UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 5, 1985

MEMORANDUM FOR: Richard W. Starostecki, Director
Division of Project & Resident Programs
Region I

Roger D. Walker, Director
Division of Reactor Projects
Region II

Charles E. Norelius, Director
Division of Reactor Projects
Region III

Richard P. Denise, Director
Division of Reactor Safety & Projects
Region IV

Dennis Kirsch, Director
Division of Reactor Safety and Projects
Region V

FROM: Hugh L. Thompson, Director
Division of Licensing, NRR

SUBJECT: IMPACT TO PLANT OPERATIONS DUE TO PROCESSING OF LICENSE AMENDMENTS

There is continuing Commission and Congressional concern about delays in processing amendments due to the Sholly licensing review procedures. Of particular interest are those instances where plant operations were affected (i.e., resulted in delays in plant startups, or caused plant shutdowns or derating), were unrelated to safety and were due to Sholly procedural delays.

In order to be responsive to these concerns, we would appreciate your assistance in identifying such specific situations. Please provide this information by April 10 and it would be helpful if it were in the form as indicated in the enclosure.

Hugh L. Thompson, Jr., Director
Division of Licensing

Enclosure:
As stated

CONTACT:
G. Lainas
X27817

DATE _____

REGION _____

IMPACT TO PLANT OPERATIONS DUE TO PROCESSING OF LICENSE AMENDMENTS

PLANT	DATE	TYPE OF UTILITY REQUEST (1)	CAUSE OF DELAY (2)	AFFECT ON PLANT OPERATION (3)	POSSIBLE SAFETY ISSUE (4)	DESCRIPTION OF REQUEST, CIRCUMSTANCES AND EVENTUALLY DISPOSITION

(1) Emergency Tech. Spec. change, Exigency, Exemption to Regulation other. Include an identification of the regulation, Technical Specification or license condition which prevented plant startup, or caused plant shutdown or derate.

(2) Sholly Notice time, abiility to make a no subject hazards finding; timeliness of request, other.

(3) Prevented startup, caused plant shutdown plant derate.

(4) None or Describe.

ERAL APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5570

CENTER FOR NUCLEAR RESPONSIBILITY, INC., et al.

Appellants,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, et al.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERZEL H. E. PLAINE
General Counsel

WILLIAM H. BRIGGS, JR.
Solicitor

E. LEO SLAGGIE
Deputy Solicitor

MICHAEL B. BLUME
Senior Attorney
U.S. Nuclear Regulatory Commission
Washington, DC 20555

F. HENRY HABICHT II
Assistant Attorney General

EDWARD J. SHAWAKER
DIRK D. SNEL
Attorneys
Land and Natural Resources Division
U.S. Department of Justice
Washington, DC 20530

April 5, 1985

C.A. No. 83-3570

BRIEF FOR FEDERAL APPELLEES

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MICHAEL B. BLUME
Senior Attorney
U.S. Nuclear Regulatory
Commission
Washington, DC 20555

F. HENRY HABICHT II
Assistant Attorney
General

EDWARD J. SHAWAKER
DIRK D. SNEL
Attorneys
Land and Natural
Resources Division
U.S. Department of
Justice
Washington, DC 20530

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AA61-2 PDR

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Commission
Washington, DC 20555

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DIRK D. SNEL
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DIRK D. SNEL
Attorneys
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QUESTIONS PRESENTED*

1. Whether this Court has jurisdiction over this appeal in view of appellants' failure to note an appeal until 108 days after the entry of the order dismissing their District Court action.

Assuming this Court has jurisdiction to hear this matter, the following issue is also presented.

2. Whether the District Court correctly determined that it lacked jurisdiction over appellants' attack on a final NRC decision, pursuant to section 189(a) of the Atomic Energy Act, that a particular license amendment presented no significant hazards considerations in view of Congress' clearly expressed statutory directive that such decisions are reviewable solely in courts of appeals. 42 U.S.C. § 2239(b) and 28 U.S.C. § 2342(4).

Depending on this Court's resolution of questions 1 and 2, the following issues may also be presented.

3. Whether the District Court should be reversed for its failure to transfer appellants' action to a court of appeals

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*This case has not previously been before this Court. Federal appellees are aware of no related cases.

pursuant to 28 U.S.C. §1631 when such transfer was never requested of the District Court, much less shown to be "in the interest of justice."

4. Whether the NRC correctly characterized, as no significant hazards consideration amendments pursuant to 42 U.S.C. §2239(a)(2), certain highly technical license amendments which permitted changes that improved the fuel efficiency of Florida Power & Light Company's Turkey Point nuclear reactors and reduced the risk of pressurized thermal shock for those reactors.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR FEDERAL APPELLEES

This brief is submitted by the United States and the United States Nuclear Regulatory Commission ("federal appellees").

COUNTERSTATEMENT OF THE CASE

1. Nature Of The Case

This is an appeal from the Honorable John Garrett Penn's dismissal of this action for lack of subject matter jurisdiction. This lawsuit began on November 29, 1983 when appellants filed their complaint with the United States

District Court for the District of Columbia seeking to enjoin the Nuclear Regulatory Commission ("NRC" or "Commission") from issuing two sets of license amendments for the Turkey Point Nuclear Power Plant, Units 3 and 4. Appellants contended before the District Court that the NRC's action would violate their rights to a prior adjudicatory hearing and to a complete safety and environmental analysis.

The District Court twice denied motions for temporary restraining orders, on November 30 and December 8, 1983. It also denied a motion for preliminary injunction on January 6, 1984. The NRC issued one set of license amendments for both Unit 3 and Unit 4 on December 9, 1983. It issued the other set, again for both units, on December 23, 1983. See 48 Fed. Reg. 56518 (December 21, 1983); 49 Fed. Reg. 3364 (January 26, 1984) (J.A. 168) ("J.A." refers to the Joint Appendix).

Holding that judicial review over an NRC amendment action was vested exclusively in the courts of appeals, the District Court dismissed the complaint in a judgment entered April 27, 1984. (J.A. 148). An explanatory Memorandum Opinion followed on May 4. Center for Nuclear Responsibility v. Nuclear Regulatory Commission, 586 F. Supp. 579 (D.D.C. 1984). After the District Court granted federal appellees' motion to correct an erroneous portion of its

Memorandum Opinion on June 12 (J.A. 155), this appeal followed on August 13, 1984.

2. Statutory And Regulatory Framework

In enacting the Atomic Energy Act of 1954, Congress provided for a regulatory format broad in the discretion given to the administrators of the Act, and remarkably free of express restrictions in its charter. Carstens v. Nuclear Regulatory Commission, 742 F.2d 1546, 1551 (D.C. Cir. 1984), quoting Siegel v. Atomic Energy Commission, 400 F.2d 778, 783 (D.C. Cir. 1968); see also North Anna Environmental Coalition v. Nuclear Regulatory Commission, 533 F.2d 655, 658-59 (D.C. Cir. 1976).

The NRC's process for initial licenses for power reactors is two-stage. In the first stage of reviews, the NRC staff determines whether an applicant should be authorized to construct a power plant. See 42 U.S.C. § 2235. At the second stage, the staff evaluates whether the utility should be permitted to operate the facility to generate electricity. Thereafter, the NRC issues amendments, when required, over the service life of the facility. In section 189(a) of the Atomic Energy Act, Congress established a hearing framework for these actions. 42 U.S.C. § 2239(a).

In the case of a construction permit application, there is a mandatory, prior adjudicatory hearing before a three-member Atomic Safety and Licensing Board (Licensing

Board), generally composed of one lawyer and two technical members. 10 C.F.R. § 2.104. For operating license applications, hearings are granted only when an interested person timely requests one, and then only on those material issues specifically contested by the person. 10 C.F.R. §§ 2.105, 2.714. See generally, 10 C.F.R. Part 2, App. A. In either case the findings and conclusions of the Licensing Board are the agency's initial decision on all contested issues. If further administrative review is sought, a party may appeal to an Atomic Safety and Licensing Appeal Board ("Appeal Board"), composed generally of two lawyers and one technical person. 10 C.F.R.§ 2.785. Further review is available as a matter of discretion by the five members of the Nuclear Regulatory Commission. 10 C.F.R. § 2.786.

Uncontested issues are reviewed and resolved by the technical staff. The NRC technical staff exercises this broad responsibility carefully and in a manner designed to raise and resolve health, safety, and environmental issues relating to license applications, through review of an applicant's detailed safety and environmental reports. The staff's conclusions are set out in a Safety Evaluation Report ("SER"), in an Environmental Impact Statement where a license is sought initially, and in Supplements to that Environmental Impact Statement if significantly changed circumstances are found.

