UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED MAY 4 1979

ATOMIC SAFETY AND LICENSING APPEAL BOARD

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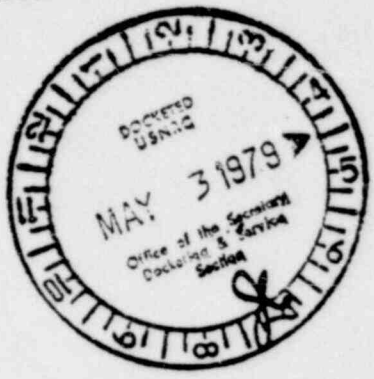

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit No. 2)	)	
	)	

Mr. Martin Harold Hodder, Miami, Florida, pro se and as counsel for intervenors Rowena E. Roberts et al.

Messrs. Harold F. Reis, Washington, D. C., and Norman A. Coll, Miami, Florida, for the applicant Florida Power & Light Company.

Messrs. James R. Tourtellotte and William D. Paton for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

May 3, 1979

(ALAB-543)

Last month we called for a hearing in this construction permit proceeding on an issue that had been troubling us for some time, i.e., the stability of the applicant's electrical grid and, ultimately, the general adequacy of this facility's emergency power systems. ALAB-537, 9 NRC__

(April 5, 1979). Our order has triggered disparate action by the parties.

The applicant was heard from first. It moved that we reconsider our decision and call off the hearing; in support, it asserts that the inquiry we wish to conduct is forbidden by Commission regulations. Alternatively, it wants us at least to convene a prehearing conference -- in substance an oral argument -- to consider its motion further.

At nearly the same time, the intervenors submitted their own motion. Obviously wanting the hearing to go forward, they have asked us to enter an order allowing them to conduct certain broad classes of discovery against the applicant. The applicant opposes the motion on a variety of grounds.

For its p rt, the staff has taken no position on the discovery request, pointing out that (as is now the case) the intervenors are seeking material only from the applicant. For a different reason, the staff has not responded to the substance of the applicant's motion. Rather than brief the merits, the staff has simply supported the suggestion that we all gather together to discuss the point

orally.[1/]

We deny both motions.

1. The applicant's motion rests almost entirely on its understanding of the so-called "single failure" standard. See 10 C.F.R. Part 50, Appendix A, "General Design Criteria." The application of that standard, however, requires careful judgment. What is involved here is the likelihood that diesel generators will not start on command. Generally speaking, the staff will permit this circumstance to occur as often as once in a hundred times during tests. It is far from certain that the single failure standard extends to, or was ever intended to extend to, a situation arising that frequently. In other words, it is not clear to us that a diesel engine's refusal to start is at all analogous (within the contemplation of the "single failure" standard) to, for example, the refusal of an electrically operated valve, pump, switch or relay to function on command.

In any event, the single failure standard appears in Commission criteria which, according to their own introductory terms, (1) are incompletely developed, (2) establish only minimum requirements, and (3) reflect the expectation

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1/ In doing so, the staff did not inform us of the position it was likely to take on the merits of the applicant's motion.

that "additional or different criteria" will have to be "identified and satisfied in the interest of public safety" in "unusual" situations.[2/] In addition to what we said above, the peninsular configuration of the south Florida electrical grid -- and the attendant system power failures which have therefore been encountered -- seem to us to present an "unusual" situation precisely within the explicit contemplation of the regulation itself.[3/]

The short of it is that the matter cannot be resolved as a question of law. At most from the applicant's point of view, it may prove to be a mixed question of law and fact. As such, it is best resolved after a hearing, not on the papers before us or on lawyers' arguments at a prehearing conference.

2. The intervenors' discovery motion is somewhat ambiguous. It is not clear whether they are seeking the

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2/ See 10 C.F.R. (1978 rev.) at 349.

3/ Similarly, if the applicable regulations did clearly bar our inquiry, the facts we have noted would provide the "special circumstances" necessary to justify us in asking the Commission itself to waive the bar and to let us proceed. See 10 C.F.R. §2.758. In view of the exception already built into the regulations, however, there is no need to invoke the "special circumstances" procedure here. Thus we do not set out the full reasoning which we would furnish the Commission if that procedure were involved. To some extent, however, that reasoning already appears in ALAB-537.

requested order because they think that (1) no discovery would otherwise be permitted in any proceeding before us (as opposed to one before a licensing board); (2) no discovery at all can take place in this particular proceeding without our first opening the door; or (3) in all proceedings each discovery measure employed must receive advance approval.[4/] We need not pause, however, to divine their intentions. In all the circumstances, including the timing and extent of the intervenors' participation on this matter thus far, and our own role in fashioning the way that the issue has been developed, we believe that the following course is appropriate.[5/] The applicant and staff should continue to prepare their written direct testimony. Possibly, much of the material sought by the intervenors will be reflected in that testimony. Or, to the extent that the applicant and staff begin now to make such material available informally -- as has been done in other similar situations[6/]

4/ The first and last of these theories do not comport with Commission practice.

5/ Whenever we conduct a hearing as part of our appellate review function, we must fashion time periods and procedures for discovery different from those contemplated by the Rules of Practice, which are structured in terms of licensing board hearings.

6/ See Public Service Company of New Hampshire (Seabrook Units 1 and 2), ALAB-488, 8 NRC 187, 193 (1978); and our unpublished order of April 9, 1979 in Virginia Electric and Power Company (North Anna Units 1 and 2), Docket Nos. 50-338 and 50-339 (copies are being sent to counsel; the comments we made there might well guide the parties here).

-- any need for formal discovery may be obviated. In any event, after the testimony of those two parties is filed the intervenors will be in a better position to make any specific formal requests to the parties then thought warranted. And, by the same token, if it then becomes necessary for us to referee any disputes, we will be in a better position to do so. In the interim, cooperation among the parties will do much to reduce the scope of the discovery matters that may eventually have to be brought before us for resolution.

Motions denied.

It is so ORDERED.

FOR THE APPEAL BOARD

Margaret E. Du Flo
Secretary to the
Appeal Board