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October 5, 1998

Mr. John C. Hoyle
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff

ADJ

DOCKET NUMBER
PROPOSED RULE PR MISC
(63FR41872)

Subject: Florida Power & Light Company Comments
Statement of Policy on Conduct of Adjudicatory Proceedings
CLI-98-12, 63 Fed. Reg. 41872 (Aug. 5, 1998)

Dear Mr. Hoyle:

Florida Power & Light Company (FPL), the licensee for the St. Lucie Nuclear Plant, Units 1 and 2, and the Turkey Point Nuclear Plant, Units 3 and 4, hereby submits the following comments on the above-referenced Policy Statement. FPL also endorses the comments of the Nuclear Energy Institute on the Policy Statement.

As explained below, FPL supports the efforts of the Nuclear Regulatory Commission (NRC) to streamline the NRC's adjudicatory process, as reflected in the Policy Statement and in the initial rulings regarding the Baltimore Gas & Electric Company's application for renewal of the Calvert Cliffs Nuclear Power Plant operating licenses. In this regard, the Policy Statement is an important first step. FPL offers additional suggestions on how to further accomplish the important goal of reaching final adjudicatory decisions on nuclear power plant license renewal applications in a timely and efficient fashion.

FPL Comments

On August 5, 1998, NRC published an update of its 1981 Policy Statement on the conduct of adjudicatory proceedings (CLI-81-8, 13 NRC 452 (1981)) with the stated purpose ensuring "the efficient conduct of proceedings." The update was published in light of expected applications for nuclear power plant license renewal, industry restructuring efforts, and licensing of waste storage facilities. FPL fully supports the Commission's effort. As stated in a letter to the Commission dated June 26, 1998, FPL is currently pursuing development of a license renewal application for its Turkey Point Nuclear Plant, Units 3 and 4. FPL's decision whether to pursue license renewal will depend in large part on the Commission's efficient resolution of technical and environmental issues in the adjudicatory context. In this regard, the Policy Statement is an important first step towards ensuring efficient and timely processing of license renewal applications.

FPL also supports the important steps taken by the Commission to define the scope of the

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Calvert Cliffs renewal proceeding, provide guidance on discovery, and to establish milestones for adjudicatory decisions in that proceeding (CLI-98-14, (1998)). The Commission's close oversight of adjudicatory proceedings can help ensure compliance with the Policy Statement and prevent recurrence of protracted proceedings such as the Louisiana Energy Services licensing proceeding, the Vogtle license transfer proceeding, and the Shoreham and Comanche Peak operating license proceedings.

FPL supports the following aspects of the Policy Statement in particular to expedite the adjudicatory process:

Requiring licensing boards to set and adhere to schedules for proceedings;

Establishing procedures for electronic filing;

Appointment of additional presiding officers or licensing boards only where the adjudicatory process could be expedited;

Strict enforcement of parties' obligations by striking material from the record or dismissing a party from the proceeding for failure to comply with the Rules of Practice or with Board or Commission orders;

Require strict adherence with Commission requirements on admissibility of contentions in 10 CFR 2.714(b)(2); and

Require close and efficient management of the discovery process.

FPL notes, however, that many aspects of the Policy Statement are similar to the 1981 Policy Statement. The 1981 Policy Statement did not alone prevent lengthy adjudicatory proceedings in the 1980s and 1990s which have created questions concerning the performance of the Atomic Safety and Licensing Board (ASLB) judges.

FPL offers the following suggestions to further ensure that adjudicatory proceedings are conducted in an efficient manner:

1. Closely monitor compliance with "milestones." FPL strongly supports the Commission in establishing milestones for completion of an adjudicatory proceeding. However, FPL questions whether "milestones" will in fact prevent lengthy proceedings. In fact, the Commission's September 17, 1998 order (CLI-98-19) relaxing the schedule for submittal of contentions in the Calvert Cliffs license renewal proceeding would seem to defeat the purpose of the Policy Statement which is to promote streamlining of hearings. The September 17 order also appears to endorse an intervenor's deliberate failure to comply with a Licensing Board scheduling order. To ensure efficiency in this

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process, FPL recommends an amendment to the Policy Statement to require automatic Commission review in the event that any of the schedular milestones are exceeded by an ASLB. FPL also recommends stringent enforcement of schedules set by Licensing Boards.

2. Hold informal hearings. NRC has traditionally afforded formal hearings in reactor licensing proceedings even though such hearings are not required by Section 189 of the Atomic Energy Act, 42 USC 2239(a). While Section 189 requires NRC to provide an opportunity for a "hearing" for certain Commission licensing actions, the words "on the record" does not accompany this requirement, and therefore, formal evidentiary hearings are not required by the Administrative Procedure Act. United States v. Florida East Coast Ry. Co., 410 U.S. 224, 238 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972). The Commission reaffirmed its interpretation of this issue in the recent notice of proposed rulemaking on "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 48644, 48645 (Sept. 11, 1998), and in the case law cited therein. FPL supports issuance of this proposed rule and respectfully suggests that the guidance on informal hearings be specifically endorsed in a revised Policy Statement.

