

10377

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'90 MAY 21 A10:06

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

Docket Nos. 50-250 OLA-5
50-251 OLA-5

FLORIDA POWER & LIGHT COMPANY)

(Turkey Point Plant, Units 3
and 4))

(Technical Specifications
Replacement)

APPLICANT'S REPLY TO
NEAP'S RESPONSE TO THE
ASLB'S MEMORANDUM AND ORDER

I. Introduction

In a Memorandum and Order dated April 24, 1990, the Licensing Board directed the Nuclear Energy Accountability Project ("NEAP") to respond to certain questions regarding NEAP's standing to intervene. On May 5, 1990, NEAP submitted "NEAP's Response to the ASLB's Memorandum and Order" ("NEAP Response") which contained an "Affidavit of Shirley Brezenoff" ("Brezenoff Affidavit"). Florida Power & Light Company ("Applicant") hereby files its reply to the NEAP Response.

NEAP states it is relying on the standing of one of its "members," Ms. Brezenoff, as the basis for its standing in this proceeding. (NEAP Response at 3). Based upon the Brezenoff Affidavit, it appears that Ms. Brezenoff would have had the requisite standing to intervene in this proceeding. However, she has not submitted such a petition and, as explained below, neither the Brezenoff Affidavit nor the NEAP Response provides an adequate foundation for allowing NEAP to derive standing based on

9005220391 900517
PDR ADDCK 05000250
G PDR

D503

the standing of Ms. Brezenoff. Accordingly, NEAP's petition to intervene should be denied.

II. Relevant Legal Principles

A. General Principles

Under 10 C.F.R. § 2.714 (1990) of the Commission's regulations, a person has a right to intervene in an NRC proceeding only if he has an interest that may be affected by the results of the proceeding. The Commission has held that, in determining whether a person has an interest which may be affected by a proceeding, "contemporaneous judicial concepts of standing should be used." Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).

As the U.S. Supreme Court explained in Diamond v. Charles, 476 U.S. 54, 61-62 (1986), judicial concepts of standing have their underpinnings in Article III of the Constitution, which limits the power of federal courts to deciding "cases" and "controversies."

The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. This Court consistently has required, in addition, that the party seeking judicial resolution of a dispute "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of the other party.

Id. Thus, standing will not be afforded to "'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" Id.

In accordance with this principle, both the courts and the NRC have adopted the general rule that a person cannot acquire standing based on the interests of third persons. See Warth v. Seldin, 422 U.S. 490, 499-500 (1975); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474-75 n.1 (1978). This principle is applicable even in cases where the third person has explicitly authorized the complainant to undertake litigation as his representative. For example:

- ° In American Legal Foundation v. FCC, 808 F.2d 84, 88-91 (D.C. Cir. 1987), the court denied representational standing to an organization even though individuals who appeared to have standing submitted affidavits stating that the affiants supported the suit brought by the organization and that the organization represented the interests of the affiants.
- ° In Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 459 (1979), a licensing board denied an organization representational standing even though individuals with standing authorized the organization to represent their interests and supported the position of the organization.

One exception to the general rule that an individual may not represent third persons applies to the standing of organizations to represent the interests of their members. O'Hair v. White, 675 F.2d 680, 691 (5th Cir. 1982). Both the courts and the NRC have held that an organization may acquire standing if one of its

members has standing and if the member has authorized the organization to represent his interests. Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979).

This exception for organizations is attributable to the unique relationship between an organization and its members. As the U.S. Supreme Court noted in one of the earliest cases involving representational standing, NAACP v. Alabama, 357 U.S. 449, 459 (1958), the NAACP was an appropriate party to assert the rights of its members, "because it and its members are in every practical sense identical." It is this theoretical identity between an organization and its members which forms "the core concept of associational representation." Telecommunications Research & Action Center v. Allnet Communication Services, Inc., 806 F.2d 1093, 1095-96 (D.C. Cir. 1986).

However, even an organization does not have an unlimited right to represent the interests of its members. See O'Hair v. White. For example, the U.S. Supreme Court has stated that an organization may acquire representational standing only if:

- (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). Satisfaction of these criteria is necessary to

ensure that there is a sufficient identity between the organization and its members. See Telecommunications Research & Action Center.

