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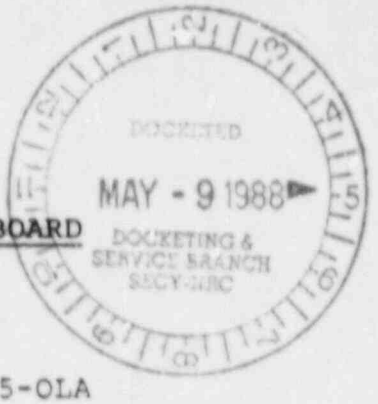

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of:	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket No. 50-335-OLA
	)	
(St. Lucie Plant, Unit No. 1)	)	

LICENSEE'S NOTICE OF APPEAL FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER GRANTING A REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE AND SUPPORTING BRIEF

Dated: May 9, 1988

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Pursuant to 10 C.F.R. § 2.714a(c), notice is hereby given that Florida Power & Light Company ("FPL" or "Licensee") appeals from the Memorandum and Order of the Atomic Safety and Licensing Board, dated on April 20, 1988. The effect of the Memorandum and Order was to grant a Request for Hearing and Petition for Leave to Intervene ("Amended Petition") in this operating license amendment proceeding.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

On April 20, 1988, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") designated to rule on petitions for leave to intervene and to conduct any necessary hearing in connection with the Licensee's request for an operating license amendment authorizing an increase in the spent fuel pool storage capacity for St. Lucie Plant, Unit No. 1 ("St. Lucie 1"), from 728 to 1,706 fuel assemblies, issued a prehearing conference

Memorandum and Order ("Order") concerning the admission of petitioner, Campbell Rich, and the contentions he had proferred. The Licensing Board found that the petitioner had standing to intervene in the proceeding. Of the 14 contentions which were not withdrawn at the prehearing conference, the Order provided for the admission of seven, held one in abeyance, and rejected the other six. In particular, Contentions 3, 4, 6, 8, 9, 11 and 15 were found to be admissible. Contention 5 is being held in abeyance while petitioner reviews certain material provided late last month by the NRC Staff. Contentions 1, 2, 10, 13, 14 and 16 were deemed inadmissible. Contentions 7 and 12 were withdrawn at oral argument. For the reasons presented below, Licensee maintains that none of the contentions should have been admitted and that all should have been dismissed. Accordingly, Licensee requests that the Order be reversed and the proceeding terminated.

Licensee recognizes fully that the Commission has developed a liberal policy governing the admission of contentions. Admissible evidence need not be submitted in support of a contention, and a licensing board may not address the merits of a contention in determining its admissibility. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 933 (1987). Further, "the Licensing Board exercises a substantial amount of discretion in determining the adequacy of the bases for a contention," and the Appeal Board's review "on this score is limited to whether the Board abused its

discretion." Id. at 931 (footnote omitted). Licensee wishes to emphasize, from the outset, that it is not in any way challenging this general doctrine.

Rather, the principal question raised in this appeal -- and one common to each of the admitted contentions as well as to the contention which is being held in abeyance -- is whether the proponent of a contention must specify why, in the case where a licensee and/or the NRC Staff have identified the issue raised by a contention and developed and presented a resolution, that resolution is inadequate. See generally, Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit No. 1), LBP-82-52, 16 NRC 183, 188 (1982) (hereinafter "Dresden"). Cast somewhat differently, the appeal seeks to clarify the "ironclad obligation," enunciated by the Appeal Board and confirmed by the Commission, of the proponent of a contention

> to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention. 1/

It is Licensee's position -- detailed below -- that the Order, in admitting certain contentions and holding one in abeyance, failed completely to recognize the duty of the petitioner: (1) to examine the publicly available documentary material pertinent to this proceeding; and (2) to specify deficiencies therein in the treatment of issues he sought to raise. In view

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1/ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated on other grounds, CLI-83-19, 17 NRC 1041, 1045 (1983) (hereinafter "Catawba").

of the failure of the Order to recognize this duty and impose it, and petitioner's complete failure to discharge the duty, the Order should be reversed and this proceeding terminated.

