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Michael C. Farrar, Chairman
Richard S. Salzman
Dr. W. Reed Johnson

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-389
	)	
(St. Lucie Nuclear Power Plant, Unit No. 2)	)	
	)	

Messrs. Terrence J. Anderson and Martin Harold Hodder, Miami, Florida, for the intervenors.

Messrs. Harold F. Reis, Washington, D. C., and Norman A. Coll, Miami, Florida, for the applicant.

Mr. William D. Paton for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

February 14, 1980

(ALAB-579)

On December 12, 1979, the intervenors once again moved for consideration of "Class 9" accidents[1/] in this proceeding.

1/ "The term 'Class 9 accidents' stems from a 1971 AEC proposal to place nuclear power plant accidents in nine categories to take account of such accidents in preparing environmental impact statements. That proposal was put forward for comment in a proposed 'Annex' to the Commission's regulations implementing NEPA. 36 Fed. Reg. 22851-52 (December 1, 1971). The nine categories in that 'Annex' were listed in increasing order of severity. 'Class 9' accidents involve sequences of postulated successive failure more severe than those postulated for the design basis of protective systems and engineered safety features. (FOOTNOTE CONTINUED ON NEXT PAGE)

[illegible] request was premised on the Commission's recent decision in Offshore Power,[2] which they construe as reversing a previous generic prohibition against considering the consequences of Class 9 events in individual licensing proceedings. The motion must fail.

1. The Licensing Board authorized issuance of a permit to construct St. Lucie Unit 2 in 1977, an action that we approved later that year.[3] The Commission's election not to review our decision made it the agency's final action[4] and it has now been upheld on judicial review.[5]

1/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) The Annex concluded that, although the consequences of Class 9 accidents might be severe, the likelihood of such an accident was so small that nuclear power plants need not be designed to mitigate their consequences, and, as a result, discussion of such accidents in applicants' Environmental Reports or in staff's environmental impact statements was not required." Offshore Power Systems (Floating Nuclear Plants), CLI-79-9, 10 NRC __, __ (slip opinion pp. 2-3) (September 14, 1979)(footnote omitted).

2/ Id.

3/ LBP-77-27, 5 NRC 1038, affirmed, ALAB-435, 6 NRC 541; but see text accompanying fn. 7, infra.

4/ See 10 C.F.R. §2.785(c).

5/ Hodder v. NRC, 589 F.2d 1115 (D.C. Cir. 1978)(decision without opinion), certiorari denied, __U.S.__, 62 L.Ed.2d 36 (1979).

There remain pending in this case, however, two limited matters for our consideration. These are (1) the environmental consequences of fluid emissions during the mining and milling of uranium to fuel the plant and (2) the stability of the applicant's electrical grid. The Commission instructed us to hear the former;[6] we expressly retained jurisdiction to consider the latter when we otherwise affirmed the decision below.[7] Intervenors filed the motion now before us in open hearing while we were taking evidence on the second question.

The applicant and the staff remind us of intervenors' previous unsuccessful attempt to inject the "Class 9" issue into this case and point out that rejection of this contention was expressly upheld on judicial review.[8] Those parties add that we have no authority to admit the contention in any event. Pending completion of a rulemaking proceeding contemplating the establishment of a new general policy on this

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6/ 43 Fed. Reg. 15613, 15616 (April 14, 1978).

7/ Order of October 28, 1977, modifying ALAB-435.

8/ The court of appeals' memorandum order to that effect is unpublished. It is, however, reproduced in the appendix to applicant's brief.

~~We note that the Commission has reserved to itself the right to decide whether Class 9 accidents may be considered in proceedings involving land-based plants.~~ [illegible]

Intervenors concede that only the Commission can say whether Class 9 questions are to be taken up. They nevertheless assert that we retain sufficient "jurisdiction" to trigger that determination either by (1) instructing the staff to advise the Commission whether the issue should be considered[10/] or (2) "certifying" that question directly to the Commission.[11/] They ask that we adopt one course or the other and stay completion of these proceedings until the Commission acts.[12/]

9/ Offshore Power, supra fn. 1, 10 NRC at __ (slip opinion at 9-10); accord, Public Service Co. of Oklahoma (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC __ (slip opinion at 29-32)(December 7, 1979).