Before the three-part test in Hunt can be addressed, however, it is first necessary to consider the threshold question of what constitutes membership in an organization. In Hunt, the Supreme Court answered this question by stating that, for purposes of representational standing, an individual will be deemed a member of an organization if he possesses the "indicia of membership." Hunt, supra, 432 U.S. at 344. The Court also identified various criteria relevant to a determination of whether "indicia of membership" exist. Such criteria include whether the individuals elect the controlling body of the organization, serve on the body, and finance the organization's activities. Id., 432 U.S. at 344-45. In short, to have "indicia of membership" in an organization, a person must be able to exercise at least some control over the organization. Health Research Group v. Kennedy, 82 F.R.D. 21, 26-27 (D.D.C. 1979).

In a number of cases, a court has rejected the standing of an organization who attempted to base its standing on the standing of individuals it chose to designate as "members" or other persons who had a relationship with the organization, but who did not possess "indicia of membership;" i.e., did not exercise any control over the organization. For example:

° In Health Research Group v. Kennedy, 82 F.R.D. 21, 27 (D.D.C. 1979), a court held that persons, who contributed financial support to and communicated with

an organization but who did not elect the board of directors of the organization or otherwise exercise any control over the organization, could not be construed as "members" for the purpose of standing.

- ° In Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 993 (D. Mon. 1981), the court held that an organization could not derive its standing from the standing of its "supporters" because, among other reasons, the supporters did not possess the "indicia of membership" identified in Hunt.
- ° In Clonlara, Inc. v. Runkel, 722 F. Supp. 1442, 1450-1451 (E.D. Mich. 1989), a court held that the standing of the "members" of an organization was not sufficient to bestow standing on the organization because, among other things, the "members" merely purchased a service from the organization, could not elect its board of directors, and did not have input into the management of the organization.
- ° In American Legal Foundation v. FCC, 808 F.2d 84, 89-90 (D.C. Cir. 1987), a court held that an organization could not base its standing on the standing of its "supporters" because they did not possess any of the "indicia of membership," such as selecting the organization's leadership, guiding its activities, or financing the activities.

The cases discussed above should be contrasted with cases such as Sierra Club v. Aluminum Co. of America, 585 F. Supp. 842, 850-51 (N.D.N.Y. 1984), where the court found that the Sierra Club had representational standing based upon the standing of members who did "in fact retain effective control over the organization" by paying dues and exercising voting rights to set policy and elect the board of directors.

In summary, under contemporary judicial concepts of standing, an individual may not base its standing on the interests of third persons. An exception to this general rule applies in the case of an organization and its members, due to

the identity between the two. However, an organization may possess representational standing based upon the standing of its members or supporters only if such individuals possess "indicia of membership." Mere designation of a person as a "member" is not sufficient.^{1/} Instead, in order to ensure the identity between the organization and its members, the "members" in question must be able to exercise some control over the affairs of the organization by means such as voting for the board of directors of the organizations.^{2/}

B. Indian Point Decision

In Consolidated Edison Co. (Indian Point, Unit No. 2), LBP-82-25, 15 NRC 715, 733-36 (1982), a licensing board explicitly declined to apply one of the cases cited above, Health Research Group. Instead, the board ruled that an organization had representational standing based upon the standing of financial supporters who indicated a desire to be represented by the

-
- 1/ In an analogous case involving the definition of "members" under the Federal Election Campaign Act, the U.S. Supreme Court held that persons who contribute or respond to the solicitations of an organization and who are sent "membership cards" are not "members" of the organization because they could not elect the organization's officials or exercise control over the expenditures of the organization. See FEC v. National Right to Work Comm., 459 U.S. 197, 206 (1982).
 - 2/ In addition, to ensure the requisite identity of an organization and its members, the last two parts of the Hunt test must be satisfied; i.e., the individual interests sought to be protected must be germane to the purpose of the organization, and the claims and relief must not require participation by the individuals.

organization. For several reasons, this decision is not sound and should not be afforded any precedential weight.

