STEEL HECTOR & DAVIS

SOUTHEAST FIRST NATIONAL BANK BUILDING

MIAMI, FLORIDA 33131

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WILLIAM B. KILLIAN
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W. GLENN DEMPSEY
THOMAS R. WOOLSEY
BARBARA A. SILVERMAN
JOHN T. BUTLER
BRIAN R. BRATTESO

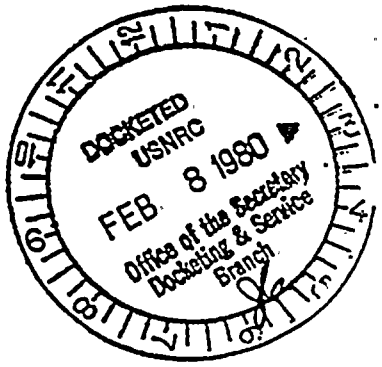
WILL H. PRESTON
DENNIS P. COYLE
OF COUNSEL

TELEPHONE
(305) 577-2800
TELEX 51-5758

DIRECT DIAL NUMBER

577-2863

January 31, 1980



Neil Chonin, Esq., P.A.
30th Floor, New World Tower
100 N. Biscayne Boulevard
Miami, FL. 33132

Re: Florida Power & Light Company -
Turkey Point Steam Generator Repairs -
Docket No. 50-250 and 50-251

Dear Neil:

The purpose of this letter is to confirm our telephone conversation several days ago, and also a conversation which I just had with Bruce Rogow. You told me, and Bruce confirmed, that service of pleadings on the Intervenor from this date forward will be accomplished by service upon you at the above address, and by service upon Henry H. Harnage, Peninsular Federal Building, 10th Floor, 200 S. E. First Street, Miami, Florida 33131. We will also continue to serve Mark Oncavage. We will no longer serve Mr. Rogow, Mr. Lumer, and Mr. Marshall at Mr. Rogow's address as was done previously.

For the benefit of the Board and the parties, I have prepared an up-dated service list which contains the names of all Board members, persons, parties, and lawyers to be served as indicated.

Very truly yours,

Norman A. Coll

NORMAN A. COLL

NAC:sml
cc: see attached service list

8003040 320

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

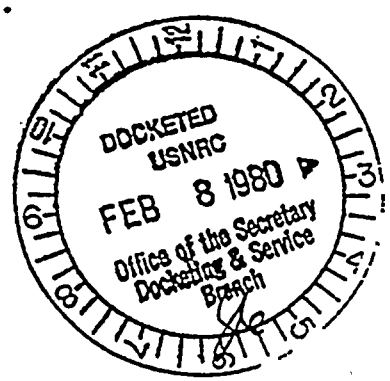
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-250-SP
	)	50-251-SP
FLORIDA POWER & LIGHT COMPANY	)	
	)	(Proposed Amendments to Facility
(Turkey Point Nuclear Generating Units Nos. 3 and 4)	)	Operating License to Permit Steam Generator Repair)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the attached

captioned in the above matter were served on the following by deposit in the United States mail, first class, properly stamped and addressed, on the date shown below.



Elizabeth S. Bowers, Esquire
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Oscar H. Paris
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Emmeth A. Luebke
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Mr. Mark P. Oncavage
12200 S. W. 110 Avenue
Miami, FL. 33176

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

Steven C. Goldberg, Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Neil Chonin, Esquire
Law Offices of Neil Chonin, P.A.
Counsel for Intervenor
New World Tower Bldg., 30th Flr.
100 N. Biscayne Blvd.
Miami, FL. 33132

Henry H. Harnage, Esquire
Counsel for Intervenor
Peninsula Federal Bldg., 10th Flr.
200 S. E. First Street
Miami, FL. 33131

Harold F. Reis, Esquire
Steven P. Frantz, Esq.
Lowenstein, Newman, Reis, Axelrad & Toll
Co-counsel for Licensee
1025 Connecticut Avenue, NW
Washington, DC 20036

NORMAN A. COLL

STEEL, HECTOR & DAVIS
1400 Southeast First National
Bank Building
Miami, FL. 33131

Telephone: (305) 577-2863

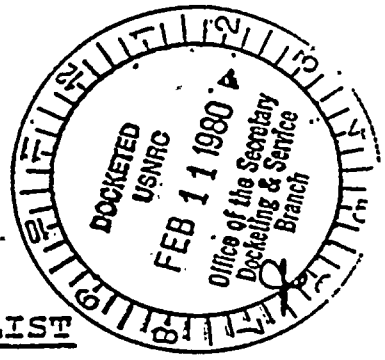
Dated:

RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

: the Matter of)
)
TROPOLITAN EDISON COMPANY, et al) Docket No. 50-320
)
hree Mile Island Nuclear Station,)
Unit 2))



SERVICE LIST

.an S. Rosenthal, Esq., Chairman
tomic Safety and Licensing Appeal
Board
.S. Nuclear Regulatory Commission
ashington, D.C. 20555

:. W. Reed Johnson, Member
tomic Safety and Licensing Appeal
Board
.S. Nuclear Regulatory Commission
ashington, D.C. 20555

r: John H. Buck, Member
tomic Safety and Licensing Appeal
Board
.S. Nuclear Regulatory Commission
ashington, D.C. 20555

Ward Luton, Esq., Chairman
tomic Safety and Licensing Board
.S. Nuclear Regulatory Commission
ashington, D.C. 20555

:. Gustave A. Linenberger
tomic Safety and Licensing Board
.S. Nuclear Regulatory Commission
ashington, D.C. 20555

:. Ernest O. Salo
rofessor, Fisheries Research
Institute, WH-10
niversity of Washington
eattle, Washington 98195

Lawrence J. Chandler, Esq.
Office of the Executive Legal Direc
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Chauncey R. Kepford
433 Orlando Avenue
State College, Pennsylvania 16801

Karin W. Carter, Esq., Assistant
Attorney General
Office of Enforcement
Department of Environmental Resourc
709 Health and Welfare Building
Harrisburg, Pennsylvania 17120

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

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

1-14-80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-250-SP
	)	50-251-SP
FLORIDA POWER & LIGHT COMPANY	)	
	)	
(Turkey Point Nuclear Generating Units Nos. 3 and 4	)	

REPLY OF FLORIDA POWER AND LIGHT COMPANY TO INTERVENOR'S RESPONSES TO FPL'S OBJECTIONS TO INTERVENOR'S INTERROGATORIES TO AND REQUEST FOR PRODUCTION OF DOCUMENTS

Florida Power and Light Company (FPL) has reviewed Intervenor's Responses dated December 27, 1979 to FPL's objections dated November 7, 1979 as supplemented November 27, 1979 to various interrogatories and document requests served October 27, 1979.

FPL has grouped the interrogatories and document requests for which objections are outstanding into five categories. FPL withdraws its objections to and will answer the interrogatories and document requests in category I. FPL will answer the interrogatories and requests in category II without waiving its objections.

Intervenor stated in his response that providing him with FPL's reply to the NRC Staff letter of November 19, 1979 to Dr. Robert Uhrig would be a sufficient response to several of his requests. FPL will provide Intervenor with a copy of that

reply when it becomes available. FPL has grouped these discovery requests into category III.

In category IV, FPL has included those requests to which an objection by FPL to performance of new calculations had been made. Intervenor's response disclaims any intent to seek such information, and FPL otherwise answered the interrogatories. Hence, what dispute there may have been is moot.

In category V, FPL identifies for the Board those interrogatories and document requests to which it continues to object and for which it has provided a reply to Intervenor's Response. This is the only category which requires resolution of objections by the Board. FPL respectfully submits that each of its objections in this category should be sustained.

I.

FPL will withdraw its objections to the following interrogatories and requests:

Introductory Interrogatory

A.	2-19	6-27	7-4	7-18	11-5	14-10
E.	3-20	6-32	7-11	9-6	11-9	14-11
F.	3-28	7-2	7-12	9-7	13-5	
G.	6-20	7-3	7-16	9-8	13-18	

FPL is in the process of preparing appropriate answers and responses to these interrogatories and requests which should be completed for service to the parties on or before January 31, 1980. FPL's answers and responses will take into account Intervenor's response which in many cases clarified or rephrased these interrogatories.

II.