In the instant case, Licensee's amendment application was accompanied by an extensive Spent Fuel Storage Facility Safety Analysis Report ("SAR"), prepared by FPL, addressed to safety and environmental issues. 2/ This was followed by an extensive exchange of written questions and answers between the NRC Staff and FPL pertaining to various related safety issues. 3/

Consequently, at the outset of its discussion of the proposed contentions, FPL called attention to the obligation of the proponent of a contention, stemming from Catawba and Dresden, to examine and address the relevant publicly available documentary material in order to establish the bases for the contention. 4/ FPL also pointed out how the petitioner had failed to meet that obligation with respect to each proposed contention.

In its subsequently filed response, the NRC Staff expressed neither agreement or disagreement with Licensee's reading of Catawba and Dresden, nor its own view concerning the

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2/ See Letter from FPL to NRC Staff, June 12, 1987 (Docket No. 50-335, No. L-87-245).

3/ See, e.g., Letter from NRC Staff to FPL, July 16, 1987 (Docket No. 50-335); Letter from FPL to NRC Staff, Sept. 8, 1987 (Docket No. 50-335, No. L-87-374); Letter from NRC Staff to FPL, Sept. 21, 1987 (Docket No. 50-335); Letter from FPL to NRC Staff, Oct. 20, 1987 (Docket No. 50-335, No. L-87-425); Letter from FPL to NRC Staff, Dec. 23, 1987 (Docket No. 50-335, No. L-87-537).

4/ Licensee's Answer in Opposition to Amended Petition to Intervene, pp. 8-11 ("Licensee's Opposition").

application of those cases to a decision as to the specificity of the contentions proferred in this proceeding. The Staff simply chose not to address the issue. 5/

FPL reiterated its views in detail at the prehearing conference held on March 29, 1988. E.g., Tr. 52-57. However, again the Staff did not respond. The Order, itself, makes one general reference to Dresden (Order, p. 5), does not refer at all to Catawba, and fails to refer to either decision in its discussion of the admissibility of specific contentions.

As described below, the Order manifests certain other errors in admitting contentions. However, the issue common to each contention admitted, and the one being held in abeyance, is whether the requirement to set forth the basis for each contention with specificity, imposed by 10 C.F.R. § 2.714(b), also imposes an obligation on the proponent of a contention to examine the publicly available documentary material -- generated by the applicant and the NRC Staff and relevant to the contention -- in order to support a claim that the safety or environmental issue raised in the contention has not been adequately addressed. The failure of the NRC Staff and the Order to even address the question suggests that such an obligation simply does not exist. FPL

5/ The response, NRC Staff Response to Amended Petition to Intervene ("Staff Response"), dated February 4, 1988, refers to Catawba only in support of the propositions that a contention must meet "the specificity requirements," that a "vague, unparticularized contention, followed by an endeavor to flesh it out through discovery is not permitted," and that certain issues must be "raised promptly" in contentions. See pp. 5-6, 16. It makes no reference to Dresden.

submits that -- for good reason -- the obligation does exist, but was neither recognized nor imposed by the Order below. This generic question, applicable to all of the admitted contentions, is appropriate for interlocutory review.

A subsidiary issue, common to the admission of a number of contentions, arises from the fact that nine of the sixteen contentions and their asserted bases, as presented in the Amended Petition, were copied substantially verbatim from another proceeding. Below, Licensee contended that, in the circumstances, "the admissibility and bases for the contentions [should] be scrutinized critically." 6/ The Order, however, misapprehended the Licensee's position, characterizing it as maintaining that the copying of a contention from another proceeding is sufficient to bar the admission of the contention. 7/ The Licensing Board has expressly rejected that view (Order pp. 18-19, Tr. 56), and Licensee did not before 8/ and does not now take issue with that position. However, the Order, itself, appears to treat copying as entirely irrelevant to the consideration of the admissibility

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6/ Licensees Opposition, p. 12. Licensee also argued -- as it does here -- that where a contention is copied from another proceeding, its proponent has at least an obligation to distinguish the disposition of the contention in the other proceeding. Id. at 11-12.

