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March 21, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO AMENDED PETITION TO INTERVENE AND MOTION TO FILE LATE SUPPLEMENTAL PETITION

I. INTRODUCTION

On June 20, 1984, pursuant to 10 C.F.R. § 2.105(a)(4)(i), the NRC published in the Federal Register a notice of consideration of the issuance of amendments to the Turkey Point licenses and offered an opportunity for hearing on the amendments. Pursuant to that notice, the Center for Nuclear Responsibility, Inc. and Joette Lorion (Petitioners) filed a timely request for hearing on July 9, 1984.

By Order of February 7, 1985, the Licensing Board in this proceeding scheduled a prehearing conference for March 27, 1985 and set February 25, 1985 as the deadline to file a supplement to the intervention petition. On March 7, 1985, Petitioners filed an amended petition to intervene, which included ten contentions, and a motion to permit the late filing addressing the five factors for late intervention set forth in 10 C.F.R. § 2.714(a)(1). Amended Petition to Intervene (Amended Petition); Motion to File Not in Accordance With the Board But in Accordance With the Rule (Motion). The Amended Petition (a) supplements the original petition by

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offering additional information on the interest of the Center for Nuclear Responsibility, (b) supplements the original petition to intervene by proffering proposed contentions for litigation and (c) requests that the license amendments be revoked. 1/ The Staff response to each of these filings is set forth below.

II. NRC STAFF RESPONSE

A. Interest of the Center for Nuclear Responsibility

In its response to the original petition to intervene, the Staff noted that the Center for Nuclear Responsibility (Center) had not shown its standing to intervene because it had neither demonstrated injury to itself from the proposed license amendments nor sufficiently identified at least one member who has standing and has authorized the Center to represent his or her interests. 2/ The Center attempts to rectify this deficiency by listing in its Amended Petition three members who reside within 25 miles of the facility, who "have consented to be represented" by the Center and whose interests allegedly would be affected by operation of the facility. Amended Petition at 2-3. Those members

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1/ Pursuant to 10 C.F.R. § 50.91(a)(4), the Staff made a final no significant hazards determination and issued the contested amendments on November 21, 1984.

2/ NRC Staff Response to Request for Hearing and Petition for Leave to Intervene Regarding Amendments to Allow Storage of Fuel With Increased Enrichment, July 31, 1984, at 6-7. The Staff stated, however, that Joette Lorion's signature on the petition as director of the Center constituted implicit authorization for the Center to represent her interests and, arguably, derivative standing for the Center. Id.

include Joette Lorion who has previously established standing in her own right. 3/

Although the statement that Ms. Lorion and two other members have consented to be represented by the Center is not supported by affidavit, 4/ the Staff again presumes that Ms. Lorion, who has the requisite interest and signs the Amended Petition as director of the Center, authorizes the Center to represent her interests in this proceeding. Accordingly, the Staff submits that the Center has adequately demonstrated its standing through the interest of at least one member.

B. Petitioners' Proposed Contentions

In their Amended Petition, Petitioners proffer ten contentions (designated as Contentions 1-10) for admission and litigation. In the discussion below, the Staff addresses the legal standards governing the admission of contentions in NRC adjudicatory proceedings, followed by the Staff's position on the admissibility of Petitioners' proposed contentions.

1. Legal Standards Governing Admissibility of Contentions

Only those contentions which fall within the scope of issues set forth in the Federal Register notice of opportunity for hearing and

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3/ Id. at 6.

4/ Under Allens Creek, affidavits are not necessary if it can be presumed from membership that the organization is authorized to litigate on behalf of its members. Houston Lighting and Power Co. (Allens Creek Generating Station, Unit 1), ALAB-536, 9 NRC 377, 395-96 (1979).

comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law may be admitted for litigation in NRC licensing proceedings. See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); Commonwealth Edison Co. (Byron Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689 (1980). See also Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

Pursuant to 10 C.F.R. § 2.714(b), a petitioner is required to file "a list of contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity." A petitioner who fails to file at least one contention which satisfies the requirements of § 2.714(b) will not be permitted to participate as a party. A proffered contention must be rejected where:

(1) it constitutes an attack on applicable statutory requirements;

(2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;

(3) it is nothing more than a generalization regarding the Petitioner's view of what applicable policies ought to be;

(4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21. The purpose of the basis requirement of 10 C.F.R. § 2.714(b) is: (a) to assure that the matter sought to be put into question does not suffer from any of the infirmities listed above; (b) to establish sufficient foundation to warrant further inquiry into the subject matter; and (c) to put the other parties sufficiently on notice "so that they will know at least generally what they will have to defend against or oppose." Id. at 20.