FPL does not withdraw its objections to the following interrogatories but will answer them, to the extent that it can, to, hopefully, eliminate the need for Board consideration of its objections at this time and advance the progress of this proceeding. In so doing, FPL does not concede the relevance of the subject matter of these interrogatories or, obviously, their admissibility into evidence in any hearing on the admitted contentions. FPL also will take Intervenor's response into consideration in framing its responses:

1-4	1-12	1-30	6-31	11-11	14-14
1-5	1-14	2-14	6-33	11-12	14-20
1-6	1-18	2-15	9-1	11-19	14-21
1-7	1-19	2-16	9-2	13-7	14-22
1-8	1-20	2-31	9-3	13-15	14-23
1-9	1-22	3-21	9-12	14-8	14-24
1-10	1-29	6-30	11-10	14-13	

FPL will make a good faith effort to frame what it believes to be appropriate responses to each of these interrogatories to try to eliminate any disputes before the Board. FPL, of course, cannot guarantee that it will succeed, but FPL believes that its responses will essentially give Intervenor the information which he desires.

III.

The NRC Staff letter dated November 19, 1979, to Dr. Robert E. Uhrig of FPL asked FPL for certain information. Intervenor states that he would like a copy of FPL's reply to the Staff in response to Interrogatories 7-23, 7-24, 7-25, 7-26 and 7-27. Without waiving its objections FPL will provide Intervenor with a copy of the reply as its response to these interrogatories.

IV.

FPL objected to several interrogatories insofar as they appeared to seek information which required it to perform new calculations. Intervenor clarified these interrogatories at page 18 of his response by saying that he is not asking FPL to

perform new calculations. Since FPL otherwise answered these interrogatories, that dispute between the parties is moot. The interrogatories are:

2-7	3-26
2-8	3-27
2-21	3-30
2-28	6-22
3-19	6-35
3-25	9-4

Intervenor has reworded Interrogatory 13-6(g) and (h) at page 35 of his response. He now seeks the names, addresses and job titles of the persons who guard monitoring alarms and who supervise monitoring operations. This modification affects the only matters in dispute for Interrogatories 13-6 through 13-18 except for one other item in 13-7 and 13-15 (which are covered in Section II of this Memorandum). FPL will respond to these interrogatories by Intervenor with the names, addresses, and titles of that person or those persons who supervise monitoring operations and have knowledge of radiation monitoring procedures during the repairs.

V.

FPL continues to object to the remaining interrogatories and will address Intervenor's arguments here.

Interrogatories 1-1 and 1-2.

These two interrogatories ask for assurances that Turkey Point Units 3 and 4 will have "maintenance free" operations for "the remaining life of the units" after the steam generator repairs (Interrogatory 1-1) and whether FPL foresees "any major repairs or major maintenance to" the Turkey Point units in the next ten years. (Interrogatory 1-2). Contention One asserts that the National Environmental Policy Act or 10 CFR §51.5 requires the preparation of an Environmental Impact Statement (EIS) prior to the issuance of an amendment to FPL's operating licenses for Turkey Point Units 3 and 4 authorizing the steam generator repairs.

These questions do not relate to the impact of the repair of the steam generators but seek information as to any maintenance or repairs at the Turkey Point units after the steam generator repairs have been completed.

Intervenor's response to FPL's objection is somewhat confusing, but, distilled, he appears to be arguing as follows:

-- The effect of additional breakdowns and other major maintenance, including further recurring steam generator degradation was not considered in

the comparison of the costs of alternatives to the repair or, put in other terms, the EIA inadequately assessed the costs of operation of the plant after the repairs.

-- Man-rem savings resulting from the repairs are illusory if maintenance free operation of the units after the repairs cannot be assured, and they were allegedly used to justify ALARA standards.

-- The discovery principles enunciated in Allied General Nuclear Services, 5 NRC 489 (1977) are inapplicable.

-- Intervenor has the burden to prove the existence of significant impacts of different varieties, including the costs of alternatives.

Intervenor's original Contention 11(a) sought to litigate the failure to provide an accurate cost benefit analysis because FPL allegedly failed to consider the cost of future recurring steam generator repairs. The Board rejected this Contention saying there was "no basis for this speculation." Intervenor's first point is essentially a

restatement of Contention 11(a) -- he says that the cost of the repairs was not properly compared to the costs of alternatives because, he says, the costs of future repairs (of any kind) at Turkey Point were not included in the cost of the steam generator repairs. This proceeding was not instituted to resolve rejected contentions or to require answers to interrogatories going to rejected contentions.

