517

DOCKETED
USNRC

'84 JUL 25 P3:16

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250 OLA-2
	)	50-251 OLA-2
(Turkey Point Plant,	)	
Units 3 and 4)	)	

LICENSEE'S ANSWER TO REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE WITH RESPECT TO SPENT FUEL POOL EXPANSION

I. Introduction

On July 9, 1984, the Center for Nuclear Responsibility, Inc. ("Center") and Joette Lorion (collectively referred to as "Petitioners") filed with the Commission a "Request for a Hearing and Petition for Leave to Intervene" ("Petition").

The Petition pertains to an application filed by Florida Power & Light Company ("Licensee" or "FPL") for amendments to the operating licenses for Turkey Point, Units 3 and 4, authorizing expansion of the storage capacity of each of the two spent fuel pools at Turkey Point. On June 7, 1984, the Commission published a notice stating that it is considering issuance of the amendments and that it has "made a proposed determination that the amendment request involves no significant hazards consideration." 49 Fed. Reg. 23,715. The notice invited comments on the proposed determination. It also offered the Licensee an opportunity to "file a request for a hearing with respect to issuance of the

D503

amendments" and an opportunity to intervene to persons whose interest may be affected by the proceeding. 49 Fed. Reg. at 23,717.

The Licensee hereby submits its answer to the Petition.

II. Standing of the Petitioners

Under 10 C.F.R. § 2.714, a petition to intervene must set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, and the specific aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene.

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); Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-27 (1980) (Ahearne and Hendrie, separate views). To have standing, a person must allege that he will be injured in fact as a result of the proceeding and that his interests fall within the zone of interests protected by applicable statutes. Pebble Springs, 4 NRC at 613-14.

The Petition states that Joette Lorion lives and works within 15 miles of Turkey Point and that her interests and those of her family could be significantly and adversely affected if a

serious nuclear accident were to occur at the Turkey Point plants. Based upon these representations, Ms. Lorion appears to possess standing.

The Petition also states that the Center is a corporation with its principal place of business in Miami, that the Center is an "environmental organization," and that the Center's "members live, use, and work and vacation in and otherwise use and enjoy, a geographic area within the immediate vicinity of the Turkey Point Nuclear Power Plants and could suffer severe consequences if a serious nuclear accident occurred at these facilities."

The Petition identifies two "members" whose interests might be affected by the issuance of the amendments. One is Ms. Lorion herself. Assuming that Ms. Lorion has standing to intervene in her individual capacity and is undertaking to do so, it would seem redundant and pointless to permit the Center also to intervene solely as the representative of Ms. Lorion. Consequently, representation of Ms. Lorion alone does not appear to be a basis for conferring representational standing upon the Center.

To be sure, the Petition states that the Center has one other member who may be affected: Beverly Mullins, who appears also to reside within 15 miles of Turkey Point. However, the Petition does not document that Ms. Mullins has authorized the Center to represent her. Consequently, the Petition fails to establish the Center's standing as a representative of "members" or other individuals. See, e.g., Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 444,

aff'd ALAB-549, 9 NRC 644 (1979). Nor does the Petition specify how the Center, which is a corporation, could itself be adversely affected by the issuance of the license amendments. 1/

To the extent that the Center is attempting to intervene on its own behalf based upon the claim that it is an "environmental organization," intervention should also be denied. The Supreme Court has rejected such grounds for standing, reasoning that:

> [A] mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

1/ The Petition also claims that the Center and Ms. Lorion are each "an appropriate party to represent the interests of others similarly situated whose interests might otherwise go unrepresented." (Petition, p. 2.) To the extent that the Petitioners are attempting to intervene in order to represent the interests of unnamed individuals who have not authorized the Petitioners to intervene on their behalf, the Petition should be denied. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474 n.1 (1978); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483-84 (1977); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-75-60, 2 NRC 687, 690 (1975).

Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972). This holding is applied in NRC proceedings. See, e.g., Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 742 (1978); Pebble Springs, 4 NRC at 613; Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 421-23 (1976).

In sum, the Center has not demonstrated any right to intervene on its own behalf or on behalf of any members. Therefore, its request to intervene as a matter of right should be denied. Nor has the Center attempted to make the required showing for discretionary intervention. See, e.g., Portland General Electric Co., 4 NRC at 616-17. As a result, no basis has been identified for intervention by the Center and such intervention should not be granted.

III. The Petitioners' Contentions

NRC and its predecessor, the Atomic Energy Commission, have long required that would-be intervenors identify the contentions which they wish to litigate. Intervention is denied if the petitioner fails to state at least one contention within the scope of the hearing, and the basis for each contention must be "set forth with reasonable specificity." 10 C.F.R. § 2.714(b). This requirement has been upheld in court. BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974). See, also Bellotti v.