All licenses are issued by the Commission based on the adjudicatory record, on the environmental impact statement and any supplements, on SERs, and on the staff's review of uncontested issues. 10 C.F.R. § 2.764. Judicial review over final orders in proceedings conducted under section 189 of the Atomic Energy Act is vested exclusively in the courts of appeals. 28 U.S.C. § 2342(4), 42 U.S.C. § 2239(b); see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 525-27 and n. 5 (1978); Power Reactor Development Corp. v. Electrical Union, 367 U.S. 396 (1961); Ecology Action v. Atomic Energy Commission, 492 F.2d 998 (2d Cir. 1974).

Prior to 1980, it was established NRC practice that license amendments could be reviewed and issued by the technical staff along the following lines. If the NRC staff could not find that an amendment involved "no significant hazards consideration," or if it was "in the public interest," the staff provided an opportunity for a prior adjudication before issuing the amendment. If it found "no significant hazards consideration" the staff issued the amendment without advance notice and, hence, without an opportunity for a prior hearing. This practice flowed directly from 1962 amendments in which Congress added the third and fourth sentences of what is now section 189(a)(1). In 1980, this Court held that the NRC could not make an

amendment immediately effective where there was an outstanding hearing request, even if the amendment involved "no significant hazards consideration." Sholly v. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980). This holding drew a strong dissent when the Court rejected the NRC's suggestion for rehearing en banc. 651 F.2d 792 (1981). Subsequently, the Supreme Court granted certiorari to review the question. 451 U.S. 1016 (1981).

While Sholly was pending in the Supreme Court, Congress amended the Atomic Energy Act to overrule this Court's Sholly decision on this point and to provide, in section 189(a)(2), detailed procedures for authorizing issuance of amendments involving no significant hazards considerations notwithstanding the pendency of hearing requests. Pub. L. No. 97-415, 96 Stat. 2067 (1983), 1982 U.S. Code Cong. & Admin. News 3598-3600, 3606-3609. In the legislative history, Congress explained:

> Under the conference agreement, the NRC may issue and make immediately effective a no significant hazards consideration amendment to a facility operating license before holding a hearing upon request of an interested party. The Commission may take such action only after (in all but emergency situations), (1) consulting with the State in which the facility is located, and (2) providing the public with notice of the proposed action and a reasonable opportunity for comment.

Id. at 3607-08.[1]

As required by the 1983 amendment, the NRC promulgated detailed regulations governing the substantive standards for determining whether an amendment involved "no significant hazards consideration," the procedure for giving public notice and soliciting written comments, and the holding of post-issuance hearings. 48 Fed. Reg. 14864, 14873 (April 6, 1983). (S.A. 6, 15) ("S.A." refers to the Statutory Appendix attached to this brief).

Under amendments to 10 C.F.R. § 50.92, the NRC generally treats proposed changes as involving no significant hazards consideration if those actions do not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated; or

2. Create the possibility of a new or different kind of accident from any previously evaluated; or

3. Involve a significant reduction in a margin of safety.

The NRC provided a series of illustrative examples to aid the public's understanding of the kinds of actions that are within or outside of the "no significant hazards

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[1]Based on the 1983 amendment, both the Supreme Court, 459 U.S. 1194 (1983), and the D.C. Circuit, 706 F.2d 1229 (Table) (1983), vacated as moot and remanded the Sholly case.

consideration" category. See 48 Fed. Reg. at 14870, cols. 2 and 3 (S.A. 12).

Although the NRC is not required to conduct a prior adjudicatory hearing on demand, the NRC does publish Federal Register notices of applications received each month which, in the staff's view, involve no significant hazards considerations. 10 C.F.R. § 50.91; 48 Fed. Reg. at 14879 (April 6, 1983).[2] The notice summarizes the action proposed by the utility and provides a preliminary assessment by the NRC staff of whether the proposed amendment involves no significant hazards consideration. Id. If the staff assessment indicates that the amendment involves no significant hazards consideration, the notice also states that the staff intends to issue the amendment without further review of the no significant hazards consideration question unless a request for a hearing (including, normally, comments on the proposed action) is received within thirty days of publication. 10 C.F.R. § 50.91(a)(2), (3). (S.A. 21). If a hearing request is received, the NRC staff addresses the issues raised in the request in its final assessment of whether the application involves any significant hazards

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[2] In some cases, individual applications may be noticed. In cases of "emergencies" or "exigent circumstances," these notice requirements can be waived or modified. See 10 C.F.R. § 50.91(a)(5),(6). (S.A. 21).

consideration. If so, the matter will be set for a prior hearing; if not, a final "no significant hazards consideration" finding is published in the Federal Register, the amendment is issued based upon the staff's review of the merits of the amendment in a Safety Evaluation Report ("SER"), and any requested hearing is held thereafter.[3] 10 C.F.R. §§ 2.105(a)(4), 50.91(a)(4); 48 Fed. Reg. at 14879 (April 6, 1983) (S.A. 21).

3. The Turkey Point Amendment Proceeding

On its merits, this case involves two sets of NRC license amendments sought by and issued to Florida Power and Light Co. ("FP&L") for its Turkey Point reactors.[4] These

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[3]The NRC also provides an informal process whereby any person may request institution of enforcement proceedings against any licensee. 10 C.F.R. § 2.206. If the petition is denied, the appropriate NRC official will set forth the basis for the denial in a written decision. Prior to a 1983 decision in a case coincidentally brought by appellant Joette Lorion, judicial review of these decisions had taken place exclusively in the courts of appeals. Compare, e.g. Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025 (D.C. Cir. 1982), and Rockford League of Women Voters v. NRC, 679 F.2d 1218 (7th Cir. 1982) with Lorion v. NRC, 712 F.2d 1472 (D.C. Cir. 1983), cert. granted, ___ U.S. ___, 104 S. Ct. 1676 (1984) (argued on October 29, 1984, decision pending).

[4]The Turkey Point reactors are the third and fourth units at a power station also incorporating two fossil fuel plants. The reactors are located on the Atlantic Coast about 25 miles south of Miami. Before they were licensed to operate in 1972 and 1973, respectively, FP&L and the NRC

[Footnote Continued]

amendments were authorized by the NRC on December 9 and 23, 1983. The first set of amendments allowed use of new fuel assemblies and core reconfiguration. The second set of amendments modified operational limits to account for the improved neutronic characteristics of the new fuel design, to make the reactor more efficient, and to account for operation with new steam generators. In addition, the core reconfiguration and operational limits were accomplished in a manner consistent with the ongoing program to resolve for Turkey Point a generic problem known as pressurized thermal shock ("PTS").[5]

[Footnote Continued]

staff completed comprehensive safety and environmental analyses. The plants are virtually identical pressurized water reactors designed by Westinghouse. Because of their similar design and operational characteristics, FP&L often seeks, and the NRC completes action on, amendments for both reactors at the same time.

[5] What is at issue in this case is the NRC's issuance of specific no significant hazards consideration amendments, not PTS and its potential significance to nuclear power plants. Besides being irrelevant to the issues before the Court, appellants' apocalyptic description of the PTS problem and its history is exaggerated, to say the least. See, e.g., Appellants' Brief at 9-10. For example, appellants' assertion that the Turkey Point "pressure vessel is likely to crack from thermal shock if a minor malfunction requires the use of standard emergency cooling procedures" Appellants' Brief at 10 (emphasis added), is flatly wrong. First, the Commission has concluded that none of the pressure vessels for plants currently licensed to operate are sufficiently embrittled at this time to pose PTS fears now. Second, a PTS event cannot be the result of a "minor" mishap. Several simultaneous and major failures would be necessary to induce such an event.

A conventional nuclear power reactor produces heat by the controlled nuclear fission of slightly enriched uranium. The reactor fuel core is contained in a large cylindrical shell, known as the pressure vessel. In this reservoir, water is channelled around and through the nuclear core to remove the large amount of heat generated by the nuclear chain reaction. The fission products from the chain reaction are largely confined in the zircalloy-clad fuel rods mounted in an appropriate configuration in the core. Neutrons released by the chain reaction are absorbed in the core, in the water surrounding the core, and in structural materials including the pressure vessel itself. It is essential that the pressure vessel and its associated piping, known as the primary system, maintain their integrity to assure continued cooling of the reactor core.

In pressurized water reactors ("PWR") such as the Turkey Point units, the heated water from the primary system passes through steam generators, where the heat is transferred to water circulating in the secondary system. Secondary system coolant water then turns to steam, which ultimately turns a turbine that drives generators of electricity. For a typical PWR, the reactor vessel is tough enough to withstand the high radiation environment and temperature and pressure during the thirty to forty-year service life. However, results from a reactor vessel

surveillance program indicated that certain older operating PWRs were fabricated with materials that tend to lose some of their toughness after comparatively short periods of exposure to the neutrons created by the chain reaction. This process is known as embrittlement, and principally affects pressure vessel welds with copper or nickel content.