At the early stages of a proceeding, petitioners need to identify only the reasons "(i.e., the basis)" for each contention. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980). The basis stated for each contention need not "detail the evidence which will be offered in support of each contention." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). Accordingly, in examining contentions and the bases therefor to determine admissibility, a licensing board may not reach the merits of contentions. Id.; Peach Bottom, supra, 8 AEC at 20. Nevertheless, the basis for contentions must be sufficiently detailed and specific: (a) to demonstrate that the issues raised are admissible and further inquiry into the matter is warranted; and (b) to put the parties on notice as to what they will have to defend against or oppose. This is particularly important where, as here, a hearing is not mandatory, in order to assure that an asserted contention raises an issue which clearly is open to adjudication. Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 12 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974).

In addition, a board is not authorized "to admit conditionally for any reason, a contention that falls short of meeting the specificity requirements." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 466 (1982), modified on other grounds, CLI-83-19, 17 NRC 1041 (1983). The NRC's Rules of Practice do not permit "the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff." Id., at 468.

Finally, a licensing board has no duty to recast contentions offered by a petitioner to remedy the infirmities of the type described in Peach Bottom, supra, in order to make inadmissible contentions meet the requirements of 10 C.F.R. § 2.714. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974). Should a board nevertheless elect to rewrite a petitioner's inadmissible contentions so as to eliminate the infirmities which render the contentions inadmissible, the scope of the reworded contentions may be made no broader than the bases that were previously provided by the petitioner for the inadmissible contentions. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114-16 (1982).

2. Proposed Contentions

Petitioners' proposed Contention 1 states:

> CONENTION 1: That the expansion of the spent fuel pool at the Turkey Point facility is a significant hazards consideration and requires that a public hearing be held before issuance of the amendments.

In Contention 1, Petitioners (1) challenge the NRC Staff's final determination that the license amendments in question do not involve a significant hazards consideration and (2) assert that the amendments cannot issue until after a hearing on the amendments is held. This contention is not relevant to any issues properly before the Board and does not raise an issue as to which the Board may take effective action or provide an effective remedy.

Pursuant to Public Law 97-415, the Commission amended its regulations effective May 6, 1983 to specify standards for determining whether proposed operating license amendments involve significant hazards considerations and to revise procedures for noticing and issuing operating license amendments. 5/ The legislation, as implemented in the revised regulations:

> authorizes NRC to issue and make immediately effective an amendment to a license, upon a determination that the amendment involves no significant hazards consideration (even though NRC has before it a request for a hearing by an interested person) and in advance of the holding and completion of any required hearing.

48 Fed. Reg. 14873. Under the revised regulations, when the NRC receives an amendment request, it will make a proposed determination as to whether the amendment involves no significant hazards considerations. If that determination is that no significant hazards considerations are involved, the NRC will issue a notice which describes the requested amendment, sets forth the proposed no significant hazards consideration finding, requests

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5/ See Standards for Determining whether License Amendments Involve No Significant Hazards Considerations, 48 Fed. Reg. 14864 (April 6, 1983); Notice and State Consultation, 48 Fed. Reg. 14873 (April 6, 1983).

comments on that proposed finding, and gives notice of opportunity for a hearing. If, pursuant to such notice, requests for hearing are filed, the NRC will make a final determination on the matter of significant hazards. If the final determination is that the proposed amendment involves no significant hazards considerations, the NRC may (upon making the other requisite health and safety findings) issue the requested amendment despite the fact that there has been a request for a hearing on the amendment and no hearing has yet been held. Any hearing on the amendment would be held after the amendment was issued and effective. 6/

