5/27/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

REPLY TO MOTION TO STRIKE
INTERVENOR'S RESPONSE

Intervenor, Mark P. Oncavage, replies to the NRC Staff Motion To Strike Intervenor's Response To NRC Staff and Applicant Objections To Amended Contention 1 and shows the following.

The NRC staff contends that its Objections To Proposed Amended Contention 1 was not in the nature of a motion. It seeks to strike any answer to its filing. The Intervenor asserts that the staff's filing was in the nature of a motion and that an answer to that filing was permissible.

In its Memorandum and Order dated April 2, 1981 the Atomic Safety and Licensing Board said at page 4 regarding amendments to Contention 1:

> The Intervenor is also granted leave to file on or before April 20, 1981, appropriate amendments to Contention 1 in order to plead with specificity the respects in which the FES (due to be filed by the staff by April 1) does not legally or factually comply with NEPA (Tr. 36, 38-9-43). The staff is granted leave to file a motion for summary disposition of Contention 1 as thus amended,

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on or before May 1, 1981 (Tr.44-5,47,50). The Intervenor shall file its response to the staff's motion for summary disposition of Contention 1 as amended by May 20, 1981 (Tr.52).

The staff was not given leave to file objections to the amendments to Contention 1. Nothing in this order can be the source of the staff's authority to file the objections that it did file.

Intervention in a proceeding before an Atomic Safety and Licensing Board is governed by 10 C.F.R.§2.714. Paragraph (b) of that regulation requires an intervenor to file a list of contentions which he seeks to have litigated. Nothing in paragraph (b) gives the staff the authority to file objections to those contentions. Paragraph (c) merely permits the staff to file an answer to a petition to intervene, with particular reference to the factors set forth in paragraph (d) of the regulation. Paragraph (d) makes no mention of the list of contentions. Nothing in 10 C.F.R.§2.714 grants the staff the authority to file objections to an amended contention.

The staff's objection was not an answer pursuant to 10 C.F.R. §2.705 nor a reply pursuant to 10 C.F.R.§2.706. The only remaining procedure under which its objections could have been filed was the motion practice provided for in 10 C.F.R.§2.730.

The staff did not file its objection for no reason at all. The objection was filed to obtain a result. The result sought was the striking or dismissal of the amended contention. Common sense would indicate that though it gave its document

a different name, the staff was attempting to file a motion similar in nature to the motions to dismiss and to strike described in Rule 12(b) and (f) of the Federal Rules of Civil Procedure.

The Licensee, using its common sense, thought that the staff's filing was a motion to dismiss. At page 4 of its Licensee's Response In Support of NRC Motion For Summary Disposition of Amended Contention 1 and Objections To The Amended Contention, the Licensee says:

> This pleading may be treated both as a response in support of the NRC Staff's motion to dismiss Contention 1 and as an objection to the admissibility of the proposed amendments. (emphasis supplied).

The Licensee tries to back off this statement in its most recent filing, but a fair reading of the common meaning of the Licensee's words shows that the Intervenor is not the only one who has viewed the staff's objections as a motion to dismiss.

10 C.F.R.§2.730(c) permits a party to file an answer in support of or in opposition to a motion. Pursuant to this rule the Intervenor chose to file an answer to the staff's motion to dismiss. The NRC staff may have made a tactical error in filing both a motion to dismiss and a motion for summary judgment at the same time, but this is no reason for denying the Intervenor an opportunity to reply separately to each motion.

The staff next asserts that the answer to its motion should be stricken, because the alternatives of energy conservation and

solar generation "are patently beyond the legal scope of a license amendment environmental review." NRC Staff Motion To Strike at p. 3

The requirement of 42 U.S.C.§4332 is that the agencies of the United States include in every recommendation or report on major federal actions significantly affecting the environment a detailed statement on alternatives to the proposed action. Conservation and solar energy production are proposed by the Intervenor as an alternative not to the original construction of the units at Turkey Point, but to the repairs that are presently under consideration. The Intervenor merely asks that the staff comply with the mandate of 40 C.F.R. §1502.14 and rigorously explore and objectively evaluate conservation and solar energy as an alternative to these repairs.

In assessing alternative courses of action, the staff is not limited to considering only those actions that the Nuclear Regulatory Commission can order or effectuate. The NRC staff must consider alternatives that are outside its jurisdiction or control and beyond the area of its particular expertise. Sierra Club v. Lynn, 502 F.2d 43,62 (5th Cir. 1974) an Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123,1135(5th Cir. 1974).

Given these standards, the Intervenor asserts that an analysis of the alternatives that he proposes are within the scope of the environmental study that is required for this

license amendment.

