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50-389 St. Lucie Plant, Unit 2, Florida Power & Light Co. 05000389
AUTH.NAME AUTHOR AFFILIATION
GOLDBERG,J.H. Florida Power & Light Co.
RECIP.NAME RECIPIENT AFFILIATION
LIEBERMAN,J. Ofc of Enforcement (Post 870413)

See Reports

SUBJECT: Forwards memo in response to 940307 10CFR2.206 petition & 940323 suppl thereto filed by TJ Saporito.Response describes circumstances which led to Saporito being terminated & also addresses questions raised in recipient 940407 ltr.

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L-94-126

Mr. James Lieberman
Director, Office of Enforcement
United States Nuclear Regulatory Commission
Washington, DC 20555

Subject: Turkey Point Units 3 and 4
Docket Nos. 50-250 and 50-251
St. Lucie Units 1 and 2
Docket Nos. 50-335 and 50-389
10 CFR 2.206 Petition Filed by Thomas J. Saporito, Jr.

Dear Mr. Lieberman:

Attached is our memorandum in response to the March 7, 1994, 10 CFR 2.206 petition and March 13, 1994 supplement filed by Thomas J. Saporito, Jr. As you requested, the attachment also addresses the questions raised in your letter of April 7, 1994.

As more fully described in the attachment, the petition (including the supplement) is wholly without merit. The petition simply repeats allegations previously made by Mr. Saporito which the NRC and DOL have already extensively considered and determined do not warrant further action. The petition provides no grounds for the NRC to institute a revocation proceeding or for the baseless charge that FPL has taken action with respect to Mr. Saporito which has a "chilling effect" on employees who wish to raise safety concerns. In that connection, NRC inspection results and previous NRC decisions relating to earlier petitions containing the same allegations directly contradict many of Mr. Saporito's contentions. In these circumstances, it would also be wholly inappropriate, even if within the Commission's authority, for the Commission to take any of the actions relating to back pay and compensatory damages requested by Mr. Saporito and it would be similarly inappropriate for the Commission to inject itself into the proceedings related to Mr. Saporito now before the Department of Labor.

The attached response describes the circumstances which led to Mr. Saporito's being terminated, as developed in seven days of evidentiary hearings before a Department of Labor Administrative Law Judge conducted in 1989. Those hearings examined the reasons for Mr. Saporito's discharge referred to in your April 7, 1994 letter and alleged as the basis for the relief requested in Mr. Saporito's latest petition. After a thorough review, the Judge denied Mr. Saporito's claims. Specifically, the Judge determined that the actions taken against Mr. Saporito were not motivated by any protected activity, but that the actions "by FPL and its management personnel were a result of [Mr. Saporito's] contentiousness and recalcitrance as an employee. Saporito's

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discharge resulted solely from his crossing the line from contentiousness and recalcitrance into the area of insubordination."

In response to your request, the attachment also addresses the circumstances in which FPL believes it is appropriate to inquire about employees' safety concerns, whether or not these concerns have been disclosed to the NRC. As recently noted by Chairman Selin, "[i]t is not the NRC, but the licensee who has the first responsibility for safety" and that the Commission "encourages employees to report violations immediately to their supervisors so the licensee can investigate and resolve issues." A number of NRC regulations, in effect now and at the time of the events in question, either explicitly require employees to report unsafe conditions or clearly contemplate that employees will do so. This policy is obviously appropriate. The prompt identification and correction of safety problems is essential to nuclear safety and a cornerstone of NRC's regulations. As a practical matter, both licensees and the NRC rely on plant personnel to identify safety issues that come to their attention. The ability of the licensee and the NRC to assure public health and safety is impaired if employees fail or refuse to report them.

Consistent with these principles, FPL's policy is to direct employees to report safety concerns to their immediate supervisor or to a higher management individual, or to report them through the Company's employee concern program. As an alternative, employees are also advised that they can report any concerns to the NRC.

In this case, Mr. Saporito, in November, 1988, openly announced that he had safety concerns, but refused to tell licensee management the nature of those concerns. Therefore, licensee management specifically directed Mr. Saporito to immediately report his concerns to the NRC. Despite his present assertions, the fact is that Mr. Saporito did not report his claimed safety concerns to either FPL or the NRC at the time FPL directed him to do so. He therefore effectively precluded either FPL or the NRC from evaluating the significance of those concerns from an operational safety perspective in a timely way.

One further matter warrants the Commission's attention and action. For over five years, Mr. Saporito has filed numerous complaints and instituted duplicative and redundant proceedings against FPL before both the NRC and the Department of Labor. To date, all of these proceedings have been found to be without merit and based largely upon insupportable allegations; in no case has the action requested by Mr. Saporito been found to be warranted. As early as 1990, one DOL investigator concluded that Mr. Saporito was using the legal remedies made available to licensees' employees "to terrorize the company [FPL] rather than being a victim" and that "Mr. Saporito

will continue to level charges at Florida Power & Light until he receives monetary compensation one way or the other." The current petition and supplement, filed more than five years after Mr. Saporito left Turkey Point, are no more than the latest round in Mr. Saporito's campaign, attempting to enlist NRC and other governmental processes in support of his effort to coerce a financial settlement from FPL.

FPL is harmed by Mr. Saporito's continuing misuse of the NRC's processes but this cost does not fall on just FPL. These repeated unfounded claims have led to extensive investigations and expenditures of resources by the NRC and the Department of Labor, and breed cynicism among licensees, employees and members of the public who are seriously concerned about nuclear safety. We therefore urge the NRC to review the petition in the context of the many prior unsubstantiated claims and proceedings which Mr. Saporito has filed relating to Turkey Point and take whatever action is appropriate to stop this ongoing abuse.

We recognize and appreciate the Commission's obligation to treat fairly all who avail themselves of the remedies provided by law and the NRC's regulations to raise safety and related concerns. However, where, as here, there exists a prolonged history of frivolous, repetitive claims which -- as noted by a DOL investigator -- appear to be motivated by private, pecuniary gain -- some restraint is called for. We submit that, in dispositioning any future filings of this type by this petitioner which contain no new information, the Commission should not -- as in this case -- seek further views of the licensee or otherwise attenuate the process but rather dismiss the pleading summarily with a caution to the petitioner that the Commission's processes shall not be further abused.

Respectfully,

J. H. Goldberg
President, Nuclear Division

JHG:abk
Enclosure

cc: Chairman Ivan Selin
Commissioner Kenneth C. Rogers
Commissioner Forrest J. Renick
Commissioner Gail de Planque
Senator J. I. Lieberman
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MEMORANDUM IN RESPONSE TO MARCH 7, 1994
10 CFR 2.206 PETITION AND MARCH 23, 1994
SUPPLEMENT THERETO FILED BY
THOMAS J. SAPORITO, JR.

MEMORANDUM IN RESPONSE TO 10 CFR 2.206 PETITION FILED BY THOMAS J. SAPORITO, JR.

I. INTRODUCTION

This memorandum responds to the March 7, 1994, § 2.206 Petition 1/ and March 13, 1994, supplement thereto, filed by Thomas J. Saporito, Jr., 2/ and the associated inquiries in an April 7, 1994, letter transmitted to Florida Power & Light Company ("FPL") by the Nuclear Regulatory Commission ("NRC") Director of Enforcement. As more fully described below, this 2.206 petition is without merit, contains factual inaccuracies and misleading statements, and is premised on an incorrect understanding of NRC law and policy. Mr. Saporito's Petition is an attempt to reopen matters that have already been exhaustively reviewed by the NRC and the Department of Labor ("DOL"), and to enlist the NRC in his campaign of redundant and meritless proceedings to extract money from FPL.

Mr. Saporito's Petition requests: (1) that the NRC file an amicus curiae brief "regarding issues of fact" 3/ in a DOL proceeding initiated by Mr. Saporito (the evidentiary hearings in that case were concluded more than five years ago and resulted in a recommended decision adverse to Mr. Saporito); (2)

1/ Letter from Thomas J. Saporito, Jr. to NRC, dated March 7, 1994 (hereinafter referred to as "Petition").

2/ Letter from Thomas J. Saporito, Jr. to NRC, dated March 13, 1994 (hereinafter referred to as "Supplemental Petition").

3/ Petition at 1.

that the NRC institute a show cause proceeding to suspend, revoke, or modify the operating license for the Turkey Point nuclear plant; and (3) that the NRC institute a proceeding and order FPL to reinstate Mr. Saporito, and pay him "back wages, front pay, compensatory damages for pain and suffering," and take other actions. 4/

As shown below, Mr. Saporito has provided no sound basis for any of the requested actions. His Petition rests entirely on allegations that were thoroughly reviewed by the NRC many years ago and have previously been determined not to warrant further action. Accordingly, the Petition should be denied summarily and in its entirety. Furthermore, the Petition, viewed in the context of prior filings, stands as a clear case of abuse of the NRC's processes, resulting in a waste of both NRC and licensee resources and diverting attention from legitimate efforts to ensure nuclear plant safety. As such, FPL requests that the Commission take such action as will make clear that it will not countenance further baseless and redundant filings by Mr. Saporito in the future.

II. THE ALLEGATIONS IN THE PETITION ARE REPETITIONS OF CLAIMS THAT HAVE PREVIOUSLY BEEN INVESTIGATED AND DETERMINED TO BE BASELESS

At the core of Mr. Saporito's allegations is his discharge from employment by FPL in 1988. The facts and circumstances surrounding that discharge have previously been

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4/ Petition at 2.

extensively litigated before the DOL and have also been the subject of numerous previous § 2.206 petitions and letters to the NRC. As further described below, both the DOL and the NRC have already determined that the allegations advanced by Mr. Saporito are meritless and warrant no relief.

Long before he claimed to have any nuclear safety concerns, Mr. Saporito's employment with FPL was characterized by mediocre work performance and disciplinary actions, including suspensions and demotions. In addition, prior to asserting any alleged nuclear safety concerns, he claimed on numerous occasions to have suffered "harassment," "mental duress," "humiliation and grief," "discrimination," and "extreme stress" concerning a variety of issues, and demanded millions of dollars in payment from FPL. At one point, Mr. Saporito alone had more than 50 separate grievances pending, and was responsible for more than one-half of all of the Union grievances at the Turkey Point plant, which employs more than 700 people.

Mr. Saporito's ultimate discharge was the direct result of three separate acts of insubordination in response to entirely reasonable requests by FPL management. The facts and circumstances surrounding Mr. Saporito's discharge are thoroughly described in the recommended decision of the DOL Administrative Law Judge ("ALJ" or "Judge") who heard the contemporaneous testimony of Mr. Saporito and those who supervised and worked with him. After hearing this testimony and weighing the evidence, the Judge determined that Mr. Saporito's discharge was

"in no way motivated by Complainant's protected activity." 5/

The Judge summarized his findings as follows:

> The actions taken against [Mr. Saporito] by FPL and its management personnel were a result of his contentiousness and recalcitrance as an employee. Saporito's discharge resulted solely from his crossing the line from contentiousness and recalcitrance into the area of insubordination. 6/

The Judge's determination was based in large measure on determinations regarding Mr. Saporito's credibility made during the hearings. After hearing Mr. Saporito's own testimony and that of other witnesses, the Judge determined that several of the particular allegations advanced by Mr. Saporito could not be believed and were not true. 7/

In response to 2.206 petitions and other letters filed by Mr. Saporito in 1988 and 1989, in which Mr. Saporito repeated the claims he had advanced before the DOL, 8/ the NRC also evaluated the circumstances surrounding Mr. Saporito's discharge. The NRC's evaluation included Mr. Saporito's allegation that his discharge had a "chilling effect" on other employees at Turkey Point. The NRC Director of Nuclear Reactor Regulation ("NRR") reviewed the DOL Judge's decision and determined that:

5/ Saporito v. Florida Power & Light Company, 89-ERA-7, 89-ERA-17, slip op. at 18 (June 30, 1989). A copy of this recommended decision is appended as Attachment 1.

6/ Id. at 21.

7/ Id. at 19-21.

8/ See Florida Power & Light Company, (Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-90-1, 31 NRC 327 (March 22, 1990).

> Because the DOL Administrative Law Judge did not substantiate petitioner's allegation, and because nothing in the Petition or otherwise available to me leads me to conclude the Petitioner's allegation [that she was discriminated against for engaging in protected activity] is valid, I have concluded that there is no basis for the requested relief. 9/

Similarly, with respect to Mr. Saporito's claim that a "chilling effect" upon other employees resulted from his discharge, the Director noted that the NRC Office of Investigations ("OI") had conducted an investigation of those claims and that:

> The OI investigation concluded, based upon the large volume of testimony received from numerous interviewees and the extensive review and analysis of pertinent records, correspondence, and documents, that the allegations of employee harassment, the chilling effect condition, and Licensee discrimination against individuals who reported or identified nuclear-safety-related concerns could not be substantiated as alleged. 10/

Based on these facts, the Director determined that "no basis exists for taking the actions requested by the Petitions . . . ." 11/

In sum, Mr. Saporito's current allegations are simply a rehash of the claims he made to the DOL and NRC in 1988 and 1989. Those claims were thoroughly evaluated in contemporaneous hearings, investigations, and decisions and found to be without

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9/ Id. at 331. The Director noted that it would consider the matter further depending upon its ultimate resolution by the Secretary of Labor.

10/ Id. at 330-331 (emphasis added).

11/ Id. at 331.

merit; the current petition contains no new facts and should be similarly rejected.

III. FPL'S INQUIRIES AS TO MR. SAPORITO'S ALLEGED SAFETY CONCERNS WERE ENTIRELY PROPER AND MOTIVATED BY MANAGEMENT'S SAFETY OBLIGATIONS

In his April 7, 1994 letter to FPL, the Director of Enforcement requested FPL to describe the circumstances under which it "believes it is appropriate to inquire about employees' safety concerns, whether or not these concerns have been raised to the NRC," 12/ and to describe the circumstances under which FPL sought to obtain information regarding Mr. Saporito's alleged safety concerns.

FPL's policy towards employee safety concerns balances the overriding interest in protecting the public health and safety through timely notification of safety concerns against an employee's choice to take his concerns directly to the NRC. The policy reflects that safety problems can be detected and corrected only if employees report them, and that employees must feel free, without fear of discrimination or retaliation, to report concerns to either the Company or the NRC. FPL directs its employees to report concerns by informing appropriate supervision or management or the Company's confidential employee concern program, Speakout. As an alternative, employees are directed to inform the NRC of their concerns.

12/ Letter from James Lieberman (NRC) to FPL, dated April 7, 1994, at 1.

With respect to inquiring about a particular employee's concerns, if management becomes aware that an employee has a safety concern, FPL believes that it is entirely proper to inquire about the specific nature of the concern so that it can be evaluated and corrected. This policy is consistent with, and necessitated by, FPL's obligation to protect the public health and safety in the operation of its nuclear facilities and by NRC regulations designed to ensure that this obligation is fulfilled.

A fundamental basis of nuclear power plant regulation is that when a safety problem is identified, the licensee is responsible for evaluating that problem and taking action to assure that plant safety is maintained and that the problem is corrected. As recently noted by NRC Chairman Selin, "the licensee . . . [has] the first responsibility for plant safety. . . . In that regard, the NRC encourages employees to report violations immediately to their supervisors so that the licensee can investigate and resolve the issues." 13/

Numerous NRC regulations and policies explicitly or implicitly require that safety problems identified by employees be promptly reported to the licensee. For example, the Quality Assurance Criteria for Nuclear Power Plants require that:

> Measures shall be established to assure that conditions adverse to quality . . . are promptly identified and corrected. . . . The identification of the significant condition

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13/ Testimony of NRC Chairman Ivan Selin before the Subcommittee on Clean Air and Nuclear Regulation, Committee on Environment and Public Works, United States Senate, dated July 15, 1993.

> adverse to quality, the cause of the condition, and the corrective action taken shall be documented and reported to appropriate levels of management. 14/

Similarly, Commission regulations require licensees to train all individuals given access to the plant's protected area on their responsibility to report concerns to management. Specifically, the regulations state that:

> All individuals working in or frequenting any portion of a restricted area . . . shall be instructed of their responsibility to report promptly to the licensee any condition which may lead to or cause a violation of Commission regulations 15/

The obligations of NRC reporting requirements, such as those contained in 10 C.F.R. § 50.72, § 50.73, and 10 C.F.R. Part 21 are similarly dependent upon a licensee's ability to elicit safety concerns from its employees. For example, 10 C.F.R. § 21.21(a)(3) provides that licensees must adopt procedures to ensure that responsible officers and directors are notified of defects in plant basic components or failure to comply with Commission regulations. 16/

14/ 10 C.F.R. 50, Appendix B, Criterion XVI., "Corrective Action" (1994) (emphasis added).

15/ 10 C.F.R. § 19.12.

16/ The NRC's enforcement policy also provides that individuals who conceal safety problems from the licensee may face individual enforcement action. 10 C.F.R. Part 2, Appendix C, Criteria VIII "Enforcement Actions Involving Individuals" provides examples of situations which could result in enforcement actions against individuals, including "[w]illfully withholding safety significant information rather than making such information known to appropriate supervisory or technical personnel in the licensee's

(continued...)

These are good reasons for these requirements. Plant technical specifications and Commission regulations often require rapid action. For example, the determination that a problem with a piece of equipment renders it inoperable may require action within as little as one hour after the discovery of the problem; some items require immediate action. Similarly, obligations to report certain types of conditions to the NRC, state and local authorities, and the Federal Emergency Management Agency are often imposed on an immediate or one hour basis. Clearly, if employees know of safety concerns, but do not reveal them, the licensee cannot take action to comply with these safety, reporting, and notification requirements.

In addition, many safety concerns are complex in nature. A detailed understanding of plant-specific system and component functions may be required in order to assess effects on system or component operability or overall safety significance. Such determinations often require the resources of licensed plant operators, safety committee personnel, and engineers who have been trained on the specific workings of the nuclear plant and are licensed to take appropriate operational action in order to ensure that the plant continues in a safe condition. Unless the employee describes the nature of the problem, there is no way to evaluate it and take appropriate action.

16/(...continued)
organization." Enforcement sanctions specified in such cases include removal of the individual from all nuclear-related activities.

Based upon these considerations, once an employee announces that he or she has a safety concern, FPL believes that it is incumbent upon the licensee to inquire as to the nature of that concern so that it can be promptly evaluated and addressed.

This policy must be applied with reason. FPL instructs employees that they may, as an alternative to speaking directly to the Company, raise concerns with the NRC. While ultimately it is the licensee that has the licensed operators, technical resources, and physical control of the plant necessary to take action to ensure safety, the Company recognizes that some employees may wish to take their concerns to the NRC, and that it is their right to do so. Accordingly, in cases where employees choose not to divulge their safety concerns through the means available at FPL, the Company directs them to bring those concerns to the NRC. If they report their concerns to the NRC, the Company does not question them about the nature of their discussions with the NRC. Nor, when the NRC investigates allegations it has received, or passes on such allegations for FPL to review, does FPL attempt to determine the identity of the alleger. FPL believes that this policy represents a sound balance between the need to quickly obtain and address information regarding potential plant safety problems, and the need to ensure that personnel feel free to bring concerns to either the Company or the NRC.

FPL's inquiries as to Mr. Saporito's alleged safety concerns were entirely proper and fully consistent with these

policies. The circumstances under which those inquiries took place may be summarized as follows:

1. Mr. Saporito had voluntarily announced to FPL management that he had nuclear safety concerns. He did not try to keep his identity secret. He was not a "confidential" informant.

2. Mr. Saporito did not state that he had disclosed his nuclear safety concerns to the NRC. The FPL personnel who requested that Mr. Saporito disclose his concerns did not believe that those concerns had been communicated to the NRC. Indeed, NRC personnel later told FPL that Mr. Saporito had not described his safety concerns to them, but that they had encouraged Mr. Saporito to inform FPL of his concerns. 17/

3. FPL was not aware of the substance of Mr. Saporito's nuclear safety concerns when he was directed to disclose them and did not have any way to evaluate their significance for plant safety without more information.

17/ Mr. Saporito now claims in his current Petition that "everyone involved knew [that these concerns] had already been reported by Petitioner to the NRC." Petition at 7. In fact, Mr. Saporito had not reported those concerns to the NRC, but indicated that he would do so. The responsible FPL officer then directed Mr. Saporito to disclose his concerns to the NRC at the first available opportunity. Several days later, in a discussion with the NRC's Allegations Coordinator for Region II, FPL management learned that Mr. Saporito did not follow this direction and had not disclosed his concerns to the NRC. FPL management was also informed at this time that the NRC had specifically encouraged Mr. Saporito to inform FPL of his concerns. Mr. Saporito also refused to disclose his concerns to local union personnel. See Saporito v. Florida Power & Light Company, 89-ERA-7, 89-ERA-17, slip op. at 9-12 (June 30, 1989).

4. Although Mr. Saporito asserted that his concerns would not immediately affect the public's health and safety, he provided no basis for this judgment. FPL management did not believe that Mr. Saporito was necessarily in a position to know whether or not his concerns had immediate safety significance. Mr. Saporito had no licensed operator training, was not trained or qualified to make operability determinations regarding Turkey Point systems, structures, or components, and was not qualified by training or procedure to ascertain whether plant activities were in compliance with the plant's technical specifications.

5. Therefore, FPL directed Mr. Saporito to disclose his nuclear safety concerns. The responsible officer felt that, given his legal and professional obligation to resolve any identified safety problems at the plant, he had no choice but to attempt to determine the substance of alleged safety problems. When Mr. Saporito refused to describe his concerns, FPL specifically directed Mr. Saporito to immediately report those problems to the NRC. Mr. Saporito did not do so. 18/

These circumstances are described in substantially more detail in the DOL Judge's recommended decision (Attachment 1). Notably, after hearing the testimony of Mr. Saporito, the FPL

18/ Mr. Saporito's behavior, including his refusal to divulge his alleged safety issues, was of such concern to his co-workers that local union officials took the highly unusual step of requesting FPL management to restrict Mr. Saporito from access to the vital area of the Turkey Point plant. The union personnel explained to FPL management that they were concerned that Mr. Saporito might try to justify his as yet unspecified claims by creating safety problems. Id. at 10.

management personnel involved, and Mr. Saporito's co-workers, the Judge determined that the inquiries by FPL management were entirely reasonable and were motivated by a desire to fulfill FPL's health and safety obligations. 19/

As officers and employees of an NRC licensee, the FPL management personnel involved were directly charged with assuring that the plant ran safely and in compliance with NRC regulations. If a safety problem existed, it was their duty to promptly evaluate it and take whatever actions might be necessary to maintain the plant in a safe condition, to comply with NRC reporting requirements, and to comply with the Turkey Point Operating License and Technical Specifications. Without any specific information as to the nature of the safety problems allegedly identified by Mr. Saporito, they could not fulfill these obligations. Since the only available source of information on the alleged problems was Mr. Saporito, they had no reasonable choice but to ask what his concerns were. Not to have done so would have been tantamount to ignoring management's responsibility for plant safety, operating license requirements, and reporting requirements. Furthermore, it was entirely unreasonable, and contrary to explicit and implicit NRC regulation and policy, for Mr. Saporito to refuse to report his alleged safety problems to either FPL or the NRC.

19/ Id. at 18.

IV. THE 2.206 PETITION IS AN IMPROPER ATTEMPT TO CIRCUMVENT THE DOL'S APPEAL PROCESS SPECIFIED IN SECTION 210/211 OF THE ENERGY REORGANIZATION ACT OF 1974

A. An NRC Hearing Concerning Mr. Saporito's Allegations Would Be an Improper Duplication of the Statutory DOL Process

Mr. Saporito's request that the NRC institute a show cause proceeding regarding his 1988 discharge and "'any chilling effect' which may have been instilled . . . [at FPL] as a . . . result of [this] discharge,"20/ would be an improper and unnecessary duplication of DOL's process set forth in Section 210/211 of ERA. Congress authorized the DOL to investigate complaints of whistleblower retaliation and to provide relief where a violation is found. Section 210/211 specifically provides that:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may . . . file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination. 21/

Upon the receipt of a complaint:

> [T]he Secretary [of Labor] shall conduct an investigation of the violation alleged in the complaint . . . [and] issue an order either providing the relief prescribed in subparagraph (B) or denying the complaint. 22/

20/ Petition at 2, 3.

21/ 42 U.S.C. § 5851(b)(1) (emphasis added).

22/ 42 U.S.C. § 5851(b)(2)(A).

Congress also provided that:

> Any person adversely affected or aggrieved by an order . . . may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. 23/

Further, action by the NRC that duplicates the DOL's proceeding is inappropriate because it would allow Mr. Saporito to get "two bites at the apple" -- in effect, filing the same grievance in two different agencies. It is a well established principle that parties should not be afforded a second opportunity to argue the same issues in another forum or to introduce new evidence that could have been produced in an earlier proceeding. 24/ This principle is justified by reasons

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23/ 42 U.S.C. § 5851(c). Congress specified that the filing of a complaint with the DOL and the DOL's investigation should not delay the NRC from taking appropriate action "with respect to an allegation of a substantial safety hazard." 42 U.S.C. § 5851(j). This statutory exception, however, is inapplicable because, as already determined in previous NRC decisions on earlier petitions containing essentially the same allegations, Mr. Saporito has failed to raise in his Petition any such issues. See the NRC decisions cited in Sections II and V.

24/ See, e.g., Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-25, 30 NRC 187, 191 (1989) ("It appears sensible . . . not to afford a party two bites at the apple."). See also EEOC v. Westinghouse Elec. Corp., 925 F.2d 619, 631 (3d Cir. 1991) ("A remand should not be ordered when 'two bites of the apple' would be given to a litigant who . . . has neglected to produce evidence to support a desired finding and has, therefore, failed to carry the requisite burden as to a particular issue."); Northwestern Indiana Telephone v. FCC, 872 F.2d 465, 471 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035 (1990) (no second opportunity afforded to comply with administrative exhaustion requirements because "[t]he efficiency and fairness values served by exhaustion principles would be seriously compromised if agencies were obliged to furnish

(continued...)

of economy and fairness. It clearly applies to Mr. Saporito who is requesting, five years after an initial trial and decision by the ALJ, that the NRC provide him yet another opportunity to re-litigate the facts upon which the DOL ALJ issued a recommended decision adverse to him, and which the NRC has already reviewed and determined not to warrant action.

As explained in Sections II and V, Mr. Saporito's claims were already fully litigated in the DOL proceeding. It would be an incredible duplication of effort and waste of governmental resources to hold yet another hearing on these matters. 25/ Mr. Saporito was discharged in December of 1988. The DOL's hearing was held in February of 1989. More than five years have passed since the hearing. As a practical matter, given the passage of time, it would be extremely prejudicial, and contrary to the statute of limitations imposed by § 210/211 of

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24/(...continued)
such second bites at the apple."); Szubak v. Secretary of Health & Human Services, 745 F.2d 831, 834 (3d Cir. 1984) (claimants should be afforded only one fair opportunity to demonstrate eligibility for benefits under any one set of circumstances because otherwise "[a] claimant might be tempted to withhold medical reports, or refrain from introducing all relevant evidence, with the idea of 'obtaining another bite of the apple' if the Secretary decides that the claimant is not disabled.").

25/ See, e.g., General Electric Co. (Wilmington, North Carolina Facility), DD-86-11, 24 NRC 325, 332 (1986) ("Generally, when a complaint has been filed with [DOL] alleging discrimination by an NRC licensee, the NRC defers its consideration of the matter until [DOL] has acted. This policy avoids duplication of effort and the needless expense of resources.").

the ERA, to permit Mr. Saporito to institute a new proceeding on his claims before the NRC.

Finally, Mr. Saporito will receive two plenary reviews of the ALJ's recommended decision. First, the Secretary of Labor will issue a final order based not only on the recommended decision of the ALJ, but also on the record as a whole. 26/ If the decision of the Secretary of Labor is adverse to Mr. Saporito, he may appeal the order to a U.S. Court of Appeals. 27/ The record of the proceedings before the ALJ will then be transmitted to the appellate court, which will make yet another review of Mr. Saporito's case. 28/ The statutory framework established by Congress does not provide for the NRC to interfere with proceedings before the DOL. In sum, NRC intervention in the DOL case is neither legally authorized nor equitably justified.

B. The Personal Relief Requested by Mr. Saporito Can Only Be Obtained from the DOL

Mr. Saporito's request that the NRC "provide [him] with a 'make whole' remedy," including reinstatement, frontpay, backpay, and damages for "pain and suffering" 29/ is inappropriate because the NRC does not have authority to afford such a remedy; relief of this type can be obtained only through

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26/ 29 C.F.R. § 24.6(b)(1).

27/ 42 U.S.C. § 5851(c).

28/ 29 C.F.R. § 24.7(c).

29/ Petition at 2.

the DOL. 30/ The NRC has itself recognized that it is without authority to provide "traditional, labor-related remedies to individuals for their losses resulting from discrimination." 31/ Similarly,

> The Commission's current employee protection rules, including § 50.7, are derived from § 210 of the Energy Reorganization Act of 1974, as amended. Section 50.7 itself states, "[t]he protected activities are established in Section 210." Section 210 provides employees who have been the victims of impermissible discrimination with a direct means of obtaining a remedy against their employer, including obtaining job reinstatement and back pay. The responsibility for administration of the employee remedies under § 210 rests with the Secretary of the United States Department of Labor. 32/

Chairman Selin has similarly stated:

> Where an alleger suggests that discrimination may have already occurred, we emphasize to the individuals that, if they want a personal remedy for the discrimination, they must contact the DOL promptly. It is not that we force them to go to the DOL, but we make it clear that we are not in the position to give them this remedy. 33/

Further, Mr. Saporito's request to shutdown FPL's Turkey Point plant and to impose on FPL a posting requirement to offset any "chilling effect" his termination may have had on

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30/ 42 U.S.C. § 5851(b)(2)(B). See discussion at pp. 14-17 above.

31/ Nuclear Energy Services, DD-93-16, 38 NRC 255, 260 (1993).

32/ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 NRC 1759, 1764 (1985) (citations omitted).

33/ See Testimony of NRC Chairman Ivan Selin before the Subcommittee on Clean Air and Nuclear Regulation, Committee on Environment and Public Works, United States Senate, dated July 15, 1993.

other FPL employees is neither warranted nor appropriate. Mr. Saporito does not cite any authority or specific evidence to support his assertions that FPL's Turkey Point plant is operated in an unsafe manner and that his discharge resulted in any "chilling effect."

In fact, this "chilling effect" allegation was previously made by Mr. Saporito in the 2.206 petitions he filed in 1988 and 1989. In 1989, an NRC investigation determined that these allegations could not be substantiated, and that there was no basis for granting relief requested by Mr. Saporito. 34/ The NRC conducted a second investigation in 1991 to determine if any "chilling effect" existed at FPL which discouraged the reporting of safety concerns. Although that investigation related to FPL's nuclear engineering department, it is significant that the NRC concluded that "[t]here was no evidence found to substantiate the allegations of an overall atmosphere of intimidation, threats, coercion, harassment, or negative evaluations to limit the pursuit of safety issues." 35/

The NRC has found FPL's nuclear plants to be free of any "chilling effect" on other occasions since Mr. Saporito's discharge. For example, between September 21 and October 15, 1993, the NRC conducted a comprehensive inspection of FPL's St. Lucie and Turkey Point Nuclear Safety Speakout Programs to

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34/ See pp. 4-5 above.

35/ NRC Inspection Report Nos. 50-250/91-45 and 50-251/91-45, Executive Summary at p. ii.

evaluate their effectiveness in addressing safety concerns. The NRC examined procedures and records, and interviewed numerous FPL personnel. The inspection identified "no violations or deviations." 36/ In particular, the NRC concluded that FPL's Speakout Program "encouraged employees to share any concerns with their supervisors." 37/

With respect to the procedures implementing the Speakout Program, the NRC found them to be "comprehensive and detailed, including 82 pages of instructions and forms." 38/ The inspectors also found that the "personnel administering the program were well qualified and adequate resources had been committed to ensure program implementation." 39/

Moreover, the NRC inspectors interviewed numerous FPL employees including: Senior Managers; Speakout Program supervisors and investigators; and 50 other FPL employees (including 20 from St. Lucie, 20 from Turkey Point, and 10 from Juno Beach). The employees interviewed included representatives from various levels (i.e., technicians and supervisors) in various disciplines, including: engineers; operators; maintenance planning; electrical, mechanical, and instrumentation and control maintenance; quality assurance; health physics; and chemistry. Of all employees interviewed, each stated that they

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36/ Id., Cover letter at 1.

37/ Id., Encl. at 1.

38/ Id., Encl. at 2.

39/ Id.

were aware of the Speakout Program and that they would raise safety concerns. 40/ Further, contrary to Mr. Saporito's "chilling effect" assertion, nearly 20% of those interviewed had used the Speakout Program, "and all but one was satisfied with the Speakout resolution of all of their concerns." 41/ The NRC inspection team thus "concluded that the FPL employees perceived the Speakout Program to be effective." 42/

Similarly, the NRC has repeatedly found that the Turkey Point plant is operated in a safe manner. For example, the NRC's most recent Systematic Assessment of Licensee Performance ("SALP") report, issued on May 14, 1993, states that "[o]verall plant performance continued to improve in almost all areas. This improved performance was due to the licensee's continued commitment to self-identification and correction of potential problems; a strong management team; and a dedicated, experienced staff." 43/ A conservative approach to plant safety was also noted, and five of the seven areas rated were given a "1," the highest rating, with the others ranked "2 - improving." The ratings thus reflect "superior" or "good" performance in every area. All areas were similarly rated "superior" or "good" in the previous SALP report issued on December 2, 1991.

40/ Id., Encl. at 3.

41/ Id.

42/ Id.

43/ NRC Inspection Report Nos. 50-250/93-03 and 50-251/93-03 dated May 14, 1993, Encl. 2 at 3.

In view of the NRC's recent inspection of FPL's Speakout Program and finding that the Program is effective in handling and resolving employee safety concerns, and the NRC's overall determination that Turkey Point is operated with a commitment to identification and correction of problems, Mr. Saporito's "chilling effect" claims are completely baseless. His demand to "modify, suspend, or revoke [FPL's] permissive operational licenses"44/ and to impose a posting requirement on FPL should thus be denied.

C. The Requested Amicus Brief by the NRC Is Not Warranted

Mr. Saporito's request "that the NRC construct and submit an amicus curiae brief to the U.S. Department of Labor . . . regarding issues of fact . . . concerning the Licensee's retaliatory conduct towards Petitioner during Petitioner's period of employment at the Licensee's Turkey Point nuclear station" 45/ should be denied. (emphasis added). It is well established that the role of an amicus curiae is to "assist the tribunal in resolving matters of general public import or [to] insure a complete presentation of difficult issues so that a proper decision is reached." 46/ Indeed, "[o]ne rarely, if ever, encounters participation amicus curiae in the actual trial of

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44/ Petition at 1.

45/ Id.

46/ Nuclear Fuel Services, Inc. & New York State Energy Research and Development Authority (Western New York Nuclear Service Center), ALAB-679, 16 NRC 121, 125 n. 11 (1982).

factual issues in an evidentiary hearing . . . . An amicus curiae can neither inject new issues into a proceeding nor alter the content of the record developed by the parties." 47/

Significantly, as Mr. Saporito concedes in his petition, all factual issues are already before the DOL. The hearing before the DOL ALJ lasted seven days. Mr. Saporito was represented by counsel. He had a full opportunity to present witnesses and other evidence, and to cross-examine witnesses called by FPL. All of the witnesses testified under oath. Mr. Saporito's request is simply an attempt to burden the record with hearsay allegations through the indirect route of an amicus curiae brief.

Further, under the circumstances of this case, there are no legal or public policy issues to be briefed. The only policy issue raised by Mr. Saporito -- whether "licensee employees have a right to bypass licensee management and report perceived safety concerns directly to the NRC" (Supplemental Petition at 6) -- is irrelevant because at the time Mr. Saporito was asked to describe his concerns, he did not report them to either FPL or the NRC. In fact, FPL specifically directed Mr.

47/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987). See also Resident Council of Allen Parkway Village v. HUD, 980 F.2d 1043 (5th Cir.), cert. denied, 114 S.Ct 75 (1993) (amicus curiae generally cannot expand scope of appeal to implicate issues that have not been presented by parties to appeal); New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196 (1st Cir. 1979) (an amicus is one who, not as a party, gives information of some matter of law in regard to which the court is doubtful or mistaken).

Saporito to immediately bring his concerns to the NRC, but was told by an NRC official several days later that Mr. Saporito had not reported any specific concerns. 48/ Accordingly, the supposed policy issues raised by Mr. Saporito do not exist in this case, and no amicus curiae brief is warranted.

V. THOMAS SAPORITO'S CURRENT PETITION IS THE LATEST IN A SERIES OF BASELESS AND REPETITIVE FILINGS AND ALLEGATIONS WHICH SHOULD NOT BE COUNTENANCED

Mr. Saporito's current Petition should be viewed in light of the numerous unsubstantiated allegations concerning FPL's Turkey Point and St. Lucie nuclear power plants that he has previously asserted. These have included: five DOL Section 210 (now Section 211) "whistleblower" complaints; over twenty-five petitions, supplemental petitions, or corrections to petitions under 10 C.F.R. § 2.206 filed with the NRC seeking to have the Turkey Point plant shutdown; over fifteen petitions or letters with NRC Region II similarly seeking to have Turkey Point shutdown; six petitions to intervene and requests for hearing involving Turkey Point and FPL's other nuclear plant, St. Lucie; and numerous letters to senators and congressmen, NRC Commissioners, the President of the United States, and even former Soviet President Mikhail Gorbachev requesting his assistance in shutting down the Turkey Point plant. We respectfully submit that while we strongly support the right of

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48/ Saporito v. Florida Power & Light Co., 89-ERA-7, 89-ERA-17, slip op. at 11 (June 30, 1989).

any citizen to avail himself or herself of the remedies afforded by law under the Atomic Energy Act or otherwise, the Commission has a duty to protect itself and its licensees against gross abuses of its processes; this is such a case.

In his latest 2.206 Petition dated March 7, 1994, as supplemented on March 13, 1994, Mr. Saporito presents no new facts, but simply recounts old allegations already made in his previous filings, which both the NRC and the DOL exhaustively investigated and rejected years ago. The following summarizes the record of Mr. Saporito's irresponsible use of NRC and DOL processes to raise repetitious and inflammatory, but unsupported, allegations as a means of harassing and attempting to extract money from FPL.

- Mr. Saporito Files Two DOL Section 210 Whistleblower Complaints On October 14 and November 28, 1988

Mr. Saporito first began his now six-year attack on FPL on October 14, 1988 and November 28, 1988, when he filed two complaints with the DOL against FPL alleging violations of Section 210 of the ERA. Mr. Saporito supplemented his complaints six times, raising additional allegations that FPL harassed, discriminated against, and ultimately discharged him on December 22, 1988, in retaliation for having engaged in protected activity. 49/ The allegations now raised by Mr. Saporito in his

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49/ See Saporito v. Florida Power & Light Co., 89-ERA-7, 89-ERA-17, slip op. (June 30, 1989).

present 2.206 Petition are essentially identical to those heard and rejected by the DOL ALJ five years ago.

After seven days of hearings and after reviewing post-hearing briefs filed by both parties, the DOL ALJ concluded that Mr. Saporito's behavior constituted insubordination "which warranted dismissal." 50/ Specifically, the ALJ stated that:

> My review of the record convinces me that the reasons given by [FPL] for the discharge are sincere and valid in the circumstances and were in no way motivated by [Mr. Saporito's] protected activity. Again, ironically [FPL] could not, consistent with safe and sound management practices, tolerate insolence manifested by the behavior of an employee who alleges safety concerns and fails to divulge them when asked, refuses to take a minute or two to explain to the Site Vice President why he could not attend a meeting and then refuses to undergo a physical examination, scheduled by management in an attempt to ascertain whether the refusal to holdover was medically warranted and whether [Mr. Saporito's] medical condition was such as to warrant his return to an important and sensitive position in a nuclear power plant. 51/

Accordingly, the ALJ concluded that:

> The actions taken against [Mr. Saporito] by FPL and its management personnel were a result of his contentiousness and recalcitrance as an employee. Saporito's discharge resulted solely from his crossing the line from contentiousness and recalcitrance into the area of insubordination. Furthermore, the insubordination impacted on the Site Vice-President's grave responsibility to

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50/ Id. at 19. Mr. Saporito's appeal of this decision to the Secretary of Labor is pending.

51/ Id. at 18.

assure that the nuclear facility over which he holds jurisdiction operates safely. 52/

The ALJ's decision was, to a great extent, based on credibility determinations adverse to Mr. Saporito. For example, the ALJ held that Mr. Saporito's testimony of being too sick to attend a meeting with the Site Vice President (after initially claiming that he could not attend because of "family business") was not credible. 53/ Mr. Saporito also testified that he did not refuse to undergo a physical examination. The ALJ ruled that testimony was not credible in light of Mr. Saporito's prior statements that he would not undergo the examination. 54/ At the hearing, Mr. Saporito also admitted, on cross examination, that he falsified his employment application at FPL. 55/

- Mr. Saporito Files First 2.206 Petition With The NRC Concerning FPL's Turkey Point Plant On December 21, 1988

Concurrent with his DOL 210 complaints, Mr. Saporito filed a 2.206 petition to shutdown FPL's Turkey Point Nuclear Generating Plant, Units 3 and 4 and suspend those Units' operating licenses. 56/ Mr. Saporito supplemented his petition

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52/ Id. at 21.

53/ Id. at 20.

54/ Id.

55/ See Saporito v. Florida Power & Light Co., 89-ERA-7, 89-ERA-17, Hearing Transcript at 966.

56/ See Florida Power & Light Co., (Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-89-5, 30 NRC 73 (July 12, 1989). A copy of this decision is appended as Attachment 3.

employee harassment and discrimination at Turkey Point, the NRC wrote to Mr. Saporito that:

> Because none of the above letters addresses new concerns . . . or provides information we did not already have, no additional NRC action is necessary. Please be advised that we do not plan to separately acknowledge receipt of any future letters you might submit regarding suspension/revocation of the Turkey Point licenses. 60/

On July 12, 1989, in a Partial Director's Decision denying the petition as it related to Mr. Saporito's alleged safety concerns, the NRC concluded that "no substantial basis was found for taking the actions requested in the Petition." 61/ The NRC deferred consideration of the issues involving discrimination and destruction of documents pending further investigation by the NRC OI. Prior to issuance of this final decision, however, Mr. Saporito on two separate occasions raised additional claims of harassment, intimidation and coercion in violation of 10 C.F.R. § 50.7 -- the NRC's implementing regulation of Section 210 of the ERA.

60/ Letter from T.E. Murley (NRC) to T.J. Saporito, Jr. dated April 14, 1989. A copy of this letter is appended as Attachment 6. Many of Mr. Saporito's allegations were not matters initially identified by him, but were simply restatements of items previously addressed in NRC inspection reports or FPL Quality Assurance reports.

61/ Florida Power & Light Co., (Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-89-5, 30 NRC 73, 83 (July 12, 1989).

