad Pres. Conf. v. Noerr Motor Freight Co., 365 U.S. 127 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

**Applicants' Interrogatories to Cities Nos. 234-239, 269-275, and 293.

We are not, of course, at this stage ruling upon the ultimate admissibility of evidence. Rather, in accordance with 10 CFR §2.740(b)(1), the test we must apply is whether "... the information sought appears reasonably calculated to lead to the discovery of admissible evidence."* This is also the test under Rule 26 of the Federal Rules of Civil Procedure. The Board observes that the interrogatories objected to on the basis of Noerr-Pennington seem to be designed to lead to the discovery of admissible evidence, even if the legislative conduct thus demonstrated may not be the basis of a finding of a violation of the antitrust laws. Moreover, it will not be possible until after discovery for the Board to determine whether the activities in question are entitled to the constitutional protection recognized by the Noerr-Pennington cases,** or

*The Staff urges that the purpose and character of the Applicants' activities are relevant, and that this would be a permissible showing under Pennington, supra. The Board can envision other unprotected products of this discovery. For example, we may be aided in establishing the appropriate relevant geographic and product markets for antitrust analysis in this proceeding.

**In addition to Noerr and Pennington, supra, see California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, (1072) and Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) and 417 U.S. 901 (1974).

whether they may fall within "sham" or other possible exceptions to the doctrine.

Therefore the Board overrules the following objections to interrogatories relating to legislative activities based upon Noerr-Pennington because we see as a reasonably expected result the discovery of admissible evidence:

1. The Board overrules Applicant's objection to Joint Request ~~Interrogatory No. 60~~ to the extent that it depends upon Noerr-Pennington. However the Board sustains a portion of Applicant's objection to the breadth of the interrogatory. Documents pertaining to legislation "...possibly affecting competition between electric utilities in the State or Florida." could embrace all of Applicant's considerations and activities with respect to legislation, and is too broad. The Board grants leave to refile this request on or before March 1, 1977. The Board overrules the objection to that portion of Interrogatory No. 60 relating to proposed legislation to allow small systems to participate in joint ventures.

2. The Applicant's Noerr-Pennington objections to Cities' Interrogatory No. 21(e) (as modified) are overruled. We sustain a portion of Applicant's objection to this interrogatory based upon breadth. Instead of requiring production of data about legislation and constitutional revision "affecting" the ability of electric utilities to own, finance, and construct facilities and to sell electricity, we limit production to data pertaining to legislation or constitutional revision directly related to those abilities.

3. Applicant's objections to Cities' Interrogatories No. 26(5) and (6) are overruled except to the extent that 26(5) relates to the Board's request to the parties to negotiate concerning the issue of tax subsidization of utilities. (See Tr. 177 and "Tax Advantages" below).

4. Cities' reservations concerning parity with Applicants in producing data relative to legislative activities (Cities Objections to Applicants' Discovery Against Cities, p. 10) have been satisfied by the foregoing rulings.

Discovery of Legal Opinions and Positions

The Board assured the parties that complete disclosure of legal opinions and positions on the issues will be made before the evidentiary hearing, and requested the parties to confer in an effort to agree to mutually acceptable stages of disclosure, and to a report with recommendations by March 15, 1977. (Tr. 155, 156 and 159) Therefore the Board defers ruling on interrogatories and request for documents pertaining to the legal opinions and positions.

Tax Advantages

Many interrogatories and requests are concerned with relative tax advantages and disadvantages and the benefits of operating in the public sector compared to the private sector. All parties have agreed to negotiate toward a simplification of this issue with the objective that an abbreviated factual record in support of the differing positions may be made. The Board requests that the parties report to it on the results of their negotiations on or before March 15. (Tr. 177)

Work Product

Applicant's objection to Joint Request Interrogatory 87(d) is overruled. In replying to Interrogatory 87(d) the Applicant may avoid disclosing the mental impressions, conclusions, opinions, or legal theories of its representatives concerning these proceedings. Applicants may seek the assistance of the Board toward this end.

Applicant's Objections to "Fishing"

Applicant's objections to Cities' Interrogatories 17 and 20(a) and (e) are sustained.

Acquisition Procedures

The Board defers ruling upon the Cities' objections to Applicant's interrogatories regarding procedures necessary to acquire a municipal electric power system and the legal theories surrounding the antitrust significance of acquisitions of this nature (Nos. 168, 188-192) pending further negotiations between Cities and Applicant and a report to the Board by March 15, 1977. (Tr. 187)

Participation in South Dade

Cities' objections to Applicant's interrogatories Nos. 105 to 108 are in general overruled. However, with respect to No. 108(b) the Board requests Cities and

Applicants to include this subject in their negotiation in the manner anticipated in connection with 168 and 188-192 and report to the Board on or before March 15.

Cooperatives' Objections

The Cooperatives' objections to interrogatories which may produce trade secrets (51-53, 55, 60 and 121) are overruled. However Cooperatives may request a protective order (10 CFR §2.740(c) and §2.790) on or before March 15.

The Cooperatives' objections predicated upon general relevancy considerations (p. 15 Cooperatives' Objections) have now been satisfied by the First Additional Memorandum of Understanding Between Applicants and Cooperatives dated February 8, 1977.

All recommendations to the Board for corrections and modifications of this order are to be filed by March 4, 1977.

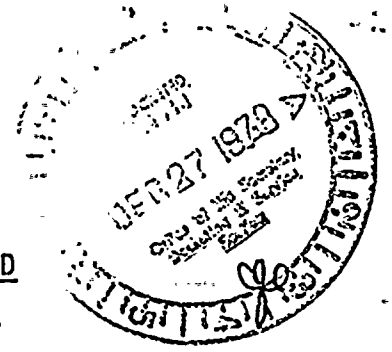
IT IS SO ORDERED.

Ivan W. Smith, Chairman

Daniel M. Head, Member

John M. Frysiak, Member

Issued at Bethesda, Maryland
this 22nd day of February, 1977.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	NRC Docket No. 50-389A
(St. Lucie Plant, Unit No. 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF'S RESPONSE TO APPLICANT'S OBJECTIONS TO DISCOVERY REQUESTS AND MOTION FOR A PROTECTIVE ORDER in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 22nd day of December, 1978.

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Reg. Cent.

12/22/78

Michael C. Farrar, Esq., Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Richard S. Salzman, Esq.
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U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

In the Matter of
FLORIDA POWER & LIGHT COMPANY
(St. Lucie Nuclear Power Plant, Unit 2)
Docket No. 50-389

Gentlemen:

This is to inform the Board of certain information provided in a preliminary fashion by one of the NRC Staff consultants relating to criteria in buckling of steel containment structures. The report is attached, along with a Staff evaluation of this matter.

In this connection, the Staff believes that the information does not adversely affect the evaluation conducted by the Staff in this case. If you need any further information, please let us know.

Sincerely,

William D. Paton
Counsel for NRC Staff

DISTRIBUTION
JTourtellotte
WPaton, WOlmstead
Shapar/Engelhardt/Scinto
FF (2)
Reg. Cent., LPDR
O.Lynch, R.Birkel
D.Vassallo, H.Smith

Enclosure as Stated

cc (w/encl.):

Edward Luton, Esq.,
Michael Glaser, Esq.
Dr. David L. Hetrick
Martón Harold Hodder, Esq.
Dr. Frank Hooper
Dr. Marvin M. Mann
Harold F. Reis, Esq.
Norman A. Coll, Esq.
Docketing and Service Section

Atomic Safety and Licensing Board Panel
Atomic Safety and Licensing Appeal Board
Mr. Samuel J. Chilk

OFFICE			OELD			
SURNAME			WPaton:ns			
DATE			12-13-78			

NRC FORM 318 (9-76) NRCM 0240 ☆ U.S. GOVERNMENT PRINTING OFFICE: 1976 — 626-624

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ENCLOSURE

NRC STAFF EVALUATION OF FACTORS OF SAFETY AGAINST BUCKLING

In a report entitled "Stability Criteria for Primary Metal Containment Vessel Under Static and Dynamic Loads" written for GE by R. L. Citterley of Anamet Laboratory, Inc., a factor of safety against buckling ranging from 2.0 to 2.75 is recommended. Also recently the 1977 summer addenda of the ASME Code requires a factor of safety of between 2.0 and 3.0 against buckling depending upon the applicable service limits.

Due to the lack of experimental data and uncertainties in establishing the theoretical buckling load, we have an ongoing technical assistance program to study this issue. It is expected that any final design recommendations or guidelines resulting from this program will be evaluated for possible use in our licensing review work. We are not at this time in a position to make any changes to previously accepted criteria. However, we have urged applicants to study their buckling criteria further and form a strong technical basis for their approach. As indicated above, through the help of our outside consultant, the Staff will develop our technical position further.

BN # 101

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

JAN 30 1978

MEMORANDUM FOR: D. B. Vassallo, Assistant Director
for Light Water Reactors
Division of Project Management

THRU: J. P. Knight, Assistant Director
for Engineering
Division of Systems Safety

FROM: I. Sihweil, Chief
Structural Engineering Branch
Division of Systems Safety

SUBJECT: INFORMATION TO BE PROVIDED TO ACRS AND LICENSING BOARDS (SEB: 001, 002)

We just received the attached progress report from our consultant that questions the current criteria for buckling of steel containment shells. We believe that the appropriate licensing boards and the ACRS should be notified.

It should be realized that this report is preliminary in nature and has not been fully evaluated by our branch. We believe it may have an impact on the design of steel containments such as those used for the BWR Mark III and PWR Ice-Condensers.

/s/ I. Sihweil

I. Sihweil, Chief
Structural Engineering Branch
Division of Systems Safety

Attachments: As stated

cc w/encl:
R. Mattson K. Wichman
D. Eisenhut SEB Members
L. Shao

INTERNATIONAL STRUCTURAL
ENGINEERS, INC.
P. O. BOX 0505
GLENDALE, CALIF. 91206 U.S.A.

January 11, 1978

Dr. A. Hafiz
Division of System Safety
Office of Nuclear Reactor Regulation
Nuclear Regulatory Commission
Washington, D.C. 20555

Subject: Buckling Criteria and application of Criteria to design of steel containment shell. Number RS-77-8.

Dear Dr. Hafiz:

Our first progress report is enclosed in accordance with the requirements of our NRC contract.

We have started preparing a buckling design criteria document covering the buckling design of steel containment shells. As parts of this document are completed, they will be forwarded to you.

We are still evaluating the static and dynamic loading conditions which the steel containment shell is subjected. This study should be completed shortly.

Please contact us if you have any questions related to the progress reports.

Sincerly,

A.F. Masri

January 3, 1978 Progress Report for "Buckling Criteria and Application of Criteria to Steel Containment Shell" (#RS-77-8)

As stated in our proposal, after we received the go-ahead from NRC a detailed literature survey would be carried out to determine the state of the art on the use of buckling criteria on the design of metal containment vessels under static and dynamic loads. The following work has been completed on this phase of the contract:

1. Library search. We have conducted a detailed literature search using information retrieval systems such as the Engineering Index, NASA Publications, U.S. Defnese Department Publications, and the International Engineering Index.

2. Solicited Information. We have contacted the leading authorities in the buckling field requesting them to send us any information that would help us to establish buckling criteria for steel containment vessels. Appendix A contains a sample letter and a list of people contacted. Individual meetings were also held with:

Dr. P. Gou (General Electric)

Dr. R. Citerley (Anamet Laboratories)

Dr. C. Babcock (California Institute of Technology)

to obtain their views on establishing buckling criteria, safety factor and ASME Code requirements. Subsequent to the meeting with Dr. Gou we received a summary of the dynamic loads that General Electric uses in the design of their containment structures.

Based on our investigations the following statements can be made about the state of the art to date:

1. Most of the experimental results available in the literature

for determining design criteria are based on model tests and the correspondence between model tests and full size structures still needs to be assessed. Design criteria verified by experiment which considers effects of imperfections, dynamic loads, asymmetric loadings and nonlinear effects is practically nonexistent. To obtain this type of information will not be an easy or inexpensive task. It appears that our best method of obtaining experimental data for establishing design criteria is through carrying out a large number of carefully planned model tests.

2. A large number of computer programs exist for determining buckling loads of shells of revolution and general shells. Programs which seem to have gained the confidence of engineers developing design criteria are BOSOR 4, STAGS, NASTRAN and MARC. Even though many of these programs consider nonlinear effects, very little correlation has been obtained between the results of these computer programs to predict experimental buckling results even when the imperfections of the test models are well known beforehand. For the actual design condition when imperfections and loadings are not well defined, computer programs can only be used as guidelines or as a first step before knockdown factors are imposed. It also seems important that the limitations of these computer programs should be well documented and the codes should be easily available to those interested in the buckling characteristics of containment structures.

3. The ASME Section III Buckling Criteria Regulation Guide 1.57 NE-3224 which states that

(A) One half the value of critical buckling stress determined by one of the methods given below

1. Rigorous analysis which considers gross and local buckling, geometric imperfections, nonlinearities, large deformations, and inertia forces (dynamic loads only).
2. Classical (linear) analysis reduced by margins which reflect the difference between theoretical and actual load capacities.
3. Tests of physical models under conditions of constraint which reflect the difference between theoretical and actual load capacities.

must be changed. The use of these criteria permits designers to select the method which yields a buckling stress which is least conservative. In fact, even with the use of the one half factor it is possible for a shell to buckle at a stress below that predicted by Method 3. For example, it is well known that some axial compression cylinder model tests yield results for carefully made specimens close to 90 percent of the classical buckling value and others with imperfections yield results less than 20 percent of the classical value. The use of Method 3 is valuable in establishing guidelines for buckling criteria but could be dangerous and yield unconservative buckling stresses if the physical models did not exactly approximate the loading and imperfections of the full scale operating model. Since it is impossible to know the exact geometric imperfections and static and dynamic loadings of the full scale operating model, Method 1 which uses rigorous analysis has some of the same problems of Method 3. In cases where these factors were known for test models, rigorous analyses were not, in most cases, able to accurately predict the experimental buckling values. Most authorities in the field agree that Method 2 is the most reliable method and this should be reflected in the ASME Section III Regulatory Guide 1.57.

The other methods should be used in conjunction with Method 2 and only in special cases, determined by NRC, used to establish design criteria.

4. Until more test data is obtained to study the effects of imperfections, asymmetric loading, load interaction, dynamic and nonlinear effects, a conservative factor of safety such as 3 should be used.

5. A general procedure for determining the buckling stress of a metal containment structure has been developed and is summarized below.

1. The containment structure will be accurately modeled by using a general finite element program such as SAP 6 or NASTRAN.

2. The dynamic and static load combinations of

a) dead loads

b) construction loads

c) accident design loads (LOCA)

d) external pressure

e) seismic loads

f) penetration loads

g) thermal loads

H) symmetric and asymmetric loads

will be imposed on the finite element model of the containment structure and a linear static and dynamic analysis using SAP 6 or NASTRAN programs will be performed for all critical laod combinations. Maximum stresses will be determined and tabulated.

3. After determining a set of critical maximum stress combinations the maximum stress along any meridian will be assumed to be axisymmetric. This has been shown in the past to be an accurate and conservative approximation. These critical maximum stress combinations will then be input to the BOSOR 4 program and the

overall buckling load will be determined. The BOSOR 4 program considers nonlinear prebuckling deformations and performs a bifurcation analysis to determine the buckling load. Using this proposed procedure asymmetric loads, interaction effects, dynamic loadings, seismic effects and nonlinear prebuckling deformation can be consideredd.

4. Once the overall buckling stresses are determined, these buckling stresses will be reduced by margins which will reflect the difference between theoretical and actual load capacities. The NASA design criteria lower bound curves based on experimental data will be used to determine these reduced margins of safety.

5. After overall buckling is investigated, localized buckling will then be considered based on the stresses obtained from the linear static and dynamic analysis. Any part of the structure that does not satisfy both the local and overall buckling requirements will be redesigned until these criteria are satisfied.

At the present time we are

1) evaluating the various containment vessel loading conditions which must be considered to determine the applied static and dynamic stresses.

2) synthesizing the information that we have obtained and evaluating and recasting this information in the form of a buckling criteria design document.

UNIVERSITY OF SOUTHERN CALIFORNIA

UNIVERSITY PARK • LOS ANGELES, CALIFORNIA 90007

SCHOOL OF ENGINEERING
DEPARTMENT OF CIVIL ENGINEERING

October 12, 1977

Dear Colleague:

The undersigned are involved in a project which requires the compilation of information on the buckling of shells, including shells of revolution, under localized and nonsymmetric loading. We intend doing a thorough survey of the open literature as well as relying on such compendiums as the Column Research Committee of Japan's Handbook of Structural Stability and Applied Mechanics Reviews. We are concerned, however, that much useful information will be overlooked because of the relative obscurity of the journal in which it is published or its unavailability in journal form.

Thus, we would be grateful for any help which you might give us in this task by taking a few moments to search your memory and your files for titles and authors of papers and reports on the subject of buckling under nonsymmetric loading. Copies of hard-to-get items would be appreciated. Your aid will be acknowledged in the final report on the subject.

Sincerely,

S.F. Masri
Professor

P. Seide
Professor

V.I. Weingarten
Professor and Chairman
Dept. Civil Engineering

PS/lrm

B. Budiansky, Harvard University
J.W. Hutchinson, Harvard University
W.T. Koiter, Technological University of Delft, the Netherlands
N.J. Hoff, Stanford University
C.R. Steele, Stanford University
W. Flugge, Stanford University
J. Singer, Technion-Israel Institute of Technology
W. Nachbar, University of California at La Jolla
Dr. L.H. Donnell
Dr. D. Bushnell, Lockheed-Palo Alto Research Laboratories
Dr. B.O. Almroth, Lockheed-Palo Alto Research Laboratories
D. Brush, University of California at Davis
C.D. Babcock, California Institute of Technology
E.E. Sechler, California Institute of Technology
M. Baruch, University of Wisconsin
G.J. Simitses, Georgia Institute of Technology
G. Wempner, Georgia Institute of Technology
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Dr. J.H. Starnes, Jr., NASA-Langley Research Center
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Dr. V. Tvergaard, Danish Center for Applied Mathematics and Mechanics
Dr. F.I. Niordson, Danish Center for Applied Mathematics and Mechanics
Dr. M. Esslinger, Institut fur Flugzerzban, Braunschweig, Germany
A.C. Walker, University College, London
J.M.T. Thompson, University College, London
R.M. Evan-Iwanowski, Syracuse University
D.G. Ashwell, University College, Cardiff, Wales
Dr. E.I. Grigolyuk, Academy of Sciences of the USSR, Moscow
Dr. W.F. Thielemann, DVL Inst. fur Feltigkeit, Mulheim-Ruhr, Germany
W. Schell, Technological University, Darmstadt, Germany
Dr. C.D. Miller, Chicago Bridge and Iron Company

12/15/78

December 15, 1978

Michael C. Farrar, Esq., Chairman
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Atomic Safety and Licensing
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Richard S. Salzman, Esq.
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
Florida Power and Light Company
(St. Lucie Nuclear Power Plant, Unit 2)
Docket No. 50-389

Gentlemen:

Enclosed is a letter dated December 6, 1978 from the permittee stating that their estimated cost for St. Lucie Unit No. 2 has been increased from $850 million to $925 million.

The Staff will assess the significance of this information and will advise this Board.

Sincerely,

William D. Paton
Counsel for NRC Staff

Enclosure
As Stated

cc: Edward Luton, Esq.
Michael Glaser, Esq.
Dr. David L. Hetrick
Martin Harold Hodder, Esq.
Dr. Frank Hooper
Dr. Marvin M. Mann
Harold F. Reis, Esq.
Norman A. Coll, Esq.
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DATE➢						

P. O. BOX 013100, MIAMI, FL 33101

FLORIDA POWER & LIGHT COMPANY

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USNRC-OELD

December 6, 1978
L-78-377

Office of Nuclear Reactor Regulation
Attention: Mr. Robert L. Baer
Light Water Reactors Branch No. 2
Division of Project Management
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Mr. Baer:

Re: St. Lucie Unit No. 2 Cost Estimate

This is to advise that the estimate of cost for St. Lucie Unit No.2 has been updated recently and has increased over the $850 million estimate previously given to the Commission. The revised estimate is now $925 million and is based upon a construction schedule of 65 months, beginning with resumption of construction in June 1977, and commercial operation planned for mid-1983.

Yours truly,

J. A. de Mesty
for

Robert E. Uhrig
Vice President

REU:LLL:cf

cc: Martin H. Hodder, Esquire
W. D. Paton, Esquire
H. F. Reis, Esquire
N. A. Coll, Esquire

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

12/13/78

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2	)	
	)	

MOTION CONCERNING
ALAB-509

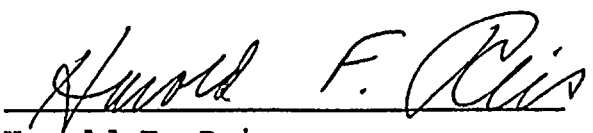
Florida Power & Light Company (FPL) has examined ALAB-509, dated December 1, 1978, and captioned in this as well as in a number of other proceedings. FPL notes that, at pp. 7-8 of the slip opinion, the Appeal Board states that it may consider "additional evidence on this generic matter" which "might be forthcoming in other proceedings . . ." in its decision in the instant proceeding (p. 7 n. 8). In addition, ALAB-509 sets forth procedures pursuant to which parties in two of such proceedings*/ may address the issue of the accuracy of the radon release data and concentration levels as determined by the Licensing Board in the Perkins proceeding. Duke Power Co. (Perkins Units 1, 2 and 3), 8 NRC 87 (July 14, 1978). The Board's language may be interpretable as providing an opportunity

*/Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) (Tyrone Energy Park, Unit No. 1) Docket No. STN 50-484; Rochester Gas and Electric Corporation (Sterling Power Project Nuclear Unit No. 1) Docket No. STN 50-485.

to address these issues only to "the intervenors" and "the other parties to those two proceedings" (p. 8). In view of the Board's recognition that what is involved is a "generic matter" (p. 7 n. 8), it may be appropriate for parties in proceedings other than Sterling and Tyrone to address issues raised by the intervenors in those proceedings. We therefore assume that the reference to the parties to those proceedings in ALAB-509 is not meant to preclude parties to other proceedings from seeking to file appropriate responsive memoranda as amicus curiae or pursuant to such other procedure as the Appeal Board may deem appropriate.

