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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

LICENSEE'S MOTION FOR RECONSIDERATION
OR CLARIFICATION OF ORDER

Licensee, Florida Power & Light Company, moves for an Order reconsidering or clarifying the "Order Scheduling Prehearing Conference," entered by the Atomic Safety and Licensing Board February 8, 1985, for the reasons set out below.

1. On May 16, 1984, the Board entered its "Prehearing Conference Order" following a prehearing conference held in Homestead, Florida, February 28, 1984. The Prehearing Conference Order granted standing to the Center for Nuclear Responsibility, Inc., and Joette Lorion ("Intervenors") to intervene in this proceeding and admitted, as issues for adjudication, Contentions (b) and (d) proposed by Intervenors.

2. On May 29, 1984, Licensee propounded Interrogatories to Intervenors relative to the respective contentions,

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which were answered in "Intervenors' Response to Interrogatories Propounded by Florida Power & Light Company," dated July 10, 1984.

3. On August 10, 1984, Licensee filed a separate Motion for Summary Disposition as to each admitted contention, with supporting affidavits, statements of material facts as to which there is no genuine issue to be heard, and a memorandum of law.

4. On September 4, 1984, the NRC staff filed the "NRC Staff Response to Licensee Motions for Summary Disposition of Contentions (b) and (d)," with attached affidavits, supporting the motions for summary disposition.

5. On September 4, 1984, the Intervenors filed "Intervenors Response to Licensee's Motion for Summary Disposition of Intervenors' Contentions (b) and (d)," with attached affidavits, opposing the motions for summary disposition.

6. Thereafter, on September 21, 1984, Licensee moved to strike the affidavits supporting Intervenors' Response in opposition to the motions for summary disposition as well as that Response. On October 9, 1984, the NRC staff filed a response substantially in support of the motion to strike; and, on October 17, 1984, Intervenors filed a response in opposition. Both the motions for summary disposition and the motion to strike are outstanding.

7. On February 8, 1985, this Board entered its "Order Scheduling Prehearing Conference," scheduling a prehearing conference for March 26, 1985 at 9:30 a.m. in the Greater Miami area. The Order specifically provides:

Florida Power and Light Company (Licensee) should be prepared to respond in a didactic manner through its experts to questions and issues raised in the various filings:

For example:

- The calculations used to determine critical heat flux (CHF) and peak cladding temperature (PCT) for Low-parasitic (LOPAR) fuel, Optimized Fuel Assemblies (OFA) and mixed LOPAR/OFA fuel.

- The hydraulic and thermal effect of spacer grids (as related to calculations of CHF and PCT values).

- The procedure and calculations used in arriving at the 10°F increase in PCT identified in items 5 and 8 of the Parvin affidavit.

- The uncertainties listed in Joette Lorion's affidavit at pages 4, 5 and 8 and item 9(d) of Dr. Edward's affidavit at pages 6-7.*

* * * *

* See Intervenors' Response to Licensee's Motion for Summary Disposition of Intervenors' Contentions (b) and (d), dated September 4, 1984.

8. The Commission's regulations, in particular 10 CFR § 2.749(d) (1984), do not mention oral testimony as one of the matters to be considered in determining

a motion for summary disposition.^{1/} In fact, it would appear that the Commission does not contemplate an evidentiary hearing at which oral testimony will be taken in conjunction with such a motion, for it has directed licensing boards to

encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

Statement of Policy on Conduct of Licensing Proceedings, 13 N.R.C. 452, 457 (1981) (emphasis added). Indeed, as noted in Licensee's Memorandum of Law in Support of its Motions for Summary Disposition, the Appeal Board has endorsed the use of summary disposition as "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably unsubstantial issues." Houston Lighting & Power Company (Allens Creek Nuclear Generating Station), 11 N.R.C. 542, 550 (1980); Gulf States Utilities Co. (River Bend Station), 7 A.E.C. 222, 228 (1974).

9. It has been held that decisions arising under the Federal Rules may serve as guidelines to licensing boards in applying 10 C.F.R. 2.749. E.g., Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), 16 N.R.C. 512, 519 (1982).

^{1/} Section 2.749 is entitled "Authority of Presiding Officer to dispose of certain issues on the pleadings." (Emphasis added). See also, 10 C.F.R. Part 2, Appendix A, Section V.(b)(7).

Although several federal cases have held that there is a discretionary power to hear oral testimony at a summary judgment hearing under Rule 56 of the Federal Rules,^{2/} this discretionary power is derived not from Rule 56, but from Rule 43(e), which provides:

Rule 43. Taking of Testimony.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

No similar provision to Rule 43(e) appears in the Commission's regulations.

10. The federal cases which have considered the question have found that the courts should use oral testimony on a summary judgment motion sparingly and with great care.

The purpose of summary judgment—providing a speedy adjudication in cases that present no genuine issue of material fact — would be compromised if the hearing permitted by Rule 43(e) and Rule 56(c) became a preliminary trial. Furthermore, oral testimony might come as a surprise to the other litigants and therefore they might not have had an opportunity to prepare themselves to rebut that type of evidence. This is particularly

^{2/} See cases cited 10 Wright & Miller, Federal Practice and Procedure, Section 2723.

undesirable when it is the party
opposing the motion who is put
at a disadvantage by the interposition
of oral evidence.