In the late-1970s, it was recognized that these vessels could potentially experience a phenomenon known as pressurized thermal shock ("PTS"). If an embrittled reactor vessel is subjected to abrupt reduction in temperature by introduction of large volumes of cold water, while at the same time the primary system pressure remains high, the vessel is exposed to severe stress and may approach its limits of strength. This might happen, for example, if a primary coolant pipe breaks, causing the emergency core cooling system to actuate, injecting a large volume of cool water into the reactor vessel when the system pressure is high. In theory, the resulting severe temperature changes and pressure in the system could cause an embrittled reactor vessel to rupture, although an event of sufficient severity to cause such a rupture has never occurred. The NRC staff has concluded that as long as the fracture resistance of a reactor vessel remains high, such over-cooling/high pressure incidents will not cause vessel failure.

The staff has encouraged utilities to find ways to retard the embrittlement process so that pressure vessels will be assured of retaining adequate strength throughout the service life of the reactor. The NRC staff has decided that the most immediately effective way to minimize embrittlement and to extend the life of the pressure vessel is to reduce the bombardment of fission neutrons, or "flux," at certain areas of the vessel wall.[6] The program at Turkey Point is aimed at reducing the flux at the peripheral weld seams (welds in the middle of the vessel which are particularly susceptible to embrittlement) and at producing more uniform "fluence" ("fluence" is the flux absorbed over a length of time) by the end of the service life of the plant.

The two sets of license amendments for Turkey Point -- two groups of amendments for each unit -- were consistent with these goals. By a letter dated June 3, 1983 and supplemented on November 16, 1983, FP&L asked permission to begin the use of a new fuel design and configuration for

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[6] Reducing the power level of a reactor -- "derating" -- can also extend the calendar time of operation for a vessel. However, performance is measured in "effective full power years," the total amount of energy produced by the plant during a given time period, such as a year or a plant lifetime. The goal of the staff is to extend the number of effective full power years by slowing the embrittlement process and distributing the flux effects more uniformly in the vessel.

Turkey Point Units 3 and 4. This fuel design is now being used in most if not all Westinghouse PWRs, at least in part because it increases the efficiency of the reactor. Westinghouse has largely discontinued manufacture of the previous design.

It should be recognized that the specific actions authorized by the amendments, i.e., changes associated with a reconfiguration of the reactor core, involved straightforward and thoroughly understood processes. In July 1983 the staff decided that, barring some new circumstance, the reconfiguration amendments involved "no significant hazards consideration" because the fuel design itself was similar to designs in use at other facilities, and because there were no significant changes made in the overall safety of the reactor under the standards in 10 C.F.R. § 50.92. This set of amendments and proposed no significant hazards consideration finding were noticed in the Federal Register, offering interested persons thirty days in which to request a hearing. 48 Fed. Reg. 33076, 33080 (July 20, 1983) (J.A. 160, 162). No hearing request was received in response to this notice, and the amendments were issued on December 9,

1983 on a final finding that they involved "no significant hazards consideration."[7]

The NRC staff's Safety Evaluation Report ("SER") for the reconfiguration amendments provides a detailed assessment of potential accidents and concludes that the reconfiguration amendments do not present a substantial risk to the public health and safety. Moreover, because the amendments do not authorize any change in magnitude or type of effluent release, nor any increase of power level, nor any other effect which would have a significant environmental impact, the NRC staff concluded, pursuant to 10 C.F.R. § 51.5(d)(4), that no environmental impact statement ("EIS") or negative declaration and appraisal was required in connection with these amendments. SER at 21-22. (J.A. 112, 113). In effect, the environmental impact of these amendments is bounded by those impacts considered in the evaluation done for the facility when operation was originally authorized.

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[7]NRC rules provide that a final "no significant hazards consideration" finding need not be made unless a request for a hearing is received. In this case, because the first set of amendments had not issued, the staff, in its discretion, chose to make the determination on the first set as part of its response to comments submitted by plaintiffs on the second set of amendments. Aside from the other defects associated with this appeal, this first set of amendments per se is not properly before the Court because appellants

[Footnote Continued]

On August 19, 1983, FP&L proposed a second set of amendments for Turkey Point -- again, one group for each unit -- to change the operational limits of the reactors, accounting for the new fuel design's characteristics and potential efficiencies, and for new steam generators. In the Federal Register on October 7, 1983, the staff noticed the application for the second set of amendments; it also offered in that notice its tentative finding of no significant hazards consideration, the basis for that finding, and an opportunity for hearing. 48 Fed. Reg. 45862. (J.A. 162). The staff noted that the second set of amendments covered four types of changes: (1) an increase to the hot channel limit, (2) an increase to the total heat flux peaking factor, (3) changes to the overpower temperature setpoints, and (4) changes to reflect new steam generators.

The first two changes permit portions of the reactor core to be at a higher temperature than they were in the preceding fuel cycle. In the October 7, 1983 Federal Register notice, 48 Fed. Reg. at 45862, col. 2 (J.A. 162), the staff concluded that the first two types of changes, in accord with example [vi] of "Changes Not Likely To Involve

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[Footnote Continued]
failed to submit to the NRC a timely request for a hearing on them.

Significant Hazards Considerations," 48 Fed. Reg. at 14870, col. 3 (S.A. 12), were within the overall margins of safety previously analyzed for the reactors, were to be balanced by more restrictive limits in other areas, and thus were not significant changes under 10 C.F.R. § 50.92.

The staff concluded that the third type of change, which required more uniform temperatures and thus constituted a safety improvement, was:

> similar to example [ii] of "Changes Not Likely To Involve Significant Hazards Considerations": A change that constitutes an additional limitation or control not presently included in the technical specifications: for example, a more stringent surveillance requirement .... The changes ... are all in the conservative direction and constitute a more stringent limitation.

48 Fed. Reg. at 45862, col. 3 (October 7, 1983) (J.A. 162), quoting 48 Fed. Reg. at 14870, col. 3 (April 6, 1983) (S.A. 12).

The fourth change accounted for the use of new steam generators which allow more secondary coolant to contact the heated primary system water. The heat exchange between the primary and the secondary systems occurs as primary system water passes over pipes carrying secondary coolant. Over time these tubes sometimes dent or fracture, and they need to be plugged or replaced. The old steam generators were repaired and the damaged tubes replaced. Of this fourth type of change the staff concluded that:

> The deletion of the technical specifications relating to the old steam generators is similar to example (v) of "Changes Not Likely To Involve Significant Hazards Considerations": Upon satisfactory completion of construction in connection with an operating facility...relief [is] granted from an operating restriction that was imposed because the construction was not yet completed satisfactorily.
>
> This is intended to involve [relaxation of] restrictions [imposed during construction] where it is justified [when] construction has been completed satisfactorily. The deletions requested are to remove the restrictions placed on the use of the old steam generators with tubes plugged in excess of five (5) percent....[Because the new steam generators function satisfactorily], the restrictions placed on the old steam generators are no longer applicable....

48 Fed. Reg. at 45862, col. 3, 45863, col. 1 (Oct. 7, 1983) (J.A. 162, 163), quoting 48 Fed. Reg. 14870, col. 3 (April 6, 1983) (S.A. 12).

In summary, the October 7, 1983 notice made clear that the staff viewed this second set of amendments as contributing to the protection of the reactor against the possibility of pressurized thermal shock, rather than as raising significant new safety issues.

On November 4, appellants filed both a timely request for a hearing and a number of comments on the second set of amendments, the technical specification changes.

On December 23, 1983, the NRC staff issued the second set of amendments in a final "no significant hazards consideration" finding supported by a detailed SER, and a determination under 10 C.F.R. § 51.4(d) of no environmental

impact. SER at 13-14. (J.A. 137, 138). The SER explained that although there would be higher temperatures in portions of the core, there would not be additional heat overall, and thus no attendant increases in pressure and temperature stresses. In addition, new steam generators allowed more primary/secondary coolant interaction and better temperature control. In all, the staff found that all changes were safely within the previously analyzed operational limits for Turkey Point.[8] SER at 5-8 (J.A. 129-132).

Appellants' hearing petition was referred to a Licensing Board, which is now holding hearings on the second set of amendments. In the interim, appellants requested the District Court, and now request this Court, to nullify the NRC's actions on the amendments and the "no significant hazards consideration" determinations. Complaint (Nov. 29, 1983), Plaintiffs' Motion for Extension of Time ..., at 2 (Dec. 29, 1983); Brief for Appellant at 2-3, 32 (Jan. 28, 1985).

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[8]The staff analyzed the effects of the changes on postulated accidents involving loss of reactor coolant. Using elaborate computer models, the NRC staff predicted that under accident conditions, the reactor as changed by the amendments would remain within previously calculated and accepted limits. The NRC staff assumes a conservative approach toward safety questions and builds safety margins into its calculations, such that the plant is, in fact, safer than the calculations show. Minor changes in one [Footnote Continued]

SUMMARY OF ARGUMENT

Appellants have appealed from a District Court order which dismissed their action. However, Appellants' notice of appeal was filed 108 days after the entry of this order. Because a notice of appeal must be filed within sixty days of the order or judgment from which an appeal is taken, and because this time limit is mandatory and jurisdictional, this Court lacks jurisdiction to hear the appeal.

