6481

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '88 JUN -8 A11:27

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

RESPONSE OF NRC STAFF TO LICENSEE'S APPEAL FROM LICENSING BOARD'S MEMORANDUM AND ORDER GRANTING PETITION TO INTERVENE, REQUEST FOR HEARING AND CONTENTIONS

Benjamin H. Vogler
Senior Supervisory Trial Attorney

May 24, 1988

D507

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

RESPONSE OF NRC STAFF TO LICENSEE'S APPEAL FROM LICENSING BOARD'S MEMORANDUM AND ORDER GRANTING PETITION TO INTERVENE, REQUEST FOR HEARING AND CONTENTIONS

Benjamin H. Vogler
Senior Supervisory Trial Attorney

May 24, 1988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

RESPONSE OF NRC STAFF TO LICENSEE'S APPEAL FROM LICENSING BOARD'S MEMORANDUM AND ORDER GRANTING PETITION TO INTERVENE, REQUEST FOR HEARING AND CONTENTIONS

I. INTRODUCTION

On May 9, 1988, the Florida Power & Light Company (Licensee), pursuant to 10 C.F.R. Section 2.714(a)(c) filed an appeal from the April 20, 1988, Memorandum and Order [1/] of the Atomic Safety and Licensing Board, granting the petition of Campbell Rich for leave to intervene, request for a hearing and admitting seven of his contentions. For the reasons set forth below the NRC staff (Staff) opposes the Licensee's appeal.

II. BACKGROUND

The St. Lucie Plant is owned and operated by the Florida Power & Light Co., and is located on Hutchinson Island in St. Lucie County, Florida. On March 11, 1988, in response to the Licensee's request, the Staff issued amendment number 91, authorizing the requested spent fuel pool (SFP) expansion at St. Lucie, Unit 1 to provide for an increase in storage capacity from 728 to 1706 fuel assemblies. Also, on March 11, 1988, and

---

1/ Florida Power & Light Co. (St. Lucie Plant, Unit No. 1), Docket No. 50-335 OLA, Memorandum and Order, slip op. (April 20, 1988).

contemporaneously with the issuance of the amendment, the Staff, in connection with the present amendment, made a final no significant hazards determination pursuant to 10 C.F.R. Section 50.92.

Pursuant to the direction of the Licensing Board, Campbell Rich, the Petitioner, filed an amended petition to intervene on January 15, 1988, which contained sixteen contentions. The Licensee and the Staff filed responses to the petition and a prehearing conference was held on March 29, 1988, where the parties presented oral arguments in support of their positions. In its Memorandum and Order of April 20, 1988, the Licensing Board admitted seven contentions, 3, 4, 6, 8, 9, 11 and 15. Two contentions, 7 and 12, were withdrawn by the Petitioner and Contention 5 was held in abeyance pending review of certain Staff materials, but has since been dismissed. The remaining contentions were not admitted. The Licensing Board, in agreement with the positions taken by the Staff and Licensee, found that the Petitioner had the requisite standing to intervene in this proceeding. Order at 3. As noted, on May 9, 1988, the Licensee filed its appeal from the Licensing Board's Memorandum and Order of April 20, 1988 (Order). The Staff's Response is set forth below.

III. DISCUSSION

A. Standards Governing Contentions

A brief review of the Commission's rules and regulations on the admissibility of contentions will provide a proper context in which to consider the Licensee's appeal. Each proposed contention must be set forth with reasonable specificity. 10 C.F.R. § 2.714(b). This regulation has been read to require for each contention "a reasonably specific articulation of its rationale -- e.g., why the Applicant's plans fall short of

certain safety requirements, or will have a particular detrimental effect on the environment." 2/

Under 10 C.F.R. § 2.714(b) and applicable Commission case law 3/ a petitioner for intervention in a Commission proceeding must also set forth for each contention the basis which supports that contention. The purposes of the basis requirements of 10 C.F.R. § 2.714 are (1) to assure that the contention in question raises a matter appropriate for litigation in a particular proceeding, 4/ (2) to establish a sufficient foundation for the contention to warrant further inquiry into the subject matter addressed by the assertion and, (3) to put the other parties sufficiently on notice

---

2/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-82-50, 15 NRC 566 at 570 (1982).

3/ See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Unit Nos. 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), aff'd BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974); Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 242, 245 (1973).