In promulgating the revised regulations for the treatment of license amendment applications, the Commission noted that, though the substance of public comments on the Staff's proposed no significant hazards consideration determination might be litigated in any hearing ultimately held, neither the Commission nor its adjudicatory boards will entertain hearing requests on Commission actions with regard to such comments. 7/ In addition, the Commission stated 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." 8/ These Commission statements imply that the Staff's actions in making a final no significant hazards consideration finding, despite contrary comments on the question of

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6/ Notice and State Consultation, 48 Fed. Reg. 14873, 14876. This procedure was followed in the instant proceeding.

7/ Id.

8/ Id. In this vein, Petitioners' request in Contention 5, infra, that the amendments be revoked, must be rejected.

significant hazards, and in issuing the license amendment prior to hearing in the face of such contrary comments, are not matters for hearing. At the very least, the Commission has made it clear that, while the substance of public comments on the Staff s no significant hazards determination and the essence of the Staff determination might be considered at hearing (at least in the context of considering the health and safety aspects of the amendment itself), any such consideration and subsequent Licensing Board action cannot impact on the effective date of the previously-issued amendment.

In these circumstances, litigation over the finding of no significant hazards considerations, in and of itself, can result in no useful remedy in the event it is found that the no significant hazards determination which Petitioners seek to challenge is wrong. In short, Petitioners' Contention 1 raises nothing that may be meaningfully litigated and presents no relevant issue for which the Licensing Board may provide a remedy in the event that Petitioners prevail. The issue before the Licensing Board is whether there is reasonable assurance of adequate protection of the public health and safety by operation of the facilities with the expanded storage capacity of the spent fuel pools, not whether or not there are significant hazards considerations. The latter issue is irrelevant in this proceeding since its only purpose is to determine the

timing of the hearing (before or after issuance of the amendment). For these reasons, the Staff opposes admission of Contention 1. 9/

Proposed Contention 2 states:

> CONTENTION 2. Expansion of the spent fuel pool at Turkey Point constitutes a major Federal action and requires that the Commission prepare an environmental impact statement in accordance with the National Environmental Policy Act of 1969 ("NEPA") and 10 CFR Part 51.

Contention 2 alleges that an EIS must be prepared because (1) the reracking of the spent fuel pool increases the "probability and possibility" of radiation releases resulting from normal operation and in the event there is a total or partial loss of coolant from the spent fuel pool, (2) there has been no analysis of the effect of the site being used

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9/ Basis (b) is also incorrect. The Commission has not traditionally held that storage capacity expansions involve significant hazards considerations. In a response to the March 15, 1983 letter referred to in the basis, the Chairman stated that the NRC has not taken a position on whether any particular reracking involves significant hazards. Letter to Hon. A.K. Simpson, U.S. Senate, from N.J. Palladino, NRC, April 22, 1983. Rather, the Staff has been prenoticing applications involving expansion of spent fuel storage capacity "as a matter of discretion" in light of possible public interest. SECY-83-337, Study on Significant Hazards, August 15, 1983, at 2.

Furthermore, in issuing its interim final rule on standards for determining whether an amendment involves significant hazards considerations, the Commission stated that it was "not prepared to say that reracking of spent fuel storage pool will necessarily involve a significant hazards consideration" and determined that the matter needed further study. 48 Fed. Reg. 14864, 14869. The Commission directed the Staff to prepare a report (which became SECY-83-337) for the Commission's use in revisiting the rule. While the Commission indicated that it did not expect that reracks accomplished by proven technology would involve significant hazards, the Commission stated that during the interim, a finding on a significant hazards consideration for each reracking application, would be made on a case-by-case basis. 48 Fed. Reg. 14864, 14869.

for "permanent waste disposal," and (3) certain alternatives to onsite storage have not been considered. Amended Petition at 5-6. The Staff objects to the admission of this contention because the bases alleged are not adequately specific and because the basis, in part, reflects an issue beyond the scope of this amendment proceeding.