Assuming that this Court determines that it has jurisdiction to review this appeal, the lower court was correct to dismiss the complaint for lack of District Court jurisdiction. Section 189(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2239(b), in conjunction with 28 U.S.C. §2342(4), provides that proceedings conducted under section 189(a), 42 U.S.C. §2239(a), shall be reviewed exclusively in the courts of appeals. Section 189(a) specifically addresses the NRC actions which are at issue in this case. The actions at issue are the NRC's amendment of licenses, and the NRC's determination that the amendments involved no significant hazards consideration, both actions which are specifically listed in section 189(a).

[Footnote Continued]

aspect of safety analyses usually do not affect the overall conclusions because of this conservative approach.

Accordingly, the District Court properly held that section 189(b), in conjunction with 28 U.S.C. §2342(4), makes the amendments at issue reviewable solely in the courts of appeals.

Moreover, the District Court did not err in failing to transfer appellants' action to this Court pursuant to 28 U.S.C. §1631. The standard of review for such a claim is whether the District Court abused its discretion. There can be no such abuse of discretion in this case because appellants never requested that the District Court transfer this matter. Indeed, appellants are barred from raising this issue on appeal, because they failed to raise it below.

Finally, if this Court reaches the merits of the underlying substantive matter at issue in this case, it should defer to the technical expertise of the NRC. The NRC staff's determination that the Turkey Point license amendments at issue involved no significant hazards consideration has a substantial basis in fact and should be upheld. Indeed, appellants attack fails to suggest how this determination is even arguably in error. Rather, they launch a confusing attack on the general issue of pressurized thermal shock and ignore the only issue on review, i.e., whether the amendments at issue raise significant, new, unreviewed safety issues.

ARGUMENT

I. This Court Does Not Have Jurisdiction Over This Appeal Because Appellants Failed To Notice Their Appeal Within Sixty Days Of Entry Of The District Court Judgment Dismissing Their Action

Before addressing the jurisdictional and substantive arguments that were before the District Court, this Court must first determine whether it has jurisdiction over this appeal. By motion of November 5, 1984, federal appellees asked this Court to dismiss this appeal for lack of jurisdiction. That motion was denied without prejudice on December 19, 1984. We reassert and incorporate that motion at this time, and we briefly review those jurisdictional arguments here.

The federal defendants moved to dismiss appellants' District Court action on the ground that challenges to NRC license amendments are to be heard only in the courts of appeals. The District Court subsequently issued an order which, "for the reasons set forth in the accompanying Memorandum Opinion ..." granted appellees' motion and ordered "that the action be and is dismissed." (J.A. 148). This order was filed and entered on the docket sheet by the clerk of the District Court on April 27, 1984. (J.A. 148). Not until May 4, 1984, however, did the District Court issue the "accompanying Memorandum Opinion" referred to in the April 27 Order. Center for Nuclear

Responsibility v. NRC, 586 F. Supp. 579 (D.D.C. 1984). The May 4 Opinion set forth the District Court's reasons for having earlier dismissed the complaint. In addition to correctly holding that it had no jurisdiction, however, the lower court unnecessarily and erroneously stated in dictum that the Commission's regulations never required the preparation of a Supplemental Environmental Impact Statement. Id., 586 F. Supp. at 581.

On May 14, 1984, the federal defendants filed a Motion to Clarify Opinion which asked the District Court to delete the erroneous and unnecessary dictum from its May 4 Opinion. Obviously, the federal defendants' motion did not seek to disturb in any way the District Court's April 27 Order which dismissed plaintiffs' action. The District Court granted this clarification motion on June 12, 1984, noting that since the plaintiffs had not responded, "the motion is deemed conceded under Local Rule I-9(d)." (J.A. 156).

On August 13, 1984, plaintiffs filed a Notice of Appeal. This notice purports to appeal "from the final order dismissing plaintiffs' complaint for want of subject matter jurisdiction entered in this action on June 12, 1984." It is apparent, however, that appellants are appealing the April 27 Order, for that is the District Court judgment for defendants which dismissed plaintiffs'

complaint for lack of jurisdiction. This appeal does not and could not lie from the District Court's June 12 clarifying opinion, which merely deleted a portion of its May 4 Opinion which was unnecessary to the District Court's reasons for dismissing the action on April 27.

The procedures for appealing from judgments of district courts are specifically prescribed by Rule 4 of the Federal Rules of Appellate Procedure. As relevant to this litigation, Rule 4(a)(1) provides that a notice of appeal must be filed within sixty days "after the date of entry of the judgment or order appealed from ...." Because the time limits provided in Rule 4(a)(1) are mandatory and jurisdictional, failure to file a timely notice of appeal deprives a court of appeals of jurisdiction to hear the appeal. See Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, 264 (1978); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1983).

In this case that 60-day period must run from April 27, 1984, the date of entry of the District Court's order, or judgment, which dismissed this case. Thus, the time within which appellants could note their appeal expired June 26, 1984. Their August 13 notice, filed 108 days after the judgment dismissing their complaint, was 48 days out of time. Because it was filed late, this Court lacks jurisdiction over appellants' appeal.

Determining the operative ruling which is to be the judgment upon which an appeal must rest is a simple, straight-forward function, which a unanimous Supreme Court has instructed "must be applied mechanically." United States v. Indrelunas, 411 U.S. 216, 220-22 (1973). The Federal Rules clearly define the judgment or order which begins the running of the 60-day period within which an appeal must be noted. Federal Rule of Appellate Procedure 4(a)(6) states that

> [a] judgment or order is entered within the meaning of Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

In turn, Rule 58 of the Federal Rules of Civil Procedure requires that "[e]very judgment should be set forth on a separate document." Rule 79(a) describes how the district court clerk must enter court rulings on the "civil docket." Application of these mechanical rules to this case makes it clear that the April 27 Order is the only order upon which this appeal can rest. It is the only "separate document" which has been entered on the civil docket in accordance with Rule 79(a).

This appeal would be timely if the District Court's May 4, 1984 Opinion were the operative judgment dismissing this case, and if the federal defendants' motion to clarify that opinion (filed within 10 days of that opinion but not the April 27 judgment) were the type of

motion which tolled the time within which this appeal could be noted. However, both necessary prerequisites to such an argument are absent in this case.

First, and foremost, the District Court's May 4 Opinion is not a judgment. It does not meet the specific, mechanical requirements of Rule 58 -- it is not a "separate document" dismissing this case. Additionally, a court's "opinion does not constitute its judgment." See 6A Moore ¶ 58.02; 11 Wright and Miller, Federal Practice and Procedure § 2785. Cf., Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., ___ U.S. ___, 104 S. Ct. 2778, 2781, (1984) ("... [t]his Court reviews judgments, not opinions ..."). Rule 58 clearly requires a court's judgment to be separate from its opinion. Although Rule 58 is formalistic, and must be applied mechanically, commenters have noted that "something like this was needed to make certain when the judgment becomes effective" for purposes of appeal and post-judgment motions. 6A Moore ¶ 58.04 [4-1], quoted with approval in United States v. Indrelunas, 411 U.S. 216, 220-22 (1973).

Moreover, the Advisory Committee comments on the 1963 amendment to Rule 58 also make this point in unmistakable terms:

> The amended rule eliminates ... uncertainties by requiring that there be a judgment set out on a separate document -- distinct from any opinion or

memorandum -- which provides the basis for the entry of the judgment.

Id. (Emphasis added).

Thus, it is clear that the District Court's May 4 Opinion cannot be the judgment upon which this appeal is based, nor can it be a judgment for purposes of determining the timeliness of a Rule 59 motion which would have extended the time for filing this appeal.

Second, even if the May 4 opinion were somehow found to be a judgment, the motion to clarify opinion was not the type of motion which could postpone the deadline for filing the notice of appeal, i.e., one of those listed in Rule 4(a)(4) of the Federal Rules of Appellate Procedure. It was instead a motion under Rule 60(b)(1) of the Federal Rules of Civil Procedure to correct a mistake in the opinion which otherwise would need to be corrected on appeal. This is a proper motion in this Circuit. See D.C. Federation of Civic Assns. v. Volpe, 520 F.2d 451, 453 (D.C. Cir. 1975). See also, 7 Moore ¶ 60.22[3].

It would be unreasonable to rule that the Motion to Clarify Opinion was a Rule 59(e) motion to alter or amend a judgment. The April 27 Order of the District Court was entirely favorable to the federal defendants. It provided all of the relief requested in the federal defendants' motion to dismiss the complaint. It would be illogical to treat a motion for clarification of an opinion, filed by the

prevailing party, as a motion to alter or amend a judgment, since the prevailing party would have no reason to request a modification of a judgment in its favor.