In this connection, we note that with respect to the health issue, the Appeal Board indicates that any party in any other proceeding who supports the Licensing Board's de minimus theory concerning health effects is extended an opportunity to reply to expressions of disagreement with that approach filed "in any other pending proceeding . . ." and that the Appeal Board will see to it that briefs concerning health effects filed in one proceeding will be received by parties to all of the other proceedings to which ALAB-509 is applicable. FPL requests that the Appeal Board take the same action to distribute the memoranda relating to radon emissions (p. 8) filed by the intervenors in the Sterling and Tyrone proceedings; and FPL hereby so moves.

Respectfully submitted,



Dated: December 13, 1978

Harold F. Reis
Lowenstein, Newman, Reis,
Axelrad & Toll
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the matter of FLORIDA POWER & LIGHT COMPANY (St. Lucie Nuclear Power Plant, Unit 2)	Docket No. 50-389

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Motion Concerning ALAB-509" has been served this 13th day of December, 1978, on the persons shown on the attached service list by deposit in the United States mail, properly stamped and addressed.

Harold F. Reis

Harold F. Reis
Lowenstein, Newman, Reis,
Axelrad & Toll
1025 Connecticut Avenue
Washington, D.C. 20036

Dated: December 13, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

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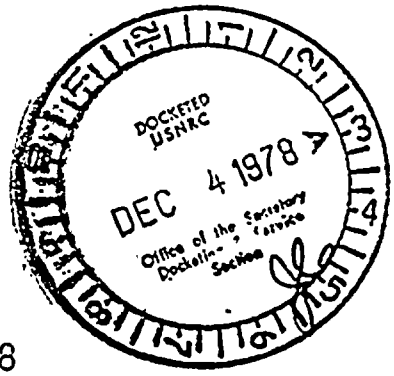
Reg. files

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING APPEAL BOARDS*

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Michael C. Farrar
Richard S. Salzman
Dr. W. Reed Johnson
Jerome E. Sharfman

12/1/78

SERVED DEC 4 1978

In the Matters of	
PHILADELPHIA ELECTRIC COMPANY et al.	Docket Nos. 50-277 50-278
(Peach Bottom Atomic Power Station, Units 2 and 3)	
METROPOLITAN EDISON COMPANY et al.	Docket No. 50-320
(Three Mile Island Nuclear Station, Unit No. 2)	
VIRGINIA ELECTRIC AND POWER COMPANY	Docket Nos. 50-338 50-339
(North Anna Power Station, Units 1 and 2)	
PUBLIC SERVICE ELECTRIC AND GAS COMPANY	Docket Nos. 50-354 50-355
(Hope Creek Generating Station, Units 1 and 2)	
FLORIDA POWER AND LIGHT COMPANY	Docket No. 50-389
(St. Lucie Plant, Unit No. 2)	
CAROLINA POWER AND LIGHT COMPANY	Docket Nos. 50-400 50-401 50-402 50-403
(Shearon Harris Nuclear Power Plant, Units 1,2,3 and 4)	

* Every Appeal Panel Member is on one or more of the Boards hearing the captioned proceedings; their collective designation is simply a convenience in issuing this joint order.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE et al.	
(Seabrook Station, Units 1 and 2)	Docket Nos. 50-443 50-444
KANSAS GAS AND ELECTRIC COMPANY AND KANSAS CITY POWER AND LIGHT COMPANY	
(Wolf Creek Generating Station, Unit No. 1	Docket No. STN 50-482
NORTHERN STATES POWER COMPANY (MINNESOTA) AND NORTHERN STATES POWER COMPANY (WISCONSIN)	
(Tyrone Energy Park, Unit No. 1)	Docket No. STN 50-484
ROCHESTER GAS AND ELECTRIC CORPORATION et al.	
(Sterling Power Project Nuclear Unit No. 1)	Docket No. STN 50-485
DUKE POWER COMPANY	
(Cherokee Nuclear Station, Units 1, 2 and 3)	Docket Nos. STN 50-491 STN 50-492 STN 50-493
THE TOLEDO EDISON COMPANY et al.	
(Davis-Besse Nuclear Power Station, Units 2 and 3)	Docket Nos. 50-500 50-501
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	
(WPPSS Nuclear Project No. 4)	Docket No. 50-513
TENNESSEE VALLEY AUTHORITY	
(Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B)	Docket Nos. STN 50-518 STN 50-519 STN 50-520 STN 50-521

PUBLIC SERVICE COMPANY OF INDIANA, INC.		
(Marble Hill Nuclear Generating Station, Units 1 and 2)	Docket Nos.	STN 50-546 STN 50-547
TENNESSEE VALLEY AUTHORITY		
(Phipps Bend Nuclear Plant, Units 1 and 2)	Docket Nos.	50-553 50-554

MEMORANDUM AND ORDER

December 1, 1978

(ALAB-509)

Earlier this year, the Commission held incorrect the value it had assigned in Table S-3 (10 CFR Part 51) to the emissions of radon-222 expected to occur as a result of the mining and milling of uranium. 43 Fed. Reg. 15613 (April 14, 1978). At that time, it told us to reopen the records in pending licensing proceedings "to receive new evidence on radon releases and on health effects resulting from radon releases." Id. at 15615-16. In implementing that directive in some seventeen separate proceedings (Philadelphia Electric Co. (Peach Bottom Units 2 and 3), ALAB-480, 7 NRC 796 (1978)), we decided it would be to the parties' and boards' advantage to begin with the record being made before the licensing

board in yet another proceeding, Perkins.[1] Accordingly, we called upon the parties to frame their positions in terms of the Perkins record and the Licensing Board's subsequent decision therein.[2] 7 NRC at 804-06.

We have studied carefully the papers the parties have submitted.[3] They involve a variety of matters. A number of parties are dissatisfied with either the record or the decision in Perkins, or both.[4] Intervenors in several proceedings wish us to consolidate those proceedings. Under normal circumstances, the next step would be a prehearing conference at which we could explore with all the parties not only the best procedure to follow but also -- in order to clarify exactly what contentions the parties wish to pursue -- the precise nature of the issues which are controverted.

1/ Duke Power Co. (Perkins Units 1, 2 and 3), Docket Nos. STN 50-488, 50-489, and 50-490.

2/ That decision is reported as LBP-78-25, 8 NRC 87 (1978).

3/ In one uncontested proceeding, which was also pending before a licensing board, we granted the parties' request for a remand so that the board below could consider the radon issue. It has since done so. See our unpublished order of September 27, 1978 in Tennessee Valley Authority (Yellow Creek Units 1 and 2), and LBP-78-39, 8 NRC ___ (November 24, 1978).

4/ Our use of the shorthand notation "Perkins" elsewhere in this order should be taken, unless the context requires otherwise, as referring to both the record and the decision in that proceeding.

Owing to the number and scattered location of the parties involved, however, it is not practicable to hold a prehearing conference at this point. Instead, we will attempt to accomplish the same purpose by calling for the submission of further written memoranda.

In this connection, two areas seem to call for attention now. First, we need to clarify the extent to which particular parties are dissatisfied with Perkins insofar as it deals with rates of radon release or levels of radon concentration from either natural sources or nuclear fuel cycle activities (as distinguished from the health effects of any resulting exposure). Second, if Perkins is accurate on emission rates and concentration levels, it seems appropriate to examine at the threshold the Licensing Board's de minimus theory, i.e., its conclusion that the nationwide health effects attributable to radon released in fueling nuclear power plants must be deemed to be insignificant because those emissions are extremely low in relation not only to natural radon background but also to fluctuations which occur in that background. 5/

5/ Certain parties have emphasized in their papers the question of radon-induced health effects felt by those living close to uranium mines and mills. Different considerations may be relevant where nearby impacts are concerned. See generally our recent decision in Rochester Gas and Electric Corp. (Sterling Unit 1), ALAB-507, 8 NRC __ (November 17, 1978).

1. Radon Emissions.

In establishing the format under which Perkins would be used as the starting point for considering the radon issue in other proceedings, we observed that "[o]bviously, non-participants in Perkins cannot be held bound by the record adduced in that proceeding." ALAB-480, supra, 7 NRC at 805. As it turned out, a number of parties filed objections with us about one aspect or another of the Perkins record. Most such objections, however, went to the adequacy of that record on the question of health effects. That is, most parties seemed willing to accept without further ado both the evidence and the decision in Perkins on the levels of radon emissions and the resulting concentrations to which the population is exposed.[6/] In those respects, then, as

---

6/ Intervenors in the Three-Mile Island and Peach Bottom proceedings did mention in general terms a need for discovery of unspecified staff documents concerning source terms. As we understand it, the current staff practice is to make much material available to the parties without the need for invocation of formal discovery procedures. Having heard no more about the matter, we assume that the intervenors' representative, Dr. Chauncey Kepford, has been given any material he asked the staff for. If we are mistaken about the accessibility of staff material relevant to this point, or if the material in question does provide a basis for objecting to this aspect of Perkins, any affected parties are free to seek a specific remedy from us.

was contemplated by ALAB-480, those parties could now be held bound by the Perkins record.[7] In other words, we would now be free in most proceedings to go forward on the basis of the Perkins record alone insofar as emission rates and concentration levels are concerned.[8]

We cannot do so, however, in every proceeding: intervenors in Sterling and Tyrone have suggested that more evidence should be adduced on the question of emission rates and concentration levels.[9] Those suggestions reflect in general terms the topics in which the intervenors are interested. Before we can begin to decide whether to accept the Perkins figures as valid, we need to learn more about the objections to them.

7/ Any party who objects to this conclusion should tell us promptly why he believes it should not apply to him. See 10 CFR 2.752(c).

8/ It is not likely, however, that we will do so. In each proceeding, the Board has sua sponte responsibility, that is, the obligation to review the record independently of the parties' positions. In light of that, it seems unwise to decide either Perkins or the uncontested cases knowing (see p. 8, infra) that additional evidence on this generic matter might be forthcoming in other proceedings. See Carolina Power & Light Company (Shearon Harris Units 1,2,3 and 4), ALAB-490, 8 NRC ___ (August 23, 1978, slip opinion, p. 15); Virginia Electric & Power Company (North Anna Units 1 and 2), ALAB-491, 8 NRC ___ (August 25, 1978, slip opinion, p. 9, fn. 12).

9/ As we understand their papers, the intervenors in Marble Hill and Wolf Creek are essentially content, insofar as these topics are concerned, to have their proceedings governed by what transpires in Sterling and in the proceedings in which Dr. Kepford is involved, respectively. As we have indicated, significant developments will, in any event, most likely have to be considered in all proceedings (see fn. 8, supra).

Specifically, the intervenors in Sterling and Tyrone -- Ecology Action of Oswego and Northern Thunder, respectively -- are to furnish us a particularized memorandum setting forth (1) not only the respects in which they believe the radon release data and concentration levels in Perkins are inaccurate or otherwise deficient, but also the basis for their assertions and the potential significance of the deficiencies (i.e., the degree of impact that any corrections might have upon the Perkins figures); (2) whether, and if so why, they believe a hearing is necessary on those topics or whether some other procedure for considering the matter is appropriate; and (3) what evidence, either written or oral as the case may be, they are prepared to offer. The intervenors' memoranda are to be filed and served upon the other parties to the Sterling and Tyrone proceedings by Friday, January 5, 1979. After service of those papers, the other parties to those two proceedings will have thirty days to file responsive memoranda. The responses should focus, inter alia, on whether a hearing is necessary or whether some other procedure is appropriate.

2. Health Effects.

As indicated by the preceding section, we are not now in a position to determine whether Perkins accurately

reflects the levels of exposure to radon. If, however, at some future time we were to find the Perkins emission and concentration figures correct (or reasonably close to being so), we would have to come to grips with the Licensing Board's de minimus theory.

The Perkins board took the approach that, whatever else might be said about the health effects of radon,

> Based on the record available to this Board, we find that the best mechanism available to characterize the significance of the radon releases associated with the mining and milling of the nuclear fuel for the Perkins facility is to compare such releases with those associated with natural background. The increase in background associated with Perkins is so small compared with background and so small in comparison with the fluctuations in background, as to be completely-undetectable. Under such circumstance, the impact cannot be significant.10/

If we were to subscribe to that view, there would appear to be no reason to consider the question of health effects further. Consequently, we believe it appropriate to consider this aspect of the Board's decision at the outset.

Toward this end, any party in any of the pending proceedings who disagrees with the Licensing Board's approach

---

10/ LBP-78-25, supra, 8 NRC at 100.

should brief us fully on why that Board's views are not acceptable.[11/] Those briefs should be filed and served[12/] within forty-five days of the date of this order.[13/] Responses from any party in any of the proceedings who supports the Licensing Board's approach will be due thirty days thereafter.[14/]

11/ In order that those briefs be most useful to us, they should accept arguendo the levels of exposure set forth in Perkins. If those levels prove to be significantly incorrect (in a direction favorable to the intervenors' position), then the Licensing Board's premise (relating to the disparity between natural and fuel-cycle-related concentrations of radon) would be faulty and its de minimus conclusion could not stand. The briefs called for here should focus, therefore, on the validity of the conclusion, not of the premise. The premise will be challenged in the memoranda called for in section 1 of this order.

12/ It will suffice for each party to serve only the other parties to its own proceeding. We will see to it that the parties to all the other proceedings receive copies.

13/ We stress to the parties that they may not have another opportunity to file briefs before us on the correctness of the de minimus theory, and that our analysis of it may turn out to be crucial in shaping the future course of these proceedings.

14/ All parties should discuss whether an analogy might be drawn to the Commission's Appendix I regulations. 10 CFR Part 50, App I., Sec. II. Those regulations set limits upon radioactive releases during normal operation which are couched in terms of levels above background and which permit resulting doses which are small in relation to those caused by background (as is shown by 10 CFR Part 51, Table S-4, fn. 2).

It is so ORDERED.

FOR THE APPEAL BOARDS

Margaret E. Du Flo

Margaret E. Du Flo
Secretary to the
Appeal Boards

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER AND LIGHT COMPANY	)	Docket No.(s) 50-389
	)	
(St. Lucie Plant, Unit No. 2)	)	
	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document (s) * upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accoradance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D. C. this 4th day of Dec 1978.

Peggy T. Dawning
Office of the Secretary of the Commission

* Served on 16 cases (BP)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER AND LIGHT COMPANY	)	Docket No.(s) 50-389
	)	
(St. Lucie Plant, Unit 2)	)	
	)	

SERVICE LIST

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11/16/78

November 16, 1978

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Washington, D. C. 20555

In the Matter of
FLORIDA POWER & LIGHT COMPANY
(St. Lucie Nuclear Power Plant, Unit 2)
Docket No. 50-389

Gentlemen:

Enclosed are recent memoranda discussing certain problems experienced in connection with pipe support base plate design. The NRR staff has informed us that the problems discussed in Mr. Stello's memorandum dated September 28, 1978 are applicable to the St. Lucie facility, and that DSS is presently reviewing this aspect of piping design analysis on a base-by-case basis under SRP section 3.9.3 - ASME Codes 1, 2 and 3 Components, Component Supports and Core Support Structures. If the Board or any of the parties wish additional information, please let us know.

Sincerely,

William D. Paton
Counsel for NRC Staff

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FF (2)
Reg. Cent., LPDR
D.Vassallo, H.Smith
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Enclosures as Stated

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Atomic Safety and Licensing Appeal Board
Docketing and Service Section

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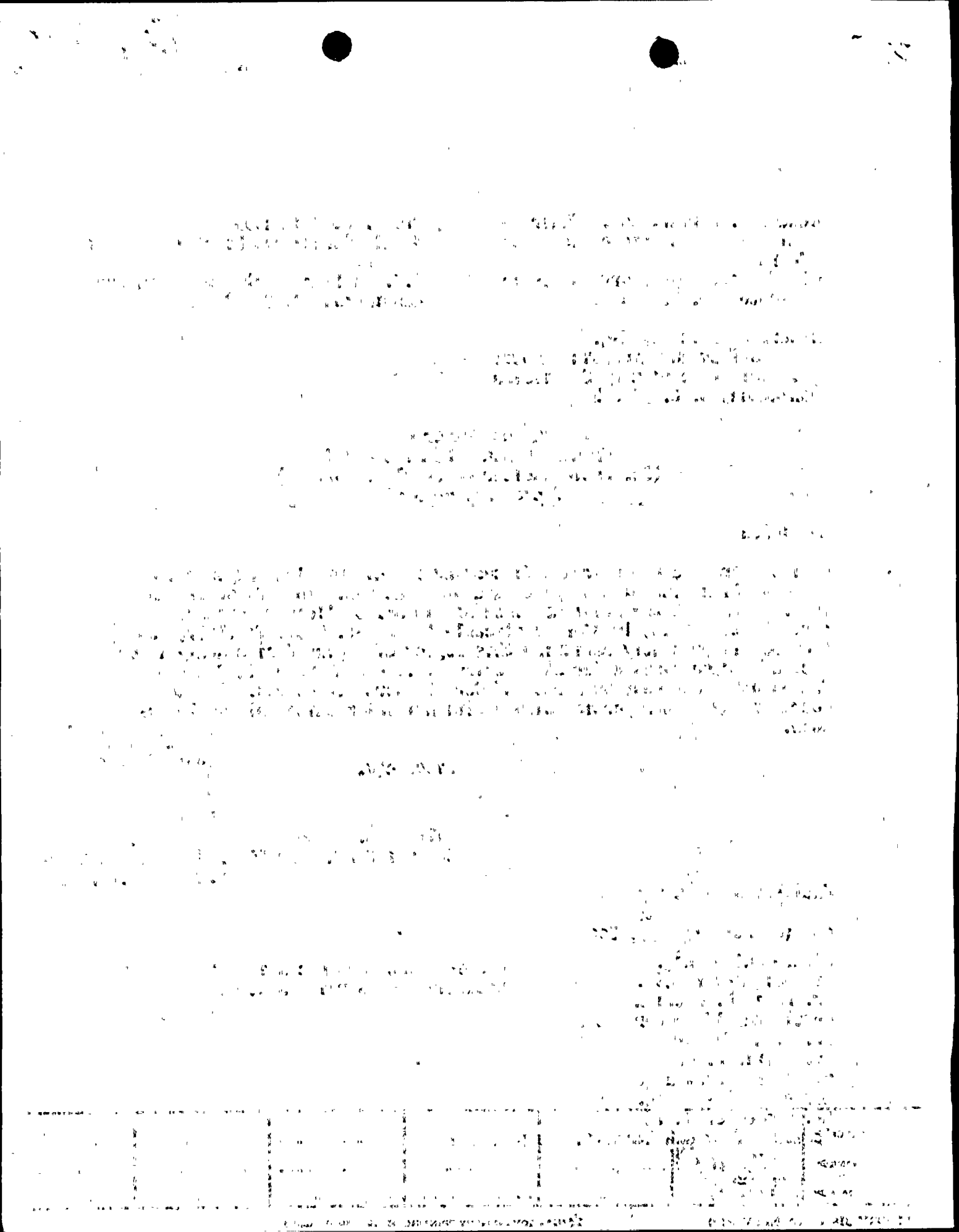
NRC FORM 318 (9-76) NRCM 0240 ☆ U.S. GOVERNMENT PRINTING OFFICE: 1978—626-624



Reg Cent.
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11/9/78

November 9, 1978

Michael C. Farrar, Esq., Chairman
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Washington, D. C. 20555

In the Matter of
FLORIDA POWER & LIGHT COMPANY
(St. Lucie Nuclear Power Plant, Unit 2)
Docket No. 50-389

Gentlemen:

Enclosed is a memorandum from the Director of the Office of Nuclear Reactor Regulation to the Commissioners dated September 29, 1978 discussing the results of a recently conducted fire protection research test by the Underwriters Laboratory for the Commission as part of the NRC's fire protection research program.

If the Board or the parties wish any additional information, please let us know.