Petitioners allege that the proposed rerack requires preparation of an EIS but provide no arguable basis within the scope of this proceeding for concluding that the expansion will cause significant environmental impact. The implication that releases during normal and accident conditions in the storage area will cause significant environmental consequences is speculative and not supported by any of the bases. Petitioners have not identified the scenario for a total or partial loss of spent fuel water, which are beyond design basis events for the pool, nor do they specify why such speculative releases are environmentally significant. Neither have Petitioners provided a basis for challenging the conclusion of the Staff's Environmental Assessment, dated November 14, 1984 and Finding of No Significant Impact (49 Fed. Reg. 45514, November 16, 1984). In addition, Petitioners' second basis, which asserts there is a need to examine the effects of permanent waste disposal, is clearly outside the scope of the current amendment since

such permanent storage is not being authorized by the instant amendments. 10/

As for alternatives to spent fuel storage capacity expansion, the Final Generic Environmental Statement on Handling and Storage of Spent Light Water Power Reactor Fuel, NUREG-0575, August 1979, analyzed such alternatives and concluded that the environmental impact of expanded onsite fuel storage is negligible. Petitioners offer no basis for challenging the applicability of that generic finding to the Turkey Point Plant.

Consequently proposed Contention 2 should be rejected for lack of a basis for the claim that an EIS is necessary.

Proposed Contention 3 states:

> CONTENTION 3. That the calculation of radiological consequences resulting from a cask drop accident are not conservative, and the radiation releases in such an accident will not be ALARA, and will not meet with the 10 CFR Part 100 criteria.

Contention 3 alleges that the calculation of radiological consequences resulting from a cask drop accident do not comply with SRP

10/ The assertion that long-term waste storage will have significant environmental impacts also challenges the findings of the Commission's Waste Confidence Rulemaking. 49 Fed. Reg. 34658 (August 31, 1984). There the Commission concluded that spent fuel could be stored on site for at least 30 years beyond the expiration of a reactor operating license without significant environmental consequences. Id. This generic determination was codified by the adoption of a rule providing that a discussion of the environmental impacts of post-operating license, at-reactor storage is not required in any EIS, environmental assessment or other analysis in connection with the issuance or amendment of an operating license. Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating License, 49 Fed. Reg. 34688, 34694; 10 C.F.R. §§ 51.23(b), 51.30(b).

criteria or Regulatory Guide 1.25 [11/] and thus the doses may exceed Part 100 criteria and ALARA (as low as is reasonably achievable). As a basis for the contention, Petitioners state that the calculations are not adequately conservative due to the radial peaking factor used. Amended Petition at 6.

The focus of this contention is on whether accidental releases will be within applicable regulatory criteria. The reference to the ALARA principle, which is found in 10 C.F.R. §§ 20.1(c) and 50.34a(a), is inappropriate because ALARA generally applies to routine operation, not accidents. 10 C.F.R. § 50.34a; see e.g., Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-81-14, 13 NRC 677, 702-03, aff'd, ALAB-660, 14 NRC 987 (1981). This is not to suggest, however, that it is improper for Petitioners to allege that the release limits in Parts 20 and 50 will be exceeded in the event of an accident. With the exception of the reference to ALARA, the Staff is of the opinion that the contention raises an issue within the scope of the proceeding, is adequately specific and is supported by a minimally sufficient basis. The Staff does not oppose the admission of the contention so long as Petitioners are limited to the basis asserted.

Proposed Contention 4 states:

> CONTENTION 4. That FPL has not provided a site specific radiological analysis of a spent fuel boiling event that proves that offsite dose limits and personal (sic) exposure limits will not be exceeded in allowing the pool to boil with makeup water from only seismic Category 1 sources.

Contention 4 alleges that FPL has not provided a site specific analysis of a spent fuel pool boiling event which demonstrates that onsite

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11/ Nonconformance with Staff guidance materials such as regulatory guides or SRP criteria does not mean that a licensee has not complied with the regulations. E.g., Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 772-73 (1977).

and offsite dose limits will not be exceeded (presumably Part 20 and Part 100). In support of the contention, Petitioners allege that FPL extrapolated from a study for the Limerick plant. Amended Petition at 6.