On March 22, 1990, the NRC issued a Final Director's Decision denying Mr. Saporito's remaining requests. 62/ The Director based his denial on the conclusions reached by an extensive NRC OI investigation into Mr. Saporito's discrimination and document falsification claims. The Director noted that:

> The OI investigation concluded, based upon the large volume of testimony received from numerous interviewees and the extensive review and analysis of pertinent records, correspondence, and documents, that the allegations of employee harassment, the chilling-effect condition, and Licensee discrimination against individuals who reported or identified nuclear-safety-related concerns could not be substantiated as alleged. Additionally, there was insufficient evidence to confirm the allegations that instrumentation and control maintenance records were willfully and intentionally falsified, altered, and/or destroyed to conceal procedure violations. Finally, the investigation also concluded that no Turkey Point employee who testified for [Mr. Saporito] at the DOL hearing was knowingly harassed or discriminated against by the Licensee for this activity 63/

Further, taking into account the DOL ALJ's June 30, 1989 decision in 89-ERA-7 and 89-ERA-17, the allegations in Mr. Saporito's petitions, and other available information, the Director rejected Mr. Saporito's allegation that his employment had been adversely affected because he raised safety concerns. 64/ The NRC therefore concluded that "no basis exists for taking the actions

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62/ See Florida Power & Light Co., (Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-90-1, 31 NRC 327 (March 22, 1990).

63/ Id. at 330-31 (emphasis added).

64/ Id. at 331.

requested in the Petitions as no substantial health and safety issues have been raised by the Petitions." 65/

- Mr. Saporito Writes Letter To Mikhail S. Gorbachev Dated March 6, 1989

While this first 2.206 petition, as well as his two DOL cases were pending, Mr. Saporito requested Mikhail Gorbachev, then President of the Soviet Union, to apply the resources of the Soviet Union to "secur[e] the safe shut down of the Turkey Point Nuclear Reactors . . . ." 66/ Mr. Saporito also sent copies of the letter to then President Bush, a local congressman, the NRC, and "ALL MEDIA SOURCES."

- Mr. Saporito Petitions For Late Intervention And Requests A Hearing On May 16, 1989, And On July 3, 1989, Requests To Reverse NRC Decision Approving Turkey Point License Amendments Issued March 27, 1989.

Again while his 2.206 petition and DOL cases were pending, on May 16, 1989, Mr. Saporito filed an after-the-fact petition to intervene and request for a hearing on a March 27, 1989 license amendment in which the NRC authorized changes to FPL's qualification requirements for the Operations

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65/ Id.

66/ Letter from Thomas J. Saporito, Jr. to Mikhail S. Gorbachev dated March 6, 1989. A copy of this letter is appended as Attachment 7.

Superintendent. The Commission denied the request as untimely and found that no good cause was shown for such untimeliness. 67/

Even in the face of the Commission's denial of his hearing request on the license amendments, on July 3, 1989, Mr. Saporito requested a modification of the licenses to reverse the March 27, 1989 approval of those amendments. The NRC again rejected Mr. Saporito's request stating that his submittal "appears to be an attempt to circumvent the rules for timeliness . . . , raises the same issues raised in [Mr. Saporito's hearing request on the license amendments], which was denied by the Commission . . . , [and] does not raise any new issues not previously considered by the Commission in the issuance of the amendments." 68/

- Mr. Saporito Files Second 2.206 Petition To Shutdown FPL's Turkey Point Plant On June 20, 1989

On June 20, 1989, Mr. Saporito filed his second 2.206 petition concerning the Turkey Point plant in less than six months and prior to any decision on either his December 21, 1988, 2.206 petition, the numerous supplements to that petition, or his pending DOL complaints. Mr. Saporito further supplemented this petition on June 22 (as amended August 12) and July 3, 1989. Like his first petition, Mr. Saporito sought the shutdown of the

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67/ See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), DD-89-8, 30 NRC 220, 228 (Sept. 25, 1989). A copy of this decision is appended as Attachment 8.

68/ Id.

Turkey Point facility and suspension of the Unit 3 and 4 operating licenses. Mr. Saporito also requested, inter alia, the NRC to investigate an alleged drug usage problem and FPL's corrective measures, and investigate alleged reactor pressure vessel embrittlement, which had previously been a subject of litigation before the Atomic Safety and Licensing Board and had been resolved. 69/ After reviewing Mr. Saporito's allegations, the NRC again denied the petition stating that "no basis exists for taking the actions requested in the Petition, since no substantial health and safety issues have been raised by the Petition." 70/

- Mr. Saporito Petitions To Intervene In FPL's Exemption Request For St. Lucie From Provisions Of 10 C.F.R. Part 20 On August 14, 1989

On August 14, 1989, Mr. Saporito petitioned to intervene and requested a hearing on FPL's request for an exemption from those requirements of Part 20 concerning the use of "protection factors" in respirators used by workers in radioactive environments. 71/ After due consideration, the Commission denied the request "because [Mr. Saporito] ha[d] not demonstrated a cognizable interest that could be addressed in any

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69/ Id. at 220.

70/ Id. at 228.

71/ See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 326 (Nov. 30, 1989).

proceeding," 72/ nor had Mr. Saporito met any of "the threshold standards for instituting a proceeding under the Commission's regulations." 73/

Mr. Saporito Files Third 2.206 Petition To Shutdown Turkey Point Plant On December 29, 1989

Notwithstanding the NRC's full denial of one of his two previous 2.206 petitions, and the partial denial of the other (later denied in full), Mr. Saporito filed yet another 2.206 petition which was similar in nature to the earlier petitions and requested essentially the same relief. This petition, his third that year, was filed on behalf of the Nuclear Energy Accountability Project ("NEAP"), an entity which generally acted as Mr. Saporito's alter ego. 74/ Among other things, Mr. Saporito requested the NRC to investigate trips of Turkey Point Units 3 and 4, impose a civil penalty and immediately suspend Turkey Point's operating licenses if the investigation revealed that the reactors tripped due to poor maintenance practices or improper operation of the plant.

72/ Id.

73/ Id. at 330.

74/ Mr. Saporito founded NEAP in September 1989 and was its "Executive Director." Its "immediate objective [was] to secure the safe shut down of the Turkey Point Nuclear Plant." See NEAP publication entitled: "The Whistleblower Newsletter," Vol.: II, Issue: 7, dated January 2, 1990, appended as Attachment 9. Mr. Saporito has subsequently disbanded NEAP.

As with his other meritless petitions, the NRC found that Mr. Saporito "presented no specific facts in support of [his] allegations, and ha[d] not raised any new information which [was] not already being reviewed by the NRC." 75/ Since Mr. Saporito failed to "set forth the factual basis for [his] request with the specificity required by 10 C.F.R. §2.206," the NRC determined that "further action need not be taken on [the] request." 76/

- Mr. Saporito Attempts To Participate In Three Turkey Point Operating License Amendment Proceedings Between October 1989 And October 1990

Between October 1989 and October 1990, Mr. Saporito and NEAP attempted to participate in three operating license amendment ("OLA") proceedings involving FPL's Turkey Point plant. In every instance, the Commission denied the petitions to intervene and hearing requests either because they were untimely, withdrawn by Mr. Saporito, or because they failed to comply with the Commission's well-established rules on standing.

On October 22, 1989, eleven months after the time specified in the Notice of Opportunity for Hearing, Mr. Saporito filed a petition to intervene in FPL's OLA-4 proceeding regarding pressure-temperature limits. The Licensing Board held the petition "inexcusably late," found no basis for untimely filing,

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75/ Letter from T.E. Murley (NRC) to T.J. Saporito, Jr. dated January 23, 1990, p.1. A copy of this letter is appended as Attachment 10.

76/ Id.

and accordingly rejected it in its entirety. 77/ The Appeal Board similarly affirmed. 78/

On December 29, 1989, Mr. Saporito and NEAP petitioned to intervene in FPL's OLA-5 proceeding to upgrade the technical specifications for its Turkey Point plant so that they would conform to a recently-approved standard NRC format. Mr. Saporito subsequently withdrew from the proceeding, claiming that FPL and its counsel had harassed and intimidated him. The Licensing Board, however, found these allegations to be groundless and admonished Mr. Saporito for making such unsupported accusations. The Board stated:

> Based on this failure to supply information, we conclude that Mr. Saporito was not subject to any coercion and we order that all material alleging coercion shall be considered struck from our record. We also caution Mr. Saporito not to make defamatory charges in this proceeding unless he is prepared to prove them. Further unsubstantiated attacks could constitute grounds for barring him from participation. 79/

77/ See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 83 & n.12 (Jan. 16, 1990).

78/ See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 496 (June 24, 1991).

79/ See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 514 (June 15, 1990) (emphasis added). A copy of this decision is appended as Attachment 11.

The Licensing Board subsequently dismissed NEAP, the sole remaining intervenor in the OLA-5 proceeding, for lack of standing, stating: 80/

> We are particularly concerned that NEAP has not brought to bear any substantial expertise to demonstrate the importance and immediacy of its concerns or to justify the necessity of considering them. 81/

Both the Appeal Board 82/ and the Commission 83/ affirmed the Licensing Board's determination.

Notwithstanding the Licensing Board's decision regarding Mr. Saporito's and NEAP's lack of standing, both NEAP and Mr. Saporito filed intervention petitions and requests for hearing on FPL's OLA-6 proceeding to permit an emergency power system enhancement at the Turkey Point plant. As the Licensing Board, Appeal Board, and Commission held in the OLA-5 proceeding, the Licensing Board here similarly denied both petitions for failure to demonstrate standing based upon residence or work

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80/ See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 15, 17 (July 18, 1990). A copy of this decision is appended as Attachment 12.

81/ Id. at 17.

82/ Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521 (June 28, 1991) (holding that "NEAP's argument is without merit." Id. at 529).

83/ Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185 (Sept. 11, 1991).

activity in the vicinity of Turkey Point. 84/ In particular, the Board noted that it was unable to conclude that Mr. Saporito and NEAP had demonstrated standing in light of inconsistencies in Mr. Saporito's statements, including sworn testimony, concerning his residence and mailing address, 85/ which apparently changed depending upon what proceeding Mr. Saporito was testifying in.

Although Mr. Saporito filed a notice of appeal of the Board's decision, he failed to timely file a brief in support of his appeal. Accordingly, the Commission dismissed the appeal. 86/

- Mr. Saporito Files Third DOL 210 Whistleblower Complaint Against FPL On March 14, 1990, And An Additional 210 Complaint Against ATI Career Training Center On May 11, 1990

On March 14, 1990, less than 1½ years after filing his first § 210 complaint, Mr. Saporito initiated his third unsuccessful DOL 210 case against FPL. Mr. Saporito supplemented his March 14, 1990 complaint on March 27 and again on March 30. He claimed that FPL had blacklisted him and interfered with his employment as a technical instructor for ATI Career Training Center causing ATI to terminate his employment. Mr. Saporito

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84/ See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42 (Jan. 23, 1991). A copy of this decision is appended as Attachment 13.

85/ Id. at 46-47.

86/ Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238 (April 3, 1991). A copy of this decision is appended as Attachment 14.

subsequently filed a separate, similar complaint against ATI on May 11, 1990, and the two cases were consolidated.

After a hearing, the DOL ALJ held that Mr. Saporito had failed to establish a prima facie case against either FPL or ATI. 87/ The ALJ specifically noted that Mr. Saporito's immediate supervisor at ATI "credibly testified that he terminated Mr. Saporito because he was not a 'team player', as evidenced by his poor attitude . . . and because he personally disliked [Mr. Saporito]." 88/ Moreover, the ALJ noted that with respect to his "chilling effect" allegations, Mr. Saporito "offered no proof . . . failed to call a single FPL employee to testify at the hearing, nor were any affidavits or depositions of FPL employees contained in the record corroborating Mr. Saporito's claim." 89/

- Mr. Saporito Files Fourth DOL 210 Whistleblower Complaint Against FPL on September 4, 1990

In early September of 1990, Mr. Saporito initiated his fourth unsuccessful DOL 210 case against FPL. In that complaint, Mr. Saporito alleged that FPL authored a list of persons (the "NO LIST") who were not eligible for re-employment or for recommendation for employment to other prospective employers.

87/ See Saporito v. Florida Power & Light Co. and ATI Career Training Center, 90-ERA-27, 90-ERA-47, slip op. at 22 (Nov. 6, 1990).

88/ Id. at 21.

89/ Id. at 16.

Mr. Saporito stated that he obtained the list "by an abandoned missile base between 1:00 a.m. and 2:00 a.m." from a "Turkey Point worker" who "would only identify himself as Terry," but whose actual identity Mr. Saporito disclaimed knowledge of. 90/ FPL conducted an investigation regarding the document and determined that the list was not an FPL document and that the circumstances surrounding its creation were, to say the least, suspicious.

The DOL Wage and Hour Division also investigated the matter and also reached the conclusion that the document was not genuine. In fact, the DOL investigator who conducted the investigation, stated in his Narrative Report that:

> All the credibility remains on FPL's side. Once again, a case could be made that Mr. Saporito was using the [ERA § 210] statute to terrorize the company rather than being a victim. 91/

Further, the Wage & Hour investigator expressed the view that "Mr. Saporito will continue to level charges at Florida Power & Light until he receives monetary compensation one way or the other." 92/

90/ See Affidavit of Thomas J. Saporito, Jr. at 1-2, attached as Exhibit 1 to his DOL Complaint dated September 4, 1990.

91/ Narrative Report of E.G. Morel, DOL Wage & Hour Investigator dated October 30, 1990, at 3 (emphasis added). A copy of this report is appended as Attachment 15.

92/ Id. (emphasis added).

Mr. Saporito did not appeal the Wage and Hour Division's determination and ceased attempting to persuade the DOL and NRC that his "NO LIST" was genuine and not a fabrication.

- Mr. Saporito Files Fourth 2.206 Petition With NRC To Shutdown The Turkey Point Plant On January 3, 1992

Based on claims almost identical to those alleged in his previous 2.206 petitions, Mr. Saporito, on January 3, 1992, filed a fourth 2.206 petition requesting the NRC to initiate a show cause proceeding and take enforcement action against FPL based upon an alleged continuing practice of employee harassment and discrimination at the Turkey Point plant (where Mr. Saporito had not worked for more than four years). The NRC evaluated the allegations made in the petition and "concluded that it does not provide any basis for any action against FPL." 93/ Moreover, the NRC explicitly stated that "[t]he basis for this position is that [Mr. Saporito] has not provided any new information that has not already been addressed by the licensee and the NRC staff." 94/

- Mr. Saporito Files Fifth DOL 210 Whistleblower Complaint Against FPL on October 27, 1992

In October of 1992, Mr. Saporito initiated yet another unsuccessful DOL 210 case against FPL. This time Mr. Saporito alleged that an official of FPL blacklisted him by telephoning an official of Arizona Public Service Company. After a hearing, the

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93/ 57 Fed. Reg. 6748 (Feb. 27, 1992).

94/ Id.

DOL ALJ held that Mr. Saporito again failed to establish even a prima facia case. 95/

- The Current (Fifth) § 2.206 Petition

The current § 2.206 Petition by Mr. Saporito is simply a repetition of previous allegations that have been thoroughly investigated and repeatedly found to be without merit. The Petition is the latest in a years-long series of allegations which, upon investigation, have been found to be baseless, of little significance, or simply a rehash of issues already documented and well-known to the licensee and the NRC. The allegations in the current Petition do not raise any new facts or safety issues, but are an irresponsible abuse of NRC processes and waste of the resources of both the NRC and FPL.

VI. CONCLUSIONS

Mr. Saporito's latest Petition should be denied. It contains no facts of which the NRC was not aware at the time it denied Mr. Saporito's previous petitions on exactly the same issues. The Petition also is an improper attempt to circumvent a DOL proceeding to which both Mr. Saporito and FPL are parties, and which is progressing on its normal course. Mr. Saporito has presented no specific facts in support of his allegations of a "chilling effect" or other safety problems at FPL's Turkey Point

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95/ See Saporito v. Florida Power & Light Co., 93-ERA-23, slip op. at 11 (Nov. 12, 1993). A copy of this recommended decision is appended as Attachment 16.

Nuclear Station, and his bald allegations are directly contradicted by inspections and evaluations performed by the NRC staff. For these reasons, Mr. Saporito's Petition should be rejected.

The circumstances under which FPL directed Mr. Saporito to divulge his safety concerns show that that request was entirely proper. At the time of the request, Mr. Saporito had voluntarily announced to the Company that he had safety concerns and had not disclosed those concerns either to the Company or to the NRC. Failure to inquire as to the nature of Mr. Saporito's safety concerns would have been irresponsible and inconsistent with the Company's regulatory and safety obligations. In addition, FPL specifically directed Mr. Saporito to disclose his safety concerns to the NRC at the earliest opportunity, a direction with which Mr. Saporito did not comply. FPL was subsequently informed by the NRC that Mr. Saporito had not divulged any specific safety concerns to the agency, and that the NRC had encouraged Mr. Saporito to report his concerns to FPL. Mr. Saporito's attempt to portray these inquiries as somehow improper distorts the facts, ignores the licensee's solemn and primary obligation to protect public health and safety, and directly contradicts NRC regulations.

Mr. Saporito's current 2.206 Petition is simply the latest in a series of attempts to extract money from FPL by harassing the Company with multiple, redundant, and baseless legal proceedings. The NRC should not allow itself to be

directly or indirectly enlisted in furtherance of this enterprise. Accordingly, FPL respectfully requests that, at a minimum, the Commission cease treating these repetitious filings as having presumptive merit, and summarily reject them.

ATTACHMENTS FOR
MEMORANDUM IN RESPONSE TO MARCH 7, 1994
10 CFR 2.206 PETITION AND MARCH 23, 1994
SUPPLEMENT THERETO FILED BY
THOMAS J. SAPORITO, JR.

U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts 02109

DATE: June 30, 1989

CASE NOS.: 89-ERA-7
89-ERA-17

IN THE MATTER OF

Thomas J. Saporito, Jr.
Complainant

v.

Florida Power and Light Company,
Respondent

Appearances:

W. Trent Steele, Esq.
301 Clementis Street
West Palm Beach, FL 33401
For Complainant

Thomas J. Saporito, Jr.
Pro Se, on brief

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Special Appearance
Counsel for Union Employee-Witnesses

Before: Anthony J. Iacobo
Administrative Law Judge

Recommended Decision and Order Denying Complaint

This is a proceeding under the Energy Reorganization Act of 1974, as amended, (Act) 42 U.S.C. §5851 and the implementing regulations found in 29 Code of Federal Regulations Part 24, whereby employees of employers subject to the Act and regulations may file complaints and receive

certain redress upon a showing of being subjected to discriminatory action resulting from protected activity. The hearing in this proceeding was held in Miami, Florida, on February 1 through 3 and February 9, 10, 13 and 14, 1989. The parties[1] appeared and were given the opportunity to present evidence and argument.[2] Briefs were received by June 2, 1989.

Procedural History

These cases stem from complaints dated October 14, 1988, (89-ERA-7) and November 28, 1988, and subsequent dates, (89-ERA-17) by Mr. Thomas J. Saporito, Jr., lodged with the Employment Standards Administration, Wage and Hour Division, of the U.S. Department of Labor (DOL) alleging he was subjected to harassment, discriminatory conduct and ultimately dismissal by Respondent, Florida Power and Light Company, (FPL), because of certain activity protected by section 5851(a)(1-3) of the Act. In the absence of any evidence as to the date of mailing, the complaints shall be deemed filed as of the dates they bear. 29 CFR 24.3(b). The initial complaint alleged that Mr. Saporito was the subject of discrimination and harassment as a result of a communication sent to the Nuclear Regulatory Commission (NRC) on September 29, 1988 "regarding a series of events concerning a management person at the nuclear plant." RX 75. This matter was investigated by the Wage and Hour Division and found to be without merit on November 18, 1988. The determination was timely appealed by Complainant and was given the docket number 89-ERA-7.

On November 28, 1988 a second letter of complaint was sent by Saporito to the Wage and Hour Division alleging safety concerns to the NRC by Complainant on November 20 and 23, 1988. Then followed three other complaints by Mr. Saporito dated (a) December 6th, alleging harassment and discrimination for further protected activity, letters to the NRC dated December 2nd and 5th, (b) December 16th, complaining of FPL's efforts to submit him to a medical examination as retribuion for protected activity and (c) on December 20th and 23rd, 1988 complaining of being discharged (at first suspended without pay until further notice) allegedly as retribution for his protected activity. These

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1/ Counsel for the International Brotherhood of Electrical Workers were allowed to participate only insofar as to be available to confer with witnesses who were union members.

2/ A pre-hearing conference was held in Miami on January 5, 1989 before another judge who later recused himself.

latter complaints were treated as one by the Wage and Hour Division which concluded on January 10, 1989 that the allegations were valid, ordered Mr. Saporito be made whole and that he also be awarded $100,000.00 in compensatory damages. Complainant appeals, seeking $500,000.00 in compensatory damages. Respondent seeks dismissal of the complaints. This matter was assigned docket No. 89-ERA-17. This proceeding embraces and shall dispose of both docketed cases.

Basic Issue

The basic issue in these cases is whether the Complainant, because of protected activity, was the subject of prejudicial actions and ultimately dismissal by his employer, FPL.

Preliminary Observations

The Act specifically requires an individual to file a complaint within thirty days of the occurrence of the alleged violation in order to obtain redress. 42 U.S.C. §5851(b)(1), 29 CFR 24.3(b). Accordingly, only those allegedly improper activities by FPL within 30 days of October 14, 1988 are embraced within the initial complaint. Any subsequent actions would be embraced by either the initial or the subsequent complaints.

In its brief, FPL notes that the United States Court of Appeals, Fifth Circuit, has held that an employee's activity, to be protected, must involve communication with a government entity. Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984). This rule is contrary to what I believe to be the majority rule and contrary to the position taken by the Department of Labor. Kansas Gas & Electric Co. v. Brock, 780 F.2d 1505 (10th Cir. 1985), Mackowick v. University Nuclear Systems, Inc., 735 F.2d 1159, (9th Cir. 1984). The issues shall be treated on this premise, although I shall distinguish between Complaint's communications to governmental and non-governmental agencies.

Stipulations

The parties stipulated that:

At all times relevant to the instant complaints, Complainant, Thomas J. Saporito, Jr., was an employee of Respondent, FPL, within the meaning of Section 210 of the Act, 42 U.S.C. §5851.

Respondent, FPL, is an employer within the meaning of the Act.

Respondent is a licensee of the Nuclear Regulatory Commission (NRC).

Complainant was hired by FPL in the job classification of Instrument & Control Specialist.

Complainant began working for Respondent on March 8, 1982.

Throughout Complainant's employment with Respondent, Complainant worked in job classifications covered by the collective bargaining agreement entered into by FPL and the International Brotherhood of Electrical Workers AFL-CIO (IBEW). That collective bargaining agreement contained a grievance procedure, ending in binding arbitration.

Complainant's job history with Respondent includes work at several FPL power plants, both fossil fuel and nuclear powered. As here pertinent, he worked at Turkey Point Power Plant (nuclear) from April 13, 1985 to June 22, 1985, from August 24, 1985 to February 1, 1986, and from June 6, 1987 to June 20, 1987.

He worked at the St. Lucie Power Plant (nuclear) from June 20, 1987 to April 23, 1988 as an Instrument and Control Specialist-Nuclear until he voluntarily transferred to Turkey Point in the same capacity on April 23, 1988. Respondent discharged Complainant on December 22, 1988. The validity or lack of validity of the matters raised by Complainant in 1988 to the NRC regarding plant safety is not at issue in this proceeding. The parties also stipulated as to the dates of nineteen different items of correspondence Complainant mailed to one or various agencies. Among these, a letter sent to the Institute of Nuclear Plant Operations (INPO), a private industry group, the NRC and DOL. The letter to INPO was sent on May 9, 1988 and received by FPL the same day. The first letter to FPL with a copy to NRC was sent and received on September 29, 1988. There then followed a series of letters to either NRC or DOL, or both, within short intervals from October 31st to December 28, 1988.

Summary of the Facts

I

This summary is based on the findings and conclusions I have reached after hearing the testimony and observing the demeanor of the witnesses and reviewing the transcript and exhibits of record. References to appropriate segments of the record shall be as follows: TR for transcript of the hearing, CX for Complainant's exhibits, RX for Respondent's exhibits, CB for Complainant's brief and RB for Respondent's brief. Since nearly all of the events embraced in this

proceeding transpired in the year 1988, the month and date alone shall be generally used in referring to various events taking place in 1988.

Complainant was first employed by FPL in 1982. FPL is a licensee of the NRC. As here pertinent, it operates nuclear power plants in St. Lucie County and Turkey Point (Dade County), Florida. Complainant, during 1988 and for some time prior thereto, resided in Jupiter, Florida, described as about two and one-half hours away from the Turkey Point plant. TR 232. Obviously, traffic conditions will affect the driving time. TR 782. I take official notice that the distance is well in excess of 100 miles. In April 1988 he successfully bid, on the basis of the FPL-IBEW bargaining agreement, on a job at Turkey Point. Having been stationed at Turkey Point in the past, there was some anticipation of his arrival by those who knew him. Mr. Jerard Harley, the I & C Production Supervisor, had been an I & C Technician and a Job Steward for the Union in 1985 and 1986. TR 1726. He and Complainant had worked together for about four months at St. Lucie in late 1985 and early 1986. During this period he had lived in Saporito's home on a mutually convenient basis. Harley had the use of a bedroom in Complainant's home and he provided transportation for Complainant in return. TR 1727. He was not pleased to learn Saporito was going to work in his shop, believing him to be a "non-worker". Harley considered him a threat to his efforts to improve production and made various adverse statements about Saporito's imminent arrival. TR 1730-1. Ms. Loretha Mathis, an I & C Specialist at Turkey Point and a Job Steward at the time, also knew Complainant from his past stints at Turkey Point. She had been called upon to complete jobs originally assigned to Saporito which he had, for one reason or another, failed to complete. TR 560-3. In her view, Sapporito's return was regarded by the employees as "an event". TR 573-4.

It was in this setting that on the first day he was due to report to Turkey Point, Saporito called in sick. TR 231. Shortly thereafter, he challenged the failure of management to include his telephone number in Jupiter on the "call-out" list, the list used to summon employees for emergency or overtime work. Tr 232-3, 1884-5. He also requested a long distance telephone access number to use to call home for personal-business use, if he was required to perform unscheduled overtime, for example. This, too, after some debate involving union stewards was denied. TR 234-5, 1330-1, 1885-6.

During this same early period Complainant is alleged to have made derogatory racial remarks regarding Ms. Mathis. TR 1734. Whether this took place or was aided and abetted by Harley is unclear because Mathis and the other union

employees who may have some knowledge of the affair concluded it was an intraunion matter resolved within that organization. They refused to discuss the matter, except to show that management was attempting to use it as a spear on which to impale Complainant. TR 517-520. This was allegedly in contrast to management's relative indifference when she had complained about somewhat similar episodes, involving others in the past. TR 521, 584. As I noted on the record in conjunction with Mathis' testimony as well as that of Mr. Robert Boyle, the Chief Steward, and others, I am not going to give any probative weight to their testimony regarding this aspect of the case because I do not believe a witness should be allowed to pick and choose the areas about which he or she will testify. TR 557-8, 238-242. Further, it clouds the reliablity of their testimony generally.

In addition to the foregoing, the first couple of weeks of Complainant's arrival at Turkey Point also included an alleged infraction of the rules regarding notification to plant management that one is out sick. Saporito called in one morning and, before having seen a physician, advised the FPL answering machine he would be out sick that day and the next. He later offered to present a physician's note justifying the action. TR 755. Usually, unless there is clear evidence of a continuing illness or incapacitation, such as a hospitalization, an employee is expected to call for each day he is sick. TR 1753. While it is unclear when it started, it is also clear that Saporito was given, at the request of Mr. Greg Verhoeven, his immediate supervisor, special "one-person" job assignments because other journeymen in Verhoeven's crew did not like to work with him. TR 1378-9. Saporito also allegedly did two jobs incorrectly which came to management's attention. TR 1891-4. In any event, on May 4th, while under the scrutiny of an INPO team evaluating the Maintenance Department's operations, a job assigned to Saporito resulted in a confrontation between Saporito on the one hand, and the Production Supervisor, Harley, and the Maintenance Department Head, Daniel Tomaszewski, on the other, regarding what procedural steps were necessary to carry out the work order. The job was eventually assigned to another technician, Mr. William Dinan. TR 1895-9, TR 1743-7. There was also a confrontation regarding the propriety of a "meal ticket" submitted by Complainant for reimbursement. One is entitled to a "prepared meal" if one works a certain period beyond one's scheduled work shift. Saporito submitted a supermarket receipt which was not reimburseable. TR 1736. When Saporito protested that the practice was allowed at St. Lucie, a check with that plant revealed he had been embroiled in a similar situation there and rebuffed. TR 1888-90. There was testimony from some employees that this requirement is overlooked at times. TR 2152.

On May 9, Saporito wrote to the INPO evaluation team

alleging that there were various inadequacies in the I & C Department and that Harley was not "technically competent" to fulfil his functons. RX 51. Various others, including Mr. Joseph Kappes, the Maintenace Department Superintendent, were copied.

On the morning of Monday, May 9th, Tomaszewski, after reviewing during the weekend the events in which Saporito was involved over the prior two weeks, brought his concerns to Kappes and noted that discipline was warranted. TR 1902-4. He prepared three reports of discipline (ROD's) and a meeting was convened with Saporito, several job stewards, and Kappes, Tomaszewski, Harley and Verhoeven. TR 100. Kappes, who ran the meeting, alleges this was decided before he learned of the INPO letter. TR 1972. The above-noted episodes were reviewed. After counseling Saporito that insulting racial references would not be tolerated, the matter was dropped. TR 1979. Kappes also dropped the meal ticket issue, after further discussion. TR 1979-80. Sick leave was the subject of discussion, including alleged excessive absenteeism. TR 1906-7, 1981. Complainant's job performance was also discussed but continued to a future time in order to allow Saporito time to review the plant work orders (PWOs). TR 1982.

This meeting is alleged by Complainant as one of the first reactionary measures taken by FPL in retaliation for voicing his safety concerns. He became "a marked employee." (CB 18).

II

The summer witnessed several other meetings and confrontations. Some were continuances of the May 11th meeting. TR 1989-90. Kappes complained to Mr. John Odom, Site Vice President, about Saporito's conduct and explored the feasability of firing him or transferring him elsewhere. TR 1995-6. During this same general period Saporito's bid on a job at the St. Lucie plant was denied, despite his being the senior qualified bidder, a violation of the bargaining agreement. Complainant alleges that this, too, reflects the continuing harassment he was subjected to during this period. TR 777-782. This is denied by FPL management. TR 1399-1400. Mr. Charles F. Leppla, the person at St. Lucie who had made the decision, testified that he was familiar with both Saporito and the other candidate, a Mr. Chuck Denning. After conferring with Tomaszewski, Leppla concluded that Denning was the better choice. Saporito was considered "borderline" insubordinate during his prior tour at St. Lucie. TR 1613-21.

On July 28th Complainant was ordered by Harley to take some readings in a containment area where temperatures were close to 120 degrees Farenheit. RX 133. The job was rotated among the department's personnel so as to spread the possible exposure to radiation and thus keep the dosage low for any one person. Saporito had zero exposure. TR 1761. Harley ackowledged that when Saporito left the containment area feeling ill, complaining he could have died in there, that he commented "Maybe he should have." Harley disclaims that the assignment or the comment were motivated by Saporito's protected activity. TR 1766. The task had been assigned to another individual the night before without incident. TR 1764. He viewed Saporito as one who "spent most of his time writing ("hung up on procedure") rather than working." TR 1762.

III

Complainant filed his first complaint with DOL on October 14th. RX 75. In it he alleges FPL management at Turkey Point Nuclear as "aggressively discriminating and harrassing (sic)" him because of protected activity, viz, a letter dated September 29th to NRC regarding the conduct of Mr. Bruce Koran. The four page letter was addressed to Kappes, copy to others including Odom, union leaders Robert Boyle and Leonard Spring and to NRC. RX 68. In it Complainant recited four episodes where Koran, his immediate supervisor at the time, began shouting at him and gesticulating, including "pointing directly at [him] with his finger." Koran was accused of answering a telephone inquiry concerning Saporito's creditworthiness and, while acknowledging Complainant had worked for FPL for some years, suggested he may not continue to be employed if his conduct did not improve. TR 1697-8. In the letter, Complainant requested $500,000.00 as compensation for damages and "Respectfully request[ed] that this employee [Koran] undergo extensive drug testing within the scope of the FPL Fitness for Duty Program and additionally this employee [Koran] should be psychologically evaluated to determine if his behavior warrants removal of his unescorted access to our nuclear facilities." RX 68, p.4. Complainant also suggested Koran's unescorted access to restricted areas be suspended until the evaluations were carried out and he is declared fit; alleging that he, Complainant, is concerned about the health and welfare of his fellow employees and the general public.

The incidents complained of were essentially confrontations where Koran became frustrated with Saporito's intransigence in several matters involving work procedures,

interpretation of rules and work habits, and especially Saporito's rather indifferent response to instructions. TR 1669-1690. Koran acknowledged that he was out of line in speaking about Saporito as he did to the woman who identified herself as being from a credit union. TR 1697-8. Saporito identified the caller as a potential landlady from whom he was considering renting a room. He was offered the room, in any event. TR 1106-1114.

Saporito became embroiled in another confrontation a few weeks later with a FPL instructor, Robert Boger, on October 12th. The initial incident arose from a question Saporito put to Boger during a refresher class concerning the rule on wearing hard hats. Boger felt he was being admonished by Saporito for disagreeing with him. TR 1644. The following day Boger encountered Saporito discussing with another instructor the correctness of certain aspects of a test Saporito and the other employees had taken the previous day. Although Complainant had passed he had returned to discuss certain aspects of the test. He had a right to do so. TR 1646. However, the discussion escalated to an argument during which Boger shouted obscenities at Saporito, following him out the door as Complainant retreated from the instructor's verbal onslaught. TR 802, 1647-1651. This "aberrant behavior" was reported to superiors at Turkey Point and was also reported by Saporito to NRC, as another indication of the harassment he was being subjected to and as support for his "concern" that management could not deal with the matter. He felt that the health and safety of the public required NRC intervention. RX 76.

On the same day, October 13th, Complainant received a written warning for excessive absenteeism. He believed this to be a form of reprisal for his earlier protected activity. TR 819-21, 885. The record shows, however, that the subject of the disciplinary meeting was not unique to Complainant. TR 316-7, TR 667, 1779.

The Koran and Boger episodes were each subjected to a rather thorough investigation by the Turkey Point Quality Assurance Department which concluded that neither individual constituted a threat. Each was recommended for further training: Koran in being a supervisor dealing with "difficult" employer/employee relations; Boger in dealing with confrontational situations. RX 77, 79.

IV

Odom, the Site Vice President, in view of the above events, concluded that an outside investigative team was

necessary to review the situation at Turkey Point and report to him. After conferring with FPL officials he retained the firm of Stier, Anderson & Malone (SAM), attorneys who had performed a similar function elsewhere, charging them with the task of examining Saporito's charges of harassment and discrimination and his allegations concerning Boger and Koran. He also advised the NRC. TR 1420-33. Saporito refused to cooperate unless his grievances were addressed. TR 1428. (Saporito, alone, had filed more than 50% of the grievances filed at Turkey Point. TR 1433). Odom agreed to address them personally and arranged a meeting for November 23rd. On November 21st he learned for the first time that Saporito had nuclear safety concerns. The following day he learned that Saporito would not reveal to the Quality Assurance Superintendent what those concerns were. TR 1438. The next day, November 23rd, he began a virtually day long meeting with Complainant, union officials and others in an attempt to resolve the grievances. Later in the conference Odom raised the question of Saporito's nuclear safety concerns and asked him to disclose them. While acknowledging having such concerns, Saporito refused to divulge them, stating he would reveal them only to the NRC. Odom allegedly "directed" him to divulge them "now." He intended the inquiry to be an "order". TR 1438H-I. Chief Job Steward Boyle believed the request by Odom to Saporito not to have been an "order" and therefore Saporito was not insubordinate. TR 151-4. Odom later ordered Saporito to at least divulge his concerns to the NRC. TR 1438S. In response, Saporito demanded varous stationery and office equipment and supplies to aid in preparing his report to the NRC and as a precondition to speaking to SAM. TR 1438I, RX 88. Of those present, neither Boyle nor Mathis felt the demand for supplies and equipment was reasonable. TR 369-70, 596-7.

Near the end of that same meeting Saporito also refused to divulge his safety concerns to Leonard Spring, President of the local union. TR 386. Later that evening, Kappes advised Odom that in view of Complainant's unwillingness to divulge safety concerns some job stewards approached him and expressed concern that Saporito might create a problem to justify his position. TR 388-9, 2015. It was suggested that Complainant be excluded from the plant's protected area. TR 390, 2017. Kappes took the suggestion to Odom and they agreed to restrict Complainant's access to vital areas. TR 1438N, 2017. Complainant still had access to the I & C shop which, while within the protected area, was not in a vital area. TR 2019.

On or about November 20th Odom contacted Mr. Oscar DiMiranda of the NRC regional office inquiring about any nuclear safety concerns DiMiranda may have learned from Saporito. He learned that while Saporito had contacted DiMiranda, he spoke in vague generalities; no specific concerns were divulged. TR 1438S. On November 29th many of the outstanding grievances were resolved. The principal one being an agreement (which Odom achieved by going "over the head" of his St. Lucie counterpart [TR 1441-2]) to award Saporito the I & C Technician's job transfer to St. Lucie retroactively to July 16th, with reimbursement for commutation expenses sustained by the employee during the interim. TR 1230-41. This was designed to become effective December 17th, to enable Saporito to meet the SAM attorneys before he left Turkey Point. TR 1440.

On November 30th, Complainant met with the attorneys for about six hours, beginning at 9:30 a.m. TR 913-4. At about 5 p.m., Kappes told Harley to summon Saporito to meet with Odom to discuss his safety concerns. TR 1793, 2023-4. Odom learned Saporito was talking to the investigators. He decided this would be a good time to talk to Complainant to establish a protocol for Saporito's review of the records he had requested to document his safety concerns, to attempt to define a nuclear safety concern and to learn what those concerns were. He felt a certain sense of urgency in ascertaining the precise nature of Saporito's concerns because he considered Saporito to be "not qualified to determine whether they're important or not." TR 1446. Believing Complainant to be scheduled to work until 7:30 p.m., he asked Kappes to summon him for the meeting. Kappes told Harley to fetch Saporito.

Harley approached Saporito at the I & C shop where Saporito was standing near another worker's bench speaking with several co-workers. When told of the meeting, Saporito declined, stating at first that he had no safety concerns. He later said he had personal family business to attend to. TR 1794. When Kappes was told of this he relayed the message to Odom who ordered him to tell Saporito he wanted him present for a meeting. Kappes approached Saporito as he was still standing, talking to his co-workers. TR 2025. Kappes leaned over a stool to tell him he was required to attend a meeting when Saporito turned and was startled. Kappes alleged, and I credit it, that no hostility was intended. When he told Saporito of Odom's summons, Saporito at first declined, stating again he had personal family business to attend to. TR 2025. When Kappes insisted he

holdover for the meeting Saporito declined, saying he was "sick." TR 2027. There is a dispute as to Complainant's countenance when he made this later statement. Kappes testified:

> It's what he did and then said. He looked me straight in the eyes, his whole body English (sic) changed, and he gave me one of those "I gotcha looks," and he said, "I'm sick." TR 2027.

Saporito, while acknowledging he "was standing ("leaning") by a work bench, as was noted by Harley earlier, and had at first given as an excuse, "personal and family matters" to attend to, testified he was feeling very poorly from the intensive examination he had undergone from the SAM attorneys earlier in the day. TR 916-20. Mrs. Rosemary Saporito testified her husband was ill on Thanksgiving Day the preceeding week, November 24th, and complained "of having stomach-type chest pains" when he got home the night of November 30th. TR 699, 705. Mr. Kyle Roberts was present during the Kappes-Saporito confrontation. While confirming Kappes' basic account of the episode, including the fact that Kappes warned Complainant he was making "a career decision" while ordering him to holdover several times, nevertheless, failed to see any "smile" on Saporito's face while giving his second excuse for failing to holdover. TR 2027. In any event Kappes believed Complainant was lying to him and was being insubordinate in front of other employees. TR 2027-2028, 2044. Kappes left the shop and returned with Harley. He told Harley, in Saporito's presence, that Complainant had refused a direct order and told Saporito he was being suspended. He told Harley to walk Saporito to the gate and remove his plant access badge. TR 2028-9. The time to traverse the distance between the I & C Shop and Odom's office was one variously described as being less than one minute (TR 145) to "a couple minutes." TR 1255.

Complainant had not, earlier in the day, sought to be released early from work due to illness. TR 1246-7. He did not seek aid at the plant, nor did he seek it on the way home, or in the Jupiter area. TR 924, 1258-9. He explained he was unfamiliar with medical facilities in the Miami area and that he had to stop along the road several times to rest. He knew when he got home his wife, a registered nurse, could help him. TR 923-4, TR 1259. He saw his doctor the next day. TR 1259.

After Harley escorted Complainant from the shop, Kappes reported what transpired to Odom and the union stewards who had assembled for the meeting. TR 2034. Odom, desiring to get to the bottom of the safety issue, instructed Kappes to put the suspension in abeyance, contact Saporito and get him back to work. TR 1453-4, 2034. This was done the next day. TR 2035. Saporito stated he was on sick leave until December 12th due to "medical disorders due to stress." TR 2035.

VI

On December 5th, Kappes called Complainant and told him that FPL was requesting him to be evaluated by a Company doctor concerning the medical disorder due to stress which he had reported and inquired whether the interrogation by the SAM attorneys could be continued in the Jupiter area. Saporito told him that he was not well enough to be interviewed and that he was declining the "request" to be seen by a Company doctor. TR 927-8, 1285. Odom advised union officials, Messrs. Sims and Boyle, that Saporito would have to see a Company doctor before returning to work to resolve two issues: the circumstances surrounding his refusal to holdover on November 30th; and his medical disorder related to stress. TR 428-9, 1457-8. He also told them if Complainant's and the Company's doctors disagreed, FPL and the union could select a third doctor to resolve the matter. TR 1458.

When Complainant returned to work on December 12th with a doctor's note excusing the absence, Kappes told him he had to see a Company doctor. Saporito refused, alleging he was being harassed due to protected activity. TR 2042, 436. This request was repeated on December 13th, citing as reasons: to ascertain whether Complainant had been too ill to hold-over on November 30th; and to see whether he was fit to return to his work as an I & C Specialist. TR 2046-7, 438. On the following day, at Complainant's suggestion, it was agreed that the respective doctors should confer and perhaps eliminate the need for the company-sponsored physical examination. TR 936. This hoped for resolution did not come to pass. Dr. Richard Dolsey, the FPL consultative physician, concluded he had to examine Saporito in order to give a properly informed opinion. TR 832.

