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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
TECHNICAL SERVICE

In the Matter of)	
FLORIDA POWER & LIGHT COMPANY)	Docket Nos. 50-250 OLA-1
(Turkey Point Nuclear Generating)	50-251 OLA-1
Units 3 & 4)))	ASLBP No. 84-496-03 LA

LICENSEE'S MOTION TO STRIKE

I. Introduction

On August 10, 1984, Florida Power & Light Company (Licensee) filed motions for summary disposition of Contentions (b) and (d), together with supporting affidavits and statements of material fact as to which there is no genuine issue to be heard. The NRC Staff submitted a response and affidavits in support of these motions on September 4, 1984. Also on September 4, 1984, Joette Lorion and the Center for Nuclear Responsibility, Inc. (Intervenors) filed "Intervenors Response to Licensee's Motion for Summary Disposition of Intervenors' Contentions (b) and (d)" (Intervenors Response) with supporting affidavits from Gordon D.J. Edwards and Joette Lorion. For the reasons stated

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below, the Licensee hereby moves to strike each of those affidavits and the Intervenors Response. 1/

II. The Affidavits And Intervenors Response Should Be Stricken Because The Affiants Are Not Competent To Testify To The Matters Therein.

Under 10 CFR § 2.749(b), when a motion for summary disposition is made and supported by affidavits, the answer of a party opposing the motion may not rest upon mere allegations or denials but instead must set forth by affidavits or other appropriate means specific facts showing that there is a genuine issue of fact. See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-629, 13 NRC 75, 78 (1981); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453-56 (1980). If a party fails to file such an answer, the motion for summary disposition shall be granted if appropriate. 10 CFR § 2.749(b); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-562, 10 NRC 437, 444 (1979).

More specifically, if a party submits an affidavit in opposition to a motion for summary disposition, 10 CFR § 2.749(b) requires that the affidavit "set forth such facts as would be admissible in evidence and shall show affirmatively that the

1/ Section 2.749(a) of the Commission's regulations does not provide for the filing of a reply to an answer opposing a motion for summary disposition. Accordingly, this pleading does not address any of the misunderstandings expressed in the affidavits and Intervenors Response. If the Board has any questions, we assume that it will provide an opportunity for addressing them as provided in 10 CFR § 2.749(b).

affiant is competent to testify to the matters stated therein." See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 754-56 (1977). In this regard, an affidavit which only attests that all statements of fact set forth therein are true and correct to the best of the knowledge, information, and belief of the affiant falls short of a showing that the affiant is competent to testify to the facts in the affidavit. Pacific Gas & Electric Co. (Stanislaus Nuclear Plant, Unit No. 1), LBP-77-45, 6 NRC 159, 162-63 (1977).

In judging whether information is admissible and whether a person is competent to testify, the Commission has adopted the expert witness standards set forth in Rule 702 of the Federal Rules of Evidence. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-701, 16 NRC 1517, 1524 (1982); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

Rule 702 states:

If scientific technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The party sponsoring a witness or an affiant "has the burden of demonstrating his expertise" under this standard. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). Furthermore, a person not otherwise competent does not become so because he has

studied "the problems of nuclear power" for a number of years, Peach Bottom, supra, 16 NRC at 1523-24; because he has spent years reading AEC and NRC documents, McGuire, supra; because he has an ability to understand and evaluate technical matters, id.; or because he is "a well-informed layman, with a broad general knowledge of the field," Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 573-74 (1978). Instead, a person is competent to testify only if, through experience or education, he has acquired "special" knowledge or skill "germane to the matters which his proposed testimony" addresses sufficient to qualify him as an expert. See Peach Bottom, supra; McGuire, supra.

It is apparent that neither of the Intervenors' affiants is competent to testify under the standards elucidated above. Contentions (b) and (d) raise issues involving the fields of reactor physics, thermodynamics, heat transfer and fluid mechanics. They also concern the interpretation and application of regulations to complex technical analysis.

Insofar as Ms. Lorion is concerned, her affidavit does not even contain a resume, nor does it identify whether she has any applicable education or work experience. Therefore, the Lorion Affidavit fails to satisfy the Intervenors' burden to demonstrate that Ms. Lorion qualifies as an expert. 2/ Although

2/ Ms Lorion states, on the first page of her affidavit, that she has "personal knowledge of the matters stated" therein. It is not clear precisely what is meant by this statement, but -- however interpreted -- it cannot qualify her testimony. If "personal knowledge" means knowledge of the

the affidavit states that Ms. Lorion has been "writing and researching nuclear safety issues since 1978," this alone does not render her competent to testify. ^{3/} See Peach Bottom, supra; McGuire, supra. The affidavit also states that Ms. Lorion has "acted as a consultant" to various news organizations and others. However, it does not identify the nature of the consultation, nor does it specify the qualifications required for such consultation or attempt to show that those qualifications are also sufficient to permit her to testify with respect to matters pertinent to consideration of Contentions (b) and (d). In a similar situation, a licensing board held that consultation on nuclear matters "is of little value" unless the board is apprised of the reasons for the consultation and the subject matter involved. Diablo Canyon, supra, 8 NRC at 572-73. Consequently, the affidavit does not establish Ms. Lorion's credentials as an expert on the basis of her alleged consultations.

