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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

B. Paul Cotter, Jr., Chairman
Glenn O. Bright
Jerry Harbour

SERVED JAN 19 1990

In the Matter of FLORIDA POWER AND LIGHT COMPANY (Turkey Point Nuclear Generating Plant, Units 3 and 4)	Docket Nos. 50-250-OLA-4 50-251-OLA-4 (Pressure-Temperature Limits) (ASLBP No. 89-584-01-OLA) January 16, 1990

MEMORANDUM AND ORDER
(Denying Petition to Intervene)

On October 19, 1988, notice was published in the Federal Register specifying that persons whose interest might be affected by this proceeding and who wished to participate as a party "must file [by November 18, 1988] a written petition for leave to intervene." 53 Fed.Reg. 40981, 40988 (1988). Eleven months after the close of the time specified in that notice, the Nuclear Energy Accountability Project (NEAP) and its Executive Director, Thomas J. Saporito, Jr., seek leave to intervene in this

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proceeding.[1] Both the Licensee and the NRC staff oppose intervention by these petitioners, principally on standing and lateness grounds.[2] For the reasons set out below, we deny the petition as to both petitioners.[3]

Our authority to entertain a late-filed petition for leave to intervene turns on a balancing of five factors set out at 10 CFR § 2.714(a)(1). Those factors are:

> (i) Good cause, if any, for failure to file on time.
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> (ii) The availability of other means whereby the petitioner's interest will be protected.
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> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.

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[1] Petition for Leave to Intervene (October 22, 1989)(hereinafter cited as "Petition at __"); Clarification of Contentions and Answer to Licensee's Response in Opposition to NEAP/Saporito Petition for Leave to Intervene (November 16, 1989)(hereinafter cited as "Clarification at __").

[2] Licensee's Response in Opposition to NEAP/Saporito Petition for Leave to Intervene (November 13, 1989); NRC Staff's Response to Petition for Leave to Intervene of Thomas J. Saporito, Jr. and the Nuclear Energy Accountability Project (November 16, 1989).

[3] For a discussion of the history of this proceeding and the specific nature of the license amendments at issue, see Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-89-15, 29 NRC 493, 495-98. In addition, in a separate Memorandum and Order issued contemporaneous with this decision, we resolve all issues remaining in this proceeding in the licensee's favor, and sustain the Staff's issuance of the license amendment under challenge here.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

While all five must be considered and none is dispositive, the most important of the five factors is the presence or absence of "good cause" justifying the lateness of the petition. Absent "good cause", a petitioner bears a heavy burden to justify a late intervention based on the remaining four factors. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Wisconsin Public Service Corporation (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 83 (1978).

I. Good Cause

Mr. Saporito advances three reasons for his failure to file a petition to intervene in this proceeding within the time specified in the Notice of Opportunity for Hearing. Those reasons are: (1) he was an employee of the licensee; (2) he was not aware of the severe radiation damage to the Turkey Point facility; and (3) he did not have actual notice of the opportunity for a hearing. Petition at 20; Clarification at 6. Whether viewed individually or jointly, these reasons fail to support a finding of "good cause."[4]

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[4] Because we find each of the reasons advanced by Mr. Saporito wanting, we need not address the question of whether otherwise meritorious but, under the applicable facts, hypothetical justifications for a late-filed petition can satisfy 10 CFR § 2.714(a). In our view, they cannot. Because we read § 2.714 to require us to engage in a balancing of the competing factual equities, we believe a petitioner has an obligation to advance those reasons, and

As a general rule, a decision to remain silent, and refrain from intervening in a timely manner is no justification for a Board to permit intervention in an untimely manner. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 396 n.37 (1983). Mr. Saporito asserts, however, that he was unable to initially file a timely petition because he was employed during the relevant filing period by Licensee, Florida Power and Light Company, implicitly suggesting that the threat of employer retaliation explains and justifies his inaction. Petition at 6; Clarification at 20. We are unable to find and petitioners fail to identify, any statute, regulation, policy statement or Commission case law that even suggests that employees of an applicant or licensee are entitled to a generic exemption from the Commission's procedural rules. We decline to author such a rule here.