On December 16th Kappes told Complainant that arrangements were made for the consultative physical examination with Dr. Dolsey. Arrangements were made for a supervisor, Willis, to drive Saporito and a job steward, Robert Caponi. Saporito stated he would go to see the doctor but would not be examined. TR 2051, 443-4. Despite this answer, Kappes decided to send Saporito to Dr. Dolsey on the chance he might change his mind. TR 2052. Boyle advised Complainant to comply and then grieve. TR 451. At Dr. Dolsey's office Complainant refused to fill out the personal medical history form. TR 605, 1297. Complainant was accompanied by Caponi into the physician's examining room. TR 606. Willis remained outside in the reception area. TR 611.

Precisely what happened in the examining room is disputed to some degree. It is undisputed, however, that upon Dr. Dolsey's arrival, Complainant told him that before anything else, he had some questions he wanted answered. TR 607-8, 834, 942, 1298. After answering a number of questions, he attempted to ask Saporito some questions and to examine him. Saporito would neither answer questions nor submit to an examination. Consequently, Dolsey asked Saporito and Caponi to leave. TR 834-6. During the course of this Dolsey entered and exited the examining room one or two times. TR 835, TR 939-43.

On December 19th Saporito explained his version of what transpired in Dolsey's office to FPL management, arguing that he did not refuse to be examined. He allegedly left the office on Dolsey's instruction. TR 943-4. However, when asked by Kappes as to whether or not he refused to be examined, Saporito answered "No comment." TR 1303. Kappes suspended Saporito effective immediately on December 19th. Id., 2054. On December 22nd Saporito was discharged by John Odom for his (a) refusal to reveal his safety concerns to Odom on November 23rd, (b) refusal to holdover on November 30th to attend a meeting with Odom, and (c) refusal to undergo a physical examination by Dr. Dolsey. RX 104, TR 255.

Applicable Law

The parties agree that Complainant has the initial burden of establishing a prima facie case showing:

(1) that the party charged with discrimination is an employer subject to the Act;

(2) that the complainant was an employee under the Act;

(3) that the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;

(4) that the employee engaged in protected activity;

(5) that the employer knew or had knowledge that the employee engaged in protected activity; and

(6) that the retaliation against the employee was motiviated, at least in part, by the employee's engaging in protected activity.3

Once the complainant establishes a prima facie case, the burden of proof shifts to the respondent to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.4

DISCUSSION AND CONCLUSIONS

My review of the record in this case convinces me that Complainant has failed to present a prima facie case. He failed to meet the sixth of the six elements necessary to establish his case. The probative evidence of record fails to show that the alleged discriminatory actions and eventual discharge were motivated in any way by Complainant's protected activity, be it the INPO letter in May or the more recent allegations in the fall of 1988 beginning in September 20, 1988. CX 20. Even if one were to find, arguendo, that a prima facie case were established, it is obvious that the actions taken by FPL against Complainant starting in September 1988 were entirely warranted in Respondent's role as a manager and would have been pursued regardless of whatever protected activity Complainant may have engaged in. The individual actions of Koran and Boger shall be treated infra in greater detail.

Complainant arrived at Turkey Point in April 1988 preceded by an unfavorable reputation, pertaining to his

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3/ DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); Ledford v. Baltimore Gas & Electric Co., 83-ERA-9, slip op. ALJ at 9 (Nov. 29, 1983), adopted by SOL.

4/ Ashcraft v. Univ. of Cincinnati, 83-ERA-7, slip op. of SOL at 12-13 (Nov. 1, 1984); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1164 (9th Cir. 1984); Consolidated Edison of N.Y., Inc. v. Donovan, 673 F.2d 61, 62 (2nd Cir. 1982).

work habits, whether deserved or not. TR 574, 1752. This was not diminished when he called in sick on his first scheduled day at Turkey Point despite the fact he clearly had a good medical reason. TR 231. Respondent's management team did not require news of Saporito's letter to INPO to develop a hostile attitude when on May 4th, he delayed a job two hours in a confrontation with supervisors, a task someone else, less experienced, completed in one and one-half hours. TR 1743-7. All this transpired under the eyes of the INPO evaluation team. Daniel Tomaszewski, the I & C Department Head, summarized the situation thus:

> I've never seen so many problems from what was supposed to be a six and seven year experienced journeyman in such a short period of time. TR 1899

Saporito gave as well as he received, being personally responsible for more than one-half of all the grievances filed at Turkey Point. TR 1433.

1. Turning now to the specific allegations made by Complainant in his complaints. The complaint filed on October 14, 1988 and its subsidiary letters dated October 31 and November 8, 1988 were embraced in the determination of the Wage and Hour Division on November 18, 1988 and became the case docketed as 89-ERA-7. Essentially this group of complaints alleges that Complainant was the subject of retaliatory discriminatory practices, such as threatening behavior by Koran and Boger and disciplinary action for alleged infractions such as excessive absenteeism. The clear preponderance of the probative evidence demonstrates that these charges are not true. The Koran and Boger episodes were nothing more than arguments precipitated at least in part by Complainant's contentiousness. Both Koran and Boger contributed to the affair by their low tolerance for such behavior. Koran and Boger, each in his own way, displayed outrageous reactions toSaporito's conduct. Koran should not have vented his frustratons on the telephone to an unknown caller. Boger should not have shouted obscenities. Their conduct, however, was clearly not motivated in any way by whatever protected activity Complainant wishes to point to. The same holds true with regard to all the other alleged injustices suffered by Saporito regarding absenteeism, meal tickets and job performance, or assignments. While these may or may not be matters which Saporito might grieve successfully, the alleged injustices are not shown to be causally related to his protected activity. If the matters were dealt with by FPL management at a higher than usual level or in a slightly harsher than usual way, it was

entirely due to the fact that Complainant constituted a greater than usual personnel problem. I credit the testimony of Koran, Boger, Harley, Kappes, Tomaszewski and Odom that their actions towards Saporito were in no way related to his protected activity. I observed their demeanor and studied their testimony. In this connection I note that Verhoeven, while characterizing management's treatment of Saporito as "not usual", admitted asking Harley to assign Complainant "one-person" jobs because others in Verhoven's crew did not like to work with him. TR 1375-9. I conclude there is no persuasive evidence to support Complainant's charges. This conclusion is reached after a careful and sympathetic review of the record, recognizing the serious financial and professional straits in which Complainant finds himself.

2. The complaint of November 28, 1988 and the subsequent letters embrace the negotiations surrounding Complainant's unsuccessful attempt to transfer to the St. Lucie plant, his being given demeaning assignments due to his restricted clearance level, and his suspension and ultimate discharge. They are embraced in case No. 89-ERA-17 Complainant summarizes his positon in his brief where he states:

> At issue in this case is whether Complainant engaged in protected activity in accordance with 42 U.S.C. §5851 and as a matter of law, and whether the decision by FPL to terminate Complainant's employment was motivated by animus toward Complainant solely because of his engaging in protected activity, or for reasons not protected by this (Act). CB p. 3.

The record overwhelmingly supports Respondent's position that the denial of the St. Lucie transfer was a matter which was acted on long before the effective date of the first complaint and therefore outside the scope of this proceeding 42 U.S.C. §5851(b)(1). Assuming this matter falls within the scope of the proceeding because it was still being negotiated in the fall of 1988 (a conclusion which is purely hypotyhetical), it is quite evident that the St. Lucie people, having had experience with Saporito, wanted nothing more of him. "Borderline insubordination. He lacked the willingness to work cooperatively with management and his peers. He intimidated his supervisors. He was very unproductive..." He filed: "Numerous grievances." TR 1615. These are the views of the individual who had been Complainant's supervisor at St. Lucie. TR 1610. The same individual, Charles Leppla, was instrumental in rejecting Saporito's attempt to return. TR 1613. I credit this testimony.

Complainant's access to restricted areas was withdrawn for very valid reasons entirely independent of his alleged protected activity. Ironically, his access was limited as a safety precaution. TR 388-9, 2015. I credit the reasons advanced by Kappes and Odom. Complainant's insolence towards Odom and Spring during the November 23rd conference properly gave his co-workers and supervisors reason to at least wonder, if not worry, about Saporito's future conduct. The record also makes it clear that Complainant's preoccupation with procedures led the Production Supervisor to give him assignments which enabled him to work alone because "nobody wanted to work with him". TR 1752.

The last matters for consideration are the series of events which culminated in Complainant's discharge. Responde cites three basic episodes, Complainant's:

(a) refusal to divulge his safety concerns to Odom on November 23rd,

(b) refusal to holdover to meet with Odom on November 30th, and

(c) refusal to submit to a physical examination by a licensed physician chosen by FPL.

My review of the record convinces me that the reasons given by Respondent for the discharge are sincere and valid in the circumstances and were in no way motivated by Complainant's protected activity. Again, ironically Respondent could not, consistent with safe and sound management practices, tolerate insolence manifested by the behavior of an employee who alleges safety concerns and fails to divulge them when asked, refuses to take a minute or two to explain to the Site Vice President why he could not attend a meeting and then refuses to undergo a physical examination, scheduled by management in an attempt to ascertain whether the refusal to holdover was medically warranted and whether Complainant's medical condition was such as to warrant his return to an important and sensitive position in a nuclear power plant. TR 616-7. I shall review each of these in greater detail.

Saporito was asked by Odom at a formal meeting, in the presence of others to divulge his safety concerns and refused to do so. This is not controverted. The controversy is over whether the "request" was an "order." I credit the testimony of John Odom on this point. It was substantiated by Loretha Mathis, a witness called in behalf of Complainant who was largely favorable to Complainant yet who was not entirely uncritical of either Complainant or Respondent FPL. TR 513-4.

524.5 In addition, when one views the circumstances under which the request for information was made and the subject matter of the request--safety concerns in a nuclear power plant--one can readily understand Odom's chagrin and everyone's concern about Saporito's intentions and future conduct. Complainant's refusal constituted insubordination which, in my opinion, justified discharge. At the very least it certainly constituted a valid increment toward the ultimate conclusion to discharge Complainant.

Complainant's refusal to holdover for a meeting with Odom on November 30th constituted an insubordinate act which warranted dismissal. I credit Odom's testimony that he felt a certain sense of urgency in ascertaining the precise nature of Saporito's concerns because he did not believe Saporito qualified to determine whether or not they were important. TR 1446. It is obvious he has a continuing obligation to search out an individual voicing safety concerns and to learn of their precise nature. I cannot imagine a responsible management person not wanting personally to be involved in such a situation. Leaving the matter to a government agency person (DiMiranda) located many miles away would reflect poor judgment, indeed. The question then arises as to whether Complainant's refusal to holdover was justified in the circumstances. I conclude it was not. As noted above, it is undisputed that the distance between Saporito's shop and Odom's office is trifling. TR 1255, 1451. Saporito was not lying down but standing when first seen by Harley and later by Kappes. TR 1794, 2025. Saporito testified he was "leaning" on his work bench. TR 918. The fact is also undisputed that he at first told Harley and Kappes that he had personal business to attend to. It was also undisputed that he was biding his time until quitting time. TR 919. These circumstances coupled with the fact that he had, both prior and subsequent to this, failed to seek any medical attention or assistance at the plant but elected to drive the extended distance home, regardless of whether he stopped along the way, fail to support his contention. This seriously undermines the credibility of Saporito's testimony. I also note that while Complainant alleges that the condition was long-standing, and said this to Dr. Klapper on December 1st, he had not sought medical treatment for the condition at any earlier date and according to Dr. Klapper, "had

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5/ Ms. Mathis and several other employees made vague references to alleged retalilation by FPL when safety concerns were voiced in the past. These were rather vague and not convincing.

absolutely no sign of having any problems with gastritis during that period (August 1988) or in the following months until he presented to my office on December 1, 1988". CX 90, p. 11. I do not credit the testimony by Complainant on this point, that is, of being too sick to attend a meeting with Odom. It challenges common sense. It was contemptuous conduct towards a management official who had made a legitimate request. To argue that regular hold over rules dealing with job completion situations apply in the instant circumstances is obviously a specious argument not worthy of further comment.

Lastly, we come to the episode surrounding FPL's efforts to require Sapporito to undergo a physical examination for the reasons cited above and Saporito's reacton thereto. As I review the circumstances, I find it strange that an individual who urged that a co-worker at Turkey Point "undergo extensive drug testing...[and be] psychologically evaluated" to ascertain his fitness to continue to functon at the plant, should then balk when the tables are turned. TR 1295, RX 68, p. 4. In any event, the record clearly establishes that Saporito knew of the purposes of the physical examination. TR 1287-8, 1308. The union had advised him to comply with the order and grieve through established bargaining procedures. TR 1289. Yet, Complainant stated before leaving for Dr. Dolsey's office that he would go but refuse to be examined. TR 1295-6. That he intended to carry out his purpose is supported by his refusal to even make out the personal history medical form handed to him on his arrival. TR 605.

Complainant argues on brief that "Dr. Dolsey never requested to examine Complainant nor did the doctor indicate that an examination was required as Complainant was never asked to undress or even unbutton his shirt." CB p. 47. Dr. Dolsey testified Complainant not only refused to be examined but refused to answer questions preliminary to the examination. TR 834-6. I credit this testimony. Dolsey appeared to be a credible witness. He answered questions forthrightly. Although he performs examinations for FPL for pay, this constitutes a small percentage of his overall practice. TR 850. Caponi, while stating that Dr. Dolsey dismissed them from his office, also testified that Dr. Dolsey told Complainant:" ...[I]t's obvious that you won't let me examine you. And Tom (Saporito) said, well, I still have some more questions to ask." TR 611. Viewing this statement from a witness who was obviously bissed in favor of Complainant and who appeared to be evasive, especially on cross-examination, in the light of Dolsey's testimony, the earlier admissions of Saporito regarding his intentions not to be examined and the overall circumstances surrounding the visit to the physician's office, one cannot come to any other rational conclusion. Saporito, true to his

earlier word, went to "see" the doctor but not to be examined, and, in fact, refused to be examined. To come to any other conclusion would require a sort of sophistry with which I am not familiar. Complainant's argument that the examination was part of a conspiracy has no probative basis in the record.

Ultimate Findings and Conclusion

I conclude, therefore, that Complainant has failed to present a prima facie case. The actions taken against Complainant by FPL and its management personnel were a result of his contentiousness and recalcitrance as an employee. Saporito's discharge resulted solely from his crossing the line from contentiousness and recalcitrance into the area of insubordinaton. Furthermore, the insubordination impacted on the Site Vice President's grave responsibility to assure that the nuclear facility over which he holds jurisdiction operates safely. I was impressed by how solemnly this responsibility is shared by the other employees, both union and non-union, who testified.

For the foregoing reasons, it is Ordered that the complaints be Denied.

Anthony J. Iacobo

ANTHONY J. IACOBO
Administrative Law Judge

Dated: June 30, 1989

Boston, Massachusetts

AJI/maq

U.S. Department of Labor

Office of Administrative Law Judges
Mercedes City Center
200 S Andrews Avenue, Suite 605
Ft. Lauderdale, FL 33301

Date: November 6, 1990

IN THE MATTER OF:

THOMAS J. SAPORITO,
Complainant,

CASE NO.: 90-ERA-0027

v.

FLORIDA POWER AND LIGHT COMPANY,
Respondent;

and

THOMAS J. SAPORITO,
Complainant,

CASE NO.: 90-ERA-0047

v.

ATI CAREER TRAINING CENTER, and
FLORIDA POWER & LIGHT COMPANY,
Respondents.

Appearances:

BILLIE PIRNER GARDE, ESQ.
For the Claimant

JAMES S. BRAMNICK, ESQ. and
PAUL C. HEIDMANN, ESQ.
For the Respondents

BEFORE: E. EARL THOMAS
District Chief Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (hereinafter "ERA" or the "Act") and the implementing regulations set forth at 29 C.F.R. Part 24. These provisions, commonly known as the "whistleblower" provisions, protect employees against discrimination in employment for attempting to implement the purposes of the ERA and the Atomic Energy Act, as amended, found at 42 U.S.C. 2011 et seq. A hearing was held in Fort

Lauderdale, Florida on August 21 and 22, 1990 and all parties were afforded full opportunity to present evidence and legal argument. Briefs were received in this Office from Complainant and Respondent, Florida Power and Light Company (hereinafter "FPL"). Respondent, ATI Career Training Center (hereinafter "ATI") did not submit a post-hearing brief but instead relied upon the assertions contained in FPL's document.

STATEMENT OF THE CASE

These cases stem from complaints dated March 14, 1990 (90-ERA-27) and May 11, 1990 (90-ERA-47), as amended, by Mr. Thomas J. Saporito, Jr. against FPL and ATI for harassment and discriminatory conduct in violation of the Act. The initial complaint, brought solely against FPL, alleged that Mr. Saporito was the subject of an ongoing practice and pattern of intimidation and harassment through "blacklisting" designed to discourage him and others from participating in protected activities. Specifically, Complainant alleged that he was placed in an "embarrassing and intimidating position before his employer (ATI)" when an attorney for FPL forwarded an employment verification letter to the school. The purpose of this letter was to determine whether Mr. Saporito worked in Miami. The correspondence was sent in connection with a proceeding before the United States Nuclear Regulatory Commission, Atomic Safety and Licensing Board (hereinafter "NRC" and "ASLB", respectively) regarding licensing of FPL's Turkey Point plant in which Complainant sought to intervene. Further, the complaint alleged that a comment which an FPL spokesperson had made to a local newspaper reporter was discriminatory and jeopardized Mr. Saporito's procurement of future employment.

Complainant amended his initial complaint, by letter to the United States Department of Labor (hereinafter "DOL"), on March 27, 1990. Therein, he stated that he had received a second letter from FPL's attorney, which had been copied to ATI, outlining the reasons for the original inquiry. Mr. Saporito believed that this letter was an additional instance of intimidation.

Mr. Saporito further supplemented his March 14th complaint to the DOL on March 30, 1990. In this correspondence, Complainant alleged that he had been bypassed for an afternoon teaching position at ATI as a direct result of FPL's actions; thus, he maintained FPL was continuing an existing pattern of harassment.

After an initial investigation by the DOL Wage and Hour Division, the agency concluded, on April 2, 1990, that no violation of the ERA had occurred. Accordingly, Mr. Saporito's original petition was denied. Complainant timely appealed that determination and requested a de novo public hearing.

Complainant's second complaint, dated May 11, 1990, was filed against both FPL and ATI. In that complaint, Mr. Saporito alleged that he was terminated by ATI in May, 1990 due to the previously referenced correspondence issued by FPL in March. It is to be noted that Complainant was proceeding pro se until this point.

On June 4, 1990, the DOL issued its decision with respect to Complainant's second cause of action. Again, the Wage and Hour Division determined that no violation of the Act had been substantiated. Mr. Saporito timely appealed that determination as well.

Complainant's two complaints were consolidated for hearing by Order of Consolidation dated June 11, 1990. Thereafter, the matter was referred to the Office of Administrative Law Judges for adjudication. The exhibits proffered at the hearing, along with the hearing transcript, comprise the record herein.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND

Mr. Saporito was employed by FPL, a private utility company, from March, 1982 until his discharge on December 22, 1988. While Complainant challenged the validity of this termination under the Act, Administrative Law Judge Anthony J. Iacobo determined in his Recommended Decision and Order of June 30, 1989 that Mr. Saporito was properly discharged for insubordination. The reasons found to uphold the termination were three-fold; namely, Complainant's refusal to divulge safety concerns to FPL management; Complainant's refusal to holdover to attend a meeting scheduled by his supervisors; and Complainant's refusal to submit to a physical examination by a licensed physician chosen by FPL. This decision was appealed by Mr. Saporito and is currently pending before the Secretary of Labor.

Prior to his discharge, Complainant worked at FPL's Turkey Point Nuclear Power Plant (hereinafter "Turkey Point") near Homestead, Florida. He resides in Jupiter, Florida which Judge Iacobo judicially noticed as a distance in excess of 100 miles from the facility. Complainant obviously had great concern regarding safety conditions at Turkey Point as he initiated

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1/ The following abbreviations will be used when citing to the record in this matter: "RX" for Respondent's Exhibits; "CX" for Complainant's Exhibits and "TR" for Hearing Transcript.

contact with the NRC regarding alleged safety violations at the plant in 1988. Moreover, Mr. Saporito has continuously maintained this contact, ostensibly to provide a conduit between FPL nuclear power employees and the NRC.

On December 5, 1988, Complainant sent information to the NRC detailing eighty-two alleged safety violations at Turkey Point. As a result of the allegations, the NRC deployed an investigative team to the plant to determine the validity of Mr. Saporito's concerns. Of the eighty-two allegations raised, the NRC team determined that thirty-nine were unsubstantiated, thirty-one were at least partially substantiated but had "little or no safety significance," and the remaining twelve had been previously identified by FPL and the proper corrective actions had already been taken. This investigation received a great deal of publicity within the community through the local media.

On December 14, 1989, Complainant secured a part-time teaching position at ATI in Miami, Florida. ATI is a technical school, offering courses in electronics, air conditioning/refrigeration, computer-assisted design and other related subjects. ATI is headquartered in Dallas, Texas and is accredited by the National Association of Trade and Technical Schools (hereinafter "NATTS"). The Miami school operates on a system of ten-week quarters and employs approximately twenty to thirty instructors to teach a three hundred forty member student body.

Complainant was so employed, teaching an evening class in digital electronics, from the date of his hiring until he was discharged on May 10, 1990. Mr. Saporito was hired by Randall Withers, Director of Education at ATI until mid-April, 1990. Dr. Peter Diaz subsequently replaced Mr. Withers. Both Mr. Withers and Dr. Diaz reported to Mark Gutmann, the Director of the school. As Director, Mr. Gutmann oversees all operations at the school but does not become involved in the day-to-day management of the various departments unless a problem arises. According to both Mr. Gutmann and Dr. Diaz, who had control over hiring and termination within his area, Complainant was discharged due to his poor attitude and because he was not a "team player." Mr. Saporito, on the other hand, contends he was discharged solely on the basis of his participation in protected activities under the Act.

A. The Golden Comment

In October, 1989, Complainant formed an environmental organization known as the Nuclear Energy Accountability Project (hereinafter "NEAP"). Complainant is the President, Treasurer and Executive Director of NEAP as well as Editor of the group's

newsletter. The purpose of this organization is to "ensure that the nuclear power plants in Florida operate safely and in full compliance with federal regulations."

On February 14, 1990, Complainant, in his capacity as Executive Director of NEAP, requested the NRC investigate an allegation that a quality control inspector, Steven E. Kennedy, was resigning from FPL because he was "being forced to sign-off safety related documents for parts and equipment which he had not inspected." In addition to forwarding the allegations to the NRC, Complainant released the allegations to "all media sources." According to Mr. Saporito, he took that action because it is "his policy (and the policy of NEAP) to hold... government representatives as well as the utilities accountable to the public for actions that have an impact on public health and safety." By coping the allegations to the media, he would be ensured the NRC adequately investigated his concerns.

The following day, February 15, 1990, The Miami Herald published a story based on Mr. Saporito's letter. The article stated that the NRC was investigating allegations that Steven Kennedy, an FPL inspector, had "resigned because he was ordered to falsify safety inspection reports."

On February 16, 1990, Mr. Kennedy wrote a letter to the NRC refuting the allegations Complainant had raised in his February 14, 1990 letter.[2] Kennedy stated, inter alia,:

2/ Complainant apparently questions the authenticity of this letter. In his post-hearing brief, he states "although it is not disputed... that Steven E. Kennedy authored the rebuttal letter..., it is clear,... that the origin of the letter is in question... The fact... that the letter was distributed to the media by FPL on the same day it was authored raises the legitimate question of how, and why the letter was generated. An employee reading the article might well assume that if a safety concern was raised, FPL had within its power the tools to create real problems for the alleger regardless of the merits of the allegation, enough to get an employee to issue a rebuttal for use by FPL against the Complainant." Complainant has offered no objective evidence to support such a contention. Indeed, the Court has not found an iota of evidence in the record to cast doubt on the authenticity of authorship or the motivation behind such correspondence. Accordingly, the letter in question is found to be the work, and solely the work, of Mr. Steven E. Kennedy.

> According to recent news items, a self proclaimed nuclear "watch-dog" group issued a letter to the Nuclear Regulatory Commission that was very misleading and in many respects totally false. In the past, I have doubted the credibility of this group and their actions in this case reinforces this belief. I was not contacted by them and I consider the letter which they sent to the NRC to be documented evidence of their irresponsibility. They have done a disservice to myself, Florida Power and Light Co., and the public in general.

This statement, like many others in this case, was distributed to the local media, particularly newspapers in Palm Beach, Broward and Dade Counties. Charles Elmore, a reporter with the Palm Beach Post, contacted both Complainant and FPL for comment on Mr. Kennedy's letter. Mr. Saporito stated that "there's a cloud hanging over this whole investigation." Ray Golden, FPL's Communication's Coordinator, said "finally this may be one more nail in Saporito's coffin." Mr. Golden testified that he believed his comment to be an off-the-record response to a request for his personal opinion. Both statements were published in the February 17, 1990 edition of the Palm Beach Post.

After publication of Mr. Golden's remark, Complainant states that he felt "humiliated and embarrassed" because the paper is widely distributed in the area in which he, his family and other FPL employees reside. Further, he believed that Mr. Golden's comment "discredited him and undermined the work he was doing to protect public health and safety." To support this contention, Claimant asserts that since the "nail in the coffin" statement was published, workers at FPL nuclear facilities have been much more reluctant to make their safety concerns known to him, resulting in this "channel of information to the NRC drying up."

FPL maintains that Mr. Golden's statement addressed Complainant's credibility with the NRC solely. Mr. Golden "meant that by Complainant's own actions, Complainant's credibility with the NRC may be waning." Indeed, Respondent cites Judge Iacobo's determination that Complainant had been discharged for insubordination and the fact that the NRC's investigative team failed to substantiate a number of Complainant's safety allegations at Turkey Point as the other "nails" addressing Mr. Saporito's credibility.

B. The Butler Letters

Subsequent to Mr. Saporito's dismissal from FPL but prior to the Golden comment, Complainant had sought to intervene, on his own behalf as well as NEAP's, in an ASLB proceeding regarding

amendments to the technical specifications for two nuclear generating units at Turkey Point. He filed a petition to intervene on December 27, 1989. In January, 1990, both FPL and the NRC filed motions opposing Complainant's petition on the ground that Complainant lacked the requisite standing to intervene as he neither lived nor worked within the NRC's fifty-mile "zone of interest." Briefly, the NRC's rule states that an intervenor must either work or reside within fifty miles of the nuclear power plant to meet the standing requirement. On March 5, 1990, Complainant filed an amended petition to intervene in the ASLB proceeding. He attached an affidavit stating the location of his job at ATI and his hours of employ with the school to establish his compliance with the fifty-mile rule.

John T. Bulter, a partner in the law firm of Steel, Hector & Davis in Miami, and Harold Reis, a partner in the law firm of Newman & Holtzinger, P.C., in Washington, D.C., were co-counsel for FPL in the ASLB proceeding. On or about March 6, 1990, they decided to verify the information in Complainant's affidavit as the question of Mr. Saporito's standing was of great import to the ASLB proceeding.

Mr. Butler and Mr. Reis discussed various methods, ranging from a telephone call to a deposition, to verify these facts. They settled on mailing a letter to ATI as it would provide them with written documentation of the contact. Further, they decided to send Complainant a copy of the letter. The correspondence, signed by Mr. Butler, requested ATI verify the employment-related statements which Complainant had proffered in his affidavit.

On March 8, 1990, Mr. Gutmann received Mr. Butler's letter. Mr. Gutmann testified that he did not "pay much attention" to the letter as he routinely receives salary and employment verification requests. Consistent with his policy, Mr. Gutmann informed Mr. Saporito of the inquiry and told him that he was going to confirm that Complainant was employed at ATI. Complainant told Mr. Gutmann that it was "okay" to respond. Mr. Gutmann stated that he did not believe that Complainant was embarrassed or concerned about the letter at the time. He also did not find the correspondence to be intimidating, hostile, coercive or unprofessional. Moreover, Mr. Gutmann did not believe the letter to be of particular significance to warrant discussion with anyone else at the school. Mr. Gutmann telephoned Mr. Butler on March 9, 1990 and confirmed Complainant's employment with ATI. Upon confirmation, FPL withdrew its challenge to Complainant's standing.

On the same day as the Gutmann-Butler telephone conversation, Complainant wrote the NRC alleging that the March 7, 1990 letter from Mr. Butler placed him in an "embarrassing and intimidating position before his employer." He further claimed that it was "totally out of line and unethical

and unprofessional and represents an unwarranted attack of Mr. Saporito's integrity and privacy." Complainant provided Mr. Butler with a copy of his correspondence. Mr. Butler testified that he was "surprised" by Complainant's response as he felt the letter to ATI was innocuous. On March 19, 1990, Mr. Butler and Mr. Reis drafted a letter to Complainant which they copied to ATI. Therein, Mr. Butler stated that he regretted that Complainant found his initial correspondence threatening or coercive and that its sole purpose was to verify the facts relating to the standing issue.

Subsequently, the ASLB addressed Complainant's assertion that he felt intimidated by Mr. Butler's letters. In a Memorandum and Order dated April 24, 1990, the ASLB stated the following: "[Mr. Saporito] has not persuaded the Board that there is any valid reason for his serious charge of intimidation." With respect to Mr. Butler's first letter, the ASLB stated, inter alia:

> We have examined that letter [to ATI] and have concluded that it was a simple factual inquiry for the purpose of confirming facts concerning Mr. Saporito's employment. There is nothing in the letter that we consider to be intimidating. Indeed, all the letter may have done with respect to Mr. Saporito's employment relationship is to bring to the employer's attention, in a neutral manner, a fact that is common knowledge and that Mr. Saporito reasonably must have expected his employer to learn during the course of this litigation: that Mr. Saporito is involved in a case affecting Florida Power and Light...

Complainant then amended his complaint, on March 27, 1990, to include the allegation that FPL continued to harass, intimidate and embarrass him before his employer by copying the letter of apology to ATI. The ASLB also commented on Mr. Butler's second letter. The ASLB stated that while there did not appear to be "any strong reason" for Butler to send a copy of that letter to ATI, Butler may have felt "that the letter would reassure the employer about there being no coercive intent [behind the first letter] and we find that the routine copying of that letter does not, by itself, demonstrate coercion to this Board."

C. Complainant's Employment Relationship with ATI

As previously noted, Mr. Saporito was employed as a part-time instructor on December 14, 1989. He was hired by Mr. Withers, who was then the school's Director of Education, and worked approximately twenty hours a week. Mr. Saporito taught a class in digital electronics from 6:00 p.m. until 11:00 p.m., Monday through Thursday. Mr. Withers, and subsequently Dr. Diaz, was his immediate supervisor.

Beginning in January, 1990, problems arose between Complainant and the school's administration. Mr. Saporito testified that he had difficulty obtaining teaching supplies from Mr. Withers. Notably, he stated that this was a problem prior to the Butler letters as well as afterward. He also had trouble obtaining supplies from Dr. Diaz.

In late March, 1990, two instructors left ATI during the quarter. One of those instructors, Calvin Gatewood, taught an afternoon class in semi-conductor electronics. There was also a paid assistant instructor assigned to that class, Jorge Jorge. Mr. Gatewood had not informed Mr. Withers that he was leaving ATI's employ. Indeed, there was a four-day period during which Mr. Withers thought Mr. Gatewood was absent due to illness. During that period of time, Mr. Withers had Mr. Jorge teach the class. Mr. Withers sat in on the class and observed that Mr. Jorge was doing a fine job. Moreover, the class had accepted him. Mr. Withers then learned that Mr. Gatewood was leaving.

Complainant spoke to Mr. Withers about filling the vacancy created by Mr. Gatewood's departure. Complainant wanted the position so that he could teach full-time. Mr. Withers decided not to assign Complainant to the class because he felt that Mr. Gatewood's departure was disruptive and did not wish to disturb the class further by introducing a new instructor. Therefore, he decided to replace Mr. Gatewood with Mr. Jorge. At the hearing, Complainant stated that he was bypassed for the position vacated by Mr. Gatewood as a result of the Butler letters.

At the end of the month, Mr. Gutmann received another written request to verify that Complainant worked at ATI. The request was from a mortgage company. In response to one question on the form, Mr. Gutmann wrote that the probability of Complainant's continued employment at ATI was "excellent." Mr. Gutmann completed the form on March 29, 1990, after he had received the Butler letters.

In addition to Mr. Gatewood leaving ATI in the midst of the spring quarter, Mr. Withers also departed. Mr. Withers left on Friday, April 20, 1990 and his replacement, Dr. Diaz, began working for ATI on Tuesday, April 17, 1990. During Mr. Withers' last days at ATI, he tried to organize a tentative schedule for the instructional staff for the next quarter. He needed someone who could teach microprocessors. Mr. Withers had a brief conversation with Complainant in which he asked him whether he was able to teach that material and whether he was available to teach in the afternoon during the upcoming quarter. Complainant responded that he was able and available. Mr. Withers advised

Mr. Gutmann that Complainant was available to teach microprocessors in the afternoon for the next quarter. Mr. Gutmann subsequently offered Complainant the position; however, he intended to reserve final approval on the totality of the tentative schedule to Dr. Diaz.

Shortly after Dr. Diaz's arrival, Mr. Gutmann held a staff meeting to introduce Dr. Diaz to the faculty of the school. At the meeting, Dr. Diaz testified that Complainant displayed a negative attitude towards him. Mr. Saporito denies this assertion. Dr. Diaz also stated that the remainder of the staff was upbeat and positive about his appointment.

Prior to the meeting, Mr. Gutmann discovered a letter written by Complainant on his desk. The letter addressed various complaints that Mr. Saporito had with the school. Namely, Complainant found ATI's curriculum to be inconsistent, student supplies deficient, lab equipment outdated and poorly maintained, instructional materials scarce and classroom boards dirty. Mr. Saporito sent a copy of this letter to ATI headquarters in Dallas and to the Executive Director of NATTS. Mr. Gutmann met with Complainant and asked him to draft a letter to NATTS informing them that ATI was resolving his concerns. Complainant so wrote the accrediting agency and copied the correspondence to Mr. Gutmann and the ATI headquarters. Apparently, both parties believed they could "work out their differences."

On April 23, 1990, Mr. Gutmann held a meeting with Dr. Diaz and Complainant to discuss Complainant's letter. At that meeting, Mr. Gutmann confirmed his offer to Complainant to teach both afternoon and evening classes, thus a full-time position, during the school's next quarter. At this point, Dr. Diaz made no objection to Complainant's appointment. Additionally, Dr. Diaz testified that as of the April 23rd meeting, he was unaware of Complainant's involvement in proceedings with FPL.

Dr. Diaz conducted his first staff meeting at the end of that week or early the following week. He testified that Complainant's attitude at the meeting was poor. Dr. Diaz reached the decision that Mr. Saporito had to be replaced. Sometime after April 23, 1990 and before May 7, 1990, the date on which Mr. Gutmann received a deposition subpoena in connection with this proceeding, Dr. Diaz approached Mr. Gutmann and told him that he was going to discharge Complainant. Dr. Diaz told Mr. Gutmann that he was very unhappy with Complainant and that he did not want Complainant on his staff. Mr. Gutmann reiterated that it was Dr. Diaz's decision as long as he had a replacement for Complainant. Both administrators decided to allow Complainant to finish the quarter before discharging him. Accordingly, Dr. Diaz waited until May 10, 1990 to terminate Complainant. Concomitant with the discharge, Dr. Diaz offered to write letters of recommendation for Complainant.

A factual dispute exists as to the language utilized by Dr. Diaz during the discharge meeting. Complainant testified that at the meeting, Dr. Diaz told him that he had been "directed to terminate Complainant by Mr. Gutmann because Mr. Gutmann did not want ATI involved with litigation involving FPL and DOL." Dr. Diaz denied making any such statement. Dr. Diaz testified that he told Complainant that he would not be needing him the next quarter because Complainant was not a "team player" and he did not want him as part of his staff.

Approximately one week after the discharge meeting, Complainant sent a letter to Dr. Diaz requesting that he write letters of recommendation for two prospective employers. Dr. Diaz sent the requested letters and mailed copies of them to Complainant. The body of those letters was identical. The letters stated, inter alia, that Complainant "always came to class prepared and his paperwork was impeccable. Mr. Saporito possesses outstanding organizational skills and is in my experience dependable and punctual." No other contact was made between the parties until discovery procedures were initiated in context of this proceeding.

II. STATEMENT OF THE LAW

A. Issues

The issues presented herein are basically two:

(1) Was the comment by an FPL's spokesperson inherently discriminatory conduct subjecting FPL to the Act's mandates; and

(2) Did the Butler letters amount to blacklisting in violation of the ERA and cause Complainant's termination from ATI.

B. Establishing a Prima Facie Case

To sustain a discrimination claim under the Whistleblower Protection Provision of the Energy Reorganization Act, the Complainant must prove, by a preponderance of the evidence, that:

(1) the party charged with discrimination is an employer subject to the Act;

(2) the complainant was an employee under the Act;

(3) the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;

(4) the employee engaged in protected activity;

(5) the employer knew or had knowledge that the employee engaged in protected activity; and

(6) the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.[3]

Once the complainant establishes a prima facie case, the burden of proof shifts to the respondent to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.[4]

III. JURISDICTION

This case was brought under the Employee Protection Provision of 42 U.S.C. § 5851. The statute provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a

3/ DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); Ledford v. Baltimore Gas & Electric Co., 83 ERA 9, slip op. ALJ at 9 (Nov. 29, 1983), adopted by SOL.

4/ Ashcraft v. University of Cincinnati, 83 ERA 7, slip op. of SOL at 12-13 (Nov. 1, 1984); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1164 (9th Cir. 1984); Consolidated Edison of N.Y., Inc. v. Donovan, 673 F.2d 61, 62 (2nd Cir. 1982).

> proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 et seq.].

For this tribunal to exercise jurisdiction over a claim it must first be determined that the participants in the cause of action fall within the scope of the Act's provisions. In the instant case, the Court must determine whether ATI and FPL are "employers" subject to the Act and whether Mr. Saporito is an "employee" entitled to the ERA's protections.

A. ATI as Employer

An employer is defined as "a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant..." The undersigned first turns to ATI. Complainant maintains that ATI falls within the ERA's definition of an employer because the Congressional intent behind the Act was for it to be "liberally construed" to effectuate its remedial purpose. Complainant cites a National Labor Relations Act (hereinafter "NLRA") case where a bank was held to be an employer because its conduct tended to discourage unionization, even though the action was not directed at the bank's employees. See, Seattle-First National Bank v. NLRB, 651 F.2d 1272 (9th Cir. 1980). While the Court agrees that the Act should be construed broadly and that NLRA case law is to be referenced for guidance in this area, these concepts cannot be employed to extend coverage beyond the plain meaning of the ERA.

ATI neither operates a nuclear power plant on its own behalf or under contract from any other entity nor is it an applicant for any such license. Further, ATI maintains no special relationship with FPL. While a limited number of ATI graduates may eventually be employed at FPL, there exists no recruitment program between the two organizations. It appears to this Office that the sole contact between the corporate entities, prior to this proceeding, was the sale and purchase of electricity.

The language of the Act appears definite on its face. ATI's activities do not place the school within the realm of the definitional terms set forth in 42 U.S.C. § 5851. Moreover, the legislative history relating to the employee protection provision of the ERA indicates that the word "employer" refers to entities related to nuclear power plants either by contract or license from the NRC. Notably, the Congressional records addressing this legislation describe the whistleblower provision as "provid[ing] protection to employees of Commission licensees, applicants, contractors, or subcontractors..." See, H.R. Conf. Rep. No. 95-

1796, 95th Cong., 2nd Sess. 16 (1978), reprinted in [1978] U.S. Code Cong. & Admin. News 7303. Accordingly, ATI is not an employer within the meaning of the Act; therefore, this Court lacks jurisdiction to decide Complainant's claim against ATI.

B. FPL as Employer

The Court next addresses FPL's availability for suit under the ERA. It is beyond doubt that FPL fits squarely within the Act's definition of a covered employer. What remains questionable, however, is whether FPL, through its actions, subjected itself to the ERA's provisions after Mr. Saporito left its employ.

Case law has established that an employer is capable of discrimination, thus subject to the Act, even though the individual discriminated against is not its employee. Young v. Philadelphia Electric Co., 87 ERA 11, 88 ERA 1 (February 4, 1988). Indeed, in Hill v. Tennessee Valley Authority, 87 ERA 23 (May 24, 1989), the Secretary of Labor held that the language of the Act "is not limited in terms to discharges or discrimination against any specific employer's employees, nor to "his" or "its" employees." However, the Secretary also noted that "this ruling is limited to the narrow facts and circumstances here presented. There is no occasion here to decide whether other employees, differently situated, could seek the Act's protection from alleged discrimination." Nonetheless, a former employer was found liable, under a continuing violation theory, for discriminating against a former employee. Egenrieder v. Metropolitan Edison Co., 85 ERA 23 (April 20, 1987). The Egenrieder case held, however, that the basis for this ruling was the determination that the former employee had been "blacklisted" from employment with other nuclear facilities by the respondent. In the instant case, for FPL to be subject to the Act's provisions, it must be found to have discriminated against Complainant through continuing discriminatory acts, specifically, through the alleged means of blacklisting.

C. Complainant as Employee

The determination of whether Mr. Saporito is a covered employee under the Act goes hand-in-hand with a decision regarding FPL's status under the ERA. Complainant may only be deemed an employee of FPL if it is established that FPL engaged in discriminatory conduct against him. See, Hill, supra. Thus, to determine whether this Court may rule in this instance, it must first be established that FPL engaged in ongoing discriminatory conduct against Mr. Saporito in violation of the Act.

IV. THE QUESTION OF DISCRIMINATION

A. The Two Events Giving Rise to the Claim

The case at bar is not a typical whistleblower claim where an employee of an NRC licensee blew the whistle on his employer and the employer subsequently discharged the employee. While FPL is a licensee of the NRC, the events giving rise to this cause of action occurred after Complainant and FPL had terminated their professional relationship. [illegible] Complainant maintains that he has been discriminated against by Respondents through their conduct toward Complainant as evidenced by two specific acts. Initially, Mr. Saporito contends that the comment by FPL's spokesperson, Ray Golden, in the Palm Beach Post is inherently discriminatory conduct in violation of the Act. Secondly, Complainant states that the employment verification letters sent by FPL's counsel to ATI, in connection with the ASLB proceeding, "interfered with the terms and conditions of his employment with ATI." Thus, as a former employer, FPL blacklisted Complainant causing his eventual discharge from ATI. Complainant believes these actions were taken as a result of his participation in protected activities. Specifically, Mr. Saporito alleges that his actions of reporting his safety concerns about FPL's Turkey Point plant to the NRC and his petition to intervene in an FPL licensing proceeding form the foundation for those alleged discriminatory practices. This Office must review each of these incidents separately to decide whether Complainant has established a prima facie case under the ERA.

B. The Golden Comment

One of the focal issues in dispute herein is whether the "nail in the coffin" statement by Ray Golden, as published in the Palm Beach Post, constituted an act of inherently discriminatory conduct. Conduct is regarded as inherently discriminatory if the natural consequence of the action is to encourage or discourage certain conduct on the part of an employee. NLRB v. Erie Register Corp., 373 U.S. 221 (1963). If actions are so deemed, the employer is held to have intended the foreseeable consequences of its actions and specific proof of discriminatory intent is not required.

