11/7/79

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of	)	Docket Nos. 50-250-SP
	)	50-251-SP
FLORIDA POWER & LIGHT COMPANY	)	(Proposed Amendments to
	)	Facility Operating License
(Turkey Point Nuclear Generating Units Nos. 3 and 4)	)	to Permit Steam Generator Repairs)

MEMORANDUM OF LICENSEE RELATING TO UNTIMELY DISCOVERY

This memorandum is submitted on behalf of Florida Power & Light Company (FPL or Licensee) in response to the instructions of the Licensing Board orally conveyed during a conference telephone call among the parties and the members of the Board on Friday, November 4, 1979.[1] At the end of the second conference call, the Chairman requested FPL to file, by Wednesday, November 7, a memorandum in support of its position that the Board should not, in the exercise of its authority under 10 CFR § 2.711(a), extend the time for the Intervenor to submit a document entitled "Intervenor Mark P. Oncavage's Interrogatories to, and Request for the Production of Documents from, Licensee Florida Power and Light Company" (Discovery Request). The Board also directed FPL to file

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[1] Two lengthy conference calls were held on that date. All three Board members, Messrs. Rogow and Marshall, Counsel for Intervenor Oncavage, Messrs. Coll and Reis, Counsel for FPL, and Mr. Goldberg, Counsel for the NRC Staff, participated in each call.

on the same date objections it had, other than the timeliness objection, to particular questions or requests for document production contained in the Discovery Request. Intervenor was directed to respond to both FPL filings by Tuesday, November 13. The procedure was designed to give the Board an opportunity further to consider the positions advanced by the parties in the conference calls and to make it possible to rule promptly both on the extension of time question and, should the Board grant the extension, on the objections to specific discovery requests.[1] This memorandum relates only to the question whether the extension of time should be granted. FPL is submitting its objections to specific aspects of the Discovery Request in a separate document.

I

The Procedural and Legal Context

In its "Order Ruling on the Petition of Mark P. Oncavage" of August 3, 1979 (August 3 order), the Licensing Board asked

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[1] Presumably the Board will, in accordance with established practice, enter a written order on any rulings resulting from the conference calls. Pacific Gas & Electric Co. (Diabalo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-334, 3 NRC 809, 814-815. The material it requested from the parties should be of assistance in that regard.

the parties to meet promptly in an effort to agree on contentions or enter into a stipulation, "to agree on a realistic discovery schedule ..." and "to keep the Licensing Board informed on progress." (p. 29) The parties met on August 30, 1979,[1] and, as reflected in a letter to the Board dated August 31, 1979, no stipulation or agreement concerning contentions was reached. However, the Intervenor and the Licensee did agree to propose an expeditious discovery and hearing schedule, with discovery on six admitted contentions to begin on August 31, i.e., at once; and the hearing to commence on December 4. The Staff agreed to the commencement of discovery on August 31 but had certain other objections or reservations about the schedule proposed by the Intervenor and the Licensee.

After considering the positions of the parties, the Licensing Board, on September 25, 1979, issued an "Order Relative to Contentions and Discovery." That order ruled on the admissibility and wording of the contentions to be considered in this proceeding and established a schedule for discovery and hearing. The Board modified the proposed schedule of the Licensee and the Intervenor but still provided for expedition. The September 25 order set October 22, 1979 as the final date for filing discovery requests on all contentions;

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[1] Earlier preliminary meetings and telephone discussions disclosed that August 30 was the first date all of the parties could prepare for and meet to discuss the matters suggested by the Board.

November 30 as the final date for filing responses to discovery requests; December 21 as the date to file prepared testimony and January 8, 1980, as the date on which the hearing is to commence. There is, of course, no question of the authority of the Board to enter the order (see 10 CFR § 2.718), and no party has ever objected to the schedule or requested that it be modified in any respect or reconsidered.

Despite the Board's order fixing Monday, October 22, as the final date for filing discovery requests, the instant Discovery Request was dated October 27, 1979, as was the accompanying certificate of service. In fact, the envelope in which it was mailed was postmarked October 29. Promptly upon receipt of the Discovery Request, Counsel for the Licensee sent a letter to the Licensing Board and the parties stating that, absent an order from the Board pursuant to 10 CFR § 2.711 extending the time to file the Discovery Request, the Licensee would treat it as a nullity.[1] Following receipt of the letter the Board initiated the conference calls.