The Staff is of the view that the contention raises an issue within the scope of the proceeding, is adequately specific and is supported by a minimally sufficient basis (although factually erroneous). Consequently the Staff does not oppose the admission of the contention so long as the personnel and offsite dose limits are specified as those in Parts 20 and 100 and litigation is limited to the basis provided.

Proposed Contention 5 states:

> CONTENTION 5. That the main safety function of the spent fuel pool, which is to maintain the spent fuel assemblies in a safe configuration through all environmental and abnormal loadings, may not be met as a result of a recently brought to light unreviewed safety question involved in the current rerack design that allows racks whose outer rows overhang the support pads in the spent fuel pool. Thus, the amendments should be revoked.

Contention 5 asserts that rerack design is not safe because of the potential for lift-off during seismic events and thus the amendment should be revoked. Amended Petition at 7. In the basis, Petitioners claim that the matter involves an unreviewed safety question demanding a safety analysis of all seismic and hurricane conditions which could cause damage to fuel rods and thereby create a criticality accident. Id. Petitioners further request such analyses be performed before the amendments are issued. Id.

As presently framed, the contention poses a litigable issue. The issue, however, is not whether the potential for lift-off during a seismic event is an unreviewed safety question, but whether there is a deficiency in the current rack design and a necessity for a restriction

on loading to prevent potential lift-off. 12/ On the other hand, that part of the basis which asserts, without any support, that hurricane conditions will impact the storage racks but demonstrates no nexus between hurricane loads and the instant rerack, raises issues beyond the scope of the current amendments. The effect of hurricane and tornado wind loads, and hurricane-induced flooding, on the spent fuel storage buildings was evaluated and documented at the operating license stage. Safety Evaluation in the Matter of Turkey Point Plant Units 3 and 4, March 15, 1972, Section 5.0. Thus, this basis should be rejected for failure to raise an issue within the scope of the proceeding and to proffer an adequate basis. Accordingly, the Staff does not oppose the admission of Contention 5 if it is limited to whether the fuel can be stored safely in view of the potential for lift-off during seismic events.

Proposed Contention 6 states:

> CONTENTION 6. The Licensee and Staff have not adequately considered or analyzed materials deterioration or failure in materials integrity resulting from the increased generation and heat and radioactivity, as a result of increased capacity and long term storage, in the spent fuel pool.

Contention 6 asserts that the Staff's and Licensee's analysis of the effect of increased heat and radiation from the expanded storage capacity

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12/ Under 10 C.F.R. § 50.59, the decision as to whether a matter constitutes an unreviewed safety question rests with the Licensee in the first instance. The Licensee currently has administrative controls in place which prevent the occurrence of lift-off by not loading the overhanging rows while the remainder of the racks are empty. As a result, as indicated in a letter from the Staff to Licensee, the conclusions of the Staff's safety evaluation have not been affected. Letter to J.W. Williams, FPL, from D.G. McDonald, NRC, February 26, 1985. A copy of this letter was transmitted to the Board and parties by letter of Staff counsel, dated February 28, 1985.

and long-term storage on materials integrity is inadequate. As a basis for the contention, Petitioners cite deterioration of fuel cladding and the concrete pool structure, and loss of storage rack and pool liner integrity. Amended Petition at 7-8.

The Staff does not oppose the admission of Contention 6 provided the reference to "long-term storage" is limited to the storage period authorized by the amendments (i.e. full core discharge until 2005 for Unit 4 and 2006 for Unit 3) and the contention is limited to the basis offered. As limited, the contention raises an issue within the scope of the proceeding, is adequately specific and is supported by a minimally sufficient basis.

Proposed Contention 7 states:

> CONTENTION 7. That there is no assurance that the health and safety of the workers will be protected during spent fuel pool expansion, and that the NRC (sic: FPL) estimates of between 80-130 rem/person will not meet ALARA requirements, in particular those in 10 CFR Part 20.

Contention 7 asserts that is no assurance that worker health and safety will be protected during the reracking because worker dose will not meet ALARA requirements and the limits of Part 20. The sole basis for the contention is that the Licensee's estimates of occupational exposure are higher than the NRC Staff estimate of 40-50 person-rem and much higher than those experienced at other plants. Amended Petition at 8.