In the instant case, the comment, attributable to FPL by the nature of Mr. Golden's employment as Communications Coordinator, arose from a series of events culminating in Steven Kennedy's resignation from FPL. As previously noted, Complainant forwarded correspondence to the NRC stating that Mr. Kennedy resigned because he was being forced to "sign off" on parts and equipment he had not inspected. Mr. Saporito additionally copied

this letter to the local media. Subsequently, Mr. Kennedy publicly refuted Complainant's assertions regarding his resignation. Charles Elmore, a reporter with the Palm Beach Post, contacted Mr. Golden and Complainant about the matter. Both parties resorted to cliche's to express their opinions. Mr. Saporito stated there was a "cloud hanging over the whole investigation;" Mr. Golden said that Mr. Kennedy's refutation of Complainant's allegation "finally... may be one more nail in his coffin."

Complainant asserts that the nature of the comment reveals animus toward Complainant and his activities. It sends a message that those who utilize Complainant as a conduit of information to the NRC are subject to similar treatment. Further, Complainant maintains that this animus is directed to the activities of Complainant protected by the Act. As proof of these allegations, Mr. Saporito states that the Golden Comment has had a chilling effect on FPL employees as employee contact with Complainant has decreased significantly since the statement's publication. Since this communication has produced a chilling effect, according to Complainant, it is inherently discriminatory. Therefore, Mr. Saporito is under no legal obligation to establish a discriminatory intent on the part of FPL.

The Court cannot agree with this assertion. The "nail in the coffin" comment speaks to Complainant's credibility, not to his engagement in protected activity. Given the nature of the contact between Complainant and FPL to that point, it appears reasonable that FPL would have cause to question Mr. Saporito's believeability. This lack of credibility, and possible decrease in FPL employee contact with Complainant, cannot rest with FPL. Mr. Saporito's own conduct, as evidenced by his discharge from FPL for insubordination and Mr. Kennedy's refutation, can only be blamed for any loss of contact with employees at FPL. Notably, Complainant proffered no proof of this alleged chilling effect. He failed to call a single FPL employee to testify at the hearing, nor were any affidavits or depositions of FPL employees contained in the record corroborating Mr. Saporito's claim.

Additionally, this comment does not reveal particular animus towards Complainant. Rather, it appears to be a somewhat innocuous statement addressing Mr. Saporito's credibility. Complainant's credibility is certainly germane to FPL as he is an intervener in their ASLB proceeding. While Mr. Golden could have refrained from an "off-the-cuff" comment, his statement speaks only to FPL's perception of Complainant's credibility.

Complainant notes that his allegations were raised in good faith, although the majority of his concerns were unsubstantiated. He further maintains that FPL "has no qualms

about publicly humiliating employees who raise safety concerns" and that FPL, through the Golden Comment, sent a message to employees that "they better be right if they are going to the NRC." The evidence belies such a finding. While it is true that an employee is not required to show that he disclosed unique evidence to the NRC, or evidence that an employer attempted to hide in order to establish a case under the ERA, the alleged retribution for this action must be supported by the record. DeFord, supra at 286. That showing has not been made here. Respondents have not questioned, and there appears no reason to question, Complainant's good faith in raising safety allegations. However, a zealous belief in unsubstantiated concerns cannot be formed into a viable complaint by reading more into a comment than exists. Accordingly, the Court finds that the Golden Comment was neither inherently discriminatory nor a violation of the ERA.

Respondents maintain that if the Golden comment is viewed as substantial, it is protected by FPL's First Amendment right to free speech. Both parties to this cause of action are free to exercise their rights of free speech; moreover, were this proceeding grounded in defamation, Mr. Saporito's status as a public figure would require clarification. However, as the Court has ruled that the Golden Comment is not a violation of 42 U.S.C. § 5851, the statute in question, a discussion of any First Amendment ramifications of the Golden Comment is unwarranted and beyond the scope of this tribunal.

C. The Butler Letters

1. Discriminatory Intent

The second significant area of dispute revolves around the letters sent to ATI by John Butler, counsel for FPL in the ASLB proceeding, regarding verification of Complainant's employment at ATI. Complainant maintains FPL's motivation for these letters was an intent to "intimidate, threaten, restrain, coerce, blacklist, discharge or... discriminate" against Complainant for his involvement in protected activities. Moreover, Mr. Saporito asserts his termination by ATI was caused by, and in the spirit of, this discriminatory intent.

Discriminatory intent or retaliatory motive is a legal conclusion provable by circumstantial evidence although there exists testimony to the contrary by a witness who perceived a lack of improper motive. Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563 (8th Cir. 1980), cert. den'd., 405 U.S. 1040 (1981). Several methods, such as anger toward Complainant's protected conduct and a suspicious sequence of events surrounding the employees conduct, may serve to establish the requisite

discriminatory motive in whistleblower claims.[5] Complainant notes the Golden Comment as the instance of FPL's animosity toward Complainant's protected activity and the events surrounding the Butler letters, as well as the letters themselves, as suspicious. Since the undersigned has previously addressed the Golden Comment, there exists no cause to reiterate the Court's finding except to note that the "nail in the coffin" statement does not reflect animosity toward Mr. Saporito's participation in protected activities.

Addressing the Butler letters, the undersigned finds that FPL had a legitimate interest in verifying Complainant's employment with ATI. Mr. Saporito sought to intervene in an ASLB proceeding regarding FPL's Turkey Point facility. The question of his standing was pivotal to his availability to intervene. He sought to establish that standing through his employment at ATI. In addition, the method FPL chose to corroborate Mr. Saporito's affidavit was reasonable under the circumstances. The letters in question were merely a verification of information request and a letter of apology. While the same employment information could have been garnered vocally, it is not unreasonable for FPL to prefer to have written documentation. The language of both the initial inquiry and the subsequent apology were not coercive, intimidating or threatening. Indeed, the correspondence appears direct and professional.

Complainant contends that the letters were "carefully written and edited to affect Complainant's standing in the licensing proceedings by effecting his employment at ATI." Mr. Saporito cites that since two partners at two law firms drafted the employment verification letter, there must exist some "end" they sought to achieve. Particularly, he proffers that this letter intended to "plant a seed of doubt" by informing ATI that one of their employees was involved in a major legal proceeding with FPL over its nuclear plant. Further, Complainant maintains the second letter was copied to ATI to "nourish the seed" by reminding the school of Complainant's involvement with FPL and to inform them that they too were involved.

Again, the Court is unpersuaded by this argument. The sequence of events surrounding the Butler letters suggests no discriminatory intent or retaliatory motive. Indeed, the evidence as a whole does not support such a conclusion. It does not appear unreasonable that in an ASLB proceeding, a matter of considerable import to FPL, that two attorneys would be utilized in that particular proceeding. Further, as Complainant's

5/ See, Lewis Grocer Co. v. Holloway, 874 F.2d 1008 (5th Cir. 1989); Simmons v. Simmons Industries, Inc., No. 87 TSC 2 (July 14, 1988).

assertion that he worked within the fifty-mile "zone of interest" was focal to his availability to intervene in the hearing, the verification letter was important to the proceeding as a whole. Collaboration between two attorneys employed by the same client does not automatically give rise to a discriminatory intent. Complainant offered no objective evidence, circumstantial or otherwise, to establish that FPL discriminated against him through the Butler letters as retaliation for his participation in the ASLB proceeding.

2. Blacklisting

Concomitant with this assertion is Complainant's allegation that FPL blacklisted him through the Butler letters. Blacklisting is defined as:

> A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as where a trades-union "blacklists" workmen who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association.

Black's Law Dictionary (5th Ed. 1983).

Since blacklisting, by its very nature, is a continuing course of conduct, it may constitute a continuing violation if it is based upon an employees protected activity under the ERA. Egenrieder, supra, at 29. In the case at bar, the Butler letters do not fall within this definition. The initial letter, as previously noted, was solely an employment verification request. Upon confirmation of Complainant's employment at ATI, FPL withdrew its objection to his standing in the ASLB proceeding.

Mr. Butler's second letter, which was copied to ATI, does not constitute blacklisting either. The evidence of record suggests that the parties involved took little note of the apology. Significantly, the ASLB did not consider the letters to constitute blacklists. To establish a prima facie case under the ERA, Complainant must prove that FPL took adverse action against him because of his protected activities. The Butler letters, either under a theory of discriminatory intent or blacklisting, cannot sustain such a finding.

3. Attorney-Client Privilege and Work Product

With reference to Respondent's assertion that the Butler letters constituted work product and fell within the attorney-client privilege, the undersigned has previously addressed that issue. By Order dated August 9, 1990, this Office ruled that

since the nature of Complainant's allegations were directly correlated to the Butler letters, the attorney-client privilege was unavailable. Further, the work-product doctrine was only held applicable to Mr. Butler's mental impressions and litigation strategy. The letters themselves were not so covered. The Court finds no reason to deviate from this position at this juncture.

4. ATI's Termination of Complainant

Assuming, arguendo, that ATI is an employer within the meaning of the ERA, its actions in terminating Complainant must be scrutinized under the Act's mandates. The facts establish that Complainant was hired as a part-time teacher by ATI on December 14, 1989 and discharged on May 10, 1990. During his employment at ATI, several noteworthy events occurred between Mr. Saporito and the school's administration. Namely, on April 19, 1990, Complainant wrote a letter to Mark Gutmann, which he copied to ATI headquarters and NATTS, outlining areas of concern he had about the school. On April 21, 1990, Complainant authored a letter to NATTS, at Mr. Gutmann's behest, assuring the agency that his concerns were being addressed by ATI. Two days later, Complainant met with Mr. Gutmann and Dr. Peter Diaz, the recently hired Director of Education, to discuss the letter. At that time, Mr. Gutmann extended an offer to Complainant to become a full-time instructor. Notably, this offer was extended well after Mr. Gutmann had received and reviewed the Butler letters. After meeting with Mr. Saporito, Dr. Diaz, who controlled employment decisions within his department, decided to terminate Complainant. During the termination, on May 10, 1990, Dr. Diaz offered to write Complainant letters of recommendation for potential future employers.

Complainant maintains that his termination by ATI was motivated by the Butler letters. He alleged that after receipt of that correspondence, he was "treated differently" by ATI, denied teaching supplies, denied a position that became open during his tenure and eventually discharged. In support of this allegation, Complainant offered the testimony of A. Saumell, a former ATI student. Mr. Saumell testified that Complainant's appearance on television was known by the student body and his involvement in legal proceedings with FPL was discussed among ATI students. He further stated that he overhead a discussion between Dr. Diaz and Mr. Withers, the prior Director of Education, regarding FPL correspondence.

Mr. Saumell's testimony does not establish that ATI violated the Act. Initially, Mr. Saumell's testimony regarding the alleged conversation between Dr. Diaz and Mr. Withers is hearsay. Moreover, it was not offered for the truth of the matter asserted. As this Office is under federal jurisdiction, it is bound by those evidentiary rules. This testimony,

therefore, is accorded little probative weight. Had Mr. Saumell heard Mr. Withers mention FPL letters, his testimony did not establish that Mr. Withers was referring to the Butler letters. To the contrary, Mr. Saumell testified that he did not hear either Mr. Withers or Dr. Diaz refer to Complainant. Both Mr. Withers and Dr. Diaz testified that they never discussed Mr. Saporito. Additionally, Mr. Gutmann testified that neither Mr. Withers nor Dr. Diaz was aware of the Butler letters.

The timing of Mr. Saporito's termination from ATI offers no support to his claim. Case law has held that when an employee is terminated shortly after participating in protected activity, a presumption arises that the termination was the result of the employees conduct in engaging in protected activity.[6] However, this presumption is not raised in the instant case. While ATI was put on notice of Complainant's involvement in legal proceedings with FPL by the Butler letters and Mr. Gutmann's notice of deposition, the evidence has not shown that these events in any way influenced ATI's decision to discharge Mr. Saporito. Dr. Diaz, who solely possessed authority to discharge within his department, was not employed by ATI when Mr. Gutmann received the Butler letters. The record does not offer any definite evidence, other than Mr. Saporito's own testimony, that Dr. Diaz had knowledge of the existence of those letters. Additionally, Dr. Diaz testified that he had decided in April, 1990 to terminate Complainant but did not wish to do so until the end of the school's quarter in May. Dr. Diaz credibly testified that he terminated Mr. Saporito because he was not a "team player", as evidenced by his poor attitude and letter to ATI and NATTS, and because he personally disliked Complainant. The undersigned finds no reason to doubt Dr. Diaz's veracity.

The letters of recommendation Dr. Diaz wrote for Complainant are consistent with his testimony. Dr. Diaz stated that he believed Complainant to be punctual and well-prepared for class. The letters of recommendation reiterated those statements; they did not offer any opinion on Mr. Saporito's performance of his job duties. Moreover, it is not unlikely or illogical that Dr. Diaz would offer to write Complainant such letters of recommendation. Although Dr. Diaz did not wish to have Mr. Saporito in his employ, there exists no evidence suggesting that Dr. Diaz wanted to thwart Mr. Saporito's attempts to secure another position. Given the competitive nature of the current job market, the inability to produce a recommendation from a former employer could seriously harm Complainant's search for employment. If any inference can be read into the letters of recommendation, it can only be ATI's gesture of "good will" toward Mr. Saporito in his search for alternate employment.

6/ Priest v. Baldwin Assocs., 84 ERA 30 (June 11, 1986).

Accordingly, ATI's termination of Complainant was not a violation proscribed by the ERA. In addition, Complainant has failed to establish that the Butler letters played any part in that discharge. The letters lacked any discriminatory intent or retaliatory motive; they were merely an employment verification letter and an apology. They do not constitute an instance of blacklisting. Therefore, Complainant has not proven his prima facie case under the Act regarding the Butler letters.

V. RELIEF

The evidence submitted in connection with this claim has not persuaded the undersigned that this Office has appropriate jurisdiction to decide this matter. Assuming the undersigned possesses the requisite jurisdiction, this Court is still unable to fashion a remedy for Complainant as he has failed to establish a prima facie case against either ATI or FPL under 42 U.S.C. § 5851. ATI did not take any action against Complainant because of the Butler letters or because of any protected activity in which Complainant engaged. FPL's actions, specifically the Golden Comment and the Butler letters, were not adverse to Mr. Saporito within the meaning of the Act. Accordingly, Complainant's claim requires denial.

VI. ATTORNEY'S FEES, COSTS AND SANCTIONS

For sanctions to be imposed against an unsuccessful litigant, it must be shown that the individual pursued his claim in bad faith. Bad faith generally implies or involves

> actual or constructive fraud, or a design to mislead or deceive another... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. The term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity... it contemplates a state of mind affirmatively operating with furtive design or ill will.

Black's Law Dictionary (5th Ed. 1983). As applied to legal causes of action, the concept represents a bar against frivolous claims. See, Fed.R.Civ.P. 11.

In the case at bar, Respondents have not established that Complainant's claim was either frivolous or brought in bad faith. To the contrary, it is apparent from the record that Complainant and his counsel believed a viable claim existed. A ruling adverse to their position does not automatically warrant an award of attorney's fees, costs or sanctions. As the claim was

grounded in good faith yet unsuccessful, each party should bear their expense of this litigation.

RECOMMENDED ORDER

Consistent with the foregoing, it is hereby ORDERED that Complainant's complaint is hereby DENIED.

E. EARL THOMAS
District Chief Judge

EET/VB/pcc

Of course Staff must set a pass-fail mark at some point. However, Staff is not without flexibility in its administration of this program. Section 55.47 of the Regulations provides that Staff may waive examination and test requirements under certain circumstances. If, as appears to be the case, Mr. Ellingwood has satisfied all other requirements for an SRO's license, Staff may wish to consider whether waiving his 1.4% shortfall would be appropriate. Doing so would not only benefit Mr. Ellingwood, it would also save Staff the expense of administering another SRO's examination to him.

In consideration of the foregoing, it is ORDERED that:

1. Staff's proposed denial of Mr. Ellingwood's application for an SRO's license is sustained.

2. Pursuant to 10 C.F.R. §§2.1253, 2.1255, 2.762, and 2.763, Mr. Ellingwood may appeal this Initial Decision to the Atomic Safety and Licensing Appeal Board by filing a notice of appeal specifying the party appealing and the decision appealed within 10 days following service of this Initial Decision. If Mr. Ellingwood appeals, he must file a brief in support of his appeal within 30 days following the filing of his notice of appeal. Staff may file a responsive brief within 40 days following the expiration of the period for the filing of Mr. Ellingwood's brief.

3. In the event that Mr. Ellingwood does not appeal, this Initial Decision shall become the final action of the Nuclear Regulatory Commission 30 days after its issuance.

PRESIDING OFFICER

John H Frye, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July 31, 1989

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of Docket Nos. 50-250
50-251

FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating Plant,
Units 3 and 4) July 12, 1989

In this Partial Decision, the Director of Nuclear Reactor Regulation defers consideration of two issues raised in a Petition filed by Thomas J. Saporito and denies the remainder of the Petition. Specifically, Mr. Saporito requests that the NRC keep Turkey Point Units 3 and 4 shut down until the Licensee completes an internal safety investigation and the NRC completes an investigation of certain allegations, immediately suspend and revoke the operating licenses for these units, issue a notice of violation and impose an escalated civil penalty on the Licensee because of discrimination and harassment, and immediately issue an order outlining steps to be taken to correct problems with security, operations, maintenance, plant equipment, and training deficiencies. As a basis for his requests, he alleges that the Licensee has demonstrated problems with maintenance, leadership, "quality improvement," operator behavior, training, procedural deficiencies, and security; that there has been a chilling effect on reporting safety concerns as a result of discrimination and harassment against employees; and that there has been a willful falsification and destruction of safety-related plant documents. In this Partial Decision, the Director defers consideration of the issues of discrimination and destruction of documents, and denies the Petitioner's requests with regard to the other issues.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only where substantial health and safety issues have been raised.

TECHNICAL ISSUES DISCUSSED

Systematic Assessments of Licensee Performance
Repairs and Maintenance
Operator Performance
Organization and Management
Procedures and Training
Security Program.

PARTIAL DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

INTRODUCTION

On December 21, 1988, Thomas J. Saporito, Jr., submitted a request pursuant to 10 C.F.R. § 2.206 that the NRC take certain actions with regard to the Turkey Point Nuclear Generating Plant, Units 3 and 4. The request of December 21, 1988, was supplemented by five later submittals dated January 13 and 30, February 7, April 25 and 26, 1989. These six documents were referred to the Office of Nuclear Reactor Regulation for consideration pursuant to section 2.206. The documents will be jointly referred to herein as the Petition.

The Petition requests the NRC to (1) keep Turkey Point Units 3 and 4 shut down until Florida Power & Light Company (FPL, the Licensee) completes an internal safety investigation and the NRC completes an investigation of allegations provided by Mr. Saporito to the NRC Region II office on December 5, 1988; (2) immediately suspend and revoke the operating licenses for Units 3 and 4; (3) issue a notice of violation and impose an escalated civil penalty on the Licensee because of discrimination and harassment; and (4) immediately issue an order outlining the steps to be taken to correct problems with security, operations, maintenance, plant equipment, and employee/operator training deficiencies.

As a basis for his requests, the Petitioner makes numerous assertions. Broadly summarized, these are that the Licensee has demonstrated and/or experienced: (1) poor maintenance, (2) poor leadership, (3) poor "quality improvement,"[1] (4) unprofessional operator behavior, (5) poor training, (6) procedural deficiencies, and (7) security problems. Mr. Saporito also cites a severe chilling effect on reporting safety concerns as a result of discrimination against and harassment of employees, the willful falsification and destruction of safety-related plant documents, and the Licensee's inability to address and resolve these problems effectively. In addition to the Petition, numerous additional letters were submitted by Mr. Saporito which urged the NRC to implement the requests in his Petition.

In support of his assertions, Mr. Saporito refers to numerous documents that, in his view, have identified problems with the facility. Many of these documents are simply listed without further explanation as to the concerns these documents have identified. To the extent that Mr. Saporito has stated his purpose for citing these documents, the Staff has factored the information provided into this Decision. However, to the extent that Mr. Saporito has not provided the factual basis for his request with the specificity required by section 2.206, action need not be taken with regard to the alleged findings of these documents. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), DD-85-11, 22 NRC 149, 154 (1985).

By letter dated January 30, 1989, I acknowledged receipt of Mr. Saporito's Petition. In that letter, I explained that a preliminary review of the concerns raised in the Petition did not indicate any immediate need to keep the Turkey Point Units 3 and 4 shut down, since the concerns did not identify any new information that was not already being addressed by the Licensee and the Staff, or of which the Staff was not aware. A notice was published in the *Federal Register* on February 6, 1989 (54 Fed. Reg. 5708) indicating that the Petitioner's request was under consideration.[2] By letter dated February 1, 1989, the Licensee was asked to respond to the Petition. In its response, dated March 15, 1989, the Licensee stated that, for the most part, the items referred to in statements made by Mr. Saporito involved information already addressed by the NRC and FPL, do not raise any safety concerns, are so vague as to preclude meaningful response, or are demonstrably untrue, and that the relief requested in the Petition should be denied.

With the exception of two issues raised in the Petition, the NRC Staff review of the Petition is now complete. Those two issues, which were also submitted as allegations to the Region II office, are still under investigation and allege

[1] Mr. Saporito does not explain what he means by "quality improvement." For the purpose of this Decision, the Staff has interpreted this term to encompass Mr. Saporito's claims regarding the Licensee's quality assurance and assertions that the Licensee has failed to correct long-standing problems in its program, which has resulted in a generally poor enforcement history.

[2] A letter to Thomas J. Saporito, Jr., from Thomas E. Murley, Director, Office of Nuclear Reactor Regulation, dated April 14, 1989, acknowledged receipt of additional submittals by Mr. Saporito. In that letter, Mr. Saporito was informed that the NRC would not separately acknowledge receipt of any future letters he might submit regarding suspension/revocation of the Turkey Point licenses.

that there has been (1) a chilling effect on reporting safety concerns as a result of discrimination and harassment and (2) a willful falsification and destruction of safety-related documents. When the investigation is complete, the NRC will determine whether any action is appropriate to take with regard to these two issues. With regard to the remaining issues raised by the Petitioner, for reasons stated in this Partial Decision, the Petitioner's requests are denied.

BACKGROUND

The NRC Staff has been concerned about the performance of the Turkey Point plant for a number of years. This has been evidenced by an increasing number (and magnitude) of civil penalties that peaked in 1986 and 1987, issuance of several NRC orders for specific improvements, below-average ratings and identification of areas needing improvement in the NRC systematic assessments of licensee performance (SALPs), a high level of NRC inspection effort, and the inclusion of Turkey Point on the NRC list of plants to be monitored more closely. Over the years the NRC Staff has identified and documented specific issues of concern. For example, the most recent SALP report identified maintenance and operations as areas needing improvement. In two of the three most recent SALP reports, training has been rated below average. In the confirmatory order issued by the NRC on October 19, 1987, management concerns were identified and an independent management appraisal was ordered. Also, in that confirmatory order, the operator professionalism issue was recognized and a management-on-shift (MOS) program was ordered. The need for improved plant procedures was recognized in a confirmatory order dated July 13, 1984, and the Licensee initiated a broad-scoped procedures upgrade program. A subsequent confirmatory order dated August 12, 1986, was issued, superseding the order of July 13, 1984, to expand the scope of requirements to include certain other items.

In response to these concerns, the Licensee has made many improvements. In the past few years, several hundred million dollars worth of improved facilities and equipment have been added at Turkey Point, such as a new maintenance facility, a new training building with a plant-specific simulator, and new steam generators. The Licensee is currently in the process of adding two new safety-related emergency electric power generators, a major safety enhancement, at an additional cost of about 80 million dollars. Reliability of equipment has been enhanced by adding many preventive maintenance and surveillance procedures for plant equipment. Extensive changes in management have been made, bringing in new experienced personnel in key positions and adopting an improved management philosophy. In 1988, the plant set site records for continuous operation, with no major operational events. The number and

magnitude of civil penalties also has decreased markedly since 1987. Although the improvements noted above have been made, and I believe the plant to be safer today than before the improvements were made, the NRC is still dissatisfied with Turkey Point's performance. The many program, management, and hardware changes implemented at Turkey Point have not resulted in plant performance on a par with NRC expectations. We intend to continue to monitor the operation of the plant closely until it is clear that the plant is operating well and can be expected to continue to do so.

On December 5, 1988, Mr. Saporito provided the NRC Region II office with a number of allegations that he refers to in support of his subsequent requests. Nearly all of these allegations were referred to the Licensee in a letter from the NRC Staff, dated January 6, 1989. The Licensee responded to these allegations in a letter dated February 24, 1989. An NRC special inspection was conducted to follow up on these allegations. The inspection team reviewed the Licensee's response in conjunction with the followup inspection of the allegations. Although forty-three of the allegations were substantiated, the inspection team concluded that the allegations raised no new safety issues that had not been previously addressed. *See* Inspection Report 50-250/89-13 and 50-251/89-13, dated May 8, 1989.

Subsequently, on March 3 and 15, 1989, a second group of maintenance-related allegations was provided to the NRC Region II office by Mr. Saporito. These were very similar in substance to the earlier maintenance-related allegations. These allegations were sent to the Licensee for response on April 12, 1989. The NRC Staff has reviewed these allegations and has concluded that the second group of allegations had little safety significance and will notify Mr. Saporito of our findings on them under separate cover.

DISCUSSION

For the purposes of the discussion below, the Petitioner's major areas of concern (which were described earlier in the introduction to this Decision) have been separated into three categories: (1) poor maintenance, leadership, quality improvement, unprofessional behavior, and inability of management to resolve these problems; (2) procedural deficiencies and poor training; and (3) poor security. As noted above, the two remaining issues, relating to a chilling effect on reporting safety concerns as a result of discrimination and harassment and willful falsification of documents, are still under investigation.

1. **Poor Maintenance, Leadership, Quality Improvement, Unprofessional Behavior, and Inability of Management to Resolve Problems**

The Petitioner alleges that Turkey Point Plant has demonstrated poor maintenance practices, poor leadership, poor "quality improvement" (i.e., poor quality control and a poor enforcement history), unprofessional operator behavior, and a lack of suitable management expertise to properly address and resolve these concerns. In support of these assertions, the Petitioner refers to the Enercon Services Inc. report, which was an independent management appraisal that identified five root causes of performance deficiencies to be inadequate leadership, inadequate sense of personal accountability, lack of sufficient technical support, inadequacies in key support systems, and a lack of a strong sense of leadership in the operations department, which in his view fails to "demand excellence" from other departments. The Petitioner also refers to the findings of the SALP report dated February 7, 1985, for the period July 1, 1983, through October 31, 1984 (50-250/85-01; 50-251/85-01), and the most recent SALP report dated September 13, 1988 (50-250/88-15; 50-251/88-15), for the period June 1, 1987, through June 30, 1988, which rated the maintenance area Category 3 and had many adverse findings that the Petitioner lists. The Petitioner also asserts that because of problems, including maintenance, the Licensee has been unable to bring Unit 3 on line since early December 1988. Finally, the Petitioner asserts that conduct of maintenance performed on the Unit 3 thimble guide tube assemblies departed from safety-related procedures. In his view, the Licensee's zeal to return these nuclear units to operation resulted in "rush work," and a severe accident may well have resulted from this maintenance activity.

With respect to the Petitioner's concern about poor maintenance, the NRC Staff has recognized the need for improvement in this area as evidenced by a low SALP rating in three of the last four SALP periods, including the most recent one. However, a low SALP rating does not mean a plant is unsafe but that the NRC believes improvements should be made by the Licensee. Partly because of aging plant equipment, a good maintenance program is especially important to ensure a well-run plant. In bimonthly management meetings with the Licensee since 1987, the NRC Staff has continually focused on the need for maintenance improvements. The Licensee added a new maintenance building in 1988, has significantly increased the ratio of preventive maintenance to corrective maintenance activities over the past year, and has markedly reduced the number of green tags (signifying maintenance needs) in the control room. A special NRC maintenance inspection was conducted in December 1988, and Inspection Report 50-250/88-32; 50-251/88-32 was issued on April 4, 1989. This report concluded that a satisfactory maintenance program had been developed, but that its implementation is poor. An improving trend was noted, stemming from changes in management's approach to maintenance and from newly instituted

programmatic changes. The recent focus at the site on improving the spare parts program, combined with other improvements in the maintenance program such as management changes in the maintenance organization and a higher level of staffing, should assist in improving the overall reliability of plant equipment. Although a number of maintenance-related allegations were presented to our Region II office by the Petitioner, Inspection Report 50-250/89-13; 50-251/89-13 dated May 8, 1989, presented the results of a special inspection of those allegations, which indicated that no significant safety concerns were found that would justify shutting down the plant.

The Petitioner also cited an instance of maintenance error in performing work on the Unit 3 thimble guide tube assemblies, as noted above, and attributes it to rush work. Our inspection efforts indicate the error occurred because of carelessness by a worker. Although the guide tube to be repaired was well marked, and details of the repair work to be performed had been discussed with the worker, he proceeded to begin work on the wrong guide tube. The mistake was considered to result from an unacceptable implementation of work controls, and the worker was dismissed from employment by the Licensee.

With respect to Petitioner's concerns about unprofessional operator behavior, this concern was raised by the NRC Staff in 1987 and documented in Inspection Report 50-250/87-44; 50-251/87-44, dated December 9, 1987. Although unprofessional behavior was found not to be pervasive at the site, there were isolated instances identified and reported in the inspection report. One such instance involved an unlicensed person manipulating a control under the supervision of a licensed operator, in violation of NRC regulations. This event was identified by the Licensee, although the Licensee did not respond with action in a timely manner. The NRC responded with high-level discussions with the Licensee which resulted in NRC conducting continuous control room observations over an extended period. Since that concern was raised, the Licensee has appointed a new Plant Manager, a new Operations Superintendent, and several new operations shift supervisors. In addition, a number of newly trained operators have been added, while some previous operators have been removed from on-shift duty. As a result the NRC Staff believes the quality of the operations staff has improved. A new guidance document for professional behavior was prepared for control room operators and committed to by them. Control room operators have begun wearing uniforms in an effort to establish pride in their position and teamwork. As part of the confirmatory order of October 19, 1987, a management-on-shift (MOS) program was implemented in late 1987 to monitor operations. This program was conceived by the Licensee and included a number of independent managers and personnel, experienced in control room operations, who served on shift in a monitoring capacity. Because of the operational improvements already implemented and under way, the NRC granted approval for the Licensee to terminate the MOS program on January 20, 1989.

With respect to the Petitioner's concerns about management issues, such as poor leadership, poor quality improvement, and the inability of management to address and resolve concerns, the NRC Staff recognized the need for improved management at Turkey Point several years ago. In its confirmatory order dated October 19, 1987, the NRC Staff confirmed the Licensee's commitment to cooperate in an independent management appraisal (IMA) of the Licensee's corporate and Turkey Point organizations. This appraisal was carried out by Enercon Services Inc., and issued as a report dated April 18, 1988. The issues noted above were identified in the IMA along with numerous recommendations. The Licensee's formal response to the IMA was dated August 15, 1988. However, actions to deal with the management problems began earlier. Widespread management changes were made throughout the organization at corporate headquarters and at the Turkey Point site, bringing in new leadership from outside the Licensee's organization in several important positions, including a new site Vice President in mid-1987, a new Operations Superintendent in October 1987, a new Senior Vice President–Nuclear in January 1988, a new Plant Manager in May 1988, and a new site Vice President in May 1989. Also, in early 1989, a new Maintenance Superintendent and a new Security Director were appointed. In the Licensee's response to the IMA, numerous actions were identified to address and resolve the issues identified in the IMA. Many of these actions have already been implemented, while some are ongoing, including setting goals and communicating them to employees, defining job requirements and matching them with skilled people, and establishing performance measures. Quality improvement information, such as trends in radiation exposures and plant performance indicators, is updated on a monthly basis and provided to top management.

The NRC Staff is continuing to monitor the Licensee's implementation of the numerous IMA recommendations. We believe the IMA effort and the Licensee's response so far have resulted in some performance improvements. For example, both units have operated in 1988 with few problems, the number and severity of civil penalties have decreased significantly from the high levels of 1986 and 1987, and an improved and more professional attitude can be seen at the site, especially in operations. There are still problems to be overcome at the plant, but progress has been and is being made.

2. Procedural Deficiencies and Poor Training

The Petitioner raises concerns with regard to the training of personnel and with procedures. He claims that these problems also have been part of the reason that the Licensee has been unable to bring Unit 3 on line since early December 1988. In support of his allegations in these areas, he refers to NRC Inspection Report 50-250/85-32; 50-251/85-32. This report had indicated that there were no administrative controls or technical specification requirements in place to ensure

the availability of the nonsafety-grade standby feedwater system. The report further stated that, with regard to the safety-related nitrogen system, it cannot be assumed that control room operators would shift the flow control valves from automatic to manual mode within 6-7 minutes following an accident because (1) some operators were trained to assume that they had 15 to 20 minutes to take action, and (2) applicable emergency procedures did not include requirements for the operators to shift the flow control valves to manual. The Petitioner also asserts that the Licensee has a well-documented history involving departures from approved procedures that have resulted in escalated enforcement actions.

With respect to procedural deficiencies, there are two basic reasons for such deficiencies: (1) the procedures themselves need improvement, and (2) the procedures are not adhered to strictly. The latter problem is a management/training issue that is expected to improve as the management and training improvements continue to take effect. The need for improved procedures at Turkey Point was recognized by the NRC Staff in the early 1980s. After discussions between NRC and the Licensee, the Licensee proposed a major performance enhancement program (PEP) in a letter to the NRC Region II office, dated April 11, 1984. In confirmatory orders issued by the Commission on July 13, 1984, and August 12, 1986, the PEP program was made a requirement. One facet of PEP was a procedures upgrade program.

As part of the procedures upgrade program, a major upgrade was made to procedures for technical specification surveillances. Many added surveillances/procedures were developed to permit operators to more closely monitor the performance of their equipment. Already-existing surveillance procedures were revised and improved. Additional preventive maintenance procedures were added. The NRC Staff believes that this effort produced a significant enhancement to safe plant operation. Other procedural improvements include: the adoption of the writers guide for procedures prepared by the Institute of Nuclear Power Operations (INPO); the consideration of human factors when developing procedures; required walkdowns of new procedures, where appropriate; and the implementation of upgraded emergency operation procedures in response to NRC requirements that were developed after the accident at Three Mile Island. The NRC Staff recognizes that significant additional improvements are still needed with respect to procedures at the plant. However, the Licensee has made considerable progress, and the procedure upgrade process is an activity expected to continue for the life of a plant (at all plants) and can proceed while the plant operates.

With respect to training at Turkey Point, a new Training Superintendent, who is experienced in operations, was appointed in mid-1987. The training staff was augmented at that time by about fifteen contractor personnel who had previously held senior reactor operator licenses. In addition, the non-operator training changed from a self-teach program to include classroom instruction. The training

staff has now increased to nearly eighty personnel from fewer than sixty in early 1987. The Licensee's increasing recognition of the importance of training has led to larger classes of trainees than existed a few years ago. The addition of a new training facility in late 1986, including a recently added plant-specific simulator, represents an improved training capability and is expected to result in a stronger operational staff over the long term. Even with the improvements noted, the NRC Staff believes further near-term progress is needed, especially in the implementation of improvements already identified by the Licensee. This was evidenced by recent unsatisfactory performance on NRC-administered requalification examinations. Following these exams, extensive retraining and NRC-monitored reexamination were administered. The Licensee has recently outlined steps that are expected to lead to a satisfactory training program. For example, simulator training will be increased, emergency plan criteria will be designed into the simulator scenario guides, and instructors will be retrained and evaluated. The Staff has been closely monitoring the Licensee's progress in this area.

With respect to certain findings in Inspection Report 50-250/85-32; 50-251/85-32 cited by the Petitioner, these findings were published in 1985 and do not reflect the current state of the plant. Corrective actions were taken years ago. For example, for the nonsafety-grade standby feedwater system, administrative controls, such as periodic testing and limited allowable outage time for the pumps, have been in place for several years to ensure the availability on demand of this system. As another example, for the safety-related nitrogen system, the Licensee responded on October 1, 1986, to an NRC notice of violation. The Licensee stated that procedures had been revised and operators trained for proper shifting of the auxiliary feedwater flow control valves from automatic to manual. This was inspected and closed by the NRC in Inspection Report 50-250/88-14; 50-251/88-14, dated July 29, 1988, which found that these items had been satisfactorily resolved.

3. Poor Security

Finally, the Petitioner alleges weaknesses in the Licensee's security program, as evidenced by what he describes as a continuing number of violations in this area. In this connection, the Petitioner refers to a number of enforcement actions taken against the Licensee, as well as the SALP report for the period June 1, 1987, through June 30, 1988, which assessed the Licensee's performance in this area as a Category 3.

The Petitioner has provided no new information regarding security weaknesses. Instead he cites various reports issued by the NRC or to the NRC. These were all considered in our performance assessment process (SALP) and formed part of the basis for a SALP Category 3 rating in the area of security. Where significant violations of regulations have occurred, civil penalties have been imposed to encourage the Licensee to improve in specific areas. The Licensee has continued to increase its security staff, restructure the management, and add system improvements. The NRC is continuing to require further improvements. However, the security violations cited by the Petitioner do not represent a breakdown of the plant security which poses a significant threat to the public health and safety, or that would justify shutting down the plant. A plant security system has many redundant and diverse features so that security is not compromised when one feature weakens.

CONCLUSION

The Petitioner seeks the suspension and revocation of the operating licenses for the Turkey Point facility pursuant to 10 C.F.R. §2.202. In addition the Petitioner asks that Units 3 and 4 not be permitted to restart until the Licensee and the NRC Staff complete investigations of allegations provided to NRC on December 5, 1988. The Petitioner further requests that an escalated civil penalty be imposed upon the Licensee for discrimination against and harassment of employees and that NRC immediately issue an order outlining the steps to be taken to correct problems with security, operations, maintenance, plant equipment, and employee/operator training deficiencies.

The institution of proceedings pursuant to section 2.202 is appropriate only where substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that has been applied to determine whether the actions requested in the Petition are warranted.

For the reasons discussed above, no substantial basis was found for taking the actions requested in the Petition. Rather, based upon the identification and pursuit of concerns by the NRC Staff and the progress and improvements made by the Licensee in its efforts to resolve these concerns, it is concluded that no substantial health and safety issues have been raised by the Petition. Accordingly, the Petitioner's request for action pursuant to section 2.202, except for the remaining two open issues, is denied. As provided in 10 C.F.R. §2.206(c), a copy of this Decision will be filed with the Secretary for the Commission's review.

When the NRC Staff investigation of the issues of a severe chilling effect on reporting safety concerns as a result of discrimination and harassment and of the willful falsification and destruction of safety-related documents is complete,

I will further review the Petitioner's section 2.206 request with regard to these two issues and determine whether any action is appropriate.

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 12th day of July 1989.

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

January 30, 1989

Docket Nos. 50-250/251

Mr. Thomas J. Saporito, Jr.
1202 Sioux Street
Jupiter, Florida 33458

Dear Mr. Saporito:

This letter acknowledges receipt of your Petition filed on December 21, 1988 and supplemented January 13, 1989. The Petition alleges that the Turkey Point Plant has continuously demonstrated poor maintenance, poor leadership, poor quality improvement, unprofessional operator behavior, and the inability of management to address and resolve these concerns.

You have requested that the Florida Power & Light Company (the licensee) not be permitted to bring the Unit 3 or Unit 4 reactors critical until the licensee completes an internal safety investigation and the NRC completes a safety investigation relating to the concerns contained in the report of December 5, 1988, that you filed with the NRC Region II office. You have further requested that the operating licenses for the Unit 3 and 4 reactors be immediately suspended and revoked. You assert as grounds for your request that an Institute of Nuclear Plant Operations (INPO) Report and an Enercon Services Report identified several problems at the Turkey Point Plant. You also refer to the Nuclear Regulatory Commission's Safety System Functional Inspection Report (50-250/85-32; 50-251/85-32), a number of identified inspection reports and NRC enforcement actions, and NRC Systematic Assessment of Licensee Performance (SALP) Reports which found various problems at the Plant.

Your Petition has been referred to me pursuant to 10 CFR §2.206 of the Commission's regulations. We have also requested the licensee to address your concerns. As provided by 10 CFR §2.206, action will be taken on your request within a reasonable time. However, a preliminary review of the concerns contained in your report of December 5, 1988, to the NRC Region II office and items contained in the Petition of December 21, 1988, as supplemented January 13, 1989, filed with the Office of the Executive Director for Operations under 10 CFR §2.206 does not indicate any immediate need to keep the Turkey Point Plant, Units 3 and 4 reactors shut down. Our basis for this position is that your concerns have not identified any new information which is not already being addressed by the licensee and the staff, or which we were not already aware of.

I have enclosed for your information a copy of the notice of receipt of your Petition that is being filed with the Office of the Federal Register for publication.

Sincerely,

James H. Sniezek/for

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

Enclosure: As stated

cc w/enclosure: See next page

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

March 6, 1989

Docket Nos. 50-250
and 50-251

Mr. Thomas J. Saporito, Jr.
1202 Sioux Street
Jupiter, Florida 33458

Dear Mr. Saporito:

This letter acknowledges receipt of your letters of January 30 and February 7, 1989, addressed to the Executive Director for Operations (EDO), which we are treating as Supplements 2 and 3, respectively, to your Petition pursuant to 10 CFR 2.206 filed with the Office of the EDO on December 21, 1988. We are treating your letter of January 13, 1989, as Supplement 1. Supplements 2 and 3 address the following issues:

1. Supplement 2 alleges that the employees at the Turkey Point Plant are experiencing a severe chilling effect because of reprisals against plant employees who express concerns about the plant. This supplement also alleges the failure of personnel to follow procedures, poorly written procedures, poor personnel training, and maintenance problems. In this supplement, you request that the U.S. Nuclear Regulatory Commission (NRC) immediately suspend and revoke the operating licenses (DPR-31 and DPR-41) for the Turkey Point Plant.

2. Supplement 3 alleges that the Turkey Point Plant is engaged in discrimination and harassment against employees who have been subpoenaed to testify in pending Department of Labor proceedings (89-ERA-07 and 89-ERA-17). In this supplement, you again request that the NRC suspend and revoke the operating licenses for the Turkey Point Plant. Furthermore, you request that the NRC issue a Notice of Violation and impose an escalated civil penalty on the licensee.

We also note receipt of your letter dated January 19, 1989, addressed to the EDO, that praises the actions of a certain member of the NRC staff at the Region II office and requests that copies of your letter be posted in all nuclear power plants in the country. We further note receipt of your letter dated January 30, 1989, addressed to Mr. Victor Stello, that discusses several concerns and alleges that the licensee denied you access to certain plant documentation.

As provided by 10 CFR 2.206, action will be taken on your Petition (as supplemented) within a reasonable time. However, a preliminary review of the concerns in Supplements 2 and 3 does not indicate any immediate need to suspend and revoke the operating licenses of the Turkey Point Plant. Our basis for this finding is that your supplements have not identified any significant new information beyond that already acknowledged by our letter to you dated January 30, 1989.

Sincerely,

Thomas E Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

cc: See next page
Licensee

Thomas J. Saporito, Jr.