Sincerely,

William D. Paton
Counsel for NRC Staff

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

NRC Central

September 25, 1978

9/25/78

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(Attn: Margaret Du Flo)

In the Matter of:
Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), Docket Nos. 50-400 through 50-403
Duke Power Company (Cherokee Nuclear Station, Units 1, 2 and 3), Docket Nos. STN-491, STN-492, STN-493
Florida Power and Light Co. (St. Lucie Plant, No. 2), Docket No. 50-389
Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit 1), Docket No. STN 50-482
Metropolitan Edison Company (Three Mile Island 2), Docket No. 50-320
Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), Docket Nos. 50-277 and 50-278
Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin) (Tyrone Energy Park, Unit 1), Docket No. STN 50-484
Public Service Co. of Indiana, Inc. (Marble Hill 1 and 2), Docket Nos. STN 50-546 and STN 50-547
Public Service Co. of New Hampshire (Seabrook Units 1 and 2), Docket Nos. 50-443 and 50-444
Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 and 2), Docket Nos. 50-354 and 50-355
Rochester Gas & Electric Corporation (Sterling Power Project Nuclear Unit 1), Docket No. STN 50-485
Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1-4) Docket Nos. STN 50-518 through STN 50-521
Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), Docket Nos. 50-553 and 50-554
Tennessee Valley Authority (Yellow Creek Nuclear Power Plant, Units 1 and 2), Docket Nos. STN 50-566 and STN 50-567
Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3), Docket Nos. 50-500 and 50-501
Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), Docket Nos. 50-338 and 50-339
Washington Public Power Supply System (Nuclear Project No. 4), Docket No. 50-513

Gentlemen:

Pursuant to the Order of the Atomic Safety and Licensing Appeal Board Panel in ALAB-480, the Staff on July 10, 1978 filed with the members

of the Appeal Board and parties in the above-captioned cases a copy of the transcript of hearings held in connection with motion releases in the Perkins proceeding in the matter of Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), Docket Nos. 50-488, 50-489 and 50-490. On September 22, 1978 Staff counsel received from the Office of the Secretary the attached letter from Ace-Federal Reporters, Inc. It indicates that a page was missing from the bound copies of the transcript in the Perkins proceeding. The new page 2798A should be inserted into its correct location in the transcript.

Sincerely,

Joseph F. Scinto
Deputy Director
Hearing Division

Enclosure As Stated

cc: Alan S. Rosenthal, Esq., Chairman
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Docketing and Service Section

(ESTAB. 1946)

Ace-Federal Reporters, Inc.

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GEORGE J. JAKABCIN, MBA
BERNARD M. ENGLEBERG, MBA

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WASHINGTON, D.C. 20001
202 347-3700

GEORGE A. MONICK, CSR
ROBERT J. MONICK, CSR
ROBERT JAMES MONICK, CSR

SEPTEMBER 20, 1978

NUCLEAR REGULATORY COMMISSION
DOCKETING AND SERVICE BRANCH
ATTN: MR. CHASE STEPHENS
1717 H STREET, N.W. - ROOM 1141
WASHINGTON, D. C. 20555

DEAR CHASE:

PLEASE FIND ENCLOSED A COPY OF PAGE 2798A, WHICH IS TO BE INSERTED BEHIND PAGE 2798 IN THE TRANSCRIPT IN THE MATTER OF: DKT 50-488,489,490 DUKE POWER CO. (PERKINS NUCLEAR STATION UNITS 1, 2 AND 3) DEPOSITION OF CHAUNCEY KEPFORD, HELD IN BETHESDA, MARYLAND ON THURSDAY, JUNE 8, 1978.

I AM SORRY FOR ANY INCONVENIENCE THIS MAY HAVE CAUSED YOU.

VERY TRULY YOURS,

ACE-FEDERAL REPORTERS, INC.

Mary A. Simpson

(MISS) MARY A. SIMPSON

CC: ALL SALES

with the ceasing of operations at the plant; they continue, and Dr. Poll, in his paper referred to earlier, calculated under contract with the EPA the quantity on rate on 222 released from thorium 230 in the mill tailings piles and subsequent health effects.

Going back to the Federal Register notice from which I just quoted, even when this rule-making petition was brought to the Commission's attention, and I call, in particular, your attention to the back, the last page of Exhibit H, Document SECY 75-741, where the distribution list is offered for this rule-making petition way back in 1975.

It was scattered all over the Commission, many copies of it. Nothing was done.

In May of 1976, I believe, the Environmental Protection Agency published a document entitled, "Radiological Quality of the Environment," in which they went into the problems of existing mill tailing piles in Salt Lake City -- for instance, on the edge of Grand Junction, Colorado and a number of other cities, and concluded that, indeed, the radon-222 problem from existing mill tailings piles was causing fairly severe health effects problems, at least in the vicinity of the mill tailings pile.

In fact, to give you some magnitude of the problem, from that document the EPA calculated that the dose to the bronchial epithelium from radon-222 emissions from the pile on the edge

Reg. Cent.

September 18, 1978

9/18/78

Michael C. Farrar, Esq., Chairman
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O.Lynch, R.Birkel

In the Matter of
Florida Power & Light Company
(St. Lucie Nuclear Power Plant, Unit 2)
Docket No. 50-389

Gentlemen:

The results of analyses performed for the NRC Staff by a consultant indicate that the impact force on fuel assembly spacer grids, caused by asymmetric loads during blowdown following a loss-of-coolant accident, may be more sensitive to core plate motion than it was originally believed to be. A copy of the consultant's memorandum on this subject dated November 4, 1977, is enclosed. As noted, the information is preliminary. Therefore, the Staff's conclusion that pressurized water reactor fuel assembly designs are acceptable has not been altered. However, a question has been raised about the margin to deformation of the fuel assembly grids.

The NRC Staff and its consultant are continuing their evaluation of fuel assembly mechanical response.

Sincerely,

William D. Paton
Counsel for NRC Staff

Enclosure: As stated

cc: See Page 2

OFFICE➤	OELD	OELD				
SURNAME➤	Paton:dm	JTourtellotte				
DATE➤	9/12/78	9/14/78				

NRC FORM 318 (9-76) NRCM 0240 ☆ U.S. GOVERNMENT PRINTING OFFICE: 1976—626-624

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Atomic Safety & Licensing Board Panel
Atomic Safety & Licensing Appeal Board
Docketing & Service Section

NOV - 4 1977

R. E. Tiller, Director
Reactor Operations & Programs Division
Idaho Operations Office - DOE
Idaho Falls, Idaho 83401

PWR FUEL ASSEMBLY MECHANICAL RESPONSE ANALYSIS - Stig-316-77

Ref: (a) R. L. Grubb, PWR Fuel Assembly Mechanical Response Analysis, Idaho National Engineering Laboratory, RE-E-77-141, March 1977
(b) R. L. Grubb, PWR Fuel Assembly Mechanical Response Analysis, Amendment No. 1, Idaho National Engineering Laboratory, RE-E-77-140, March, 1977
(c) R. L. Grubb and B. F. Saffell, Jr, Non-Linear Lateral Mechanical Response of Pressurized Water Reactor Fuel Assemblies, ASME Paper 77-WA/DE-18, December 1977
(d) H. Muno, H. Mizuta, and H. Tsumuna, Development of Advanced Method For Fuel Seismic Analysis, 4th International Conference on Structural Mechanics in Reactor Technology, San Francisco, California, USA, August, 1977
(e) R. L. Grubb, Feasability Study for Bounding the Lateral PWR Fuel Assembly Mechanical Response Analysis, Idaho National Engineering Laboratory, RE-E-77-160, Rev. 1, July, 1977

Dear Mr. Tiller:

A parametric study to assess the effect of variations in core plate motions on fuel assembly spacer grid crushing loads is currently in progress. A summary description of this study including preliminary results has been prepared at the request of the Nuclear Regulatory Commission's Division of System Safety, Core Performance Branch. Results of this study indicate that a small variation in core plate frequency may have a significant effect on spacer grid crushing loads. As the study is not complete, these results should be considered preliminary.

A mechanisim was postulated in Reference (e) which indicated that the input core plate motion could significantly affect spacer grid crushing loads. The primary objective of the present study was to determine if this mechanisim could be shown to exist. A secondary objective is to compare linear and nonlinear analysis techniques. In summary then the purpose of this study is twofold:

(1) Statistically determine the effect of core plate frequency and magnitude on the fuel assembly maximum spacer grid crushing loads, and

(2) Statistically compare linear and nonlinear analysis methods for lateral fuel assembly mechanical response in an attempt to simplify the nonlinear analysis.

The structural model utilized to analyze the fuel assembly mechanical response is basically described in References (a) through (c). Two exceptions included in the present study are the use of fuel assembly experimental frequencies and mode shapes and utilization of the method presented in Reference (d) for calculation of spacer grid crushing loads. The nominal forcing function, core plate accelerations, are presented in Reference (b). While eight variations on the frequency and amplitude of core plate motions are to be considered, only the four extreme cases are addressed in this discussion. The four cases are ± 10% variation on frequency and ± 10% variation of the amplitude. It is noted that all the frequencies contained in the core plate motions are varied the same amount. Nonlinear dynamic analysis as described in References (a) through (d) is in progress and preliminary results are provided in Table 1. A linear analysis is also being pursued using the methods outlined in Reference (e).

TABLE 1

RATIO OF PEAK SPACER GRID CRUSHING LOAD TO THE NOMINAL CURSHING LOAD[1]

Spacer Grid Elevation	Maximum Crushing Load/Nominal Crushing Load[1]			
	-10% Frequency	+10% Frequency	-10% Amplitude	+10% Amplitude
Center	1.76	0.804	0.979	1.04
Center-up	1.45	0.844	0.842	1.23
Center-down	2.11	0.830	0.835	1.25
Top	1.34	0.945	0.771	1.34
Bottom	1.56	0.808	0.863	1.26

[1]Nominal crushing load is the peak spacer grid crushing load obtained from the base case core plate motions.

Based on the results in Table 1, it does appear that a variation in frequency of ten percent effects a significant change in the spacer grid crushing loads. This indicates that a variation in this parameter may be in order for this type of nonlinear analysis. It should be pointed out that the model studied represents a general configuration. The purpose of this study was not a direct analysis of a specific plant but to determine if the mechanisim postulated

Reference (e) could actually be elicited in the nonlinear analysis. The mechanism appears to exist; thereby causing concern that permanent deformation of spacer grids may occur.

Upon completion of this study the conclusions presented in Reference (b) will be reassessed.

Very truly yours,

ORIGINAL SIGNED BY

R. R. Stiger, Manager
Reactor Behavior Division

BFS:clj

cc: V. Stello, NRC-DOR
P. S. Check, NRC-DSS
S. B. Kim, NRC-DSS
R. J. Mattson, NRC-DSS
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R. W. Kiehn, EG&G Idaho

bcc: R. L. Grubb
R. W. Macek
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B. F. Saffell
G. L. Thinnes
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File

Reg. Cert.

Septptember 5, 1978

9/5/78

Docket No. 50-389

Martin Harold Hodder, Esq.
1131 N.E. 86th Street
Miami, Florida 33138

Dear Mr. Hodder:

You recently requested that I obtain information for you concerning construction of the two St. Lucie nuclear facilities. Because you stated you needed the information immediately, I agreed to answer several brief questions over the phone but suggested that any additional information be sought on a more formal basis.

This is the information I read to you by telephone on Thursday, August 31, 1978:

1. The St. Lucie 2 inspector first knew of permittee's intent to use the "slipform" method of construction between September 13 and 16, 1977 when he saw slip forms (not then in use) on the site. Between August 2 and 5, 1977, FP&L's engineering department told our inspector of their intent to use the "slipform" method of concrete placement.

2. The shield wall for containment for St. Lucie 2 went above grade between November 8 and 11, 1977.

3. Regarding St. Lucie 1 - On October 28, 1970, containment was not above grade. Between February 3 and 5, 1971, FP&L was 39 feet above grade with concrete containment walls. We estimate, based on these facts, that they came above grade with the St. Lucie 1 containment between January 3 and 5, 1971.

Attached is a copy of a letter dated August 30, 1978 in which Florida Power and Light answer questions put to them by our inspector. I also read that letter to you.

Sincerely,

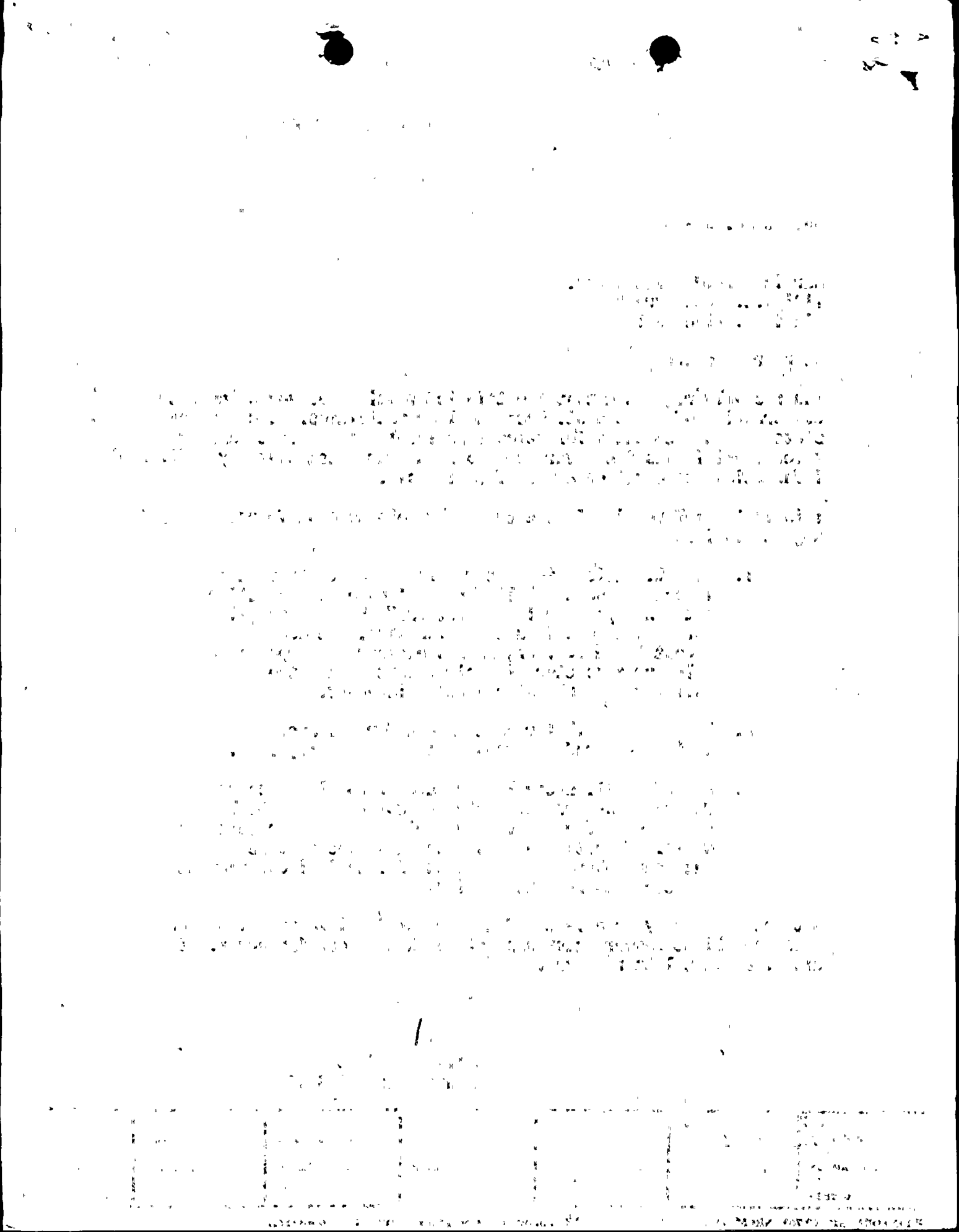
151

William D. Paton
Counsel for NRC Staff

Attachment
See Page 2

OFFICE➤						
SURNAME➤						
DATE➤						

NRC FORM 318 (9-76) NRCM 0240 ☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 — 626-624



cc:

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Michael Glaser, Esq.
Dr. David L. Hetrick
Mr. Frank Hooper
Dr. Marvin M. Mann
Harold F. Reis, Esq.
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Docketing and Service Section
Mr. Samuel J. Chilk
Mr. Robert D. Pollard

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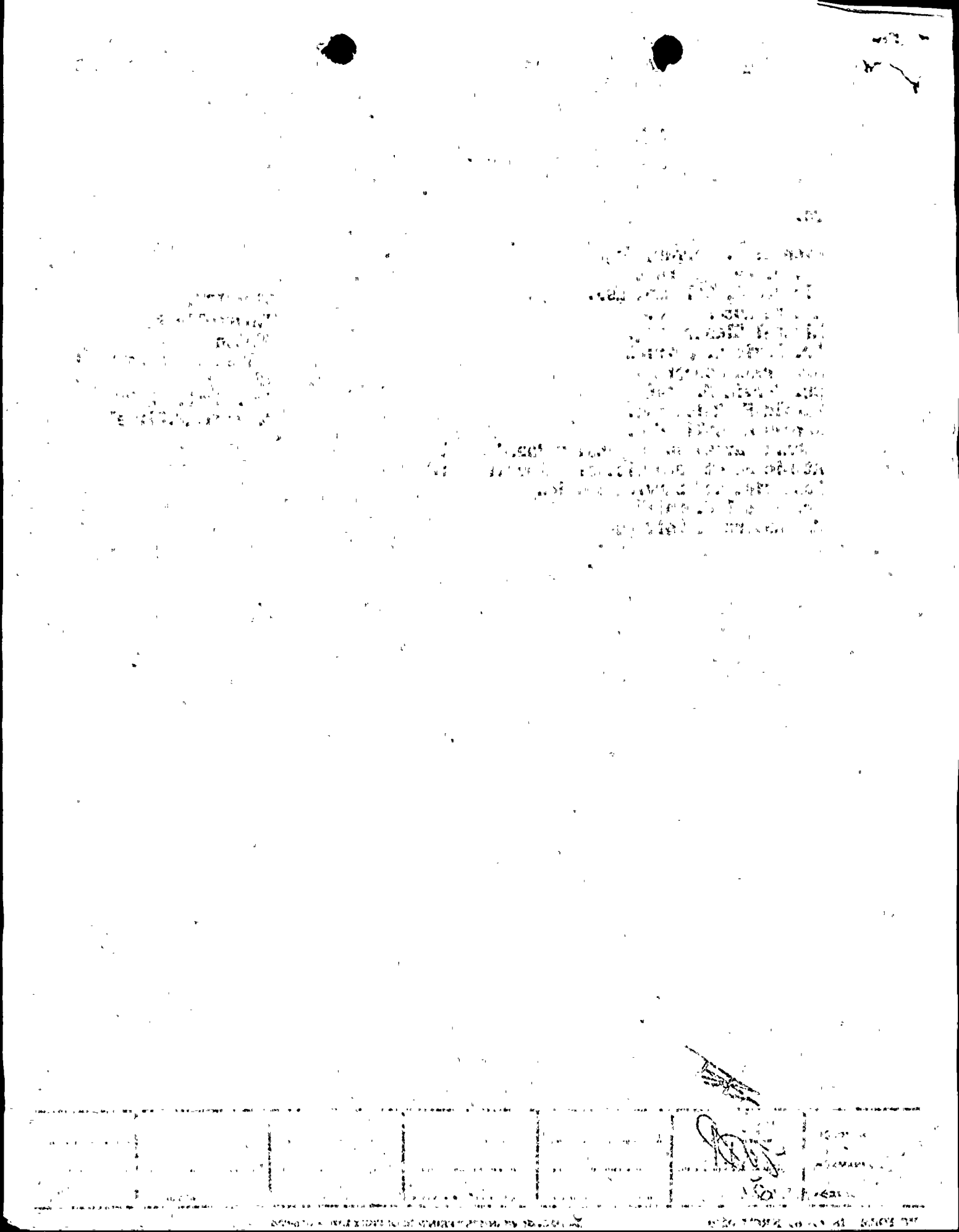
DATE➔	9/12/78					



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

8/31/78

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

NRC STAFF RESPONSE TO
INTERVENORS' MOTION FOR STAY

I. Introduction

On August 11, 1978, Intervenors filed a "Motion for Stay" of the effectiveness of the April 19, 1977 initial decision and a suspension of construction of the St. Lucie Nuclear Reactor Unit No. 2, until issues of offsite power and onsite power availability are resolved by reopened hearings. Intervenors seek further hearings on this issue in a Motion for a New Contention filed on the same date and opposed by the NRC Staff. The NRC Staff opposes the motion.

II. Background

On April 19, 1977, the Licensing Board issued an Initial Decision authorizing the issuance of a construction permit for St. Lucie Nuclear Power Project, Unit No. 2 (hereafter St. Lucie 2). On May 2, 1977, the U.S. Nuclear Regulatory Commission (NRC) issued a construction permit for St. Lucie 2. On May 31, 1977, in ALAB-404 (5 NRC 1185), this Board

(a) denied Intervenors' motion for an immediate stay of the effectiveness of the construction permit issued on May 2, 1977, and (b) set June 8, 1977 for oral argument on Intervenors' motion for a "long-term" stay. On June 8, 1977, oral argument was held in Bethesda, Maryland. Intervenors now claim that during this argument certain statements were made to this Board that provide the basis for a stay. On June 28, 1977, this Board denied Intervenors' request for a "long-term" stay (ALAB-415, 5 NRC 1435). On October 7, 1977, this Board affirmed the Initial Decision which authorized issuance of the construction permit, subject only to the outcome of further examination into the issue of steam tube integrity (ALAB-435, 6 NRC 541).[1/]

III. Intervenors' Argument

During the oral argument on June 8, 1978, Intervenors argued that if a stay were not granted while the appeal of the April 19, 1977 Initial Decision was pending before this Board, the construction work undertaken by Applicant during that period would tilt the cost-benefit balance in favor of the Applicant. The Appeal Board rejected the Intervenors' position, finding that the construction planned during the appeal's pendency could not significantly affect the ultimate decision on the merits. (ALAB-415, 5 NRC 1435, 1436-7 (1977)).