Employees of an applicant or licensee are in a unique position to know of potential safety problems that might exist at a particular nuclear power facility yet may confront practical difficulties in identifying those

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only those reasons, which in fact reasonably caused the failure to act in the timely manner. For example, reading Mr. Saporito's first three reasons for his inaction together, he in essence asks this Board to excuse his one year delay because, as an employee of the licensee, he could not raise concerns he didn't have in a proceeding he knew nothing about.

potential problems for evaluation and, if necessary, resolution. In our view, the purpose of Section 210 of the Energy Reorganization Act, as amended, 42 U.S.C. § 5851(a), "Employee Protection,"[5] is to ensure that these potential problems are raised in a timely manner and to the proper forum by broadly prohibiting, inter alia, retaliation against an employee who commences or participates in any manner in a proceeding under the Atomic Energy Act of 1954 as amended.[6]

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[5] In pertinent part, 42 U.S.C. § 5851 provides that:

> [n]o employer...may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under [the Energy Reorganization Act of 1974] or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under [those Acts];
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding...

42 U.S.C. § 5851(a).

[6] While it appears that, ordinarily, the Commission's regulations implementing Section 210 contemplate that employees of an applicant or licensee would participate in a licensing proceeding by way of testimony (see 10 CFR § 50.7(a)(1)), the regulation does not exclude participation as an intervenor from the scope of protected activities. Moreover, the express language of Section 210 clearly encompasses such participation.

The Commission has successfully argued elsewhere that the courts must construe Section 210 in a manner that give its protections practical, meaningful and broad effect. See, Kansas Gas & Electric Company v. Brock, 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011 (1986). Presumably, that argument applies with equal, if not greater, force to the Commission's own adjudicatory bodies. Yet, to adopt Mr. Saporito's proposition that his employment status, standing alone, constitutes "good cause" for late intervention requires that we find Section 210 to be a meaningless and ineffective protection in one of the very situations and for the very class of individuals it was intended to serve. Mr. Saporito's own experience in exercising his rights under Section 210 argues to the contrary.[7] It would be inconsistent to affirmatively give effect to Section 210 in one context while at the same time

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[7] Mr. Saporito's employment with the licensee was terminated December 22, 1988. Based on complaints filed pursuant to Section 210(b)(1) of the Energy Reorganization Act, as amended, the District Director for the U.S. Department of Labor made a preliminary investigative finding that the termination of Mr. Saporito's employment constituted retaliation in violation of Section 210(a) of the Act. The District Director went on to order Mr. Saporito's reinstatement and the payment of compensatory money damages in the amount of $100,000. In re Thomas J. Saporito , DOL Nos. 89-ERA-7 and 89-ERA-17. While this unrelated case is currently pending before the Secretary of Labor on appeal, it indicates that Mr. Saporito was personally aware of the steps necessary to invoke the protection of Section 210 and the scope of potential remedies that Section provides.

conclude that the statutory provision must be assumed to be ineffective in another context.

Moreover, one of the guiding principles underlying both the Commission's rules of practice and Section 210 is that potentially important and significant safety information should and must be aired identified, evaluated and resolved in a timely manner. Thus, we are troubled by any rule which could encourage individuals to delay entering a proceeding, awaiting an opportune time to spring forth to claim intervenor status based on potentially significant safety concerns or information. Not only would such a rule wreak havoc with the concept of finality and the orderly conduct of administrative proceedings, it gives rise to the possibility that such concerns might never come to light because, in the mind of the silent employee, the "opportune time" never arrives.

