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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the
ATOMIC SAFETY AND LICENSING BOARD

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

INTERVENOR'S REPLY
to
FPL's and the NRC Staff Response to Intervenors' Motion with Respect to Class 9 Accidents

Black Fox[1] seemingly resolves intervenors' motion. The Appeal Board should direct the staff to promptly advise the Commission of the reasons why it believes the consequences of class 9 accidents should or should not be considered in these proceedings and should establish the time within which other parties may respond and make their views on the question known to the Commission. The staff's explicit acknowledgment that the proximity between the proposed plant on Hutchinson Island and the Atlantic Gulfstream may require consideration of the class 9 consequences to the liquid pathway[2] makes such a

1. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, ____NRC____, slip op. pp. 29-32 (1979).

2. NRC Staff Response to Intervenors Motion to Consider Class 9 Accidents, pp. 9-10 [cited as "Staff Resp."]

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resolution more urgent here than in Black Fox. In addition, intervenors suggest the Board should grant the first alternative relief requested and should also certify the questions posed in their motion to the Commission in order that it may have the opportunity to resolve the procedural and jurisdictional problems implicit in its order in Offshore Power Systems.[3]

Jurisdiction

At the December hearings, the Appeal Board asked all parties to address the question whether the Board had jurisdiction to decide the motion. Under the construction of the Commission's order adopted in Black Fox, clearly the Board does not have jurisdiction to decide or grant relief on the merits. By that decision the Board ruled that the Commission had reserved jurisdiction to itself and that the Board's role was limited to assuring that the staff followed the mandate to advise the Commission in a timely fashion. By their jurisdictional arguments, however, the applicant and the staff ask this Board to arrogate this jurisdiction unto itself and to enter an order which would in effect relieve the staff of its duty to advise the Commission of its views prior to completion of these construction permit

3. Offshore Power Systems (Floating Nuclear Power Plants). Docket No. STN 50-437, ____NRC____ (1979) (reproduced as an Addendum to intervenors' motion).

proceedings. Intervenors submit that the jurisdictional arguments not only fail to heed the teaching in Black Fox, but also do not accurately reflect the jurisdictional principles established by this Board's prior decisions.[4]

A. Black Fox:

The Appeal Board concluded that the Commission's order in Offshore did not expand the right or duty of the Licensing or the Appeal Boards with respect to environmental consideration of class 9 accidents. The Board also concluded, however, that the Commission's order did mean that the Commission had opened the door to such consideration and had reserved to itself the right to decide which individual land base reactor cases required such consideration (pending adoption of a new general policy). Although the Commission's order did not specify the time, the Appeal Board recognized that the Commission's decision should be made at the earliest possible moment in pending proceedings in order that due consideration could be given in those cases where the Commission determined consideration was required. Accordingly, the Appeal Board ruled that

4. Again intervenors find the staff's arguments anamolous in view of their recognition that the St. Lucie plant is one of those plants whose similarity to a floating plant is so striking that consideration may well be required. (Staff Resp., pp. 9-10).

its role was limited to assuring that the staff's advice was promptly submitted to the Commission for its decision.

The application of that decision to the case at hand seems clear. Were the Appeal Board to deny the motion in its entirety, it would be exercising jurisdiction to deprive the Commission of an opportunity to decide whether class 9 accidents should be considered during these construction permit proceedings. No one challenges the jurisdiction of the Commission to interject an issue into pending proceedings and to direct the Licensing and Appeal Boards to reopen pending proceedings to receive evidence and resolve this issue.[5] In the radon emission proceedings, the Commission withdrew a part of a generic rule which had been applied in pending cases and directed both the Appeal Board and the Licensing Board to reopen the record and consider the question in all cases pending before them, irrespective of whether the issue had been previously raised by the parties, (Id ; see also, Peach Bottom.[6])

By its order in Offshore, the Commission acknowledged that its generic prohibition might be outdated and opened the door

5. "Uranium Fuel Cycle Impacts From Spent Fuel Reprocessing and Radioactive Waste Management," 43 Fed. Reg. 15613 (1978).

6. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-480, 7 NRC 796 (1978).

to class 9 accident consideration in individual cases. This Board decided in Black Fox that the Commission had reserved to itself the right to decide whether such consideration should be given in any individual pending case. In reaching this decision in pending cases, the Commission may well wish to consider whether the doctrine of finality or the stage which a proceeding has reached constitute appropriate bases for its declining to order consideration in an otherwise proper pending case. But the Appeal Board must recognize that a decision to deny consideration based on finality grounds is an exercise of discretion. By its Black Fox decision the Board has recognized that that discretion has been reserved to the Commission. Intervenors submit that under that decision the Appeal Board may not itself apply the discretionary doctrine of finality to deny the motion because by so doing it would be exercising discretion to deprive the Commission of an opportunity to decide an issue the Commission has reserved to itself.

B. Of Mandatory and Discretionary Jurisdictional Principles.

The analyses set out in the applicant's and the staff's responses to the motion share two fallacies. Each treats Black Fox only to the extent it precludes the Appeal Board's deciding the class 9 issue on the merits and each fails to recognize that

the Board's prior jurisdictional decisions have distinguished between two kinds of jurisdictional principles, those which are mandatory and those which involve the exercise of discretion.

1. Mandatory jurisdictional principles. When the proceedings are over, the proceedings are over. After the Licensing Board has made its decision on an application for a license or permit, after the Appeal Board has affirmed, and after the Commission has affirmed or the time for Commission review has expired, the proceedings are over; neither the Licensing Board nor the Appeal Board has any "proceeding" before it in which new or old issues can be raised. Both boards have lost subject matter jurisdiction because there is no basis either in the statute or in the regulations for a further exercise of jurisdiction.

The Board has had occasion to illustrate the application of these mandatory principles in recent decisions. Thus, in South Texas,[7] a co-applicant asked the Licensing Board to order an antitrust hearing on an application six months after the Appeal Board had affirmed the Licensing Board's decision authorizing the issuance of a construction permit. No appeal had been taken

7. Houston Lighting & Power Co. (South Texas, Units 1 and 2), ALAB-381, 5 NRC 582 (1977).

from the original decision and no issues remained outstanding in the construction permit proceedings. The Appeal Board ruled that the proceedings were over and that there had been no basis for the Licensing Board to exercise jurisdiction over the issues raised by the motion. (See also WPPSS.[8])

Clearly, neither the decisions nor the rule is applicable here. The Appeal Board still has before it two issues -- the adequacy of the offsite/onsite emergency power systems and the radon emission issue. The construction permit proceedings are not complete.[9]

2. Discretionary Jurisdictional Principles. Apart from the duty to decide applications properly before them and the

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8. Washington Public Power Supply Systems (WPPSS Projects 3 and 5), ALAB-501, 8 NRC 381 (1978)(denying as untimely a motion posing questions for review filed in Appeal Board after time for Commission review of decision had expired).

9. It bears repeating that there is a second rule of jurisdiction which is mandatory, not discretionary. The Commission itself has the right to order consideration of an issue in any uncompleted proceeding. It matters not the stage of the proceedings, that the issue may have already been litigated, or that the issue may never have been placed in controversy at all; it becomes the duty of the Licensing and Appeal Boards to comply with this mandate. The Commission's directive on the radon emission issue (supra, n. 5) and this Board's response in the Peach Bottom decision (supra, n. 6) illustrate this principle. Intervenors submit it is applicable here.

duty to refrain from deciding questions when no part of the proceedings remain before it, the Appeal Board has recently been confronted with a number of cases which posed serious questions with respect to the circumstances in which the Licensing or the Appeal Boards should decline to exercise jurisdiction over issues which arise late in the proceedings. Although their parameters are unclear, the basic principles have emerged.