It is not correct to argue that man-rem savings from the repair of the steam generator repairs are "illusory" if "maintenance free operation" of the entire plant cannot be "assured." There are specific man-rem costs resulting from inspection and plugging of steam generator tubes. Those specific costs would be eliminated by replacing the existing steam generators. Licensee has not said more than this. Interrogatories 1-1 and 1-2 are both broad and irrelevant and ask FPL to speculate about future maintenance of any kind at either Turkey Point unit in the years ahead accompanied by hypothetical man-rem costs which may or may not be associated with such maintenance.

Contrary to Intervenor's statement at page 9 of his response, the EIA does not determine that exposures during the repairs will be as low as reasonably achievable "because of" predicted man-rem savings. See EIA, pp. 4-1 and 4-2. In addition, these interrogatories address the operation of the plants in every respect after the repairs, and not just the steam

generators. FPL will also be answering the interrogatories addressing post repair steam generator tube integrity. (See Section II of the this memorandum).

In this section of his response, Intervenor also attempts to distinguish the opinion of the Licensing Board in Allied General Nuclear Services, 5 NRC 489 (1977). But he fails. Intervenor says that the Board there relied on the second sentence of 10 CFR 2.740(b)(1) which limits the subject matter of discovery to matters in controversey identified by the Commission or a presiding officer at a prehearing conference in proceedings on application for a construction permit or an operating license for a production or utilization facility. He says that this proceeding involves an amendment to an operating license and, therefore, is not affected by this "discovery restriction." But Allied General Nuclear Services involved a Part 70 licensing proceeding and not the Part 50 proceeding referred to in the second sentence of § 2.740(b)(1). Footnote 1 of the opinion, 5 NRC at 491-92, expressly deals with and rejects the argument made by Intervenor here.

Finally, Intervenor makes an argument related to his burden of proof. Whatever the nature of the burden, none of Intervenor's discussion demonstrates the propriety of interrogatories dealing with assurances about "maintenance free" operation or forseeability of "major" repairs, at two nuclear units for decades to come.

Interrogatories 1-1 and 1-2 are improper ones and FPL's objections to them should be sustained.

Interrogatory 1-3

This interrogatory seeks details of any warranties or guarantees issued by the manufacturer of the replacement steam generator lower assemblies. Intervenor does not suggest how this information is relevant to the disposition of Contention One in any respect. He simply relies on the "reasons stated in 1-1 above."

The reasons stated in 1-1 do not support a motion to compel an answer to this interrogatory. What warranties or guarantees might exist in some document somewhere relative to steam generators purchased from the warrantor or guarantor will not affect the impacts of the repairs on the quality of the human environment.

An answer to the interrogatory would not advance the resolution of Contention One. A warranty or a guarantee is not proof that anything will or will not happen to the product covered by it.

FPL will, moreover, answer the interrogatories relating to the integrity of the steam generators after repair. (See Section II).

Intervenor also references here its response to Interrogatory 2-21. That response discusses 10 CFR 2.740(c)'s

provisions regarding protection of confidential documents. Intervenor says that (6) of § 2.740(c) only applies to protection of NRC documents. Intervenor argues that no document of a licensee can be protected by § 2.740(c)(6) because of the references to § 2.744 and § 2.790 in (c)(6). The only reasonable interpretation of (c)(6), however, is that it applies to any party, including intervenors, except that where NRC documents might be in issue, § 2.744 and § 2.790 must be considered.

Intervenor's 2-21 response also embraces the opinion of the Licensing Board in Allied General Nuclear Services, 5 NRC 489 (1977), which Intervenor rejected in his 1-1 response. Intervenor does so to introduce the Supreme Court's decision in Schlagenhauf v. Holder, 379 U.S. 104, 114-115 (1964) where the Court discussed the broad and liberal treatment to be accorded the Federal discovery rules.

Sixteen years have passed since the Holder decision. Discovery abuses, primarily reflected by the filing of voluminous interrogatories, imprecisely worded, seeking the minutest of details, have become a litigation art to the detriment of the "just, speedy and inexpensive determination" (F.R. Civ. P. 1) of claims under the Federal discovery rules. In response, the United States District Court for the Southern District of Florida now limits a party to forty interrogatories, including parts and subparts, except upon a showing of cause.

The Western District of Missouri has a limit of twenty. Crown Center Redevelopment Corp. v. Westinghouse Electric Corp., 82 FRD 108 (W.D. Mo. 1979). The Section of Litigation of the American Bar Association has recommended a limit of thirty be imposed under the Federal Rules. 77 FRD 648.