Notwithstanding the absence of a generic exemption for licensee or applicant employees, we do not foreclose the possibility that special facts might exist which would warrant a departure from the general rule that one cannot successfully stand on his rights to file an untimely petition after sitting on his rights to file a timely petition. While petitioners allude to a pervasive fear of employer retaliation, mere assertions of fears of retaliation do not come close to the type of special facts we believe necessary. Nor do we find sufficient the fact

that Mr. Saporito may have been the victim of such retaliation at some point after November 18, 1988, the date relevant here. Without more than was offered by Petitioners, we cannot find (nor will we assume) that Mr. Saporito's employer's actions after November 18 so infected or controlled Mr. Saporito's actions prior to November 18 so as to render him effectively incapable of exercising his rights under the Commission's rules of practice as protected by Section 210 of the Energy Reorganization Act.

As to his second justification, Mr Saporito appears to suggest that he originally had no safety concerns (or didn't realize that he should have had concerns) regarding the license amendment at issue here. Stated another way, during the filing period specified in the October 1988 Federal Register notice, he had yet to put the pieces of his safety puzzle together. This does not excuse the failure to comply with the Commission's procedural rules. While newly-arising information has been recognized as "good cause," Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982), previously available information newly-acquired by a petitioner has not. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984).

Finally, Mr. Saporito's claim that he lacked actual notice of the license amendment or its attendant opportunity for a hearing is without merit. While an early decision of

the Appeal Board suggested that the door was open on the question whether publication in the Federal Register was sufficient, standing alone, to put potential intervenors on notice, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-148, 6 AEC 642, 643 n.2 (1973), that door was subsequently closed in Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), ALAB-341, 4 NRC 95 (1976), wherein the Appeal Board summarily rejected a petition to intervene filed beyond the period specified in the applicable Federal Register.

Moreover, even assuming arguendo that Mr. Saporito's employment status, his lack of actual notice, and his failure to comprehend the existence of possible safety problems justifies the failure to file a timely petition to intervene, these reasons only excuse a portion of the delay that accompanied Mr. Saporito's instant petition.

His employment with the licensee terminated in December 1988.[8] Mr. Saporito certainly had actual notice of this proceeding and the issues before us as early as the March 1989 pre-hearing conference, a conference he attended. And while the record is unclear as to when Mr. Saporito's safety concerns "came together," that event must have occurred prior to April 6, 1989, when he served the first of a series

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[8] See note 7, supra.

of filings with this Board.[9] Thus, as of April 1989, all the disabilities identified by Mr. Saporito as rendering him unable to file a timely petition to intervene had been cured. Yet, another six months passed before the instant petition was filed with the Board.[10]

As to this additional delay, Mr. Saporito offers two justifications for the lateness of the instant petition: (1) the NRC staff advised him that his concerns would be addressed in this proceeding and (2) he relied upon Intervenors to address his copper content concerns through their Contention No. 3. Petition at 21; Clarification at 6-7. Once again, the reasons proffered to justify the additional six months delay in the filing of the instant petition fall far short of the mark.

Mr. Saporito originally sought to raise his safety concerns through a request filed with the NRC staff under 10 CFR § 2.206 (1989). According to petitioners, the staff

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[9] Prior to the instant Petition for Leave to Intervene, Mr. Saporito filed five documents with the Board. See, "Statement for Reconsideration," (April 6, 1989)' "Amended Petition for a Limited Appearance Statement," (August 30, 1989); "Notice of Appearance," (August 30, 1989); Request for Contention Reconsideration," (September 7, 1989); "Relevant Information for Consideration," (October 14, 1989).

[10] We note that the Commission summarily rejected as untimely a request for a hearing filed five months late by this same petitioner for the purpose of challenging a license amendment involving this same facility. Unpublished Order Denying Request for Hearing (May 30, 1989), Florida Power and Light Company (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251.

declined to take action on Mr. Saporito's request because his copper content concern was the subject of this proceeding. Petitioner at 21. However, Mr. Saporito makes no effort to explain how this action by the NRC staff can be translated into "good cause" justifying a late-filed petition to intervene.[11] We can only read curious absence of argument to mean that Mr. Saporito cites the staff's action not as justification for his delay in seeking intervention, but rather, as the justification for his reasonable reliance upon the existing Intervenors to address his copper content concerns through their Contention No. 3. Unfortunately, a claim by a petitioner that it was lulled into inaction because it relied on another party or entity to represent its interests does not constitute "good cause." See, Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 796 (1977).