1/ On October 28, 1977 this Board amended its decision of October 7, 1977 (ALAB-435) by retaining jurisdiction over matters raised in a letter from Robert D. Pollard to the Attorney General of the United States. Mr. Pollard claimed improper employee behavior in connection with the investigation of grid stability in Florida. On November 25, 1977 this Board deferred to the Commission with respect to the Commission's investigation into allegations of improper employee behavior, but stated that in other respects, review of matters then pending would continue. Thus, the grid stability issues also remains before this Board for disposition.

As discussed in ALAB-480 (May 30, 1978) this Board is also considering emissions of radon-222 as part of Table S-3 of 10 CFR Part 51.

Intervenors now claim the Appeal Board was misled. They cite an exchange at pp. 75-6 of the transcript of the oral argument on June 8, 1977:

> "Mr. Salzman: One traditional ground for stay as far back as I can remember the cases is to moot the decision.
>
> I would like to know what will be spent in the next six months.
>
> Mr. Reis: The LWA will be completed in the next six months and that is about seven percent.
>
> Mr. Salzman: Seven percent of the total cost?
>
> Mr. Reis: Seven percent of the forward costs. Less than one percent has been expended up to now. I would like to reserve an opportunity to send the board and all of the parties any correction, if that is wrong. The Derrickson Affidavit says, "finishing the LWA" and that was filed with the licensing board and is on record here."

Intervenors attach to their Motion a December 7, 1977 newspaper article which describes a "new state-of-the-art" "slipforming" method of concrete placement accomplished by Applicant during November 1977. The new method is stated to have completed in 16 days a task which would have taken 14 months using a conventional method. Intervenors conclude from the above that:

> ...[I]nstead of limiting their construction activities to seven (7%) percent of the total below-grade activity during the sixth month period described in the sworn affidavit of their project manager and relied upon by the ASLB, ALAB, and the U.S. Court of Appeals, District of Columbia, the utility has achieved about 50% completion of their project by completed [sic] erection of the containment building in the same six (6) month period.

Intervenors' conclusion that Applicant has completed "about 50%" of the project is apparently based on the information in the newspaper article. No other source is cited.

IV. Staff Position

As stated by this Board, Intervenors' claim of irreparable injury made at oral argument was bottomed entirely on the possibility that construction undertaken by the Applicant "while the appeal is before us" [emphasis supplied], ALAB-415, 5 NRC 1435, 1436, (June 28, 1977), would tilt the cost-benefit balance in favor of Applicant. Intervenors completely ignore the fact that on October 7, 1977, (four months after the oral argument), this Board affirmed the Initial Decision authorizing the issuance of a construction permit, except for an issue over which it retained jurisdiction (not involving an issue raised by Intervenors in their appeal).[2/] Thus, even if it were the case that construction work has proceeded much faster than expected, it is beside the point. The only conceivably relevant question at this point is whether further construction over the next months would in any way prejudice the Board's consideration of the questions over which it has retained jurisdiction. While it is possible that this Board might not be satisfied with specific resolution of these questions proposed by the Staff, there is no reason to believe that further measures of the type proposed would

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2/ The question as to what would be accomplished in six months was, of course, necessitated by the fact that the Appeal Board could not know, on June 8, 1977, that it would reach its decision on October 7, 1977.

not ultimately be satisfactory. Absent a radical change in approach to resolution, no alternatives will be foreclosed during this Board's consideration of these matters.

There is nothing in the record or Intervenors' motion to indicate that Applicant's statement concerning planned future construction was not accurate when made. Nor is there anything to indicate that there was any substantial deviation from the expressed intent. In fact, Applicant attached to its response to Intervenors' motion stating that at the end of November, 1977 (almost 6 months after the June 8, 1977 oral argument):

> "physical construction was 3.5 percent complete and approximately $35 million had been expended on such construction, or 4.2% of the total estimated project costs of $850 million."3/

The affidavit further states that even at the end of July 1978 physical construction is only 12.7% complete.

It is the Staff's view that Intervenors have provided this Board with no factual basis that could possibly support a request for a stay.

V. Criteria For Stay

The criteria governing stay requests have previously been fully briefed by parties to this proceeding. Those criteria are now codified in 10 CFR Section 2.788(e):

3/ Pp. 3-4 of Affidavit of W. B. Derrickson attached to Applicants' "Opposition of Florida Power and Light Company to 'Motion for a New Contention and Motion for Stay'" (hereafter Derrickson affidavit).

> In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:
> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
> (2) Whether the party will be irreparably injured unless a stay is granted;
> (3) Whether the granting of a stay would harm other parties, and
> (4) Where the public interest lies.4/

With respect to a "strong showing that it is likely to prevail on the merits," Intervenors state only (p. 7 of their Motion for Stay) that "...they expect to prevail in the Federal Courts on the Class 9 and alternative sites issue [sic]...". This Board has affirmed licensing board decisions in this proceeding authorizing the issuance of a construction permit on May 2, 1977, retaining jurisdiction over questions involving (1) grid stability, (2) steam generator tubes, and (3) Table S-3. Intervenors make no showing that they are likely to prevail on the merits of any of these matters now before this Board.

On the issue of grid stability this Board has before it affidavits and reports which the Applicant and the Staff have been sending since October 1977, when the Staff submitted materials on this issue to the

---

4/ See Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630 at 631-2 (October 14, 1977).

Board. Applicant filed affidavits on March 31, 1978 in support of their position that there is overall assurance that there will be electric power at St. Lucie under both accident and normal conditions. The NRC Staff responded on June 12, 1978 detailing the basis for its conclusion that there is a sufficient level of assurance of safety requisite at the construction permit stage that loss of both St. Lucie units would not cause a loss of offsite power.

Because of information developed in the Prairie Island record, this Board has also retained jurisdiction with respect to steam generator tube integrity (ALAB-435, 6 NRC 541, October 7, 1977) to consider "...the likelihood of steam generator tube denting at St. Lucie." (ALAB-435, pg. 546).5/

On November 4, 1977 Applicant sumitted the affidavit of Clifford S. Kent in support of their belief that the proposed steam generator tube and condenser design and operating procedures provide assurance of steam generator tube integrity. On November 29, 1977 the Staff submitted an affidavit stating that the design modifications described by

5/ In Northern States Power Company (Prairie Island Nuclear Generating Plants, Units 1 and 2), ALAB-427, 6 NRC 212 at 220 (August 15, 1977), in a supplemental memorandum to ALAB-343, the Appeal Board stated:

> "...although much of what has been said here and in ALAB-343 may have a generic flavor, it is solely the Prairie Island units and their particular circumstances which are before us in this adjudicatory proceeding and, therefore, the operative effect of our determinations regarding the lack of a serious safety concern necessarily is confined to those units.

the Applicant "....should eliminate the potential to encounter the phenomenon of 'denting'...". On March 10, 1978, this Board directed further questions to Applicant regarding steam generator tubes. Applicant's answers were filed March 31, 1978. On April 21, 1978, the Staff filed an affidavit in response to Applicants' answers in which the Staff concluded that the system described by Applicant established the level of assurance requisite at the construction permit stage.

On August 14, 1978, the Staff submitted to this Board a memorandum on the applicability and effect of the Perkins partial initial decision. We set forth there our reasons to believe that the Perkins record with respect to radon 222 was applicable to the instant proceedings and that, taking that record into account, the cost-benefit balance is not tipped against the construction of St. Lucie 2.

Intervenors have submitted no evidence on the three outstanding issues. They have made no showing of a likelihood of prevailing on the merits. The evidence of record weighs the other way. Consequently, Intervenors have a much more difficult burden to meet on the remaining factors in order to justify a stay.

Intervenors' only comment about the irreparable injury criteria is that they:

> "may have already suffered irreparable damage given the nature and extent of the FPL construction and the permitting by the Commission of the practice Intervenors warned about at Tr.____ [sic] at oral argument in Bethesda, Maryland on June 8, 1977 and have described as 'incremental rulemaking.'"

This totally fails to demonstrate any specific injury.

As to harm to other parties, Intervenors ask this Board to apply the equitable doctrine of "clean hands" (Intervenors' Motion for Stay, p. 8). Applicants' Derrickson affidavit sets forth the substantial economic harm to the Applicant and its 1413 workers.

In Intervenors' discussion of the public interest criteria, they assume without any explanation that a suspension of construction is necessary in order to assure that the grid stability issue can be adequately resolved. As noted above, we believe that this assumption is completely wrong. Continued construction will not foreclose, either practically or legally, any options in the resolution of that issue.

For the foregoing reasons, Intervenors' Motion for Stay should be denied.

Respectfully submitted,

William D. Paton

William D. Paton
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 31st day of August, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR STAY", dated August 31, 1978 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 31st day of August, 1978.

*Michael C. Farrar, Esq. Chairman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

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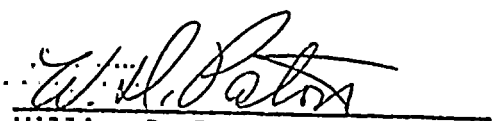

William D. Paton
Counsel for NRC Staff

8/31/78 Reg Cent

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

8/31/78

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR A NEW CONTENTION

I. Introduction

On October 13, 1977, Robert D. Pollard wrote to the Honorable Griffin Bell making certain allegations about the NRC Staff's investigation of grid stability problems in Florida. This letter and all attachments were sent by the Staff on October 21, 1977 to the Commission, the Appeal Board, the Licensing Board, and all parties including Intervenors. In an Order dated October 28, 1977, the Appeal Board amended its decision of October 7, 1977 (ALAB-435, 6 NRC 541) which had affirmed the Licensing Board's decision authorizing issuance of a construction permit for Unit 2 of the St. Lucie facility by retaining jurisdiction of the matters raised in Mr. Pollard's letter relating to grid stability.

On November 8, 1977 in response to Mr. Pollard's letter of October 13, 1977, the U.S. Nuclear Regulatory Commission directed its Office of Inspector and Auditor to "conduct a thorough investigation into the

allegations of improper employee misbehavior", which was one of the matters raised in the Pollard letter. The Appeal Board, in a Memorandum dated November 25, 1977, took note of the Commission's November 8, 1977 Order and indicated that "...pending our receipt of the [OIA] report, we will not proceed further with our own inquiry into those allegations which will be covered by the forthcoming investigation. In other respects, our review of the matters before us will continue."

On October 25, 1977, the Staff sent to this Board and the parties a 27-page report entitled "A Further Evaluation of the Florida Power and Light Company Electric Power System." On November 3, 1977, the Staff sent to this Board copies of all references cited in the above 27-page report. Copies of these letters were, of course, sent to Intervenors. The Staff will not list all documents that have been sent to Intervenors during this Board's consideration of the merits of the grid stability issue. This Board is fully aware of them. The Staff agrees with Applicant's characterization of what occurred after the Pollard letter of October 13, 1977 - there was an "outpouring of information". (Applicant's Opposition to Intervenors' Motions, p. 15).

By Order dated March 10, 1978, the Appeal Board directed the Applicant and the Staff to respond to certain questions concerning, inter alia, the electrical grid. The Appeal Board ordered that within 21 days after service of the Applicant's resonse, each other party could file a reply

memorandum. The Appeal Board further stated, "should any party believe that further proceedings are necessary, it should describe the kind of proceeding that should be undertaken, the questions which should be addressed, and the contribution it is prepared to make." The Applicant's response was filed on April 3, 1978. The Staff's response was filed on June 12, 1978.[1/] Intervenors filed no response.

In June, 1978, the Office of Inspector and Auditor issued a report entitled "Report to the Commission: Inquiry Into an Allegation of Employee Misconduct by Restricting the Investigation to Determine the Reliability of the Power Grid Serving St. Lucie - June 1978." On July 11, 1978, the Staff sent copies of this report to the Appeal Board, the Licensing Board and all parties.

In a July 31, 1978 Order, the Appeal Board stated that with respect to the report of the Inspector and Auditor that it would "await word from the Commission on the course to be followed before we take any further steps on that matter." The Appeal Board also stated:

[1/] On April 19, 1978, the Staff sought an extension of time to May 22, 1978 to respond to Applicant's submittal. The Appeal Board granted the request on April 21, 1978. On May 19, 1978 a further extension was granted allowing the Staff to respond until June 12, 1978.

> 2. Regardless of how the question of alleged misconduct is handled, however, it remains our responsibility to bring to a conclusion our review of the merits of the electrical grid stability question, that is, to determine whether it currently creates any safety problems. We also still have before us the merits of the steam generator tube integrity matter. In that regard, we received last month the final responses to certain questions we had posed to the parties on both topics. We note that the Intervenors have not availed themselves of the opportunity we gave them to submit their own views on either subject. In particular, they have not suggested that further proceedings are necessary or that they are prepared to make any additional contribution to the development of the record (see our Order of March 10, 1978). In these circumstances, we shall proceed to a decision, treating the sworn written submissions before us as part of the record and giving them appropriate weight. We will order further formal proceeding only if we deem them necessary.

On August 11, 1978, five months after the original Appeal Board request to the parties was made Intervenors filed a "Motion for a New Contention to read as follows:

> "Whether the Florida Power and Light Company (FPL) offsite power grid serving St. Lucie Unit 2 is sufficiently reliable to meet NRC criteria and whether the NRC should require greater FPL system interties with electrical systems outside the State of Florida to assure sufficient system reliability."

It is unclear whether the Intervenors are submitting the above contention pursuant to 10 CFR §2.714(a)(3) (untimely contentions), as a late response

to the Appeal Board's March 10, 1978 Order, or as a motion to reopen the record.[2/] In any event, the Intervenors have utterly failed to advance a credible excuse for this untimely motion, to impugn the accuracy of the affidavits filed by the Staff and Applicants, or to establish a colorable argument that a significant safety hazard exists.

II.
Argument

A. Timeliness

As noted above it is unclear under which procedure the Intervenors motion is being made. However, as a threshold matter the Intervenors must face the fact that their motion comes ten months after the Pollard letter and five months after this Board's Order requesting the parties' views on the need for (and form of) further proceedings regarding grid stability. The Staff submits that whether it be regarded as a motion to reopen the record, Vermont Yankee Power Corp. (Vermont Yankee Station), ALAB-138, 6 AEC 520, 523 n.12 (1973), or a response to the Board's March 10 Order,

---

2/ The Applicants have viewed the subject motion as one to reopen the record. Procedurally the specific criteria that are to be applied to the Intervenor's Motion within the present context of this proceeding are unclear. However, it would seem clear that 10 CFR §2.503, under which the Intervenors claim to be proceeding, is inapposite in that Sub Part E, within which 2.503 is contained, applies to a different type of CP or OL proceeding. The choice of options, of course, depends on whether one views the Staff's affidavits and the Appeal Board's consideration of the grid stability issue as a threshold inquiry to determine whether or not significant new information exists sufficient to conclude that a different result might be reached on a reopened record or whether one assumes that the Appeal Board's consideration of the issue is in lieu of remand and the filings on grid stability are therefore evidence of record.

Public Service of New Hamsphire (Seabrook Station Units 1 and 2), ALAB-488, slip op. at 7 (August 18, 1978), the Intervenors have failed to advance any credible excuse for the late filing of the subject motion.

Intervenors set forth the following reasons for their complete failure to indicate any interest in this matter over the last year:

(1) The Applicant and the Staff had meetings in April and June of 1978 of which Intervenor had no notice. (Motion, p. 3).

These meetings were six months after the Appeal Board Order of November 25, 1977 indicating its intent to pursue this issue. In the interim there had been absolutely no expression of interest from Intervenors.[3/]

3/ Since Intervenors have expressed a belated interest in the grid stability issue, notice will be sent regarding future meetings, if any, on that issue. This is consistent with the new Commission policy issued on June 28, 1978 (43 F.R. 28058) to the effect that informal meetings between NRC Staff and Applicants will generally be open to attendance by Intervenors.

(2) The NRC Staff sought and obtained two extensions of time to respond to Applicant's submittal of April 3, 1978 and "since these delays existed, Intervenors did not believe the deadline established in the March 10, 1978 Order still applied."

The Staff submits that Intervenors were not entitled to assume from the specific and limited extension granted to the Staff that Intervenors were to have some indefinite extension on an issue on which they had never even expressed an interest. On the contrary, the fact that the Staff sought two extensions should have signalled the Intervenors that they, no less than the Staff, were required to move for an extension. See e.g., Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-488, slip op. p. 7, ___ NRC ___ (August 18, 1978).

(3) Since the most significant responses to the Appeal Board's March 10, 1978 Order were published only recently "at a time when counsel for Intervenors was then committed to drafting a reply brief on the Appeal of the alternate sites and Class 9 accidents issues" before a federal court,

"it was not possible to review the new Staff and OIA data and draft these motions...".

The Staff's reply to this Board's March 10, 1978 Order was filed on June 12, 1978. This Board, however, first expressed its intent to consider the merits of the grid stability issue on October 28, 1977. In the interim extensive information has been made available to all parties. The fact that Intervenors' counsel was busy in June and July, 1978 does not excuse the long delay prior to that period. Indeed the Intervenors' Motion was not filed until a few days after the Appeal Board noted, on July 31, 1978, that "it remains our responsibility to bring to a conclusion our review of the merits of the electrical grid stability question." Thus, at the very conclusion of the extensive review of the grid stability question undertaken by the Appeal Board and over five months after they were canvassed as to any questions that should be addressed, the Intervenors want to add this "new" contention.

B. Other Considerations

1. The Board's Order

The Intervenors have wholly ignored the specific requests of the March 10 Order, viz.: views of the parties on whether the Applicant's submittal was accurate and sufficient for purposes of assuring the level of safety required for a Construction Permit; identification of questions which needed to be examined at any further hearing; and specification of the contribution to said hearing to be made by the party. Instead, the Intervenors have contented themselves with a criticism of the OIA report's failure to interveiew them or to discuss the Unit 2 proceeding in detail. Wholly absent from the Intervenors' critique is an explanation of how the inquiry undertaken in the OIA report, would be affected one iota by their allegation that Unit 2 was not given prime focus.

Thus, even at this late date, the Intervenors do little, if anything, to advance the Appeal Board's inquiry. They certainly have not advanced any justification for further hearings.

2. Motions to reopen

The Appeal Board recently reiterated the heavy burden borne by a proponent of a motion to reopen. Metropolitan Edison Co. (Three Mile Island Unit No. 2) ALAB-486, slip op. at 23 (July 19, 1978); Kansas Gas and Electric

Co. (Wolf Creek Unit 1), ALAB-462, 7 NRC 320, 339 (1978). In Three Mile Island the Appeal Board noted that if an initial decision has already been rendered, "it must appear that reopening the proceeding might alter the result in some material respect. In the case of a motion which is untimely without good cause, the movant has an even greater burden; he must demonstrate not merely that the issue is significant but, as well, that the matter is of such gravity that the public interest demands its explanation. (citation omitted)."

Intervenors make no attempt to demonstrate the need for a further exploration of the grid stability matter. Intervenors have not challenged the affidavits submitted by the Applicants and Staff or established what contribution they could make to any further proceedings. Since they have failed to demonstrate what benefit would be obtained from further evidentiary hearings on the matter, the Intervenors' motion -- should it be styled a motion to reopen -- must also fail. Vermont Yankee, supra, at 523.

3. 10 CFR §2.714(a)(3)

To the extent the Intervenors are seeking to amend their petition to add a late, albeit new, contention, the requirement of Section 2.714(a)(3) would have to be met. As noted, supra, the Intervenors have failed to

advance credible grounds for its lateness. In this circumstance an especially strong showing on the four factors in 10 CFR s2.714(a)(1) is required. Duke Power Co. (Perkins Units 1, 2, 3), ALAB-431, 6 NRC 460, 462 (1977). But, Intervenors have made no such showing at all.

III.
Conclusion

For the foregoing reasons, the Intervenors motion for the acceptance of a new contention should be denied. .

Respectfully submitted,

William D. Paton
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 31st day of August, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR A NEW CONTENTION", dated August 31, 1978 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 31st day of August, 1978:

*Michael C. Farrar, Esq. Chairman
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

*Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board
U. S. Nuclear Regulatory Commission
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*Richard S. Salzman, Esq.
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Edward Luton, Esq., Chairman
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Martin Harold Hodder, Esq.
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Miami, Florida 33131

Atomic Safety and Licensing Board
Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Appeal
Board
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Docketing and Service Section
Office of the Secretary
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Samuel J. Chilk
Secretary of the Commission
U. S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Mr. Robert D. Pollard
Union of Concerned Scientists
1025 - 15th Street, N. W.
Washington, D. C. 20005

W. D. Paton

William D. Paton
Counsel for NRC Staff

Reg. Cent.

August 30, 1978

8/30/78

Docket No. 50-389

Martin Harold Hodder, Esq.
1131 N.E. 86th Street
Miami, Florida 33138

Dear Mr. Hodder:

I enclose, at your request, a copy of the St. Lucie Plant, Unit No. 1 Final Environmental Statement dated June, 1973.