For all of the above reasons, and as more fully explained in our November 5, 1984 motion, this appeal should be dismissed for lack of jurisdiction.

II. The District Court Correctly Held That It Lacked Jurisdiction To Review The NRC Licensing Actions At Issue In This Case

If this Court determines, contrary to Argument I, supra, that it has jurisdiction over this appeal, it must then review the lower court's decision that the District Court lacks jurisdiction to review the NRC license amendments complained of here.

In section 189(b) of the Atomic Energy Act, Congress directed that "[a]ny final order entered in any proceeding of the kind specified in [section 189(a)] shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129) ...", more commonly known as the Hobbs Act. 42 U.S.C. § 2239(b), see 28 U.S.C. §§ 2341-51. Under 28 U.S.C. § 2342(4), a "court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the [Nuclear Regulatory] Commission made reviewable by

section 2239 of Title 42." Vermont Yankee v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (hereafter cited as "Vermont Yankee"). Among the final orders contemplated in Section 189(a) are both: (1) orders in a "proceeding [for the] ... amending of any license," 42 U.S.C. § 2239(a)(1); and (2) "a determination by the Commission that [an] amendment involves no significant hazards consideration ..."42 U.S.C. § 2239(a)(2). (S.A. 4).

By the terms of the statute itself, the judicial review directives in section 189(b) apply to all of the different types of section 189(a) proceedings. So long as the actions are final, section 189(b) provides that the courts of appeals shall have exclusive jurisdiction to review all such determinations. On this basis, the District Court correctly dismissed the complaint challenging both the license amendments and the "no significant hazards consideration" determinations.

Appellants asserted before the District Court, and they assert here, that this Circuit's Lorion decision controls this case, and requires the District Court to exercise its jurisdiction. Lorion v. NRC, 712 F.2d 1472 (D.C. Cir. 1983), cert. granted, 104 S. Ct. 1676 (1984) (argued on October 29, 1984, decision pending). Even if its outcome in the Supreme Court is contrary to federal appellees' position, Lorion is not dispositive here.

In Lorion, this Court decided that NRC decisions to deny requests to take enforcement action under 10 C.F.R. § 2.206 ("2.206") were not final orders entered in "proceedings" of the kind specified in section 189(a). The Court concluded that such 2.206 decisions were final actions on "requests for proceedings" but were not "proceedings" themselves. Therefore, according to the Lorion Court, subject matter jurisdiction over this sort of 2.206 decision is not governed by the special appellate review format described above, but rather is controlled by the general federal question jurisdiction statute, 28 U.S.C. § 1331.

Even if upheld by the Supreme Court, Lorion is distinguishable from the instant case. The Lorion court was only concerned about whether denial of a 2.206 request for NRC enforcement action was a proceeding under section 189(a)(1). Unlike a 2.206 proceeding, a Commission proceeding to make a "no significant hazards consideration" determination is explicitly specified in Section 189(a)(2) and therefore is clearly included in the judicial review provisions of section 189(b). Under the special review statute, judicial review should proceed in the court of appeals.[9] San Luis Obispo Mothers for Peace v. Hendrie, 502

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[9]That appellants have raised claims under the National [Footnote Continued]

F.Supp. 408, 411-12 (D.D.C. 1980). See City of West Chicago v. Nuclear Regulatory Commission, 542 F.Supp. 13, 15 (N.D. Ill. 1982), aff'd, 701 F.2d 632 (7th Cir. 1983).

It is well settled that where Congress has specified a particular forum for review of agency action, the congressional choice of forum is exclusive. Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 419-20 (1965); Investment Company Institute v. Board of Governors, 551 F.2d 1270, 1279 (D.C. Cir. 1977); 16 Wright, Miller, Cooper and Gressman, Federal Practice and Procedure: Jurisdiction, § 3943 (1977). Similarly, although there is a presumption that agency action is subject to judicial review, it is presumptively subject to review in either a district court or a court of appeals, but not both. Investment Company Institute, 551 F.2d at 1279-80; Sun Enterprises v. Train, 532 F.2d 280, 287 (2d Cir. 1975). "[W]here it is unclear whether review jurisdiction is in the

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[Footnote Continued]

Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-61, does not affect this determination. Where NEPA claims are raised in the context of a challenge to a final NRC licensing action, judicial review lies in a court of appeals. Vermont Yankee, supra, 435 U.S. at 526-27; Susquehanna Valley Alliance v. Three Mile Island Reactor, 619 F.2d 231, 239-42 (3d Cir. 1980), cert. denied, 449 U.S. 1096 (1981). Jurisdiction to review all issues related to these actions should proceed only in a court of appeals. See City of Rochester v. Bond, 603 F.2d 927 (D.C. Cir. 1979).

district court or the court of appeals the ambiguity is resolved in favor of the latter..." Denberg v. U.S.R.R. Retirement Bd., 696 F.2d 1193, 1197 (7th Cir. 1983), citing Rockford League of Women Voters v. Nuclear Regulatory Commission, 679 F.2d 1218 (7th Cir. 1982).

Placing review of final NRC actions on license amendments and associated findings exclusively in a court of appeals gives appellants all necessary legal remedies, while avoiding the inefficiency of bifurcated review. The courts of appeals have the authority to determine the adequacy of the environmental and safety record in support of the amendments, the propriety of the "no significant hazards consideration" findings, and the adequacy of NRC's actions on appellants' comments.[10]

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[10]The NRC has already examined all technical issues raised in appellants' comments to the agency, even though appellants did not file a timely request for hearing on the first set of amendments. Further, an NRC Licensing Board is currently reviewing appellants' claims on the merits of the second set of amendments. Thus, that hearing process holds out the prospect of at least partial relief on the entire case. In addition, if appellants have other concerns beyond those so far addressed to this Court, the District Court, or to the NRC (such as, for example, the general concerns about PTS which fill their brief but are irrelevant to this case), the 2.206 process is also available to assure that the agency develops a full factual record for judicial review, avoiding the prospect that the resources of this or some other court would be prematurely expended. Appellants should exhaust NRC remedies before seeking judicial review. McKart v. United States, 395 U.S. 185, 193 (1969); Simmons

[Footnote Continued]

Accordingly, the District Court correctly dismissed the complaint for lack of subject matter jurisdiction.

III. Appellants Cannot Complain To This Court That the District Court Refused To Transfer This Action Under 28 U.S.C. § 1631

Appellants argue, for the first time in this action, that the District Court erred in failing to transfer this case to the Court of Appeals. They interpret 28 U.S.C. § 1631 as mandating a sua sponte transfer whenever a court determines, as here, that it lacks jurisdiction over the matter. They cite no support for this proposition, and we are aware of none.

Before the District Court, appellants did not move for transfer. Thus they presented no argument to the District Court that the "interest of justice," or any other interest, warranted transfer of this case. This Court's reviewing role is limited to determining whether the District Court abused its discretion when it failed to transfer this case under 28 U.S.C. § 1631. See Billops v.

[Footnote Continued]

v. Arkansas Power and Light Co., 655 F.2d 131 (8th Cir. 1981); Honicker v. Hendrie, 465 F.Supp. 414 (M.D. Tenn.), aff'd, 605 F.2d 556 (Table) (6th Cir. 1979), cert. denied, 444 U.S. 1072 (1980).

Department of the Air Force, 725 F.2d 1160, 1164 (8th Cir. 1984). The District Court was under no obligation to exercise its discretion to transfer the case in the absence of argument on this issue. Nor can it be said to have abused its discretion when it failed to guess the relief appellants would have preferred but never sought.

Appellants cannot be permitted to reshape their case and arguments as the spirit moves them at succeeding stages of the proceedings. They cannot challenge the District Court's decision based on arguments not even raised below, particularly when this Court's standard of review is limited to determining whether the District Court abused its discretion. This Circuit has repeatedly and consistently rejected attempts to raise on appeal contentions, including legal arguments, not sufficiently raised in district court in the first instance. E.g, United States v. Pickney, 543 F.2d 908, 915 (D.C. Cir. 1967); Miller v. Avirom, 384 F.2d 319, 321-23 (D.C. Cir. 1967); Johnston v. Reily, 160 F.2d 249, 250 (D.C. Cir. 1947) (the rule is one "of substance in the administration of the courts" and, while it "may work hardship in individual cases, it is necessary that its integrity be preserved").