First, as this case illustrates and as the Board has recently affirmed, the Appeal Board is free to raise sua sponte at any time before the close of the proceedings serious issues which were neither considered by nor presented to the Licensing Board.[10] Apart from intervenors' motion here and the motion in Black Fox, intervenors suggest the Commission's directive in Offshore Power Systems presents an issue the Appeal Board should properly raise sua sponte in all pending proceedings to assure that the Commission is promptly advised in each case.

At the other end of the spectrum, borrowing from judicial experience, the Board has recognized that some limitations must be placed upon the parties' rights to raise or reraise,

10. Virginia Electric Power Co. (North Anna Units 1 and 2), ALAB-551, 9 NRC, 704, 707 (1979) (citing Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-435, 6 NRC 541, 544-46 (1977).

to litigate or relitigate issues endlessly, in the interest of establishing an orderly process for resolving licensing proceedings. Thus, the mere fact that discrete issues remain to be resolved in a proceeding does not warrant the Licensing or Appeal Boards reopening factual questions based upon an alleged change in the factual circumstances where the questions have been or clearly should have been resolved earlier in the proceedings. For example, in Seabrook[11] the Appeal Board ruled it would not permit the question of the applicant's financial qualifications to be reopened years after the issue had been fully litigated, decided, and affirmed, based upon an intervenor's motion alleging the applicant's financial circumstances had changed materially, even though the proceedings were still incomplete because the Appeal Board still had two unrelated and discrete issues before it -- an alternative site issue and the radon emission issue. Similarly, in Marble Hill, the Appeal Board refused to consider an intervenor's motion to reopen the safety hearings made six months after the time for review of the construction permit had expired even though the Appeal Board still had the radon

11. Public Service Co. of New Hampshire (Seabrook Units 1 and 2), ALAB-513, 8 NRC 694 (1978).

emission issue before it.[12] Both those decisions, of course, involved an attempt to reopen a fully litigated factual question based upon an alleged change in the factual circumstances. Here, the Appeal Board has before it a motion asking to address a legal question which arose solely as a result of a recent Commission decision.

The doctrine of finality can not be applied here. The only issue that has been litigated in these proceedings is legal -- as a matter of law, did the Licensing Board correctly apply the Commission's 1971 interim guidelines to preclude consideration of the consequences of class 9 accidents in licensing proceedings, absent an affirmative showing of probability by intervenors? That issue has been fully litigated and decided against intervenors. Intervenors concede that they may not now seek to reopen that question in these proceedings before the Board. But no facts were litigated and a new question of law has arisen as a result of the Commission's order in its 1979 decision in Offshore Power Systems.

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12. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261 (1979); but see and compare, earlier decision in Marble Hill, ALAB-493, 8 NRC 253, 260 (1978) (concluding "the power to reconsider is inherent in the power to decide" and deciding to consider legal questions not raised on prior appeal of same issue.)

The question posed by the motion here (and in Black Fox) raises different issues -- whether the Commission's 1979 directive applies to these proceedings and, if so, how it should be implemented. With respect to these issues, the teaching of Black Fox is clear. The Commission has reserved jurisdiction over the question unto itself and the Board's function is simply to assure that the staff promptly advises the Commission of its views so the Commission can exercise that jurisdiction.[13]

C. Alternative Remedies. Both the applicant and the staff suggest the intervenors' remedy is to petition the Director of Nuclear Reactor Regulation to institute a show

13. The staff has made it clear that it disagrees with the Black Fox decision. "It is the NRC Staff's position the Commission's Offshore Power System decision does not require the Staff to inform the Commission of individual cases in which the staff does not believe Class 9 accidents should be considered." (Staff Resp., p 9; emphasis added.) Thus, according to the staff, the Commission's directive in Offshore is meaningless and the staff can continue, as it did before Offshore, to consider Class 9 accidents informally. (See NRC Staff's Brief in support of Affirmative Funding on Certified Question; pp. 44-45, Offshore Power Systems, Docket No. STN 50-437). If it cannot reach a private agreement on the question with the applicant, then and only then need it seek permission for formal consideration on the record from the Commission. On this basis, the public and intervenors may continue to be deprived of any right to participate or know the basis upon which these decisions are made. Such are the "lessons learned" from the experience at Three Mile Island. Intervenors find this construction of Offshore and Black Fox difficult to accept.