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[1] The Discovery Request was delivered to Licensee's Miami counsel on October 30 and to its Washington counsel on October 31. Both were in Washington on both days and neither had any opportunity to examine the discovery request until the evening of October 30. The Licensee's letter was hand delivered to the Board on October 31.

During the first conference call, counsel for the Licensee elaborated upon the position taken in its letter: there had been no stipulation entered into -- or even requested -- for an extension of time to file the Discovery Request; Intervenor could not, therefore, simply ignore the time limits set in the September 25 order; and if Intervenor is to obtain an extension, it should be by way of a motion and Board order issued pursuant to 10 CFR § 2.711(a), which provides:

> Except as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer, or by stipulation approved by the Commission or the presiding officer. (Emphasis supplied.)

There was no disagreement with Licensee's position that 10 CFR § 2.711(a) governs.[1] Indeed, Mr. Rogow, counsel for the Intervenor, orally moved for such an order during the first conference call. As we understand it, the Board tentatively granted the motion to extend time at the end of that conference

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[1] The burden of proof of demonstrating good cause is on the Intervenor as the moving party. 10 CFR § 2.732; Consolidated Edison Co. of New York, Inc. (Indian Point Station, Units 1, 2, and 3), CLI-77-2, 5 NRC 13. It is particularly appropriate that the burden be placed upon the Intervenor here because if there are any facts which can demonstrate good cause they are in his possession.

call.[1] However, as a result of disclosures made in discussions among counsel for Intervenor and Staff made between the two conference calls and during the second call, the Board agreed to reconsider its tentative ruling, directing the Intervenor and Licensee to address the matter in writing.

Consequently, the question presented is whether the Intervenor has carried the burden imposed upon him and established good cause for an extension of time to file the Discovery Request. We respectfully submit that if he has not, the Board cannot, under the rules, extend the time. We demonstrate below that no showing of good cause has or can be made.

II

Lack of Good Cause

At the outset, we emphasize that the situation here presented cannot be regarded as one in which an isolated and inadvertent "mistake" has been made involving an insignificant few days. The Intervenor has conducted discovery in a manner significantly different from what was implicitly and explicitly represented to the Licensing Board in filings which led to the Board's orders authorizing the late intervention and fixing the schedule. The change places a heavy and unfair burden on the other parties.

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[1] The necessarily informal structure of the conference call and the lack of a transcript may make the description herein of the Board's rulings and the discussion which led to them less than precise. However, we believe the substance of the discussions and rulings referred to herein are described with accuracy.

The question before the Board must be examined in the context of the history of this proceeding, including disclosures made during the conference calls.

The initial history is set forth in detail in this Board's August 3 order. There it pointed out that the petition to intervene was more than a year late, that no good cause for the lateness was established and that considerable doubts existed as to the ability of the Intervenor to contribute to a hearing. It appears from the opinions that the last minute appearance upon the scene of Intervenor's present counsel (together with the promise of expert witnesses) weighed heavily in the ultimate decision to hold the hearing. See Board Opinion pp. 6-7; Paris Opinion, pp. 33-34. Moreover, the Board emphasized the impression conveyed by the Intervenor's new attorneys that measures would be taken to avoid unnecessary delay. Describing the representations of one of Intervenor's present counsel, the Board Opinion emphasized (p. 8):

> He says that serious delay in the proceedings can be avoided by a pre-hearing conference to narrow and define the scope of the hearing, by stipulations, and by submission of written materials without live testimony, and he maintains that any small time savings that would be gained by denying his petition for leave to intervene would be far out-weighed by the benefit to be derived from ventilating his contentions.

Apparently at least in part on the basis of such representations the Board concluded that "the effective

delay of granting the petition would amount to a few months at most." (Board Opinion, p. 26; emphasis in original.) Obviously, limiting delay to a few months contemplated conducting pre-hearing proceedings, including discovery, within a compact time frame in which the parties cooperated and complied with deadlines. Indeed, the Board urged prompt meetings among the parties, an attempt to stipulate on contentions[1] and a realistic discovery schedule. (Board Opinion, p. 29). The Board reemphasized this and its own willingness to help resolve problems in its September 25 order. There it said:

> The Board urges the parties to fully cooperate during discovery and to make every effort to resolve possible differences. If any party determines a discovery request is inappropriate and is not able to resolve the matter, the party objecting should take immediate action and not wait for the final day for filing the responses.

