

**FPL**

Florida Power & Light Company, P. O. Box 14000, Juno Beach, FL 33408-0420

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Ms. Annette Vietti-Cook
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attn: Rulemakings and Adjudications Staff

DOCKETED
USNRC

September 21, 2001 (12:05PM)
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: Florida Power & Light Company Comments
Proposed Rule – Changes to Adjudicatory Process
66 Fed. Reg. 19610 (Apr. 16, 2001), RIN 3150-AG49

Dear Ms. Vietti-Cook:

Florida Power & Light Company (FPL), the licensee for the St. Lucie Nuclear Plant, Units 1 and 2, and the Turkey Point Nuclear Plant, Units 3 and 4, provides the following comments on the above-referenced notice of proposed rulemaking.

FPL supports the Commission's proposed use of informal hearing procedures in place of the existing formal hearing process, subject to our comments on the details of the Commission's proposed rulemaking, as set forth below. FPL urges the Commission to promulgate a final rule revising NRC's hearing procedures as soon as possible.

NRC's Authority to Implement the Proposed Rulemaking

FPL agrees with the Commission's analysis of its legal authority to conduct informal adjudicatory hearings. The plain language of the Atomic Energy Act has never required "on the record" formal hearings. Accordingly, FPL believes that there are no legal constraints on the Commission in offering informal hearings in most NRC adjudicatory matters.

Use of Informal Hearings

FPL believes that the final rule should provide for the use of informal hearings for most reactor licensing proceedings, including reactor license amendment proceedings, license renewal proceedings, license transfer proceedings, and for licensing of the high-level waste repository. In order to recognize the efficiencies of this proposal, it is essential that the presiding officer be required to exercise discipline in enforcing standing requirements, proper thresholds for the admissibility of contentions and evidence, as well as hearing procedures and schedules. Without enforcement of these requirements by the presiding officer or the Commission, the proposed changes will not achieve the desired efficiency in the adjudicatory process.

FPL disagrees with the proposal to retain formal hearing requirements for "complex issues in reactor licensing." This exception could result in all proceedings being subject to formal hearings because intervenors will argue in every case that there are complex issues in every

proceeding. Moreover, unless the presiding officer exercises discipline over the application of this rule, the vast majority of reactor licensing hearings will be conducted as formal hearings. These criteria should be deleted from the final rule.

FPL suggests that formal hearings should be retained for enforcement proceedings. As explained in more detail in the NEI comments, enforcement proceedings raise pure factual issues that can effectively be explored through cross-examination, as opposed to the opinions and expert testimony that predominate in reactor licensing proceedings, which should be addressed through rebuttal expert testimony.

Criteria for Determining the Type of Hearing

With respect to the Commission's request for comment on defining the types of proceedings that are appropriate informal hearings, FPL suggests that the final rule clearly specify which type of proceedings are subject to informal hearings. FPL disagrees with the use of criteria that would be applied by a presiding officer and/or the Commission to determine the type of hearing procedure. We suggest that the rule be clear so that applicants can expect certainty with respect to the type of hearing that their application would be subjected to, in order to allow for adequate planning to complete the adjudicatory process.

The Presiding Officer

The Commission has also requested comments on criteria to determine the presiding officer (an Administrative Law Judge, an Atomic Safety and Licensing Board, or the Commissioners). FPL suggests that the final rule should specify which officer or board should preside over a particular proceeding, rather than set forth criteria for determination of the applicable presiding officer at a later date. Specific designations of the applicable presiding officer would promote certainty in applicant expectations of the type of proceedings that will be held for particular applications.

The Need for Discovery

Formal discovery is not required in most proceedings given the availability of most licensee documents in the NRC's public document room. FPL agrees that discovery should be limited to requests from the presiding officer. In the enforcement context, however, due process considerations should result in the subject of the enforcement action (licensees and individuals) being permitted full discovery rights in order to be able to understand and challenge the NRC's basis for the proposed enforcement action.