7/ This may have resulted from the fact that the discussion of each proposed contention in Licensee's Opposition begins by noting whether or not it was copied from another proceeding. This was done for purposes of basic orientation with respect to each contention, however, and not in support of an argument that copying, in and of itself, is impermissible.

8/ See Licensee's Opposition, p. 10; Tr. 56-57.

of contentions. This position, Licensee submits, is erroneous and makes the Order further deserving of the Appeal Board's consideration.

II. PROCEDURAL BACKGROUND

On August 31, 1987, the Nuclear Regulatory Commission published a notice of: (1) consideration of amendment to facility operating license for St. Lucie Plant, Unit 1; (2) proposed finding of no significant hazards consideration; and (3) opportunity for hearing. 52 Fed. Reg. 32,852 (1987). In response to the Federal Register notice, a letter was received requesting that a hearing be held concerning the proposed amendment. The letter did not meet the formal requirements for intervention. However, the Licensing Board extended a further opportunity to the petitioner, Mr. Campbell Rich, to file an amended petition satisfying NRC requirements. Memorandum and Order, November 13, 1987. The petitioner later responded by transmitting his Amended Petition, proposing 16 contentions. Most of these drew heavily on contentions and bases that had been offered in a similar proceeding concerning a spent fuel storage pool expansion amendment for Licensee's Turkey Point Plant, Units 3 and 4, 9/ copying nine essentially verbatim.

9/ See generally, Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250-OLA-2, 50-251-OLA-2, Memorandum and Order (Mar. 25, 1987; unpublished) (ruling on summary disposition motions); Initial Decision, 27 NRC -- (April 19, 1988) [hereinafter Turkey Point].

Licensee's Opposition argued against the admission of any of the contentions on the grounds that they were either outside the scope of the proceeding, or failed to meet the specificity requirement of 10 C.F.R. § 2.714(b). The Staff opposed the admission of ten contentions, but took the position that six were "supported with adequate bases and should be admitted for litigation." Staff Response, pp. 26-27.

A prehearing conference was held on March 29, 1988, on Hutchinson Island, Florida, to hear oral argument from petitioner, NRC Staff and Licensee, concerning the Amended Petition and proposed contentions. On April 20, 1988, an Order was issued concerning the admission of the petitioner and his contentions. Appeal is taken from that Order.

III. ARGUMENT

A. A Petitioner Has a Duty to Review the Publicly Available Material Related to a Proceeding and Particularize Contentions in Accordance with Alleged Inadequacies

Under 10 CFR § 2.714(b), a petition to intervene "must include a list of the contentions which petitioner seeks to have litigated in the matter, and the basis for each contention set forth with reasonable specificity." As pointed out in the Introduction and Summary of Argument, above, this basis requirement has not been applied in a highly restrictive manner, and licensing boards have considerable discretion with respect to the admission of contentions.

Nevertheless, it is clear that the basis requirement is not totally without substance, and imposes at least some obligations upon the petitioner. For example, in Catawba the Appeal Board passed "interlocutory judgment" upon generic questions referred to it by the Licensing Board with respect to the "conditional admission" of ten contentions lacking the specificity required by 10 C.F.R. § 2.714(b). The conditional admission was

> based on the unavailability of Staff or Applicant documents which might allow the further particularization of the contentions. These contentions were admitted subject to further specification after documents became available. . . .

16 NRC at 463. In part relying upon the administrative history of section 2.714, the Appeal Board concluded "that a licensing board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements." Id. at 467 (emphasis in original). If such a contention cannot even be admitted conditionally, it certainly cannot be admitted -- as here -- unconditionally.

In light of the restriction identified in Catawba, particular questions were raised there concerning the impact of NRC Staff documents which became available after the date for filing contentions. It was in this context that the Appeal Board enunciated its position, referred to above in the Introduction and Summary of Argument, that -- even in the absence of such documents -- "an intervention petitioner has an ironclad obligation to examine the publicly available documentary material

pertaining to the facility in question." 16 NRC at 468. Indeed, as the Appeal Board explained in Catawba, such a duty was "implicit" in an earlier decision it had issued.

