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 RECIPIENT AFFILIATION: Atomic Safety and Licensing Board Panel

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SUBJECT: Notice of Comptroller General 801203 opinion disallowing procedural assistance in adjudicatory licensing proceedings. Comptroller General 801203 ltr to J Ahearne & Congressman M McCormack encl.

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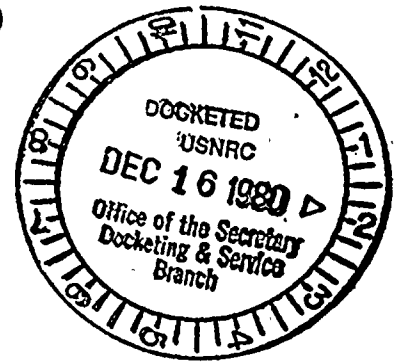
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Elizabeth S. Bowers, Chairman
Dr. Emmeth A. Luebke
Dr. Oscar H. Paris



SERVED
DEC 16 1980

In the Matter of:

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Nuclear Generating
Unit Nos. 3 and 4)

Docket Nos. 50-250-SP
50-251-SP

December 16, 1980

THE COMPTROLLER GENERAL'S OPINION
RELATIVE TO PROCEDURAL ASSISTANCE
IN ADJUDICATORY LICENSING PROCEEDINGS

On July 25, 1980, the Commission published the notice of "Procedural Assistance in Adjudicatory Licensing Proceedings" (45 Fed. Reg. 49535). On December 3, 1980, the Comptroller General issued an opinion that this aid was not permitted under the law.

A copy of the Comptroller General's opinion and his letter to Chairman Ahearne is enclosed for your convenience.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Elizabeth S. Bowers
ADMINISTRATIVE JUDGE

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY
REFER TO:

B-200585

December 3, 1980

The Honorable John F. Ahearne
Chairman, Nuclear Regulatory Commission

Dear Mr. Chairman:

We are enclosing for your information our letter of this date to the Chairman, Subcommittee on Energy Research and Production, Committee on Science and Technology, House of Representatives. In our letter we conclude that the Nuclear Regulatory Commission may not lawfully use funds appropriated by the Energy and Water Development Appropriation Act, 1981, Pub. L. No. 96-367, 94 Stat. 1331, to implement the procedural cost reduction program announced by the Commission in the Federal Register on July 25, 1980 (45 Fed. Reg. 49535).

Sincerely yours,

Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-200585

December 3, 1980

The Honorable Mike McCormack
Chairman, Subcommittee on Energy Research
and Production
Committee on Science and Technology
House of Representatives

Dear Mr. Chairman:

You have requested our opinion on the propriety of the procedural cost reduction program for intervenors being instituted by the Nuclear Regulatory Commission. This program is designed to ease the economic burden on intervenors in the Commission's adjudicatory proceedings by providing free copies of transcripts and by copying and serving without charge certain of the documents the intervenors need to participate in the proceedings. Under the program the Commission has also reduced from 20 to 2 the number of copies of filings required of all parties.

For the reasons indicated below, we conclude that, with the exception of the reduction of required copies, the Commission may not lawfully use its fiscal year 1981 appropriation to implement the cost reduction program.

The Commission's adoption of the program was announced in the Federal Register on July 25, 1980, (45 Fed. Reg. 49535). The program was effected by means of three amendments to the Commission's regulations relating to adjudicatory licensing proceedings in 10 CFR Part 2. First, Section 2.708(d) of that part was amended by reducing from 20 to 2 the number of copies of pleadings or other documents that every party to the proceeding is required to file. Second, Section 2.712 was amended by adding a provision that, except in antitrust proceedings, the Commission will copy and serve, at no cost to the party, the party's testimony, proposed findings of fact and conclusions of law, and responses to discovery requests. This free copying and service is available to all parties to the proceeding except the applicant for the license. Third, Section 2.750 was amended by adding a provision allowing the presiding officer at the proceeding to provide a free transcript of the proceeding to any party, other than the applicant, at the same time that the Commission staff receives its copies.

B-200585

Funds for carrying out the Commission's functions for fiscal year 1981, were appropriated by the Energy and Water Development Appropriation Act, 1981, Pub. L. No. 96-367, 94 Stat. 1331. Section 502 of this Act provides:

"None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act." (94 Stat. 1345)

It is clear from this language that if the procedural cost reduction program will pay the expenses of intervenors in the Commission's adjudicatory proceedings the Commission may not use funds appropriated by the fiscal year 1981 Appropriation Act to implement the program.

Obviously the cost reduction program will apply to the Commission's adjudicatory proceedings. The very title of the Federal Register announcement ("Procedural Assistance in Adjudicatory Licensing Proceedings") and the Federal Register summary ("NRC is amending its regulations in order to provide a one-year pilot program of procedural assistance in adjudicatory proceedings ***") make this clear.

It is equally clear that the beneficiaries of the program are to be intervenors in the Commission's proceedings. The amended regulations state that the free transcripts, copies, and service, are to be provided to parties "other than the applicant." The explanatory material in the Federal Register announcement indicates that procedural assistance will be offered "to all intervenors without qualification" (45 Fed. Reg. 49535), that copies of transcripts will be "mailed to intervenors" (Id. at 49536), and that the free copies of documents will reduce costs "to intervenors" (Id.).