cause proceeding under 10 CFR § 2.206. Neither the applicant nor the staff discuss the source of the Director's authority to exercise jurisdiction over a matter with respect to which the Commission has reserved jurisdiction to itself. (Black Fox, Slip. Op. at p.31.)[14]

Beyond this, the applicant's and staff's suggestions are both disingenuous. Both suggest that intervenors petition the Director for an order to show cause. And yet neither finds it necessary to discuss whether, apart from Black Fox, the Director would find himself constrained by the "doctrine of finality" to deny relief under the Commission's decision in Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), Dkt. No. 50-367, __NRC__(1978).[14a] Although the case could be distinguished, it is clear that the same arguments the applicant and staff urge here to induce the Appeal Board decline to address the merits and defer to the Director could be urged to persuade the Director that to consider the merits of such a petition would constitute an

14. Indeed, absent intervenors being able to carry the burden of showing probability, the only relief the Director could grant, consistent with the 1971 interim guidelines, would be to require a showing with respect to the specific Three Mile Island type Class 9 accident. See, Pennsylvania Power and Light Co. (Susquehenna Steam Electric Station, Units 1 and 2), LPB-79-29, 10 NRC ____ (1979).

14a. CCH Nuclear Reg. Reptr. ¶ 30,287.

unwarranted interference with the adjudicative functions of the Licensing and Appeal Boards.[15] Thus, the merits need never be addressed.

The staff suggests two additional proceedings in which intervenors might properly raise this issue -- in the proceedings that will take place when FPL applies for an operating license and in the rulemaking proceedings the Commission suggested would be reinstituted as a result of Offshore. (Staff Resp. p. 8.) Neither alternative permits intervenors to pose the question in proceedings to determine whether and under what conditions a second nuclear power plant should be constructed on Hutchinson Island. Both suggestions would defer the issue until the applicant had made further investments in the project. In either proceedings the environmental issues will be wholly different from those posed here.

The Merits

Although the Appeal Board has determined in Black Fox that it will not itself consider the merits, the substantiality

15. The staff does acknowledge that this procedure is generally invoked only when "appellate jurisdiction [has] terminated" (Staff Resp., p.7). It is, of course, well established that "It has never been necessary to invoke this procedure in a pending case . . . ." Union Electric Co. (Calloway Plant, Units 1 and 2) ALAB-348, 4 NRC 225, 232 (1976).

of the question posed may be a factor in deciding whether the staff should be directed to submit its views to the Commission before these proceedings are completed. The nature of the application here and the staff's own admissions clearly show the question here is critical.

Liquid pathway interdiction was one of the factors that led the staff to seek class 9 accident consideration in the proceedings on the application for a manufacturing license in Offshore. As the staff admits in its reponse (Staff Resp. p. 10), it is one of the factors that might demonstrate the need for class 9 consideration here. But under the staff's conception of its role, there is no real urgency for a decision here; indeed, the staff suggests that these construction permit proceedings be permitted to close, that the applicant be permitted to continue construction on the existing design,[16]

16. Although intervenors believe class 9 consideration might compel reconsideration of the decision to permit construction of a plant on a narrow barrier island adjacent to a major international liquid pathway, they also recognize such consideration might only result in a conclusion that design changes were needed to strengthen the barriers between the "core" of the plant and the liquid pathway. (For a literate description of the preliminary planning and design process undertaken when floating power plants were first conceived, see J. McPhee, "The Atlantic Generating Station," reproduced in McPhee, Giving Good Weight, pp. 76-118 (New York: 1979).) For this reason alone, intervenors submit the question should be reviewed and decided before further construction is completed, which can only make subsequent modifications more costly.

and that intervenors, the applicant, and the Commission should simply wait until such time as the staff turns its attention to this problem in connection with the St. Lucie site. Such a proposal serves no one's interest and hardly reflects an orderly administrative process for resolving a critical and disputed issue (nor does it evidence particular zeal on the part of the staff).