While the Licensee's premodification estimate was revised downward to 59 person-rem in a later submittal (August 22, 1984, Table 3), the Petitioners' concern that the dose estimates are not ALARA because they allegedly exceed actual exposures at other plants is within the scope of the proceeding. Although there is no identification of the other

facilities whose actual occupational exposure experience has been less than that estimated for Turkey Point, the contention poses an issue which adequately informs opposing parties of the matter to be defended. Thus, the contention raises an issue within the scope of the proceeding, is adequately specific and is supported by a minimally sufficient basis. Therefore, the Staff does not oppose the admission of this contention so long as it is limited to the bases offered.

Proposed Contention 8 states:

> CONTENTION 8. That the high density design of the fuel racks will cause higher heat loads and increase in water temperature which could cause a loss-of-cooling accident in the spent fuel pool, which could in turn cause a major release of radioactivity to the environment. And, that the decrease in the time that it takes the spent fuel to reach its boiling point in such an accident, both increases the probability of accidents previously evaluated and increase the chances of accidents not previously evaluated.

Contention 8 alleges that the high density storage design of the fuel racks will increase heat and water temperatures such that a loss-of-cooling accident may occur, due to the decrease in time to boiling, 13/ causing major releases to the environment. As a basis for the contention, Petitioners cite the reduction in time to boiling and the possibility of a loss of water accident resulting in a zirconium cladding fire and assert, without reference to any particular document, that the NRC has stated that pool water temperatures should be kept below 122°F. Amended Petition at 8-9.

13/ There is approximately 24 feet of water above the racks. Time to boil from loss of SFP cooling is not the time it takes for the stored spent fuel to become uncovered as a result of SFP water boil-off.

While Petitioners are alleging a beyond design basis event for the spent fuel pool, the contention raises an issue within the scope of the proceeding, is adequately specific and is supported by a minimally sufficient basis. Therefore, the Staff does not oppose the admission of Contention 8 as long as it is limited to the basis offered.

Proposed Contention 9 states:

> CONTENTION 9. Licensee has not analyzed the effect that a hurricane or tornado could have on the spent fuel storage facility or its contents, and that the SER neglects certain accidents that could be caused by such natural disasters.

Contention 9 alleges that the effects of a hurricane, tornado, or other natural disasters, on the spent fuel storage facility or its contents have not been analyzed. In its basis, Petitioners assert that (a) a wind driven missile could damage the spent fuel racks and (b) a hurricane-induced tidal wave could spread spent fuel pool radioactivity into the surrounding environment. Amended Petition at 10.

Contrary to Petitioners' assertion, the effect of wind, tornado and hurricane flooding on the spent fuel storage building was evaluated at the operating license stage. Safety Evaluation, March 15, 1972, Section 5.0. This analysis also included a study of tornado-borne, external missiles. Id. at Section 4.8. Petitioners summarily assert, as they did with respect to proposed Contention 5, that there is a nexus between the arrangement of the contents of the fuel storage building and the impact of winds, flooding, and airborne missiles. No such nexus is shown and no basis for reevaluating the effects of hurricanes and tornadoes because of this amendment has been presented. Consequently, this contention should be rejected for lack of basis.

Proposed Contention 10 states:

> CONTENTION 10. That the increase of the spent fuel pool capacity, which includes fuel rods which have experienced fuel failure and fuel rods that are more highly enriched, will cause the requirements of ANSI NI6-1975 (sic) not to be met and will increase the probability that a criticality accident will occur in the spent fuel pool and will exceed 10 CFR Part 50, A 62 criterion.

Contention 10 alleges that the increased storage capacity will not meet ANSI N16-1975, "Nuclear Criticality Safety in Operations with Fissionable Materials Outside Reactors," and will increase the probability for a criticality accident contrary to GDC 62 (Prevention of criticality in fuel storage and handling). As a basis for the contention, Petitioners state that added storage of failed fuel and fuel with increased enrichment will increase the probability that the fuel will go critical and cause a major criticality accident with releases in excess of 10 CFR Part 100 criteria. Amended Petition at 10.