FPL makes these observations to illustrate that the Federal Rule analogy of "liberal discovery treatment," urged by Intervenor when it appears advantageous to do so, is not a talisman to eliminate thoughtful analysis of discovery requests relative to the contentions in issue. Indeed, the Supreme Court has recently demonstrated a concern about the proper use of discovery:

> The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. Schlagenhauf v Holder, 379 US 104, 114-115, 13 L Ed 2d 152, 85 S.Ct. 234 (1964); Hickman v Taylor, 329 US 495, 501, 507, 91 L Ed 451, 67 S Ct 385, 34 Ohio Ops 395 (1947). But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, speedy, and inexpensive determination of every action." To this end, the requirement of Rule 26(b)(1) that the material sought in discovery by "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed Rule Civ Proc 26(c). With this authority at hand, judges should not hesitate to exercise approriate control over the discovery process.

Herbert v. Lando, 60 L.Ed.2d 115, 134 (1979). (Emphasis the Court's).

Information relative to steam generator warranties or guarantees takes the Board and the parties nowhere. Any warranty or guarantee is probative of nothing relevant or material to this proceeding. FPL's objections to this interrogatory should be sustained.

Interrogatory 1-11

This interrogatory inquires about retrofitting required by the NRC Staff since review of Three Mile Island.

Intervenor says at p. 12 of his response that the safe operation of a plant is relevant to "whether or not the probability for significant environmental impact exists." He then reasons that "such matters" are required to be addressed in "any consideration of dangers to the environment." He then argues that the EIA may be inadequate if there is a "failure to address significant safety changes demanded from analysis of the TMI accident in reviewing the impacts of licensee's plant."

However, this proceeding is to address steam generator repair impacts, and not impacts of plant operation or retrofitting of the plant in some respect. The scope of a proceeding to amend an operating license is limited to the amendment itself; other issues cannot be considered. Tennessee Valley Authority (Browns Ferry Nuclear Plan, Units 1 and 2), LBP-76-10, 3 NCR 209, 221-222 (1976). Only those "matters arising

directly from the proposed change" in the facility are cognizable by a licensing board in an amendment proceeding, Vermont Yankee Nuclear Corp. (Vermont Yankee Nuclear Power Station), ALAB-245, 8 AEC 873, 875 (1974). This Board has previously rejected an attempt by Intervenor to raise matters concerning the operation of the plant. See "Order ruling on the Petition of Mark P. Oncavage," August 3, 1979, p. 45, f.n.9. The information sought is irrelevant and FPL's objection should be sustained.

Interrogatories 1-31, 1-32 and 1-36

These interrogatories relate to financing the steam generator repairs, purchase of replacement power and the demineralizer system (1-31); pursuit of a rate increase before the Florida Public Service Commission (1-32); and whether FPL has obligations under contracts for the repairs or installation of the demineralizer system. (1-36).

Intervenor argues (p.16) that these matters relate to socio-economic impacts. He adds (at p. 11) that repair costs passed on to a consumer "have more than social and economic impacts on, at least poverty-stricken individuals in the community, of which there are many in Dade County."

Economic and social impacts are insufficent alone "to trigger an agency's obligaton to prepare an EIS." Image of Greater San Antonio v. Brown, supra, 570 F.2d 517, 522 (5th Cir. 1978).

But beyond this rule of law, these questions do not relate to any contention before the Board. FPL's financial qualifications are not an issue. The Board has no jurisdiction over rate increases. What FPL's contractual obligations may be if the repairs are not permitted is not an issue here. The cost of the alternative of continuing operation without repair is discussed in the EIA, and has nothing to do with any hypothetical harm to FPL.

Moreover, socio-economic impacts resulting from the repairs on FPL's two million customers are remote and speculative. Who is to say with any admissible precision what effect on FPL's customers, if any, will result from FPL's financing decisions, or any rate increase (assuming one is sought and approved as sought) or any hypothetical breach of contract? Will the Board allow a hearing on the steam generator repairs to consider the plight of the fixed income FPL customer and try to determine a causal relationship between the repairs and income erosion? NEPA is based upon a rule of reason and negative answers to these questions are clearly required by applicable precedent. Concerned About Trident v. Rumsfeld, 555 F.2d 817, 828 (D.C. Cir. 1977); Northern States Power Co. (Prairie Island Nuclear Generator Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48-49 (1978), remanded on other grounds, Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979). FPL's objections to these questions should be sustained.