The two questions posed by this motion can perhaps be graphically assessed on three axes -- a procedural axis and two substantive axes. On the procedural axis, FPL correctly describes the proceedings that have taken place since it first applied for a construction permit in 1973 and since intervenors first sought class 9 consideration in 1974. The proceedings are indeed well advanced on the procedural axis and one may empathize with the applicant's concern that additional litigation ensue at this date.[17]

But there is a second axis -- a substantive axis. The Commission has now found that the consequences of class 9 accidents should be considered in connection with floating power plants and has indicated it intends to reconsider its

17. Intervenors hope all might also recognize that the lateness with which the opportunity to consider this issue comes is not attributable to want of effort on their part. (See discussion, FPL Resp. pp. 7-8.)

policy with respect to land based plants. Thus, a second axis might be constructed with floating power plants at one end and land based plants proposed to be located away from major waterways and on seismically and meteorologically stable locations.[18] Clearly the plant being constructed on Hutchinson Island is as close to the floating power plant end of the axis as a land based plant could be.

Finally, a second substantive axis can be constructed -- an axis defined by the potential environmental consequences of nuclear accidents. At one end are the consequences of those accidents in what the Commission calls class 1; at the other, are the consequences of core melt accidents in class 9. However one perceives the probability of an occurrence, there has been little doubt that the consequences would be severe. The Appeal Board has before it a motion which asks the staff to advise the Commission, inter alia, whether the potential consequences to Atlantic Gulfstream and site environs resulting from a core melt accident at plant located on narrow barrier island are such that environmental consequences of class 9 accidents should be considered in determining whether and how

18. The Black Fox plant would appear to be near the secure end of the spectrum. E.g., Black Fox, Slip Op. pp. 33 et seq.

such a plant should be constructed at that location. Surely the experience at Three Mile Island and the decision on Offshore suffice to make this a question of sufficient importance to compel the staff to submit its views to the Commission before the construction permit proceedings are completed.

CONCLUSION

Since 1974 petitioners here have sought to compel consideration of the environmental consequences that might result if a class 9 accident occurred on Hutchinson Island. In the record there is no explanation to show why the staff concluded consideration of class 9 accidents was appropriate in 1973 in connection with a land based site (Newbold Island)[19] and was appropriate in 1978 for floating site (Offshore Power Systems) but was not appropriate for a site located on a narrow barrier island in the Atlantic Ocean adjacent to the Gulfstream.

It may be that the nation's energy needs substantially outweigh any risk to the human environment from a core melt accident. It may be they do not. Or the best judgment may fall somewhere between: cost-benefit analysis may dictate

19. See, NRC Staff's Brief in Support of Affirmative Finding on Certified Question, Offshore Power Systems, Docket No. STN 50-437), at pp. 44-45.

additional precautions and different siting criteria. But whatever the conclusion, there can be no justification for the Commission's not being presented with the question here. Before the population on and and surrounding Hutchinson Island is compelled to spend 40 years in the shadow of a second nuclear reactor, they are entitled to have the Commission consider the environmental consequence of a class 9 accident or, at a minimum, to an explanation why such consideration is not appropriate in this case.

Accordingly, intervenors submit that the Appeal Board should enter an order:

1. staying completion of these proceedings until the Commission has received and acted upon the staff's recommendations with respect to class 9 accident consideration at the St. Lucie site or has adopted a new general policy;

2. directing the staff to advise the Commission within 30 days of the reasons why it believes the consequences of class 9 accidents should or should not be considered in this case and granting the other parties 30 days after that advice is given to submit their views on the question to the Commission; and

3. certifying to the Commission as major and novel the

questions of the standards to be applied by the staff in determining in which "individual cases . . . the environmental consequences of Class 9 accidents should be considered," the procedures by which such staff determinations are to be reviewed, and how the Commission's order in Offshore is to be implemented.

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