Florida Power and Light Company Turkey Point Plant

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

April 14, 1989

Docket Nos. 50-250
and 50-251

Mr. Thomas J. Saporito, Jr.
1202 Sioux Street
Jupiter, Florida 33458

Dear Mr. Saporito:

This letter acknowledges receipt of your letter dated March 1, 1989, as well as your two letters dated March 2, 1989, your letter dated March 6, 1989, and your letter dated March 22, 1989, regarding the Turkey Point plant.

In the letter of March 1 and the two letters of March 2, 1989, you allege an example of poor procedures and an example of employee harassment and discrimination resulting in a chilling effect on reporting safety concerns. These letters also refer to previous information given to our Region II office. Your letter of March 6, 1989, expresses your dissatisfaction with the NRC decision to not immediately suspend or revoke the Turkey Point licenses. Your letter of March 22, 1989, cites four Licensee Event Reports and one Preliminary Notification of Unusual Occurrence, all of which the NRC had already received and reviewed and which the licensee has evaluated and taken corrective actions.

Because none of the above letters addresses new concerns (beyond those in your letters of December 21, 1988, and January 13, 19, 30 (two letters), and February 7, 1989), or provides information we did not already have, no additional NRC action is necessary.

Please be advised that we do not plan to separately acknowledge receipt of any future letters you might submit regarding suspension/revocation of the Turkey Point licenses.

As provided by 10 CFR 2.206, and as noted in my letter to you dated March 6, 1989, action will be taken on your earlier petition, as supplemented, within a reasonable time.

Sincerely,

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

cc: See next page
Licensee

Chairman Mikhail S. Gorbachev
4 Staraya Ploschad
Moscow Russia USSR

March 6, 1989

re: United States Nuclear Power Generation Safety Concerns

Dear Chairman Gorbachev:

Please be advised and officially informed as this letter represents formal notification to your government soliciting immediate actions by your government to insure that a nuclear disaster as evidenced by your country's Chernoble Nuclear Station does not occur in the United States of America and specifically at the Turkey Point Nuclear Station owned and operated by the Florida Power & Light Company in Miami Florida.

Enclosed in this package are official government safety inspection reports which evidence the significant and repetitive safety violations at the Turkey Point Station. Enforcement actions taken by the United States government in the form of escalated civil penalties amounting in excess of ONE MILLION dollars has failed to insure the Health and Safety of the Public and thus the United States Nuclear Regulatory Commission has failed to meet it's own mandate.

Because we the people of the United States live in a free society, independent, privately owned utilities such as the Florida Power & Light Company have very strong influencial powers through Political Action Committees who can persuade high ranking government officials in their vote on decisions of law and Federal Regulations as they apply to Commercial Nuclear Power generation in this country.

Although the Turkey Point Nuclear Station utilizes a containment structure around the reactor's vessel and primary systems, a significant, major event at this facility resulting in a loss of coolant to the reactor's core 'exampla Chernoble', could cause the formation of a large hydrogen bubble within the reactor vessel and containment structure. A possible explosion of the containment structure would displace an enormous amount of air borne radiation into the environment and depending on the prevailing winds, this life threatening radioactive cloud has the potential to effect human life even in your country.

A private concerned citizens group 'The Center for Nuclear Responsibility' is currently petitioning the United States government to shut down the Turkey Point Nuclear Unit #4 as welds on the reactors vessel may be embrittled and therefore a potential exists for a vessel fracture which could result in a core melt down.

All efforts by your government in securing the safe shut down of the Turkey Point Nuclear Reactors would promote world wide 'Good Will' and concern for the Health and Safety of Everyone.

cc: U.S. President George Bush
Congressman Dante B. Fascell
U.S. NRC Washington D.C.
U.S. NRC Region II Atlanta GA.
ALL MEDIA SOURCES

Sincerely,

Thomas J. Saporito, Jr.

Thomas J. Saporito, Jr.
1202 Sioux Street
Jupiter, Florida 33458

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Thomas E. Murley, Director

In the Matter of

Docket Nos. 50-250
50-251

FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)

September 25, 1989

The Director of Nuclear Regulation denies a Petition filed by Thomas J. Saporito requesting immediate action with regard to Turkey Point Nuclear Generating Plant, Units 3 and 4. Specifically, the Petitioner requested that the NRC cause the cold shutdown of the facility and the suspension of its operating licenses, investigate the extent of an alleged drug usage problem and review the Licensee's corrective measures; take actions concerning the Licensee's program for reactor vessel materials surveillance and analysis, because the Petitioner asserts that the reactor vessels at Units 3 and 4 are experiencing vessel embrittlement; and modify the licenses to require that the Turkey Point Operations Superintendent hold a senior reactor operator's license, because, according to the Petitioner, operation of the facility by an Operations Superintendent who is not the holder of such a license would involve a significant increase in the probability and consequences of a nuclear accident.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

The principle is firmly established that parties must be prevented from using 10 C.F.R. § 2.206 procedures as a vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be presented.

RULES OF PRACTICE: SHOW-CAUSE PROCEEDING

The institution of proceedings pursuant to 10 C.F.R. § 2.202 is appropriate only when substantial health and safety issues have been raised.

TECHNICAL ISSUES DISCUSSED

Reactor Vessel Embrittlement;
Reactor Vessel Material Surveillance Program, Appendix H of 10 C.F.R. Part 50;
Pressurized Thermal Shock Screening Criteria, 10 C.F.R. § 50.61;
Fracture Toughness Requirements, Appendix G of 10 C.F.R. Part 50.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

INTRODUCTION

On June 20, 1989, Thomas J. Saporito, Jr., filed a request with the Executive Director for Operations pursuant to 10 C.F.R. § 2.206 that the NRC take certain actions with regard to the Turkey Point Nuclear Generating Plant, Units 3 and 4. The request of June 20, 1989, was supplemented by later submittals, dated June 22 — as amended by a submittal dated August 12, — and July 3, 1989. These documents were referred to the Office of Nuclear Reactor Regulation for consideration pursuant to section 2.206. The documents will be jointly referred to herein as "the Petition."

Specifically, the June 20 submittal requests that the NRC take immediate action to cause the cold shutdown of Units 3 and 4, cause the suspension of Operating Licenses DPR-31 and DPR-41, cause an investigation by the NRC to ascertain the extent of the drug usage problem at Turkey Point and review the Licensee's corrective measures, and order remedial action in accordance with the new Fitness for Duty rule. As a basis for these requests, the submittal alleges that the Federal Bureau of Investigation (FBI) arrested an operator at the neighboring Turkey Point fossil plant who stated that Turkey Point "ran on cocaine" and, as the FBI's investigation is not yet concluded, that the NRC cannot be fully aware of the extent of the drug problem at the facility.

The June 22 submittal requests, in addition, that the NRC take immediate action to (1) test archive weld metal test samples germane to Unit 4 in accordance with Charpy test parameters; (2) evaluate Charpy test data obtained to ascertain the degree of embrittlement of the Unit 4 reactor vessel; (3) evaluate the embrittlement and determine whether continued operation of the reactor can be safely achieved within the criterion of 10 C.F.R. Part 50, Appendix G; (4)

ensure that the Licensee will test archive weld metal samples at regular intervals in the future to ensure a close monitoring of the degree of embrittlement; (5) cause the termination of the integrated surveillance testing program currently being utilized by the Licensee, whereby Unit 3 archive weld metal test samples are evaluated and determined to be representative of embrittlement conditions germane to Unit 4; and (6) cause an NRC evaluation of the reference temperature criterion of 300 degrees established for the safe operation of a pressurized water reactor to consider whether the criterion should be lowered to offset the effects of pressurized thermal shock. As a basis for these requests, the submittal alleges that Units 3 and 4 are experiencing reactor pressure vessel embrittlement. In support of this, various documentation is relied upon.

The July 3 submittal requests that the NRC take immediate action to modify Operating Licenses DPR-31 and DPR-41 to require that the Turkey Point Operations Superintendent be required to hold a senior reactor operator's license on the pressurized water reactors germane to the facility. As a basis for this request, the submittal alleges that operation of the facility by an Operations Superintendent who is not the holder of such a license would involve a significant increase in the probability and consequences of a nuclear accident, and involve a significant reduction in the margin of safety.

DISCUSSION

A. Substance Abuse

The June 20 submittal requests immediate action to cause the cold shutdown of Turkey Point Nuclear Generating Plant, Units 3 and 4, and the suspension of the associated Operating Licenses DPR-31 and DPR-41. In addition, the submittal requests that the Commission cause an immediate investigation to ascertain the extent of the drug usage problem and to review the corrective measures taken at Turkey Point and order remedial action in accordance with the new Fitness for Duty rule, which authorizes such action where safety is potentially affected because an individual is unfit for duty.

On June 14, 1989, a Turkey Point plant employee was one of three people arrested in connection with a widespread, ongoing FBI narcotics investigation in South Florida. The arrested employee was a fossil plant operator. As the protected area for the Turkey Point nuclear plant also encompasses the fossil plants, the arrested employee had access to the protected area. This access authority was subsequently suspended. However, this employee did not have access to vital areas of the nuclear plants which contain equipment required for safety. The other two people arrested by the FBI were not employed at the Turkey Point plant and did not have authorized access. In addition to the three

people arrested, a number of people in the geographical area were interviewed by the FBI.

The NRC Staff is closely monitoring the Licensee's actions in response to the FBI arrest and the ongoing FBI investigation. The actions taken by the Licensee in response to the FBI investigation appear to be prompt and appropriate. These actions include immediate testing of all managers, supervisors, and personnel in positions significant to safety; testing of all other bargaining unit personnel who volunteered; and subjecting all personnel authorized unescorted access to the Turkey Point Nuclear Generating Plant to mandatory random testing for substance abuse, effective June 28, 1989.

Since the arrest of the fossil plant employee on June 14, 1989, and as of August 7, 1989, approximately 1950 persons with authorized access to Turkey Point have been tested for substance abuse. This represents approximately 60% of the persons with authorized access to Turkey Point as of that date. Of the approximately 1950 persons tested, six were reported as having confirmed positive test results. Authorized access for three of the six persons who tested positive was suspended for 45 days. During the 45-day suspension, these three people can be retested for substance abuse and, if they pass, access will be restored and they will enter into a frequent followup testing program for 1 year. If they fail to be reinstated during the 45-day suspension, they will not be allowed access to Turkey Point and further disciplinary action will be taken by the Licensee. Employment for the remaining three people who tested positive was terminated.

On the basis of the data received to date, there is no indication of a widespread problem of substance abuse at the Turkey Point Nuclear Generating Plant. The NRC Staff will continue to monitor the Licensee's actions concerning this matter to ensure that public health and safety are not endangered. No further actions beyond what is currently being done are deemed warranted by the NRC at this time.[1] Therefore, the request in the June 20 submittal related to substance abuse is denied.

B. Reactor Vessel Materials Surveillance

The June 22 submittal requests immediate action to cause the suspension of Operating Licenses DPR-31 and DPR-41 and to take immediate actions concerning the Licensee's program for reactor vessel materials surveillance and analysis. The Petitioner asserts, as a basis for the request, that the reactor vessels

[1] On May 24, 1989, the Commission issued the final rule, "Fitness for Duty Programs" (54 Fed. Reg. 24,468). This rule mandates the establishment of a program to deter and detect instances of substance abuse on the part of persons authorized unescorted access to nuclear power plants. The effective date for implementation of the new rule by licensees is January 3, 1990. Thus, the Petitioner's reliance on the rule as a basis for immediate action is misplaced.

at Turkey Point Units 3 and 4, are experiencing vessel embrittlement. In support of this assertion, numerous documents are cited.[2]

For the purposes of this discussion, the Petitioner's requests have been separated into the following categories:

(1) Terminate the integrated surveillance program for Turkey Point Units 3 and 4 whereby Unit 3 archive weld test samples are evaluated and determined to be representative of embrittlement conditions germane to Unit 4, require the testing and evaluation of weld metal test samples germane to Unit 4 in accordance with Charpy test parameters and criteria, and analyze the test results to ascertain the degree of Unit 4 reactor vessel embrittlement. In this connection, the Petitioner asserts, among other matters, that reasonable doubt exists that the fracture toughness requirements of Appendix G to 10 C.F.R. Part 50 for upper-shelf energy have been met.

(2) Ensure that future archive weld metal samples will be tested by the Licensee at regular intervals to ensure a close monitoring of embrittlement and safe operation pursuant to 10 C.F.R. Part 50, Appendix G.

(3) Analyze the reference temperature criterion of 300°F established by the Commission for safe operation to consider whether it should be lowered.

With respect to Category (1), above, the Licensee requested, in letters dated February 8 and March 6, 1985, a license amendment to combine the existing reactor materials surveillance program at the Turkey Point units into a single integrated program that conforms to the requirements of 10 C.F.R. Part 50, Appendix H. Notice of the requested amendment was published in the *Federal Register* on March 12, 1985 (50 Fed. Reg. 9919). On April 22, 1985, the NRC Staff issued Amendment 112 to Operating License DPR-31 and Amendment 106 to Operating License DPR-41, which authorized, in accordance with section II.C of 10 C.F.R. Part 50, Appendix H, the use of the integrated surveillance program at Turkey Point.

The Petitioner, in raising this issue, is seeking to use section 2.206 procedures to reopen a matter that was the subject of an amendment that was noticed in the *Federal Register* and fully considered. The Petitioner had the opportunity to request a hearing and failed to do so. The principle is firmly established that

[2] By letter dated August 12, 1989, the Petitioner submitted a listing of thirty-eight documents which he requested be considered as an "amendment" to his June 22 submittal, to be considered as additional evidence in support of the basis and justification for the June 22 submittal. This "amendment" consists solely of a listing of documents, without any explanation as to how these documents support the Petitioner's assertions. As the Petitioner has not provided any specific information with regard to these documents, further action with regard to his August 12 submittal is unwarranted. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), DD-85-11, 22 NRC 149, 154 (1985).

parties must be prevented from using section 2.206 procedures as a vehicle for reconsideration of issues previously decided, or for avoiding an existing forum in which they more logically should be presented. *E.g., General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Units 1 and 2; Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563 (1985).

The Petitioner has not provided new evidence that would cause the NRC Staff to reconsider its approval of the subject program. Surveillance samples will be removed from the reactor vessels in Units 3 and 4 and tested in accordance with the approved integrated surveillance program and the results will be evaluated by the Licensee and separately by the NRC Staff. No immediate action is required to test samples germane to Unit 4.

The subject of reactor vessel embrittlement in Unit 4 was recently reviewed by the NRC Staff in conjunction with the issuance of Amendment 134 to Operating License DPR-31 and Amendment 128 to Operating License DPR-41. In a letter dated September 21, 1988, the Licensee requested that the subject amendments incorporate revised heatup and cooldown pressure-temperature limit curves that would be applicable up to 20 effective full-power years (EFPYs) of service life. The curves in the Technical Specifications at the time of the request were applicable up to 10 EFPYs. Notice of the requested amendments was published in the *Federal Register* on October 19, 1988 (53 Fed. Reg. 40,988). The subject amendments were issued by the NRC Staff on January 10, 1989. As discussed in the Safety Evaluation issued for the amendments, the NRC Staff found that (1) the revised pressure-temperature limits were in compliance with the fracture toughness requirements of Appendix G to 10 C.F.R. Part 50; (2) the integrated surveillance program complies with Appendix H to 10 C.F.R. Part 50; and (3) the reactor vessel critical materials at Units 3 and 4 will remain below the pressurized thermal shock (PTS) screening criteria for their licensed life in compliance with the requirements of 10 C.F.R. § 50.61.

In response to the *Federal Register* notice dated October 19, 1988, concerning the issuance of Amendment 134 to Operating License DPR-31 and Amendment 128 to Operating License DPR-41, a Petition for Leave to Intervene, dated November 17, 1988, was filed by the Center for Nuclear Responsibility, Inc., and Joette Lorion, which raised contentions relating to the Petitioner's June 22 submittal. In a Memorandum and Order (Ruling upon Contentions), LBP-89-15, 29 NRC 493, dated June 8, 1989, two contentions were admitted by the Atomic Safety and Licensing Board, as follows:

a. Contention 2 asserted that capsule material in Unit 3 has been irradiated for a significantly shorter time than capsule material in Unit 4. This contention was admitted, limited to the relevance of the difference in operating time between Units 3 and 4.

b. Contention 3 was admitted, limited to whether the correct copper percentage was used in predicting the reference temperature (RT_{NDT}) of the critical beltline materials for setting pressure-temperature limits.

As stated in the Atomic Safety and Licensing Board order, hearings on the admitted contentions are scheduled to commence on December 12, 1989. All documentation associated with the hearings will be placed in the Local Public Document Room and will be available for the Petitioner's review.[3]

As described above, the NRC Staff evaluated reactor vessel embrittlement in Unit 4 in conjunction with Amendments 134 and 128 to Operating Licenses DPR-31 and DPR-41, respectively, and determined that there are no public health or safety concerns associated with the continued operation of Unit 4. If any concerns raised in the hearing are determined to be valid, the Staff will take the appropriate action at that time. Moreover, all of the documentation relied on by the Petitioner was considered when the amendments were issued. Therefore, further action on this concern is not warranted. *Three Mile Island*, CLI-85-4, *supra*, 21 NRC at 563.

The submittal also asserts that reasonable doubt exists that the fracture toughness requirements of Appendix G to 10 C.F.R. Part 50 for the Charpy upper-shelf energy have been met. The basis for this statement is a letter from the Staff to the Licensee, dated May 31, 1988, which indicates that additional data and analysis are necessary for the Staff to complete its review of the fracture toughness analysis of the beltline welds for the Turkey Point reactor vessels. The Licensee's fracture toughness analysis was submitted in letters dated May 3, 1984, and March 25, 1986, to comply with the requirements in section V.C of Appendix G to 10 C.F.R. Part 50. The requirements of this section apply to reactor vessels that have had their Charpy upper-shelf energy reduced below 50 foot-pounds by neutron irradiation. This section requires that the Licensee (1) perform a volumetric examination of 100% of the beltline materials that do not satisfy the requirements of section V.B; (2) provide an analysis to demonstrate equivalent margins of safety for continued operation; and (3) provide test data from supplementary fracture toughness tests.

The Licensee has satisfied these requirements by (1) performing ultrasonic examinations of beltline welds in Unit 3 and Unit 4 during July 1981 and November 1982, respectively; (2) submitting fracture mechanics analyses in letters dated May 3, 1984, and March 25, 1986; and (3) providing supplementary fracture toughness data from the Heavy-Sectional Steel Technology program in its letter of March 25, 1986.

[3] The Petitioner has filed a petition before the Atomic Safety and Licensing Board to make a limited appearance during the hearing. In a document entitled "Amended Petition for a Limited Appearance Statement" filed August 30, 1989, the Nuclear Energy Accountability Project has indicated that it will represent the Petitioner's interests in the proceeding.

The information requested in NRC's letter of May 31, 1988, was needed to evaluate the Licensee's conservative analysis (contained in its letters of March 3, 1984, and March 25, 1986) which was submitted to justify continued operation up to 40 EFPYs. Currently, the Turkey Point units have operated for approximately 10 EFPYs. Amendments 134 and 128 to Operating Licenses DPR-31 and DPR-41, respectively, authorized operation only up to 20 EFPYs. Operation beyond 20 EFPYs will require the submittal of another amendment and further evaluation by the NRC Staff. As discussed previously, there are no public health or safety concerns associated with operation up to 20 EFPYs. Therefore, the information requested in the May 31, 1988 letter to justify 40 EFPYs of operation is not required immediately and no action by the NRC is necessary at this time.

With respect to Category (2), above, the requirements for future testing of archive weld metal samples are specified in the integrated surveillance program that is contained in the Turkey Point Technical Specifications, §4.20. Compliance with the Technical Specifications is required as a condition of Operating Licenses DPR-31 and DPR-41 for Turkey Point Units 3 and 4, respectively. As such, compliance with the Technical Specifications is subject to verification by the NRC through periodic audits and review. Therefore, no further action is warranted regarding this concern.

With respect to Category (3), above, the reference temperature value of 300°F (for circumferential weld materials) which is used in PTS screening is specified in section 50.61. The Petitioner's request is, in effect, a request to change the requirements of section 50.61, and, as such, is not appropriate for consideration under section 2.206. Rather, it may constitute a petition for rulemaking that should be submitted in accordance with 10 C.F.R. § 2.802. Under section 2.802, any interested person may petition the Commission to issue, amend, or rescind any regulation. The Petitioner may wish to review the requirements for a petition for rulemaking contained in section 2.802 and consider submittal of the request to revise the reference temperature criterion of 300°F under section 2.802.

C. Operations Superintendent Qualification

The July 3 submittal requests immediate action to modify the Licensee's Operating Licenses DPR-31 and DPR-41 to require that the Turkey Point Operations Superintendent hold a senior reactor operator's (SROs) license on the pressurized water reactors germane to the facility.

In a letter dated September 12, 1988, the Licensee requested that the Technical Specifications be changed to permit the holding of an SRO license from a similar plant (i.e., another pressurized water reactor) to serve as an acceptable qualification for the Operations Superintendent at Turkey Point. Notice of consideration of issuance of the requested amendments was published in the

Federal Register on November 2, 1988 (53 Fed. Reg. 44,250). No requests for hearing or petitions for leave to intervene were filed. On March 27, 1989, the Commission issued Amendment 135 to Operating License DPR-31 and Amendment 129 to Operating License DPR-41, approving the requested change in qualification requirements for the Operations Superintendent.

On May 16, 1989, the Petitioner submitted a Request for Hearing and Petition for Leave to Intervene (amended May 18) with respect to these amendments. In the Commission's Order Denying Request for Hearing, dated May 30, 1989, the Petitioner's request was denied as untimely, indicating that no good cause was shown for such untimeliness.

The July 3 submittal appears to be an attempt to circumvent the rules for timeliness. The submittal raises the same issues raised in the Request for Hearing and Petition for Leave to Intervene, dated May 16, 1989, which was denied by the Commission on May 30, 1989. Furthermore, the submittal does not raise any new issues not previously considered by the Commission in the issuance of the amendments. Therefore, further action regarding this concern is not warranted.

CONCLUSION

The institution of proceedings pursuant to section 2.202 is appropriate only when substantial health and safety issues have been raised. *See Consolidated Edison Co. of New York* (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975), and *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984). This is the standard that has been applied to determine whether the actions requested in the Petition are warranted. For the reasons discussed above, no basis exists for taking the actions requested in the Petition, since no substantial health and safety issues have been raised by the Petition. Accordingly, the Petitioner's request for action pursuant to section 2.206 is denied.

A copy of this Decision will be filed with the Secretary for the Commission's review in accordance with 10 C.F.R. § 2.206(c).

FOR THE NUCLEAR
REGULATORY COMMISSION

Thomas E. Murley, Director
Office of Nuclear Reactor
Regulation

Dated at Rockville, Maryland,
this 25th day of September 1989.

NUCLEAR ENERGY ACCOUNTABILITY PROJECT

1202 Sioux Street • Jupiter, Florida 33458 • (407) 743-0770
Environmental Protection • Involvement • Litigation • Information

"THE WHISTLEBLOWER NEWSLETTER"

VOLUME: II ISSUE: 1 JANUARY 2, 1990

A corporate policy change was brought before the NEAP Board of Directors for consideration. NEAP is a non-profit environmental organization incorporated within the State of Florida for the primary purpose of ensuring that all nuclear power plants and nuclear facilities in the State of Florida are operated safely and that the environment does not sustain permanent harm or adverse effects as a direct or indirect result of nuclear power generation or nuclear fuel storage, usage or transport.

After exhaustive research and review of voluminous government documents and reports germane to nuclear energy and nuclear waste disposal, it is quite evident that the everyday operation of nuclear power plants and nuclear weapons plants in the United States results in some release of radiation into our environment. Recently the Rocky Flats nuclear waste facility was discovered to have leaked radiation into the environment.

Additionally, no matter how small the amount of radioactive leakage from nuclear power plants into the environment, the leakage is cumulative and therefore permanently harms the environment. Of course, we can not realistically expect to secure the shutdown of every nuclear plant in the country, however, we will initiate aggressive actions to prohibit the licensing of any new nuclear plants in Florida until such time as the U.S. government resolves the problem of nuclear waste. Finally, we will initiate actions to secure the shutdown of nuclear facilities, such as Turkey Point, which are unsafely operated and poorly maintained.

We are gravely concerned about the lack of effective regulation and oversight demonstrated by the Nuclear Regulatory Commission in their failure to shutdown the dangerous Turkey Point nuclear plants. The NRC has miserably failed to ensure public health and safety through their own neglect of duty. If the public can not be assured of a strong government regulator, then public confidence in nuclear power generation will not occur in this country. The NRC is pushing for one step licensing of new nuclear plants instead of initiating strong effective regulation on the very poorly operating plants in the United States today. It just doesn't make good sense to move forward with more nuclear power plants until the government resolves the very grave issue of nuclear waste.

For all the foregoing reasons, and because NEAP's articles of incorporation provide for the protection of the environment as a whole, it is therefore by unanimous vote of the Board of Directors, the decision of the Board, to implement the policy change that:

"The Nuclear Energy Accountability Project is an Anti-Nuclear Environmental Organization with the primary purpose of protecting the environment by ensuring the safe operation of all nuclear facilities in the State of Florida by holding government and utility representatives accountable for their actions and decisions concerning nuclear energy issues."

Florida Power and Light's Turkey Point nuclear plants units 3 and 4 were both shutdown during the Christmas blackout of 1989 because of poor maintenance and resulting equipment failure. Apparently, water had entered an electical conduit box and shortec some wiring causing a power fuse to blow. As a result, one of the Turkeys automatically shutdown and FPL manually shutdown the other reactor.

NEAP has filed a Petition under NRC regulations requesting the suspension of FPL's operating licences because reasonable assurance for the continued safe operation of the Turkeys does not exist. The NRC is currently investigating the events. According to NRC regulations, FPL could be sujected to an escalated civil penalty if the NRC determines that the event was due to a maintenance problem which could have been prevented.

FPL was not able to supply power to all of its customers on Christmas Day, and then had the arrogance to blame its customers for the blackout ! FPL should realize that its customers have a right to expect continuous safe and reliable energy even when it gets cold outside. It would appear that our Public Service Commission has failed to ensure that these utilities have enough reserve generating capacity to handle the needs of Florida. Indeed, is there even a state agency which inspects the utilities non-nuclear plants for proper maintenance to ensure their operation and availability ?

FPL requested permission from the NRC to relax their safety margins by amending their operating licenses to allow them to adopt a new set of plant technical specifications. The plant technical specifications are the plant parameters which FPL has to operate the plant under such as pressure and temperature limits. NEAP has petitioned the NRC for a public hearing to address this issue because we believe that it is unsafe to allow FPL to operate Turkey Point under generic technical specifications based on the operating history of other plants. To expense the costs involved with this hearing, we would appreciate all donations to this cause.

On December 15, 1989, Public Citizen, a Ralph Nader organization in Washington, D.C. sent a letter to FPL's President, Robert E. Tallon. In their letter, Public Citizen requested that FPL shutdown the Turkey Point nuclear plants permanently because they are 17 years old and are no long economical to operate. Public Citizen will also address these concerns to the Florida Public Service Commission. FPL wants to expense $100 million dollars to install two diesel generators at Turkey Point, a cost which Public Citizen does not recommend.

We have reviewed several Public Citizen reports which are based on NRC government documents. These reports evidence that other nuclear plants which were shutdown for extended periods of time for equipment upgrades, performed worse afterwards. We concur with Public Citizen in that FPL should permanently shutdown the Turkey Point plants for economical reasons. Turkey Point's budget for 1988 was 92.5 million dollars plus a 20% overrun which resulted in operating and maintenance costs of about $111 million dollars in total. Turkey Point has exceeded its operating and maintenance budets for the last five consecutive years. Turkey Point's operating and maintenance costs escalate every year because these plants are 17 years old and very poorly maintained.

Common sense would tell you that if you paid $10,000 dollars for a new car, you would not spend another $50,000 to keep it operating. Now FPL has some mighty smart business boys on their Board of Directors who realize that it makes good business sense to keep pumping money into the Turkey so long as FPL can continue to pass these costs on to the ratepayers. Sure, FPL only paid $235 million to build both Turkeys, and sure FPL will say that the Turkeys have paid for themselves 3 times over, but the fact remains that FPL has never provided anyone with documents evidencing these claims to our knowledge, nor does FPL address the escalating operating and maintenance costs of the Turkeys. Plant equipment at the Turkey which was supposed to last 40 years, has already been replaced at the ratepayers expense. I'm talking about $500 million dollars to replace the Turkey Point steam generators. I'm talking about leaky seal tables which the manufactor, Westinghouse, has recommenced replacing. Just how much of the ratepayer's money does FPL expect to be deposited into this "money pit" ?

If you believe that the Turkey Point "money pit" has sucked up enough of your hard earned money, then write a letter to the Florida Public Service Commission asking them to initiate measures to shutdown the Turkey for economical reasons and that your tired of throwing away your money.

Your letter should be addressed to:

Mr. Swafford, Executive Director
Florida Public Service Commission
Fletcher Building
101 E. Gaines Street
Tallahassee, Florida 32399-0850

Tell them I sent you and that you demand safe and reliable energy at a fair and reasonable price and that when Christmas comes around next year, that you expect to have electricity to cook your Christmas Turkey with. I wonder if Robert Tallon had a hot Christmas dinner ???

NEAP has petitioned the Florida Public Service Commission for permission to participate in the scheduled public hearings on Febuary 21, 1990 in Tallahassee concerning fuel cost recovery for the Turkey Point plants. We need your support in the form of donations so that we can convince the PSC to ORDER FPL to refund some of your money back to you. Last summer, we participated at the FPL rate hearings and protested the costs associated with the FPL Deming award and the PSC ORDERED a refund to us the customers. So please help if you can.

Because of the problems at the Rocky Flats nuclear waste storage facility, our government is negotiating with the Energy Department officials in an effort to store plutonium on various military bases. YES, your read it correctly, PLUTONIUM, to be stored on military bases...This facility will reach the permitted maximum storage of 1,601 cubic yards of nuclear waste in March or April of this year. The U.S. Energy Secretary, James Watkins told Congress that the New Mexico facility - a cavern known as the Waste Isolation Pilot Plant, that lies 2,150 feet beneath the desert near Carsbad, cannot open before July 1. Well, it would appear that our government is just going to throw this PLUTONIUM waste into a big hole in the ground so that it will be around for our grandchildren to worry about.

The Fernald uranium processing plant near Cincinnati apparently leaked radioactive materials into the environment resulting in a class action lawsuit against the Mobil Mining and Minerals Company. U.S. District Judge Carl Rubin ruled that the 14, 000 residents and businesses within five miles of the plant could engage in legal actions against the U.S. Department of Energy to recover clean-up costs of the radioactive pollution.....Not a nice place to visit and who would want to live there now...

Ants are now dredging up radioactive material at nuclear waste disposal sites in the desert Southwest and using that material as part of their anthills. The discovery is being downplayed by scientists saying that the radioactivity measured on the anthills is relatively low. Sounds similar to FPL's statement about the radiation released by the Turkey Point plants...

Four whistleblowers who worked at military nuclear plants and complained of environmental and safety problems at the plants were subjected to harassment by being ordered to submit to psychiatric examinations. Edwin Bricker, one of the workers at the Hanford nuclear plant in Washington state said his sessions with psychologists included questions like "how do you feel about your fellow workers, your employer, and do certain things tick you off?" "How do you feel about your mother? Do you kick the dog ?"

Thomas Carpenter, a lawyer representing the workers said the tactic was intended to damage the employees' careers and "sense of self-worth."

The Russian newspaper *Izvestia* reported that the Soviet government issued strict curbs on reporting of accidents at nuclear power plants. Severe limitations designate as classified nearly all reports on nuclear and conventional power accidents, breakdowns or contamination of any severity....I guess if Chernobyl had not exploded and just leaked badly, nobody would have been the wiser, just a little sicker, maybe like radiation poisoning.

Yes, it's true, two years after the Nuclear Regulatory Commission shutdown the Peach Bottom nuclear plant in Pennsylvania because 33 control room operators slept on the job, they have decided to grant permission for the plant to operate again. Of course the NRC warned that they will be watching the utility very closely...just like Turkey Point... At Peach Bottom, four control room employees responsible for running the plant were asleep at the same time...Several operators were found huddled around a personal computer playing video games...To end naps by operators, plant officials replaced comfortable, high backed chairs in the control room with chairs in which sharp nails protrude into the backs of the operators...no just kidding about the nails...

Did you ever dream about winning the Florida Lottery and receiving maybe $50 million dollars or so...Seems like a tremendous amount of money doesn't it...Well did you know that ONE BILLION DOLLARS has already been spent over the last ten years to clean-up the Three Mile Island melt-down accident and that the clean-up contiues to go on and on and on...Congress, some years ago, passed the Price Anderson Act which limits a utilities liability in the event of a nuclear accident...What would it cost FPL to replace the very expensive homes in the Miami area should Turkey Point melt-down

and contaminate the area ? You can be reasonably sure that the Price Anderson Act would limit their liability...Better check your homeowners insurance policy for nuclear accident coverage...

Well, maybe you really don't believe that Turkey Point could ever melt-down...I mean after all, nobody expected Chernobyl to explode or Three Mile Island to melt-down either...Let's take a general overview of just the significant events which occurred at the Turkey Point nuclear plants in 1989 only and not consider the previous years totally over ONE MILLION in fines.

January 1989...Turkey Point starts off with a $100,000 dollar fine by the NRC for a significant security violation...a reoccuring problem for years at Turkey Point.

James L. Broadhead is appointed as FPL's chief operating officer.

Leaks on the Turkey Point reactor seal tables are discovered to be leaking radioactive water due to corrosion of the pipes in the seal tables.

A plant operator mistakenly opened the wrong valve, (poor training), resulting in a leak of about 300 gallons of radioactive water...FPL was required by State and Federal Law to notify Dade County Emergency Management officials and the Nuclear Regulatory Commission of the serious event within 15 minutes. FPL decided not to tell anyone about the event until about the next day.

March 1989...Joette Lorion, Director of the Center for Nuclear Responsibility presents argument before the NRC Safety Board at a public conference in Miami. The arguments center around the radiation damaged reactor vessels.

The NRC sent a Confirmatory Action letter to FPL effectively ordering the shutdown of both Turkey Point units because 50%, thats right, half of the licensed plant operators failed a NRC administered requalification exam... makes you feel real safe doesn't it...Sure, it can't melt-down...neither could Three Mile Island or Chernobyl...

NRC lists Turkey Point among the nation's ten worst nuclear plants in the country.

April 1989...Seal table leaks force the shutdown of Turkey Point again...same problem which occurred in January...Westinghouse recommends the replacement of both seal table units, but FPL just wanted to do a "quick fix" and keep sucking in the money...Definitely the mark of a Deming Prize company...

Robert Landry, hired to do repairs at the Turkey Point nuclear plant as a contractor with the Bechtel Construction Co. filed a lawsuit against FPL claiming that FPL knowingly exposed him to radiation at the plant. Apparently, FPL refused to provide the man with a respirator on the job and he breathed in a little radiation...maybe causing him to glow at night...keeping the wife and kids up...

April 1989...FPL Nuclear Chief, William F. Conway quits and leaves for Arizona...far away from Turkey Point...of course many Turkey Point executive managers have come and gone over the years at Turkey Point...its just a matter of how long they can last...

John Odom the Turkey Point Site Vice President ...lasting about a year at the Turkey...is replaced by Ken Harris the Vice President from the St. Lucie nuclear plant...I told you these managers don't last too long around the Turkey...Now Mr. Harris, a former Turkey Point manager will make an endurance run and who knows...maybe he will establish a new record for stay time of an executive manager...

May 1989...Dade County Commissioner Barbara Carey backed an effort calling for a federal hearing on safety issues at the Turkey Point nuclear plants. Carey sponsored a resolution urging the U.S. Atomic Safety and Licensing Board to hold a formal hearing on the claim that the nuclear reactors at FPL's Turkey Point plant are dangerously brittle.

Public Citizen, a Ralph Nader national organization named the Turkey Point unit 3 as the worst and most unsafe plant in the United States. Turkey Point unit 4 was ranked 10th. "These are the plants that are most likely to experience a severe accident [that] would have the most severe consequences in the event of an accident, and/or are the most expensive to operate," the report stated. The report officially classified Turkey Point unit 3 as the Number 1 lemon in the USA.

June 1989...FPL was notified by the NRC, that Turkey Point will continue under increased scutiny for at least the next six months. The NRC created a watch list of troubled nuclear plants in 1986 and FPL's Turkey Point plants have been on this watch list since its creation. Also, the NRC places 3 NRC site inspector constantly at Turkey Point because it is a dangerously problemed plant. Usually only one NRC inspector is assigned to a nuclear plant.

June 1989...The Center for Nuclear Responsibility was granted a formal public hearing on pressure vessel concerns at Turkey Point. The Director for the Center stated that "We don't expect to win these hearings, but like a policeman on the corner, we just want to make things safer. We would like to win this particular hearing, however, because we feel Unit 4 should not be operating because of

its ceteriorating condition."...NEAP agrees with the Center and has requested permission to participate at the public hearing now scheduled for Febuary 27, 1990...We sure could use some funds to help obtain expert witnesses and pay for legal fees...so please help us out a little if you can...

June 1989...FBI Busts Turkey Point drug ring...FBI agents cracked a cocaine ring that may involve as many as 30 FPL Turkey point nuclear workers says the FBI. A Turkey Point supervisor, Vernon Rice, was charged with distribution of almost a pound of cocaine in a four-count indictment. Rice was quoted as stating that "Turkey Point runs on cocaine"...

The NRC warns that Turkey Point might be shutdown by the end of the year...NRC Chairman Lando Zech stated that FPL "should recognize that the commission's patience is wearing very thin,"..."We're looking for results and we want to see them."

FPL initiates drug testing of Turkey point supervisors.

Ten years after the Three Mile Island melt-down, Turkey Point has failed to upgrade safety equipment designed to prevent a nuclear meltdown. According to a NRC report, safety relief valves, which vent off excess pressure, may not work during accident or earthquake conditions.

July 1989...Joette Lorion, Director for the Center for Nuclear Responsibility charges FPL with a poorly operated Turkey Point plant. Lorion states that "We should not have to pay for Florida Power and Light's nuclear problem, they should pay for it,...it's not only consumers who are losing when it comes to problems at Turkey Point; stockholders are also suffering." It is interesting to note that FPL Group net earnings fell 23% in the first quarter of 1989 and the loss is blamed on maintenance costs at FPL's four nuclear units 2 at Turkey Point and 2 at St. Lucie.

August 1989...FPL executive resigns after 38 years...John J. Hudiburg threw in the towel after hiring on with FPL in 1951. At the ripe old age of 61, Hudiburg quit soon after James Broadhead was appointed as CEO...gee, maybe John was expecting the job...

FPL goes to Texas to find a replacement for Conway who quit and jumped ship for Arizona. Well, FPL found themselves a Texan..Jerome H. Goldberg...a 58 year old fellow from the South Texas Nuclear Project with a nine year career with the Houston Lighting and Power Company. When questioned about the Turkey...Jerry stated that "I think I can help get it back on track. That's where I get my kicks."... Well, Jerry old boy, we'll just see how long you last at the FPL executive graveyard known as Turkey Point...

The Public Service Commission questions FPL's costs involved with their quality programs and FPL's zeal to win the Deming Prize. Costs from the quality improvement program include $793,000 for 11 FPL management trips to Japan. Also FPL paid $892,000 to Japanese quality consultants last year.

September 1989...FPL may ban swearing on the job at Turkey Point...FPL is considering implementing a new employee policy which prohibits swearing and can discipline an employee for failing to file a tax return, sodomy, carnal knowledge, parking tickets and other terrible things according to FPL...I'll bet the employee moral really picked up after this announcement...

In Tallahassee at the PSC hearings concerning FPL and Turkey Point, the Center for Nuclear Responsibility and the Nuclear Energy Accountability Project petitioned against the consumers having to pay for Turkey Point's problems. Thomas Saporito, Executive Director of the Nuclear Energy Accountability Project, called Turkey Point a "money pit" and stated as the plant has aged, its costs have soared to among the highest in the industry. The PSC was given about 2,000 signed petitions for the commission's consideration....Well, it worked so let's all do it again in Febuary 1990...Send me the petitions and I'll certainly be more than happy to present them to the PSC commissioners in person for you...

A significant event occurs at Turkey Point...an oil leak on a turbine valve caused the valve to slam shut...this failure should have automatically shutdown the nuclear reactor, but instead, the reactor would not shut itself down...the plant operators in a last ditch effort managed to shutdown the reactor by pushing the "panic button" called the scram button which causes control rods to drop into the reactor and hopefully shut it down. An NRC investigation of the event revealed that numerous equipment failures occurred during this event. Emergency equipment which should have started automatically, failed to operate. A comparator circuit was found not to have been calibrated for about 3 years...a critical piece of safety equipment...yet the NRC failed to ORDER the shutdown of Turkey Point...

September 1989...Ralph Nader's Group...Public Citizen ranked Florida #4 in the nation in the amount of nuclear waste generated. According to the report, Turkey Point 3 came in at 282 million curies, Turkey Point 4 at 264 million curies, St. Lucie 1 at 260 million curies, St. Lucie 2 at 115 million curies and Crystal River at 238 million curies...The curie is the unit scientists use to measure radioactivity....Dan Boroson, analysist for Public Citizen, stated that the problem is that the country doesn't know what to do with spent nuclear fuel rods. Most are lying in 40 foot deep pools of water on nuclear plant sites....NEAP notes here that in Sept. 1988, Turkey Point leaked 3,300 gallons of radioactive water into

the environment through the canals around Turkey Point...Gee, did you every go fishing in those canals...Its especially easy to fish at night...just look for the fish that glow and are unusually large and deformed and swim fast...

Just kidding about the fish swimming fast...

September 1989...A Turkey Point plant electrician landed in the hospital when a valve literally blew apart and drove a steel shaft through the mans face. The steel shaft smashed through the workers jaw and up through his mouth and now area. The force was so great that the worker was knocked off his feet backwards striking his head on a steel beem...A NRC investigation of the accident revealed that FPL had an improper equipment clearance and failed to isolate pressure from the valve...One of the very same problems this whistleblower identified to the NRC and was fired for...

October 1989...NRC issues a report on Turkey Point indicating improvements...this report comes in the wake of a possible shutdown order in December...what a coincident...or maybe a whitewashed government report...or maybe collusion...

November 1989...FPL even closer to the NRC shutdown order, decides to announce that it will voluntarily shutdown both Turkeys in November 1990 for 11 months to replace 2 diesel generators...Gee...do you think FPL might try to fool around with the NRC in an effort not to be ordered shutdown...no it couldn't possibly be so...could it...

FPL decides to wall off the Nuclear units from the fossil units at Turkey Point...yes...a Berlin Wall here in the USA...Gee, I guess the wall will surely stop any drug usage or maybe its to prevent non-nuclear workers from talking with nuclear workers...or maybe its in case another radioactive leak occurs...

Power from FPL is found to cost 5% more than the average rate charged by Florida's investor owned electric utilities.