With the exception of the reference to failed fuel causing criticality, the contention raises an issue within the scope of the proceeding, is adequately specific and is supported by a minimally sufficient basis. The Petitioners' concern that failed fuel will cause criticality should be rejected since there is no nexus or relationship between the license amendment in question, the storage of failed fuel and increased likelihood of criticality. Accordingly, the Staff has no objection to the admission of the contention provided that the references to failed fuel causing criticality is deleted in both the contention and basis, and the contention is limited to whether added storage of fuel and more highly enriched fuel will cause a criticality accident.

To summarize, it is the Staff's view that proposed Contentions 1, 2, and 9 are inadmissible and should be rejected. However, Contentions 3, 4, 5, 6, 7, 8, and 10 raise matters within the scope of the proceeding, are supported with adequate bases, and should be admitted for litigation.

C. Late-Filed Petition

The Petitioners were directed to file a supplement to their July 9, 1984 intervention petition by February 25, 1985. Order Scheduling Prehearing Conference, February 7, 1985. Petitioners failed to file their supplemental petition by that date. After the deadline had passed and in a conference call between the Board and parties on March 6, 1985, the Board directed Petitioners to file a supplement by March 7, 1985 and provide justification for the late filing. On March 7, 1985, ten days after the date prescribed in the Order, Petitioners filed their Amended Petition and a Motion which requested that their filing date be extended to March 7, 1985.

A late intervention petitioner must address the five factors specified in 10 C.F.R. § 2.714(a) and "affirmatively demonstrate that on balance, they favor his tardy admission into the proceeding." Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980); see Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). These factors are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Commission has emphasized that licensing boards are expected to demand compliance with the lateness requirements of 10 C.F.R. § 2.714. See Pacific Gas and Electric Co. (Diablo Canyon, Units 1 and 2), CLI-81-5, 13 NRC 361, 364 (1981). The burden is on the petitioner to demonstrate that a balancing of these five factors is in its favor.

1. Good Cause

Petitioners assert that there is good cause for late filing because as a pro se litigant, their representative, Ms. Lorion, followed the time for filing set forth in 10 C.F.R. § 2.714(b) and "the vicarious advice of counsel." Motion at 2. Ms. Lorion also asserts that due to deadline and time constraints as a "researcher, writer, and mother," she missed the February 25 deadline and was unable to file before March 7, 1985. Id.

The reasons proffered by Petitioners constitute, at best, only a minimally colorable claim of good cause for the failure to file by February 25, 1985. Pursuant to 10 C.F.R. § 2.711(a), licensing boards are expressly empowered to extend or shorten the time periods provided in the rules. Allens Creek, ALAB-574, 11 NRC 7, 13 (1980); Allens Creek, ALAB-565, 10 NRC 521, 523 (1979). 14/ Even as pro se litigants, Petitioners

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14/ In Allens Creek, ALAB-574, the Appeal Board upheld the denial of intervention to a pro se litigant who filed his contentions 11 days late and had read neither the board's order directing the filing of contentions nor the Rules of Practice, but relied on advice of friends that he was entitled to file fifteen days prior to the first prehearing conference. 11 NRC at 13.

should be expected to comply with the procedural requirements of the regulations as well as Board ordered filing dates. It was Ms. Lorion's inability to meet the deadline, as well as her erroneous conclusion as to the filing due date, which gave rise to the brief delay occasioned here. While it is understandable that Ms. Lorion may have been confused about her filing deadline and erroneously relied on the "vicarious advice of counsel" and her own reading of the rules, her failure to meet the Board's filing date, although innocent, is not totally excusable. 15/ If Petitioners were uncertain as to whether the Board schedule for the supplemental petition superseded the minimum time period permissible in Section 2.714(b) (no later than 15 days before the prehearing conference) and were unable to comply with the Board's schedule, it was incumbent on Petitioners to seek, in advance, an extension of time for filing from the Board, or seek clarification of its filing deadline from the Board. Because Petitioners have made a questionable showing as to good cause for the delay in filing their contentions, the first factor weighs slightly against intervention. 16/

15/ It is interesting to note that Petitioner was unable to comply with the Board's schedule even though the deadline postdated the July 1984 intervention petition by over 7 months.