Sincerely,

William D. Paton
Counsel for NRC Staff

Enclosure as Stated

cc (w/o encl.):
Michael C. Farrar, Esq.
Dr. W. Reed Johnson
Richard S. Salzman, Esq.
Edward Luton, Esq.
Michael Glaser, Esq.
Dr. David L. Hetrick
Dr. Frank Hooper
Dr. Marvin M. Mann
Harold F. Reis, Esq.
Norman A. Coll, Esq.
Atomic Safety and Licensing Board Panel
Atomic Safety and Licensing Appeal Board
Docketing and Service Section
Mr. Samuel J. Chilk
Mr. Robert D. Pollard

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CWoodhead
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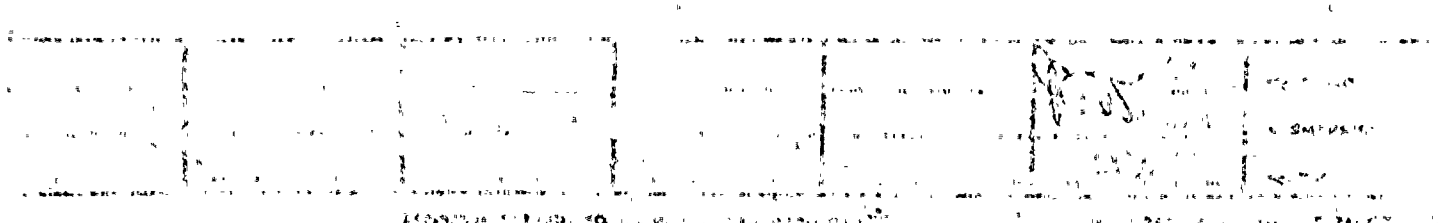
FF (2)
Reg. Cent., LPDR

OFFICE	OELD					
SURNAME	WPaton:hs					
DATE	8/30/78					

NRC FORM 318 (9-76) NRCM 0240 ☆ U.S. GOVERNMENT PRINTING OFFICE: 1978—626-624



Reg. Cent.

August 28, 1978
8/28/78

Docket No. 50-389

Martin Harold Hodder, Esq.
1131 N.E. 86th Street
Miami, Florida 33138

Dear Mr. Hodder:

In response to your request, I attach a copy of a letter dated August 8, 1978 from Florida Power and Light Company to the Office of Inspection and Enforcement in Atlanta, Georgia.

Sincerely,

William D. Paton
Counsel for NRC Staff

Enclosure as Stated

cc (w/encl.):

Michael C. Farrar, Esq.
Dr. W. Reed Johnson
Richard S. Salzman, Esq.
Edward Luton, Esq.
Michael Glaser, Esq.
Dr. David L. Hetrick
Martin Harold Hodder
Dr. Marvin M. Mann
Harold F. Reis, Esq.
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Mr. Samuel J. Chilk
Mr. Robert D. Pollard

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O.Lynch, R.Birkel

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SURNAME➤	WPaton:ns					
DATE➤	8/27/78					

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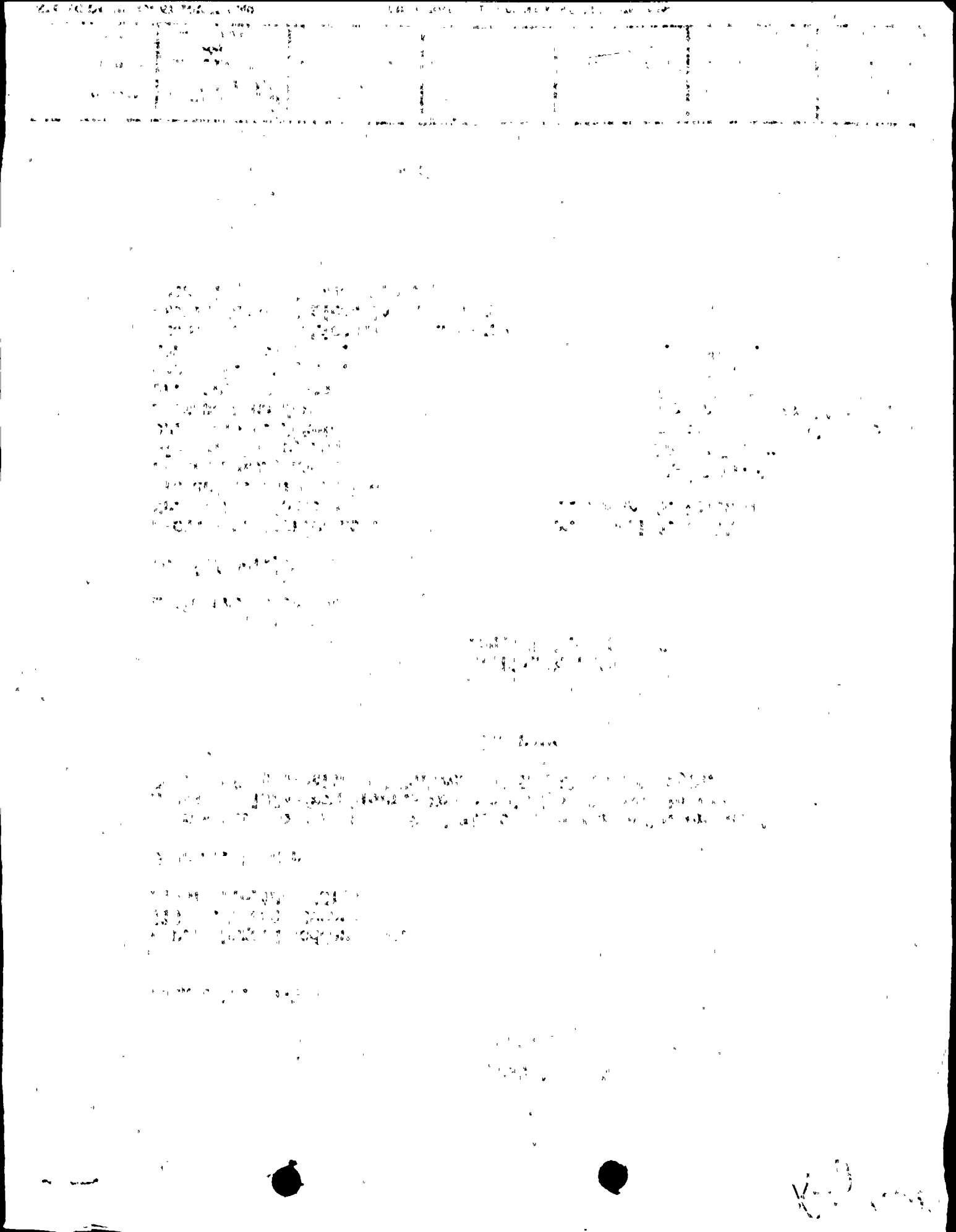

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Docketing & Service
Section

August 23, 1978

8/23/78

Nuclear Regulatory Commission
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Atomic Safety and Licensing Board
Edward Luton, Esq., Chairman
Dr. David L. Hetrick
Dr. Frank F. Hooper

Atomic Safety and Licensing Appeal Board
Michael C. Farrar, Esq.
Richard S. Salzman, Esq.
Dr. W. Reed Johnson

In the Matter of
Florida Power & Light Company
(St. Lucie Nuclear Power Plant, Unit No. 2)
Docket No. 50-389

Gentlemen:

We have today filed with the Appeal Board an opposition to the motions referred to in the letter to you of August 4, 1978, from Mr. Martin Harold Hodder, one of the Intervenors and counsel for the Intervenors in the above captioned proceeding. A copy of the opposition is attached.

In large part the letter is a criticism of the investigation described in the report to the Commission of the Office of Inspector & Auditor, dated June, 1978. However, the letter suggests that "new action by the Commission" (p. 3) is called for concerning St. Lucie Unit No. 2. We think it appropriate

to point out that nothing in Mr. Hodder's letter justifies the grant of those motions, the merits of which are addressed in the opposition.

Respectfully,

Harold F. Reis

Harold F. Reis
Counsel for
Florida Power & Light Company

Attachments

cc: See attached service list

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit No. 2)	)	

OPPOSITION OF FLORIDA POWER & LIGHT COMPANY TO "MOTION FOR A NEW CONTENTION" AND "MOTION FOR STAY"

On August 11, 1978 the Intervenors in this proceeding filed a "Motion for a New Contention" (New Contention Motion), requesting a hearing on a contention relating to the offsite power grid which will serve St. Lucie Unit No. 2, and a "Motion for Stay" (Stay Motion), requesting the suspension of construction of the Unit pending the completion of the hearing requested in the New Contention Motion. Florida Power & Light Company (FPL) hereby files its Opposition to both motions.

As set forth below in greater detail, the New Contention Motion presents no grounds for reopening the proceeding or for holding a hearing. The Stay Motion meets none of the legal criteria for the grant of a stay. That Motion is largely based upon charges relating to the status of construction and of alleged misrepresentations made on behalf of FPL concerning construction work planned for the last half of 1977. The charges are false.

I

The Factual Background

A. Previous Procedural History and Stay Requests

The Initial Decision of the Licensing Board was issued on April 19, 1977 (5 NRC 1038), and the construction permit authorized by the decision was issued on May 2, 1977. The Initial Decision was affirmed by this Board in ALAB-435 of October 7, 1977 (6 NRC 541), and, although Intervenors sought Commission review of ALAB-435, their petition was denied when the time for review by the Commission expired on December 23, 1977. Thereafter Intervenors filed a petition for judicial review in the Court of Appeals for the District of Columbia Circuit (No. 78-1149); on March 17, 1978, that proceeding was consolidated with an earlier appeal (No. 76-1709) from ALAB-335, 3 NRC 830 (1976) and the appeals are now pending.

During the course of the Administrative and judicial appeals from the Initial Decision, the Intervenors made a number of requests for a stay pending appeal. A motion for such a stay was denied by the Licensing Board on May 11, 1977, and by this Board on May 31, 1977 (ALAB 404, 5 NRC 1185), and on June 28, 1977 (ALAB 415, 5 NRC 1435). Similar motions were

denied by the Court of Appeals on May 12, 1977, and June 1, 1977.[1/] FPL attached to some of its oppositions to the stay requests an affidavit prepared by W.B. Derrickson, Project General Manager, which addressed a number of issues, including construction plans.[2/]

In pertinent part the affidavit stated that a 65-month schedule had been developed for St. Lucie Unit No. 2, even though the industry average is 72 months; that the level of activity reached for LWA construction that had been stayed in October of 1976 could again be reached by mid-June, 1977 and that:

> "During the first six months, the work to be initially undertaken will consist of that described in the LWA. Essentially, this will be excavation and civil work in a portion of the site which already is cleared and which already has subsurface preparation work completed in conjunction with the construction of St. Lucie Unit No. 1"

1/In addition, on October 21, 1976, the Court of Appeals for the District of Columbia entered an order staying a limited work authorization which had been issued in 1976 and holding in abeyance the appeal which the Intervenors here had taken from ALAB-335. On May 12, 1977, the Court issued an order dissolving the October 21, 1976, stay and directing that the appeal no longer be held in abeyance.

2/See Affidavit of W.B. Derrickson, dated April 29, 1977, attached to FPL's "Response in Opposition to Motion for Stay Order," dated May 2, 1977, and filed with the Atomic Safety and Licensing Board. That affidavit was referred to by FPL in its "Opposition to Motion for Stay" (at pp. 42-43, 47) filed with this Board on June 2, 1977. The same affidavit was attached to a pleading filed by FPL in the Court of Appeals prior to that Court's order of May 12, 1976, dissolving the stay of a LWA construction.

During the course of oral argument on Intervenor's request that this Board stay construction, counsel for FPL was asked "what will be spent in the next six months." Referring to the Derrickson affidavit, counsel stated: "The LWA will be completed in the next six months. . . and that is about seven percent. . . of the forward costs."[3/] Thereafter, in ALAB-415 this Board concluded that a stay was "not warranted under the standards laid down in Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958. . ." and the Commission's Rules of Practice, 10 CFR §2.788(e). The Board went on to say:

> "At oral argument, intervenors acknowledged with commendable candor that 'the amount of work the applicant seeks to do in the next few months' would have an 'insignificant [environmental] effect' (App. Tr. 8). Rather, their claim of irreparable injury was bottomed entirely on the possibility that construction undertaken by the applicant while the appeal is before us would prove sufficient of itself to tilt the environmental cost-benefit balance in favor of allowing the plant to be completed. Ibid. But our review of the record and our understanding of the nature and amount of work likely to be completed in the next few months satisfies us that in no event could that work significantly affect our ultimate decision on the appeal."

5 NRC at 1436-1437 (Footnote omitted).

3/Transcript of Oral Argument before this Board, June 8, 1977, pp. 75-76.

On October 7, 1977, this Board decided the substance of the construction permit proceeding in ALAB-435, 5 NRC 541. It affirmed the Initial Decision in all respects, but retained jurisdiction over an issue involving steam generator tubes which it had raised sua sponte. Intervenors then pursued appeals to the Commission and the Court of Appeals. However they never requested a stay of construction after the issuance of ALAB-435.

B. Background of the New Contention Motion

The events relevant to the New Contention Motion were initated by a letter dated October 13, 1977, from Robert D. Pollard of the Union of Concerned Scientists, to Attorney General Griffin D. Bell. The letter characterized system disturbances on the FPL power grid as an instance "where it appears that the agency [NRC] acted to suppress information concerning safety hazards at nuclear power plants." The Pollard letter was transmitted to this Board by NRC staff counsel on October 21, 1977, together with other information concerning the generic aspects of grid stability and offsite power problems. Counsel's letter stated that the staff would "provide to the Board in the near future a further technical evaluation of the specific grid distrubance problems cited in Mr. Pollard's letter." This was done on October 25, 1977, when the NRC staff transmitted a 27-page document prepared by M. Srinivasan in consultation with D. MacDonald, Jr. entitled "A Further Evaluation of the Florida Power and Light Company

Electric Power System." Each filed an appropriate supporting affidavit. Based on a review of system disturbances, the document reaffirmed "our prior conclusions that the FPL eletric [sic] grid system satisfies the Nuclear Regulatory Commission's requirements . . . and is acceptable." (p. 24) It also stated (p. 26):

> "Considered together, the reliability required for the offsite power source combined with the additional requirement for redundant onsite power supplies, provide reasonable assurance that the facilities which conform to the Commission's General Design Criteria and can be operated without endangering public health and safety."

The foregoing material was transmitted to Intervenors as were copies of the references cited in the "Further Evaluation" and copies of relevant staff documents.

On October 28, 1977, this Board issued an order referring to Mr. Polland's letter, to the subsequent communications it had received from the staff, and to the need to "complete our own review. . ." of the reliability of the off-site power grid. It therefore amended its previous order retaining jurisdiction over the steam generator problem "to reflect our retention as well of jurisdiction over the specific matters raised in Mr. Pollard's letter insofar as they concern . . ." St. Lucie Unit No. 2. On November 8, 1977, the Commission issued an order referring to this Board's order of October 28, 1977 and stating that the Commission had directed the Office of Inspector and Auditor to conduct an investigation into

Mr. Pollard's allegations of employee misconduct. The Commission's order stated that: "The results of the investigation will be made public and filed with the Appeal Board." (Footnote omitted). On November 25, 1977, this Board issued a memorandum noting the Commission's directions to the Office of Inspector and Auditor and stating that no purpose would be served by duplicating the investigation. The memorandum stated the Board would proceed no further with its own inquiry, but that: "In other respects, our review of the matters before us will continue."

Accordingly, on March 10, 1978, this Board issued an order addressing a number of questions to FPL concerning both the steam generator tube problem and the electrical grid. FPL was directed to provide its answers, by affidavit where appropriate, to the Board and the parties by April 3, 1978.

The order went on to direct that:

> "Within twenty-one days after service of the applicant's response, each other party may file a reply memorandum. These should focus on (1) whether the information then before us is accurate and (2) if so, whether it is sufficient to establish the level of assurance of safety requisite at the construction permit stage. Should any party believe that further proceedings are necessary, it should describe the kind of proceeding that should be undertaken, the questions which should be addressed, and the contribution it is prepared to make."

On March 16, 1978, Mr. Pollard addressed another letter to the NRC Commissioners and to the members of this Appeal Board with copies to counsel, including Intervenors' counsel. This was a ten-page letter with attachments which, among other things, criticized the "Further Evaluation" which the staff had submitted on October 23, 1977.

On March 31, 1978, FPL provided its responses to the March 10 order by affidavit. Copies were of course served on the Intervenors. Included was an extensive set of responses to questions earlier posed by the staff concerning a power failure which had occurred on May 16, 1977.

On April 10, 1978, FPL supplied the Board and the parties with copies of a substantial additional body of information contained in its responses to further staff questions and a document entitled "Florida Public Service Commission Engineering Department Final Report on Southeast Florida's Susceptibility to Blackouts" (In Re: Docket No. 770489-EU (CI) - Investigation of the system reliability of Florida Power & Light Company), together with related attachments, memoranda and comments. On May 25, 1978, FPL supplied the Board and the parties with still more information in the form of a lengthy report on a system disturbance which had occurred on May 14, 1978.

The FPL power system disturbances have been studied by the Oak Ridge National Laboratories (ORNL) and their reports and recommendations--the most important of which was the adoption of a system of predefined definitions and responses to alerts--were supplied to the Board and the parties.[4/] In addition, the NRC staff held meetings with FPL and its representatives on April 24 and June 5, 1978.[5/]

FPL's response to the Appeal Board's March 10, 1978, order was filed on March 31, 1978. In consequence the reply memoranda, if any, were due on or about April 20, 1978. Intervenors never filed such a reply memorandum nor did they request any extensions of time to do so. After requesting and receiving extensions of time, the staff filed its reply on June 12, 1978, in the form of an affidavit of Robert G. Fitzpatrick (Fitzpatrick Affidavit). The staff also enclosed an ORNL analysis and material relating to staff positions and meetings the staff had held with FPL. The Fitzpatrick Affidavit stated in part (pp. 4-6) that the Florida grid system possesses inherent vulnerability and

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4/See letter from staff counsel dated April 21, 1978, and NRC staff response, dated June 12, 1978, to applicant's April 3, 1978 submittal.

5/See staff memoranda both dated June 7, 1978, entitled "Summary of Meeting with Florida Power & Light Company" and "Summary of Meeting held on June 5, 1978". Copies of both memoranda were filed in the docket and sent to the parties.

that the onsite system had not been augmented "to compensate for any real or preceived inadequacies in the offsite system". The affidavit stated that, in consequence, FPL would be required to (1) as recommended by ORNL, establish predefined conditions of alert and responses thereto; (2) evaluate, before a planned outage of any major component, the resulting grid configuration; and (3) establish procedures for enhanced testing of on site diesels; and that FPL had undertaken to implement these requirements. (Fitzpatrick Affidavit, pp. 6-12).

The affidavit also stated (pp. 3-4) that a staff position on protection from sustained low voltage condition which had been adopted subsequent to the construction permit review of St. Lucie Unit No. 2 would be applied during the operating license review; and, noting improvements scheduled by FPL for the period 1978 to 1981, the Fitzpatrick Affidavit (p. 12) concluded:

> "Those improvements coupled with the staff's positions in Enclosure 3 provide a sufficient level of assurance of safety requisite at the construction permit stage that loss of both St. Lucie units will not cause a loss of offsite power.
>
> Further overall assurance is provided in that during the operating license review of Unit 2, such events will be reviewed in detail. Standard Review Plan 8.2 includes the above class of events in the staff review of offsite power systems."

On July 11, 1978, the NRC Staff counsel transmitted to the Appeal Board and the parties, the Report of the Office of Inspector and Auditor, dated June 1978, and prepared in response to the Commission's Order of November 8, 1977. The report concluded (p. 5) that the inquiry,

> "based on the limited documentation available and the recollection of the individuals involved, did not disclose (1) any misconduct on the part of AEC employees in their handling of grid stability issue during the licensing process for the St. Lucie plant, or (2) that the grid disturbances experienced in Florida affected the safe operations of the nuclear plants on the FPL grid."

Thereafter, on July 31, 1978, this Board issued an order stating that it intends to await word from the Commission on the course to be followed before it takes any further steps with respect to the investigation of the staff. The Board went on to state:

> "Regardless of how the question of alleged misconduct is handled, however, it remains our responsibility to bring to a conclusion our review of the merits of the electrical grid stability question, that is, to determine whether it currently creates any safety problems. We also still have before us the merits of the steam generator tube integrity matter. In that regard, we received last month the final responses to certain questions we had posed to the parties on both topics. We note that the intervenors have not availed themselves of the opportunity we gave them to submit their own views on either subject. In particular, they have not suggested that further proceedings are necessary or that they are prepared to make any additional contribution to the development of the record (see our order of March 10, 1978). In these circumstances, we shall proceed to

> a decision, treating the sworn written submissions before us as part of the record and giving them appropriate weight. We will order further formal proceedings only if we deem them necessary."

It was only after that announcement on August 11, 1978, that the Intervenors filed the instant motions. In addition, they addressed a letter[6/] to the Commission, to the Appeal Board and to the Licensing Board criticizing the report of the Office of Inspector and Auditor and claiming that they had been denied the right to litigate grid stability and related problems. The letter stated that one of its purposes was to "introduce" the New Contention Motion and announced that Intervenors were seeking a stay of construction.