United States Nuclear Regulatory Comm'n, 725 F.2d 1380 (D.C. Cir. 1983). As is demonstrated below, the Petition does not meet the contention requirement for intervention.

A. The Petition seeks to litigate the validity of the "no significant hazards considerations" determination -- a matter not within the Board's jurisdiction.

Paragraph 6 of the Petition appears to state that it contains Petitioners' proposed contentions. Conceivably, Paragraphs 5 and 7 might also be intended to set out contentions. As discussed in detail below, however, treating all three Paragraphs (5, 6, and 7) as statements of contentions, it is clear that the Petitioners wish only to litigate whether the requested amendments involve a "significant hazards consideration" and, therefore, whether they may be issued prior to conducting a validly requested hearing. That is a question which is not within the cognizance of the Licensing Board.

Section 50.92(c) of the NRC's regulations provides that the Commission may make a final determination that no significant hazards considerations are involved

> if operation of the facility in accordance with the proposed amendment would not:
>
> (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
>
> (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
>
> (3) Involve a significant reduction in a margin of safety.

Paragraph 5 of the Petition only contends, without any further explanation, that "operation of the Turkey Point spent fuel facilities for Turkey Point Plants Nos. 3 and 4 would" create or involve each of the three conditions set forth in the regulation. Thus, the only issue sought to be raised in Paragraph 5 is whether a valid no significant hazards considerations determination can be made with respect to the amendments.

Although Paragraph 6 purports to reserve the right to make additional contentions, it states only that "Petitioners contend that the amendment request constitutes a significant hazards consideration because" of five alleged reasons (designated A.1 through A.4 and B.1). These apparently are offered as the bases for the contention that there is a significant hazards consideration.

Paragraph 7 states that the issues raised in the Petition "should be assigned to the Atomic Safety and Licensing Board for review in formal hearing process before there can be issuance of any license amendments." (Emphasis supplied.) The only reason for deciding whether there is a significant hazards consideration is to decide whether a hearing, if requested, is to be held before or after issuance of the amendment. 48 Fed. Reg. 14,873, 14,874, 14,876 (April 6, 1983). Indeed, in the absence of a hearing request, no final determination that no significant hazards consideration exists is ever made. 10 C.F.R. §

50.91(a)(3). Consequently, the statement that a hearing should be conducted before the amendments issue is merely another way of stating that a significant hazards consideration is involved.

Thus, the three paragraphs state, and restate, a single contention--but the matter sought to be raised is not one which may be decided in a hearing before a Licensing Board.

Public Law 97-415, signed on January 4, 1983, amended section 189a of the Atomic Energy Act (22 U.S.C. § 2239(a)) so as to permit the Commission "to issue and make immediately effective," i.e., without a prior hearing, amendments to operating licenses pursuant to procedures and standards specified by regulation. Obviously, it would make no sense to adopt procedures providing a prior hearing concerning the question of whether a prior hearing must be granted, and the Commission did not do so. Rather, it adopted procedures which merely permit public comment on the Commission's proposed determinations regarding the existence of significant hazards considerations.

The Commission, acting through the Staff, considers the substance of any public comments before deciding whether a particular proposed operating license amendment meets regulatory standards with respect to health, safety, and environmental effect. If it is decided that the amendment may be issued and no hearing is requested, then, as noted above, no final determination on significant hazards consideration will be made. However, the pertinent regulation (10 C.F.R. § 50.91(a)) provides that

> (4) Where the Commission makes a final determination that no significant hazards consideration is involved and that the amendment should be issued, the amendment will be effective upon issuance, even if adverse public comments have been received and even if an interested person meeting the provisions for intervention called for in § 2.714 has filed a request for a hearing. The Commission need hold any required hearing only after it issues an amendment, unless it determines that a significant hazards consideration is involved.

(Emphasis supplied.) It is therefore clear that, once the "final determination" is made, the amendment issues; no provision is made for a hearing prior to issuance. The public notice accompanying the issuance of the pertinent regulation underscores this intention:

> The Commission wishes to state in this regard that any question about its staff's determinations on the issue of significant versus no significant hazards consideration that may be raised in any hearing on the amendment will not stay the effective date of the amendment.

