PP

7/18/80

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 RESPONSE TO INTERVENORS' MOTION TO CONSIDER CLASS 9 ACCIDENTS

INTRODUCTION

Intervenors, Rowena E. Roberts, et al., have moved the Atomic Safety and Licensing Appeal Board in this proceeding to enter an order requiring the NRC Staff to prepare a supplement to the FES which considers the environmental consequences of Class 9 accidents at St. Lucie or which justifies why such consideration should not be given and, in addition, to establish prehearing and hearing procedures for determining the adequacy of such a supplement. In the alternative, Intervenors ask: that further proceedings be stayed until the NRC Staff makes the recommendations called for by the Commission in Offshore Power Systems,[1/] or that the Appeal Board certify to the Commission the questions arising from the application of the Commission's decision to these proceedings.

1/ Offshore Power Systems (Floating Nuclear Plants), CLI-79-9, 10 NRC ___ (September 14, 1979).

8004150277

G

8004150 160

Intervenors served their motion on the parties at the recent hearings before the Appeal Board in Coral Gables, Florida, on December 13, 1979. (Tr. 398) The Appeal Board requested that the Applicant and the NRC Staff address three points in further filings responding to Intervenors' motion: (1) the jurisdiction of the Appeal Board to consider the motion; (2) other avenues of relief available to the Intervenors within the Commission (in the event it is concluded that the Appeal Board lacks jurisdiction); and (3) the merits of the arguments raised in the motion. (Tr. 868)

The NRC Staff believes that the Appeal Board is without jurisdiction to grant the requested relief. Other appropriate relief is available to Intervenors. They can address a request for relief to the Director of the Office of Nuclear Reactor Regulation pursuant to 10 CFR § 2.206, they can petition to participate in the operating license proceeding when it is noticed, or they can participate in the rulemaking proceeding which the Commission has indicated its intent to conduct. In any event, the arguments raised by Intervenors are insufficient to require further inquiry into the environmental consequences of Class 9 accidents at St. Lucie as a part of the currently pending proceeding.

DISCUSSION

1. The Appeal Board is Without Jurisdiction to Grant the Requested Relief. On October 7, 1977 the Appeal Board affirmed the Licensing Board's Initial Decision authorizing the Director of Nuclear Reactor Regulation to issue a construction permit for St. Lucie Unit 2 at Florida Power and Light's Hutchinson Island site on Florida's east coast.[2/] However, jurisdiction was retained

2/ Florida Power and Light Company (St. Lucie Unit 2), ALAB-435, 6 NRC 541 (1977).

over three issues: steam generator tube integrity, the stability of the applicant's electrical grid and radon.[3/] The steam generator tube issue was finally resolved in April 1979 leaving only the electrical grid issue and radon as matters over which this Board has jurisdiction.[4/]

In their present motion the Intervenors have not attempted to demonstrate that there is a particular Class 9 accident related to grid stability or radon. Rather, citing the Appeal Boards' Peach Bottom decision, they have chosen to argue that since the Commission's Offshore Power Systems decision was rendered prior to the relinquishment of all jurisdiction by this Board, "...it is appropriate for this Appeal Board to retain jurisdiction to dispose of the factual and legal issues."[5/]

Intervenors' reliance on Peach Bottom is misplaced. In that case the Appeal Boards were implementing a Commission directive to consider a specific issue in all proceedings "still pending before Licensing or Appeal Boards".[6/] The Commission specifically required that "[w]here cases are pending before Appeal Boards, the Appeal Boards are also directed to reopen the records to receive new evidence on radon releases and on health effects resulting from

---

3/ The grid issue was retained as the result of an October 28, 1977 order amending ALAB-435. The Board also has jurisdiction over radon releases as in other cases pursuant to a Commission directive contained in 43 Fed. Reg. 15613 (April 14, 1978).

4/ ALAB-537, 9 NRC 407 (1979).

5/ Motion p. 3 citing Philadelphia Electric Company, et al. (Peach Bottom Units 2 and 3), ALAB-480, 7 NRC 796 (1978).

6/ Peach Bottom, supra, p. 799.

radon releases."[7/] Thus, the Commission specifically gave jurisdiction over that issue to the Appeal Boards even in cases where the environmental record was finally decided and even though no party had placed the matter in issue. The Peach Bottom Appeal Boards specifically rejected arguments that their jurisdiction did not attach in cases where limited issues remained before it, noting the grant of jurisdiction in the Commission's Order.[8/]

Unlike Peach Bottom, the Commission's Offshore Power Systems decision contains no special grant of jurisdiction to Licensing Boards or Appeal Boards to consider Class 9 accidents in pending cases. In Black Fox, the Appeal Board specifically noted this fact stating: "...[T]he Commission has reserved to itself the right to decide whether such matters are to be considered in any given case until it adopts a new general policy."[9/] The NRC Staff does not believe that Offshore Power Systems affects the proposition that boards can admit Class 9 contentions where an affirmative showing is made pursuant to existing rules that other accident assumptions may be more suitable than those described in the proposed annex to Appendix D to 10 CFR Part 50. [36 Fed. Reg. 22851 (1971)] This, of course, leaves Intervenors' motion subject to the applicable rules and case law which govern jurisdiction of the Boards

7/ 43 Fed. Reg. 15613, 15615 (April 14, 1978).