Interrogatory 1-35

This interrogatory relates to the use of conservation or non-nuclear fuel sources to obtain sufficient electricity to satisfy the need for power that will result in the absence of the repairs.

Intervenor argues in his response (p. 17) that conservation should have been considered as an alternative to the repairs, and conclusorily argues that discovery of other sources of energy being considered by FPL "is meaningful and relevant to the question of the preparation of an EIS."

The need for power is not a contention in this proceeding. Each Turkey Point Unit generates approximately 700 megawatts of power. The suggestion that conservation would reduce replacement power needs of this magnitude during the repairs is clearly unreasonable.

The question of the need for the power provided by Turkey Point Units 3 and 4 or alternative ways to obtain it was resolved long ago in connection with the operating licenses issued for the plants. Moreover, the Staff specifically stated that operation of the FPL system without Turkey Point Units 3 and 4 in light of its review of the power demand in the FPL service area is "not feasible." EIA, p. 5-1.

Issuance of amendments to operating licenses need not depend upon "a prior exploration of the environmental impact of continued operation and consideration of the alternatives to that

operation". Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 46-47, n. 4 (1978) remanded on other grounds, Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

In addition, certain alternative energy sources are discussed in the EIA, pp. 5-1 and 5-2, and are summarized in Section 7 of the Steam Generator Repair Report.

Alternatives to a proposed action when an EIS is being prepared need only be considered where they are reasonable. Vermont Yankee Nuclear Power v. NRDC, 435 U.S. 519, 550-551 (1978); Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973), cert. den. 416 U.S. 961 (1974). That is not even the case here. More fundamentally, however, the threshhold determination of the existence of significant impacts which affect the quality of the human environment so as to trigger preparation of an EIS has not yet been made. The objection to Interrogatory 1-35 should be sustained.

Interrogatory 7-15

This interrogatory asks for a copy of the purchase agreement for the demineralizer equipment. Intervenor discusses it at p. 29 of his response, together with interrogatory 7-15, by saying: "The location where the demineralizer system will be installed is relevant to the subject matter of this proceeding."

Interrogatory 7-15 has nothing to do with location of this system. Intervenor nowhere demonstrates how this information is relevant. In any event, FPL plans to answer Interrogatory 7-16 (Section I above). The objection to Interrogatory 7-15 should be sustained.

Interrogatory 11-35

Intervenor seeks in this interrogatory the amount of titanium reuired for condenser retubing "in kilograms." He argues that it is a "factor in considering the commitment of non-renewable resources to the repair project."

Contention Eleven does not relate to a commitment of non-renewable resources. FPL has told Intervenor in its answer to Interrogatory 11-13 the kind of tubing used in condenser retubing. In its answer to Interrogatory 11-15, FPL explained that the tubing, labor, equipment, engineering and other costs for condenser retubing approximated $1 million per water box, that eight water boxes will be retubed and that seven of the eight have been completed. In its answer to Interrogatory 11-21, FPL explained that its cost estimates for condenser retubing reasonably agreed with actual costs of retubing for the seven water boxes that have been completed. Intervenor has withdrawn Interrogatories 11-14 and 11-17. FPL's objection to Interrogatory 11-35 should be sustained.

CONCLUSION

Intervenor's response to FPL's objections resulted in the withdrawal of some 83 interrogatories, not including parts and subparts. FPL has tried to answer most of the remaining interrogatories. As to those interrogatories to which it continues to object, FPL believes that its objections are well taken and should be sustained.

Respectfully submitted,

STEEL HECTOR & DAVIS
Co Counsel for Licensee
14th Floor
Southeast First National
Bank Building
Miami, Florida 33131

By: Norman A. Coll
Norman A. Coll

By: John M. Barkett
John M. Barkett

DATED: January 14, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-250-SP
	)	50-251-SP
FLORIDA POWER & LIGHT COMPANY	)	
	)	(Proposed Amendments to
(Turkey Point Nuclear Generating	)	Facility Operating
Unit Nos. 3 and 4)	)	Licenses to Permit Steam
	)	Generator Repair)
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached "Reply of Florida Power and Light Company to Intervenor's Responses to FPL's Objections to Intervenor's Interrogatories to and Request for Production of Documents" captioned in the above matter was served on the following by deposit in the United States mail, first class, properly stamped and addressed, on the date shown below.