December 1989...Yes...the Christmas Blackout...A cold snap hit Florida and FPL could not meet the power needs of the customers. Indeed FPL blamed us, the customers, for the blackout. Well, what were we supposed to do, run around the house to keep warm...Well, FPL went cold Turkey for Christmas as both of the Turkey Point nuclear reactors were shutdown for equipment failure again...Now wait a darn minute...you don't mean the nuclear reactors tripped off-line again...yep they did...by our estimate, this totals 6 reactor trips for 1989...

We here at NEAP headquarters, unlike the NRC folks, try to use a little common sense when evaluating the performance of a nuclear plant such as Turkey Point. We have researched the capacity factors

for the Turkey Point nuclear units for the period dating from 19.. to 1988. The results are listed below and directly evidence the poor performance of the Turkey Point units:

Year	Turkey Point 3	Turkey Point 4
1974	62.1%	74.1%
1975	75.0%	68.4%
1976	73.8%	64.5%
1977	76.6%	62.8%
1978	77.1%	64.9%
1979	49.3%	65.9%
1980	77.3%	67.9%
1981	16.1%	78.5%
1982	66.5%	67.9%
1983	75.0%	51.7%
1984	81.8%	52.6%
1985	57.4%	88.0%
N	NRC PLACES TURKEY POINT ON THE WATCH LIST	
1986	75.9%	29.7%
1987	15.3%	45.1%
1988	58.9%	55.0%

Now, let's average the performance since 1986 when the Turkey was put on the NRC watch list...Unit 3 comes in at 50% and Unit 4 comes in at 43.26%...Obviously these nuclear plants only operate at best 50% or less per year...Now, are they really economical to operate or should FPL retire these old, aged, clunkers...

This concludes our January newsletter...due to the costs expensed for these newsletters, and considering we operate soley on donations, we are forced to continue these newsletters only on a subscription bases. (Does not apply to the media or Public Citizen and NIRS). Therefore, if you wish to continue to recieve our newsletters in the future, please complete and mail the application below. We look forward to your subscription as these funds are needed to provide the means to for litigation concerning Turkey Point through the NRC and the Public Service Commission.

[ ] I wish to subscribe to the NEAP newsletters and I have enclosed a check in the amount of $12.00 for a one year subscription.

Name: Address:

Please make your check payable to the Nuclear Energy Accountability Project. Note: you do not have to be a member of NEAP to receive our newsletters.

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

January 23, 1990

Mr. Thomas J. Saporito, Jr.
Executive Director
Nuclear Energy Accountability Project
1202 Sioux Street
Jupiter, Florida 33458

Dear Mr. Saporito:

This letter is in response to your Petition filed on December 29, 1989, with the Executive Director for Operations. In your Petition, you request that the NRC: (1) immediately investigate and determine the root cause of the recent trips of Turkey Point Units 3 and 4 on or about December 25, 1989; (2) impose an escalated civil penalty if the investigation reveals that the reactors tripped due to poor maintenance practices or incorrect operation of the plant; and (3) immediately suspend Turkey Point's operating licenses (DPR-31 and DPR-41) if the investigation reveals that these reactor trips could have been prevented through correct maintenance practices or proper operation of the plant. As the basis for your request, you allege that reasonable assurance for the continued safe operation of Turkey Point Units 3 and 4 does not exist due to: (1) loss of administrative controls and significant plant events resulting in reactor trips which evidence deficiencies in the licensee's programmatic overall maintenance of the physical plants; and (2) the licensee's failure to establish a satisfactory operator training program that meets the NRC criteria for such a program.

Your Petition has been referred to me for response pursuant to 10 C.F.R. §2.206 of the Commission's regulations. We have reviewed your Petition and find that you have presented no specific facts in support of your allegations, and have not raised any new information which is not already being reviewed by the NRC. Since you have not set forth the factual basis for your request with the specificity required by 10 C.F.R. §2.206, further action need not be taken on your request. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), DD 85-11, 22 NRC 149, 154 (1985). Nevertheless, let me clarify the events that occurred at Turkey Point Units 3 and 4 to which you refer. On December 23, 1989, Turkey Point Unit 4 experienced a reactor trip due to the closure of a main steam isolation valve (MSIV) caused by water intrusion and corrosion within the MSIV's terminal box. As a result, Florida Power and Light Company (FPL) inspected the other MSIV terminal boxes at the site and found two other boxes associated with Unit 3 MSIVs that had also experienced water intrusion and corrosion. FPL declared these MSIVs inoperable and shut down Unit 3 to make the necessary repairs. Therefore, only Unit 4 experienced a reactor trip due to this event. However, the issue of water intrusion and corrosion within terminal boxes is a concern for both Turkey Point Units 3 and 4. FPL is performing a detailed inspection of terminal boxes at the plant for this problem and is preparing a root-cause analysis.

In your Petition, you request that the NRC immediately investigate the trips at Turkey Point (actually only one trip) and determine the root cause. The NRC is aware of the circumstances of the event and is currently monitoring FPL's inspections and root cause analysis as part of its ongoing inspection program at the site. If the NRC determines that a violation of its regulations or the conditions of FPL's licenses has occurred, the NRC will consider taking

appropriate enforcement action. The documentation associated with NRC inspection and enforcement actions will be filed and available to you in the Local Public Document Room at the Environmental and Urban Affairs Library, Florida International University, Miami, Florida.

With regard to your allegations concerning deficiencies in the licensee's maintenance and operator training programs, the adequacy of the licensee's maintenance, operation, and training activities was raised by you in your Petition submitted pursuant to 10 C.F.R §2.206, dated December 21, 1988 (as supplemented). In my Partial Director's Decision DD-89-05, dated July 12, 1989, I responded to these issues and found that no substantial basis was provided for taking the actions requested in your December 21, 1988, Petition. You have not provided any new evidence which would cause me to reconsider this conclusion. In addition, the issues you raise are the subject of NRC inspection activities at Turkey Point and are also evaluated as part of the NRC's Systematic Assessment of Licensee Performance (SALP). As stated above, should the NRC identify any violations in these areas, the NRC will consider taking such enforcement action as may be appropriate.

Based on the above, I have concluded that you have presented no new information concerning this event that is not already being considered by the NRC. Therefore, there is no basis at this time to take the actions you request in your Petition.

Sincerely,

FOR Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

cc: See next page
Florida Power and Light

Mr. Thomas J. Saporito
Florida Power and Light Company

Turkey Point Plant

cc:
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Newman and Holtzinger, P.C.
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Mr. Jacob Daniel Nash
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Administrator
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Mr. J. H. Goldberg
Executive Vice President
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. George C. Anderson
Elizabeth B. Johnson

In the Matter of

Docket Nos. 50-250-OLA-5
50-251-OLA-5
(ASLBP No. 90-602-01-OLA-5)
(Technical Specifications Replacement)
(Facility Operating Licenses Nos. DPR-31, DPR-41)

FLORIDA POWER AND LIGHT COMPANY
(Turkey Point Nuclear Generating Plant, Units 3 and 4)

June 15, 1990

The Licensing Board admits an intervenor after detailed consideration of issues of standing, timeliness, and the admissability of contentions. Five of fifty-six contentions are admitted. The admission of safety issues is based on genuine issues of fact arising because of Applicant's admission that a particular change in technical specifications is a "relaxation" and because of an error or omission in the accompanying analysis. The admission of environmental issues is based on genuine issues of fact raised with respect to safety issues that might ultimately result in a finding that the change in specifications is "a major federal action."

RULES OF PRACTICE: STANDING

An organization may gain standing based on the standing of a "member," providing that the member is more than just a passive contributor without any control over its operation. Furthermore, the "member" on whom membership is based must be a member for herself and not for another organization whose standing has not been demonstrated.

RULES OF PRACTICE: DEFAMATORY ALLEGATIONS

Allegations of harassment and intimidation must be documented. After an opportunity for documentation has been afforded, unsupported defamatory allegations may be struck from the record.

RULES OF PRACTICE: WITHDRAWAL OF BASIS FOR STANDING; NONLAWYER

A nonlawyer representing an organization stated — as part of a filing that alleged harassment and intimidation — that he no longer authorized that organization to represent him. Nevertheless, since no other basis for standing exists and his withdrawal would deprive the organization of standing, it is appropriate to give the nonlawyer a second chance to consider the implications of his withdrawal.

RULES OF PRACTICE: ADMISSION OF CONTENTIONS; 10 C.F.R. § 2.714(b)(2)

In applying the Commission's newly adopted standard for the admission of contentions, the Board finds that a petitioner must identify an error or omission in Applicant's analysis in order to gain admission for its contention. Merely stating, in reliance on an admission of Applicant, that a change in its technical specifications is a "relaxation" is not sufficient to gain admission for a contention when Applicant's analysis accompanies its admission. Petitioner must also identify an error or omission in the accompanying analysis to create a genuine issue of fact and gain admission for its contention.

With respect to environmental issues, the Board admitted two contentions because genuine issues of fact with respect to safety contentions could ultimately result in a finding that this case entails "a major federal action."

TECHNICAL ISSUES DISCUSSED

For a pressurized water reactor: risks during out-of-service time; combined limit for thermal power, pressurizer pressure, and the highest operating loop coolant temperature; change in mode reduction requirements; RCS boron concentration; BAT boron concentration surveillance; outage time for one channel of heat tracing; rod drop time.

MEMORANDUM AND ORDER

(Prehearing Conference Order: Parties and Contentions)

Memorandum

The purpose of this proceeding is to determine whether or not Florida Power and Light Company (Applicant) may amend the technical specifications for its plant pursuant to "the NRC and industry initiative to standardize and improve technical specifications for nuclear plants, *See* 54 Fed. Reg. at 50295 [Dec. 5, 1989]." Applicant's purpose in seeking to change its technical specifications is to benefit from industry experience with technical specifications and to facilitate a "uniform understanding of requirements."[1] However, a petition has been filed that asserts that the change in technical specifications is unsafe.

During the litigation of this case, the Staff may decide to permit the proposed change in technical specifications, after comments have been received and considered on the proposed determination of the Staff of the Nuclear Regulatory Commission (Staff) that "the amendment request involves no significant hazards considerations." 55 Fed. Reg. 20,218, 20,227-28 (May 15, 1990).

On Friday, March 23, 1990, we held a prehearing conference in this case in Miami for the purpose of determining whether either of the petitioners — Mr. Thomas J. Saporito and the Nuclear Energy Accountability Project (NEAP) — should be admitted as a party. A purpose of this memorandum is to determine whether party status should be granted. To reach that determination, we must decide whether or not a petitioner: (1) has standing, and (2) has submitted at least one admissible contention. Both prongs of this test must be met for a petitioner to be granted party status.

With respect to the standing issue, the Board ruled at the prehearing conference that it would accept the position of Applicant and the Staff that Mr. Saporito had standing[2] and that, based on his standing, NEAP — which Mr. Saporito

[illegible] respect to Applicant's [illegible] Staff's [illegible] [illegible] to [illegible] answers. However, we [illegible]

[1] "Applicant's Response to Amended Petition to Intervene" (Applicant's Response), March 16, 1990, at 5.

[2] Mr. Saporito works over 40 hours a week as a teacher at the ATI Career Training Center, 1 N.E. 19th Street, Miami, Florida 33132, and this is well within the 50-mile geographical zone of interest.

serves as a director — also would have standing. The validity of this ruling was, however, placed under fresh doubt when Mr. Saporito filed a "Notice of Withdrawal from Proceeding" on April 1, 1990. In that petition, he alleged that Applicant had intimidated and harassed him; and he therefore asked to withdraw both as an individual party and as the basis on which NEAP might be said to have standing. On April 24, 1990, we established a schedule for resolving this motion through the issuance of an unpublished memorandum and order concerning the Motion to Withdraw.

The first part of this Memorandum will address the merits of the Motion to Withdraw and the standing issue. The second part of this Memorandum will address the question of whether any contentions are admissible.

I. MOTION TO WITHDRAW AND STANDING

In our April 24 memorandum, we discussed in detail Mr. Saporito's charge of intimidation and we invited him to resolve that charge, which he has not done. Our discussion, which now contains our reasons for denying Mr. Saporito's motion to withdraw as the person on whom NEAP relies for standing, follows:

II Unproven Allegations and Ambiguities

A Unproven Allegations

Mr. Saporito stated in his motion that he was withdrawing both as an individual Petitioner and as a person on whom NEAP relies for standing because he felt intimidated by actions of the Applicant. However, he has not persuaded the Board that there is any valid reason for his serious charge of intimidation.[3] [Footnote in original.]

An allegedly intimidating event of which we have been informed is a letter of March 7, 1990, sent by Mr. John T. Butler, counsel for Applicant, to Mr. Saporito's employer. We have examined that letter and have concluded that it was a simple factual inquiry for the purpose of confirming facts concerning Mr. Saporito's employment. There is nothing in the letter that we consider to be intimidating. Indeed, all the letter may have done with respect to Mr. Saporito's employment relationship is to bring to the employer's attention, in a neutral manner, a fact that is common knowledge and that Mr. Saporito reasonably must have expected his employer to learn during the course of this litigation: that Mr. Saporito is involved in a case affecting Florida Power and Light, a customer of Mr. Saporito's employer.

In addition to the March 7 letter, Mr. Saporito's employer also received a copy of a letter sent by Mr. Butler to Mr. Saporito on March 19. In that letter, Mr. Butler assured Mr. Saporito that "neither Florida Power & Light Company nor I had any hostile or coercive motives in making the inquiry [of March 7]." Since the contents of Mr. Butler's letter was not directly relevant to any interest of Mr. Saporito's employer, there does not appear to be any strong reason for him to have sent a copy of the letter to the employer and — in light of Mr. Saporito's earlier complaint — Mr. Butler might easily have anticipated that Mr. Saporito could have felt coerced by this procedure. Mr. Butler could have avoided the appearance of coercion by not copying the employer. However, he may also have felt that the letter would reassure the employer about there being no coercive intent and we find that the routine copying of that letter does not, by itself, demonstrate coercion to this Board.

After Mr. Saporito complained in a filing of March 9, 1990, that the March 7 letter was intimidating, we had an internal Board discussion about the allegation, but we did not communicate to anyone our conclusion that no intimidation had been demonstrated to us and that there was, therefore, no need for us to act on Mr. Saporito's filing, which did not request any specific action on our part. At the Prehearing Conference that we held in Miami on March 23, 1990, Mr. Saporito apparently also was in possession of a copy of the March 19 letter.[4] Yet, Mr. Saporito did not raise the question of coercion at that time, and we did not rule on it.

Subsequently, we have learned from Applicant [footnote in original] that Mr. Saporito filed a complaint with the Department of Labor concerning the March 7 letter; and that his complaint has been dismissed.

It is important to the Licensing Board to get to the bottom of this matter. It is not acceptable for one party to coerce another in a proceeding of this importance. *It also is not acceptable for a party to accuse another of coercion on our record without supporting facts* [emphasis supplied].

We also admit to being puzzled by charges of intimidation in this matter, for Mr. Saporito's fear of intimidation does not keep him from: (1) continuing to make public accusations against Applicant, (2) filing charges before the Department of Labor against Applicant, or (3) continuing to represent NEAP — though, apparently, in some "nonpersonal" manner that causes him to want not to be the source of standing for NEAP.

On May 5, 1990, Mr. Thomas J. Saporito, Jr., filed "NEAP's Response to the ALSB's Memorandum and Order." In that filing, Mr. Saporito had an opportunity to address the Board's serious concern that one party should not accuse another of coercion without supporting facts. He did not address that concern.[5] He also did not address the following question asked by the Board:

[3] We do not find that "Intervenor's Answer to Applicant's April 13, 1990 Response . . . ." April 20, 1990, is a permissible filing because it is a reply to Applicant's answer and is not provided for under the rules. Furthermore, we do not find any good cause for permitting Petitioner to reply because it has not demonstrated that there was anything in the answer that could be considered a surprise.

[4] Applicant's Response to Notice of Withdrawal from Proceeding, April 13, 1990 (Response), at 3. According to Applicant, Mr. Saporito made a complaint with the Department of Labor under the "Whistleblowing" Statute, section 210 of the Energy Reorganization Act (42 U.S.C. §5851), based on the March 7 letter; his complaint was dismissed by a Letter of April 2, 1990, from Jorge Rivero, Assistant Director, Employment Standards Administration, Wage and Hour Division, U.S. Department of Labor, at

[5] "Applicant's Reply to NEAP's Response to the ASLB's Memorandum and Order" was filed May 17, 1990, and the "NRC Staff's Reply to NEAP's Response to Licensing Board's Memorandum and Order of April 24, 1990" was filed May 24, 1990. Both parties chose to ignore Petitioner's charge of intimidation and did not address whether or not we should grant all or part of Mr. Saporito's motion to withdraw. This is, of course, not surprising: Mr. Saporito's withdrawal is essential to Applicant's and Staff's argument challenging NEAP's standing based on another "member" who claims to be a basis for standing. However, we are permitted — in the interest of justice, and to prevent manipulation of this Board — to address an apparent attempt by a party to raise a procedural issue frivolously, whether or not another party would have us do so.

(Continued)

If he [Mr. Saporito] is a member [of NEAP], then why is he not willing to authorize himself — acting for NEAP — to represent himself?

Based on this failure to supply information, we conclude that Mr. Saporito was not subject to any coercion and we order that all material alleging coercion shall be considered to be struck from our record. We also caution Mr. Saporito not to make defamatory charges in this proceeding unless he is prepared to prove them. Further unsubstantiated attacks could constitute grounds for barring him from participation.

In light of our finding that Mr. Saporito was not coerced and in light of his failure to explain why he is not willing to authorize himself to represent himself, we consider his motion to withdraw himself as the basis for NEAP's standing to be frivolous and we deny that motion — whose effect would be to place in controversy a procedural issue concerning whether another person could be the basis for NEAP's standing.[6] (Were Mr. Saporito a lawyer, fully informed of the possible consequences of his motion to withdraw, we might grant his motion and rule that NEAP is no longer a party. However, given Mr. Saporito's lay status, our denial of his motion will give him a chance to consider the full consequences of his request.)

However, Mr. Saporito's motion to withdraw as an individual is granted because it does not create any new issues for us to decide. We caution Mr. Saporito not to engage in procedural maneuvers whose principal purpose appears to be the creation of new issues for decision in this case.

If Mr. Saporito continues to withdraw himself as the basis for NEAP's standing, he may do so. However, he is the sole basis on which NEAP relies and NEAP has already had all the opportunity it needs to establish standing; it may not file any further documents alleging a new basis for standing. Hence, if Mr. Saporito fails to assure us of his willingness to have NEAP represent him (by complying with ¶2 of our order, below) the entire basis for standing for NEAP fails and this case will be dismissed.

We note that (were Mr. Saporito's motion granted) we are inclined to deny standing based on the alleged standing of Shirley Brezenoff — whom we find: (1) has no control, either formal or through her membership activities (which she did not discuss in her affidavit despite our invitation to do so) over NEAP, and (2) became a member "For Quad City Citizens for Nuclear Arms Control" and not for herself. (*See* her certificate of membership.) Therefore, she lacks the indicia of membership requisite to provide a basis for NEAP's standing. *Health Research Group v. Kennedy*, 82 F.R.D. 21 (D.D.C. 1979); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1451 (E.D. Mich. 1989); *compare Consolidated Edison Co. of New York* (Indian Point, Unit 2), LBP-82-25, 15 NRC 715, 736 (1982).

[6] At the beginning of the prehearing conference, Mr. Saporito revealed his strong feelings that his own standing was not necessary for NEAP's standing. Tr. 5-6. At that time, he acknowledged that the issue was moot. Tr. 6. However, he has since taken steps calculated to raise the issue that we all considered moot. The Board is not pleased by this apparently contrived attempt to cause us to consider an issue that all agreed was moot.

II. CONTENTIONS

A. Legal Setting

This case represents one of the first in which the Commission's recently amended contentions requirement is applicable. Consequently, it is appropriate to set forth the full contentions requirement as it appears in 10 C.F.R. § 2.714(b)(2):

> Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
>
> (i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged fact or expert opinion on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
>
> (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, *if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.* On issues arising out of the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment; or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document. [Emphasis supplied.]

B. General Description of Contentions

Although Petitioner submitted lengthy contentions that purported to comply with the contention requirements now in effect, on examination we find that they consist primarily of allegations — based on Applicant's own admissions — that Applicant has in some instances relaxed requirements in the course of amending its technical specifications. Generally, Petitioner failed to advance an independent basis for any of its contentions. Instead, Petitioner relied entirely on alleged omissions in Applicant's analyses and said it intended to support its proposed contentions by Mr. Saporito's expert opinion, by interrogation of Applicant's witnesses, and by discovery, without any indication of the analytical basis for further inquiry. These allegations of omission were always based on assertion, without any specific source of evidence concerning the importance of the alleged omission.

The question this presented to us was: could an allegation, based solely on an admission of Applicant, that some of its technical specifications are being "relaxed" — while others are being made more rigorous — form the basis of a contention that should be admitted under the newly applicable rules? We have concluded that there is no simple answer to this question but that we must look further and examine Applicant's explanations for why a particular relaxation is not hazardous. If Applicant provides a clear explanation that is not directly challenged by Petitioner — through evidence or citations to sources or reasoning — then Applicant's admission of a "relaxation" is not by itself sufficient to admit a contention. If, however, Applicant's "analysis" is merely conclusional and therefore fails to provide any assurance that its "relaxation" is safe, then we accept Petitioner's reliance on Applicant's admission as sufficient grounds for the admission of a contention.

Applying this standard, Petitioner NEAP has presented contentions that are properly admitted. Since NEAP provisionally has standing,[7] based on Mr. Saporito's membership, NEAP may be a party and may be referred to as "Intervenor."

"Petitioners Amended Petition for Intervention and Brief in Support Thereof (Amended Petition)," March 5, 1990, contains fifty-six proposed contentions. The first two contentions are environmental and shall be reserved for later discussion. The twenty-fifth contention relates to facts that are not related to the change in technical specifications, as we shall discuss below. The other contentions (3-24 and 26-56) follow a uniform format that we shall proceed to analyze, for the purpose of communicating accurately the issue with which we were faced.[8]

In Table 1 we set forth Petitioner's third contention verbatim. We have added to the contention our titles, which we insert in all capital letters, for the purpose of indicating the apparent purpose of each section of the contention. Then, in the right margin, we have inserted our comments on the individual sections of the contention.

We note that Contention 3 relates to a change in wording of the technical specifications and is in this respect different from some of the other contentions.[9] However, the basic approach is the same for all contentions.

In the succeeding portion of this memorandum, we will analyze each section of the transcript of the prehearing conference and the related documents to determine whether the criteria for admission of contentions are met. In those analyses, we discuss the rationale advanced by Applicant for determining that each "relaxation" does not have significant safety consequences. Because three of the Applicant's explanations with respect to safety contentions are unsatisfactory, we admit three safety contentions and two environmental contentions.

[7] *See* Ordering ¶2, *infra*.

[8] We consider it our obligation to set forth our reasoning fully both because this facilitates review of our determination and the use of our decision by future parties who wish to be guided by prior cases.

[9] All the participants agreed with the Board that the proper place to evaluate the effect of the omission of definitions is with respect to those substantive sections in which the omission of a definition changes the required action. Tr. 22-32.

TABLE 1
UNIFORM FORMAT FOR CONTENTIONS

NOTE: Petitioner's heading for the contention we analyze is: *Contention 3: Statement of the issue of law or fact to be raised or controverted.*

Descriptive Title (Provided by Board) and Text of Contention 3	Board Comments
PURPOSE STATEMENT (a) The license amendments requested by the Applicant to the Turkey Point operating licenses DPR-31 and DPR-41 for Turkey Point Units 3 and 4 respectively, would authorize replacement of the current plant Custom Technical Specifications (CTS), with a set of technical specifications based on the Westinghouse Standard Technical Specifications (STS).	This statement is true. However, it does not provide the basis for a contention.
FEAR OF CONSEQUENCES (b) The license amendments sought by the Applicant, to revise the Turkey Point (CTS) with the Westinghouse (STS) will cause the plant to be operated unsafely because of the *relaxed safety margins* contained in the Westinghouse (STS), resulting in a release of radiation and fission products into the environment which will enter the food chain causing loss of life, due to cancer and other related illnesses, to the general public and radioactively contaminate hundreds of miles of land and privately owned property and homes, solely dependent on	This statement contains general fears that are not grounded on any technical concerns about the proposed changes in technical specifications.

TABLE 1 Continued

the prevailing air currents. [Emphasis added.]	
DESCRIPTION OF CHANGES (c) Specifically, the amendments would change the CTS at specification 1.0 and Table 4.1-1 omitting the following Technical Specification definitions: 1. SAFETY LIMITS, 2. LIMITING SAFETY SYSTEM SETTINGS, 3. LIMITING CONDITIONS FOR OPERATION, 4. PROTECTIVE INSTRUMENTATION LOGIC, 5. DESIGN POWER, 6. REACTOR COOLANT PUMPS, 7. ENGINEERED SAFETY FEATURES, 8. REACTOR PROTECTION SYSTEM, 9. SAFETY RELATED SYSTEMS AND COMPONENTS, 10. PER ANNUM, 11. REACTOR COOLANT SYSTEM PRESSURE BOUNDARY INTEGRITY, 12. COOLANT LOOPS, 13. HEAVY LOADS.	Statement of a change from the CTS to the STS. No statement of the basis for a contention. Note: this is the only part of the uniform format that changes from contention to contention. Often this part alleges a "relaxation."

Note: the next portion of the discussion of Contention 3 is preceded by the following title: *Concise statement of the alleged facts or expert opinion on which the Petitioner intends to rely in proving the contention at the hearing.*

SERIOUSNESS OF NUCLEAR ACCIDENT (a) Petitioners would state here that the alleged facts supporting Contention 3 are that any release of radiation and fission products from a nuclear power plant adversely affect human life and the environment as a whole and that the relaxed safety margins evidenced in the Applicant's (RTS) provide the means and method for such a release of radiation and fission products into the environment.	Petitioners state their fears. They do not state how Applicant's STS will contribute to those fears. In other words, "the means and method" are not specified. Petitioners cite Applicant's word: "relaxed."

TABLE 1 Continued

NAME OF WITNESS[10] (b) Petitioners will rely on the expert opinion of Thomas J. Saporito, Jr., Executive Director of the Nuclear Energy Accountability Project (NEAP), in support of Contention 3. *See Affidavit of Thomas J. Saporito, Jr.*	Petitioners name a witness without providing any idea about what he may say.
CROSS-EXAMINATION (c) Petitioners will rely on cross-examination of Applicant's witnesses to support Contention 3.	Petitioners fail to state any analytical basis for cross-examination.
GENERAL REFERENCES *References to those specific documents on which the Petitioner intends to rely to establish those facts or expert opinion:* (1) Applicant's (CTS) and (RTS), (2) Applicant's Safety Evaluation for No Significant Hazards Consideration, (3) Applicant's Undated Final Safety Analysis Reports, (4) Federal Register Volumes 48, No. 67 at 14870, (5) Other documents which Petitioners may find through further research or which Petitioners may obtain through discovery in these proceedings.	There are no specific citations.

III. DISCUSSION OF SPECIFIC CONTENTIONS

A. Withdrawn Contentions

The following contentions were withdrawn by the Petitioner at the prehearing conference and are no longer at issue:

[10] The same witness, Thomas J. Saporito, Jr., is specified for all the contentions.

- all portions of Contention 3 other than those related to the definitions of "safety limits" and limiting safety system settings. [Tr. 22, 29 (Staff statement, uncontradicted by Petitioner).]
- the portion of Contention 3 relating to the omission of the definitions of "safety limits" and limiting safety system settings [Tr. 27-29, 30, 31-32], with the understanding that these omissions may be considered with respect to particular portions of the tech. l specifications where it is alleged that the change has an effect.
- Contention 10 [Tr. 102].
- All of Contention 12 but that part that deals with the frequency of RCS boron concentration surveillance.
- Contention 13 [Tr. 130-31].
- Contention 14 except for the portions stating: (1) that the boric acid pump need only be available when its associated flow path is required to be operable, and (2) permitting hot standby for 108 hours after loss of operability of a charging pump. [Tr. 131-43.]
- Contentions 15, 17, 19, 20, 22, 23, 24, 26, 27, 28, 29, 31, 32, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56 [Tr. 144, 150, 154, 158, 163,[11] 168, 175, 181].

B. Contention 4

Petitioner's proposed Contention 4 states:

> Specifically, the amendments would change the CTS at specification 1.0 and Table 4.1-1. Surveillance tables pages 3-8 to 3-10 of the RTS utilize frequency codes which are defined in Table 1.1 in section 1 at page 1.7 of the RTS.
>
> Therefore, plant operators will experience increased and greater difficulty using the surveillance tables at pages 3-8 to 3-10 of the RTS since the operators will have to refer back to the frequency code table in Section 1, at page 1.7.
>
> This change incorporated in the RTS as compared to the CTS which provides a frequency code table with the surveillance Table 4.1-1 increases the probability of operator error which could result in missed surveillances and unsafe plant operation.

This contention relates to an editorial change in the current technical specifications. In the current technical specifications, the definition for certain frequency codes used in Table 4.1-1 was contained at the end of that table. In the revised technical specifications, these codes are defined in Section 1, Table 1.1 — which provides more specific definitions than do the current technical specifications. That is, definitions have been transferred from footnote status to an earlier section of the Technical Specifications, where they are more fully defined.

[11] Although Petitioner spoke of Contention 31, he addressed the substance of Contention 33 and purposely skipped over Contentions 31 and 32. *See* Tr. 165.

Petitioner did not offer any facts and cited no expert sources on this subject and presented no reasoned statement of why this was unacceptable (*see* Tr. 33-41, 43 [discussion of Judge Bloch and Mr. Frantz]; Tr. 44 [Frantz for Applicant: operators are fully trained]; *compare* Tr. 44-45); hence, the admission of this contention is denied. There is no genuine issue of fact raised pursuant to 10 C.F.R. § 2.714 (b)(2)(ii) and (iii).[12]

C. Contention 5

Contention 5 states, without further specification, that "RTS, Table 4.3-1, section 3/4 at page 3-8 relaxes certain surveillance requirements [without specifying which requirements]." At the prehearing conference, Petitioner clarified that he is concerned that: (1) the power range neutron flux detectors may be excluded from channel calibration both for the high setpoint and the low setpoint (Tr. 46-49); (2) the test frequency for overtemperature Delta T is decreased from biweekly to every 31 days (Tr. 49); (3) the test frequency for overpower Delta T is decreased from biweekly to every 31 days (Tr. 49); and (4) there is no test for "under voltage 4.16 kilo volts" (Tr. 49). Petitioner also provides the following statement of reasons:

> I'd also like to point out that over-temperature Delta T and over-power Delta T and under-voltage 4.16 KV have been analyzed in the current technical specifications safety analysis of the plant, so to change these frequency surveillances is definitely going to affect the health and safety of the public because it's going to provide a means and a method to release fission products to the environment.

Tr. 52.

These concerns are addressed in the No Significant Hazards Evaluation, Appendix A 3/4 at 3-1, which discusses the changes in test frequency in detail. In particular, it relies on a Westinghouse Owner's Group study, WCAP-10271 series. In light of this reference, we find that Petitioner has not show us how Applicant's analyses are in error or that they have made a significant omission. Consequently, the contention is not admitted.

[12] Our memorandum defines the failure to demonstrate a genuine issue of fact as a failure to provide any factual evidence or supporting documents that produce some doubt about the adequacy of a specified portion of Applicant's documents or that provides supporting reasons that tend to show that there is some specified omission from Applicant's documents. *See* 10 C.F.R. § 2.714(b)(2)(ii) and (iii).

D. Contention 6

Proposed Contention 6 states:

> Specifically, the amendments would change the CTS at specification 1.17.[13] In the RTS the definition of OPERABILITY requires "electrical power" for system operability, and the A C power source requirements are defined by the A C sources Technical Specification.
>
> Where one of the A-C sources is inoperable and a component in the opposite train of a redundant system is inoperable, the CTS require that both of the redundant trains be declared inoperable. The RTS permit the ACTION restrictions of the A-C source to govern.
>
> The CTS would typically require MODE reduction within 7 hours pursuant to T.S. 3.0.1. The RTS requires MODE reduction within 14 hours when one Diesel Generator and an opposite train component are inoperable.
>
> This relaxation of the safety margins discussed above is unacceptable because it provides for an increase in the time permitted for MODE reduction from 7 hours to 14 hours. Additionally, this relaxation of the safety margins would provide for one train of a two train safety system being inoperable at the same time that one of the two A-C sources powering the opposite train components is inoperable.

Contention 6 deals with a "relaxation" in technical specifications pursuant to an NRC letter dated April 10, 1980, to all power reactor licensees from the Division of Operating Reactors. The purpose of the letter was to clarify "the use of the term OPERABLE as it applies to the single-failure criterion for safety systems." The letter states that:

> By and large, the single failure criterion is preserved by specifying Limiting Conditions for Operation (LCOs) that require all redundant components of safety related systems to be OPERABLE. When the required redundancy is not maintained, either due to equipment failure or maintenance outage, action is required, within a specified time, to change the operating mode of the plant and to place it in a safe condition. The specified time to take action, usually called the equipment out-of-service time, is a temporary relaxation of the single failure criterion, which, consistent with overall system reliability considerations, provides a limited time to fix equipment or otherwise make it OPERABLE. If equipment can be returned to OPERABLE status within the specified time, plant shutdown is not required.

Letter at 1.

The gist of the letter is that there must be full redundancy of systems. However, one system may lose a source of power (either on site or off site but not both)[14] *providing* "all of its redundant systems, subsystems, trains, components and devices are OPERABLE, or likewise satisfy the requirements of this specification." Enclosure 1 at 3.0.5.

[13] This appears to be a citation to the RTS.

[14] At the preliminary hearing, Judge Bloch asked a question that showed that he did not properly understand the nature of this change in technical specifications. He believed that this specification permitted one of two alternative sources of offsite power to be unavailable but that this change had nothing to do with emergency onsite power. This apparently incorrect view was, however, corroborated by counsel for Applicant. Tr. 56-63.

The Revised Technical Specification has adopted this Staff suggestion. It obviously does represent a "relaxation," as Applicant admits: previously two sources of power had to be available for a safety-related system or the system had to be declared inoperable and *now* conditions are specified where a system with only one power source can be operated temporarily. However, Petitioner does not provide any technical opinion or reasons to believe that the change is unsafe; in particular, it is not shown to be in violation of the single-failure criterion.[15] Tr. 55-63, 65. Hence, Petitioner has not given us a reason to determine that there is a genuine issue of fact with respect to this contention and it shall not be admitted.

We note that this change in Technical Specifications also increases the time allowed for mode reduction (while operating in Modes 1 through 4) from 7 to 14 hours. No Significant Hazards Evaluation, Appendix A at 1-5. *Compare* Revised Technical Specifications at 3/4 0-1, §3.0.3, which appears to differ from the No Significant Hazards Evaluation. This time allowance exceeds the Model Technical Specifications attached to the April 10, 1980, Staff letter on which Applicant relies for its technical specification change. Section 3.0.3 of the Model Technical Specifications requires that the unit be placed in at least HOT STANDBY within 1 hour and at least HOT SHUTDOWN in the next 6 hours.

Had the Petitioner cited this source, we would have required Applicant to respond. None of Applicant's analyses clearly states the risk — in the form of possible accident sequences — that is being avoided by mode reduction. Hence, it is impossible for us to evaluate the appropriate duration of time before mode reduction is required.

It is obvious that permitting operation during an equipment out-of-service time is a potentially dangerous practice. Because the time of out-of-service operation is limited, there is little total risk during this time and therefore little chance that empirical evidence will become available with which to evaluate the

[15] The explanation of the basis for the Staff letter is not wholly satisfying to the Board. There is no discussion, for example, of what new risks occur for reactors because of this change nor of what analyses have been done to provide assurance that it is appropriate to permit such new risks to occur during the limited out-of-service time. Nor is this matter cleared up by Applicant's No Significant Hazard Evaluation at 1.17. It is not clear why Applicant has concluded that these risks are acceptable. If they have not already done so, we urge Applicant and Staff to pay detailed attention to possible risks. *See* Tr. 116 (Staff counsel agrees with the Board that Applicant should have thought through what sequences they are inviting through the relaxation of requirements).

However, we still conclude that Petitioner failed to state an admissable contention. Though the request for an amendment does not appear to be as well analyzed as we would like, Petitioner failed to address the Staff's technical letter at all and failed to state a reasoned, documented basis for believing that this change was unsafe. Thus it did not meet the genuine issue requirement of 10 C.F.R. §2.714(b)(2)(ii) and (iii).

We note that 10 C.F.R. §50.63 states that operators must demonstrate that their alternative AC power sources "will constitute acceptable capability to withstand station blackout," presumably under adverse operating conditions such as might occur during the limited out-of-service time. However, Applicant is not yet required to comply with this regulation, which goes into effect according to a schedule filed by Applicant. 10 C.F.R. §50.63(c)(4); Tr. 206.

extent of the risk occurring during implementation of this practice. So it seems to the Board that it is particularly important that risks during out-of-service time be carefully delimited by analysis. As no such analysis appears to have been done,[16] we ask the Applicant and the Staff to carefully scrutinize these provisions and, in particular, to anticipate possible accident sequences that are being risked and to take appropriate steps — including reducing the risk exposure — if the analysis indicates some new grounds for caution. *See* Tr. 108-17.

In this instance, however, Petitioner's assertions that there is increased risk from this technical specification change is based entirely on Applicant's admission that there is a relaxation of requirements here; and we do not think that the admission, without more, is enough to provide a basis for this contention in light of the Staff letter supporting the Applicant's position. Petitioner brought no expert opinion to bear to show what risks are being taken and only the Board — and not Petitioner — has advanced reasons to be concerned about Applicant's new procedure.[17] *See* Tr. 65. Consequently, we find that Petitioner did not show the existence of a genuine issue of fact and this contention is not to be admitted.

E. Contention 7

Proposed Contention 7 states:

> Specifically, the amendments would change the CTS at specification 2.1.1. The CTS require, at the related section 1.1, that if any safety limit is exceeded, the associated reactor shall be shut down until the AEC authorizes resumption of operation. The CTS at section 2.1 provides for fuel cladding integrity as indicated at B2.1 with a design pressure of 2485 psig for safety valve set points. Additionally the CTS include requirements for TWO and ONE loop operation, and natural circulation.
>
> The RTS are less restrictive because they do not include requirements for TWO and ONE loop operation, and natural circulation. The RTS relax existing safety margins in the CTS by permitting a (one hour) time requirement for mode reduction in the ACTION statement. In the RTS at Figure 2.1-1, the reactor core safety limits appear to be outside of the safety margins described in the CTS.

[16] The Applicant's No Significant Hazards Evaluation does *not* analyze this situation. Instead, it uses the following phrases to supplant analysis: generally high reliability, marginal reduction in overall system reliability, slight increase in time, generally high reliability, and extremely remote. No consideration has been given to specific accident scenarios and no probabilities have been estimated. The full "analysis," in Appendix A at 1-5, is:

> The potential relaxation discussed above is acceptable because of the generally high reliability of the A-C sources, the marginal reduction in overall system reliability due to the temporary unavailability of one of the two A-C sources and the slight increase in time allowed for the mode reduction (7 to 14 hours). Also, due to the generally high reliability of the safety systems in the plant, the likelihood of one train of a two train safety system being inoperable at the same time that one of the two A-C sources powering the opposite train components is inoperable, is extremely remote.

[17] Although we might declare a *sua sponte* issue on the ground that this issue is important to safety, we trust the Staff to respond sympathetically to our suggestion and we do not, therefore, think it necessary to make this a matter set for hearing.

In this contention, Petitioner challenges a portion of Applicant's proposed technical specifications that appears to be more restrictive than the prior version. In the proposed specifications, Applicant has deleted the requirements for one- and two-loop power operation. They have done this because power operation with less than three loops has not been analyzed in the safety analysis and, therefore, should not be permitted in the technical specifications. Proposed Technical Specification 2.1.1, Appendix A at 2-1. Since Petitioner does not show how this apparent tightening of the technical specifications is less restrictive, we find no genuine issue with respect to that part of the contention. *See* Tr. 68-72.

There is another potential issue here concerning whether or not there has been a change in the time required for mode reduction. Applicant claims that "[a]n ACTION statement is added for consistency with the Standard Technical Specification." The Action statement permits 1 hour for mode reduction for exceeding a combined limit for thermal power, pressurizer pressure and the highest operating loop coolant temperature. Proposed Technical Specification 2.1.1 at A 2-1.

We note that Applicant does not discuss what action was appropriate under the current technical specifications, *prior* to the addition of this action statement — so we do not know precisely what change in practice has occurred. However, the revised procedures have a separate section dealing with the reactor trip system, which produces faster shutdowns than the 1 hour required by § 2.1.1. Furthermore, they contain a clear statement that the plant must be in hot shutdown within an hour (§ 2.1.1), that the NRC must be notified "as soon as practical" (§ 6.7.1.a) and that critical operation shall not be resumed without permission of the NRC (§ 6.7.1.d). This appears to comport fully with 10 C.F.R. § 50.72 and, since Petitioner has given us no reason to determine that there is any uncovered situation for which faster shutdown than 1 hour is required, we find that there is no genuine issue of fact and do not admit this portion of the contention. *See also* Tr. 73 (representation of counsel concerning current practice).

Still another potential issue with respect to Contention 7 relates to Petitioner's argument, at Tr. 84-85, that

> [T]he reactor core safety limits appear to be outside the safety margins described in the current technical specification. And in that revised technical specification Figure 2.1-1, the RTS at 110 [percent] power [has a] Delta T [(T-average = 1/2 (T-hot + T-cold)] . . . at . . . 2,385 psig, [of] . . . approximately 620 degrees fahrenheit. And that has to refer to their figure 2.1-1. That is compared to the current tech specs at 110 percent . . . at 2,385 psig . . . [of] approximately 627 degrees F.

However, both the Applicant and Staff stated that there was no change in this particular figure from the current technical specifications. Having checked both the current and revised specifications we also are not aware of any change.

Therefore, it appears — as Mr. Saporito stated at the prehearing conference at Tr. 87 — that Mr. Saporito was misled by the documentation he used into believing that a problem existed when in fact no problem did exist. Hence, this portion of the contention shall not be admitted.

F. Contention 8

Contention 8 states[18]:

> Specifically, the amendments would change the CTS [current technical specifications] at specification 2.1.2. The CTS require immediate plant shut down and compliance with Administrative Controls in section 6.3[:] . . . page 6.3-1 contains the reporting requirements. The RTS [revised technical specifications], in an ACTION statement, require plant shutdown within 1 hour and compliance with Administrative Controls in Section 6.7.1 if the safety limit is not met in MODE 1 or 2. Therefore, the RTS represent a relaxation of safety margins existing in the CTS.

The lack of admissibility of this contention is governed by the portion of our discussion of Contention 7 in which we discussed § 2.1.1 in the revised technical specifications (with respect to THERMAL POWER, pressurizer pressure, and the highest operating loop coolant temperature) that requires plant shutdown within 1 hour and compliance with the Administrative Controls in section 6.7.1. We find that the same procedure, when applied by § 2.1.2 to Reactor Coolant System pressure, fully complies with 10 C.F.R. § 50.73 and that Petitioner has not demonstrated that there is any significant safety concern. Hence, this contention is not admitted.