8/ Peach Bottom, p. 802 n. 4.

9/ Public Service Co. of Oklahoma, et al. (Black Fox Units 1 and 2), ALAB-573, 10 NRC __; Slip op. p. 31 (1979).

to consider Class 9 contentions[10/] and which state the standards for reopening records for receipt of additional contentions.

The applicable case law governing Intervenors' motion is set forth in Public Service Company of New Hampshire, et al. (Seabrook Units 1 and 2), ALAB-513, 8 NRC 694 (1978). There the Appeal Board held that it lacked authority to reopen the record on an issue to which finality had attached even though it still retained before it a discrete issue in the proceeding.[11/]

Intervenors' effort to raise the Class 9 issue in this proceeding has been previously rejected by the Licensing and Appeal Boards and their appeal of that decision has been denied in the courts.[12/] Likewise, a motion to reopen the record would be inappropriate because the appellate process has been completed and the decision in this proceeding is final except for the limited issues of grid stability and Table S-3 (radon) over which jurisdiction has been retained.

10/ See e.g., Consumers Power Co. (Midland Units 1 and 2), ALAB-123, 6 AEC 331, 347 (1973); Wisconsin Electric Power Co., et al. (Point Beach), ALAB-137, 6 AEC 491, 502 (1973); Long Island Lighting Co. (Shoreham), ALAB-156, 6 AEC 831, 835 (1973); and Pennsylvania Power & Light Co. (Susquehanna Units 1 and 2), LBP-79-29, 10 NRC ___, (October 19, 1979).

11/ 8 NRC 694, 695; accord, Washington Public Power Supply System (WPPSS Projects 3 and 5), ALAB-501, 8 NRC 381 (1978); Public Service Company of Indiana, Inc. (Marble Hill Units 1 and 2), ALAB-530, 9 NRC 261 (1979); Houston Lighting and Power Co., et al. (South Texas Units 1 and 2), ALAB-381, 5 NRC 582 (1977).

12/ Hodder v. NRC, 589 F.2d 1115 (D.C. Cir. 1978), cert denied __ U.S. __, 100 S.Ct. 55 (1979).

It is true, of course, that jurisdiction to entertain new matters where finality has attached to some but not all issues may lie if there exists a reasonable nexus between the new matter and the issues remaining for resolution.[13/] Even assuming the Board's limited jurisdiction in this instance could be stretched to encompass a Class 9 contention, Intervenors have failed to so allege. Rather they seem to be attempting to resurrect the same arguments which they have previously exhausted in this very proceeding and consequently they are barred from attempting to relitigate their general arguments in this forum by the doctrines of finality and res judicata.[14/]

An implicit recognition of the jurisdictional problems seems to be contained in Intervenors' Motion by the use of pleading in the alternative.[15/] Intervenors suggest that this Board either stay further proceedings pending consideration of NRC Staff recommendations for interim modifications to the Commission's Class 9 policy which were called for in the Offshore Power Systems decision or in the alternative certify the question of the applicability of the Commissions Offshore Power Systems decision to the pending St. Lucie proceeding.

13/ Virginia Electric Power Co. (North Anna Units 1 and 2), ALAB-551, 9 NRC 704, 707 (1979).

14/ Although not fully applicable in administrative proceedings the considerations of fairness and conservation of resources embodied in these doctrines are relevant. See Public Service Company of New Hampshire, et al. (Seabrook Units 1 and 2), CLI-78-1, 7 NRC 1, 27 (1978); Houston Lighting and Power Company, et al. (South Texas Units 1 and 2), CLI-77-13, 5 NRC 1303, 1321 (1977).

15/ Motion p. 4.

The suggestion that the proceedings be stayed can be readily dismissed. The Commission's "Interim Statement of Policy and Procedure" published in October clearly contemplates that licensing decisions and appellate reviews should continue even in cases where complete decisions may not be possible.[16/] Certainly, there is nothing in the Offshore Power Systems decision relied on by Intervenors which prevents this Board from reaching a final decision on the discrete issues over which it has retained jurisdiction. Consequently, there is no justification for not going forward on those issues.[17/]

2. Other Avenues of Relief.

The usual response to a party seeking to reopen a record in a docket where a final decision has been rendered and appellate jurisdiction terminated is that the party has recourse to the provisions of 10 CFR § 2.206.[18/] Those

16/ 44 Fed. Reg. 58559 (October 10, 1979).