4/ A contention must be rejected where:

(a) it constitutes an attack or applicable statutory requirements;

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

(c) it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be;

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

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

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 20-21 (1974).

". . . so that they will know at least generally what they will have to defend against or oppose." Peach Bottom, supra, at 20. From the standpoint of basis, it is unnecessary for the petition to detail the evidence which will be offered in support of each contention. 5/ Furthermore, in examining the contentions and the bases thereof, a licensing board should not reach the merits of the contentions. 6/ The Appeal Board in Farley 7/ noted that in assessing the acceptability of a contention as a basis for granting intervention:

> [T]he intervention board's task is to determine, from a scrutiny of what appears within the four corners of the contention as stated, whether (1) the requisite specificity exists; (2) there has been an adequate delineation of the basis for the contention; and (3) the issue sought to be raised is cognizable in an individual licensing proceeding. (Footnotes omitted).

If a contention meets these criteria, the contention provides a foundation for admission "irrespective of whether resort to extrinsic evidence might establish the contention to be insubstantial." Farley supra, at 217. 8/

As the Appeal Board in Comanche Peak 9/ concluded:

> Thus, the bases requirement is merely a pleading requirement designed to make certain that a proffered issue is sufficient-

---

5/ Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973).

6/ Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 548 (1980); Duke Power Co. (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979); Peach Bottom, supra, at 20; Grand Gulf, supra, at 426.

7/ Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216-217 (1974).

8/ Id. at 217.

9/ Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 930-931 (1987).

> ly articulated to provide the other parties with its broad outlines and to provide the Licensing Board with enough information for determining whether the issue is appropriately litigable in the instant proceeding. The requirement generally is fulfilled when the sponsor of an otherwise acceptable contention provides a brief recitation of the factors underlying the contention or references to documents and texts that provide such reasons. But the fact that a contention complies with the bases requirement of section 2.714(b) does not mean that the issue is destined to go to hearing -- such a contention is subject to being rejected on the merits prior to trial under the summary disposition provisions of the Rules of Practice.
>
> The bases requirement most assuredly "should not be read and construed as establishing secretive and complex technicalities such as in some other areas of the law are associated with special pleading requirements for which some practitioners have an almost superstitious reverence." The regulation does not require the detailing of admissible evidence as support for a contention. And, in assessing the admissibility of a contention, it is not permissible for a licensing board to reach the merits of the contention. As we have held repeatedly, "[w]hether the contention ultimately can be proven on the merits is 'not the appropriate inquiry at the contention-admission stage.'"
>
> Because the Licensing Board exercises a substantial amount of discretion in determining the adequacy of the bases for a contention, our review of its ruling on this score is limited to whether the Board abused its discretion. Neither the applicants nor the staff mentions the required review standard in calling for reversal of the Licensing Board's determination. But, in order for us to reverse the lower Board, we must be persuaded that no reasonable person could take the view adopted by it. (footnotes omitted)

With these criteria in mind, the Staff will consider the Licensee's appeal.

B. Licensee's Appeal

1. Licensee's View Of The Standards For Admissibility Of Contentions Is Too Restrictive And Not In Accord With Commission Case Law

The Licensee's Appeal does not analyze each admitted contention to demonstrate that not one admitted contention satisfies the standards for admissibility; rather, the Licensee asserts that all are deficient because the Licensing Board did not employ the criteria urged on it by the

Licensee. Licensee acknowledges that the Commission has developed a liberal policy governing the admission of contentions and that admissible evidence need not be submitted to support a contention; that licensing boards exercise a considerable amount of discretion in evaluating contentions and that the Appeal Board's review thereof is limited to whether the Licensing Board abused its discretion. Appeal Brief at 3-4. Although Licensee states that it is not in any way challenging this general doctrine, Id. at 3, the criteria it proposes does, in fact, impose a far more stringent standard for evaluating this pro se Intervenor's proffered contentions.

Basically, the Licensee, relying upon a Licensing Board's opinion in Dresden [10/] and the Appeal Board's decision in Catawba [11/] avers that in this proceeding the Petitioner had a duty to examine the publicly available documentary material relevant to his contentions and in those cases where the Licensee or the Staff have identified an issue raised by the contention, why any proposed resolution of the issue is inadequate. Appeal Brief at 3. Accordingly, the Licensee asserts that in addition to providing a basis with reasonable specificity -- or in order to determine whether a contention has reasonable specificity -- a petitioner must address publicly available documents in order to form an acceptable basis for its contentions. Because of the Petitioner's failure to discharge this duty and the Licensing Board's failure to impose it, Licensee asserts

---

10/ Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), LBP-82-52, 16 NRC 183 (1982).

