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Staff 7/30/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO REQUEST FOR HEARING
AND PETITION FOR LEAVE TO INTERVENE REGARDING
AMENDMENTS TO EXPAND THE SPENT FUEL POOL

I. INTRODUCTION

Florida Power & Light Company (Licensee) is licensed to possess, use and operate Turkey Point Plant, Units 3 and 4, two pressurized water nuclear reactors located in Dade County, Florida. On June 7, 1984, pursuant to 10 CFR § 2.105(a)(4)(i), the NRC published in the Federal Register a notice of consideration of the issuance of amendments to the facility licenses and offered the opportunity for hearing on the amendments. 49 Fed. Reg. 23715. The amendments would allow the expansion of the spent fuel pool storage capacity. The notice established July 9, 1984 as the deadline for filing a request for hearing and petition for leave to intervene.

Pursuant to that notice, the Center for Nuclear Responsibility (Center) and Joette Lorion (Petitioners) filed a joint request for hearing and petition for leave to intervene on July 9, 1984. In that document, the Center alleges that it is an environmental organization with its principal place of business in Miami, Florida, and that it has

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members who "live, use, . . . work and vacation in . . . a geographic area within the immediate vicinity" of the plant and (1) could "suffer severe consequences" from a serious nuclear accident at Turkey Point and (2) would be adversely affected by the proposed action. Petition at 1-2. The Center also alleges it is an appropriate party to represent the interest of "persons similarly situated or whose interests might otherwise go unrepresented." Id. at 2.

The petition also states that Joette Lorion is an individual who lives, works and owns real property in and about the city of South Miami, Florida, approximately 15 miles from Turkey Point, "uses and enjoys a geographic area within the immediate vicinity of the plant" and whose interests, along with those of her family, could be significantly and adversely affected if a serious nuclear accident occurred at the plant. Petition at 2. The petition further alleges that she is an "appropriate party to represent the interests of others similarly situated whose interests might go unrepresented." Id. at 2. The petition also contains a list of "contentions" which Petitioners would raise. Petition at 3.

For the reasons set forth below, the Staff is of the view that Petitioners have established their standing and sufficiently identified at least one aspect of the proceeding as to which intervention would be proper.

II. DISCUSSION

A. Interest and Standing

Section 189a of the Atomic Energy Act, 42, U.S.C. § 2239(a) provides that:

In any proceeding under [the] Act, for the granting, suspending, revoking, or amending of any license or construction permit ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Section 2.714(a) of the Commission's Rules of Practice also provides that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene." Thus the pertinent inquiry under Section 189a of the Act and 10 CFR § 2.714(a) of the regulations is whether Petitioners have alleged an interest which may be affected by the operating license amendment proceeding. The Commission has held that contemporaneous judicial concepts of standing are controlling in the determination of whether the requisite interest prescribed by both Section 189a of the Atomic Energy Act and Section 2.714 of the NRC's Rules of Practice is present. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). There must be a showing that (1) the action being challenged could cause "injury-in-fact" to the person seeking to intervene and that (2) such injury is arguably within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act.^{1/} Id. See Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972). Thus a petitioner must "set forth with particularity" its interest in the proceeding and how that interest may be affected by the outcome of the proceeding. 10 CFR § 2.714(a)(2).

^{1/} 42 U.S.C. § 4321 et seq.

1. Rules of General Applicability to Organizations and Individuals

An organization may establish standing based upon an injury to itself or through members of the organization who have interests which may be affected by the outcome of the proceeding. Edlow International Co., CLI-76-6, 3 NRC 563, 572-74 (1976); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-322, 3 NRC 328, 330 (1976).^{2/} When an organization claims standing based on the interests of its members, at least one of its members must have standing in his or her own right, the organization must identify (by name and address) specific individual members whose interests may be affected, and the organization must demonstrate that such members have authorized the organization to represent their interest in the proceeding. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-97 (1979); Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 488-89 (1973). Absent express authorization, groups may not represent other than their own members, and individuals may not assert the interest of other persons. See Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No. 2), ALAB-470, 7 NRC 473, 474-75 n.1 (1978); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977).

^{2/} A petitioner must particularize a specific injury that it or its members would or might sustain should it be denied relief. The test is whether a "cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome or another." Marble Hill, CLI-80-10, 11 NRC 436, 439 (1980).

Generally, the close proximity of a petitioner's residence is presumed sufficient to satisfy the interest requirements of 10 CFR § 2.714. Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153 (1982) (hereafter "AFRRI"); Allens Creek, 9 NRC at 393, citing, Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).^{3/} Nevertheless, since there is no presumption that every individual who lives near the plant will consider himself potentially harmed by the outcome of a proceeding, it is important that the nature of the invasion of an individual's personal interest be identified. Allens Creek, 9 NRC at 383. Accordingly, it has been found that persons who live near the site have standing to intervene if they allege a potential for injury from operation of the facility. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-80-22, 12 NRC 191, 195-96 (1980), affirmed, ALAB-619, 12 NRC 558, 564-65 (1980).