16/ See, e.g., Florida Power and Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 NRC 183, 190 (1979) (Board did not demand that the early performance of a pro se petitioner who had not shown good cause for its late filing adhere rigidly to the rules and did not weigh this factor as heavily as it otherwise might have).

2. Availability of Other Means and Representation by Existing Parties

The second factor to be considered is whether other means are available to protect petitioner's interest. This factor weighs in favor of granting the Petition because there appear to be no means other than participating in the NRC licensing proceeding for Turkey Point which would enable Petitioners to pursue their interests. Similarly, the fourth factor (the extent to which petitioner's interest will be represented by existing parties) also favors Petitioners. There is no other party who might directly represent the interest of Petitioners. However, the Appeal Board has observed that the availability of other means whereby a petitioner can protect its interest and the extent to which other parties will represent that interest are properly accorded relatively less weight than the other three factors in Section 2.714(a). South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895 (1981).

3. Development of Sound Record

The third factor, the extent to which petitioner can assist in developing a sound record, also weighs against permitting late intervention. Petitioners must affirmatively demonstrate that they have special expertise which would aid in the development of a sound record to prevail on this factor. See Summer, 13 NRC at 892-93; Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980). When a petitioner addresses this factor "it should set out with as much particularity as possible the precise issues it plans to

cover, identify its prospective witnesses, and summarize their proposed testimony. Vague assertions regarding [a] petitioner's ability or resources . . . are insufficient." Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982) (citations omitted).

In the instant case, Petitioners assert that their participation, "through research and expert testimony, will assist in developing a sound record . . . ." Motion at 3. This vague and unsupported assertion does not establish that Petitioners possess any special expertise or could assist in any manner in developing the record. Nor does the statement indicate that Petitioners have retained qualified experts who would aid in the development of a sound record since the substance of their testimony has not been summarized. Thus, petitioners have failed to meet their burden with regard to this factor.

4. Delay and Broadening of Issues

Finally, the fifth factor, the extent to which a petitioner's participation will broaden the issues or delay the proceeding, does not significantly weigh against the Amended Petition. In this amendment proceeding where a hearing is not mandatory and would not be held were the Board to deny intervention, it is indisputable that participation by Petitioners, the only intervenor, will broaden the issues because absent Petitioners' intervention, there would be no issues for hearing. However, the delay which can be attributed directly to the tardiness of the petition is to be taken into account in applying this factor. West Valley, CLI-75-4, 1 NRC at 276; Long Island Lighting Co. (Jamesport, Units 1

and 2), ALAB-292, 2 NRC 631, 650 & n.25 (1975). Because Petitioners' ten-day delay in filing the contentions was brief and, in fact, had no effect on the timing of the prehearing conference (in part through the efforts of the other parties) or on other progress in this proceeding, the Staff does not believe this factor weighs against intervention.

In sum, the first and third factors weigh slightly against Petitioners. While there may not be any other forum (second factor) or party (fourth factor) which might afford protection to Petitioners' interest and these factors are accorded relatively less weight than the others, petitioners' innocent, though mistaken, failure to adhere to the Board deadline has not resulted in any delay to the proceeding. On balance, the factors to be considered under 10 C.F.R. § 2.714 weigh slightly in favor of permitting late intervention.

III. CONCLUSION

For the reasons discussed in the foregoing, the Staff is of the opinion that Petitioners have adequately demonstrated their standing to intervene, have proffered at least one admissible contention, prevail under the five-factor balancing test for late intervention, and should be admitted as a party to this proceeding.

Respectfully submitted,

Mitzi A. Young

Mitzi A. Young
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 21st day of March, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO AMENDED PETITION TO INTERVENE AND MOTION TO FILE LATE SUPPLEMENTAL PETITION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks, by express mail, this 21st day of March, 1985:

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Atomic Safety and Licensing Board Panel
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