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

that the Order herein should be reversed and the proceeding terminated. Id. at 3-4. None of the cases cited by the Licensee support such a proposition and indeed the Licensee's views on the admissibility of contentions are at variance with prevailing Commission case law on the subject. See, Part A, supra.

In Catawba, the Appeal Board considered whether a contention could be conditionally admitted, subject to its later being fleshed out through discovery against the Staff or based upon the issuance of a subsequently filed document. In response to this issue the Appeal Board rejected the admission of conditional contentions and noted that an intervention petitioner has an "iron clad" obligation to examine the material that is presently available for information that could serve as a foundation for a specific contention at the time of filing, rather than wait and attempt to furnish a more specific basis at a later date. 12/ The filing of a vague, conditional contention with the expectation of fleshing it out later through the discovery process or the subsequent issuance of a Staff document is not an issue in this proceeding. Unlike Catawba, the Licensing Board did not attempt to excuse inadequate contentions, permitting them to be fleshed out later on the basis of later documents. 13/ In this case, the contentions have been judged on the basis of the "four corners of the contentions as stated," Farley, supra,

---

12/ Catawba, ALAB-687, at 468.

13/ The Board reserved one contention number 5, pending review of a Staff analysis that was sent to petitioner after the prehearing conference. The Licensing Board gave petitioner until May 19, 1988 to pursue the reserved contention and advise the Board or have the contention dismissed. Order at 15-16. Because May 19 has passed and no indication from Petitioner of his plans have been received, Staff considers Contention 5 as dismissed.

at 216-217, and the discussions at the prehearing conference. Nor does the Staff believe that Catawba, requires that an admissible contention must address all of the available information relevant to a contention. The Appeal Board considered and rejected that issue in Allens Creek, supra. For proposed contentions that provide an adequate basis at the admission stage, but are without merit when all of the undisputed facts are brought to light, the appropriate remedy is summary disposition. 10 C.F.R. Section 2.749. The Licensee's attempt to use Catawba in this manner is not supported by that case.

Similarly, Dresden is not applicable to this appeal. In that case, after an amended petition had been filed and responses thereto from the Staff and Licensee received, the Licensee announced that it could not carry out its planned chemical decontamination (the subject of the requested amendment) for approximately two years. In view thereof, the Licensing Board requested the petitioners to comment on the impact of the delay on their pending contentions, since one of the contentions dealt with the long term effects of delay upon treated reactor equipment. Subsequently, the petitioners filed another amended petition which did not address the Licensing Board's request, but simply restated their contentions without change. 14/ In these circumstances, the Licensing Board noted that more was required to state an acceptable contention; the Petitioner should have addressed the issue with specificity and basis. In addition, the proffered contentions were found to be nothing more than conclusions rather than contentions and failed to give notice of factual issues that should be litigated and thus did not satisfy the requirements

---

14/ Dresden, LPB-82-52, at 188.

of 10 C.F.R. § 2.714. [15] In the present proceeding, the intervenor has set forth, in Staff's opinion, a reasonably specific basis for six contentions found acceptable by the Licensing Board [16]. This is very different from the situation in the Dresden case.

Because of the circumstances in this proceeding that are different from the circumstances delineated above in Catawba and Dresden Staff believes that these two decisions do not support the Licensee's position that the contentions accepted by the Licensing Board should be dismissed because of the failure to address all the publicly available information. Commission case law does not support such a proposition. See, e.g., Allens Creek, supra, and Comanche Peak, supra. [17]

2. It Was Not Error to Accept Contentions Phrased In the Same Language As That Used In Another Proceeding

Licensee alleges that another reason that the contentions admitted by the Licensing Board are defective stems from the fact that a number of Petitioner's contentions were cribbed from Licensee's Turkey Point proceeding without further explanation. Appeal Brief at 6-7. The Licensing Board's response to this argument is that the copying of contentions from prior proceedings is not grounds for barring the contention in the present proceeding. Licensee does not take issue with such ruling (Appeal Brief at 6) but asserts that the Order "appears to treat copying as en-

---

15/ Id.

16/ Of course, in order for this matter to proceed further before the Licensing Board, only one contention need be found admissible. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13 (1987); reconsideration denied, ALAB-876, 26 NRC 277 (1987).