II

The New Contention Motion

In essence the motion requests that the record be reopened for the purpose of holding a hearing on a new contention, defined as follows:

> "Whether the Florida Power and Light Company (FPL) offsite power grid serving St. Lucie Unit 2 is sufficiently reliable to meet NRC criteria and whether the NRC should require greater FPL system interties

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6/Although the letter is dated August 4, 1978, the copies sent to counsel for FPL were mailed on August 11, 1978, with the motions.

with electrical systems outside the State of Florida to assure sufficient system reliability."

The basic principles governing a motion to reopen a record in order to hear evidentiary issues not previously considered are well established.7/ The question whether to reopen turns upon (1) the timeliness of the motion; and (2) the significance or gravity of the issues raised. Reopening of a record is required "only when the matters raised are, in the board's opinion of major significance to plant safety." Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358, 365 (1973); ALAB-138, 6 AEC 520, 523 (1973); see also Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975); Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 332 (1978). The motion meets neither test.

In its order of March 10, 1978, this Board, in effect, defined the issues which should be addressed in order to show that there exists a matter of "major significance to plant safety." These were

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7/ The New Contention Motion argues that good cause for conducting a hearing exists within the meaning of 10 CFR §2.503. That section is inapplicable. It is part of Subpart E of 10 CFR Part 2 and applies only to reactors licensed for manufacture at an industrial location, i.e. it is part of the NRC's standardized reactor design program.

> "(1) Whether the information then before us is accurate and (2) if so, whether it is sufficient to establish the level of assurance of safety requisite at the construction permit stage."

The New Contention Motion does not address these issues.

The alleged "good cause" for conducting a hearing is set forth at pages 1-3 of the Motion. It is contended that in 1974 the Staff withheld information from the Intervenors concerning alleged grid instability problems in the FPL system and that the staff unduly restricted "the scope of the FPL grid stability investigation." It is obvious, however, that these contentions in no way address the issues defined by this Board. The contentions have no bearing on either the accuracy of the information before the Board or the assurance of safety provided by that information.

As an additional basis for "good cause," emphasis is placed upon those portions of the Fitzpatrick Affidavit which refer to the vulnerability of the Florida peninsular system, to the operation of diesel generators and to the completeness of FPL's responses to questions addressed to it in this Board's Order of March 10, 1978. However, the motion makes no reference whatsoever to the compensating measures discussed in the Fitzpatrick Affidavit, including the ORNL's recommendation concerning alerts, the improvements in the FPL system which are scheduled for the period 1978 to 1981, or the action which

the staff intends to take in connection with the operating license review. Thus it wholly fails to address the question whether the information "is sufficient to establish the level of assurance of safety requisite at the construction permit stage."

To be sure, the motion expresses a desire to investigate the question whether there should be "greater FPL system interties with electrical systems outside the State of Florida." However, this is a question which is addressed in some detail in the information filed with the Board and the parties.[8/] In no way does the motion challenge the accuracy of that information or "indicate the contribution [the Intervenors are] prepared to make" to that issue or any other issue.

Nor is the timeliness test met. The Intervenors were informed of a possible grid stability issue no later than when they received the first Pollard letter in October of 1977. An outpouring of information followed which highlighted the issue and the various orders issued by this Board made it crystal clear that it would address the merits. A request for

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8/Existing and planned interconnections are discussed at pages 20-23 of the "Final Report on southeast Florida's susceptability to Blackouts" forwarded to the Board and the parties by FPL on April 10, 1978. That material is quoted and discussed at pp. 6-10 of an ORNL document entitled "Supplement to Transmission System Disturbances: Florida Power and Light, May 16, 1977; Con Edison July 13, 1977." The latter document was forwarded with the staff's Response June 12, 1978. Neither document recommends such interties.

proceedings could have been made any time during that period, but none was made. Indeed, it was only after the Board, in its order of July 31, 1978, emphasized that Intervenors had not suggested further proceedings that the New Contention Motion was filed.

Perhaps dispositive of the timeliness issue is Intervnor's admission (p. 4) that a "deadline [was] established in the March 10, 1978 Order." Since they had before them the example of the NRC staff expressly requesting extensions, they had no reason to "believe" the specified deadline had been lifted or that they have a right to await the staff's comments or that there was an open-ended period of time for them to respond to the March 10 Order.[9/]

Referring to the precedent concerning the need to complete administrative proceedings, this Board has stated

> "after a decision has been rendered, a dissatisfied litigant who seeks to persuade us-or any tribunal for that matter-to reopen a record and reconsider 'because some new circumstance has arisen, some new trend has been observed or some new fact discovered' has a difficult burden to bear.'

Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976). Intervenors do not even attempt to bear that burden.

9/The burdens of appellate litigation could not have been so heavy as to deprive Intervenors of the time to make a simple request for an extension.

The request for a hearing contained in the New Contention Motion should be denied.

Another request contained in the motion should also be denied. Intervenors allege that they were unfairly excluded from the April 24 and June 5 meetings between the NRC Staff and the Applicant. They state that they should have received notice so that their counsel could have attended. In their New Contention Motion, Intervenor also requests this Board to direct that their counsel receive notice of all future meetings "between the Applicant and Staff on the grid stability issue where other legal counsel are present or invited" (pp. 3, 5).

In fact, Intervenors were not treated unfairly. Under the regulatory scheme, the staff's function is largely carried on outside of the hearing process, Northeast Nuclear Energy Company (Montague Nuclear Power Station, Units 1 and 2), LBP-75-19, 1 NRC 436, 437 (1975); and Commission regulations expressly call for meetings between the staff and parties on an informal basis. 10 CFR §2.102(a) states that "the staff may request any one party to the proceeding to confer with the staff informally." For these reasons the Commission staff has regularly held informal meetings, including counsel, like those held on April 24th and June 5th, without the presence of opposing parties.

On June 28, 1978, after the two meetings cited by Intervenors, the NRC issued a statement of policy to the effect that

informal meetings between the NRC Staff and an Applicant, held pursuant to 10 CFR §2.102, will be open to attendance by opposing parties as observes. 43 Fed. Reg. 28058 (June 28, 1978). The new statement of policy provides that reasonable efforts will be made by the staff to give the advance notice and opportunity to attend requested in the motion. There is no reason to believe that the staff will not abide by the new policy, and an order would be inappropriate. In any case, licensing boards do not have jurisdiction over the practices and procedures of the Commission Staff in gathering information outside of the hearing process. See New England Power Company, et al. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-79 (1978); Northeast Nuclear Energy Company, Id. at 437.

III

The Stay Motion

The Stay Motion (p. 1) requests a stay of effectiveness of the Initial Decison of April 19, 1978, "thereby suspending construction work activity at the Hutchinson Island site until the serious issues of offsite power and onsite power availability are resolved by hearings . . ." as requested in the New Contention Motion.

The principal basis for the motion (pp. 1-7) is that in connection with earlier stay requests FPL, by way of affidavits and through counsel, represented to this Board and the Court of Appeals that, during the first six months of resumed construction (an estimated period during which a stay, if granted, might have remained in effect), essentially only the work that constituted LWA activities would be accomplished; that such work would be below grade and constitute only about "seven (7%) percent of the entire construction project . . ." (p. 4), or seven percent of forward costs (p. 5); that, in fact, construction has been accelerated by FPL, which has built a containment building, "with no notice to the Intervnors of a change in the company plan" (pp. 6-7); and FPL has thereby "achieved [sic] about 50% completion of their project by completed erection of the containment building within the same six (6) month period . . ." (pp. 5-6).

Intervenors argue that construction should be stayed in order to prevent a shift of the cost-benefit balance (p. 6), because FPL lacks "clean hands," having "accelerated a construction project at their own risks after representing to the Commission and the parties they would conduct only LWA activities" (p. 8), and for safety reasons (pp. 8-9).

The accusations of misrepresentation and lack of "clean hands" are false.

First, FPL has not "achieved about 50% completion of their project by completed erection of the containment building . . . ." The only basis for that statement is a newspaper article which contains no such figure and speaks only about the containment building. The facts are that construction of St. Lucie No. 2 at the end of November, 1977 was 3.5 percent, not even seven percent, much less fifty percent, complete. Indeed, as of the end of July, 1978, construction was only approximately 12.7% completed. Affidavit of W.B. Derrickson, dated August 16, 1978,[10/] attached to this Opposition.

Second, nothing that was said in any affidavit, pleading or oral argument constituted a commitment concerning the precise details of construction. Rather, FPL attempted to provide the adjudicating bodies with a rough estimate of the amount and kind of work that would likely be carried out during a theoretical period in which a stay might be in effect. The facts show that, although some construction other than LWA work was done, the estimates were responsible. The figures concerning the actual status of construction contained in the Derrickson affidavit demonstrated that, if anything, FPL overestimated the amount of construction which would be

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10/ The Derrickson affidavit discloses that the total project costs are presently estimated at approximately $850 million; and that total project costs spent by the end of November, 1977, were approximately $165.7 million, of which approximately $36 million (4.2% of $850 million) had been expended on construction. At the end of July, 1978, total project expenditures amounted to approximately $257 million of which approximately $64 million was on construction.

accomplished, thereby giving the Intervenors the benefit of the doubts inevitably involved in any such prediction.

Even if a commitment could be inferred, such a commitment would have been discharged on October 7, 1977 when this Board issued ALAB-435, disposing of the appeal. In ALAB-415 the Board stated it was concerned about the amount of work that would be done "while the appeal is before us" and whether that work could "significantly affect our ultimate decison on the appeal." ALAB 415, supra, at 1436, 1437. The newspaper article referred to in the motion states that the construction was begun on November 7, a month after Intervenors' appeal had been rejected by the Appeal Board.

The Derrickson affidavit details the high costs of delay in completing a major project like St. Lucie Unit No. 2. Some of those costs are referred to below. Efforts to complete the job ahead of the 65 month construction schedule, through the use of innovative construction techniques such as were utilized for the containment building, are therefore wholly appropriate and commendable.

Intervenors' suggestion that FPL misled the "ASLB, ALAB and the U.S. Court of Appeals, District of Columbia . . ." through the use of a "sworn affidavit" (p. 6) and the charge of lack of "clean hands" are therefore undeserved insults to the integrity of FPL and its counsel. The accusations are without warrant; they may not be relied upon as a basis for the relief requested.

Nor are the ordinarily governing standards for a stay[11] met by the motion. So far as the merits of the alternative site and class 9 issues are concerned, this Board has already decided them in ALAB-335 and ALAB-435. And we have demonstrated in our opposition to the New Contention Motion that the Intervenors have raised no safety issue whatsoever concerning off-site and on-site power appropriate at the construction permit stage. Consequently, the Intervenors have made no showing of likelihood of prevailing on the merits.

Intervenors make no claim of injury to themselves personally, as opposed to their status as members of the public, if a stay is denied. By contrast the injury to others would be extremely serious. The Derrickson affidavit states that if construction is interrupted 1248 of the 1413 workers on the site "would have to be laid off immediately", and further layoffs would occur depending upon the length of the interruption of construction. Such an interruption would also have a severe economic impact on FPL and its customers. Mr. Derrickson states that FPL estimates that for each day of delay there will accrue additional carrying charges at the end of the project approximating $45,000 and, based on recent estimates of cost

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11/ See Virginia Petroleum Jobbers Assn'n v. Federal Power Commission, 259 F. 2d 925 (D.C. Cir. 1958); 10 CFR §2.788(3), ALAB 415, supra. concerning stays while appeals are being taken.

of oil generated power, additional fuel charges of $372,000 per day will be incurred. Mr. Derrickson further states that it is conservative to assume that "each day's delay in construction will result in at least a day's delay in completion." Storage and site maintenance costs are estimated at $516,000 per month and escalation of material, labor and services at approximately $1.9 million per month. Regardless of the duration of the stay any stay would require orderly demobilization including the securing and storing of machinery and components. Mr. Derrickson estimates these costs, together with the costs of demobilization at some later date, to approximate $9.2 million. All of the foregoing establish that the public interest will suffer serious injury if a stay should be granted.

Only two opposing public interest arguments are suggested in the motion. The first is that failures in the grid system might present safety questions which could be resolved only by "interties with other interstate electric systems" (pp. 8-9). Intervenors in no way indicate why this is so. In any event, as pointed out above, the Intervenors have pointed to no safety issue concerning grid stability pertinent to the "assurance of safety requisite in the construction permit stage."

The second argument is that continued construction may have an impact on the cost-benefit balance as against other alternatives (pp. 6-7). However, even assuming that the New Contention Motion properly raises an issue concerning the reliability of the off-site power grid, that would be a safety

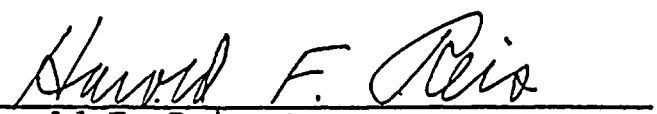
issue not a NEPA issue, and no cost-benefit analysis would be involved. Continued construction at the Hutchinson Island site would not constitute irreparable harm because it would not affect the resolution of such a safety issue.

IV

Conclusion

For the foregoing reasons the "Motion For A New Contention" and "Motion For Stay" are wholly lacking in merit. They should be denied.

Respectfully submitted,



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Miami, Florida 33131

Telephone: (305) 577-2863

Dated: August 23, 1978

Attachment

STATE OF FLORIDA)
)
) ss.
)
COUNTY OF DADE)

AFFIDAVIT OF W.B. DERRICKSON

I am W.B. Derrickson, Project General Manager for the St. Lucie nuclear plant project for Florida Power & Light Company (FPL). My responsibilities associated with the St. Lucie No. 2 project are to develop a schedule and budget for completing the project and placing the unit into commercial operation, and to manage all aspects of the project including planning, scheduling and budgeting, engineering and design, material procurement, construction and labor, licensing and permitting, and startup requisite to the meeting of that schedule.

The St. Lucie Unit No. 2 project is an extremely large one. The presently projected cost of the project is $850 million. It involves employment of a substantial number of skilled and unskilled individuals on and offsite. It involves careful coordination and scheduling of complex manufacturing, design, and construction activities. Interruption of a project of this magnitude will inevitably have significant impacts.

Among them, it will have a severe economic impact on FPL and its employees and customers. Any interruption will also jeopardize FPL's ability to provide its customers with a reliable system of electric power generation.

There are large financial costs attributable to an interruption in construction, some of which are quantifiable. One category of costs will be incurred regardless of the duration of an interruption. Any stay of construction will require that the work force of over 1410 persons be brought to an orderly demobilization. Structures under construction must be secured and machinery and components must be stored. The costs associated with these activities, plus the costs of remobilization of the work force and preparation for resumed construction, total approximately $9.2 million.

Another category of costs will be directly related to the length of the stay. Escalation of materials, labor and services during the period of interruption is presently estimated at $1.9 million per month. Storage and site maintenance costs are estimated at $516,000 per month.

FPL previously experienced an interruption of construction when it was operating under a limited work authorization granted by the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission. That interruption lasted seven months. FPL now estimates that it resulted in an additional cost to the plant of approximately $33 million, which consisted generally of the costs described above plus carrying charges (allowance for funds used during construction).

There are presently 1413 workers on the site. If construction is interrupted, 1248 of these workers would have to be laid-off immediately. More lay-offs would occur depending upon the length of the interruption of construction.

St. Lucie Unit No. 2 is presently scheduled for commercial operation in 1983. Under FPL's load forecasts, St. Lucie Unit No. 2 is needed by that date or before then to insure an adequate reserve margin for system reliability.

It is impossible to predict precisely how long an interruption in construction would actually operate to delay the completion date for St. Lucie Unit No. 2. Presently, FPL has a 65-month construction schedule for the plant beginning at the point that construction resumed in June, 1977 until fuel load. The industry experience has run as high as 94 months for approximately the same amount of remaining construction. Under favorable conditions, a period of 72 months from a point in construction substantially similar to St. Lucie Unit No. 2 until fuel load is a generally accepted best estimate of future construction schedules within the industry.

In an effort to reduce costs, FPL is endeavoring to effect a reduction in the 65 month construction schedule. In keeping with that commitment we have used innovative construction techniques, such as slipforming of the containment building, that reduce both time and construction costs. As of the end of November, 1977, approximately seven months after receipt of the construction permit and immediately after erection of the containment building through the slipforming method, physical

construction was 3.5 percent complete and approximately $36 million had been expended on such construction, or 4.2% of the total estimated project costs of $850 million. At that time total project expenditures were approximately $165.7 million.

As of the end of July, 1978, we show an improvement on the 65 month schedule of a few weeks with physical construction 12.7% complete. The total project expenditures at that time amounted to $257 million. Expenditures for construction represented approximately $64 million.

The status of some spcific construction activities at the site as of the end of July, 1978, was as follows:

Area	% Complete
Reactor Containment Building	18.2
Reactor Auxiliary Building	8.6
Turbine Generator Building	11.2
Outlying Facilities	10.6

It is realistic to assume that each day's delay in construction will result in at least a day's delay in completion. This may be a conservative estimate, however. Key segments of the work force are engaged in specialized crafts and are not locally available. Interruption of construction may result in the relocation of some of these workers on other projects. Upon the resumption of construction, it may be difficult to replace or rehire these skilled workers when they are needed.

Any delay in meeting the present completion date will be accompanied by large costs. FPL now estimates that it will incur additional carrying charges at the end of the project of approximately $45,000 per day of delay. Based on our most recent estimates for the costs of oil generated power to replace that of St. Lucie Unit No. 2, estimated additional fuel charges of $372,000 per day will be incurred, which ultimately would be borne by rate payers. This estimate is based on the assumption that the price of oil will increase at an annual rate of 6%. FPL has no coal fired generating capacity.

St. Lucie Unit No. 2 will also save an estimated 9.1 million barrels of oil per year of operation. This savings will reduce the public's dependency on foreign oil, and will begin as soon as the plant becomes operable.

W.B. Derrickson
Project General Manager

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

Subscribed and sworn to before me this 16th day of August, 1978.

NOTARY PUBLIC STATE OF FLORIDA at LARGE
MY COMMISSION EXPIRES MARCH 27, 1980
BONDED THRU MAYNARD BONDING AGY

My Commission expires:

Betty Brittain
NOTARY PUBLIC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No.. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the (1) "Opposition Of Florida Power & Light Company To 'Motion For A New Contention' and 'Motion for Stay'" dated today, (2) the attached Affidavit of W. B. Derrickson, dated August 16, 1978 and (3) a letter, also dated today, addressed to the members of the Nuclear Regulatory Commission and of the St. Lucie Unit 2 Atomic Safety and Licensing Appeal Board and Atomic Safety and Licensing Board have been served this 23rd day of August, 1978, on the persons shown on the attached service list by deposit in the United States mail, properly stamped and addressed.

Harold F. Reis

Harold F. Reis
Lowenstein, Newman, Reis & Axelrad
1025 Connecticut Avenue, NW
Washington, DC 20036

Dated: August 23, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

NRC STAFF MEMORANDUM ON APPLICABILITY AND EFFECT OF PERKINS PARTIAL INITIAL DECISION

This is one of 17 proceedings pending before an Atomic Safety and Licensing Appeal Board on the issue of radon-222 emissions and associated health effects from the uranium fuel cycle. Pursuant to ALAB-480[1/] the parties to these proceedings were afforded the opportunity to file two pleadings, one addressed to the adequacy of the Perkins record on the radon issue and the second addressed to the applicability and effect of the Perkins Partial Initial Decision ("PID")[2/] in this proceeding. The Appeal Board determined that Perkins was to be used as the "lead case," but parties to the other 17 proceedings could request the presiding Appeal Board to: (a) receive additional written evidence on the radon question, (b) call for a further hearing on the Perkins record, or (c) consider objections to any aspect of the Perkins radon proceeding. The Applicant in this proceeding filed a response stating that it had no objection to the Perkins record and

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1/ Slip op., May 30, 1978, at 18-20.

2/ Duke Power Co. (Perkins), Partial Initial Decision--Environmental Consequences of the Uranium Fuel Cycle, July 14, 1978.

did not believe additional testimony need be received nor a further hearing held.[3/] No other party filed a response. The Staff is therefore filing its memorandum regarding the applicability and effect of the Perkins PID in this proceeding.

The first question posed by the Appeal Board is whether the Perkins evidentiary record supports the generic findings and conclusions of the Licensing Board respecting the amount of radon emissions in the mining and milling process and the resultant health effects. The Staff believes that the Perkins record is adequate to support these findings. All sides to the issue were effectively represented and the Licensing Board (including Dr. Jordan, who had earlier raised the radon issue) took an active role in developing the record. We also submit that these findings are equally as applicable to the effects of the fuel cycle supporting St. Lucie 2 as that supporting Perkins. On this basis, we propose that this Appeal Board adopt the findings of the Perkins Licensing Board on the amount of radon emissions and the resultant health effects. The Perkins PID does have certain passages (for example, the background discussion in paragraph (1)) which are specific to the Perkins record. In all material respects, however, the Perkins PID is applicable to this proceeding. Appropriate background information regarding the significance of the environmental impacts of the uranium fuel cycle in this proceeding is found in paragraphs 115 through 124

3/ Applicant's Memorandum filed August 7, 1978.

of the Initial Decision, LBP 77-27, 5 NRC 1038 (April 19, 1977), affirmed except for matters not here relevant by ALAB 435, 6 NRC 541 (October 7, 1977).