First, on appeal, the Commission explicitly declined to reach a conclusion on the correctness of this ruling. CLI-82-15, 16 NRC 27, 31 (1982). Similarly, the Appeal Board has explicitly declined "to explore the question whether representational standing can be based on the personal interests of a mere financial contributor to the organization." Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402, 404 n.2 (1979). Therefore, the status of NRC case law on this issue is not settled, and the Licensing Board in this proceeding is free to apply the principles of Health Research Group.

Second, as the Licensing Board has recognized, questions of standing in NRC proceedings should be based on contemporaneous judicial standards.^{3/} As discussed in the previous section, numerous court decisions have held that an organization has representational standing based upon the standing of an individual only if he possesses "indicia of membership" in the organization. In this regard, it has been recognized that "supporters," "financial contributors," and even "members" of an organization do not have "indicia of membership" unless they exercise some control over the organization. Since the licensing board decision in Indian Point is inconsistent with this judicial

^{3/} Memorandum and Order (April 24, 1990) at 9.

principle of standing, the decision should not be applied in this proceeding.

Finally, it is apparent that the licensing board in Indian Point misread Health Research Group. The plaintiffs in Health Research Group were Public Citizen and the Health Research Group, which was funded and operated by Public Citizen. Both Public Citizen and Health Research Group attempted to base their representational standing on the standing of individuals who financially contributed to and communicated with Public Citizen. The court identified two "independent reason[s]" for denying representational standing to the plaintiffs. First, the court found that the financial supporters did not possess "indicia of membership" because they had "absolutely no direct control over either plaintiff." 82 F.R.D. at 27. In this regard, the court stated:

[T]here is a material difference of both degree and substance between the control exercised by masses of contributors tending to give more or less money to an organization depending on its responsiveness to their interests, or through the expression of opinion in the letters of supporters, on the one hand, and the control exercised by members of an organization as they regularly elect their governing body, on the other.

Id. (emphasis in original).

As to the second "independent reason," the court held that the plaintiffs did not possess representational standing based on the standing of contributors to Public Citizen, because the interests that the plaintiffs sought to protect were not "germane" to the purpose of Public Citizen. Thus, the court

found an "absence of any substantial nexus" between the contributors and Public Citizen (and therefore to Health Research Group). 82 F.R.D. at 28.

Thus, the court in Health Research Group held that it was necessary for an organization to demonstrate both that its supporters possessed "indicia of membership" and that the purpose of the organization was germane to the interests of the supporters. The licensing board's logic in Indian Point was faulty because it mixed and confused these two independent criteria in Health Research Group. The licensing board held that the supporters of the Union of Concerned Scientists ("UCS") possessed "indicia of membership" because the UCS intervention in Indian Point was germane to the purpose of UCS and there was a "nexus" between the goals or interests of UCS and those of its supporters. 15 NRC at 734-36. However, as the court indicated in Health Research Group, but the licensing board failed to realize in Indian Point, questions regarding "indicia of membership" are separate and independent of issues regarding "nexus" and "germaneness" among the interests of the supporters, the goals of the organizations, and the purpose of the litigation.^{4/} In particular, "indicia of membership" are not established merely because a "nexus" exists between the purpose of an organization and the interests of its "supporters" or

^{4/} Similarly, in Hunt, the U.S. Supreme Court also treated issues pertaining to "germaneness" separately from issues pertaining to "indicia of membership." See 432 U.S. at 343-44.

"members." Instead, "indicia of membership" require some measure of control by the "supporters" or "members." Since the licensing board in Indian Point did not recognize the distinction between the "indicia of membership" requirement and the "nexus" or "germaneness" requirement, its conclusion was erroneous.

Furthermore, the "indicia of membership" requirement may not be ignored. A "member" must be able to exercise control over an organization in order to enable the organization to demonstrate its identity with its members and thereby qualify for the exception to the general rule that a person cannot acquire standing based on the interests of third persons. Contrary to the apparent belief of the licensing board in Indian Point, the mere similarity of interests or goals between an organization and a third person, though necessary, is not sufficient to establish this identity or confer representational standing on the organization. As the court stated in Health Research Group:

[A] plaintiff cannot gain standing merely on a showing that its interests and expertise are germane to the interests of any third parties who would have standing in their own right.

82 F.R.D. at 26. In short, representational standing of an organization must be based on the standing of a person who can exercise control over the organization.