Under these uniform authorities, appellants are precluded from arguing in this Court that transfer is in the interest of justice, because that contention was not even

presented to the District Court.[11] In the present circumstances, however, it requires no citation to case authority to conclude that the District Court did not abuse its discretion in denying transfer when that request was not even presented to the District Court. It was appellants' burden to establish that transfer was in the interest of justice. Cf. Outboard Marine Corp. v. Pezetel, 461 F. Supp 384, 393 (D. Del. 1978) (party seeking transfer under 28 U.S.C. § 1406(a) has burden to show that such transfer is "in the interest of justice"). By failing to raise the issue in any of their papers filed with the District Court, they also failed to carry that burden. Certainly, the District Court cannot be faulted for failing to find

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[11] In Miller v. Avirom, supra, now-Chief Judge Robinson explained the rationale behind this well-established rule:

> In our jurisprudential system, trial and appellate processes are synchronized in contemplation that review will normally be confined to matters appropriately submitted for determination in the court of first resort. Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal. Canons of this tenor reflect, not obeisance to ritual, but "considerations of fairness to the court and the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact."

384 F.2d at 321-22, quoting United States v. Atkinson, 297 U.S. 157, 159 (1936).

transfer in the interest of justice when that remedy was never pursued by appellants in the District Court although fully known and available to them at the time.

IV. The NRC Staff Correctly Found That The Amendments To The Turkey Point Operating License Involved No Significant Hazards Considerations.

If, contrary to Argument I, supra, this Court finds that it has jurisdiction over this appeal and if it decides, contrary to Argument II, supra, that the District Court has jurisdiction over the challenge to NRC action raised by the appellants, this case must be remanded to the District Court for further proceedings.[12] On the other hand, if this Court assumes jurisdiction over this appeal, affirms the District Court's finding that it lacks jurisdiction over this action, but then determines that the lower court erred in failing to transfer the case to this Court (contrary to Argument III, supra) then, and only then, may it be necessary for the Court to reach the merits of the

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[12] Contrary to appellants' assertions, such review would be subject to the well-established APA principle that an informal agency decision (such as the NRC "no significant hazards consideration" decision) must be upheld unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). See, e.g., Vermont Yankee, 435 U.S. at 549.

substantive issues in this case.[13] There is only one substantive issue that is a final agency action properly reviewable at this time: the NRC staff's finding that the second set of amendments at issue involves no significant hazards consideration.[14]

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[13]The appellants argue that even if this Court affirms Judge Penn's jurisdictional analysis and concludes that the Court of Appeals has exclusive jurisdiction to review the NRC orders at issue, the Court must then transfer the case back to the district court "for a determination of the disputed facts." Argument I. E. of Appellants' Brief. To support this argument they rely on language in 28 U.S.C. § 2347(b)(3) of the Hobbs Act to the effect that a case must be transferred to a district court when "a genuine issue of material fact is presented." However, no such transfer is required here. The issue before this Court on reviewing the merits of the Commission's no significant hazards consideration determination would be whether the administrative record supports the decision. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). There is no factual issue with regard to what constitutes the record. Thus there is no need for the district court's evidentiary capabilities. "[T]he focal point for judicial review should be the record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142 (1973). Thus the transfer that appellants contemplate is not only unnecessary, it is also flatly precluded. If the Court finds the agency record inadequate to support the decision, a remand to the NRC rather than discovery in the district court is the appropriate remedy. Deukmejian v. NRC, 751 F.2d 1287 (D.C. Cir. 1984).

[14]The no significant hazards consideration finding on the first set of amendments is not before the Court because appellants did not file comments within 30 days on the proposed finding for those amendments, 10 C.F.R. § 50.91(a)(2). Thus appellants did not properly exhaust their administrative remedies with regard to the first set of amendments. Even absent this fatal flaw, appellants'

[Footnote Continued]

Appellants have given the Court absolutely no reason why the NRC's no significant hazards consideration finding should not be affirmed. Indeed, rather than address the only substantive question before the Court, i.e., whether the Commission abused its discretion in finding that the change in reactor core configuration at Turkey Point involves no significant hazards consideration, appellants expand at length on their view that reactor pressure vessel embrittlement and pressurized thermal shock are "serious safety issues." Appellants' Brief, Argument IIA. The Commission has never claimed otherwise. All that the Commission has determined is that the license amendments challenged by the appellants involve no significant hazards consideration.[15]

[Footnote Continued]

arguments on both sets of amendments are defective for the reasons discussed herein.

[15]Appellants are free to argue in a 10 C.F.R. § 2.206 petition to the NRC that more should be done to address the PTS issue as it affects Turkey Point, but that is a question which goes well beyond whether the particular amendment at issue here has been properly issued prior to an agency hearing. It is only with regard to the latter question that the Commission has reached a reviewable decision.

For the reasons given below, that determination was fully in accordance with the facts and NRC regulations. It should be affirmed.[16]

In this case the staff performed an evaluation of the amendments, and reached its no significant hazards consideration findings (J.A. 108-112) by using both the section 50.92(c) criteria and the examples in the preamble to the rule. See 48 Fed. Reg. at 14870 (S.A. 12). In their effort to turn this case into a review of PTS, appellants ignore the narrow question before the Court: the substance of the amendment at issue, the staff's SER on which the determination is based, the section 50.92(c) standards and examples which have been applied, and the NRC's attempts to faithfully carry out congressional intent to "develop...standards that to the maximum extent practicable, draw a clear distinction between amendments that involve a significant hazards consideration and those [that do not]." S. Rep. No. 113, 97th Cong., 1st Sess. at 15, reprinted in 1982 U.S. Code Cong. & Admin. News 3592, 3607. These

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[16]The appellants may attempt to challenge the substance of the amendments themselves in a hearing before the NRC -- indeed, they are doing so right now -- but in accordance with Section 189(a) and the regulatory scheme based on it, those amendments may go into effect while the hearing is pending. This effectiveness is entirely reasonable for a license amendment that involves no significant hazards consideration. It is precisely what Congress intended.

standards, as applied to the Turkey Point amendments, establish that the changes to the reactor core present no significant hazards consideration.[17] That finding should be affirmed.

It is in this kind of highly technical area involving assessments by the agency of probabilities of accidents, margins of safety, and accident sequences, that the Court's deference to the NRC should reach its zenith. See Carstens v. NRC, 742 F.2d 1546, 1557 (D.C. Cir. 1984), quoting Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 103 S. Ct. 2246 (1983). "'Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on "engineering and scientific" considerations, we recognize the relevant agency's technical expertise and

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[17]The safety and environmental merits of the amendments -- as opposed to whether they involve no significant hazards considerations -- are not before the Court at this time. They are being reviewed in an ongoing Licensing Board proceeding on the second set of amendments. Appellants have presented no arguments on the merits of the amendments, and, in any case, the exhaustion doctrine should preclude judicial consideration of the merits of those amendments at this time. These ongoing hearings will give appellants the opportunity to attempt to show that the amendments raise important safety or environmental issues which have not been adequately resolved by the NRC staff. If this showing can be made then the NRC Licensing Board is authorized to order revocation of the amendments.

experience, and defer to its analysis unless it is without substantial basis in fact.'" Id., 742 F.2d at 1557, note 17, quoting Federal Power Commission v. Florida Power & Light Company, 404 U.S. 453, 463 (1972) (emphasis added).

There is a "substantial basis in fact" for the NRC's no significant hazards consideration decisions on the Turkey Point amendments, as discussed in the SERs (J.A. 92, 125). The amendments do not increase the probability of an accident previously evaluated; they do not create the possibility of a type of accident different from those already evaluated; and they do not significantly decrease any margin of safety. Appellants do not address, much less attack, the bases for these findings.[18] Thus this Court should uphold those decisions.

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[18]The Appellants' NEPA argument (Appellants' Brief, Argument III), founders on the same misconception that vitiates their Atomic Energy Act claims. The staff found that the amendments had no significant environmental impacts because they increased neither effluents nor reactor power output, and thus that no SEIS was necessary. SER of December 9, 1983 at 21-22; SER of December 23, 1983 at 13-14 (J.A.112-113; 137-138). This accorded with 10 C.F.R. § 51.5(b)(2). The NRC has met all NEPA requirements with respect to the Turkey Point amendments, and that is all that could properly be at issue here. If the appellants see the PTS problem as a circumstance requiring additional environmental analysis at Turkey Point, they may petition the NRC for such action. 10 C.F.R. § 2.206.

It is apparent that what appellants really seek is to litigate whether, in view of PTS, the Turkey Point reactors should be operating at all. Thus, they ignore the operative staff documents on the amendments. But it was never the intention of Congress to allow the use of hearing rights on amendments to reopen hearings on the original operating licenses.[19] Appellants' approach would mean that every license amendment proposed, no matter how innocuous itself, would open up relitigation of every conceivable safety issue to which the amendment might be related. This Court rejected a similar reading of the Atomic Energy Act in Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983).

For the foregoing reasons, if the Court reaches the underlying substantive issue in this case, the Court should find that the NRC's no significant hazards consideration finding was entirely proper.