48 Fed. Reg. at 14,876.

The same point was reiterated in the NRC's notice of consideration of the very license amendments here involved and of the proposed no significant hazards consideration determination. 2/ It was there stated:

2/ Petitioners allege incorrectly in subparagraph A.1 that "The Commission has traditionally held, in a series of case law that expansion of the spent fuel facility consitutes [sic] a significant safety hazards consideration." Staff Paper SECY-83-337 (August 15, 1983) is the report ordered by the Commission which examined NRC experience with spent fuel pool expansion reviews and presented a technical judgment on the question of significant hazards considerations. The paper records that the Staff gave prior notice and opportunity for hearing on expansion amendments "as a matter

> If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.
>
> If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.
>
> If the final determination is that the amendment involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

49 Fed. Reg. at 23,718.

The Petitioners' contention relates only to the validity of a possible "final determination on the issue of no significant hazards consideration," i.e., only as to whether a hearing should be conducted before or after the amendments issue. Indeed, Paragraph 7 of the Petition expressly so states. But both the pertinent NRC regulation and the notice make it clear that this is a question the Commission has reserved to itself, acting through the Staff. Consequently, the Petitioners have not stated a single contention cognizable by a Licensing Board.

---

of discretion because of possible public interest." SECY-83-337 at 2. The Staff concluded that requests to expand storage capacity which satisfy stated considerations are "not likely to involve a significant hazards consideration." Id. at 6. The Turkey Point expansion meets the stated conditions.

B. The Petition fails to state any admissible contention concerning the merits of the proposed amendments.

As discussed above, Petitioners' Petition is most appropriately read as raising a single contention -- i.e., that the proposed amendment involves significant hazards considerations -- which is beyond the jurisdiction of any Licensing Board and can only be rejected.

However, it is possible that the Board may wish to treat the Petition as a request for a hearing on the merits of the amendment -- to be held after the amendment is issued if the Commission, through its Staff, determines that there is no significant hazards consideration. Under this reading of the Petition, subparagraphs A.2, A.3, and A.4 of Paragraph 6 identify issues which Petitioners seek to litigate with regard to the merits of the proposed amendment. Viewed in this light, the Petition is nevertheless inadequate and fails to state at least one admissible contention. 3/

These paragraphs rest upon a misreading of the Federal Register notice of June 7, 1984 (49 Fed. Reg. 23,715), and an erroneous linking of the amendment there discussed with another, separate amendment request which is the subject of the Federal Register notice of June 20, 1984 (49 Fed. Reg. 25,360). 4/

3/ Paragraph B.1 of the Petition states simply that "Expansion of the spent fuel facilities at Turkey Point should not be allowed." That statement is vague, unsupported, and entirely conclusory; it cannot constitute an admissible contention.

4/ FPL has also filed a request for another amendment which

Before we discuss Petitioners' allegations in Paragraphs A.2, A.3, and A.4, it is necessary to understand the subject matter of the requested amendments.

Among the factors to be considered in evaluating spent fuel storage is nuclear criticality -- does the design of the spent fuel storage racks prevent criticality of the fuel assemblies? The established criterion by which this determination is made is that the effective neutron multiplication factor (k_{eff}) must be equal to or less than 0.95 under all conditions. 5/ Standard Review Plan 9.1.2, Spent Fuel Storage, § III.2.a. See NRC Staff "Position for Review and Acceptance of Spent Fuel Storage and Handling Applications" (April 14, 1978); SECY-83-337, Study on Significant Safety Hazards at 5-6 (August 15, 1983).

---

would permit the storage of fuel with an enrichment higher than 3.5 weight percent U-235 in the existing fresh and spent fuel storage racks. (Letter from FPL to NRC re Fuel Storage U-235 Linear Loading Increase dated April 4, 1984, modified by letter from FPL to NRC dated May 25, 1984; and supplemented by letter from FPL to NRC dated June 15, 1984; 49 Fed. Reg. 25,360 (June 20, 1984).) The amendment would increase the allowable k_{eff} for the existing fresh fuel storage racks from 0.95 to 0.98 assuming optimum moderation (i.e., fog, mist, or foam condition). This latter value meets the Staff's acceptance criterion for fresh fuel storage (Standard Review Plan (NUREG-0800), 9.1.1, New Fuel Storage § III.2.a.). The amendment seeks no change in the allowable k_{eff} for spent fuel storage racks or for fresh fuel storage racks in the fully flooded (non-borated) condition. As the Board knows, Petitioners have filed another, separate petition seeking a hearing and intervention in connection with the application covering more highly enriched fuel.

5/ NRC acknowledges that a k_{eff} greater than 0.95 may be acceptable in a particular case. SECY-83-337 at 5-6.

The Technical Specifications presently applicable to spent fuel storage at Turkey Point require that the k_{eff} be equal to or less than 0.95 for normal operations and postulated accidents. Technical Specification, Fuel Storage, at 5.4-1. FPL's request for the amendment which is the subject of the instant Petition, authorizing expansion of the spent fuel storage pool (filed March 14, 1984, and noticed in the Federal Register on June 7, 1984), would not alter that requirement. The limiting condition for spent fuel storage under any conditions would continue to be k_{eff} 0.95 (see proposed Technical Specification at B.17-1.)