As to NEAP, Mr. Saporito argues that as its founder and Executive Director, the organization stands in his shoes, with the lateness of its organizational and representative petition to intervene justified to the same extent the lateness of his individual petition is justified.

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[11] Indeed, having been advised that his concerns would be addressed in this proceeding, one would have expected Mr. Saporito to expeditiously seek intervention to ensure that he might participate in how those concerns were resolved. Yet, as best as we can determine from the face of petitioners' various filings, the staff's response apparently did not galvanize petitioners to action.

Clarification at 7. He alternatively argues that NEAP had not obtained incorporated status as of the close of the time specified in the Notice of Opportunity for Hearing, and thus could not file a timely petition to intervene. Petition at 20.

Having found Mr. Saporito's individual petition to intervene inexcusably late, his own logic requires that we similarly find the lateness of NEAP's petition wholly unjustified. As to his alternative argument, newly-acquired organizational existence does not constitute "good cause." Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570 (1980).

Neither petitioners have advanced any reasons which, either singly or in combination, constitute "good cause" for their eleven month delay in filing their petition to intervene. This being the case, we turn to the other four factors to determine whether petitioners make a compelling argument justifying intervention notwithstanding their inexcusable delay.

II. Other Means to Protect Rights

The Licensee argues that intervention in this proceeding is not the only mechanism through which the petitioners can protect their interests, noting that they can file a petition for staff enforcement action under 10 CFR § 2.206 (1989). However, we have already held that a petitioner's rights under § 2.206 are poor substitutes for

their participation in an adjudicatory hearing. LBP-89-15, 29 NRC 493, 506 (1989). See, Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-76 (1983). Accordingly, this factor weighs in favor of intervention.

III. Contribution to Development of Record

Where, as here, a compelling argument for intervention must be made due to the absence of "good cause" explaining a late-filed petition to intervene, a petitioner has a special responsibility to particularize how its participation can reasonably be expected to assist in the development of a sound record. Petitioners suggest that this factor should be found to support intervention because they will attempt to retain a metals fracture expert to testify at hearing, and because of Mr. Saporito's experience and knowledge of particular aspects of the operational procedures and history of the Turkey Point facility. Petition at 22; Clarification at 9.

We do not doubt the sincerity of petitioners' conviction that their information and assistance would help in developing a sound and complete record in this proceeding. However, in light of petitioners' avowed interest in pursuing areas of inquiry no longer at issue before this Board, the potential significance of their contribution to the resolution of the issues currently pending before this Board is, at best marginal. Moreover,

even if the issues before us were to be broadened, the proposed participation by the petitioners does not, in our view, rise to the level of a compelling case supporting the grant of a late-filed petition to intervene.

IV. Representation by Other Parties

Petitioners argue that no other party can represent their particular interests since Intervenors do not presently advance any contentions identical to those which petitioners seek to litigate. Petition at 22; Clarification at 10-13. Because we have already concluded that petitioners' reliance upon the Intervenors to represent their interests does not constitute "good cause" justifying their late-filed petition, it would be contradictory to suggest nonetheless that they can rely upon the Intervenors to represent their interests under this factor. Accordingly, we view this factor as supporting intervention.

V. Potential for Delay/Broadening of Issues

As of the date of the instant petition, discovery had already taken place in this proceeding, summary disposition motions had been filed and responded to by all parties, and the hearing, if necessary, had been scheduled to begin in less than three months. Thus, petitioners' eleven month-late petition comes at the eleventh hour of this proceeding. Nonetheless, petitioners argue that a grant of their petition to intervene would neither unduly delay the proceeding nor broaden the issues currently pending before

this Board. Petition at 22; Clarification at 13. We disagree.

The existing parties, the public and this Board have a cognizable interest in the timely and orderly conduct of our proceedings. See, Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-49 (1979). Thus, the fact that these petitioners are prepared to go forward with their arguments immediately, and that intervention would not delay already issued license amendments does not fully answer the policy consideration underlying the Commission's concerns under this factor.