2. Interest and Standing of Petitioners in This Proceeding

Turkey Point is located about 25 miles south of Miami, Florida. Final Environmental Statement related to operation of Turkey Point Plant, dated July 1972, at I-1. The petition alleges that Joette Lorion lives within 15 miles of the plant and has interests which would be affected should an accident occur at the plant. Thus, based on

^{3/} In the past, residential distances of up to 50 miles have been found to be not so great as to necessarily preclude a finding of standing in licensing proceedings. See e.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 at n.4 (1977); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-496, 8 NRC 308 (1978) (40 miles); North Anna, ALAB-146, 6 AEC 631, 633-34 (1973) (residency within 30-40 miles sufficient to show interest in raising safety questions).

geographical proximity, Ms. Lorion has standing to intervene. AFRRI, supra at 153. Ms. Lorion does not, however, have standing to assert the interests of other persons. See Enrico Fermi, ALAB-470, supra; Watts Bar, supra.

As discussed above, the Center allegedly is an environmental organization whose members live, use, work, and vacation in the immediate vicinity of the facility. Petitioner at 1-2. The petition further alleges that the Center and its members are adversely affected by the proposed amendment. Id. at 2. While proximity to a large source of radiation can establish a petitioner's interest, AFRRI, supra at 153, the Center must sufficiently identify (by name and address) at least one member who resides near the plant, has standing and has authorized the Center to represent its interest. General assertions that a petitioner's members live and recreate near a facility are not sufficiently particularized to support a finding of standing. See Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425 (1973).

The Center lists two members who reside less than 25 miles from the site. Petition at 2. Those members include Joette Lorion, the Center's director, who previously has established standing in her own right in another Turkey Point amendment proceeding. Prehearing Conference Order (OLA), May 16, 1984, at 31. Although there is no explicit indication that the other named member within the geographical proximity of the plant has authorized the filing of the petition, it is the Staff's view that by signing the petition as director of the Center, Joette Lorion has implicitly authorized the Center to represent her interests in this

proceeding.^{4/} Thus the Center has adequately demonstrated standing through the interest of at least one member.^{5/}

B. Specific Aspects of the Subject Matter of an Operating License Proceeding

In addition to satisfying the standing and interest requirements of 10 CFR § 2.714, a petitioner must "also set forth with particularity ... the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." 10 CFR § 2.714(a)(2).^{6/}

^{4/} The Center's failure to adequately demonstrate that at least one member who lives near the plant authorized the filing of the petition, does not defeat the grant of intervenor status to the Center. Under 10 CFR § 2.714(a)(3), a petition for leave to intervene may be amended, without prior approval of the presiding officer, at any time up to fifteen days prior to a special prehearing conference held pursuant to 10 CFR § 2.751a or, if no special prehearing conference is held, fifteen days before the first prehearing conference. The Appeal Board has stated that petitions that suffer from inarticulate draftsmanship or procedural or pleading defects may be amended if they contain curable defects. North Anna, ALAB-146, 6 AEC 631, 633-34 (1973). See Wisconsin Public Service Corp. (Kewaunee Nuclear Plant), LBP-78-24, 8 NRC 78, 82 (1978). Since Section 2.714(a)(3) does not limit the reasons for amendment, and assuming the defect is curable, the petition could be amended to include a Center member affidavit which would satisfy the standing requirement. See e.g., Enrico Fermi, LBP-79-1, 9 NRC 73, 77 (1979).

^{5/} While the Center has established derivative standing, it has not sufficiently demonstrated that it has standing to intervene as an organization based on an injury to the organization itself. The Center only states that it is an incorporated environmental organization with its principal place of business in Miami, but it does not describe how the organization itself would be injured by the proposed license amendment. The Center's alleged representation of the interests of "persons similarly situated" must also be rejected absent express authorization from such persons. See Enrico Fermi, ALAB-470, supra; Watts Bar, supra at 1421.

^{6/} An "aspect" is generally considered to be broader than a "contention," but narrower than a general reference to the NRC's operating statutes. Consumers Power Co. (Midland Plants, Units 1 and 2), LBP-78-27, 8 NRC 275, 278 (1978).