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[19] The intent was to require prior hearings only on amendments which, in and of themselves, raised significant, new and unreviewed safety issues. What appellants actually seek in this case is review of a pre-existing problem, regardless of the inherent implications of the amendments themselves.

CONCLUSION

For the foregoing reasons, appellants' appeal against federal appellees should be dismissed.

Respectfully submitted,

HERZEL H. E. PLAINE
General Counsel

F. HENRY HABICHT II
Assistant Attorney General

WILLIAM H. BRIGGS, JR.
Solicitor

EDWARD J. SHAWAKER
Attorney

E. LEO SLAGGIE
Deputy Solicitor

DIRK D. SNEL
Attorney
Land & Natural Resources Division
U.S. Department of Justice
Washington, DC 20530
(202) 633-3522

MICHAEL B. BLUME
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(202) 634-1493

Dated: April 5, 1985

APPENDIX

Table of Contents

A. Statutes

42 U.S.C. § 2239 (1982)

§ 2239. Hearings and judicial review

(a)(1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in chapter 158 of title 28, and to the provisions of chapter 7 of title 5.

28 U.S.C. § 2342 (1982)

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(i)(2) of title 4. United States Code.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 1631 (1982)

Sec.
1631. Transfer to cure want of jurisdiction.

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2347 (1982)

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

B. Miscellaneous Documents

Notice of Request for First License Amendment

NUCLEAR REGULATORY COMMISSION

Applications and Amendments to Operating Licenses Involving no Significant Hazards Considerations; Monthly Notice

I. Background

Pursuant to Public Law (Pub. L.) 97-415, the Nuclear Regulatory Commission (the Commission) is publishing its regular monthly notice. Pub. L. 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the autority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This monthly notice includes all amendment issued, or proposed to be issued, since the date of publication of the last monthly notice which was published on June 22, 1983 (48 FR 28578-28583) through July 12, 1983.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Comments should be addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attn: Docketing and Service Branch.

By August 22, 1983, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance

with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR § 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifi ally explain the reasons why intervent on should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also indentify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If The final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C., by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at (800) 325–6000 (in Missouri (800) 342–6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to *(Branch Chief)*: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petitioner has made a substantial showing of good cause for the granting of a late petition and/or request. That determination will be based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d)

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C., and at the local public document room for the particular facility involved.

. . . .

Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Unit Nos. 3 and 4, Dade County, Florida.

Date of amendment request: June 3, 1983.

Description of amendment request: This amendment involves Technical Specification changes to support planned fuel design modification during Cycle 9 refueling for Unit 3, Cycle 10 refueling for Unit 4 and subsequent cycles. It is planned to replace the Westinghouse 15 x 15 low-parasitic (LOPR) fueled cores with Westinghouse 15 x 15 optimized fuel assembly (OFA) core with Wet Annular Burnable Absorber (WABA) Rods. Changes are requested to: (1) permit increases in shutdown and control rod drop time which will be based on safety analysis for the transition cores; (2) use of burnable poison rods of an approved design for reactivity and/or power distribution factors; and (3) changes in hot channel factors and other power distribution factors affecting departure from nucleate boiling (DNB). The change in core physics parameters and thermal characteristics are required due to the improved neutronic characteristics of

fuel assemblies and fuel management considerations.

Basic for proposed no significant hazards consideration determination: The Commission has provided guidance concerning the application of the standards for determining whether license amendments involve no significant hazards considerations by providing certain example (48 FR 14870). Example (iii) of amendments not likely to involve significant hazards considerations is a change resulting from nuclear reactor reloading involving no fuel assemblies significantly different from those previously found acceptable at the facility in question, where no significant changes are made to the acceptance criteria for the Technical Specifications, the analytical methods used are not significantly changed and the NRC has previously found the methods acceptable. The instant amendments are similar to the example in that the new fuel is exactly like previous Westinghouse 15 x 15 fuel assemblies except with grid spaces made with different material and improved neutronic characteristics. The core safety limits and associated setpoints in the current Technical Specifications are applicable. The effects of increased rod drop time are within all the safety limits and criteria analyzed in the FSAR and the plant will be operated within the previously approved margins and limits. Each reload core design will be evaluated to assure that design and safety limits are satisfied according to NRC approved methodology and analysis. On this basis, the staff proposes to determine that the amendments involve no significant hazards consideration.

Local Public Document Room location: Environmental and Urban Affairs Library, Florida International University, Miami, Florida 33199.

Attorney for licensee: Harold F. Reis, Esquire, Lowenstein, Newman, Reis and Axelrad, 1025 Connecticut Avenue, N.W., Suite 1214, Washington, D.C. 20036.

NRC Branch Chief: Steven A. Varga.

Notice of Request for Second License Amendment

[Docket Nos. 50-250 and 50-251]

Florida Power and Light Company; Consideration of Issuance of Amendment Facility Operating Licenses and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating Licenses Nos. DPR-31 and DPR-41, issued to Florida Power and Light Company (the licensee), for operation of the Turkey Point Plant Unit Nos. 3 and 4 located in Dade County, Florida.

These amendments would change the Technical Specifications to support the integrated program for vessel flux reduction to resolve the pressurized thermal shock issue and to take credit for operation with the new steam generators in an unplugged (maximum of five (5) percent tube plugging) configuration. Changes are requested to: (1) Increase the hot channel $F_{\Delta H}$ limit from 1.55 to 1.62; (2) increase the total peaking factor F_Q limit from 2.36 to 2.32; (3) change the overpower ΔT setpoints and thermal-hydraulic limit curves; and (4) delete restrictions and limits placed on the old steam generators to allow for operation with tubes plugged in excess of five (5) percent in accordance with the licensee's application for amendments dated August 19, 1983 as supplemented September 9, 1983.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendments request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendments would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission has provided guidance concerning the application of the standards for determining whether license amendments involve no significant hazards considerations by providing certain examples (48 FR 14870). The increase in the hot channel $F_{\Delta H}$ limit and the total peaking factor F_Q limit is similar to example (vi) of changes which are not likely to involve significant hazards considerations: A change which either may result in some increase to the probability or consequences of a previously analyzed accident or reduce in some way a safety margin, but where the results of the change are clearly within all acceptable criteria with respect to the system or component specified in the Standard Review Plan: For example, a change resulting from the application of a small refinement of a previously used calculational model or design method.

The reduction in the safety margin resulting from the increase in the $F_{\Delta H}$ and F_Q limits are addressed in the safety evaluation provided with the submittal and indicate: (1) The calculated peak clad temperature of 1605° F and 1972° F for small and large break loss of coolant accidents respectively, are within the maximum limit of 2200° F specified in 10 CFR 50.46, "Acceptance Criteria for Emergency Core Cooling Systems (ECCS) for Light Water Nuclear Power Reactors"; (2) additional departure from nucleate boiling ratio margin is identified for Overtemp ΔT and loss of flow conditions to accommodate the reduction in margin resulting from increasing the $F_{\Delta H}$ loss of limit and is within the Final Safety Analysis Report (FSAR) design basis; (3) for breaks up to and including the double-ended severance of a reactor coolant pipe the ECCS will meet the acceptance criteria of 10 CFR 50.46; and (4) the overpower ΔT setpoints will be more restrictive to provide protection using the recalculated core limits and error allowances provided in the safety evaluation which indicate the safety margin is within the acceptance criteria of the Standard Review Plan.

The change in the Overpower ΔT setpoints and thermo-hydraulic limit curves are similar to example (ii) of changes not likely to involve significant hazards considerations: A change that constitutes an additional limitation or control not presently included in the technical specifications: for example, a more stringent surveillance requirement. The changes requested in the setpoint and thermal-hydraulic limit curves are all in the conservative direction and constitute a more stringent limitation.

The deletion of the technical specifications relating to the old steam generators is similar to example (v) of changes not likely to involve significant hazards considerations: Upon satisfactory completion of construction in connection with an operating facility, a relief granted from an operating restriction that was imposed because the construction was not yet completed satisfactorily. This is intended to involve only restrictions where it is justified that construction has been completed satisfactorily. The deletions requested are to remove the restrictions placed on the use of the old steam generators with tubes plugged in excess of five (5) percent. License conditions were placed on the Turkey Point Plant, Units 3 and 4, which requires a new ECCS analysis be performed if credit is to be taken for the unplugged configuration (maximum of five (5) percent tube plugging) for the new steam generators upon satisfactory completion of the construction associated with replacement of the steam generators. Construction has been satisfactorily completed and the licensee's submittal includes new ECCS analysis which assumes a maximum tube plugging of five (5) percent. The results of the new analysis indicate that for breaks up to and including the double-ended severance of a reactor coolant pipe, the ECCS can perform its function and is within the acceptance criteria of 10 CFR 50.46 which demonstrates that the

restrictions placed on the old steam generators are no longer applicable and the new steam generators function satisfactorily.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Comments should be addressed to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Attn: Docketing and Service Branch.