17/ Intervenors suggest as an alternative that the Appeal Board may wish to certify to the Commission as "major or novel" the questions of Offshore Power Systems' applicability to St. Lucie pursuant to 10 CFR § 2.785(d). Such a course is not warranted here where the questions are not major or novel. In Black Fox, supra, slip op. p. 32, where the Appeal Board, stopping short of certification, directed the NRC Staff to inform the Commission whether it believed the consequences of Class 9 accidents should be considered in that ongoing proceeding, the Licensing Board is still in the process of conducting the safety hearings and unlike St. Lucie, no final decision has been rendered on the merits. In Black Fox, therefore, a substantive change in policy on Class 9s might have a "major" impact on the ongoing proceeding. Such considerations are inapplicable in St. Lucie where the record is closed, the decisions are final and unreviewable and the Appeal Board has only narrow and discrete issues before it. The question is of course not "novel" since the Commission is well aware of its action in Offshore Power Systems and Intervenors have pointed to nothing making St. Lucie strikingly different from other land-based reactors.

18/ See e.g., Marble Hill, supra, p. 262.

provisions permit a petition to be filed with the Director of Nuclear Reactor Regulation who has discretionary authority to grant the relief sought subject to Commission review. In this case, of course, Intervenors will also have the further opportunity to raise their concerns when the Applicant applies for its operating license.[19/] By that time the rulemaking noted in Intervenors' motion probably will have specified what environmental considerations should be given to Class 9 accidents and the parties including Intervenors will be in a better position to address such contentions in the St. Lucie proceeding.

Intervenors also have available to them an effective avenue of relief, viz, the opportunity to participate in the rulemaking which the Commission, in Offshore Power Systems, announced it would conduct. In the rulemaking forum Intervenors will have an effective opportunity to argue their point of view on Class 9 accidents to the Commission.

3. The Merits of Intervenors' Arguments on Class 9s

Intervenors' motion does not attempt to formulate a specific Class 9 contention. Assuming for argument that the Commission's Offshore Power Systems decision signals an intent to permit consideration of Class 9 accidents in individual licensing proceedings, it manifestly does not presently permit such consideration unless the requirements of existing regulations and case law are met as indicated in Midland and Susequehanna, supra, or unless the

19/ See, in this regard, the reminder in ALAB-537, supra, p. 411 where this Board noted the further opportunity presented by the filing of an OL application.

NRC Staff informs the Commission of a particular situation which the Commission then deems sufficient to require consideration of Class 9s in a particular case. Consequently, Intervenors' motion is defective on the merits since no attempt is made to address the applicable requirements.

The NRC Staff is mindful, however, of the Black Fox Appeal Board's direction to inform the Commission of the Staff's view as to whether Class 9 accidents ought to be considered in that proceeding. It is the NRC Staff's position that the Commission's Offshore Power Systems 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. While the NRC Staff has not identified St. Lucie to the Commission as a case in which Class 9 accidents should be considered pending the adoption of an interim rule and subsequently the Commission's revised policy and rules, there are a number of ongoing matters which may ultimately bear on this issue.

First, the NRC Staff has not considered St. Lucie as a case within the meaning of the Commission's direction in Offshore Power Systems because that decision was issued in October at a time when the construction permits for St. Lucie had already issued and the matters pending before the Appeal Board were limited in scope. Intervenors' Class 9 contention had already been finally rejected by the Commission and the federal courts.

Second, following the Appeal Board's direction at the December hearings, the technical staff was asked whether there might be special circumstances at St. Lucie which would suggest consideration of Class 9 accidents different from that which would be accorded other land based reactors. Based on a preliminary assessment, no such circumstances can now be identified. Consequently, current Commission policy on Class 9 accidents embodied in the proposed "annex" to former Appendix D of 10 CFR Part 50 [36 Fed. Reg. 22851 (1971)] is applicable. However, the task action plans contained in Draft NUREG-0660 (TMI Lessons Learned) proposed to the Commission identify Task Action III.E.1.4 as liquid pathway interdiction (an in-depth study of one of the special factors identified in Offshore Power Systems which might trigger further consideration of Class 9 events). Assuming approval of this plan, St. Lucie would be analyzed as part of Task Action Plan III.E.1.4. If that should result in the liquid pathway being identified as a unique consideration at St. Lucie and the Commission's interim policy on Class 9 accident consideration has not yet clarified the situation in this regard, the NRC Staff will promptly inform the Commission and this Board pursuant to the Offshore Power Systems direction.

CONCLUSION

For the foregoing reasons, the NRC Staff believes the Appeal Board lacks jurisdiction to grant Intervenors' motion. Alternative forms of relief are available to Intervenors by petitioning pursuant to 10 CFR § 2.206, by participating in the proposed Commission rulemaking when it is noticed, or

by participation in the operating license proceeding when it is instituted. Finally, the merits of Class 9 accidents should not be addressed in this proceeding under existing Commissions rules and policy.

Respectfully submitted,

William J. Olmstead

William J. Olmstead
Counsel for NRC Staff

William D. Paton

William D. Paton
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 18th day of January, 1980