Although Petitioners are not required to draft contentions until they submit a supplement to their petition, pursuant to 2.714(b), Petitioners list five "contentions" (A.1 through A.4 and B.1) which they would seek to litigate, but assert they would not be limited to these contentions. Petition at 3.^{7/} Only two of the so-called contentions, when read in concert, sufficiently identify aspects which are within the scope of the amendment proceeding and are sufficient to put the parties on notice as to the subject matter of actual contentions. In A.2 and A.4, Petitioners allege that acceptance criteria for criticality in the spent fuel pool will not be met and thus the amendment involves a significant hazards consideration because there is no assurance that the spent fuel pool will be subcritical by a safe margin under both normal operating and accident conditions. While it is not clear that Petitioners will be

^{7/} The "contentions" proffered by Petitioners state:

- A.1 The Commission has traditionally held, in a series of case law that expansion of the spent fuel facility constitutes a significant safety hazards consideration.
- A.2 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 in both normal operating and accident conditions.
- A.3 The recitation and notice in 48 Federal Register Notice 23715, Vol. 49, NO. 111, June 7, 1984, that the established acceptance criteria for criticality in the spent fuel pool shall be kept at or below K_{eff} 0.95 is untrue as evidenced by 48 Federal Register Notice 25360, Volume 49, NO. 120, June 20, 1984.
- A.4 In light of the fact that the utility, FPL, wants to operate the facility with a K_{eff} of 0.98 (FR25360), as above referenced, places the proposed undertaking in the Significant Safety Hazards Category, and there can be no issuance of a license amendment to expand the spent fuel facility without a public hearing required by the Atomic Energy Act of 1954.
- B.1 Expansion of the spent fuel facilities at Turkey Point should not be allowed.

able to proffer contentions with adequately specific and proper bases on the matter of acceptance criteria and criticality in the modified spent fuel pool,^{8/} they at least have identified an aspect (criticality in the modified spent fuel pool) which properly may be considered in this proceeding.

"Contentions" A.1, A.3 and B.1 do not identify aspects regarding which Petitioners may appropriately intervene. Contention A.1 merely alleges that Commission practice has been to find that spent fuel pool expansions involve significant hazards considerations, and A.4 mistakenly states that the Federal Register notice in this proceeding is incorrect with respect to the value for K_{eff} .^{9/} Similarly, contention B.1 is

8/ The only acceptance criteria identified in the petition is the K_{eff} (neutron multiplication factor) which Petitioners mistakenly believe will be 0.98 instead of 0.95. This mistaken belief is based on a reading of a Federal Register notice concerning a separate amendment which would: 1) allow storage of fuel with increased enrichment in the existing new fuel storage racks and spent fuel storage racks and 2) increase the K_{eff} for the existing new fuel storage racks only. 49 Fed. Reg. 25360, June 20, 1984. That notice clearly states that the K_{eff} for the fully flooded conditions in the spent fuel pool is always less than 0.95. 49 Fed. Reg. 25361. This is consistent with the 0.95 neutron multiplication factor noted in the spent fuel pool expansion notice. Therefore, unless Petitioners can identify another acceptance criterion and provide a basis for the general assertion that acceptance criteria for the spent fuel pool will not be met when they submit the supplement to their Petition, a contention concerning 0.95 neutron multiplication factor should be rejected because it is not within the scope of the instant amendment proceeding (i.e., the K_{eff} value is not being modified by the proposed amendment).

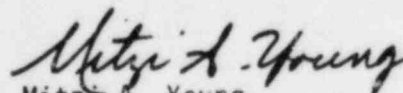
9/ SECY-83-337, entitled "Study on Significant Hazards", dated August 15, 1983, does not support Petitioner's argument that significant hazards considerations have led the NRC to conclude with respect to spent fuel expansions that a prior hearing should be held. That paper reviewed the NRC's experience with respect to spent fuel pool expansion reviews and provided a technical judgment on the basis by which a spent fuel pool expansion amendment may or may not pose a significant hazards consideration. The Staff has in the past provided prior notice and opportunity for hearing on spent fuel pool expansion amendments as a matter of discretion because of possible public interest. SECY-83-337 at 2.

merely a statement of opposition to the proposed action. The statement in A.1 is more properly construed as a significant hazards consideration comment and part of Petitioners' claim that a prior hearing is required before the amendment may be issued. See Petition at 3. Under Section 189a(2)(A) of the Atomic Energy Act, as amended, 42 U.S.C. § 2239(a)(2)(A), the Commission "may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency of a request for hearing." Thus, if the Staff makes a final determination that the amendments do not involve a significant hazards consideration, the Board would have no jurisdiction to consider Petitioners' request for prior hearing.

III. CONCLUSION

Based on the foregoing, it is the Staff's view that the Center and Joette Lorion have established standing, have identified at least one aspect properly within the scope of the proceeding and should be admitted to the proceeding if they proffer at least one admissible contention in accordance with 10 CFR § 2.714(b).

Respectfully submitted,


Mitzel A. Young
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of July, 1984

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NUCLEAR REGULATORY COMMISSION

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(Turkey Point Plant,)	50-251 OLA-2
Unit Nos. 3 and 4))	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(a), the following information is provided:

Name	- Mitzi A. Young
Address	- U.S. Nuclear Regulatory Commission Office of the Executive Legal Director Washington, DC 20555
Telephone Number	- (301) 492-7837
Admission	- U.S. Court of Appeals, D.C. Circuit U.S. District Court, District of Columbia District of Columbia Court of Appeals
Name of Party	- NRC Staff

Respectfully submitted,

Mitzi A. Young
Mitzi A. Young
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of July, 1984