Standing Requirements

The proposed rule would codify Commission standing requirements in 10 CFR 2.309(d). FPL believes that the proposed criteria for determining whether a petitioner has standing to intervene in a proceeding are generally appropriate. Standing requirements should determine whether a petitioner has demonstrated a genuine interest that can be addressed by participation in the proceeding. FPL offers three comments on standing issues.

First, we suggest that the rule specifically state that the "proximity" approach to standing applies only to initial licensing proceedings. Application of the "proximity" approach to license transfer, license renewal, and enforcement proceedings, for example, is inappropriate because there is not any obvious potential for offsite consequences from those proposed actions that should justify an automatic presumption of standing.

Second, FPL opposes inclusion of the "discretionary intervention" standard in the rule. Application of this standard would result in admitting parties to a proceeding who have failed to demonstrate a genuine interest in fact. This approach is not consistent with the overall purpose of the proposed rule -- to promote efficiency and meaningful participation in the adjudicatory process. Admitting a party who has not demonstrated an interest that can be addressed in the proceeding cannot be considered as allowing meaningful participation. For these same reasons, intervention should not be granted to a party who has not demonstrated standing simply because there is another party admitted to the proceeding.

Third, FPL would also note that any improvements that may be recognized by inclusion of standing criteria in the rule would be eviscerated by a lack of discipline in the presiding officer's application of the standing criteria.¹

The Need for Cross-Examination

FPL suggests that cross-examination should not be afforded as a right in all cases. In many NRC proceedings cross-examination of witnesses has been extremely inefficient and has not resulted in the disclosure of information that is relevant to the contention at issue. Rather, FPL believes that the general rule should be that cross-examination in licensing proceedings should be afforded only where the presiding officer determines that there are material differences in the positions of the parties that can only be resolved through cross-examination. Even in such cases, the scope of the permitted cross-examination should be limited to the narrow issue in dispute.

FPL also suggests that cross-examination be permitted in enforcement proceedings to ensure due process and fundamental fairness to the subject of the enforcement action.

Time Limitations

FPL suggests that a final hearing rule include firm time schedules for completion of hearings. The rule should provide that the Commission will establish a firm time schedule for completion of each hearing and will set schedule milestones by order in each proceeding. The rule should also provide that the Commission be notified by the presiding officer within five (5) days if any of the schedule milestones are missed.

¹ See, e.g., Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LPB-01-6, 53 NRC 138, 145-50 (2001); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-93-5, 37 NRC 96, 106-07 (1993).

Notices of Opportunity for Hearing/Filing Contentions

FPL offers one comment on the time for filing a petition to intervene and hearing request. If the Commission promulgates a rule extending the current window for intervention requests to 45 days, the petitioner should be required to submit all contentions within that time frame.

We also agree with the proposed requirement to extend the "one good contention" rule to informal proceedings. FPL concurs that this rule will focus the litigation on concrete issues and avoid the need for the presiding officer to sift through a list of concerns and decide which issues are relevant.

Alternative Dispute Resolution

FPL welcomes the suggestion that a non-mandatory framework be provided for resolving disputes by alternative dispute resolution (ADR). We suggest that an initial attempt at the use of non-binding mediation should be suggested (but not required) after a single contention is admitted in a proceeding, or at the outset of an enforcement hearing. The mediator should be a neutral familiar with nuclear energy issues and with the NRC's adjudicatory process. The ADR process should not affect the schedule set by the Commission in completing a proceeding, so this process cannot be used by parties to delay the outcome of a proceeding. FPL believes that the structure of any ADR function should be determined by the mediator and the parties and should not be subject to binding regulatory requirements.

Treatment of *Sua Sponte* Issues

FPL suggests that the NRC codify its practice, as announced in its Policy Statement on the Conduct of Adjudicatory Proceedings,² of requiring Commission approval before an issue raised *sua sponte* by a presiding officer can be litigated. The Commission should require the presiding officer to explain why other means for resolution of *sua sponte* issue will not be satisfactory.

We appreciate the opportunity to comment on the proposed rule.

Sincerely yours,



J. A. Stall
Senior Vice President, Nuclear
and Chief Nuclear Officer

² Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22-23 (1998).