The message was clear: "begin discovery promptly; try to work things out; and if you have problems bring them to the Board's attention as quickly as possible."

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[1] The hope that stipulations would be entered into in order to conserve time and effort, originally suggested as a possibility by Intervenor, did not in fact eventuate -- even with respect to contentions which the Board ultimately revised verbatim as suggested by the Licensee.

The NRC Staff acted in this spirit. On September 14, 1979, it served upon the Intervenor a set of interrogatories related to the admitted contentions. On October 4, 1979, the Staff served similar interrogatories related to the contentions admitted in the September 25 order. Upon review of the Staff's interrogatories and in an effort not to burden Intervenor, Licensee did not serve any interrogatories or document requests on Intervenor.

The Intervenor was not heard from at all during the discovery period. He did not answer the Staff's interrogatories./ He never made an informal request for information or production. He never submitted a partial set of interrogatories or discovery requests directed to less than all of the contentions.

On October 23, after the cutoff for filing discovery requests, Intervenor's counsel Rogow called Licensee's counsel Coll, noted that the discovery period had expired, but stated, nevertheless, that he intended to file discovery requests at some unspecified future date. He offered no explanation, and did not ask Licensee to stipulate to the late filing.

In the first conference call on November 2, 1979, Intervenor's counsel Rogow said that the lateness was due to the difficulty in obtaining expert assistance and the difficulty in coordinating the work of the lawyers and the experts. He said

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/ In fact, none have been answered to date.

the failure to request advance authority to file late was entirely his own fault and "mistake" and absolved Mr. Coll of any responsibility to act or advise the Board concerning their October 23, 1979, telephone conversation.

Mr. Rogow characterized the late filing as insignificant, suggesting that the Licensee be given an additional week to answer the interrogatories.

But the matter is not insignificant and the suggestion does not afford a substitute for good cause. Even in the absence of the background summarized above, Intervenor has wholly failed to explain when his alleged difficulties arose or what measures were taken to meet them. At the time the intervention was granted, Intervenor represented that Messrs. K. Z. Morgan and Walter Goldberg would be available to assist him. No attempt was made to describe any difficulty in obtaining their assistance, or coordination of their efforts as to discovery. No explanation has been given as to when the lawyers for Intervenor started working on the Discovery Request and how much time they gave to it. No explanation has been given as to why at least some of the interrogatories could not have been filed earlier. In short, the explanation for lateness is so unspecific that even if taken at face value, it cannot support a finding of good cause.

Moreover, it appears that the late filing was part of a discovery strategy which is wholly inconsistent with what the Board and the other parties expected in view of the schedule which had been adopted. In the time between

the two conference calls, Mr. Steven Goldberg, NRC Staff Counsel, called Intervenor Counsel Marshall to discuss procedures relating to summary disposition. Mr. Marshall then disclosed for the first time that Intervenor intended to serve late interrogatories and document requests on the Staff and may also seek still later to take depositions of Staff and Licensee witnesses.

Mr. Goldberg reported the disclosure at the start of the second conference call. Mr. Marshall explained in general terms that interrogatories are frequently followed by further interrogatories, document requests or depositions. He addressed the matter as though the time limits essentially agreed to by the Intervenor and set by the Board were non-existent or meaningless. After further questions from the Board, Mr. Rogow suggested that an attempt to undertake further discovery from the Staff might not actually be made, but he suggested that any determination of that matter be deferred until such an attempt was made. Nevertheless, neither stated that no such efforts would be made; rather, it appears that they were attempting to reserve such rights to further discovery as they may have.

In the light of Mr. Marshall's subsequent disclosure, Mr. Rogow's explanation that the late filing of the instant Discovery Request was only a "mistake," and an insignificant one at that, cannot withstand scrutiny. The Intervenor ignored

the understanding that discovery would be initiated early so that the Board would be in a position to resolve disputes promptly. The Intervenor treats as of no significance the Board's express order setting the "[f]inal date for filing discovery requests on all contentions." This behavior is in sharp conflict with Intervenor's original representation that he would participate in the proceeding in a manner which would minimize delay.