Hayden v. First National Bank of Mt. Pleasant, Texas,
595 F.2d 994, 997 (5th Cir. 1979), citing 10 Wright
& Miller, Federal Practice and Procedure, Section
2723; citing also, Georgia Southern and F.Ry.Co.
v. Atlantic Coast Line R.Co., 373 F.2d 493, 497 (5th
Cir. 1967), cert. den., 389 U.S. 851, 88 S.Ct. 69,
19 L.Ed.2d 120 (motion to dismiss treated as a motion
for summary judgment: Court held that it was abuse
of discretion to grant summary judgment without proper
notice of how oral testimony and affidavits taken
at hearing would be used). See also, 6 Moore's Federal
Procedure ¶¶ 56.11 [1.6], 56.11 [8]; Chan Wing Cheung
v. Hamilton, 298 F.2d 459, 460 (1st Cir. 1962), wherein
the court held:

Moreover, receiving evidence at
the hearing, as distinguished
from affidavits or depositions
normally required to be filed
'at least 10 days before' (Rule
56(c)), may place the opposing
party in an unfair position. There
is a substantial difference between
accepting matters at the hearing
which show that an issue of fact
exists, and taking evidence in
support of the motion at the last
minute when there is no opportunity
to rebut.

11. The legal authorities make it clear that an

evidentiary hearing on a motion for summary disposition, including the receipt of oral testimony, may not be conducted for the purpose of trying or resolving factual issues. The only purpose of such a hearing is to aid the adjudicator in determining whether genuine issues of material fact exist. An examination of the authorities discloses that the line is sometimes a difficult one to observe. See, e.g., Hayden v. First National Bank of Mt. Pleasant, Texas, supra, at 996-7.

12. In the circumstances, in the absence of express authority for the use of oral testimony in the Commission's regulations, and in the apparent absence of any reported N.R.C. decisions on point, Licensee respectfully requests reconsideration or clarification of the Board's Order.

13. If, after reconsideration, the Board continues to desire to receive additional information before ruling on the Motions for Summary Disposition, Licensee suggests that the Board adopt appropriate measures to avoid surprise to the other litigants and to maintain the proffering of information within proper bounds. At a minimum, the Licensee recommends that the Board propound in writing the specific questions for which it desires answers. This will eliminate the potential for surprise and will help focus the prehearing session on the fundamental question of whether a genuine issue of material fact exists. Additionally, there are alternative procedures which the Board could establish to ensure fairness to all parties. These include

the following:

- The Board could direct the Licensee to respond in writing to the questions by means of sworn affidavits from their experts. The Board could then provide the NRC Staff and the Intervenors with an opportunity to respond to the questions and to the Licensee's response by means of sworn affidavits from their experts. The Board could then rule upon Licensee's motions for summary disposition based upon all the pleadings and the written responses to the questions, without the need for oral testimony.

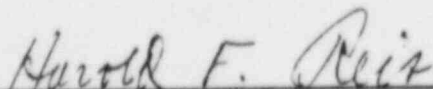
- If the Board, nevertheless, desires to hear oral testimony, it could utilize the same procedure outlined above, and then allow for the parties and the Board to examine the experts. A decision by the Board on Licensee's motions for summary disposition would then be based upon all the pleadings, the written responses to the questions, and the oral testimony upon examination.

Licensee recognizes that the procedures suggested herein, and possibly any variant of them, may make it necessary to postpone the prehearing conference now scheduled for March 26, 1985. However, Licensee submits that some such procedure is probably necessary to assure against claims of

unfairness, surprise or other error and to confine any information or testimony proffered to that necessary to determine whether any genuine issue of material fact is presented.

14. Licensee makes this motion for reconsideration or clarification without prejudice to its outstanding motions for summary disposition and to strike. Licensee continues to submit that the papers presently on file clearly and unequivocally demonstrate that there exists no genuine issue as to any material fact, that summary disposition in its favor on Contentions (b) and (d) is required as a matter of law and that no further oral testimony is required.

Respectfully submitted,



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Dated: February 19, 1985

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Motion for Reconsideration or Clarification of Order," dated February 19, 1985, were served on the following by personal service (messenger delivery to home or office) on the date shown below:

Dr. Robert M. Lazo, Chairman
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Attention: William L. Clements, Chief
Docketing and Service Section
Rm. H-1121

(Original plus two copies)

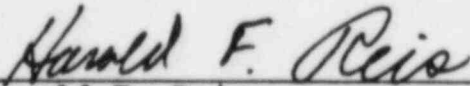
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Additional copies of the said "Licensee's Motion for Reconsideration or Clarification of Order" were also transmitted to the above-named individuals and the Atomic Safety and Licensing Board Panel by deposit in the United States Mail, first class postage prepaid and properly addressed on the date shown below.

Dated this 19th day of February, 1985.



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