By November 8, 1983, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the basis for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendments under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendments request involves no significant hazards consideration, the Commission may issue the amendments and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendments.

If the final determination is that the amendments involve a significant hazards consideration, any hearing held would take place before the issuance of any amendments.

Normally, the Commission will not issue the amendments until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendments before the expiration of the 30-day notice period, provided that its final determination is that the amendments involve no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission takes this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street N.W., Washington, D.C., by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at (800) 325-6000 (in Missouri (800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Steven A. Varga, Chief, Operating Reactors Branch No. 1, Division of Licensing: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and to Harold F. Reis, Esquire, Lowenstein, Newman, Reis and Axelrad, 1025 Connecticut Avenue, N.W., Washington, D.C. 20036.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer of the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petitioner has made a substantial showing of good cause for the granting of a late petition and/or request. That determination will be based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendments which is available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington, D.C., and at the Environmental and Urbana Affairs Library, Florida International University, Miami, Florida 33199.

Dated at Bethesda, Maryland, this 3rd day of October 1983.

For the Nuclear Regulatory Commission.

Steven A. Varga,

Chief, Operating Reactors Branch No. 1, Division of Licensing.

[FR Doc. 83-27421 Filed 10-6-83; 8:45 am]
BILLING CODE 7590-01-M

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 21, 1983

Martin H. Hodder, Esq.
1131 N.E. 86th Street
Miami, Florida 33138

Dear Mr. Hodder:

As I informed you in our last conversation, I passed on your oral request for documents to the NRC staff. The staff members I contacted were unable to identify some of the documents you requested from the titles given, and they suggested that I send you the following documents which summarize the current position on pressurized thermal shock:

(1) Summary of Meeting Held With FP&L on January 26, 1983 Concerning Pressurized Thermal Shock Program for Turkey Point Plant, Units 3 and 4, dated January 31, 1983;

(2) Letter from S. Varga to R. Uhrig requesting information on pressurized thermal shock, dated Feb. 1, 1983;

(3) Letter R. Uhrig to R. Varga supplying information on thermal shock, dated March 25, 1983;

(4) SECY-83-79, Meetings with Selected Licensees Regarding Flux Reduction Programs Related to Pressurized Thermal Shock, dated February 25, 1983; and

(5) SECY-82-465 Pressurized Thermal Shock (PTS), dated November 23, 1982.

I believe these documents may provide you with the general information which you appear to be seeking.

If these documents are insufficient to your needs, please submit any request for additional documents in writing, as we had agreed.

Sincerely,

Richard Levi

Richard P. Levi
Attorney
Office of General Counsel

cc: Harold Reis

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

FEB 1 1983

Docket Nos. 50-250
and 50-251

Dr. Robert E. Uhrig, Vice President
Advanced Systems and Technology
Florida Power and Light Company
Post Office Box 529100
Miami, Florida 33152

Dear Dr. Uhrig:

At the December 9, 1982 meeting with the Commissioners, the staff presented results of its Pressurized Thermal Shock (PTS) studies as described in SECY 82-465. The staff was subsequently directed to develop a Notice of Proposed Rulemaking that would establish an RT_{NDT} screening criterion, require licensees to submit present and projected values of RT_{NDT}, require early analysis and implementation of such flux reduction programs as are reasonably practicable to avoid reaching the screening criterion, and require plant-specific PTS safety analyses before plants are within three calendar years of reaching the screening criterion. The staff's proposed screening values are an RT_{NDT} of 270°F for plants and axial welds, and 300°F for circumferential welds.

The Commission also noted and concurred that the staff should meet with licensees of plants for which near-term flux reductions of factors of two to five would ensure that the screening criterion would not be exceeded throughout service life, to determine the licensees' plans for such programs, and proposed issuance of 10 CFR 50.54(f) letters to such licensees, if appropriate, following the meetings. We included Turkey Point Plant, Units 3 and 4, in this group of plants based on the information available to us at that time.

On January 26, 1983, your personnel met with the staff at our request to discuss the program for ensuring that the screening criterion for PTS for Turkey Point 3 and 4 would not be exceeded. Based on your presentation and our discussions, we understand that Florida Power and Light Company has already initiated a detailed program intended to achieve significant flux reductions in the next few years. The plant specific data through fuel cycle 8 indicates that the screening criterion will not be exceeded prior to 1989 due to the inclusion of low-leakage cores. The near term flux reduction, which will be implemented for fuel cycle 9 (Spring of 1983 for Unit 4 and Fall of 1983 for Unit 3), will extend the time for reaching the screening criterion to 1995. This will be accomplished by reducing the peripheral flux. Additional core configurations are being evaluated which could result in further flux reduction extending the time for reaching the screening criterion to 2004. In addition, you have indicated that the goal of your integrated PTS program is to achieve the maximum reasonable flux reduction while maintaining full power capability. Mr. Joe Moba indicated that you plan to submit the information presented in the meeting including projected schedules. We request that your submittal include the following, most of which was addressed in your presentation at the January 26 meeting:

1. Provide your assessment of the fluence experienced to date by the welds and plates in your pressure vessel, the rate of increase expected assuming future fuel cycles to which you are already committed, and a detailed description of the bases for the above (including surveillance capsule data and analysis methods, and generic methods or correlations used).

2. Using the above fluence information, provide your assessment of the RT_{NDT} presently existing in your pressure vessel welds and plates utilizing the methodology outlined in Appendix E to Enclosure A of SECY-82-465, and the expected future rates of increase, and the expected dates when the applicable proposed screening criterion will be exceeded.

3. Provide a description of the flux reduction measures that you have instituted and additional measures that you are considering for your plant. Indicate your estimated schedule for the studies in progress. Include for each option:

   a. Description of fuel management and/or fuel removal and/or fuel replacement with dummy elements including an indication of power level of outer assemblies in the axial and radial directions for future cycles;

   b. Quantitative assessment of resulting flux reduction to critical welds and plates;

   c. Parametric study showing future RT_{NDT} values resulting from both the earliest practicable implementation of the option, and from the latest possible implementation of the plan that will still avoid exceeding the RT_{NDT} screening criterion at the expiration of your operating license.

   d. Discussion of advantages and disadvantages of the option, particularly emphasizing power reductions caused by the option. With respect to power reduction, discuss the magnitude of the reduction and the particular limit (e.g., hot channel factor, DNBR, etc.) causing the power reduction. Also analyze how much relief would be necessary (with respect to the particular limit) to allow full power operation, and assess whether such relief would be an improvement to overall plant safety (considering LOCA, PTS, transients, etc.).

4. Discuss the alternatives in addition to flux reduction you are considering in your integrated program that will result in delaying or avoiding exceeding the RT_{NDT} screening criterion.

We request that the above information be provided within 60 days of your receipt of this letter. We may request a meeting with you to discuss your options and plans after we have reviewed the above requested information and as your studies progress.

OMB clearance is not required for this request since it is being transmitted to fewer than 10 addressees.

Sincerely,

Steven A. Varga, Chief
Operating Reactors Branch No. 1
Division of Licensing

cc: See next page

Robert E. Uhrig
Florida Power and Light Company

cc: Harold F. Reis, Esquire
Lowenstein, Newman, Reis and Axelrad
1025 Connecticut Avenue, N.W.
Suite 1214
Washington, D. C. 20036

Norman A. Coll, Esquire
Steel, Hector and Davis
1400 Southeast First National
Bank Building
Miami, Florida 33131

Mr. Henry Yaeger, Plant Manager
Turkey Point Plant
Florida Power and Light Company
P. O. Box 013100
Miami, Florida 33101

Mr. Jack Shreve
Office of the Public Counsel
Room 4, Holland Building
Tallahassee, Florida 32304

Administrator
Department of Environmental Regulation
Power Plant Siting Section
State of Florida
2600 Blair Stone Road
Tallahassee, Florida 32301

Resident Inspector
Turkey Point Nuclear Generating Station
U. S. Nuclear Regulatory Commission
Post Office Box 1207
Homestead, Florida 33030

James P. O'Reilly
Regional Administrator - Region II
U. S. Nuclear Regulatory Commission
101 Marietta Street - Suite 3100
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 1985 copies of the foregoing Brief for Federal Appellees were served on counsel for all parties by placing a copy in the United States mail, first class service, postpaid, to the following:

MARTIN H. HODDER, Esq.
1131 N.E. 86th Street
Miami, FL 33138

WILLIAM S. JORDAN III, Esq.
Harmon, Weiss & Jordan
1725 Eye Street, N.W.
Washington, DC 20006

HAROLD F. REIS, Esq.
Newman & Holtzinger, P.C.
1025 Connecticut Avenue, N.W.
Washington, DC 20036

DIRK D. SNEL, Esq.
Appellate Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, DC 20530

MICHAEL E. BLUME
Senior Attorney
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(202) 634-1493

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