G. Contention 9

Proposed Contention 9 states that "[t]he RTS relaxes the CTS by providing for channel drift in the reactor trip set point table 2.2-1 at page 2-4 in the RTS." However, the table in the RTS does not contain any values for channel drift and therefore does not make any substantive change in prior operation. In addition, we have been assured by Applicant that it would require a new amendment to insert a value into the blank column on this table. Tr. 92.[19] Hence, we conclude

[18] At the prehearing conference, we invited Petitioner to specify errors or omissions in Applicant's supporting analyses. In our memorandum, we have addressed only those issues for which Petitioner has attempted to show errors or omissions and have treated other portions as withdrawn. For example, in Contention 8, Petitioner had argued that "the amendments would change . . . specification 2.1.2 and . . . [the "reporting requirements" at] § 6.3 [have been relaxed]." Contention 8. However, as Applicant stated, there is no § 2.1.2 in the current technical specifications and § 6.3 is irrelevant. Letter of April 4, 1990. These problems appear to have resulted from Petitioner's use of outdated documents.

[19] We interpret the conversation in the transcript to constitute an assurance to us. If it is not, Applicant should notify us promptly of our error.

that there is no change in the referenced portion of the technical specifications and no genuine issue of fact. The contention shall not be admitted.

H. Contention 11

The proposed contention states:

> The RTS relaxes the CTS because MODE Applicability is explicitly defined for each Surveillance Requirement and forced MODE reductions required by Action statements will, for the most part, stop with the first Mode beyond the LCO requirement.

In oral argument at the prehearing conference, Petitioner stated:

> The Applicant in their safety evaluation admits in some cases that there will be a relaxation compared to the current requirements. They even cite an example that the revised tech specs for the emergency core coolant system, the ECCS, the mode applicability for modes 1, 2, and 3 and the action statement mode stops at mode 4, while the current tech specs requires mode reduction to mode 5. So the current tech specs require them to implement a mode reduction to Mode 5, and then the revised tech specs are not as restrictive. They only require mode change to Mode 4.

Tr. 103. Petitioner then has criticized Applicant for failing to document or to present supporting references for its statement that "in Mode 4 the probability and consequences from a design basis rupture is reduced." Tr. 104.

Applicant's answer to this question of lack of analysis is that the change is consistent with the standard technical specifications for Westinghouse plants.[20] Tr. 105. Applicant concedes that there is some risk from being in Mode 4 rather than in Mode 5. Statement of Counsel, Tr. 106. Applicant also concedes that it did not provide a systematic review of possible accident sequences that might occur in Mode 4. *Id.*, Tr. 108. Nor has the Board or the public been provided with supporting analyses from the Staff's acceptance of the standard technical specifications. Staff Counsel, Tr. 113.

Under the circumstances, we conclude that Petitioner has created a genuine issue of fact concerning Applicant's omission from its analysis of consideration of the risks related to the change in mode reduction requirements. Hence, this contention shall be admitted with respect to this genuine issue of fact.

[20] Although we are not aware of any analyses accompanying the standardized technical specifications — and therefore have a void on our record — we suspect that there may be very little difference in risk occurring because of a 150° difference in temperature between hot and cold shutdown, occurring in a system designed for extremely high pressures and temperatures.

I. Contention 12

In oral argument, Petitioner narrowed Contention 12 to deal exclusively with its concern that the frequency of surveillance for the RCS boron concentration in operating Modes 1 and 2 is reduced from twice per week to once in 31 effective full-power days.

The No Significant Hazards Evaluation — which also constitutes Applicant's Safety Evaluation[21] — in Appendix A 3/4 at 1-3, justifies this change because:

> the RCS boron concentration is not directly related to SHUTDOWN MARGIN in MODES 1 and 2. The SHUTDOWN MARGIN in Modes 1 and 2 is ensured by surveillance of the control rod bank position and verifying that the rod bank withdrawal is within the allowable withdrawal limit.

The principal argument Petitioner presented was the unsupported assertion that the probability for change in boron concentration is greater in Modes 1 and 2. Tr. 121-22. By inference, Petitioner therefore argues that more frequent surveillance is required to maintain constant boron concentration. However, Petitioner does not respond to the principal argument: that the boron is not needed for shutdown margin in these modes.[22] Hence, this contention shall not be admitted.

J. Contention 14

Proposed Contention 14 states:

> Specifically, the amendments would change the CTS at specification 3/4.1.2.2. (1) The RTS relaxes the safety margins existing in the CTS whereas in the RTS a boric acid pump is only required to be operable when its associated flow path is required to be operable.
>
> (2) The allowed outage time for a boric acid pump is relaxed from 24 hours to 72 hours.
>
> (3) The RTS do not require cold shutdown of the plant for a period of 102 hours after loss of the boric acid pump or the boric acid flow path.
>
> (4) The RTS include an explicit Action time for restoring operability of the boric acid flow path which ultimately can result in a lapse of 174 hours before the plant is required to be placed in cold shutdown.
>
> (5) The RTS provide for an explicit Action restriction which addresses an event where both the boric acid source and the normal flow path through the regenerative heat exchanger is inoperable.

[21] Tr. 179.

[22] *See* 10 C.F.R. §50.62, which is consistent with the position of Staff and Applicant because it requires an independent auxiliary (or emergency) feedwater system for PWRs (subsection (c)(1)) rather than a standby liquid control system, which is required for BWRs (subsection (c)(4)).

Petitioner objects to relaxing requirements so that the boric acid pump is only required to be operable when its associated flow path is required to be operable. Applicant points out in its No Significant Hazards Evaluation, Appendix A 3/4 at 1-16, that the boric acid pump is not assumed to be operable in the safety analysis. Petitioner asserts, without authority, that if safety injection fails, "the only thing you have left is insertion of boron to decrease the reactor's reactivity to bring it to safe shutdown margin." Tr. 131.

Since Petitioner does not offer qualified facts, pursuant to the regulations, or cite a relevant source on this point, we accept Applicant's representation. There is no genuine issue of fact and this portion of the contention shall not be admitted.

Petitioner also alleged that it was improper to permit hot standby for 102 hours after loss of operability of a charging pump. Petitioner is addressing a mode change where Applicant will go to hot standby with boration for 102 hours instead of cold shutdown. The full statement concerning this "relaxation" in current requirements is set forth in the No Significant Hazards Evaluation, Appendix A 3/4 at 1-14, § A.2.c.3, and states:

> The requirement for restoring operability if the boric acid pump or the boric acid flow path is not returned to service within the initial time period is changed from placing the plant in cold shutdown within an additional 48 hours to placing the plant in hot standby and borating to 1% delta-k/k at 200°F within the next 6 hours and restoring the plant to operable status within the next 72 hours or be in cold shutdown within the next 30 hours.

The logic of this section seems impeccable. The primary function of the boric acid pump and flow path in hot standby is to provide enough boration to attain the boron needed for cold shutdown margin (i.e., borating to 1% delta-k/k). Hence, if you borate to that standard, it seems acceptable to stay in hot shutdown for some period of time.

This would have ended our inquiry but for language in the No Significant Hazards Evaluation, Appendix A 3/4 at 1-17 that we do not fully understand. The language that we do not understand states:

> After borating to cold shutdown SDM, the only boration system function is make-up for loss in volume due to shrink. In the event that this capability is lost in this time interval, *the plant's ability to reduce modes as required is lost*, but the safety aspect of maintaining the SDM is preserved. So, extending the time period to restore operability to the pumps or flow path does not result in an increase in the probability of or impact on the consequences of an accident previously evaluated. [Emphasis added.]

Our concern is that it seems to be possible, during the additional time in hot standby, to lose the ability to reduce modes; the possible safety implications of this loss of ability require explanation. Accordingly, we find the Applicant's explanation inadequate and admit this contention for this one purpose.

K. Contention 16

Proposed Contention 16 states:

> Specifically, the amendments would change the CTS at specification 3/4.1.2.4. (1) The RTS would relax existing safety margins in the CTS whereas the RTS change the BAT boron concentration surveillance from twice weekly to weekly.
>
> (2) The RTS would relax existing safety margins in the CTS whereas the RTS delete the BAT level instrument weekly Channel Check.

Petitioner objects to a relaxation in BAT boron concentration surveillance from twice weekly to weekly, the deletion of a minimum volume requirement on the primary water storage tank, and the provision of some specified delays in mode changes required because of the inoperability of the Boric Acid Storage System. Applicant explains the basis for these provisions in the Proposed Technical Specifications, Appendix B 3/4 at 1-2 to -4; it also handles this subject in its No Significant Hazards Evaluation, Appendix A 3/4 at 1-27.

As Staff points out:

> In the application Applicant states the boron concentration does not vary very much over a week, thus making weekly surveillance of the concentration adequate, and that there are additional surveillance requirements which compensate for the deleted channel check. App. A at 3/4 1-23 to 24. Petitioner has not addressed Applicant's discussion of these changes at all.[23]

We agree with the Staff. Petitioner has failed to show that Applicant is in error or has omitted something from its analysis. *See* Tr. 146-50 (note that Applicant repeats its assurance that a weekly boric acid tank volume surveillance is planned). Hence, there is no genuine issue of fact and this contention is not being admitted.

Petitioner states that:

> their position in the safety evaluation is that once a week is adequate [surveillance] because the boron concentrations don't significantly change in Modes 5 and 6. Our position is the safety analysis is incomplete because they should have considered boron concentration in all modes of operation because that's the way it's established in the current technical specifications.

Tr. 146. Petitioner is correct that the safety analysis presented in the No Significant Hazards Evaluation, Appendix A 3/4 at 1-23 omits any discussion of the deletion of surveillance requirements for Modes 1 through 4. Since the boron concentration surveillance is reduced for all modes (*see* 3/4.1.2.4, § A.2.c.1,

[23] Staff Response at 40.

Appendix A 3/4 at 1-22), Petitioner seemed to have addressed an omission in the analysis. However, the Staff addressed this at Tr. 150 by stating "the technical specification at issue here appears to be related to shutdown, which would be the modes that were discussed in the safety analysis — in the accompanying no significant hazards analysis." In this assertion, which was not controverted by Petitioner, Staff appears to be correct. Hence, there is no genuine issue of fact here and this portion of the contention is not being admitted.

Petitioner continues to say:

> You know, they say that that channel check surveillance they want to delete, and they say it's not needed because they do a weekly surveil . . . — they do a weekly check on it and even the instrument that's local at the tank — if it indicated zero in there, that there's always 900 gallons remaining in there.

Tr. 147. This we find to be an incorrect reading of Applicant's position. Applicant does not assume that 900 gallons always remains in the BAT regardless of the reading of the indicator. What it says is that the indicator never shows less than 900 gallons and that they therefore rely on a weekly surveillance of the BAT liquid volume itself to determine whether the instrument readings are accurate. No Significant Hazards Evaluation, Appendix A 3/4 at 1-24. (Applicant also states that "the BAT is not required to be OPERABLE for accident mitigation by the reactor trip or ESF actuation system." Petitioner does not address this ground for asserted safety.)

We conclude, therefore, that this portion of the contention — dealing with the BAT level instrument weekly Channel Check does not contain a genuine issue of fact and is not being admitted.

L. Contention 18

Proposed Contention 18 states:

> Specifically, the amendments would change the CTS at specification 3/4.1.2.6. (1) The RTS would relax existing safety margins in the CTS whereas the RTS increase the allowable outage time for one channel of heat tracing from 24 hours to 30 days.

Applicant would increase the allowable outage time for one channel of heat tracing from 24 hours to 30 days. No Significant Hazards Evaluation, Appendix A 3/4 at 1-30. However, the increased outage time is allowed only because there is an 8-hour temperature surveillance to ensure that a proper temperature is being maintained in the portion of the system that is traced. *Id.* at 1-31.

Petitioner's principal challenge is to question how a temperature surveillance can be appropriately performed in order to ensure that proper temperature is maintained. Tr. 151; No Significant Hazards Evaluation, Appendix A 3/4 at

1-31, § B.3.a. Although this argument is not directly answered on the transcript (Tr. 152-54), Petitioner is not an expert in methods of performing surveillance of piping systems and we are unpersuaded by his unsupported assertion that there is some difficulty here.[24] In addition, we note that Applicant has stated without contradiction by Petitioner that the boric acid is not required to be operable for accident mitigation (Tr. 153), and Petitioner has not stated any other purpose for which it needs to be available. Hence, there is no genuine issue of fact and this contention is not being admitted.

M. Contention 21

Contention 21 states:

> Specifically, the amendments would change the CTS at specification 3/4.1.3.4. (1) the RTS measures rod drop time from the "beginning of decay of stationary gripper coil voltage to dashpot entry".

This contention deals with rod drop time. Petitioner alleges that Applicant admits that the measurement is a relaxation of requirements. Tr. 154. However, Applicant makes no such admission. Indeed, it is clear that the new measurement is more conservative. The prior measurement of rod drop time is from the beginning of rod motion to dash pot entry. The new measurement commences *before* there is any rod motion. It begins "from the beginning of decay of stationary gripper coil voltage" and ends at the same time as previously: with dash pot entry. Since the new measurement begins *earlier* — and ends at the same time — and since the limit on the allowed rod drop time remains the same, it is clear to the Board that the new requirement is actually more conservative and that there is no genuine issue of fact here. No Significant Hazards Evaluation, Appendix A 3/4 at 1-42; Tr. 157-58. The contention is not being admitted.

N. Contention 30

Proposed Contention 30 states:

> Specifically, the amendments would change the CTS at specification 3/4.4.1.1. The RTS relaxes the allowed outage time for a Reactor Coolant Loop in Mode 1 from one hour to six hours.

Petitioner objects to a relaxation of the outage time for a Reactor Coolant Loop in Mode 1, from 1 hour to 6 hours, because operation with two loops has not been analyzed. No Significant Hazards Evaluation, § 2.1.1 2.b.2. We conclude that this contention shall be admitted.

Applicant's explanation is far from complete:

> Relaxing the time limit to be in [get in/o][25] HOT STANDBY from one to six hours will allow the plant additional time to restore the loop or perform a normal shutdown. Increasing this ACTION statement time limit will have a *minimal impact* on a previously evaluated accident because the ACTION statement only applies in the *unlikely* event of a single RCS loop being lost during MODE 1 or 2. With power above the P-8 setpoint, a second plant accident transient during the time interval of the ACTION statement is *unlikely*. The Reactor Trip System continues to monitor plant conditions during the ACTION time interval and trip functions such as overtemperature delta-T, or loss of flow are available to provide protection during the ACTION time interval. Finally, adopting the proposed ACTION time has the potential benefit of reducing the number of reactor trip transients imposed on the plant.[26] [All emphasis added except all caps.]

Petitioner challenges Applicant's justification for this change (Tr. 160):

> Increasing this ACTION statement time limit will have a minimal impact on a previously evaluated accident *because the ACTION statement only applies in the unlikely event of a single RCS loop being lost during MODE 1 or 2.*

No Significant Hazards Evaluation, Appendix A 3/4 at 4-2 (emphasis added). The Board agrees with Petitioner that this particular justification is lacking. An ACTION statement should not be justified simply because it would be used only rarely. The question is whether it is safe when it is used.

Petitioner also challenges this new outage provision because Applicant has deleted the technical specifications governing operations with two loops, stating that the safety analysis for the plant has not analyzed the safety of operating with just two loops. Tr. 160-61; Proposed Technical Specification 2.1.1, Appendix A at 2-1 ("power operation (MODES 1 and 2) with less than three loops is not analyzed in the safety analysis"). In an attempt to explain this problem, Applicant erroneously stated that this technical specification permits "hot standby" and not operation and that there is no need for a guideline governing *operation* with two loops when all that will be attempted is hot standby with two loops. Tr. 162. However, Proposed Technical Specifications 3/4.4.1.1 A.2.c, Appendix A 3/4 at 4-1, states that "[t]he allowed outage time for a REACTOR COOLANT LOOP in MODE 1 is relaxed from one hour to six hours" (emphasis added).

[24] We expect that the Staff has ascertained, during its review of the RTS, that temperature surveillance measures are adequate.

[25] Proposed Technical Specifications 3/4 4.1.1 A.2.c, Appendix A 3/4 at 4-1, states that "[t]he allowed outage time for a REACTOR COOLANT LOOP in MODE 1 [1] is relaxed from one hour to six hours."

[26] No Significant Hazards Evaluation, Appendix A 3/4 at 4-2.

Since the loss of a coolant loop reduces heat removal capacity, it is important that operation in this mode even for 6 hours be analyzed. However, that apparently has not been done. Nor are we pleased with the Applicant's use of the adjectives "minimal impact," "unlikely event," and "unlikely," in place of analysis. While it may be true that this change increases plant safety through reducing the number of reactor trip transients, that depends on whether this particular change is safe and can be justified.

O. Contention 33[27]

Proposed Contention 33 states:

> Specifically, the amendments would change the CTS at specification 3/4.4.2.1. (1) The RTS provides for an Action statement modified so that an operable code safety valve is not required if the RCS is vented though an equivalent size vent pathway.
>
> (2) The RTS relaxes the current requirement to test all safety valves each refueling to only testing a fraction of the safety valves.
>
> (3) The RTS delete the requirement of Mode and operability of safety valves.

Petitioner objects that Applicant is moving from technical specifications that require more frequent surveillance of safety valves to the frequency specified in the American Society of Mechanical Engineers (ASME) Code, which has been accepted in 10 C.F.R. § 50.55a(g)(4) as an adequate assurance of safety. Hence, Petitioner (which did not review the ASME code provisions — *see* Tr. 167) appears to be challenging a Commission regulation, which it may not do. There is, therefore, no genuine issue of fact and the contention shall not be admitted.

P. Contention 35

Proposed Contention 35 states:

> Specifically, the amendments would change the CTS at specification 3/4.4.4. (1) The RTS deletes the PORV's from the specification. (2) The RTS relaxes the block valve mode reduction from Mode 5 to Mode 4.

Petitioner's objection to this change in technical specifications does not challenge Applicant's conclusion that "no credit is taken in the safety analysis for PORV operation in MODES 1, 2, or 3." Tr. 170. However, as Applicant has asserted without contradiction (Tr. 171-73), the challenged section of the technical specifications deals only with Modes 1, 2, or 3. No Significant Hazards Evaluation, Appendix A 3/4 at 4-22 to -23. Proposed Technical Specifications 3.4.9.3 at 3/4 4-36 and 3.4.2.1 at 3/4 4-7 require that in Modes 4 and 5 there must be adequate pressurizer relief capacity. *See* Tr. 172-73. Hence, Petitioner's objection is not well taken. There is no genuine issue of fact and this contention is not being admitted.

Q. Contention 51

Proposed Contention 51 states:

> Specifically, the amendments would change the CTS at specification 3/4.8.1.1. (1) The RTS relax existing safety margins by requiring that if both start-up transformers are inoperable, both the diesel generators be demonstrated operable within eight hours unless the diesel generators are already operating, and if one of the start-up transformers is not restored to operable status within 24 hours then both units be shut down.
>
> (2) The RTS relax existing safety margins by requiring that if both diesel generators are inoperable, both start-up transformers be demonstrated operable within one hour and if one of the diesel generators is not restored to operable status within two hours then both units be sequentially shut down.
>
> (3) The RTS relax existing safety margins by deleting the peak voltage requirement immediately following a complete diesel generator load rejection test.
>
> (4) The RTS relax existing safety margins by only requiring a check of diesel fuel inventory when the diesel is demonstrated operable.
>
> (5) The RTS relax existing safety margins by specifying that the diesel generator(s) be started only and not synchronized and loaded.
>
> (6) The RTS relax existing safety margins by allowing for performance of a fast start only at least once per 184 days and all other starts to be preceded by warmup procedures.
>
> (7) The RTS relax existing safety margins by reducing the diesel generator surveillance test frequency to at least [sic] once per 31 days.

Petitioner's principal concern in this contention is that Applicant has allegedly failed to analyze the effects of a loss of offsite power. Tr. 182-203. However, despite the Board's explicit invitation (Tr. 191), Petitioner never specified what *change* in a technical specification raised the question Mr. Saporito was addressing. Indeed, we are persuaded by Applicant's argument that the Proposed Technical Specifications 3/4.8-2 (¶ b.12) are *more conservative* because they have added a new ACTION statement that requires the demonstration of operability of the cranking diesels when a startup transformer is inoperable. Tr. 204-05. We also agree with the Staff that Petitioner's arguments address compliance with a station blackout rule that does not yet cover Applicant, that they are not relevant to the subparts of this contention, and that they do not show how a particular proposed change would in fact reduce a safety margin. Tr. 206. Hence, this contention is not being admitted.

[27] At Tr. 163, Petitioner states that it is addressing Contention 31, but he misspoke. *See* Tr. 165.

R. Contention 25[28]

This lengthy contention relates to the effect of reactor vessel heatup and cooldown and surveillance on the strength of the pressure vessel. In this contention, Petitioner first sought to argue that there was a change in a graph in the technical specifications that sets forth pressure/temperature curves, presumably for the reactor pressure vessel. However, after a conference, Petitioner agreed with Applicant that there was in fact no change made in these curves as a result of the pending amendments. Tr. 210-11.

Thereafter, the Board made repeated attempts to have the Petitioner specify what particular changes in the technical specifications were being objected to; but the Petitioner failed to specify any particular change. Tr. 211-18. In addition, as we read Contention 25, we fail to ascertain any specified change. Furthermore, Applicant stated at the prehearing conference that "[t]here are no changes of substance between the current techs and the proposed tech specs." Tr. 219. Staff also stated that "there are no changes." Tr. 221. Since the only "relaxation" in § 3/4.4.9.1 is deletion of Figure 3.1-2 and since Petitioner has not addressed the significance of that deletion (No Significant Hazards Evaluation, Appendix A 3/4 at 4-41), we conclude that Applicant's and the Staff's mutual assertion of no significant change is indeed correct.[29]

Consequently, there is no genuine issue of fact with respect to this contention and it is not being admitted.

S. Contentions 1 and 2

Contentions 1 and 2 are both environmental contentions. Contention 1 alleges that an Environmental Impact Statement (EIS) must be prepared; and Contention 2 that an Environmental Assessment must be prepared.

1. Legal Background

We agree with the Staff concerning the appropriate legal context in which to review these contentions. The applicable regulation is 10 C.F.R. § 51.20, which requires that an environmental impact statement be prepared if the proposed action (the proposed technical specification amendments) is a major federal action significantly affecting the quality of the environment. We endorse the following portion of the Staff's brief:

[28] This contention is out of order in Petitioner's filing. It can be found at p. 104.

[29] Petitioner also argued that there was some impropriety or illegality in Applicant separating out one change in its technical specifications and filing it prior to its filing of its current revision. Tr. 223-24. We do not agree with this argument. Applicant is free to file amendments to its license in any order that it desires to file those changes. We know of no limitation on that discretion.

> The scope of a National Environmental Policy Act (NEPA) environmental review of a license amendment is more limited than one performed prior to initial licensing. *Florida Power and Light Co.* (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-85 (1981); *Consumers Power Co.* (Big Rock Nuclear Plant), ALAB-636, 13 NRC 312, 319 (1981). A NEPA review for a license amendment requires an evaluation of only those environmental impacts beyond those evaluated previously which will result from the proposed action. *Id.* . . .
>
> A petitioner raising a NEPA claim is required to show a dispute exists between it and the applicant or the Staff on a material issue of fact or law. 10 C.F.R. § 2.714(b)(2)(iii); 54 *Fed. Reg.* at 33172. . . .[30]
>
> Under the Commission's regulations, an environmental impact statement is not automatically required for the proposed action. *See* 10 CFR § 51.20. The Staff determines whether an environmental assessment is required or whether the action is a categorical exclusion[31] [footnote in original] for which no environmental document is required. *See* 10 CFR §§ 51.21, 51.22(b), 51.22(c)(9) and (10), 51.14(a).[32] [Footnote added.]

2. Analysis of Contentions 1 and 2

Petitioner asks in these two contentions that an environmental impact statement and an environmental assessment be prepared. Petitioner's Amended Petition at 24, 26. The cited ground in both instances is that the amendment of the technical specifications is "a major Federal action."[33] *Id.*

Within the body of these contentions, there are no facts set forth that establish that this is a major federal action. In particular, there is no basis for believing that the amendment of the technical specifications has some overall effect other than the effect of each of the parts. However, all the other contentions allege that there is an increased hazard resulting from the proposed amendment. We think that Petitioner intends that by proving these allegations it will establish

[30] Staff Response at 21-23.

[31] "'Categorical exclusion' means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which the Commission has found to have no such effect in accordance with procedures set out in § 51.22, and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 10 C.F.R. § 51.14(a), Definitions.

[32] Section 51.25 provides:

> Before taking a proposed action subject to the provisions of this subpart, the appropriate NRC Staff director will determine on the basis of the criteria and classifications of types of actions in §§ 51.20, 51.21 and 51.22 of this subpart whether the proposed action is of the type listed in § 51.22(c) as a categorical exclusion or whether an environmental impact statement or an environmental assessment should be prepared. . . .

[33] We have reviewed the regulations governing categorical exclusions from the need to prepare an environmental assessment and find that — for the most part — the allegation of "major Federal action" is sufficient to overcome exclusions. For example, changes in inspection or surveillance requirements are exempt if there are no significant hazards considerations and no changes in offsite effluents or occupational hazards (10 C.F.R. § 51.22(c)(9)); and we interpret the allegation of major federal action to imply a significant hazard. However, pursuant to 10 C.F.R. § 51.22(c)(10), changes in administrative procedures are exempt.

We also note that Applicant has not prepared an environmental report in support of its amendment.

that the change in technical specifications is a major federal action. Therefore, it is appropriate to consider Contentions 1 and 2 in this context. If Petitioner were to establish in one of its other contentions that there is a serious effect on safety, then it might sustain these first two contentions based on the others.

Our conclusion is that Contentions 1 and 2 should, therefore, be admitted. However, their consideration — including discovery based solely on the environmental balance — shall be deferred. Only if the litigation of the other contentions establishes that there is enough of an impact on safety[14] for this amendment to be a major federal action, will it be necessary to litigate these two environmental contentions separately. Otherwise, these deferred contentions may be dismissed based on consideration of the other admitted contentions.

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 15th day of June 1990, ORDERED, that:

Contingent Admission of Party

1. The Nuclear Energy Accountability Project (NEAP) is admitted as a party to this proceeding, based solely on its representation of its member, Mr. Thomas Saporito.

2. NEAP's continued participation in this proceeding is dependent on Mr. Saporito serving on this Board, on or before the 19th day of June 1990, a pleading in which he personally states his willingness to be represented by NEAP.

3. Should Mr. Saporito fail to respond as ordered in ¶ 2, this case shall be dismissed.

Contentions

4. The contentions that are admitted in the following paragraph are admitted only with respect to the genuine issues of fact discussed in the accompanying memorandum.

5. Only the following five contentions or portions of contentions are admitted: 1, 2, 11 (risk related to change in mode reduction requirements); 14 (possible loss of ability to change mode); and 30 (operation without one reactor coolant loop).

[14] It is unlikely, but conceivable, that the Board would determine that an amendment is permissible under the regulations but creates so much additional risk that it is a major federal action.

6. Litigation of Contentions 1 and 2 is deferred, pending the Board's conclusion on whether litigation of Contentions 11, 14, and 30 establishes that the proposed modification of the technical specifications is a major federal action.

Schedule for Case

7. Discovery and the filing of motions for summary disposition with respect to Contentions 11, 14, and 30 shall be concluded by the end of August 1990.

8. A hearing on Contentions 11, 14, and 30, if necessary, shall be scheduled early in October 1990.

Alleged Harassment

9. All material in our record that contains allegations of intimidation or harassment of Mr. Saporito shall be considered to be struck from our record.

Appeal

10. Applicant and the Staff may, pursuant to section 2.714a(c), appeal the portion of this order granting the petition to intervene, contingent on Mr. Saporito's response. The time for instituting an appeal shall, however, be suspended until after Mr. Saporito shall file his response to ¶ 2 of this order.

11. Except for ¶ 10 of this order, this is an interlocutory order from which there is no appeal at this time.

THE ATOMIC SAFETY AND LICENSING BOARD

Dr. George C. Anderson (by PBB)
ADMINISTRATIVE JUDGE

Elizabeth B. Johnson (by PBB)
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chair
Dr. George C. Anderson
Elizabeth B. Johnson

In the Matter of

Docket Nos. 50-250-OLA-5
50-251-OLA-5
(ASLBP No. 90-602-01-OLA-5)
(Technical Specifications Replacement)
(Facility Operating License Nos. DPR-31, DPR-41)

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Nuclear Generating Plant, Units 3 and 4)

July 18, 1990

The Board dismisses the sole Intervenor as a party based on changed circumstances. Standing for the Intervenor was based on one member, who was employed within the zone of interest of the plant, but who was dismissed from his job. Given the prior history of the case, in which the sole Intervenor already had the opportunity to show that it had bases for standing additional to that of this one member, the Board did not afford any further opportunity to show new bases for standing. The decision was without prejudice to a motion to reopen should the member demonstrate in his pending Department of Labor action in which that Applicant was responsible for his wrongful discharge from employment.

RULES OF PRACTICE: STANDING; DISMISSAL

When an organization suffers a change of circumstances such that its standing is affected, ordinarily it may demonstrate an alternative ground for standing. However, when the organization already had the opportunity to demonstrate an alternative ground for standing and failed to do so, it will not be afforded a second opportunity. (This rule may not apply, however, to the later stages of a proceeding after extensive litigation has already occurred.)

RULES OF PRACTICE: DISMISSAL; *SUA SPONTE* ISSUE
(10 C.F.R. § 2.760a)

When the only participating intervenor is dismissed, a Board may retain jurisdiction to determine whether or not to exercise its authority to make one or more of the pending contentions a *sua sponte* issue because it is an issue important to safety or the environment. 10 C.F.R. § 2.760a. It may ask for a brief on the issue from the remaining parties.

MEMORANDUM AND ORDER
(Motion to Dismiss)

This Memorandum addresses a motion to dismiss the sole remaining Intervenor because a change in circumstances has deprived it of the basis for standing. We have decided to grant the motion to dismiss, for reasons we will discuss in this Memorandum, and to request further information from the Staff of the Nuclear Regulatory Commission (Staff) and from Florida Power and Light Company (Applicant) before deciding whether to declare a *sua sponte* issue pursuant to 10 C.F.R. § 2.760a.

Applicant filed a "Motion for Reconsideration and Dismissal" (Motion) on June 22, 1990, to which Intervenor, Nuclear Energy Accountability Project ("NEAP"),[1] filed its "Response of Nuclear Energy Accountability Project" (Response) on July 11, 1990. The Staff filed the "NRC Staff Response to Applicant's Motion for Reconsideration" (Staff Response) on July 12, 1990.

[1] Thomas J. Saporito, who had been a petitioner in this case, attempted to join in the Response. However, he was dismissed from this case in LBP-90-16, 31 NRC at 514. We inadvertently failed to include an ordering paragraph on this subject and will do so in this Order.

I. STANDING AS OF RIGHT

Applicant's Motion is based on a material change of circumstances that has occurred since the March 23, 1990 prehearing conference and which affects the basis for LBP-90-16, 31 NRC 509 (1990) (Standing Decision). In our Standing Decision, we determined that the sole ground for the admission of NEAP as a party was the standing of its officer, Thomas J. Saporito. His standing was based on his employment in the geographical zone of interest of the Turkey Point facility, at the ATI Career Training Center (ATI) in Miami, Florida. However, Mr. Saporito was discharged by ATI on May 10, 1990, and has not presented any other claim to activity that could be a basis for standing.

In its response, NEAP admits that there are changed circumstances that eliminate the basis of standing for NEAP.[2] The Response asserts that Mr. Saporito is seeking employment wherever he can find it, including within the Miami area; but there is insufficient information with which to consider the job-seeking activity a basis for standing.[3]

However, NEAP differs from Applicant in its assessment of the consequences of this changed circumstance. It seeks permission to submit additional facts and legal argument that could establish its standing on other grounds.[4] In the alternative, it asks that we hold the hearing in abeyance pending a determination in an allegedly related Department of Labor Action as to whether or not Applicant was responsible for Mr. Saporito's dismissal by ATI.[5]

However, we find that the facts NEAP would have us address have already been fully litigated, resulting in our denying Mr. Saporito's motion to withdraw as the basis for NEAP's standing. His motion was based on an allegation of intimidation that we considered frivolous and we considered as struck all allegations of intimidation. LBP-90-16, 31 NRC at 538.

Mr. Saporito filed a "Notice of Withdrawal from Proceeding" on April 1, 1990. We read the notice of withdrawal, which included Mr. Saporito's notice that he was withdrawing as the basis for NEAP's standing. The alleged reason for withdrawal was that he was harassed by Applicant. But we were not satisfied with the factual basis for the alleged harassment and we also were concerned that should the motion be granted NEAP would be deprived of its standing. Out of solicitousness for Mr. Saporito, who is not a lawyer, we issued a Memorandum and Order in which we requested further information about the

[2] Response at 2.

[3] *Id.* In the context of this case, we are considering the effect of these changed circumstances at an early stage of litigation, before discovery has commenced. We do not address in this opinion whether or not a change of residence in a more fully litigated case would destroy standing.

[4] *Id.* at 3.

[5] *Id.* at 4-7.

alleged harassment and about the standing of NEAP.[6] Then, after having received NEAP's filing — which included an affidavit that attempted to show that its standing could be based on an individual other than Mr. Saporito — we ruled that NEAP's standing was based solely on Mr. Saporito's standing and stating that "NEAP has already had all the opportunity it needs to establish standing; it may not file any further documents alleging a new basis for standing."[7]

We adhere to our prior rulings. We note that until this time Mr. Thomas J. Saporito, who is not a lawyer, has appeared on behalf of NEAP, as is his right under the procedural regulations. 10 C.F.R. § 2.1215(a). As the representative of NEAP, Mr. Saporito had the full authority and responsibility to represent it, on both technical and procedural matters. He could win or lose the case on complex issues of science, engineering, and law. He also could make arguments that impose the costs of response on opposing parties and the costs of decision on the Nuclear Regulatory Commission. While we have been patient and protective of his needs as a nonlawyer, he has now had all the protection he can properly be afforded.

NEAP has had ample opportunity to demonstrate that it has standing independent of Mr. Saporito, and it has not done so.

II. PERMISSIVE STANDING

In reviewing the record, we have noticed that we never made a clear ruling concerning whether or not NEAP was entitled to discretionary standing, pursuant to its argument that it be permitted discretionary intervention pursuant to *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 612; 614-17 (1976); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631 (1976); *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1145 (1977); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1422 (1977).[8]

The test for discretionary intervention is set forth in *Pebble Springs, supra,* 4 NRC at 616, and in the following significant passage, at 617:

> As a general matter, however, we would expect practice to develop, not through precedent, but through attention to the concrete facts of particular situations. Permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented,

[6] Unpublished Memorandum of April 24, 1990.

[7] Standing Decision, LBP-90-16, 31 NRC at 514.

[8] Petitioner's Amended Petition for Intervention and Brief in Support Thereof, March 6, 1990, at 21-22.

set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them.

In applying that standard to this case, the principal evidence that NEAP offers that it can make a valuable contribution is the Affidavit of Thomas Saporito, Jr.[9] The principal factor weighing in favor of the admission of Mr. Saporito is his statement of concern about "relaxed safety margins in the revised technical specifications." This concern, as evidenced by the voluminous contentions filed by him, has the potential for creating the incentives for the Staff and the Applicant to take a closer look than they previously had done.

However, Mr. Saporito also discloses that he needs to be employed full time and that he does his research primarily on Fridays, Saturdays, and Sundays.[10] There is no indication that any other member of NEAP plans to help him or that NEAP has any financial resources with which to hire technical or legal assistance.[11] Mr. Saporito appeared at the prehearing conference entirely by himself.

Mr. Saporito's expertise is "in the technical field of analog and digital electronics related to *instrument repair and calibration* for a period of about seventeen (17) years."[12] He has 7 years' experience in Applicant's plant in repairing and calibrating a wide variety of systems.[13] In addition, he has an Associates Degree in Electronics Technology and has attended various technical training seminars.[14] He is an instructor in digital electronics and microprocessor technology and has a patent for a Renal Dialysis Concentrate Delivery System, which he designed and built.[15]

We know Mr. Saporito, from our brief experience, as reasonable and intelligent. Furthermore, he has shown substantial integrity in withdrawing many of his contentions after we asked him to identify errors or omissions in Applicant's analysis that he thought created a safety concern.

Nevertheless, and despite these positive factors, Mr. Saporito has brought little technical expertise to his presentation of his contentions. His primary contribution has been to review Applicant's technical specification changes and to identify those in which Applicant said that some "relaxation" has occurred. When he has specified that there are omissions in Applicant's analysis, the

[9] Petitioner's Amended Petition at 21, attached affidavit.
[10] Affidavit at 2, ¶7.
[11] Although Ms. Billie Garde has now entered an appearance with respect to standing and intimidation issues, her commitment appears to be limited to this portion of the case — which is related to the Department of Labor case with which Ms. Garde also is concerned.
[12] Affidavit at 2, ¶10 (emphasis added).
[13] *Id.* at 3, ¶¶11, 12.
[14] *Id.* ¶¶13, 14.
[15] *Id.* ¶¶13-15.

specification was based on careful scrutiny and reason but did not show any independent expertise. As we said in LBP-90-16, 31 NRC at 515:

> Although Petitioner submitted lengthy contentions that purported to comply with the contention requirements now in effect, on examination we find that they consist primarily of allegations — based on Applicant's own admissions — that Applicant has in some instances relaxed requirements in the course of amending its technical specifications. Generally, Petitioner failed to advance an independent basis for any of its contentions. Instead, Petitioner relied entirely on alleged omissions in Applicant's analyses and said it intended to support its proposed contentions by Mr. Saporito's expert opinion, by interrogation of Applicant's witnesses, and by discovery, without any indication of the analytical basis for further inquiry. These allegations of omission were always based on assertion, without any specific source of evidence concerning the importance of the alleged omission.

When we evaluate the nature of NEAP's contribution, using the standard for permissive intervention, we find that it is not entitled to permissive intervention.[16] We are particularly concerned that NEAP has not brought to bear any substantial expertise to demonstrate the importance and immediacy of its concerns or to justify the necessity of considering them. Because of the way in which the case has been presented, it has been left to the Board to analyze the record and use its own expertise to determine the importance of NEAP's concerns.

Hence, we conclude that on balance it is not appropriate to use our discretion to admit NEAP as a party.

III. *SUA SPONTE* QUESTIONS

A. Legal Background

Pursuant to 10 C.F.R. § 2.760a,

> Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists.

This authority to raise matters on our own or "*sua sponte*" gives rise to the responsibility to determine whether or not to use the authority.

[16] We have examined all six factors listed in *Pebble Springs*, 4 NRC at 616. Of these, the first weighs moderately in favor of admission. The second and third have very little positive effect since NEAP's members have not demonstrated that they have substantial interests within the zone of interest for this power plant. Factors four through six have little effect. There is now an increased awareness in the Staff of NEAP's concerns and they may therefore to some extent protect Petitioner's interest, but that is always true of the Staff and has little effect on the balance. There are no other parties to protect Petitioner's interest. There is little reason to believe that the "broadening" or initiating of this proceeding is in any way inappropriate, so that factor has little weight.

In dismissing NEAP after having reached a determination that some of its contentions were litigable, we have a responsibility to consider whether or not to retain jurisdiction of one or more of its contentions as a *sua sponte* matter. In reaching this determination, we must consider the seriousness of each contention. However:

> The mere acceptance of a contention does not justify a board to assume that a serious safety, environmental, or common defense or security matter exists or otherwise relieve it of the obligation under 10 CFR 2.760a to affirmatively determine that such a matter exists.[17]

Furthermore, if the matter has already been spotlighted for serious consideration by the Staff, apart from the hearing process, then the seriousness of the issue is mitigated and a Board need not declare it to be a *sua sponte* issue.[18]

B. Consideration of the Admitted Contentions

After reviewing the admitted contentions in light of our present knowledge, some might be considered serious safety or environmental issues.[19] Therefore, we request the comments of the Staff of the Nuclear Regulatory Commission and of the Applicant concerning whether any of the admitted contentions raise issues requiring admission by the Board as *sua sponte* issues. We provide 20 business days from this opinion's date of issuance for the Staff to respond to our request and we provide the Applicant 10 additional business days to comment on the Staff response. Staff and Applicant are invited to discuss the Board's reasons for admitting these contentions and each of the criteria we have discussed above as relevant to the admission of a *sua sponte* issue.

IV. POSSIBLE EFFECT OF DEPARTMENT OF LABOR PROCEEDING

We have been informed of the pendency of a Department of Labor Proceeding concerning whether or not Applicant was responsible for having Mr. Thomas J. Saporito dismissed from his present job[20] and therefore causing the loss of standing for NEAP. There is nothing in our record to support that allegation, and Mr. Saporito had adequate opportunity to support the allegation had he chosen to do so. So we have no reason to grant NEAP's request to hold our hearing in abeyance pending the DOL determination of this case.

On the other hand, we have not fully adjudicated the facts of the allegations being litigated in the DOL case. Should that agency determine that Mr. Saporito was wrongfully dismissed, at Applicant's hands, then it would seem improper that through that wrongful action Applicant would have succeeded in having this case dismissed. Hence, we wish to state that this case is being dismissed without prejudice to a motion to reopen should the DOL uphold Mr. Saporito's allegation of wrongful discharge at the hands of Applicant.

Based on our record, we have no reason to suspect Applicant in any way. We have even ruled that allegations of harassment or intimidation against Applicant should be stricken from our record. Nevertheless, we would not close the NRC's doors should the DOL uphold Mr. Saporito's allegation.[21]

Order

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 18th day of July 1990, ORDERED, that:

1. The Nuclear Energy Accountability Project (NEAP) is dismissed as a party.
2. NEAP's dismissal is without prejudice to a motion to reopen our record should Mr. Thomas J. Saporito obtain a final judgment in a Department of Labor proceeding that he was wrongfully dismissed from his job at ATI Career Training Center at the hands of Florida Power and Light Company.
3. The Staff of the Commission is requested to comment, within 20 business days from the issuance of this decision, on whether the admitted contentions contain any serious issues that should be admitted into this proceeding *sua sponte*. Applicant may have 10 additional business days within which to comment on the Staff's filing.
4. Mr. Thomas J. Saporito is dismissed as a party.[22]
5. Because NEAP and Mr. Saporito are dismissed as parties, this is an initial decision pursuant to 10 C.F.R. § 2.760. NEAP may appeal its dismissal

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[17] *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1114 (1981).

[18] *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109, 110 (1982). As Commissioner Asselstine points out in his dissent in that case, at 116, even the Staff agreed that the particular issue met the criteria for admission as a *sua sponte* issue because it was "a most serious issue." Although the Commission itself appears not to offer a rationale for how it could take the action it did, in face of the regulation — and Chairman Palladino made it clear at 112 that he did not intend to revoke the *sua sponte* authority — we believe that our explanation in the text of this decision provides an appropriate rationale sympathetic to the intent of the Commission.