The licensing board in Indian Point attempted to distinguish Health Research Group on the grounds that the organization which petitioned to intervene in the Indian Point proceeding based its standing on individuals who "financially support the

organization's objectives and have indicated desire to be represented by the organization." 15 NRC at 736. However, this distinction is of no significance. As the decisions in American Legal Foundation and South Texas Project clearly hold, an organization is not entitled to base its representational standing on the standing of individuals who support the organization and have authorized it to represent their interests, unless the individuals also possess the requisite "indicia of membership" in the organization.

Since the decision in Indian Point did not apply contemporary judicial concepts of representational standing, the decision was incorrect. Consequently, Indian Point should not be applied in this proceeding.

III. NEAP's "Members" Do Not Possess The Requisite "Indicia of Membership"

NEAP is an organization incorporated in the State of Florida. NEAP's Articles of Incorporation, filed with the Florida Secretary of State, designate Mr. Saporito, Rosemary Saporito (the wife of Mr. Saporito) and George Dunbar of Tequesta, Florida as the founders of NEAP.

Management of the corporate affairs of NEAP is governed by Article Eight of its Articles of Incorporation. This Article states that the "powers of this corporation shall be exercised, its properties controlled, and its affairs conducted by a board of trustees." This Article also designates Thomas J. Saporito,

Rosemary Saporito, and George Dunbar as the first board of trustees, and it states that the initial officers of NEAP are to be elected at the first meeting of the board of trustees. Mr. Saporito is also the Executive Director, President, and Treasurer of NEAP.^{5/}

The Articles of Incorporation do not set forth the qualifications or rights of members. They merely state:

ARTICLE FIVE-MEMBERSHIP

The corporation shall have a membership distinct from the board of trustees. The authorized number and qualifications of the members of the corporation, the manner of their admission, the different classes of membership, if any, the property, voting and other rights or privileges of members, and their liability for dues and assessments and the method of collection thereof, shall be set forth in the bylaws.

The NEAP Response at 2-3 states that the bylaws of NEAP contain the following provisions related to membership:

- (i) Membership shall be open to all those interested individuals, who wish to participate in accomplishment of the objectives of this corporation. Members will be entitled to receive information and newsletters, but they will have no voting rights unless otherwise authorized by the board.
- (ii) Members may be required from time to time to pay dues which shall be set by the board.
- (iii) Membership in this corporation shall be approved by the board.
- (iv) Each member agrees to release, hold harmless, and indemnify the corporation, its board of directors, officers, agents or members from

^{5/} See "Petitioners Amended Petition for Intervention and Brief in Support Thereof" (March 5, 1990) at 11.

all claims for damages arising from complaints or unlawful acts against the member.

(Emphasis added). Additionally, a flier issued by NEAP states that an individual can become a "member" of NEAP by contributing \$12.00.^{6/}

To establish its standing, NEAP relies on the standing of Ms. Shirley Brezenoff. The Brezenoff Affidavit states that Ms. Brezenoff is a "member" of NEAP. However, the Affidavit does not identify Ms. Brezenoff's privileges as a member of NEAP or the nature of her participation in NEAP's activities.^{7/} Furthermore, as discussed above, the "members" of NEAP, including Ms. Brezenoff, do not have any voting rights and do not otherwise appear to have the right to exercise any control over the affairs of NEAP.

Given these facts, it is apparent that Ms. Brezenoff does not possess any "indicia of membership" in NEAP that would be sufficient to confer standing on NEAP. She is not on the board of trustees which controls the NEAP's activities; there is no indication that she is an officer of NEAP; and as a "member" of NEAP she has no voting rights. Thus, there is no reason to believe that Ms. Brezenoff has done anything more than make a

^{6/} This flier was attached to "Licensee's Answer in Opposition to Request for Hearing and Petition for Leave to Intervene" (January 10, 1990).