> In Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (1973), affirmed CLI-73-12, 6 AEC 241 (1973), affirmed sub nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), we rejected the petitioners' challenge to the legality of the contentions requirement in light of Section 189a. of the Act. One of the prongs of the challenge was that it was not possible for petitioners "to state specific contentions until after they have been permitted to intervene and to avail themselves of discovery procedures." Our principal response was that "there is abundant information respecting the particular facility available to the public at the time of the publication of the notice of hearing or of an opportunity for hearing - including at least the applicant's detailed safety analysis and environmental reports". 6 AEC at 192.

16 NRC at 467-68 (emphasis supplied; footnotes omitted) (hereinafter "Prarie Island").

The Commission, which reviewed the Appeal Board's decision in Catawba, sua sponte, modified the Appeal Board's decision somewhat with respect to the impact of the availability of licensing-related documents on the admissibility of late filed contentions, 10/ but reaffirmed, in haec verba, the Appeal

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10/ No issue concerning the admissibility of late-filed contentions is presented in this proceeding. The Amended Petition was received by Licensee on January 20, 1988; the Staff's Environmental Assessment was issued subsequently; and the requested amendment with the accompanying Staff's Safety Evaluation was not issued until March 11, 1988. However, the petitioner has not attempted to file additional or further amended contentions. Moreover, since it was
(footnote continued)

Board's statement concerning the obligation of the proponent of a contention

> to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.

CLI-83-19, 17 NRC 1041, 1045 (1983). "[A]n intervenor in an NRC proceeding," the Commission went on to note, "must be taken as having accepted the obligation of uncovering information in publicly available documentary material." Id. at 1048.

The duty to examine available documentary material and take it into account in the development and specification of contentions, of course, is not just a formalistic pleading requirement. Rather, it is necessary, having very practical implications.

Fundamentally, the requirement derives from 10 C.F.R. § 2.714(b), which calls for specificity in the proffer of contentions and their bases. See, e.g., Catawba, 16 NRC at 463-65. By alerting a petitioner to the available facts, an examination of public documentary material that could serve as the foundation of a contention will help assure that all contentions a petitioner might seek to propose are properly raised at the earliest possible time. See Catawba, CLI-83-19, supra, 17 NRC at 1045-47.

(footnote continued from previous page)
obviously impossible for the petitioner to address the Environmental Assessment and Staff's Safety Evaluation in his earlier-filed amended petition, neither Licensee's Opposition nor this appeal suggests he should have done so.

In addition, review of the available documentary material is relevant to the discharge of a petitioner's responsibility for particularity under Section 2.714(b). As recently noted by the Appeal Board, the purposes of this duty are well established. They are

> to ensure, at the pleading stage, that the agency's adjudicatory process is not invoked for impermissible purposes, such as attacks on statutory requirements or challenges to Commission regulations, and that the issue at hand is appropriate for litigation in the particular proceeding. Additionally, the requirement "help[s] assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose."

Texas Utilities Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930 (1987) (footnotes omitted).

Accordingly, if issues have been considered in the record of a proceeding, simply referring to them -- separate and apart from the attention they have already received from the NRC Staff and licensee -- is inadequate to raise a valid contention. As noted in the discussion of contentions in Dresden:

> These Contentions do no more than point to the existence of a problem which Licensee and Staff have recognized and have resolved to their own satisfaction. . . . They do not address the proposed solution to . . . identified problems. They do not give notice to the Board or the parties of the respects in which Petitioners regard the proposed solution as inadequate. . . . As they stand, the Contentions simply do not place any facts in issue. They are more conclusions than they are contentions. Because they do not give notice of facts which Petitioners desire to litigate, they fail to be specific enough to satisfy the requirements of 10 C.F.R. § 2.714.