However, in this case we are uninformed of the Staff's evaluation of the importance of the issues before us or of the extent of its followup of these issues, so the proper application of the *Zimmer* rule is not apparent.

[19] *See* LBP-90-16, 31 NRC at 526-27, 528-29, 532-34; NUREG-1410, "Loss of Vital AC Power and the Residual Heat Removal System During Mid-Loop Operations at Vogtle Unit 1 on March 20, 1990" (June 1990).

[20] Response at 4-7.

[21] Staff agrees, in Staff Response at 2 n.1, that NEAP may file a motion before the Commission to reopen the proceeding should Mr. Saporito prevail before the Department of Labor. (Staff has argued that we cannot take up a matter involving intimidation because of a Memorandum of Understanding Between NRC and the Department of Labor, Employee Protection (47 Fed. Reg. 54,585 (Dec. 3, 1982)). We do not address this point as it is no longer a live issue in this proceeding.)

[22] *See* note 1, above.

as a party pursuant to 10 C.F.R. § 2.762, which provides for a notice of appeal within 10 days after service of an initial decision and for the appellant's brief to be filed within 30 days after the filing of the notice of appeal.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. George C. Anderson (by PBB)
ADMINISTRATIVE JUDGE

Elizabeth B. Johnson (by PBB)
ADMINISTRATIVE JUDGE

Peter B. Bloch, Chair
ADMINISTRATIVE JUDGE

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

John H Frye, III, Chairman
Dr. Charles N. Kelber
Dr. David R. Schink

In the Matter of

Docket Nos. 50-250-OLA-6
50-251-OLA-6
(ASLBP No. 91-625-02-OLA-6)
(Emergency Power
System Enhancement)

FLORIDA POWER AND LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)

January 23, 1991*

The Licensing Board denies a petition to intervene because Petitioner failed to demonstrate that he resides and/or works in the vicinity of the plant in question and thus has standing.

RULES OF PRACTICE: INTERVENTION

Section 2.714(a) of 10 C.F.R. requires that a petitioner state his or her interest with particularity and how that interest may be affected by the proceeding. Judicial concepts of standing are applicable.

*Received January 25, 1991.

RULES OF PRACTICE: INTERVENTION

As a general proposition, a person whose base of normal, everyday activities is within 25 miles of the site can fairly be presumed to have an interest which might be affected by reactor construction and/or operation, thus satisfying the "injury in fact" test. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).

RULES OF PRACTICE: INTERVENTION

The burden rests with the petitioner to demonstrate that he or she satisfies the requirements of 10 C.F.R. § 2.714(a). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).

MEMORANDUM AND ORDER
(Ruling on Petition to Intervene)

In July and September, 1990, Florida Power and Light Company (FPL) proposed a number of design changes for its Turkey Point Plant located in Dade County, Florida. These changes, part of its Emergency Power System enhancement project, would add two emergency diesel generators, two battery chargers, a battery bank, and associated support and electrical distribution equipment. FPL also seeks permission to modify the Technical Specifications to reflect these changes.

Following receipt of FPL's application, the Commission's Staff published a notice indicating that this application was under consideration.[1] This notice offered an opportunity for interested persons to petition for a hearing with regard to these changes. Thomas J. Saporito, Jr., filed a timely request for hearing and petition for leave to intervene in response to the notice.[2] Both FPL and Staff oppose the petition on the ground that Mr. Saporito has not demonstrated that he has standing to intervene.

[1] *See* 55 Fed. Reg. 39,331 (Sept. 26, 1990). The Notice also indicated that the Commission proposed making a "no significant hazards" determination under 10 C.F.R. § 50.92 which, pursuant to 10 C.F.R. § 50.91(a)(4), would permit the issuance of the license amendment requested by FPL in advance of the completion of any hearing held as a result of a request filed in response to the Notice. On December 28, 1990, the Commission issued the requested amendment.

[2] The Nuclear Energy Accountability Project (NEAP) was also included with Mr. Saporito as a Petitioner, but subsequently moved to withdraw its petition. The motion represented that NEAP would be dissolved on December 31, 1990. This motion was granted on December 12. Consequently, NEAP's petition is not further considered in this Memorandum and Order.

The Commission's requirements with regard to standing are set out in 10 C.F.R. §2.714(a). This provision requires that a petitioner state his or her interest with particularity, how that interest may be affected by the proceeding, and why he or she should be permitted to intervene. The Commission has held that judicial concepts of standing are to be utilized in its proceedings. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). Thus, in order to be successful, a petitioner must allege an injury in fact to his or her interests and that that injury is within the zone of interests protected by an applicable statute. It is well settled that "as a general proposition, a person whose base of normal, everyday activities is within 25 miles of the site can fairly be presumed to have an interest which *might* be affected by reactor construction and/or operation," thus satisfying the "injury on fact" test. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974) (emphasis in original). In *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989), the Commission affirmed this proposition, noted that living within a specific distance from the plant would confer standing on individuals in proceedings on major amendments to a power plant license. The Commission has held that the burden rests with the petitioner to demonstrate that he or she satisfies the requirements of 10 C.F.R. §2.714(a). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).

Mr. Saporito's petition recites that he

> lives and works in and about the City of Miami, Florida as the Executive Director of NEAP and as a self-employed individual with the Airflow Service Corporation. The interests of Mr. Saporito could be adversely affected if a serious nuclear accident occurred at the Turkey Point nuclear plant as a direct or indirect result of the [granting of the license amendment under consideration].[3]

The petition makes no other representations with regard to the standing of Mr. Saporito to request a hearing and to intervene in the proceeding.

FPL asserts that the meaning of the quoted statement is unclear. It notes that the statement that Mr. Saporito works for NEAP and Airflow Service Corp. "in and about" Miami does not address the extent to which his work occurs in Miami as opposed to some other place.[4] Moreover, FPL notes that recently it was brought out in Mr. Saporito's deposition taken in connection with an unrelated proceeding before the Department of Labor that, in the course of its 3-year existence, Airflow Service had generated revenues of about $600-$700. Thus this work could not be extensive.

[3] Petition at 2.

[4] Assuming that NEAP has now been dissolved, work for that organization would no longer exist.

Further, FPL notes that the representation that Mr. Saporito lives in Miami does not exclude other places of abode. It observes that in a related Commission proceeding concerning the Turkey Point Plant (the OLA-5 proceeding), a brief filed on Mr. Saporito's behalf on September 5 stated that his residence was in Jupiter.[5]

Following submission of its response to the petition, FPL brought to the Board's attention the fact that it had received two change-of-address notices from Mr. Saporito. The first of these, received on November 29, indicated that Mr. Saporito's mailing address was changed to 8135 S.W. 62nd Place, Miami, Florida 33143. FPL represents that this notice recited that it became effective in July and notes that if this is so, it conflicts with Mr. Saporito's sworn testimony given in August in the Department of Labor proceeding to the effect that his address was in Jupiter, Florida. The second, received on December 2, stated that the mailing address was changed to P.O. Box 129, Jupiter, Florida 33468-0129.[6] FPL notes that the apparent inconsistency in Mr. Saporito's representations raises serious questions concerning the location of his abode.[7]

Staff also asserts that Mr. Saporito has failed to demonstrate that he has standing, noting that he has given insufficient information concerning both his residence and employment. Staff notes that Mr. Saporito did not state in his petition where he resides in Miami. Nor did he provide sufficient elaboration of the extent of his work activities in that city.[8]

On December 5, we afforded Mr. Saporito an opportunity to respond to the answers filed by FPL and Staff, including FPL's response to the notices of change of address. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979). On December 26, Mr. Saporito filed his reply. Although that reply stated that he had been directed to respond both to the answers opposing his petition and to FPL's comments prompted by the notices of change of address, Mr. Saporito addressed only the latter.[9] The substance of Mr. Saporito's reply is:

[5] Mr. Saporito does not question FPL's and Staff's assertion that Jupiter is too remote from the Turkey Point Station to support standing. *See* Staff's Answer at 8; FPL's Answer at 8. In its response, FPL notes that Mr. Saporito represented that Jupiter is about 83 miles from the Turkey Point Station in an amended petition filed in the related "OLA-5" proceeding.

[6] The motion to withdraw NEAP's petition, filed on December 8, indicated that Mr. Saporito's mailing address was 8135 S.W. 62nd Place, S. Miami, Florida 33143.

[7] *See* FPL's November 9 Response to Petition at 11-14, and its response to the notices of change of address of December 5. FPL also takes the position that Mr. Saporito has not stated an admissible contention.

[8] Staff's November 14 Response to Petition at 8-9. Staff also takes the position that Mr. Saporito has failed to state an admissible contention.

[9] The reply noted in passing that FPL's answer to the petition had also suggested that there was some inconsistency between the representations made in this proceeding and in the Department of Labor's proceeding.

Mr. Saporito's mailing address remained at 1202 Sioux Street, Jupiter, Florida at that time and did not change until some time after July 1990 and well before the time that Petitioner filed a Request for Hearing and Leave to Intervene in this proceeding.[10]

Mr. Saporito addresses none of the other arguments raised by FPL and Staff.

Here some doubt exists as to where Mr. Saporito lives. The petition recites that he "lives and works in and about the City of Miami," but indicated an address in Jupiter, Florida, as did a brief filed on his behalf in the OLA-5 proceeding on September 5. A notice of a change of Mr. Saporito's mailing address received by FPL on November 29 and effective in July 1990, indicated that mail was to be send to him at a Miami address. This was followed by a second notice received by FPL on December 2 changing the mailing address back to Jupiter. The motion to withdraw NEAP's petition, filed 3 days following FPL's response to the notices of address change, indicated that all future filings should be directed to Mr. Saporito at the Miami address. When FPL pointed out that the first notice changing the mailing address to Miami was inconsistent with Mr. Saporito's sworn testimony in the Department of Labor proceeding indicating his residence in Jupiter, Mr. Saporito's response was that his mailing address "did not change until some time after July 1990 and well before the time" he filed his petition.

Mr. Saporito's representations as to his address may be summarized as follows:

Date	Document	Representation
September 5	Brief in OLA-5	Resides in Jupiter.
October 25	Petition in this proceeding	"Lives and works in and about the City of Miami." Address indicated in signature block is P.O. Box 129, Jupiter.
Received by FPL November 29	Change of address effective July 1990	Direct mail to 8135 S.W 62nd Place, Miami.
Received by FPL December 2	Change of address	Direct mail to P.O. Box 129, Jupiter.
December 8	Motion withdrawing NEAP's petition	Direct mail to 8135 S.W. 62nd Place, Miami.
December 26	Reply to FPL and Staff	Mailing address did not change to Miami from Jupiter until after July and before October 25.

In these circumstances, a representation that Mr. Saporito "lives and works in and about" Miami not far from the plant in question is insufficient to support standing. When confronted with objections that he had not adequately set forth a basis for standing by clearly indicating where he works and lives, Mr. Saporito responded only that at the time of the filing of his petition, his mailing address was in Miami. While we would ordinarily assume that an individual petitioner receives mail at his residence, in this case such an assumption is not warranted. The frequent changes of that address in a short period of time underscore the questions concerning Mr. Saporito's standing raised by FPL and Staff. It was incumbent on Mr. Saporito to affirmatively state where he resides and the extent to which his work takes place in proximity to the plant. Absent such a statement, we cannot conclude that his "base of normal, everyday activities" is close enough to the plant to support standing.

Mr. Saporito's failure to have affirmatively responded to the questions raised regarding his standing, when coupled with his representations made over a period of about 2 weeks in late November and early December that his mailing address changed three times in a period of less than 4 months, prevents us from concluding that he resides at the Miami mailing address and thus has standing. This is particularly so in light of the fact that the last change followed hard upon FPL's comments on the earlier two notices.

Accordingly, Mr. Saporito's petition filed in this proceeding is denied.[11] Pursuant to 10 C.F.R. §2.714a(a), within 10 days after its service, Mr. Saporito may appeal this Memorandum and Order by filing a Notice of Appeal and

[10] Reply at 4. The statement that Mr. Saporito's mailing address remained in Jupiter "at that time" presumably refers to July 1990. In the preceding paragraph of the reply, Mr. Saporito states that NEAP's change of address to Miami from Jupiter became effective in July 1990.

[11] In light of this result, we do not consider whether Mr. Saporito has satisfied the other requirements of 10 C.F.R. §2.714.

accompanying brief with the Commission. *See* 10 C.F.R. §2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944, Oct. 24, 1990).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Dr. David R. Schink[12]
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

John H Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 23, 1991

[12] Dr. Schink concurs in this Memorandum and Order, but was not available to sign it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

In the Matter of

Docket Nos. 50-250-OLA-6
50-251-OLA-6

FLORIDA POWER & LIGHT COMPANY
(Turkey Point Nuclear Generating Plant, Units 3 and 4)

April 3, 1991

The Commission considers petitioner Thomas J. Saporito, Jr.'s appeal from a Licensing Board decision denying his petition to intervene in an operating license amendment proceeding. The Commission dismisses the appeal because Mr. Saporito has not filed a timely brief supporting his notice of appeal.

RULES OF PRACTICE: APPELLATE REVIEW

Under the NRC's Interim Procedures for Agency Appellate Review, 55 Fed. Reg. 42,944 (Oct. 24, 1990), the Commission, rather than an Appeal Board, will provide agency appellate review for new appellate matters. 10 C.F.R. § 2.785(b).

RULES OF PRACTICE: APPELLATE REVIEW

The NRC Appeal Panel lacks jurisdiction to hear appeals on new appellate matters. NRC Interim Procedures for Agency Appellate Review, 55 Fed. Reg. 42,944 (Oct. 24, 1990).

RULES OF PRACTICE: APPELLATE REVIEW

Filings beyond the 10-day period prescribed for appeals in 10 C.F.R. § 2.714a are justifiable only if there is a showing of good cause for the failure to have filed on time.

RULES OF PRACTICE: APPELLATE REVIEW

That a petitioner is a layman and thus possibly may be unfamiliar with NRC's Rules of Practice is not sufficient excuse for late or incomplete filings, particularly where the order that is being challenged expressly advised the petitioner of his appellate rights, of the time within which those rights have to be exercised, and of the manner in which an appeal is to be taken.

MEMORANDUM AND ORDER

On September 26, 1990, the NRC published a notice indicating that it had under consideration an application for amendments to the operating licenses for Units 3 and 4 of the Florida Power & Light Company's Turkey Point station.[1] The notice provided an opportunity for interested members of the public to request a hearing. *See* 55 Fed. Reg. 39,331. The Nuclear Energy Accountability Project (NEAP) and Thomas J. Saporito, Jr., filed a "Request for Hearing and Petition for Leave to Intervene," but NEAP subsequently filed a motion to withdraw from the proceeding, which was granted by the Licensing Board.[2] This left Mr. Saporito as the sole petitioner in the proceeding. On January 23, 1991, the Licensing Board denied Mr. Saporito's petition to intervene on the ground that he had not satisfactorily demonstrated that he had the requisite standing to intervene. LBP-91-2, 33 NRC 42.

The Licensing Board's decision focused on the standing requirements of NRC's Rules of Practice (10 C.F.R. Part 2). Section 2.714 of the regulations provides, in subsection (a)(2), that the "petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, . . . [and] why petitioner should be permitted to intervene . . . ." This means that the Petitioner must demonstrate that he satisfies the requirements of subsection (a)(2).[3]

[1] The amendments relate to the Emergency Power System for these units.
[2] NEAP withdrew on the ground that it would be dissolved effective December 31, 1990.
[3] *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989); *Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985).

Mr. Saporito attempted to show that he met the standing requirements by reciting in his petition for leave to intervene that he "lives and works" in and about the City of Miami, Florida. However, other filings he had submitted in the proceeding (as well as statements he made in an unrelated Department of Labor proceeding) cast doubt on this assertion. To ensure that he had adequate opportunity to explain his position, the Board invited Mr. Saporito to amplify his statements, but his response was unclear. As a result, the Board found that it could not conclude that he resides or works at an address that would confer standing, and it denied his petition to intervene in the proceeding.

At the end of its order, the Licensing Board stated: "Pursuant to 10 C.F.R. § 2.714a(a), within 10 days after its service, Mr. Saporito may appeal this Memorandum and Order by filing a Notice of Appeal and accompanying brief with the Commission. *See* 10 C.F.R. § 2.785 as amended October 18, 1990 (55 Fed. Reg. 42,944, Oct. 24, 1990)." LBP-91-2, 33 NRC at 47-48. The latter citation is to the NRC Interim Procedures for Agency Appellate Review, which provide that (with exceptions not relevant here) the Commission, rather than an appeal board, will henceforth provide agency appellate review for appellate matters. The Interim Procedures also provide that, until a final appellate review rule is issued, Commission review will follow existing procedures.

But, rather than going directly to the Commission, as directed by the Licensing Board Order, Mr. Saporito filed an "Appeal Request," dated February 4, 1991, with the Appeal Panel. Because it correctly concluded that it did not have jurisdiction to hear the appeal under NRC's Interim Procedures for Agency Appellate Review, the Appeal Board, on February 11, 1991, issued an Order referring the Appeal Request to the Commission.

The Commission must, at the outset, determine whether it is appropriate for it to consider Mr. Saporito's appeal. Section 2.714a of NRC's Rules of Practice allows an interlocutory appeal from a licensing board order on a petition for leave to intervene. Subsection (a) of that section requires a licensing board ruling on a petition for leave to intervene to be appealed by the filing of a notice of appeal and accompanying supporting brief within 10 days after service of the Board's order. Mr. Saporito's two-sentence Appeal Request can in no way be considered to be a supporting brief.

It may well be that the appeal period provided in section 2.714a is not jurisdictional in the sense that an appeal absolutely may not be entertained if it is not filed within 10 days after service of the order in question, but filings beyond the prescribed period are only justifiable if there is a showing of good cause for the failure to have filed on time. Moreover, the fact that the Petitioner is a layman and thus possibly may be unfamiliar with NRC's Rules of Practice is not sufficient excuse for late or incomplete filings, particularly where the order that is being challenged expressly advised the Petitioner of his appellate rights, of the time within which those rights had to be exercised, and of the manner in which an appeal is to be taken. *See Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638, 639 (1979).

A petitioner's failure to file a supporting brief when filing a timely notice of appeal from the denial of an intervention petition was addressed by the Appeal Board in *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-140, 6 AEC 575 (1973). In that proceeding, the Appeal Board took into account the possibility that the failure to file a brief was occasioned by the petitioner's unfamiliarity with the requirements of section 2.714a, and *sua sponte* entered an order that extended the time for doing so by 2 working days. When the petitioner still failed to file a brief, the appeal was dismissed.[4] The Board stated that, while it may make some allowance for the fact that a party before it is proceeding *pro se*, "considerations of fairness to other litigants, as well as of the orderly administration of the adjudicatory process, preclude the granting to any appellant of a waiver of as fundamental a requirement of the Rules as that relating to the submission of a brief detailing the basis for his appeal."[5] We are of the same view.

Accordingly, Mr. Saporito's appeal from the Licensing Board decision denying his petition to intervene is dismissed.

IT IS SO ORDERED.

For the Commission,[6]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 3d day of April 1991.

[4] Similarly, an appeal on an issue that is not addressed in an appellate brief is considered to be waived. *Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 49-50 (1981).

[5] In any event, while Mr. Saporito is a layman acting *pro se*, it cannot be assumed that he is unfamiliar with NRC's Rules of Practice since he has been active in representing himself and other outside parties in NRC proceedings in recent years. *See, for example, St Lucie*, CLI-89-21, *supra* note 3; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73 (1990), and *Turkey Point*, LBP-90-16, 31 NRC 509 (1990).

[6] Chairman Carr was absent for the formal affirmation of this Order; if he had been present he would have approved it.

Florida Power & Light
Turkey Point Nuclear Plant
Homestead, Florida 33030

NARRATIVE REPORT

This investigation was acheduled on the basis of a complaint by Thomas J. Saporito, Jr., of 1202 Sioux Street, Jupiter, Fl. 33458, who alleged that, in violation of the Energy Reorganization Act, Section 210, Florida Power & Light had discriminated against him by placing his name on a "NO LIST" beccause of his previous communications with the Nuclear Regulatory Commission on behalf of Florida Power & Light. The alleged discrimination was charactrized as an effort to prevent him from working in the industry any longer. See exhibits A-1(a) through A-3.

See the complaint statement dated 8/28/90 and attachment.

Mr. Saporito worked as an Instrument Control Specialist for Florida Power & Light for seven years. He worked at the Turkey Point Plant since 4/25/88.

This is the latest in a series of complaints received from Mr. Saporito alleging violation of the same statute. The first investigation was concluded on November 18, 1988, with a finding of no violation and notification in accordance with FOH procedure was sent to Mr. Saporito on that date.

COVERAGE

Jurisdiction is conferred by the Energy Reorganization Act at Section 210 (a), Employee Protection. Coverage was implicitly stipulated by counsel for the FPL, James S. Bramnick, of the firm of Muller & Mintz. His letter of representation is at Exhibit D-1.

TIMELINESS

Mr. Saporito's complaint, through his attorney, of 8/28/90 was based on what he felt to have been management's reaction to his numerous communications with the NRC. The complaint was timely filed. See exhibits A-1 through A-3.

PROTECTED ACTIVITY

Mr. Saporito has been and remains a persistent and articulate critic before the Nuclear Regulatory Commission of Florida Power & Light's nuclear operations at Turkey Point Near Homestead.

While an employee of Florida Power & Light, he engaged in protected activities, he was fired, he was found by this office to have suffered discrimination, an administrative law judge reversed this finding. Mr. Saporito's appeal from the administrative law judge's

finding is presently before Secretary Dole. As mentioned above, he continued in these activities after leaving the employ of Florida Power & Light. Engagement in protected activities was not disputed, then or now, by Florida Power & Light's labor counsel, Mr. Bramnick.

STATUS OF COMPLIANCE

The compliance action started with an effort at conciliation. On September 24, 1990, Mr. Saporito stated that in order to satisfy him, he would like Florida Power & Light to pay all expenses to reeducate him in another field such as law school and pay all legal expenses incurred for their actions. The request was made known to the firm's attorney who categorically refused to even consider Mr. Saporito's request.

The investigation conclusion is that Mr. Saporito was not the victim of discrimination. There was no "document" blacklisting Mr. Saporito or any other employee, current or former. It is the opinion of this Wage & Hour Investigator that the "document" in question is not legitimate. It should also be noted that Mr. Saporito's attorney never claimed that the "document" was legitimate. As a matter of fact, the "document" was to have been presented as evidence in the last hearing . However, for lack of substantiation, Mr. Saporito's attorney withdrew the "document" as evidence. If the "NO LIST" was not credible to be used as evidence then, Why is it being brought up now.

It is also the opinion of this Investigator that Mr. Saporito will continue to level charges at Florida Power & Light until he receives monetary compensation one way or the other.

No evidence was found to substantiate that a "NO LIST" (blacklist) is maintained by any organization or Dept. within the FPL Nuclear Division. Further credence to support that the "document" is not authentic is gained in view of the fact that seven of the employees listed are eligible for and recommended for rehire, according to personnel records. The "document" indicates all those listed "are not eligible for re-employment or recommendation".

According to the Nuclear Safety Speakout Investigation Report

1. No individual interviewed was familiar with the term NO LIST.

2. No individual interviewed was aware of or had seen a former employee blacklist maintained by FPL.

3. the "document" is not consistent or similar to the type of correspondence issued by Industrial Relations (IR) on that type of FPL form.

4. Only limited information is provided to individuals or

organizations outside FPL, about former employees. The information does not include the employees eligibility for rerhire or a recommendation to hire.

5. Seven of the former employees named on the "document" are eligible or recommended for rehire with FPL.

6. Two names on the "document" are not spelled correctly.

7. One name on the "document" listed the first name and last initial of the former employees Jon, R., (should be Rahn, Jon D.).

8. One name on the list (Rice, D.) cannot be verified as employed at FPL, as a contractor HP.

9. Only the first initial of the former employee was used on the list.

10. The "document" contained no date, signature, or pre-headed IR address.

11. A "Stamp" DO NOT CIRCULATE appearing on the list, is not used by FPL IR, Personnel or Human Resources.

12. The stamp is used at the FIU Library, Park Avenue, Miami, Florida.

DISPOSITION

All the credibility remains on FPL's side. Once again, a case could be made that Mr. SAporito was using the statute to terrorize the company rather than being a victim.

[redacted]

Emmanuel G. Morel EGM
WAGE & HOUR INVESTIGATOR
10/30/90

U.S. Department of Labor

Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

DATE: NOVEMBER 12, 1993

CASE NO: 93-ERA-0023

In The Matter of

THOMAS J. SAPORITO, JR.
Complainant

v.

FLORIDA POWER & LIGHT COMPANY,
Respondent

Appearances:

THOMAS J. SAPORITO
Pro Se

JAMES S. BRAMNICK, ESQ.
PAUL C. HEIDMANN, ESQ.
For Respondent

Before: E. EARL THOMAS
District Chief Judge

RECOMMENDED DECISION AND ORDER

This proceeding arose under the Energy Reorganization Act of 1974, as amended, (hereinafter "Act") 42 U.S.C. §5851, and the implementing regulations found in 29 Code of Federal Regulations, Part 24. These provisions, commonly known as part of the environmental "whistleblower" provisions, protect employees against discrimination in employment for attempting to implement the purposes of the Energy Reorganization Act and the Atomic Energy Act, as amended, found at 42 U.S.C. §2011 *et seq.* A hearing was held in Miami, Florida on September 7, 1993. All parties were afforded full opportunity to present evidence and legal argument. The evidentiary record, as finally comprised, consists of the transcript (Tr.), Complainant's exhibits 1-9 (EX), and Respondent's exhibits 1-3 (RX).

STATEMENT OF THE CASE

This case stems from a complaint dated October 21, 1992 by Thomas J. Saporito, Jr. in which he alleges that a telephone call by an unidentified caller from Respondent, Florida Power & Light Co. (hereinafter "FP&L"), was made to warn the Vice President for Nuclear Operations at Arizona Public Service Company (hereinafter

"APSC") that Saporito was working there. This "one specific act" is alleged to constitute "blacklisting" and to be responsible for the termination of his employment at APSC. *See* Saporito Complaint, p.8.

The complaint recites Saporito's employment history beginning with FP&L in 1982 as an Instrument Control (I&C) technician. His termination from that position on December 22, 1988 was the subject of discrimination cases heard by Administrative Law Judge Anthony J. Iacobo (Case Nos. 89-ERA-7, 89-ERA-8, June 30, 1989), now pending before the Secretary of Labor. RX 1. Thereafter, he continued to be involved in various activities regarding the operation of FP&L's Turkey Point Nuclear Plant. He petitioned to intervene both individually and through his non-profit organization, Nuclear Energy Accountability Project, in proceedings before the Nuclear Regulatory Commission (hereinafter "NRC").

Saporito became an electronics instructor at the ATI Career Training Center in Miami in December, 1989. A letter of inquiry to ATI by FP&L counsel sent in order to verify Saporito's employment as a basis for eligibility in an FP&L licensing proceeding before the NRC was alleged to have been a factor in his termination at ATI on May 10, 1990. The circumstances surrounding that termination were the subject of a proceeding before the undersigned. (Case Nos. 90-ERA-27, 90-ERA-47, November 6, 1990). RX 2. Those matters currently are pending before the Secretary.

Following brief periods of self-employment, Saporito obtained a position as an I&C technician at the APSC Palo Verde nuclear plant through a contract with the Atlanta Group on September 29, 1991. His termination as a contract worker on December 31, 1991 was the subject of a complaint and subsequent hearing before Administrative Law Judge Michael P. Lesniak (Case No. 92-ERA-30, May 10, 1993). CX 2. That matter is pending before the Secretary.

The Wage and Hour Division of the Employment Standards Division of the Department of Labor conducted an investigation of the facts alleged in the complaint. Complainant was advised by the District Director on February 17, 1993 that the investigation did not substantiate that an official of FP&L actually made the call to APSC or that the intent of the call was to discriminate against him because of his engagement in protected activities. RX 3.

At the beginning of this proceeding, Respondent filed a motion for summary decision. Ruling on the motion was deferred until Complainant could be given an opportunity to present evidence. In view of the recommended nature of any ruling by the

undersigned, Respondent agreed to withdraw the motion and proceed on the merits.

FINDINGS OF FACT

The following facts, among others, were stipulated not to be in dispute:

1. Respondent is an employer within the meaning of the Energy Reorganization Act;

2. Complainant worked for Respondent from March of 1982 until December 22, 1988 as an I&C Specialist at Respondent's Turkey Point Nuclear Power Plant;

3. W.F. Conway was employed by Respondent as Senior Vice President-Nuclear from January 31, 1988 until May 6, 1989, and then became Senior Executive Vice President for Nuclear Operations at APSC's Palo Verde Nuclear Plant;

4. Conway had authority over Respondent's nuclear power plants at Turkey Point and St. Lucie; and

5. FP&L and APSC are not affiliated organizations.

Following his discharge from FP&L on December 22, 1988, which he believed was in retaliation for his whistleblowing activities while employed at the Turkey Point Nuclear Plant, Thomas Saporito was self-employed until he was hired as an Atlanta Group contract employee by APSC on September 29, 1991. Tr. 20-22. At the end of that contracted work, Saporito filed a Section 210 complaint against the Atlanta Group and APSC, alleging that he was not offered employment by them for the next scheduled outage in February, 1992 due to retaliation for having engaged in protected activity while working there. *Id.* CX 2.

The nature of the protected activity in which Saporito was engaged while at APSC Palo Verde is not particularly relevant to this proceeding, but is set forth fully in Judge Lesniak's decision in *Saporito v. Arizona Public Service Company*, Case No. 92-ERA-30, ALJ Dec. May 10, 1993. CX 2. What is relevant is the testimony in that hearing, primarily of three witnesses, James Levine, William Simko, and William Conway, which became the genesis of this litigation.

The decision in *Saporito v. Arizona Public Service Company* was offered as evidence by Complainant and admitted without objection. Judge Lesniak's findings, numbered 338-340, set forth below, are consistent with the other evidence provided in this case and except for a small discrepancy in Levine's version of "the call", are adopted for purposes of this decision. His references to other paragraphs in his decision have been deleted.

339. James Levine, Vice President of Nuclear Production at PVNGS, who answers only to Bill Conway, Executive Vice President for Nuclear Operations, received a telephone call which had come in for Mr. Conway prior to the Unit 2 outage in the fall of 1991. Apparently when the person calling found out that Conway was not there, he asked to speak to Levine. The individual stated that he was with Florida Power and Light and told Levine he wanted to inform Conway that he understood Mr. Tom Saporito was working at Palo Verde. Levine was aware that Mr. Conway was a former employee of Florida Power and Light (as Executive Vice President for Nuclear Operations) and when Mr. Conway came back to town, Levine gave him the message. At one point, Levine asked through the maintenance organization if they had an employee named Tom Saporito. He believed he called Bill Simko who was the maintenance manager for Unit 2. After Levine asked Simko to find out if Tom Saporito was working at APS, Simko told Levine that there was someone under contract with that name. Levine's direction to Simko was to treat Saporito like every other employee. When Levine talked to Conway about Saporito, he probably asked the significance of the call from the individual. Levine believed that they had a short discussion that Saporito had voiced concerns at Florida Power. Levine had about two or three conversations with Conway about Saporito.

340. William Simko actually reported to Ron Flood who reported to Jim Levine. Simko had conversations about Saporito being previously employed by Florida Power and Light with Jim Levine and Steve Grove. In approximately September 1991, Simko received a telephone call from Levine who wanted to know if they had hired Saporito. Simko checked with Steven Grove and determined that Saporito had been hired. After advising Levine of Saporito's employment, Levine then asked if Saporito had worked at Florida Power and Light. Simko did not know, so he went back to Steve Grove and found out that Saporito had worked at Florida Power and relayed the information to Levine. Levine said, "Okay, I'll call you back." Several days later,

Levine advised Simko that there had been problems at Florida Power with Saporito and that he wanted to make sure that Saporito did a good job for them at Palo Verde. Simko said, "okay." During Simko's career at Palo Verde, (over ten years) he did not remember Mr. Levine ever calling before and asking him to check on someone's background. It was not normal for Levine to directly call Simko since there was a person in between, Mr. Flood.

341. William Conway, Executive Vice President for Nuclear Operations at APS, was also employed by Florida Power and Light Company as Senior Vice President Nuclear in early February of 1988 and terminated there in early May of 1989. While Conway was employed at Florida Power and Light, he learned that Saporito's employment was terminated at their Turkey Point Nuclear Station. Conway also knew that Saporito identified safety concerns to NCR and recalled a radio broadcast in March or April of 1989 on the West Palm Beach, Florida, radio station wherein Saporito was interviewed and identified various concerns relative to Turkey Point. Saporito's termination and his safety concerns at Turkey Point were high visibility issues with the news media. Sometime in August or September of 1991, Conway discussed Saporito with James Levine. Levine informed Conway that Saporito was working as an I&C technician for the Unit 2 refueling outage and that Saporito previously worked at Florida Power. Conway acknowledged to Levine that he was aware of Saporito's past employment and may have discussed Saporito's firing from Florida Power. Conway's instructions to Levine were that Saporito was to be treated like anyone else. Conway expected his wishes to more or less trickle down to all employees and believed that Levine would tell other people to treat Saporito the same as everyone else. Conway expected Frank Warriner to receive the communication that Mr. Saporito was to be treated no different from anyone else. Conway wanted this communicated to the lowest level of management, the foreman level. The message was that Saporito had problems at Florida Power and he was terminated and now

he's here and Conway wanted him to be treated like everyone else. CX 2.

The rationale behind Judge Lesniak's decision did not emphasize the telephone call received by Levine, apparently because he found that there was sufficient other opportunity for the alleged APSC discriminating official to learn of protected activity in which Saporito had engaged. However, because that telephone call forms the basis for Saporito's charge of "blacklisting" it will be examined in more detail.

Although Levine says he received the call intended for Conway in August of September, 1991, he did not provide a precise date. Regardless, it was after Saporito had been hired. CX 2, pp.68, 69. Levine believes the caller was from out of town but does not remember his name. The caller wanted to inform Conway that it was his understanding that Saporito was working at Palo Verde. Levine did not say why he believed the caller was from FP&L and did not know his position. CX 3, pp.1002-1008. Levine told DOL investigators that the caller did not mention Saporito's activities at FP&L and did not attempt to "blacklist" Saporito. CX 9.

William Conway was a Senior Nuclear Vice President at FP&L when Saporito was terminated there in 1988. He was aware of Saporito's whistleblowing activities. Tr. 130 and CX 2, p.23. Conway was interviewed at APSC by DOL Wage and Hour investigators. He provided a statement that, to his knowledge, no one at FP&L had ever tried to blacklist Saporito. CX 8.

Saporito's whistleblowing activities at FP&L were well known by many employees at APSC who knew nothing about the phone call. A number of APSC employees had worked with Saporito at FP&L and either knew him or knew of him there. CX 2. APSC Supervisor Groeneveld knew Saporito was fired at FP&L and knew his reputation as a trouble maker. CX 2, p.5. Groeneveld had conversations with ten to fifteen APSC workers about Saporito. Rex Smith had worked with Saporito at FP&L and knew twenty other technicians at APSC who knew Saporito. CX 2, p.6.

Saporito has been interviewed on public television, radio and the print media numerous times about his whistleblowing activities. CX 2, p.37. Complainant exhibit 1 is a collection of over 80 newspaper articles about Saporito. He has written letters to the Presidents of the United States and Russia complaining about the Turkey Point FP&L operation and the U.S. Nuclear Regulatory Commission. While at Turkey Point, he filed some 50 labor grievances. CX 2, p.37.

The only testimony at this hearing was provided by Saporito and Jerome Goldberg, who has been President of the Nuclear Division at FP&L since September, 1989. Tr. 30. The Nuclear

Division has 2,500 employees. Tr. 83. Goldberg's and Saporito's names sometimes appeared together in the media at the time Saporito was raising concerns at FP&L. Tr. 45.

Jerome Goldberg knew Conway before the latter came to work for FP&L, but his familiarity was purely business and contacts between the two were limited to industry meetings. Tr. 43. During the time Saporito was employed by APSC, Goldberg never discussed or mentioned Saporito to Conway. Actually, he did not recall Saporito's name ever being mentioned between them. Tr. 56. He has no knowledge of any FP&L official ever contacting APSC and mentioning Saporito's name.

Saporito testified that during his career in the nuclear industry, he has identified concerns to the Nuclear Regulatory Commission about FP&L, APSC and other nuclear plants in the Unites States. Tr. 98. He believed that it was well known by Palo Verde employees that he had been fired at Turkey Point. Tr. 123. As a result, he was isolated by his coworkers. They would not sit with him at lunch and asked not to be assigned to work with him. One employee told Saporito that he had seen him on the CNN Network News. During a confrontation, another APSC employee, Bill McCullough pushed Saporito into a security fence. *Id.*

Saporito felt that management at APSC became hostile when he continued to raise safety concerns, but he was not able to link this alleged hostility to any communication from FP&L. Tr. 124. He admitted that he has no evidence as to the identity of the FP&L caller. Nor does he have any evidence that the caller actually worked for FP&L or what the caller's motive was. Tr. 129. Although Saporito alleged that FP&L employees such as Russell Holdren called APSC employee friends, Rex Smith and Mike Farrigan, he does not know what the intent of the calls was. Tr. 136. Saporito did not identify any FP&L manager or supervisor who called anyone at APSC about him.

Frank Warriner was the APSC Unit I Instrument and Control Technician Supervisor who rejected Saporito's resume and application for contract employment for the Unit I outage at APSC. CX 2, p.41. Although there was no direct evidence in *Saporito v. Arizona Public Service Company* as to Warriner's knowledge of Saporito, Judge Lesniak found that prior to his determinations not to select Saporito, the opportunity existed for Warriner to have received information that Saporito had engaged in protected activity. CX 2, p.67. After the trial, on August 10, 1993, Conway wrote a letter to Nuclear Regulatory Commission Chief Bobby H. Faulkenberry stating that on August 8, 1993, Warriner admitted to APSC legal counsel that his testimony regarding his knowledge of Saporito's past activities and the reasons he gave for not selecting Saporito were not truthful. He had learned of Saporito's protected activity from the Unit II

supervisor. However, Warriner indicated that his misconduct was his sole decision and that no one at APSC influenced him not to select Saporito. CX 7.

Although Warriner's discriminatory conduct was the basis for Judge Lesniak's decision, it is not evidence that anyone at FP&L had anything to do with Saporito's termination at APSC. Other than the very limited information provided by Levine's testimony in the *Saporito* hearing, nothing submitted from that record or anything in this one provides any information in addition to Levine's recollection that he received a phone call intended for Conway, the purpose of which was to advise that Saporito worked for APSC.

Because neither Levine's prior testimony nor anything in this record identifies the caller, I cannot find that the caller was in fact an FP&L employee or representative. Consequently, I do not find that the caller was an FP&L supervisor, manager, or agent. Moreover, there is no evidence of the caller's motive, except to alert Conway that APSC had an employee named Saporito.

CONCLUSIONS OF LAW

This case was brought under the Employee Protection Provision of 42 U.S.C. §5851. The statute provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)..
>
> (1) commenced, cause to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 *et seq.*], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;

> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. §2011 *et seq.*].

To sustain a discrimination claim under the Whistleblower Protection Provision of the Energy Reorganization Act, the Complainant must prove, by a preponderance of the evidence, that:

(1) the party charged with discrimination is an employer subject to the Act;

(2) the complainant was an employee under the Act;

(3) the complaining employee was discharged or otherwise discriminated against with respect to his or her compensation, terms, conditions, or privileges of employment;

(4) the employee engaged in protected activity;

(5) the employer knew or had knowledge that the employee engaged in protected activity; and

(6) the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.[1]

Once the complainant establishes a *prima facie* case, the burden of proof shifts to the respondent to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity.[2]

As mentioned above, Respondent stipulated that it is an employer within the meaning of the Act, and that Saporito was an FP&L employee from March of 1982 until December 22, 1988. Even though Saporito would continue to meet the definition of

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[1] *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Ledford v. Baltimore Gas & Electric Co.*, 83 ERA 9, slip op. ALJ at 9 (Nov. 29, 1983), adopted by SOL.

[2] *Ashcraft v. University of Cincinnati*, 83 ERA 7, slip op. of SOL at 12-13 (Nov. 1, 1984); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984); *Consolidated Edison of N.Y., Inc. v. Donovan*, 673 F.2d 61, 62 (2nd Cir. 1982).

"employee" through his prior FP&L employment,[3] his subsequent employment with APSC easily brings him under the Secretary's broad definition in *Hill v. Tennessee Valley Authority*, 87 ERA 23 and 24 (Sec'y, May 24, 1989).

At least some of the activities in which Saporito engaged, both at FP&L and APSC, were found to have been protected in *Saporito v. Florida Power and Light*, 89 ERA 7 and 17 (ALJ, June 30, 1989), and *Saporito v. Arizona Public Service Company*, 92 ERA 30 (ALJ, May 10, 1993).[4] Moreover, there was uncontradicted testimony from Saporito that he had engaged in protected activities at Turkey Point and Palos Verde. Tr. 98. FP&L was aware, through its managers and previous litigation, that Saporito engaged in protected activity.

In order to complete the requirements for a *prima facie* case, Saporito must show, in addition to the above elements, that he was somehow the victim of discrimination or retaliation, as he alleged in this case. In the leading case of *Howard v. Tennessee Valley Authority*, 90-ERA-24 (Sec'y, July 3, 1991), *aff'd sub nom., Howard v. United States Department of Labor*, 959 F.2d 234 (6th Cir. 1992), the Secretary cited Black's Law Dictionary 154 (5th ed. 1979) for the following definition of "blacklist:"

> Blacklist. A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as where a trades-union "blacklists" workman who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association.

It is not necessary in this case to determine whether or not a single telephone call in which a complainant's name is mentioned, without more, would fall within the above definition. Nor is it necessary to speculate as to the motive of the caller or whether or not it could have been a form of retaliation. The Complainant here has not been able to identify the caller or connect him or her to the Respondent. Levine's recollection that the caller was someone from FP&L is not sufficient identification to charge a

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[3] *Greenwald v. The City of North Miami Beach*, 78-SDW-1 (Sec'y, Apr. 3, 1978), aff'd, *Greenwald v. North Miami Beach*, 587 F.2d 779 (5th Cir. 1979) cert. denied, 44 U.S. 826 (1979).

[4] Although the decisions of the administrative law judges are not final, the findings contained therein have been submitted by the parties as evidence and were admitted without objection. See CX 2, RX 1.

company with misconduct. The telephone call could have been made by any one of the plant's 2,500 employees or even a non-employee who may have known or knew of Saporito. For this reason, I conclude that a *prima facie* case against Complainant was not proven.

RECOMMENDED ORDER

Consistent with the foregoing, it is hereby recommended that the complaint of Thomas J. Saporito, Jr. be dismissed.

E. Earl Thomas
District Chief Judge

EET/pc
Ft. Lauderdale, FL

SERVICE SHEET

Case Name: Thomas J. Saporito, Jr.

Case No.: 93-ERA-0023

Title of Document: RECOMMENDED DECISION AND ORDER

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