Elizabeth S. Bowers, Esquire
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
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Dr. Emmeth A. Luebke
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
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U.S. Nuclear Regulatory Commission
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Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Mark P. Oncavage
12200 S.W. 110 Avenue
Miami, FL 33176

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

Steven C. Goldberg, Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

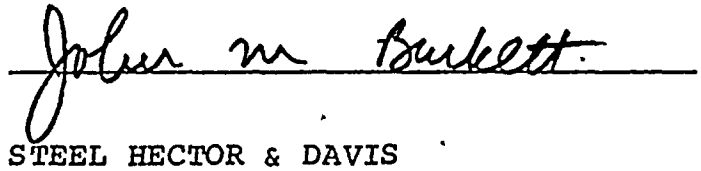
NEIL CHONIN, ESQ., P.A.,
New World Tower Building, 30th Flr.
100 N. Biscayne Boulevard
Miami, FL. 33132

Bruce S. Rogow, Esquire
Joel V. Lumer, Esquire
Richard A. Marshall, Jr., Esquire
Counsel for Intervenor
3301 College Avenue
Fort Lauderdale, FL 33314

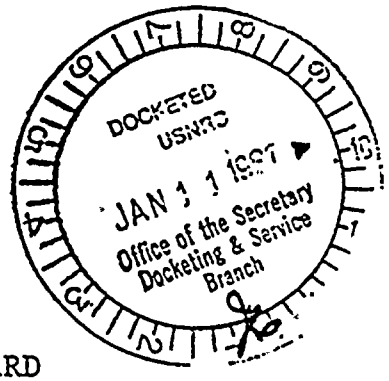
Henry H. Harnage, Esq.
Peninsula Federal Bldg., 10th Flr.
200 S. E. First Street
Miami, FL. 33131

Harold F. Reis
Lownstein, Newman, Reis, Axelrad & Toll
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dated this 14th day of January, 1980.



STEEL HECTOR & DAVIS
Co Counsel for Licensee
14th Floor
Southeast First National
Bank Building
Miami, Florida 33131



1-11-80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

In the Matter of

FLORIDA POWER & LIGHT COMPANY

(Turkey Point Nuclear Generating Units Nos. 3 and 4)

Docket Nos. ~~50-250-SP~~ 50-251-SP

(Proposed Amendments to Facility Operating License To Permit Steam Generator Repair)

/

NOTICES OF APPEARANCE FOR INTERVENOR

NEIL CHONIN hereby enters his Notice of Appearance as Counsel for Intervenor, MARK P. ONCAVAGE, 12200 S. W. 110th Avenue, Miami, Florida. I certify that I am admitted to practice by the Supreme Court of Florida; the United States District Court for the Southern District of Florida; the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States.

HENRY H. HARNAGE hereby enters his Notice of Appearance as Counsel for Intervenor, MARK P. ONCAVAGE, 12200 S. W. 110th Avenue, Miami, Florida. I certify that I am admitted to practice by the Supreme Court of Florida; the United States District Court for the Southern District of Florida; the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States.

Docket Nos. 50-250-SP
50-251-SP

Respectfully submitted,

NEIL CHONIN
Law Offices of Neil Chonin, P.A.
New World Tower Building, 30th Floor
100 N. Biscayne Boulevard
Miami, Florida 33132
Tel. (305) 377-3023

HENRY H. HARNAGE
Peninsula Federal Bldg., 10th Flr.
200 S. E. First Street
Miami, Florida 33131
Tel. (305) 3774501

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the attached Notices of Appearance For Intervenor was served on the following by deposit in the United States mail, First Class, properly stamped and addressed on January , 1980:

Elizabeth S. Bowers, Esq.
Chairperson
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Oscar H. Paris
Atomic Safety & Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Emmeth A. Luebke
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety & 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

Steven C. Goldberg, Esq.
U.S. Nuclear Regulatory Commission
Office of the Executive Legal Director
Washington, D.C. 20555

Norman A. Coll, Esq.
Steel, Hector & Davis
1400 S.E. First National Bank Bldg.
Miami, Florida 33131

Harold F. Reis, Esq.
Lowenstein, Newman, Reis, Axelrad & Toll
1025 Connecticut Avenue, N. W.
Washington, D.C. 20036