16 NRC at 188.

Similarly, where an analysis or evaluation is challenged as inadequate, the alleged deficiencies must be particularized. As the Dresden Board discussed when considering a contention addressed to an NRC Final Environmental Statement ("FES"),

> . . . [W]e are confronted with an assertion that "[t]he applicant and NRC Staff have not properly evaluated the potential impact of the waste generated by the decontamination." In five following paragraphs, it is asserted that there has been inadequate evaluation of the potential for migration of chelated radionuclides, no demonstration that these wastes will not migrate more than other wastes, no proper evaluation of potential migration following degradation of the polymer matrix, inadequate evaluation of the advantages of deactivation of the chelate complex, and inadequate assurance that the disposal sites can handle the wastes and meet the disposal criteria of the FES.
>
> None of this tells the parties or the Board in what specific ways the evaluation has been improper. We are left to speculate with what specific aspects of the evaluation Petitioners quarrel. In what respects has the evaluation of the potential for migration of chelated radionuclides been inadequate? Why should the Licensee demonstrate that its wastes will not migrate more than other wastes? What's wrong with the Licensee's evaluation of the potential for migration of chelated radionuclides following degradation of the polymer matrix, and its evaluation of the advantages of deactivation of the chelate complex? Why is there inadequate assurance that the disposal sites can accept the wastes and meet the disposal criteria, and what specific criteria in the FES are involved? The Contention poses these questions, it does not answer them. We are thus severely handicapped in judging not only whether the

> Contention improperly places the FES in issue, but, leaving the FES aside, precisely what is sought to be litigated.
>
> Petitioners have an obligation to answer such questions if their contentions are to be accepted for litigation. Section 2.714 of the Commission's regulations requires no less. Before initiating costly and time-consuming litigation, the Commission is entitled to know what is to be litigated.

16 NRC 192-93 (emphasis supplied).

FPL submits that, under Catawba, Prairie Island, and Dresden, petitioner's contentions were required to address at least the applicant's detailed SAR, including the environmental information it contains and the subsequent letters reflecting the NRC Staff's questions and FPL's answers, to the extent that they were relevant to the asserted contentions. As we demonstrate in Part III.B., infra, this duty was not discharged. Accordingly, the Order is in error in admitting any contentions. Further, as is also detailed in Part III.B., the Order is in error to the extent that it does not require consideration of the record developed in another proceeding concerning contentions which were essentially copied from that proceeding, and offered for consideration here.

Notwithstanding the foregoing, should the Appeal Board find the infirmities in the Order not to be pervasive, and determine on review that at least one contention is admissible, we request the Appeal Board to exercise its discretion 11/ and rule

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11/ See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 26-27 (1987); reconsideration denied, ALAB-876, 26 NRC 277 (1987).

upon the admissibility of each of the contentions, individually; that is, determine separately whether each contention, and the bases therefor, have been specified with sufficient particularity. Judicial economy favors such exercise of the Appeal Board's discretion. Moreover, licensing boards have not frequently addressed the requirement of examining available documentary material for its bearing on a proposed contention. The Appeal Board's examination and analysis of this obligation, in light of specific contentions, would assist in clarifying that duty and, therefore, benefit NRC adjudicatory proceedings generally.

B. The Failure of the Order to Require Petitioner to Review Publicly Available Documentary Material and Particularize Contentions Accordingly

Read literally, a petitioner's obligation under Catawba to examine relevant material is substantial, extending without limitation to "the publicly available documentary material pertaining to the facility in question with sufficient care to uncover any information that could serve as the foundation for a specific contention." 16 NRC at 468 (emphasis supplied). No matter the precise, practical scope of a petitioner's obligation under Catawba, however, it clearly imposes a duty upon a person seeking intervention in an amendment proceeding to examine the publicly available material associated with that amendment to some minimal extent, and to relate it to his proposed contentions.