The Appeal Board's second question is whether the radon esmissions and resultant health effects as established in the Perkins record are such as to tip the NEPA balance against construction of St. Lucie, Unit 2. The Perkins record demonstrates that the increase in natural background radiation associated with the mining and milling of an annual fuel requirement ("AFR")[4/] is so small, particularly in view of fluctuations in natural background radiation, as to be completely undetectable. PID, paragraph 51. Based upon its review of the evidence adduced, the Perkins Board concluded that there would be only a very minimal resulting impact on health effects. PID, para. 49. There was ample basis for the Licensing Board's conclusion, therefore, that the impact of the incremental radon is not significant. PID, para. 51. This very small incremental impact could not tip the cost/benefit balance against construction and operation of the St. Lucie 2 facility unless the record indicated that the costs and benefits were virtually in equipoise. The Licensing Board in this proceeding has previously found, however, that the benefits of construction and operation of St. Lucie Unit 2 clearly outweigh the environmental and economic costs

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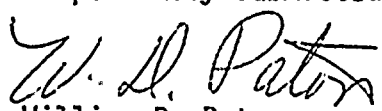
4/ An AFR is defined as the uranium required to fuel a 1000 MWe plant operating at 80% capacity for one year.

which will necessarily be incurred. Initial Decision (LBP 77-27) para. 132. The cost/benefit balance in this proceeding is not, therefore, tipped.

For the reasons set forth above, we respectfully request the Appeal Board to adopt the findings in the Perkins PID on radon emissions and resultant health effects. Based upon a consideration of the level of incremental impacts involved and the cost-benefit balance in this case, we further request the Appeal Board to find that the balance is not tipped against construction of this plant.

Respectfully submitted,



William D. Paton
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 14th day of August, 1978.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MEMORANDUM ON APPLICABILITY AND EFFECT OF PERKINS PARTIAL INITIAL DECISION", dated August 14, 1978 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 14th day of August, 1978.

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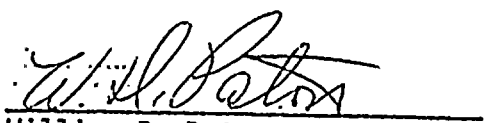
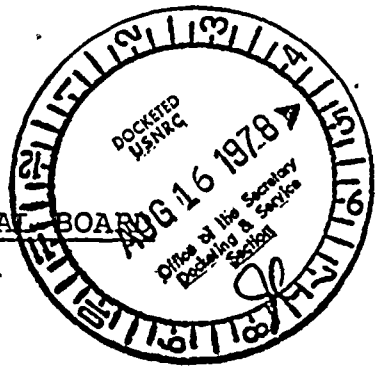


William D. Paton
Counsel for NRC Staff



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

8/11/78

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

MOTION FOR A NEW CONTENTION

In compliance with the substantial good cause requirements of the Commission's Rules of Practice at 10 CFR 2.503, Intervenors motion that the U.S. Nuclear Regulatory Commission Atomic Safety Licensing and Appeal Board (ALAB) issue a Notice of Hearing in the captioned proceedings within thirty (30) days on a new contention to be known as:

> "Whether the Florida Power and Light Company (FPL) offsite power grid serving St. Lucie Unit 2 is sufficiently reliable to meet NRC criteria and whether the NRC should require greater FPL system interties with electrical systems outside the State of Florida to assure sufficient system reliability."

The Commission's substantial good cause requirements allowing a new hearing on the FPL - St. Lucie grid stability question have been met, since the Intervenors would show:

> (1) That the Regulatory Staff, in 1974, Construction Permit hearings, withheld from the licensing board and the St. Lucie Intervenors, the knowledge that the grid instability problems in the FPL system probably affected the St. Lucie plants thereby denying to the Intervenors knowledge and information needed to effectively litigate the grid stability question and depriving the licensing board of the opportunity to hear that issue as it was required be done under NEPA. (See Aug. 14, 1974)

memorandum of Olin D. Parr, Chief, Light Water Reactors to A. Giambusso, Page 1, lines 1-7, Reproduced in OIA Report to The Commission June, 1978.

(2) That a Staff memorandum dated August 14, 1974 (Parr Memo supra.), indicated that by restricting the scope of the FPL grid instability investigation to the Turkey Point area, the then AEC, the federal regulatory agency charged with the protection of the health and welfare of the public may have placed accommodation of the utility above their public trust and prime responsibility as a regulator of industry. (See Parr Memo supra.) Also see Robert Pollard letters to the Commission of October 13, 1978 and March 16, 1978 OIA Report "A".

(3) That the Staff's investigation of grid stability problems subsequent to the October 13, 1977 letter of Mr. Robert Pollard (supra) of the Union of Concerned Scientists to the Commission and the U.S. Department of Justice, although not of sufficient depth or scope, in the view of Intervenors, clearly indicate that:

(a) "The geographical aspects of the Florida grid system provide an inherent vulnerability and modifications and improvements in (experience are not expected to upgrade the Florida grid system to the point where the inherent vulnerabilities of a peninsular system can be fully over come."
-Affidavit of R. Fitzpatrick, June 12, 1978, filed with ALAB June 12, 1978 by W.D. Paton, Esq. OELD-

(b) Onsite emergency power sources, (diesel generators) of the St. Lucie Units are characterized by unavailability of the Unit 1 onsite systems that "has been greater than that considered acceptable by current Staff guidelines."
-Fitzpatrick Affidavit, supra. P. 6-

(c) Although the utility, FPL, asserts the FPL grid is operated according to certain requirements unique to peninsular systems, to assure reliable operation, the NRC Staff reviewer Fitzpatrick states, "It is not clear to the Staff based upon the FP & L operating history that this is always the case." -Fitzpatrick Affidavit, P. 8, supra.-

(4) The Applicant utility's responses to the Appeal Board Questions ALAB Order of March 10, 1978, are according to Mr. Fitzpatrick of the Staff, non-responsive and incomplete (See Robert Fitzpatrick Affidavit of June 12, 1978) (Also see further informational request from NRC to FPL of June 7, 1978 from Robert W. Reid, Chief Operating Reactors Branch(4) to FPL and Dr. Uhrig.)

The Intervenors have not responded, until now, to the ALAB Order of March 10, 1978, which set a date of April 3, 1978, for the Applicant's response and twenty-one (21) days thereafter for the parties, because they have been both, denied and delayed access to information that would have helped them respond intelligently. Meetings between the Applicant and Staff with their counsel present have been held (For example: April 24, 1978 and June 5, 1978, neither of which were noticed to Intervenors) on the grid problems but no invitation or even notice was given to Intervenors counsel. Intervenors protest this conduct as being unfair! Notice should have been given to attend to counsel for Intervenors.

The NRC Staff sought and obtained a delay for their responses (See NRC Motions to Extend Time to Respond to Applicant's

Submitted of April 3, 1978, granted April 21, 1978). Since these delays existed, Intervenors did not believe the deadline established in the March 10, 1978 Order still applied. Furthermore, for the past four (4) years it appears the Intervenors have not been given full information on the grid stability problem in the FPL System by the Staff. Nor have the Intervenors had the opportunity to obtain discovery on this issue from the Applicant and Staff since it surfaced after Mr. Pollard's letter of October 13, 1978. Since the most significant Commission responses to ALAB's March 10, 1978 Order were only published in mid-June, 1978, (See Affidavit of Robert Fitzpatrick, June 12, 1978 and Report to the Commission - Inquiry into an Allegation of Employee Misconduct by Restricting the Investigation to Determine the Reliability of the Power Grid serving St. Lucie, June, 1978), at a time when counsel for Intervenors was then committed to drafting a reply brief on the Appeal of the Alternate Sites and Class 9 Accidents issues in the instant case before the District of Columbia Court of Appeals, (Consolidated cases Nos. 76-1709 and 78-1149) it was not possible until recently due to conflicts for Intervenors counsel to review the new Staff and OIA data and draft these Motions, it was certainly necessary to wait until recently to respond to

this Board since the only data source on the FPL grid presently available to the St. Lucie Intervenors are those efforts by the NRC Staff reviewers such as Mr. Fitzpatrick. It is Intervenors intention to seek discovery from the Applicant on the grid issue when this Appeal Board grants their Motion for a New Contention on the grid stability issue. It is further motioned here and now that counsel for Intervenors be noticed and allowed to attend any future meeting between the Applicant and Staff on the grid stability issue where other legal counsel are present or invited.

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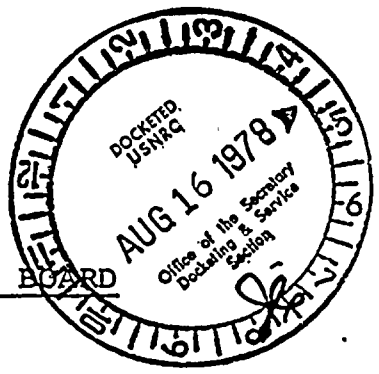

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

MOTION FOR STAY

Pursuant of the requirements of the Commission's Rules of Practice at 10 CFR 2.764, and in conjunction with their Motion for a New Intervenors Motion that there be issued by the Appeal Board a Stay of effectiveness of the initial Decision of April 19, 1977 and the Construction Permit of the St. Lucie Nuclear Reactor Unit No. 2, thereby suspending construction work activity at the Hutchinson Island site until the serious issues of offsite power and onsite power availability are resolved by hearings before the Commission all as sought by Intervenors in their Motion for a New Contention co-filed herein.

Intervenors previously sought and were denied a Stay of Construction from this Appeal Board (See ALAB 415, June 28, 1977) on the issues of alternate sites and Class 9 Accidents, which are presently on Appeal to the United States Court of Appeals for the District of Columbia. (Consolidated cases Nos. 76-1709 and 78-1149). This Appeal Board has correctly characterized Intervenors basis for requesting Stay stating:

"At oral argument Intervenors acknowledged with commendable candor that the amount of work the Applicant seeks to do in the next few months would have an insignificant (environmental) effect. (App. TR. 8). Rather, their claim of irreparable injury was bottomed entirely on the possibility that construction undertaken by the Applicant while the Appeal is before us would prove sufficient of itself to tilt the environmental cost/benefit balance in favor of allowing the plant to be completed* Ibid 4) *Emphasis supplied.
-ALAB 415, June 28, 1977-

This Appeal Board observed further in denying Intervenors Motion for Stay:

"But our review of the record and our understanding of the amount of work* likely to be completed in the next few months satisfies us that in no event could that work significantly affect our ultimate decision on the Appeal."
-ALAB 415, supra. *Emphasis supplied.

The record relied upon by this Appeal Board in denying Intervenors Motion included representations of Project Managers for the Applicant Utility in the form of sworn Affidavits and representations of the Applicant's counsel and an earlier licensing board decision. The Atomic Safety and Licensing Board first ruled on Intervenors Motion for Stay in an Order dated June 1, 1977. In denying the Motion the Board wrote:

"The Affidavit of Applicant's Project General Manager, appended to Applicant's Response in opposition to the Motion indicates the following:

During the first six months the work to be initially undertaken will consist of

> that described in the LWA. Essentially, this will be excavation and civil work in a portion of the site which is cleared and which already has subsurface preparation work completed in conjunction with the construction of St. Lucie Unit No. 1."
> -ASLB Order Page 2-

The pleading referred to in the ALSB Order can only be the Affidavit 1/ dated April 29, 1977 of W.B. Derrickson, FPL Project General Manager, for the St. Lucie Nuclear Plants, wherein Derrickson affirmed that as of April 26, 1977, less than one (1%) percent of the work at St. Lucie was completed (See Derrickson Affidavit P. 2, lines 19-20) and that over the next six months, if permitted, the scope of work activity at the St. Lucie site would encompass only that spectrum of work that originally constituted LWA activities: 2/

> "Therefore, if the construction permit should be issued on May 2, 1977, and FPL remains free to start work and begin hiring, that level of activity could be reached by mid-June, 1977.
>
> The immediate construction activity will be as follows:
>
> 1. Removal of materials from storage and ordering of materials for construction.
> 2. Relocation of equipment and obtaining equipment necessary for site development.
>
> During the first six months, the work to be initially undertaken will consist of that

1/ An earlier Affidavit of R. A. DeLorenzo, former Project General Manager at the St. Lucie plant filed in U.S. Court of Appeals, District of Columbia, Case #76-1706, defined LWA activities as comprising "approximately 7% of the total work to construct St. Lucie Unit No. 2" (See Affidavit R. A. DeLorenzo, August 20, 1976, Page 4, lines 9-10, filed with Intervenors (FPL) "Opposition to Motion for Summary Reversal and Injunctive Relief" in the U.S. Court of Appeals for the District of Columbia, Case #76-1709, August 23, 1976.

2/ See Affidavit of R. A. DeLorenzo footnote supra for definition of LWA activity.

> described in the LWA. Essentially, this will be excavation and civil work in a portion of the site which already is cleared and which already has subsurface preparation work completed in conjunction with the construction of St. Lucie Unit No. 1.
> -W. B. Derrickson, P. 3, lines 2-17, April 29, 1977, co-filed with the U.S. Court of Appeals, District of Columbia, Case #76-1709, with Intervenors (FPL) Response in Opposition to Motion for Court to Enforce Order, dated May 6, 1977-

This Affidavit manifestly indicates that the construction effort that the company would be conducting during the next six (6) months period which coincided with the projected pendency of the Intervenors pursuit of an Administrative Appeal before the Appeal Board and Commission, would only be those construction activities limited to below grade and constituting only seven (7%) percent of the entire construction project.

On June 8, 1977, in Bethesda, Maryland, this Appeal Board heard oral argument on Intervenors Motion for Stay. In the course of those arguments the Honorable Michael C. Farrar and the Honorable Richard S. Salzman queried counsel for the Applicant as to what would be spent on the St. Lucie project in the next six (6) months in the event they failed to grant the Motion for Stay:

> "Mr. Salzman: One traditional ground for stay as far back as I can remember the cases is to moot the decision.
> I would like to know what will be spent in the next six months.
> Mr. Reis: The LWA will be completed in the next six months and that is about seven percent.

Mr. Salzman: Seven percent of the total cost?

Mr. Reis: Seven percent of the forward costs. Less than one percent has been expended up to now. I would like to reserve an opportunity to send the board and all of the parties any correction, if that is wrong. The Derrickson Affidavit says, "finishing the LWA" and that was filed with the licensing board and is on record here."

-Oral Argument before the Atomic Safety and Licensing Appeal Panel, June 8, 1975, Bethesda, Maryland, p. 75-76, lines 21-9.

And yet, six months later to the day, on December 7, 1977, it was announced on the front page of the newspaper known as the "Miami Review and Daily Record" that Florida Power and Light Company by utilization of a program of innovative construction techniques had completed the containment building, accomplishing in only 16 days a construction effort that normally would have taken 14 months to complete.

"NEW STATE-OF-THE-ART construction techniques saved Florida Power & Light Company over $500,000 in erecting the 192-ft. high containment building for the second nuclear unit on Hutchinson Island. Using a "slipforming" method of concrete placement, the Houston based H.A. Lott, Inc. was able to pour 9,200 cu. yards of concrete and install more than 3,000,000 lbs. of reinforced steel bars to construct the building in 16 days. The construction technique employes movable platforms and sliding retainer braces for the three-ft. thick walls to rise with the building as the concrete is continually poured. The round-the-clock operation, requiring 390 craftsmen, started on November 7 and ended on November 23. By using a conventional method, the containment building would have taken 14 months to complete. St. Lucie No. 2 designed to have an electrical output of 802,000 kilowatts, is scheduled for operation in mid-1983."

-Miami Review and Daily Record Wednesday, December 7, 1977.

We can see that, instead of limiting their construction activities to seven (7%) percent, of the total below grade activity during the six month period described in the sworn Affidavit of their project manager and relied upon by the ASLB, ALAB and the U.S. Court of Appeals, District of Columbia, the utility has acheived about 50% completion of their project by completed erection of the containment building in the same six (6) month period. This is a manifestation of one of the objectionable aspects of incremental rulemaking. Counsel for Intervenors did not learn of this change in the construction schedule until long after the containment building was erected and being a fait acompli, it was too late to seek any judicial remedy that would effectively have prevented or undone this substantial expenditure of resources on a site the Intervenors contend is unsuitable for a nuclear power reactor.

This Appeal Board denial of a Motion for Stay was based in no small measure upon the Board's perception based upon representations to them by the Applicant that the scope of the project over the coming six month period would not exceed the LWA activity comprising seven (7%) percent of the total project. This continued work effort constitutes the irreparable harm to the Intervenors in this case. The cost/benefit analysis may have been shifted already in favor of the Applicants St. Lucie site on Hutchinson Island. But, if

so, it was done in conjunction with a construction schedule acceleration with no notice to the Intervenors of a change in the company plan. Intervenors are well aware of the standards established in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F. 2d 921, 925, (D.C. Cir. 1958) incorporated now into the Commissioners Rules of Practice at 10 CFR 2.788(e). Without re-asserting their argument filed in U.S. Court of Appeals, Cases Nos. 76-1709 and 78-1149, they expect to prevail in the Federal Courts on the Class 9 and alternative sites issue which arguments they incorporate by reference herein. Additionally, Intervenors point out to this Appeal Board that a serious safety issue consisting of a combination of inadequacy of both offsite and onsite power supplies in the FPL system has been identified by the NRC Staff's own reviewer, Robert Fitzpatrick, (Affidavit June 12, 1978) that is, in and of itself, of sufficient concern to cause this Appeal Board once again to reflect on the propriety allowing construction to proceed at the St. Lucie 2 site on Hutchinson Island as proposed.

The second condition of Virginia Petroleum Jobbers supra that the Intervenors will be irreparably injured if construction is allowed to continue is only modified by the fact that they may already have suffered irreparable damage given

the nature and extent of the FPL construction and the permitting by the Commission of the practice Intervenors warned about at Tr at oral argument in Bethesda, Maryland on June 8, 1977 and have described as "incremental rulemaking".

It is conceded by Intervenors in assessing a question of the greatest good that granting of a new Stay would conceivably harm parties such as construction workers on site at St. Lucie. The merit of the utility company's position is best left to the Appeal Board for determination in application by this Board of the equitable doctrine of "clean hands" when the utility have accelerated a construction project at their own risks after representing to the Commission and the parties they would conduct only LWA activities.

The public interest is of paramount concern and should be the ultimate governing factor in the instant case. Clearly, electrical offsite power interruptions of potential severe impact continue to occur in the FPL system, the most recent occurring on May 14, 1978. Such significant safety questions concerning the reliability of the "peninsular" FPL grid which Intervenors have previously described as an "intrastate fiefdom of an electric system" should be resolved by this Appeal Bond and the Commission in the interest of the public before further construction on Hutchinson Island is permitted. If it comes to

pass that as a condition precedent to licensing St. Lucie 2 for operation, a NRC determination of the question of interties with other interstate electric systems to achieve greater reliability for the Florida grid is necessarily required by the Commission, then withholding of a CP or OL pending resolution of that issue is neither imprudent or inequitable and would clearly be in the best public interest given the fact that an ECCS systems safe functions where stored heat must be removed in the first twenty (20) second of a blowdown, places heavy reliance on the availability of both offsite and onsite power. Intervenors further motion that this Appeal Board hear oral argument on their Motion for Stay, if in the Board's discretion such argument is warranted.

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CERTIFICATE OF SERVICE

I hereby certify that copies of a Motion for a New Contention and Motion for Stay have been served, by mail this 11th. day of August, 1978, on the following:

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Nuclear Regulatory Commission
Washington, D. C. 20555

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Chairman
Atomic Safety & Licensing
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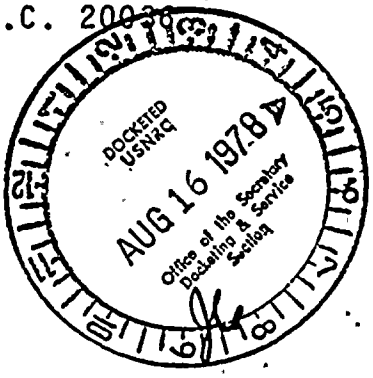

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miami review
and Daily Record
A NEWSPAPER OF GENERAL CIRCULATION DEVOTED TO THE COURTS, REAL ESTATE, FINANCE AND GENERAL BUSINESS
52nd Year — No. 124 Wednesday, December 7, 1977 Sections A, B Phone 377-2721

'Private' renewal program planned for Northwest Dade

By MAURICE LABELLE
Editor

A huge urban redevelopment proposal has gotten underway in a vast area of unincorporated northwest Dade County with little fanfare, but its backers promise it could upgrade many similar areas.

The area, west of Little River, is bounded by 79th and 186th Streets and between Seventh and 36th Avenues.

What distinguishes this program is that it incorporates a minimum of governmental participation, relying principally on private capital and the resources of the property owners involved.

The novel new plan, patterned after a similar one developed in the Pittsburgh area, was outlined by Robert V. Walker, president of First Federal Savings and Loan Association to the Rotary Club of Miami.

Officially labelled the "Neighborhood Housing Services Program," the program seeks to cure neighborhood deterioration rather than look for villains to blame, Walker told the Rotarians.

A national tragedy, he said, is that none of the previous programs for urban renewal have worked very well. As a result, federal funds have virtually dried up and work stopped.