Finally, the affidavit states that Ms. Lorion is "Research Director" of the Center for Nuclear Responsibility. Again, however, there is no indication that the qualifications for that position are such as to qualify her as an expert with

technical subject involved, the discussion in the text demonstrates that it is lacking. If personal knowledge means involvement of some kind in pertinent matters (e.g., code development, NRC approval of mathematical models, etc.) there is no showing of such personal involvement.

^{3/} The Lorion Affidavit does not identify what, if anything, Ms. Lorion has written relevant to the Contentions.

respect to the matters relevant to the contentions. The Center for Nuclear Responsibility appears to be essentially a creation of Ms. Lorion. 4/ Consequently, Ms. Lorion cannot properly argue that this position qualifies her as an expert. Otherwise, simply by establishing one's own organization and appointing oneself

4/ In an Affidavit dated April 17, 1982, which was attached to "Petitioners Response in Opposition to Intervenors Motion to Dismiss," filed in D.C. Cir. No. 82-1132 on April 19, 1982, Ms. Lorion stated as follows:

3) In June of 1981, I determined to focus my activity upon what I perceived to be dangerous conditions created by the Turkey Point Reactors. As a vehicle for symbolizing and expressing my concern, I employed the name "Center for Nuclear Responsibility" and developed the symbolic depiction used on the stationery bearing that name.

4) Although I intend to organize and develop the Center into a legal entity through which others who share my goals may associate to more effectively pursue these goals, the Center for Nuclear Responsibility does not now have and has not at any time since June 1, 1981, had: (a) any members or directors other than myself; (b) any employees; (c) any independent legal status as a corporation or otherwise; or (d) any other characteristics which would give it a legal status or subject it to the control or direction of any person other than me.

Since the affidavit was executed, Ms. Lorion has presumably effected her intention "to develop the Center into a legal entity." The petition to intervene in this proceeding states that the Center is "a corporation with its principal place of business in Miami, Florida." Nevertheless, in view of the history of the organization, it is appropriate to assume that Ms. Lorion had substantial influence on her designation as "Research Director" of the corporation. The assumption is particularly appropriate since she used the same title when the Center was admittedly merely her alter ego. See, e.g., Ms. Lorion's signature on letters of November 9 and 12, 1981, to Mr. Harold Denton, Office of Nuclear Reactor Regulation, NRC Docket No. 50-251.

"Research Director," anyone could pass oneself off as an expert. Obviously, if a licensing board were to accept such an argument, it would render meaningless the standards in Rule 702 since anyone could qualify. In short, Ms. Lorion has offered nothing which indicates that she is competent to testify factually or is an expert on Contentions (b) and (d).

Similarly, the Edwards Affidavit does not provide an adequate basis for finding that Dr. Edwards is qualified to testify as an expert on Contentions (b) and (d). Initially, it should be noted that Dr. Edwards claims that he is president of a nuclear-related group, has participated on various panels, and has acted as a consultant. For the reasons expressed above, these alone do not qualify Dr. Edwards as an expert. See, e.g., Diablo Canyon, supra, 8 NRC at 572-73 (membership on various nuclear-related panels and various consultations on nuclear related matters does not qualify a person as an expert absent a specific relationship between these activities and the subject matter of the testimony). ^{5/} Dr. Edwards also classifies himself as "an applied mathematician" with various degrees and college-level teaching positions in mathematics. However, the mere fact that Dr. Edwards may have some expertise in an area related to a technical field does not thereby render him competent to testify on Contentions (b) and (d) unless he can show some connection

^{5/} Dr. Edwards also states that he has published several articles concerning reactor safety and economics. However, he has not shown how these articles are, in any way, relevant to Contentions (b) and (d).

between his expertise and the subject matter of his testimony. See Diablo Canyon, supra, 8 NRC at 571. See also Peach Bottom, supra, 16 NRC at 1523-24 (a former professor with a Ph.D. in chemistry who had devoted himself to the problems of nuclear power was held not to be an expert on the health significance of radioactive emissions); McGuire, supra (a chemist with a master's degree in chemistry who had an ability to understand and evaluate technical matters and who had spent years reading AEC and NRC documents was held not to be an expert on containment strength and hydrogen generation and control).

In particular, and putting aside for the moment the matter of their propriety, 6/ the Edwards Affidavit (§§ 2-6, 9-10) offers opinions on heat transfer from the fuel to the coolant, departure from nucleate boiling, fuel cladding failure, and radioiodine releases. However, the Edwards Affidavit does not indicate that Dr. Edwards has any educational or professional expertise in reactor physics, thermodynamics, heat transfer, fluid mechanics, material properties, the generation and behavior of radioactive gases or other areas related to the subject matter of these opinions. Similarly -- and, again, putting aside for the moment the matter of their propriety -- the Edwards Affidavit (§ 4-10) contains opinions on the mathematical modeling of a loss-of-coolant accident (LOCA), including the BART Code utilized in the Westinghouse EECS Evaluation Model for analyzing the

6/ As discussed in part III.B of this motion, infra., much of the Edwards Affidavit constitutes an impermissible attack on the Commission's regulations.

license amendments for the Turkey Point units. However, the affidavit does not indicate that Dr. Edwards has any educational or professional expertise in the behavior of a reactor core or associated systems under LOCA conditions or the modeling thereof. Consequently, the Intervenors have not carried their burden of demonstrating Dr. Edwards' expertise in the matters addressed in his affidavit.