^{7/} In this regard, the Brezenoff Affidavit does not comply with the explicit directions in the Licensing Board's Memorandum and Order (April 24, 1990) at 9.

token financial contribution to NEAP or that she is anything more than a "member" in name only. Such "membership" is not sufficient to give NEAP standing because, as discussed in Clonlara, an organization cannot achieve representational standing merely by bestowing the title of "member" on an individual who possesses standing. Similarly, any membership fee paid by Ms. Brezenoff would not be sufficient to confer standing on NEAP because, as discussed in Health Research Group, a financial contribution alone does not constitute "indicia of membership." As the cases discussed in Section II, demonstrate, an essential element of the necessary "indicia of membership" is the ability to exercise some control (such as voting rights) over the organization. Since NEAP has not given Ms. Brezenoff or its other members such power, Ms. Brezenoff does not possess "indicia of membership" and NEAP cannot derive its standing from that of Ms. Brezenoff.^{8/}

This conclusion is not affected by the fact that Ms. Brezenoff has submitted an affidavit authorizing NEAP to represent her interests in this proceeding. As the rulings in

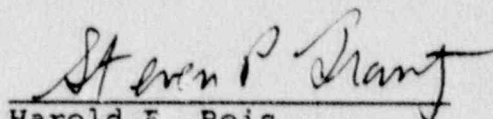
^{8/} NEAP appears to be little more than the alter ego of Mr. Saporito. He is the founder of NEAP, its offices are in his home, he fills at least three different positions in the organization, and he obviously exercises a highly significant influence over its management and affairs. Given these circumstances and Ms. Brezenoff's lack of participatory rights in NEAP, the designation of Ms. Brezenoff as a "member" of NEAP constitutes an attempt to use her as a bootstrap to enable Mr. Saporito, as NEAP's representative, to espouse his own concerns. The case and controversy principles upon which "contemporaneous judicial concepts of standing" are intended to prevent such a result.

American Legal Foundation and South Texas Project clearly indicate, such an affidavit is not sufficient to confer representational standing on an organization if the affiant does not possess "indicia of membership" in the organization.

IV. Conclusion

For the reasons discussed above, NEAP has not established its standing to intervene. Therefore, its petition to intervene should be denied and this proceeding should be dismissed.

Respectfully submitted,



Harold F. Reis
Steven P. Frantz

Newman & Holtzinger, P.C.
1615 L Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 955-6600

Co-Counsel:

John T. Butler, Esq.
Steel Hector & Davis
4000 Southeast Financial Center
Miami, FL 33131-2398
(305) 577-2939

Dated: May 17, 1990

Attorneys for Applicant
Florida Power & Light Company

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'90 MAY 21 A10:07

In the Matter of)
)
FLORIDA POWER & LIGHT COMPANY)
)
(Turkey Point Plant, Units 3)
and 4))

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket Nos. 50-250 OLA-5
50-251 OLA-5

(Technical Specifications
Replacement)

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached
"Applicant's Reply to NEAP's Response to the ASLB's Memorandum
and Order" in the above captioned proceeding were served on the
following by deposit in the United States mail, first-class
postage paid on the date shown below.

Peter B. Bloch, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. George C. Anderson
7719 Ridge Drive, N.E.
Seattle, WA 98115

Elizabeth B. Johnson
Oak Ridge National Laboratory
P.O. Box 2008
Bethel Valley Road, Bldg. 3500
Mail Stop 6010
Oak Ridge, TN 37831

Atomic Safety and Licensing Board Panel
Adjudicatory File
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Board Panel
Adjudicatory File
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Chief Docketing and Service Section
(Original plus two copies)

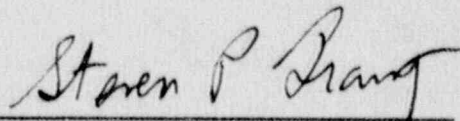
Thomas J. Saporito, Jr.
Executive Director
Nuclear Energy Accountability Project
P.O. Box 129
Jupiter, Florida 33468-0129

Janice E. Moore, Esq.
Patricia A. Jehle, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard Goddard, Esq.
Regional Counsel
U.S. Nuclear Regulatory Commission, Region II
101 Marietta Street, N.W., #2900
Atlanta, GA 30323

John T. Butler, Esq.
Steel, Hector & Davis
4000 Southeast Financial Center
Miami, Florida 33131

May 17, 1990


Steven P. Frantz
Newman & Holtzinger, P.C.
1615 L Street, N.W.
Suite 1000
Washington, D.C. 20036