17/ See, fns. 6, 9 supra.

tirely irrelevant to the consideration of admissibility of contentions. This position... is erroneous and makes the Order further deserving of Appeal Board consideration." But beyond the assertion that copying should have been considered relevant in determining admissibility, the Licensee's Brief provides no analysis of any particular contention and why copying would render such contention inapplicable or otherwise inadmissible. Before the Licensing Board, the Licensee argued that contention 6 should not have been admitted since it was copied from the Turkey Point proceeding and that in the Turkey Point proceeding nine witnesses testified that the contention was without merit. (Licensee's Answer To Petition To Intervene, at 33, (February 1, 1988)). The Licensing Board held that copying did not bar the contention and that since the St. Lucie spent fuel pool differs from the Turkey Point plant the Turkey Point decision is not a bar to considering the issue in the St. Lucie proceeding. Citing, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683, 689 (1980). Provided a contention raises matters relevant to the amendment at issue and satisfies the basis and specificity requirements, originality is not a pleading requirement for contentions, moreover in this proceeding the Licensing Board found specificity and basis to the present proceeding for all of Petitioners admitted Turkey Point contentions. See, e.g., Contention 6, Order at 17-18. Since Licensee does not offer any other challenge to all of the admitted

contentions, [18] the Licensee's request to reverse the Licensing Board and dismiss the proceeding should be denied.

3. Appeal Board Should Not Review All Of The Admitted Contentions

10 C.F.R. Section 2.714a provides for appeals from Orders of Licensing Boards granting a petition for leave to intervene and/or request for hearing on the question of whether the petition should have been wholly denied. Having failed to establish that there are no admissible contentions, the Licensee's appeal under 10 C.F.R. Section 2.714a should be dismissed. However, should the Appeal Board find at least one contention admissible the Licensee has requested that, notwithstanding the normal practice that once an admissible contention is found consideration of other contentions would not be taken, it exercise its discretion and review the admissibility of each of the contentions individually. Appeal Brief at 14-15. [19] The basis for the Licensee's request is that "judicial economy favors such exercise." To support the unusual step of Appeal Board review of all admitted contentions at the outset of a proceeding the Licensee should offer strong reasons or cogent argument but offers neither. Licensee's bald statements that judicial economy favors such a review and that it would benefit NRC adjudicatory proceedings generally (Appeal Brief at 14-15) are made without explanation or supporting argument. This is insufficient basis to warrant the exercise of Appeal

---

18/ Although the Staff would agree with Licensee's challenge to the Board ruling on addressing construction crane accidents in transferring fuel from unit 1 to unit 2, (Order at 15) that objection can and should be handled through the normal appeal process, not under 10 C.F.R. Section 2.714a nor as an interlocutory appeal.

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

Board discretion. cf., Vermont Yankee, supra. While the Licensee does not mention or refer to an interlocutory appeal, quite clearly the finding of an admissible contention renders consideration of other contentions as interlocutory in nature. Licensee has made no effort to satisfy the requirements for such an appeal and the request should be denied on that basis alone. 20/

IV. CONCLUSION

In view of the foregoing, the Staff with the exception of Licensee's appeal of one aspect of Contention 4, opposes Licensee's appeal of the Licensing Board's Memorandum and Order of April 20, 1988, and urges that it be denied.

Respectfully submitted,

Benjamin H. Vogler

Benjamin H. Vogler
Senior Supervisory Trial Attorney

Dated at Rockville, Maryland
this 24th day of May, 1988

20/ In view of the fact that Licensee has failed to address this issue Staff will not discuss the matter further.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF NRC STAFF TO LICENSEE'S APPEAL FROM LICENSING BOARD'S MEMORANDUM AND ORDER GRANTING PETITION TO INTERVENE, REQUEST FOR HEARING AND CONTENTIONS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 24th day of May, 1988:

B. Paul Cotter, Jr., Chairman
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Richard F. Cole
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Michael A. Bauser, Esq.
Harold F. Reis, Esq.
Newman & Holtzinger, P.C.
1615 L Street, N.W.
Washington, D.C. 20036

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Campbell Rich
4626 S.E. Pilot Avenue
Stuart, Florida 34997

Adjudicatory File
Atomic Safety and Licensing Board
Panel Docket
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555*

Benjamin H. Vogler

Benjamin H. Vogler
Senior Supervisory Trial Attorney