III. The Intervenors Reponse And Parts Of The Affidavits Are Defective For Other Independent Reasons And Accordingly Should Be Stricken.

A. The Intervenors Response Does Not Contain A Statement Of Material Facts As To Which There Is A Genuine Issue To Be Heard.

10 CFR § 2.749(a) states that a response to a motion for summary disposition shall contain "a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard." The requirement for such a statement is not a meaningless formality. As one licensing board has stated with respect to the corresponding statement required to be filed with a motion for summary disposition, such statements are of "substantive significance" because they are used to identify which material facts are in dispute and which are uncontroverted. Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit No. 1), LBP-77-45,

6 NRC 159, 163 (1977). Since such a statement is not annexed to the Intervenor's Response, it fails to satisfy the requirements of 10 CFR § 2.749(a) and, accordingly, should be stricken. 7/

2. Parts Of The Edwards Affidavit Attack The Commission's Regulations

Sections 7-10 of the Edwards Affidavit allege that "there are no mathematical models in existence which can accurately model" a LOCA and that "it would be unwise to relax already existing safety margins solely on the basis of mathematical analysis using computer codes which predict that cladding failure will not occur in the event of LOCA." In particular, Dr. Edwards suggests that the amendments for the Turkey Point units should not issue because computer analysis predicts that

clad temperature could reach 2140^oF
Given the approximate nature of the analysis,
it is purely a matter of judgment --
political, rather than technical in nature --
as to whether or not this is "too close for
comfort"

Edwards Affidavit, § 9(e). As is demonstrated below, it is apparent that Dr. Edwards is attacking the substance of the Commission's regulations. Accordingly, under the provisions of 10 CFR § 2.758(a), Sections 7-10 of the Edwards Affidavit should be stricken.

7/ In the alternative, the Licensee's statement of material facts should be accepted as true since the Intervenor's have failed to file a statement of material facts which controverts the Licensee's statement. See 10 CFR § 2.749(a); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-3, 17 NRC 59, 61-62 (1983).

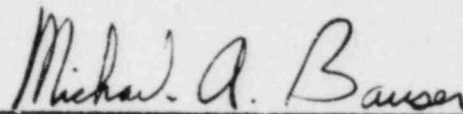
The relevant portions of the Commission's regulations which are under attack by Dr. Edwards are 10 CFR § 50.46 and 10 CFR Part 50 Appendix K. In particular, 10 CFR § 50.46(b)(1) provides that the maximum fuel element cladding temperature calculated in accordance with an acceptable evaluation model shall not exceed 2200^oF. Dr. Edwards takes issue with this figure and suggests that -- for "political" considerations -- the amendments for Turkey Point should not issue even though the calculated maximum peak clad temperature with the amendments is only 2140^oF. In essence, Dr. Edwards would have the Licensing Board deny the amendments for Turkey Point even though they comply with the Commission's regulations. Such an argument is not permissible under 10 CFR § 2.758(a) and, accordingly, it should be stricken.

Similarly, Appendix K to 10 CFR Part 50 sets forth the criteria for an acceptable evaluation model. Dr. Edwards does not contend that the computer models used in analyzing the Turkey Point amendments do not comply with Appendix K; instead, he argues that computer models, in general, should not be used to evaluate LOCAs. This argument is entirely inconsistent with the very essence of Appendix K, which is predicated upon the use of computer models to evaluate LOCAs, and which identifies criteria for an acceptable model. Consequently, the basic premise of Dr. Edwards argument attacks the validity of Appendix K, and his argument -- as embodied in Sections 7-10 of his affidavit -- should be stricken under 10 CFR § 2.758(a).

IV. Conclusions

The affidavits of Joette Lorion and Gordon Edwards should be stricken because the affiants are not competent to testify on the matters addressed in their affidavits. Since the Intervenors Response is dependent upon these affidavits, it should also be stricken. Additionally, since the Intervenors Response does not contain a statement of material facts, and since part of the Edwards Affidavit constitutes an attack upon the commission's regulations, there are other independent reasons for striking the Intervenors Response and parts of the supporting affidavits.

Respectfully submitted,



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DATE: September 21, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

FLORIDA POWER & LIGHT COMPANY)

(Turkey Point Nuclear Generating)
Units 3 & 4)))
_____)

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Motion To Strike" dated September 21, 1984 were served on 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
(original plus two copies)

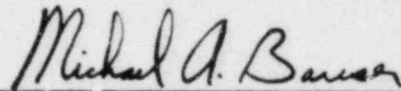
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