Under the Commission's rules of practice, a party has a right to discover, prior to hearing, the nature and factual bases of all other parties' litigation positions. Should we grant intervention at this late date, a significant delay could be avoided only at the expense of the discovery rights of the existing parties to the detriment of the orderly and efficient conduct of any future hearing, if necessary, in this case.

Moreover, despite claims under this factor to the contrary, we note that petitioners strenuously argue in terms of the ability of others to represent their interests that petitioners proffered contentions focus on different matters than those addressed in Intervenors' remaining contentions. See, Clarification at 10-13. Thus, the purpose of the instant petition is, in fact, to broaden the

scope of this proceeding. While this consequence of a late intervention might not be of critical importance at the earlier stages of a case, we find it to be a strong argument against such intervention where it occurs toward the end of the proceeding, particularly where no "good cause" exists to justify the delay in seeking intervention.

CONCLUSION[12]

Based on our assessment of each of the five factors governing late-filed petitions to intervene, we have concluded that only the absence of other means to protect their interests and the inability of other parties to represent their interests favor granting petitioners' late-filed motion to intervene. In a case presenting a strikingly similar balance, the Appeal Board has held that

> ...it is most difficult to envisage a situation in which [these two factors] might serve to justify granting intervention, after the hearing date was set, to one who (1) is inexcusably late; (2) seeks to expand materially the scope of the proceeding; and (3) offers, at best, a marginal showing with respect to its ability to make a truly significant, substantive contribution.
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> * * *
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> By ... remaining on the sidelines while the proceeding moved closer and closer to trial,

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[12] Because we conclude that the instant petition was inexcusably late and its acceptance is not supported by a balancing of the other factors set out at 10 CFR § 2.714(a)(1), we need not address the standing arguments made by the parties. See, Licensee Response at 2-7; Staff Response at 6-9; Clarification at 2-5. Nonetheless, we note that even if petitioners' assertions supporting their standing are given all reasonable weight possible, an affirmative finding of either individual or organizational standing would be at best a close call.

> [petitioners] voluntarily assumed the precise risk which has now materialized: that its participation in the proceeding could no longer be sanctioned without destructive damage to both the rights of other parties and the integrity of the adjudicatory process itself.

South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 881, 895 (1981).

The Petition for Leave to Intervene dated October 22, 1989 filed by the Nuclear Energy Accountability Project and Thomas J. Saporito, Jr. is denied in its entirety. Pursuant to 10 C.F.R. § 2.760 of the Commission's Rules of Practice, this decision will constitute the final decision of the Commission thirty (30) days from the date of its issuance, unless an appeal is taken in accordance with 10 C.F.R. § 2.762 or the Commission directs otherwise. See also 10 C.F.R. §§ 2.785 and 2.786.

ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
Glenn O. Bright
ADMINISTRATIVE JUDGE

Jerry Harbour
Jerry Harbour
ADMINISTRATIVE JUDGE

B. Paul Cotter, Jr.
B. Paul Cotter, Jr., Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
FLORIDA POWER AND LIGHT COMPANY	Docket No.(s) 50-250/251-OLA-4
(Turkey Point Plant, Unit Nos. 3 & 4)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (DENYING PETITION...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
B. Paul Cotter, Jr., Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Glenn O Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry Harbour
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Janice E. Moore, Esquire
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Patricia Jehle, Esquire
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Harold F Reis, Esquire
Attorney for FP&L
Newman & Holtzinger, P.C.
1615 L Street, N.W., Suite 1000
Washington, DC 20036

Joette Lorion, Director
Center for Nuclear Responsibility
7210 Red Road, #208
Miami, FL 33143

*Thomas J. Saporito, Jr., Exec. Director
Nuclear Energy Accountability Project
1202 Sioux Street
Jupiter, FL 33458

Dated at Rockville, Md. this
19 day of January 1990

Kris Cotter
Office of the Secretary of the Commission