10/ A procedure we adopted in Black Fox, ALAB-573 (supra fn. 9), 10 NRC at __ (slip opinion at 32).

11/ See 10 C.F.R. §2.785(d).

12/ The relief sought by intervenors' amended prayer is an order from us:

> "1. staying completion of these proceedings until the Commission has received and acted upon the staff's recommendations with respect to class 9 accident consideration at the St. Lucie site or has adopted a new general policy;
>
> "2. directing the staff to advise the Commission within 30 days of the reasons why it believes the consequences of class 9 accidents should or should not be considered in this case and granting the other parties 30 days after that advice is given to submit their views on the question to the Commission; and

(FOOTNOTE CONTINUED ON NEXT PAGE)

Our earlier [illegible] is controlled by Public Service Co. of New Hampshire [illegible] Station, Units 1 and 2, ALAB-[illegible], 6 NRC [illegible] In that case as in this one, a licensing board authorized a construction permit after deciding a contention adversely to an intervenor. There as here, we approved the trial board's ruling and a court of appeals ultimately upheld the Commission's affirmance of our decision.[13/] The Seabrook intervenors later sought on grounds of supervening developments to resurrect the issue previously interred by the board. As do intervenors in this case, they argued that we were free to act because the existence of discrete if unrelated issues still open before us meant that the proceeding was not final. We squarely rejected that argument. We held in Seabrook that after we had relinquished jurisdiction over a cause except for limited purposes,

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12/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)
"3. certifying to the Commission as major and novel the questions of the standards to be applied by the staff in determining in which 'individual cases ... the environmental consequences of Class 9 accidents should be considered,' the procedures by which such staff determinations are to be reviewed, and how the Commission's order in Offshore is to be implemented.

13/ LBP-76-26, 3 NRC 857 (1976), affirmed, ALAB-422, 6 NRC 33 (1977), affirmed, CLI-[illegible], 7 NRC 1, affirmed sub nom. New England Coalition v. NRC, 582 F.2d 87 (1st Cir. 1978).

[illegible] the appellate process was otherwise completed we would not admit new contentions unrelated to those purposes. There must be an end to litigation sometime.

Save for the added factor that these intervenors have had a petition for certiorari denied as well, the case at bar is on all fours with Seabrook.[14/] It therefore heralds the result we must reach. In the absence of a rational and direct link to the limited matters over which we retain jurisdiction, we are without authority to consider new or reopened issues at this stage of the proceeding. Accord, Virginia Electric and Power Co. (North Anna Station, Units 1 & 2), ALAB-551, 9 NRC 704, 708-09 (1979). We perceive no such relationship between the pending radon and grid stability issues and the environmental consequences of Class 9 accidents. We therefore may not accede to intervenors' request to take up that issue now.

This does not leave intervenors remediless. The staff acknowledges in its brief (p. 8) that a Commission regulation, 10 C.F.R. §2.206, "permits a petition to be filed with the Director of Nuclear Reactor Regulation who has discretionary authority to grant the relief sought subject to Commission

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14/ And is distinguishable from Black Fox (on which intervenors rely), where the licensing board proceeding was only half completed. ALAB-573, supra fn. 9, 10 NRC at __ (slip opinion at 32).

[illegible] Ltd., et al., Public Service Co. of Indiana (Marble [illegible], [illegible], CLI-79-[illegible], 10 NRC [illegible], [illegible] (1979), [illegible] intervenors to pursue that path.

[illegible] dismissed for want of jurisdiction; treating the submissions as a show cause petition and responses, the papers are referred to the Director of Nuclear Reactor Regulation for his consideration under 10 C.F.R. §2.206.[15/]

It is so ORDERED.[16/]

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

15/ The Director would make the recommendation to the Commission on whether to hear Class 9 events even were we to direct "the staff" to do so. We have no reason to believe that he will act either arbitrarily or tardily; we intimate no views on the appropriate course for him to take.

16/ The outcome of this matter to one side, we wish to acknowledge the receipt of particularly helpful and well-reasoned briefs from all parties.