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RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

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

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Docket Nos. 50-250-OLA-1
50-251-OLA-1

SECRETARY
REGULATORY SERVICE
BRANCH

LICENSEE'S RESPONSE TO INTERVENORS' MOTION TO STRIKE

On September 21, 1984, Florida Power & Light Company filed a motion to strike both the Intervenor's response to FPL's earlier filed Motion for Summary Disposition and the affidavits which Intervenor submitted in support of that response. Thereafter, on October 12, 1984, the Intervenor filed a pleading entitled "Intervenor's Response to the Florida Power & Light Company's Motion to Strike." There they contend, among other things, that FPL's motion to strike the affidavits supporting the Intervenor's opposition to FPL's motion to strike "is inappropriate and premature," apparently on the theory that the Board is not legally authorized to rule on the competence of the affiants without first having them put on the stand for a hearing on voir dire. As an alternative to denial of FPL's motion to strike, "Intervenor's motion that it be stricken." (p. 3).

It is somewhat unusual for a motion to be buried in a pleading that is simply labelled a response, and it is not clear to us that the Board will in fact expect a response to

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such a motion. However, the NRC's rules do not expressly preclude such a procedure. Accordingly, as a matter of caution, on behalf of FPL we submit this brief response to the Intervenor's motion to strike.

It is well established that the NRC summary disposition rule, 10 CFR § 2.749, is analogous to Rule 56 of the Federal Rules of Civil Procedure. See, e.g., Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 & 2), ALAB-182, 7 AEC 210, 217 (1974); Gulf States Utilities Company (River Bend Station, Units 1 & 2), LBP-75-10, 1 NRC 246, 247 (1975); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), LBP-74-34, 7 AEC 877, 878 (1974). Both 10 CFR § 2.749(a) and Rule 56(e) expressly require, in identical language, that affidavits submitted in support or opposition to a motion for summary relief "shall show affirmatively that the affiant is competent to testify to the matters stated therein." It would therefore seem plain that an affidavit which does not make such a showing is subject to a motion to strike. Indeed, careful counsel should do no less.

An affidavit that does not measure up to the standards of 56(e) is subject to a motion to strike; and formal defects are waived in the absence of such a motion or other objection.

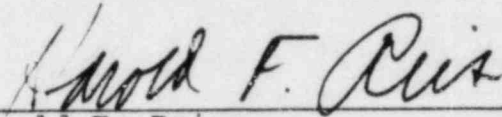
Even if an affidavit does contain some inadmissible matter, the whole affidavit need not be stricken or disregarded; the court may strike or disregard the inadmissible parts and consider the rest of the affidavit. Although the court may disregard inadmissible matter in affidavits on its own motion, as it may do at an actual trial, if counsel do not object to inadmissible matters the court may consider

them on the motion for summary judgment. Careful practice would therefore suggest that a motion to strike the inadmissible portions of the affidavit or the whole affidavit, as the case may be, should be made promptly.

6 Moore's Federal Practice (2nd Ed. 1982), ¶6522[1], pp. 56-1330 to 56-1332; footnotes omitted; emphasis added.

Accordingly, if the Board considers Intervenors' motion to strike as properly before it, that motion should be denied.

Respectfully submitted,



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Dated: October 17, 1984

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached "Licensee's Response to Intervenor's Motion to Strike" was served on each of the following by deposit in the United States mail, first class postage prepaid and properly addressed, on the date shown below.

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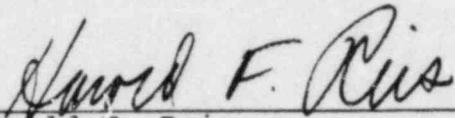
Attention: Chief, Docketing and Service Section
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