III

Prejudice to Licensee

The Discovery Request is extensive and burdensome. It contains 69 pages, 276 numbered paragraphs and more than two thousand two hundred questions! Extraordinary amounts of time of attorneys and administrative and technical personnel have already been consumed to determine whether the questions are within the proper scope of discovery in this proceeding or are even answerable and whether documents are available. Far from tailoring and refining the issues in dispute, or efficiently and fairly pursuing those issues, Intervenor has improperly enlarged the issues and materially contributed to delay in preparation for the hearing.

These interrogatories would be regarded as excessive and burdensome even if they had been filed at the earliest

possible time. Then, at least the parties would have had an opportunity to attempt to accommodate differences and the Board could have resolved remaining differences in time for discovery to be completed without unduly interfering with case preparation.

In view of the contemplation of the parties and the orders of the Board as to how discovery would be conducted, they would have been both surprising and unduly burdensome if filed technically on time but late in the discovery period. But filing them out of time, under the signature of an attorney who belatedly made it clear that he regards the filing as the beginning rather than the end of the discovery process, flies in the face of what the Board ordered and the other parties were led to believe was the understanding of all concerned.

To grant the Intervenor's Motion to Extend the Time to File the Discovery Request would unfairly impose substantial burdens upon Licensee. Licensee could not reasonably be expected to respond to the 2,200 [1] discovery requests by the November 30 deadline, and at the same time prepare its affirmative case in parallel and file its prepared testimony by the December 21 deadline. It is no answer to suggest an extension of the November 30 or December 21 deadlines for Licensee, or to suggest any delay in the commencement of the hearing January 8, 1980,

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[1] If eight preliminary paragraphs are applied to each of those requests, as set forth in the preface to the document, the requests actually total more than 16,000.

in order to accommodate the delay solely caused by Intervenor.

Throughout this proceeding, Licensee has emphasized its need to be in a position to make the repairs when they become necessary or economically desirable. See August 3 order, p. 24. Delay in commencing the proceeding is inconsistent with that objective.

Under the circumstances which have occurred in this proceeding outlined above, we believe the Board should deny the motion. However, the Board has indicated that its preliminary review of the Discovery Request discloses that it is probable that some of the requests may be appropriate. We respectfully submit that the Board cannot substitute its evaluation of the validity of the Discovery Requests for the requirement of good cause which must be shown before they can be filed. However, from this statement by the Board, we detect a concern that if the motion is denied, and no response made to the Discovery Requests, certain information might not otherwise be available to the Board for its determination of the issues in this proceeding.

For that reason, Licensee suggested a proposed procedure to the Board and parties which would accommodate this concern.

Pursuant to that procedure, we submit that upon receipt and review of this memorandum, and objections to the Discovery Requests by Licensee, and any Motion to Compel from Intervenor,

the Board will be in a position to deny the motion for lack of showing of good cause. However, the Board may at that time review the Discovery Requests to determine the validity of Licensee's objections to those requests which Intervenor elects to pursue by Motion to Compel and then determine whether any information sought therein should be available to the Board for its determination of the issues in this proceeding. Should it make such a determination, it can then direct the Licensee to address those subjects in its prepared written testimony. See, e.g., "Orders Requesting Additional Information" issued in this proceeding October 11, 1979.

CONCLUSION

This motion must be denied. The alternative procedure suggested by Licensee will assure development of a full and complete record without unfairly burdening or prejudicing the rights of any party.

DATED this 7th day of November, 1979.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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	)	50-251-SP
FLORIDA POWER & LIGHT COMPANY	)	
	)	(Proposed Amendments to Facility
(Turkey Point Nuclear Generating Units Nos. 3 and 4)	)	Operating License to Permit Steam Generator Repair)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the attached Licensee's Objections to Intervenor Mark P. Oncavage's Interrogatories to, and Request for the Production of Documents from Licensee, Florida Power and Light Company, and Memorandum of Licensee Relating to Untimely Discovery captioned in the above matter were served on the following by deposit in the United States mail, first class, properly stamped and addressed, on the date shown below.

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