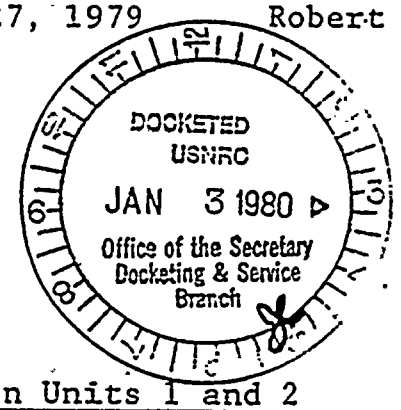
NEIL CHONIN
Law Offices of Neil Chonin, P.A.
New World Tower Bldg., 30th Flr.
100 N. Biscayne Blvd.
Miami, Florida 33132
Tel. (305) 377-3023

DOCKET NUMBER
PROD. & UTIL. FAC. 50-596,597

New York State Department of Environmental Conservation
50 Wolf Road, Albany, New York 12233

Robert F. Flacke
Commissioner

December 27, 1979



The Honorable Samuel R. Madison
Secretary
Board on Electric Generation Siting
and the Environment
Department of Public Service
Three Rockefeller Plaza
Albany, New York 12223

Re: Case No. 80008 - New Haven Units 1 and 2
Applicant's Motion for Rehearing

Dear Mr. Madison:

Having reviewed the response by Department of Public Service to Applicant's Motion, we wish to highlight the point made therein that individual Article VIII applications must not be viewed as being in mutually exclusive universes.

In the past, DEC has been concerned by dissimilar "facts" being proffered on separate records, such "evidence" being tailored to fit the assertions as needed. We strongly believe that parties should be held accountable for such inconsistencies.

On at least one occasion, the Public Service Commission has concurred in this proposition. In Case No. 80003 (Jamesport), DEC had sought to have that Board take into its record statements made in Case No. 80002 (Somerset) by a party to both. Our argument proceeded as follows:

> ...even if a slight burden [on Applicant] were created, it would be only that which would be necessary for NYSEG to explain how Rider's Cayuga/Somerset testimony is somehow not relevant or does not bear on his credibility. This is only burdensome to the extent that such an explanation is difficult to formulate.
>
> It is our view that there is no burden, but only a difficulty for NYSEG in rehabilitating the tarnished credibility of its witness. Yet even a

real burden must be balanced against the Board's legitimate interest in knowing the substance of the subject testimony, to wit: that NYSEG knows neither the extent to which insulation obtains in its service territory, nor what load-dampening benefits could be anticipated from increasing insulation standards for new electric space heating customers.

Examiner Suss' unwillingness to take notice of Rider's extra-tribunal admission against interest reflects a possible unquestioning acceptance of NYSEG's need presentation.

It should be understood that DEC's motion is solely intended for the purpose of showing that Rider (as the personification of NYSEG) has made a statement under oath and subject to cross-examination which casts grave doubts upon the reasonableness of NYSEG's load forecasts. The evidentiary principle which permits admission of such evidence is so well established that it is codified at Civil Practice Law and Rules §4514, has been reaffirmed numerous times, including in Caplan v. City of New York, 34 A.D.2d 549, 309 N.Y.S.2d 859 (2nd Dept., 1970), and has even been applied to criminal proceedings [People v. Johnson, 27 N.Y.2d 119, 313 N.Y.S.2d 728 (1970) -- inadmissible confession can be used to impeach] and disclosures of grand jury minutes [People v. DiNapoli, 27 N.Y.2d 229, 316 N.Y.S.2d 622 (1970) -- Public Service Commission Staff could see secret minutes].

Additionally, it is clear that the only party which could be prejudiced would be NYSEG; however, since NYSEG is a party to Cayuga/Somerset, there is no due process issue.

Finally, we believe that this Board should and does want to know about such deficiencies as may have existed in NYSEG's forecasting methods. [Appeal of Ruling on Motions for Official Notice (Dec. 2, 1977) 3-4]

The Commission's action on DEC's Motion established a most telling and crucial precedent fully applicable herein:

We believe that DEC is free to argue on brief to the Siting Board that the Board should look at the testimony of NYSEG's witness in Case 80002. It need not be formally incorporated into the record for that purpose. [Order Denying Appeal (Jan. 17, 1978) 2]

Having been so notified two years ago in another proceeding, this Applicant cannot now be heard to claim that it can exclude from this record damaging admissions made elsewhere.

Sincerely,

David A. Engel

David A. Engel
Senior Attorney for Energy

cc: Member of the Siting Board
Presiding Examiner Matias
Associate Examiner Schwartz
Members of the Atomic Safety
and License Board
All Parties