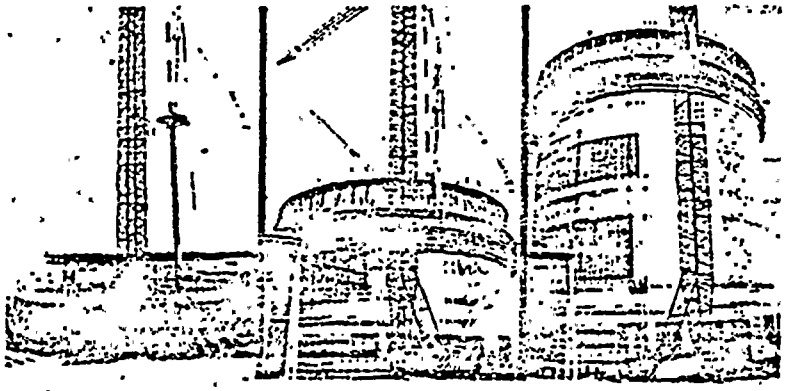
The Dade County program, which is in the process of forming, will have no federal funds and will be free of bureaucratic red tape, Walker said.

It is based on the premise that most people want decent homes, but are afraid to sink money into deteriorating neighborhoods.

While the program involves mostly single-family homes, all other

Turn to Page 2-A

"I became satisfied long ago there are no villains in this piece" — Robert V. Walker.



NOVEMBER 8, 1977 NOVEMBER 16, 1977 NOVEMBER 22, 1977

NEW STATE-OF-THE-ART construction techniques saved Florida Power & Light Co. over $500,000 in erecting the 152-ft. high containment building for the second nuclear unit on Hutchinson Island. Using a "slipforming" method of concrete placement, the Houston based H.A. Lott, Inc. was able to pour 8,290 cu. yards of concrete and install more than 3,000,000 lbs. of reinforced steel bars to construct the building in 16 days. The construction technique employes movable platforms and sliding retainer braces for the three-ft. thick walls to rise with the building as the concrete is continually poured. The round-the-clock operation, requiring 200 craftsmen, started on Nov. 7 and ended on Nov. 23. By using a conventional method, the containment building would have taken 16 months to complete. St. Lucie No. 2, designed to have an electrical output of 802,000 kilowatts, is scheduled for operation in mid-1983.

Area grows as drug entry point

Albert F. Bazemore, United States regional commissioner of customs in Miami, reports that narcotics seizure statistics that show 53.5 per cent of all cocaine seized by the Customs Service nationwide came from the Miami Region.

Bazemore also stated that 67.2 per cent of all marijuana seized within the United States by customs was confiscated within this region.

The Miami Region of Customs encompasses North and South Carolina, Georgia, Florida, Puerto Rico and Virgin Islands. The figures released cover fiscal year 1977, which ended Oct. 1.

The actual amount of narcotics seized in the region during this period totaled 569.2 pounds of

Turn to page 6-A

FOR YOUTH: A Massachusetts bank has come up with what is called the first charge card designed for people between the ages of 18 and 24 who usually have trouble obtaining other credit cards.

Turn to page 3-A

Church-related

Real estate 'empire' crumbling

By CHARLES KIMBALL
Real Estate Editor

Huge holdings of land in the Country Club of Miami have been conveyed to a bank by a firm whose officials have a record of foreclosure litigation on other major holdings.

The latest action involved close to 150 homesites. The lots were acquired in 1973 by Bonnie Brae Builders Inc. Officials of this firm included F. Richard Thoennes.

In addition, a mortgage on the property was signed by Rev. Alfred C. Janney. The purchase of the lots was one of two major deals involving Thoennes and Rev. Janney. The other was a purchase of 170 acres of land in the same general area for $1,430,000.

In this venture Janney's interest was 51 per cent and Thoennes 49 per cent. Mortgage foreclosure proceedings were filed in Circuit Court against Thoennes and Janney.

Later the property was sold for a price of $1,173,000 producing a loss of $257,000. There were also numerous other major real estate deals of record involving Rev. Janney. For example, in 1972 Dade Christian Schools Inc., headed by Rev. Janney, bought the Colonial House Apartments in Miami Springs. The price was $1,090,000.

The apartments were purchased from two real estate investors who are currently under indictment for mortgage frauds.

These investors made a profit of $250,000 on the sale to the church after owning the property less than two months. When Dade Christian later sold the property it sustained a loss of $215,000 on the deal.

About this time Rev. Janney also purchased the luxurious golf course home of Jackie Gleason for $200,000. Later the home was placed in the name of the New Testament Baptist Church. Other entities connected with Rev. Janney and the church held numerous properties at other locations.

Official records reveal losses of at least $100,000 on these parcels when they were sold off after acquisitions. In the case of the Country Club of Miami lots, a few large homes were built and sold in the development.

In the latest series of transactions about half the remaining lots were sold to the First National Bank of Saint Paul. This bank acquired the prior mortgages on the land which were owed to Citizens & Southern Realty Investors, a trust with a heavy portfolio of non-accrual loans.

The consideration on the sale to the bank was $1,326,000, the balance of mortgages allocated. More lots were deeded to the Section Two Venture Corp.,

Turn to Page 2-A

KIMBALL

review of the business day

By DICK DAVIS

Northern Telecom acquisition of Jycor valued at $77 million in stock.

IBM announced new products to protect computer information.

New acquisitions announced by Genuine Parts, Electrolux, TRW.

Commonwealth Oil is still exploring an agreement with Ashland Oil.

Lower earnings reported by ARA Services, Dynell Electronics, Phillips Van Heusen, LA-Z-Boy Chair.

Joseph Schlitz Brewing said it is optimistic about recovering from its recent slump

Halliburton offered to buy Nes Corp. for $13 per share.

McCulloch Oil discovered oil in Oklahoma.

American Fletcher Mortgage delisted by the American Stock Exchange.

R.J. Reynolds said it will report higher revenues for '77 but profit picture is clouded by just ended dockworkers' strike; a flat fourth quarter will still give Reynolds record sales and earnings.

Burlington Northern and Frisco Railway — directors approved merger.

GM is considering a price increase on its Chevette.

Sperlek object of $17.50 per share buyout offer

Perkin Elmer unveiled new software package.

American Quasar Petroleum discovered gas in Oklahoma.

Turn to Page 3-A

IMPORTANT NOTICE COIN MACHINE
ER CLEARI

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

8/7/78

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

MEMORANDUM CONCERNING
RADON EMISSIONS

ALAB-480, dated May 30, 1978, and captioned in this proceeding as well as in a number of other proceedings, provided for the receipt into the record of this proceeding of the "evidentiary record on the radon issue" as developed in the Perkins proceeding,[1/] subject to requests to receive additional written evidence or for further hearings or objections. (Slip Op. pp. 17-20) The Appeal Board also directed that, when rendered, the Licensing Board's decision on the radon question in Perkins be served on the parties to this proceeding, among others, and that they be afforded an opportunity to file a memorandum on

> "(a) whether the Perkins evidentiary record supports the generic findings and conclusions of the Licensing Board respecting the amount of the radon emissions in the mining and milling process and resultant health effects; and (b) whether the radon emissions and resultant health effects are such as to tip the NEPA balance against construction (or operation) of the particular facility in question." (Slip Op. p. 19; footnote omitted)

1/ Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3) Docket No. STN 50-488, 489, 490.

No objection or request for the receipt of additional evidence or for a hearing was filed in this proceeding; and the Partial Initial Decision of the Perkins Licensing Board, dated July 14, 1978, and addressing the radon issue ("Perkins Partial Initial Decision"),was served on the parties to the proceeding by mail on July 24, 1978. This memorandum is, therefore, submitted in response to ALAB-480 and addresses the questions set forth above.

1. The Perkins evidentiary record has been examined, and it is submitted that that record supports the generic findings and conclusions of the Perkins Licensing Board respecting the amount of radon emissions in the mining and milling process and the resultant health effects. That record, however, suggests a number of additional comments.

First, the implementation of the Branch Position on Uranium Tailings Management by the NRC and by Agreement States and the fact that man-made earthen works have survived for thousands of years are persuasive arguments for acceptance of 1 Ci Rn^{222}/(yr AFR) as the rate of radon emission to be expected from stabilized tailings.

Second, the estimate of the amount of radon emitted from the unreclaimed mine pit described by Wilde (Tr 2610) would be about 70 Ci/(yr AFR) after a period of weathering. Considering

the likelihood of mine reclamation or even that part of some mines might fill with water, the radon release may well be less than estimated. Furthermore, since about 2/3 of uranium reserves will require underground mining or in-situ leaching and since those extraction methods will cause practically no radon emission after mining ceases, the value of 100 Ci/(AFR yr) adopted for releases after mining ceases appears to be conservative.

Third, the Board apparently assumed that the dose equivalent to the bronchial epithelium arising from outdoor exposure to naturally existing radon estimated by Dr. Gotchy and by Dr. Hamilton differ by a factor of five or more (Perkins Partial Initial Decision, Slip Op. p. 19, n. 7). However, it seems more appropriate to conclude that Gotchy and Hamilton, relying on separate sources of information, agree within a factor of two. Referencing NCRP-45,[2/] Dr. Gotchy cited an average Rn-222 concentration in air over the United States of 0.15 p Ci/liter and a corresponding dose equivalent rate of 450 mrem/yr to segmented bronchial epithelium (assuming continuous outdoor exposure). Dr. Hamilton, drawing from the 1977 UNSCEAR Report,[3/] estimated the average dose equivalent rate associated with radon

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2/ National Council on Radiation Protection and Measurements, Natural Background Radiation in the United States, NCRP Report No. 45, (1975).

3/ United Nations Scientific Committee on the Effects of Atomic Radiation, Sources and Effects of Ionizing Radiation, 1977 Report, (1977).

exposure outdoors (during 20% of the time) to be 50 mrem/yr. Assuming continuous exposure outdoors, that would equal 250 mrem/yr. If the radon concentrations that are the basis of the separate estimates were similarly interpreted (over continental land in the northern hemisphere) the apparent difference would be even less.

Finally, St. Lucie Unit No. 2 is a 850 MWe plant, smaller than any of the Perkins Units or the reference reactor. It follows that the radon emissions and potentially resultant health effects from the fueling of St. Lucie Unit No. 2 will also be less than for those plants.

2. The Licensing Board in the instant proceeding has reviewed the environmental cost-benefit balance involved, including the fuel cycle aspects thereof, and has concluded that the benefits far outweigh the identifiable environmental costs. 1 NRC 101, 154 (1975), aff'd 3 NRC 830, 840-841 (1976); 5 NRC 1038, 1075 (1977), aff'd 6 NRC 541 (1977). The Perkins decision concludes that "the releases of radon-222 associated with the uranium fuel cycle and health effects that can reasonably be deemed associated therewith . . . are insignificant in striking the cost-benefit balance for the Perkins Nuclear Power Station." Perkins Partial Initial Decision, Slip Op. p. 29.

For the reasons set forth above, it is submitted that the radon emissions and resultant health effects associated with the nuclear fuel cycle are not such as to tip the favorable NEPA cost-benefit balance earlier determined for St. Lucie Nuclear Plant Unit No. 2.

Respectfully submitted,

Harold F. Reis

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1025 Connecticut Ave., NW
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Dated: August 7, 1978

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Memorandum Concerning Radon Emissions" has been served this 7th day of August, 1978, on the persons shown on the attached service list by deposit in the United States mail, properly stamped and addressed.

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Dated: August 7, 1978

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In the Matter of
Florida Power & Light Company
(St. Lucie Nuclear Power Plant, Unit
Docket No. 50-389

Gentlemen:

The purpose of this letter is twofold:
1. To Criticize the document entitled: Report to the Commission: Inquiry into an Allegation of Employee Misconduct by Restricting the Investigation to Determine the Reliability of the Power grid serving St. Lucie of June 1978.

2. To introduce a Motion that the St. Lucie Intervenors be allowed to litigate a new contention stated as: Whether the Florida Power and Light Company (FPL) offsite power grid Serving St. Lucie Unit 2 is sufficiently reliable to meet NRC criteria and whether the NRC should require greater FPL interties with electrical systems outside the State of Florida to assure sufficient systems reliability. Intervenors also seek a stay of construction at the St. Lucie 2 site until such a time as the serious safety issue presented by the alleged offsite power insufficiency is resolved.

In a letter dated October 13, 1977 and in a subsequent letter to the Commission and this Appeal Board, of May 16, 1978, Robert B. Pollard, a nuclear safety engineer with the Union of Concerned Scientists, based in Cambridge, Massachussetts, brought to the attention of the Commission documentary evidence of what appeared to be an attempt to restrict the scope of an AEC investigation on a grid stability problem in the Florida Power and Light Company system; thereby allegedly preventing knowledge of the grid instability from coming to the attention of both the St. Lucie Licensing Board and the St. Lucie Unit 2 Intervenors. (See memorandum of Olin D. Parr August 14, 1974 to A. Giambusso.) Due to the potential seriousness of outcome of the subject under investigation and implications of possible criminal wrong doing,

and having no information on the FPL grid instability, the St. Lucie Intervenors elected to await the outcome of the OIA and NRC investigations before considering further litigation or other recourse in this case.

When the OIA Report of June 1978 was reviewed, it was with surprise and dismay that the St. Lucie 2 Intervenors discovered that the OIA report did not address the contested Unit 2 proceedings where the concealment was alleged to have occured but rather only treated the uncontested St. Lucie Unit 1 proceedings. The Parr Memorandum of August 14, 1974, clearly referred to "the St. Lucie 2 intervenor" in the context of the described Staff effort to restrict the St. Lucie 2 grid stability investigation. Indeed, the St. Lucie 2 proceeding which OIA failed to investigate was the only contested aspect of the St. Lucie case. The St. Lucie 2 counsel (myself) was never interviewed or even contacted by the OIA investigators nor were any of the other Intervenors. Specifically, I object to the inculusion of hearsay representations characterizing the action and position of the St. Lucie 2 Intervenors at 0 28 of the Report. Although the OIA report purports to have conducted a complete investigation, there is mention of St. Lucie 2 proceedings only once at page 16 in apparent careless confusion of Unit 1 and 2 matters.

The entire OIA report addresses only the Unit 1 proceedings, which were uncontested. The report sets the stage at p. 3 by narrowly interpreting Mr. Pollard's complaint as addressing only Unit 1 proceedings:

> "Mr. Pollard infers that had this information been presented to the hearing Board*, they might not have issued an operating license to St. Lucie Unit 1."*Emphasis Supplied P. 2 OIA Report

The use of the plural number in describing "hearing boards" is of special interest since the investigators also tell us:

> "If no petition for leave to intervene is granted no hearing board is established." P. 21 OIA Report

Since no Intervenors appeared timely in Unit 1 proceedings no hearing Board was established for the Operating License (OL) proceedings:

> "Therefore at the OL stage no hearing board was established to consider either environmental issues or radiological, health and safety issues." P. 21 OIA Report supra

However, the OIA Report does describe an environmental review in 1973 and early 1974 relating to the construction permit for St. Lucie Unit 1 where but one hearing Board was established for Unit 1:

> "The Hearing Board Chairman indicated that neither the issue of grid instability nor the loss of offsite power was ever raised before the hearing board during the environmental proceeding relating to the construction permit for Unit 1."
> P. 21-22 OIA Report supra

Once again the OIA investigators channelize the reviewers attention to Unit 1 proceedings alone. But, the revelations on p. 21-22 of the OIA Report have a special significance for two reasons (1) they identify only one hearing Board (the Unit 1 Environmental Review outside the OL forum), yet in drawing their inferences about Mr. Pollard's concerns, at page 2, they had referred to "hearing boards" in the plural.

This reference, if accurate, can only mean the St. Lucie 2 hearing Board headed by John A. Farmakides, Dr. David L. Hetrick, and Dr. Frank F. Hooper. Yet there is no mention of any contact with those ASLB members or the Intervenors regarding the St. Lucie 2 proceedings conducted by the OIA investigators, even though the Parr memorandum clearly referred to "the St. Lucie 2 Intervenor" and a contested* LWA 1 and LWA 2 scheduled to begin on October 15, 1974."

-Parr Memorandum Aug. 14, 1974*Emphasis Supplied

This reference can only pertain to St. Lucie Unit 2.

(2) The second significant point is that the St. Lucie 1 Environmental review erroneously relied upon as being relavent and material to their investigation, by the OIA investigators at the top of page 22 of their OIA Report pre-dated the med-August 1974 Parr memorandum by almost a year and therefore, could not possibly have been either the hearing Board or proceeding that was the subject of Mr. Parr's apparent anxiety and concern.and "desire to restirict the EI & CS investigation to Turkey Point Units 3 and 4." (Olin D. Parr Memo Aug. 14, 1974)

The OIA investigators without noting any contributing attorney member of their staff proceed at page 20 of their report to interpret case law in UCCS v. AEC 499 F. 2d. 1969 in drawing not necessisarily valid legal conclusion that they by their education and experience may not be qualified to perform. In quoting an unidentified ASLB member, the investigators concentrate on Unit 1 and ignore Unit 2 proceedings:

> "Relating the board notification procedures specifically to the St. Lucie plants, an official of the ASLB explained that in the 1974 time period, it was not mandatory for a hearing board to be convened during the OL stage to consider either environmental or radiological health or safety issues."
>
> -P. 20 OIA Report

At page 16 of the OIA Report "the St. Lucie 2 limited work authorization (LWA) hearings" are mentioned coupled with unit 1. There is no further treatment of the St. Lucie 2 hearings or the reviewers attention is again channelized to Unit 1 uncontested proceedings. The page 16 St. Lucie 2 reference is at best confusing. The Licensing Board and the St. Lucie 2 Intervenors were the entities most subject to dprivation and loss due to the alleged commission of concealment of knowledge of grid instability in the FPL system.

Mr. Parr is quoted at p. 29 of the OIA Report:

> "Parr stated that if the issue of offsite power were raised at the St. Lucie 2 LWR(sic) hearings, that board would very well have had questions*."
>
> -Olin D. Parr p. 28 OIA Report. April 20, 1978 *Emphasis Supplied

This information reveals a serious flaw in the St. Lucie 2 construction heretofore concealed from the general public and the licensing Board--a flaw with such serious safety implications when one considers the performance failures of the FPL emergency generators that it can only be remedied by new action by the commission.

"As a result of this review, we have found that the unavailability of the Unit 1 onsite systems has been greater than that considered acceptable by current staff guidelines."
-Affidavit of Robert G. Fitzpatrick dated June 12, 1978 filed with NRC Staff Response to Applicant's Submittal of April 3, 1978.

The Fitzpatrick affidavit shows that not only are the FPL onsite systems deficient in performance but that there remain "inherent vulnerabilities" in the FPL system that of a St. Lucie 2 unit will not overcome. (Fitzpatrick affidavit supra P. 6, lines 2-6)

On February 28, 1974 the Commission sent to the Intervenors copies of a document entitled:

"Applicant: Florida Power and Light Company

Facilities: St. Lucie Plant Unit No. 1 (OL) and Unit No. 2 (CP)

Summary of Meetings with the Applicant on January 29, 30, 31 and February 1, 1974."

Although this document treated such areas of concern as electrical systems, diesel generators, and cables and connectors, there was no mention of the Staff concerns about possible inadequacies of off site and on site power in the FPL system as mentioned in the Parr Memorandum of Aug. 14, 1974. Nor did the Staff ever advise the St. Lucie Intervenors of these inadequacies until Mr. Pollard brought the matter to light in his letter of October 13, 1977.

Therefore, the Licensing Board in retrospect was denied an opportunity to hear a serious safety issue, and Intervenors were apparently deprived of their right to litigate a serious safety issue concerning the St. Lucie 2 reactor that could have a potential catastrophic effect on the millions of people residing on the Florida "Gold Coast".

An investigative effort so lacking in quality and depth cannot go unchallenged. If I, as counsel pro se for the St. Lucie 2 Intervenors, failed to criticize this report, I myself would be derelict in my responsibility to myself and my clients.

The failure of the OIA to address or properly include, in their investigation, the St. Lucie 2 proceeding, the only one contested, or any principals representing or potentially representing a point of view at variance with the Staff or Utility and their continuing failure to do so compells the logical conclusion that, this far, the mandate of the Commission to investigate this matter has not been carried out, to put it in the vernacular-NOBODY ASKED THE INTERVENORS.

Nobody even asked FPL's Dr. Uhrig allegedly conversant with the AEC Staff over concern the investigation might touch St. Lucie 2 contested proceedings.

Meanwhile potentially serious failures of offsite power continue to occur at the St. Lucie site on Hutchinson Island, the most recent occurring on May 14, 1978.

Since so much time has elapsed with so little fruitful result and since the utility has accelerated their work schedule (See Motion for Stay) the St. Lucie 2 Intervenors are filing, herein, a Motion for a New Contention and Motion for Stay before both the Commission and Appeal Board, since there is some confusion over which is the proper forum to bring such motions.

It is the position of the St. Lucie Intervenors that the matter is properly before the Appeal Board and it is to that Body that the accompanying motions are primarily directed.

This conduct of the Commission in its investigation of itself--i.e. its failure to ask the St. Lucie Intervenors for their views or failure to even give those Intervenors any formal opportunity to express a view which might be at a variance with the official Commission line appears to be probative of the thesis of Mr. Pollard that "it appears the agency acted to suppress information concerning safety hazards at nuclear power plants".

The question begs: why did OIA so restrict the scope of the St. Lucie investigation to Unit 1? Is this a further manifestation of the "pattern of misconduct" referred to by Mr. Pollard? Can a federal regulatory agency given its mandate to protect the health and welfare of the public legally and morally d less than fully investigate and declare its own efforts?

The St. Lucie Intervenors anxiously await the answers to these questions and beseech this Commission to perform those non discretionary duties mandated by the Congress.

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