Finally, it is certain that the program will "pay the expenses of" the intervenors. Clearly if the Commission did not adopt the cost reduction program then the costs of purchasing transcripts and copying and serving documents would be expenses that the intervenors would have to bear if they were to participate in the Commission's proceedings. By bearing these costs itself, the Commission is necessarily paying expenses of the intervenors even though the Commission is not making any cash payments directly to the intervenors.

Although the Commission's amended regulations speak of copies "without cost" to the intervenor, and of "free" transcripts, these copies and transcripts will not be "without cost" or "free" to the

Commission. The Commission will have to expend its appropriated moneys to make copies of documents and to pay the reporters the price of the transcripts.

The Commission itself, in its Federal Register announcement recognizes that it will be paying intervenor expenses. The announcement indicates that intervenors might ordinarily pay as much as \$1,000 per day to obtain transcripts and that by providing them to the intervenors at its own expense the Commission is providing "an expensive service," 45 Fed. Reg. 49535. Further, by providing free copies of certain documents and by serving them on behalf of the intervenors, the Commission would be performing "a service which would have high payoff in terms of reducing costs to intervenors ***" Id. at 49536.

Therefore, we must conclude that if the Commission implements its procedural cost reduction program using its fiscal year 1981 appropriations it will be violating Section 502 of the Appropriation Act.

The Commission's legal analysis, submitted with the request for our opinion, discusses language in the House report on the fiscal year 1980 Commission Appropriations Act that "The budget request and the committee recommendation do not include funds for intervenors." (H.R. Report No. 96-243, 96th Cong., 1st session 136. (June 7, 1979). The language of Pub. L. No. 96-367, quoted above, however, is stronger because it precludes paying the expenses of or otherwise compensating intervenors in addition to precluding the direct provision of funds to intervenors. The legal analysis also asserts that our 1976 decision on Commission intervenor funding, B-92288, February 19, 1976, found "no legal problems" with procedural cost reductions of the sort now proposed. However, the context of the discussion of cost reduction in that decision was limited to "simplifying procedures and eliminating unnecessary or unduly burdensome requirements" rather than shifting the cost burden of unchanged procedures and requirements from intervenors to the Commission.

Our conclusion does not apply to the Commission's amended regulation which states that all parties to the proceeding need file only the original and 2 copies of pleadings and other documents instead of the original and 20 copies which was formerly required. In our opinion by making this amendment the Commission is not paying intervenors' expenses, but rather is eliminating an adjudication cost for all of the parties by modifying its procedural requirements. As indicated in the previous paragraph, we determined in our 1976 decision that the Commission does have the authority to simplify procedures or eliminate unnecessary or

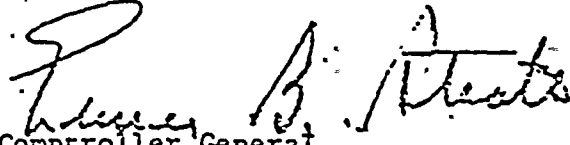
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unduly burdensome requirements which increase parties' costs in participating in the Commission's proceedings. B-92288, February 19, 1976.

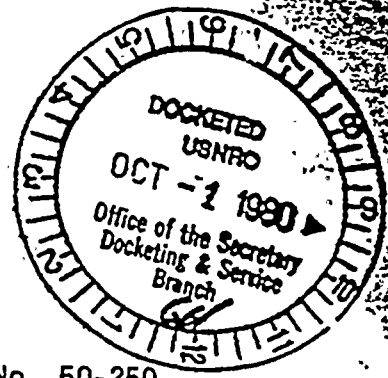
The Federal Register announcement indicates that the 20 copy requirement was "for the Commission's convenience for internal informational distribution ***" 45 Fed. Reg. 49536. Further, these 20 copies only partially met the Commission's needs and the Commission therefore produced additional copies. Therefore, the cost of producing the 20 copies was not a necessary expense of participating in the Commission's proceedings, but rather was an instance of the Commission requiring the parties to bear part of its own expenses. By eliminating this requirement for all parties, including intervenors, the Commission is not paying intervenor's expenses.

In your letter you posed questions concerning whether the Commission's program was consistent with the wishes of the Congress as expressed at H.R. Report No. 96-243, 96th Cong., 1st Sess. 139 (1979); with the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a; and with Office of Management and Budget Circular No. A-25. The enactment of Pub. L. No. 96-367, after you sent your letter, makes it unnecessary, in our opinion, to address the other questions posed in your letter. We have discussed this with a member of the subcommittee staff who indicated that in the interest of avoiding unnecessary delay we need not answer the other questions in your letter.

Sincerely yours,


Comptroller General
of the United States

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of
FLORIDA POWER AND LIGHT COMPANY
(Turkey Point Plant, Unit No. 3)

SERVED OCT 1 1980


Docket No. 50-250
(10 CFR 2.206)

ORDER

Pursuant to 10 CFR 2.772, the Commission's time to decide whether to review the Director's decision regarding this facility is extended to October 22, 1980.

It is so ORDERED.

For the Commission


SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.,
this 30th day of September 1980.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
FLORIDA POWER AND LIGHT COMPANY) Docket No.(s) 50-250
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(Turkey Point, Unit 3)) (2.206 Request)
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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 accordance 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
1st day of Oct 1990.

Peggy T. Downing
Office of the Secretary of the Commission

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