Returning to Petitioners' paragraphs A.2 through A.4 and viewing them as proposed contentions on the merits of the requested amendment, we see that no legitimate issues are raised.

Paragraph A.2 alleges that "Acceptance criteria for criticality will not be met and thus, FPL will not be able to ensure that the fuel storage facility will always be subcritical by a safe margin . . . ." Paragraph A.3 alleges that the statement (made in the Federal Register notice concerning the fuel pool expansion amendment) that "the established acceptance criteria for criticality in the spent fuel pool shall be kept at or below k_{eff} 0.95 is untrue . . . . Paragraph A.4 alleges that FPL "wants to operate the facility with a K_{eff} of 0.98 . . . ." There is simply no basis for these allegations with respect to the proposed amendment to permit expansion of the spent fuel pool, which was noticed on June 7 and to which Petitioners' "Request for Hearing and Petition for Leave to Intervene" dated

July 9, 1984, is directed. Petitioners' error is patent and incontrovertible; the conclusion that there is nothing to litigate is inescapable. Petitioners have failed to satisfy the requirements of 10 C.F.R. § 2.714 and state any valid contention on the merits of the requested amendment to expand the spent fuel pool.

IV. Conclusion.

It is our position that, following the prehearing conference, the Board may determine that:

A. Although Petitioner Joette Lorion may have standing to request a hearing and intervene, Petitioner Center for Nuclear Responsibility, Inc. has failed to demonstrate that it has standing and its request to intervene as of right is denied.

B. Petitioners seek only to litigate whether the request to expand the spent fuel pool involves a significant hazards consideration. This Board has no jurisdiction to consider that question because the Commission has reserved it for the Staff's determination. The proffered contention is therefore inadmissible and Petitioners have failed to identify a single admissible contention.

C. Alternatively, Petitioners have failed to state any admissible contention regarding the merits of the proposed amendment.

D. The "Request for a Hearing and Petition for Leave to Intervene" filed by Center for Nuclear Responsibility, Inc. and Joette Lorion is therefore denied.

Respectfully submitted,

Kathleen H. Shea
Michael A. Bauser

Newman & Holtzinger, P.C.
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-8400

Of Counsel:

Norman A. Coll
Steel, Hector & Davis
1400 Southeast Bank Building
Miami, Florida 33131
(305) 577-2800

July 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250 OLA-2
	)	50-251 OLA-2
(Turkey Point Plant,	)	
Units 3 and 4)	)	

NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that Kathleen H. Shea enters an appearance as counsel for Florida Power & Light Company in the above-captioned proceeding.

Name:	Kathleen H. Shea
Address:	Newman & Holtzinger, P.C. 1025 Connecticut Avenue, N.W. Washington, D.C. 20036
Telephone:	(202) 862-8400
Admissions:	District of Columbia Court of Appeals Supreme Court of Kansas
Name of Party:	Florida Power & Light Company Post Office Box 14000 Juno Beach, Florida 33408

Kathleen H. Shea

Kathleen H. Shea

Newman & Holtzinger, P.C.
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Date: July 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250 OLA-2
	)	50-251 OLA-2
(Turkey Point Plant,	)	
Units 3 and 4)	)	

NOTICE OF APPEARANCE OF COUNSEL

Notice is hereby given that Michael A. Bauser enters an appearance as counsel for Florida Power & Light Company in the above-captioned proceeding.

Name:	Michael A. Bauser
Address:	Newman & Holtzinger, P.C. 1025 Connecticut Avenue, N.W. Washington, D.C. 20036
Telephone:	(202) 862-8400
Admissions:	Virginia Supreme Court United States Court of Appeals for the District of Columbia Circuit
Name of Party:	Florida Power & Light Company Post Office Box 14000 Juno Beach, Florida 33408

Michael A. Bauser

Newman & Holtzinger, P.C.
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Date: July 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'84 JUL 25 P3:17

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250 OLA-2
	)	50-251 OLA-2
(Turkey Point Plant, Units 3 and 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Answer to Request for a Hearing and Petition for Leave to Intervene with Respect to Spent Fuel Expansion" in the above captioned proceeding, together with two notices of appearance of counsel, were served on the following by deposit in the United States mail, first class, properly stamped and addressed, on the date shown below.

Dr. Robert M. Lazo, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Emmeth A. Luebke
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Richard F. Cole
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

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

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

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

Joette Lorion
7269 SW 54 Avenue
Miami, Florida 33143

Mitzi A. Young
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Norman A. Coll
Steel, Hector & Davis
1400 Southeast Bank Building
Miami, Florida 33131

Dated this 24th day of July 1984

Kathleen H. Shea
Newman & Holtzinger, P.C.
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036