3. Rule on intervenor's standing before briefing on contentions. FPL suggests that Licensing Boards rule promptly on standing issues before briefing on contentions. Addressing standing issues up front could save substantial licensee and Staff time and resources addressing contentions that would otherwise be wasted if the petitioner is found not to have standing.

4. Rigorously enforce the standards applicable to admissibility of contentions and late intervention. FPL suggests that the Commission maintain close supervisory review concerning whether a party has demonstrated at least one litigable contention within the scope of the proceeding, and whether a party seeking late intervention has met the standards for participation as a party in 10 CFR 2.714(a)(1) and (d)(1).

5. Allow the hearing to commence before completion of the Safety Evaluation Report (SER) or Final Environmental Statement (FES). FPL believes that any adjudicatory hearing should commence regardless of whether the Staff has completed the SER or FES. In the case of the SER, the issue in any adjudicatory proceeding is whether the application is sufficient, and not whether the SER is sufficient. Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983), review declined, CLI-83-32, 18 NRC 1309. One way to resolve this issue is for Staff to prepare partial SERs addressing contested issues so that the evidentiary hearings on those issues could proceed. Such hearings could expedite resolution of contested technical issues without waiting for completion of Staff reviews of all issues in question.

In the case of the FES, current regulations (10 CFR 51.104(a)(1)) prohibit the Staff from presenting in a hearing the Staff's position on National Environmental Policy Act (NEPA) issues until the FES is filed with the Environmental Protection Agency. There is no requirement in NEPA or in the implementing guidance of the Council on Environmental Quality that would require starting a

hearing only after completion of the FES. FPL suggests that NRC amend this regulation to allow the separate resolution of factually distinct environmental issues after the Staff has analyzed those issues. This would expedite proceedings in the same way as the separate resolution of distinct safety issues.

6. Exercise interlocutory review over novel questions. As noted in the Commission's order referring the request for intervention on the Calvert Cliffs license renewal proceeding, the Commission should exercise interlocutory review on an expedited basis where novel legal or policy questions have been raised. Such review could help sharpen issues and resolve controversial questions before a proceeding becomes delayed.

7. Evaluate performance of ASLB judges on a continuous basis. In addition to the close monitoring of adjudicatory proceedings, NRC should evaluate the performance of each ASLB judge concerning compliance with schedules and other Commission orders on an ongoing basis.

8. Make "Significant Hazards Considerations" findings and take licensing actions regardless of the pendency of a hearing. NRC is authorized by Section 189 of the Atomic Energy Act to make a finding whether a proposed license amendment involves "significant hazards consideration." 42 USC 2239(a)(1)(A); 10 CFR 50.92(c). A finding of "no significant hazards consideration" is merely a procedural device that permits the Commission to issue a proposed license amendment prior to the resolution of any hearing request on the application, and implies no finding on the merits of the application. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 6 n. 3 (1986), reversed in part on other grounds, San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir.1986); see Georgia Power Co. (Hatch Nuclear Plant, Units 1 and 2; Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-5, 41 NRC 321, 322 (1995) (Staff not precluded from issuing amendment despite pending hearing). In practice, however, significant hazards consideration findings are rarely made where a hearing has been requested. This practice injects significant and unnecessary delay into the processing of license amendment requests. FPL suggests that the Commission follow the Act and its regulations and make "significant hazards consideration" findings and issue licenses and amendments, as appropriate, on the same schedule as if no hearing had been requested.

9. Use motions for summary disposition to narrow the scope of the proceeding. In its Policy Statement, the Commission indicated that the ASLB should limit the use of summary disposition motions only to those cases where the proceeding could be expedited. FPL believes that summary disposition motions can be useful in cases where numerous contentions have been admitted to narrow the scope of the proceeding if such motions and the schedule for resolution are carefully controlled by the ASLB. FPL suggests that the Commission change its recommendation and endorse the use of summary disposition motions and encourage licensing boards to set hearing schedules that will enable the prompt and effective use of such motions.

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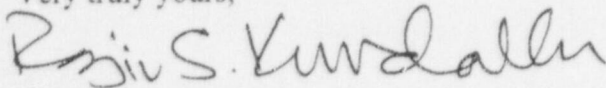
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10. Apply the standards of admissibility in the Federal Rules of Evidence to Scientific Testimony. Another way to streamline NRC adjudicatory proceedings is to require that expert testimony on scientific issues meet the admissibility and reliability standards set forth by the Federal Rules of Evidence, Rule 702,¹ and by the U.S. Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). The purpose of Rule 702 is to ensure such evidence is relevant and reliable, and the Supreme Court ruled in Daubert that the judge acts as a "gatekeeper" in screening such evidence. FPL believes that these standards should be rigorously applied to ensure that only "relevant, material, and reliable evidence" (10 CFR 2.743(c)) is admitted in NRC adjudicatory proceedings.

FPL appreciates the opportunity to comment on the Policy Statement.

Very truly yours,



Rajiv S. Kundalkar
Vice President
Nuclear Engineering

¹NRC adjudicatory boards look to the Federal Rules of Evidence for guidance. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983).