As discussed below, however, the Order does not appear to recognize any duty to examine materials docketed in connection with the requested amendment or otherwise, and -- probably as a consequence -- does not impose one on the petitioner. The issue was raised clearly a number of times. 12/ However, the Order does not address the duty, or resolve the issue. This deficiency in the Order below, when coupled with the complete failure of the petitioner to examine the docketed material in this proceeding and take it into account, requires reversal. 13/

In particular, nowhere in its discussion of Contentions 3, 4, 6, 8, 9, 11 and 15, which were admitted, and Contention 5, upon which judgment was reserved, does the Order recognize a duty on the part of the petitioner to consider the available documentary material in any way. In failing to recognize such duty, the Order also fails to address it or impose it on petitioner.

12/ See, e.g., Licensee's Opposition, pp. 6-11; Tr. 52-57.

13/ See, e.g., Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 366-67 (1983); Public Service of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41-42 (1977), aff'd, CLI-78-1, 7 NRC 1 (1978), aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). In NRC proceedings, when a Licensing Board fails to confront and resolve a contested and determinative legal issue, an Appeal Board may, itself, make factual determinations and reach a decision. Public Service of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41-42 (1977), aff'd, CLI-78-1, 7 NRC 1 (1978), aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

In addition, with respect to Contentions 3, 6, 8, and 15, which were essentially copied verbatim from the Turkey Point reracking proceeding, the Order fails to recognize any duty of the petitioner to examine the publicly available documentary material from that proceeding, so as to either distinguish the facts and/or circumstances, or demonstrate the inadequacy of the consideration given to the issues there. The basis for such a requirement, of course, is clear, and stems from the general requirement that deficiencies in the consideration given an issue be particularized. Without such a specification of why the consideration given to a contention elsewhere was either inappropriate or inadequate, neither the Board nor parties will be able to either determine the precise issue being raised, or judge if it is within the proper scope of the proceeding. At a minimum, where a contention and its bases have been copied essentially verbatim from another proceeding, the admissibility of the contention and sufficiency of the stated bases should be critically scrutinized, and the source of the contention should be considered at least potentially relevant to its interpretation. 14/

14/ See Licensee's Opposition, 10-12. Contention 5, upon which the Licensing Board has not yet ruled, is a good example of the relevance, to a contention's admissibility, of the fact that it has been copied. The stated bases for Contention 5 in this proceeding reads:

> The saturation noble gas and iodine inventories could be greater for the St. Lucie plant, Unit No. 1 as a result of fuel failure and increased enrichment; more than 1% of the fuel rods may be defective at the St. Lucie plant, Unit

(footnote continued)

Nor is the failure of the Order to recognize the need to frame contentions within the context of publicly available material, and to impose that requirement on petitioner here, in any way academic. As detailed in Licensee's Opposition and further in Exhibit 1 to this submittal, publicly available material is replete with information pertinent to the admitted contentions, as well as Contention 5 which was held in abeyance. Nevertheless, the petitioner has completely failed both to address his contentions to that information, and to allege errors or other deficiencies therein.

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> No. 1 because of the same fuel failure; and the gap activity of noble gases, such as krypton 85, and fisson products, such as radioactive iodine may also be greater for the St. Lucie Plant, Unit No. 1.

Obviously, the meaning of the contention turns upon the comparison intended by the phrases "could be greater" and "may also be greater." At page 16 the Order notes that the NRC Staff "[a]pparently . . . interpreted the use of the term 'greater' to apply to doses above the limits of NRC regulations." However, the Staff did not explain why it so interpreted the contention. Further, as the Order notes, Licensee in its opposition (pp. 30-31) pointed out that, except for references to the nuclear reactor involved here (St. Lucie 1), the bases were copied verbatim from a contention in the Turkey Point proceedings; and that in those proceedings the comparative "greater" clearly was meant only to support an assertion that the inventories and gap activity referred to were greater at Turkey Point than at still another reactor, Limerick. The intent in Turkey Point was not to refer to inventories and activity in terms related to on-site and off-site doses greater than permitted by NRC regulations. It is clearly not reasonable to ignore the fact and circumstances of copying in interpreting the contention.