The staff objects to a "fresh reconsideration of alternatives to nuclear generation" at page 4 of its latest filing. In State of Minnesota v. U. S. Nuclear Regulatory Commission, 602 F.2d 412 (D.C. Cir. 1979), the court, speaking to the scope of an environmental review said:

> There is no implication that Congress intended that the NRC ignore new knowledge or analysis in its licensing decisions
>
> Ibid at 419.

The Final Environmental Statement relating to the initial operation of Turkey Point Units 3 and 4 was published in 1972. Many things have changed in the past nine years. Among them are concern and understanding of productive conservation; advances in technology with regard to conservation and solar energy production; increases in the price of uranium; increases in the cost of replacement power produced from fossil fuels; increases in the cost of constructing and repairing large capital plants; and knowledge that the tubing in a Westinghouse nuclear steam generator is subject to repeated and severe damage during the operation of the plants. What the staff is really asking is that we all close our eyes to reality, ignore all the changes that have occurred during the past nine years and relax the requirements of NEPA that an in-depth analysis be made of all reasonable alternatives to the proposed action.

The licensee, in support of the staff on this point, argues that NEPA does not require that the same ground covered in an initial FES be wholly replowed in connection with a proposed amendment to a license. (See Licensee's Motion To Strike Or Reject Intervenor's Unauthorized Pleading at p. 16).

The "Alternatives To Proposed Action And Cost-Benefit Analysis Of The Environmental Effects" is contained in Part X of the Final Environmental Statement related to the operation of Turkey Point Plant Florida Power and Light Company, Dockets No. 50-250 and 50-251, July 1972. That FES says at p. X-1:

> In this section, alternatives to the proposed action will be described in terms of their feasibility, economic costs, and environmental impact. The alternative actions consist of:
>
> . Building a new plant at an alternative site
> . Using an alternative fuel at an existing site
> . Once through cooling using intake water from Biscayne Bay and discharging to Card Sound
> . Once through colling with both intake and discharge in Card Sound
> . Recirculation system using forced-draft cooling towers and brackish water make-up

The FES prepared in July, 1972 did not explore the alternative action of productive conservation and solar energy. This is not unusual. As the U. S. Supreme Court pointed out in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 US 519, 552 (1978),

prior to 1973 very little serious thought was given to these alternatives. But as the Supreme Court pointed out in the same opinion, at the same page, the events of recent years have emphasized not only the need but also a large variety of alternatives for energy conservation.

The Intervenor does not seek to replow ground that was covered by the 1972 FES. He seeks to force the staff to examine alternatives that were not considered in the 1972 FES and deliberately ignored in the 1981 FES despite an opinion of the U. S. Supreme Court which has taken notice of the need for and large variety of alternatives in the area of energy conservation.

The alternatives the Intervenor asks the staff to examine arise directly from the proposed change. The licensee is going to spend $731 MILLION of its customers' money in the proposed repair project. This money is being spent directly as a result of the decision to make the repairs for which the licensee seeks approval. The Intervenor suggests that this money can be spent in an alternative manner that will be more cost-effective and provide greater benefits to the licensee's customers and the public at large. The alternatives of productive conservation and solar energy are, thus, alternatives to the proposed repair of the Turkey Point steam generators. And as alternatives to the proposed repair they could not have been previously explored in the 1972 FES.

Like all other factors in our life, the need for power in Florida

is subject to change over time. The Intervenor is not challenging the need for power in Florida in the year 1972, nor the need for Turkey Point Units 3 and 4 in 1972. The Intervenor does not even challenge the need for Turkey Point Units 3 and 4 today or in the immediate future. He does suggest, though, that as an alternative to the proposed repairs the units can be slowly and systematically derated over time and that the money saved from not making the repairs can be invested in alternative projects that will be phased-in to replace the energy that will no longer be produced by Turkey Point Units 3 and 4. This process will be done so that as Turkey Point reaches the end of its normal life span the replacement sources of energy will be on-line and capable of meeting the needs of the FPL customers.

The Intervenor has filed an answer to a motion to strike. Such a filing is permitted. The alternatives suggested by the Intervenor are within the scope of a proper NEPA analysis. The alternative suggested by the Intervenor were not considered in the 1972 FES. As time passes, the NRC should not ignore changes in technology, availability of resources and costs of production. The alternatives the Intervenor suggests arise directly from the proposed repair. Consequently, the NRC staff's motion to strike should be denied.

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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	)	Facility Operating Licenses
Generating Units Nos. 3 and	)	to Permit Steam Generator
4)	)	Repairs)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply to Motion to Strike Intervenor's Response was mailed on this the 27th day of May, 1981, to the following addresses:

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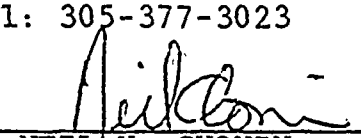
By 
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