C. Contention Beyond The Scope Of This Proceeding

Finally, with respect to Contention 4, the Order is also improper to the extent it expands the contention beyond the scope of the proceeding and the authority of the Board. Referring to Contention 4 on page 15, the Order states:

> Licensee's response to the contention should also address the potential for cask transfer of Unit 1 fuel to Unit 2 in addressing construction crane accidents. (See Staff Environmental Assessment Relating to the Transfer of Unit No. 1 Spent Fuel Between Units No. 1 and 2 of the St. Lucie Plant dated February 22, 1988.

Inter-unit fuel transfer, however, is the subject of an entirely different amendment for St. Lucie 2. 15/ The instant amendment involves only the current expansion of the St. Lucie 1 spent fuel storage pool, and is totally separate and independent of any transfer of spent fuel to St. Lucie 2. 16/ Adding the issue of "the potential for cask transfer of Unit 1 fuel to Unit 2" would operate to expand the scope of the proceeding beyond the jurisdiction of the Board. 17/ This, of course, is imper-

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15/ The relevant notice of opportunity for hearing was published in the Federal Register for that proceeding on October 20, 1986. 51 Fed. Reg. 37,242. A "patently deficient" hearing request was considered and dismissed on January 16, 1987. Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), Docket No. 50-389-OLA, Memorandum and Order.

16/ No inter-unit fuel transfers are currently planned for St. Lucie. In fact, there is not a cask for transferring fuel at the site, and FPL does not even own or possess such a cask anywhere. Tr. 47-48.

17/ A licensing board's jurisdiction is defined by the Commission's notice of hearing. E.g., Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-

(footnote continued)

missible. 18/ Accordingly, in addition to the reasons discussed above, the Order is improper to the extent it admits Contention 4 to permit consideration of inter-unit fuel transfers. 19/

(footnote continued from previous page)
739, 18 NRC 335, 339 (1983). The notice of opportunity for hearing in this case refers only to a proceeding associated with an amendment authorizing the expansion of spent fuel pool capacity at St. Lucie 1, and the notice establishing the Licensing Board granted authority "to rule on petitions for leave to intervene and/or requests for hearing and to preside over the proceeding in the event that a hearing is ordered" solely within the context of that amendment. 52 Fed. Reg. 32,852, 41,518.

18/ E.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).

19/ Even if the contention were not beyond the scope of the proceeding, it would not be proper for consideration sua sponte in the instant case. As the Appeal Board recently explained,

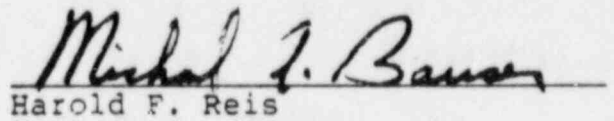
> The Commission's regulations permit boards in operating license proceedings to examine and decide "[m]atters not put into controversy by the parties," but only after determination that "a serious safety, environmental, or common defense and security matter exists." 10 C.F.R. § 2.760a. Whether this regulation authorizes a board to raise such an issue sua sponte in an operating license amendment proceeding is not clear. In any event, a board invoking its section 2.760a sua sponte authority must set forth such a determination "in a separate order which makes the requisite findings and briefly states the reasons for raising the issue." The Commission itself then reviews the determination and decides if the sua sponte issue should remain in the proceeding.

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25 (1987), reconsideration denied, ALAB-876, 26 NRC 277 (1987)
(footnote continued)

IV. CONCLUSION

For the foregoing reasons the Order below should be reversed and this proceeding terminated.

Respectfully submitted,



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(footnote continued from previous page)
(footnote and citations omitted; emphasis in original). The required procedures were not followed here.

May 9, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
FLORIDA POWER AND LIGHT COMPANY	)	Docket No. 50-335-OLA
	)	
(St. Lucie Plant, Unit No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Licensee's Notice of Appeal from Atomic Safety and Licensing Board Memorandum and Order Granting a Request for Hearing and Petition for Leave to Intervene and Supporting Brief" 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
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Dated this 9th day of May, 1988.

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