# CATEGORY 1

REGULATORY INFORMATION DISTRIBUTION SYSTEM (RIDS)

ACCESSION NBR:9707100149 DOC.DATE: 97/06/27 NOTARIZED: NO DOCKET #
FACIL:50-250 Turkey Point Plant, Unit 3, Florida Power and Light C 05000250
50-251 Turkey Point Plant, Unit 4, Florida Power and Light C 05000251
AUTH.NAME AUTHOR AFFILIATION
PADUANO,H.N. Florida Power & Light Co.
RECIP.NAME RECIPIENT AFFILIATION
COLLINS,S.J.

SUBJECT: Provides update to written notice dtd 961120 of claim involving alleged bodily injury arising out of,or in connection with,use of radioactive matl at plant.Case was dismissed by US District Court on 970606.

DISTRIBUTION CODE: A001D COPIES RECEIVED:LTR 1 ENCL 1 SIZE: 11
TITLE: OR Submittal: General Distribution

NOTES:

| | RECIPIENT ID CODE/NAME | COPIES LTTR | COPIES ENCL | RECIPIENT ID CODE/NAME | COPIES LTTR | COPIES ENCL |
|---|---|---|---|---|---|---|
| | PD2-3 LA | 1 | 1 | PD2-3 PD | 1 | 1 |
| | CROTEAU,R | 1 | 1 | | | |
| INTERNAL: | FILE CENTER 01 | 1 | 1 | NRR/DE/ECGB/A | 1 | 1 |
| | NRR/DE/EMCB | 1 | 1 | NRR/DRCH/HICB | 1 | 1 |
| | NRR/DSSA/SPLB | 1 | 1 | NRR/DSSA/SRXB | 1 | 1 |
| | NUDOCS-ABSTRACT | 1 | 1 | OGC/HDS3 | 1 | 0 |
| EXTERNAL: | NOAC | 1 | 1 | NRC PDR | 1 | 1 |

CATEGORY 1 DOCUMENT

NOTE TO ALL "RIDS" RECIPIENTS:
PLEASE HELP US TO REDUCE WASTE! CONTACT THE DOCUMENT CONTROL DESK, ROOM OWFN 5D-5(EXT. 415-2083) TO ELIMINATE YOUR NAME FROM DISTRIBUTION LISTS FOR DOCUMENTS YOU DON'T NEED!

TOTAL NUMBER OF COPIES REQUIRED: LTTR 13 ENCL 12

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

FPL

JUN 27 1997

L-97-163
10 CFR 140.6

Samuel J. Collins
Director, Office of Nuclear Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: Florida Power & Light Company
Turkey Point Units 3 and 4
Docket Nos. 50-250, 50-251
Update to Notice of Claim Pursuant to 10 CFR 140.6

Dear Mr. Collins:

This submittal provides an update to FPL's written notice, dated November 20, 1996 (L-96-310), of a claim involving alleged bodily injury arising out of, or in connection with, the use of radioactive material at Turkey Point Units 3 and 4. In the November 20 letter, FPL reported that it had moved to dismiss the case filed by Mr. Bertram Roberts and Ms. Hanni Roberts alleging that Mr. Roberts contracted myelogenous leukemia as a result of his exposure to radiation while working at Turkey Point, and that the Court had not yet ruled on this motion.

On June 6, 1997, the U.S. District Court for the Southern District of Florida granted FPL's motion and dismissed the case. A copy of the Court's decision is enclosed for your information.

Please contact Mitchell S. Ross, FPL counsel (561 691-7126) should you have any questions regarding this submittal.

Sincerely yours,

H. N. Paduano

H. N. Paduano
Manager
Licensing and Special Programs

A001



090025

OK to PDR
per Stan Lee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 95-2508-CIV-NESBITT

BERTRAM ROBERTS and HANNI ROBERTS,

Plaintiffs,

vs.

FLORIDA POWER & LIGHT COMPANY, a Florida Public Utility Corporation,

Defendant.
_____/

ORDER OF DISMISSAL



This cause comes before the Court upon Defendant's Motion to Dismiss Complaint, filed November 28, 1995 (D.E. #3).

On approximately October 10, 1995, Plaintiffs filed their Complaint in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. On November 13, 1995, Defendant ("FPL") removed this action on the grounds that Plaintiffs' claims arise under the Atomic Energy Act, 42 U.S.C. § 2201 et seq.

Plaintiffs, a married couple, allege that from 1966 through 1989, Plaintiff Bertram Roberts was exposed to nuclear radiation while he worked at FPL's Turkey Point Nuclear Power Plant in Dade County. Plaintiffs claim that as a result of this radiation exposure, Mr. Roberts developed myelogenous leukemia. Plaintiffs' Complaint is comprised of three claims: Count I is a negligence

claim; Count II is a strict liability claim; and Count III is Hanni Roberts' claim for loss of consortium.

On November 28, 1995, FPL filed its Motion to Dismiss. Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a court to dismiss a claim on the basis of a dispositive issue of law. Neitzke v. Williams, 490 U.S. 319, 326 (1989). However, the Court is confined to a review of the allegations pled in the complaint, must accept those allegations as true, and must resolve any factual issues in a manner favorable to the nonmovant. See Quinones v. Durkis, 638 F. Supp. 856, 858 (S.D. Fla. 1986). Thus, a court may dismiss a claim pursuant to Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The parties agree[1] that in order to state a cause of action for exposure to nuclear radiation, Plaintiffs must plead a "public liability action" under the Price-Anderson Amendment Act of 1988, 42 U.S.C. § 2011 et seq. A "public liability action" is "any suit asserting" "legal liability arising out of or resulting from a

[1] See Plaintiff's Memorandum in Opposition, D.E. #8, at 2 ("Plaintiffs do not contest the correctness of this statement.").

nuclear incident[2] or precautionary evacuation." 42 U.S.C. § 2014(hh) & § 2014(w).[3]

FPL contends that in order to properly plead a public liability action arising out of or resulting from a nuclear incident, a plaintiff must allege that a defendant breached its duty of care by permitting the plaintiff to be exposed to an amount of radiation in excess of federally defined permissible radiation dose standards. Because Plaintiffs have failed to make such an allegation, FPL argues that the Court should dismiss Plaintiffs' claims.

In response, Plaintiffs contend that federal dose standards do not define FPL's sole duty of care. Instead, Plaintiffs contend that the Price-Anderson Amendments Act does not expressly or impliedly preempt state law tort standards, and that the Act incorporates

---

[2] A "nuclear incident" is defined, in part, as

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . . .

42 U.S.C. § 2014(q).

[3] See also O'Conner v. Commonwealth Edison Company, 13 F.3d 1090, 1096 (7th Cir. 1994) ("'Any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act.'") (quoting S.Rep No.218, 100th Cong., 1st Sess. 13 (1987), reprinted in 1988 U.S.C.C.A.N. 1424, 1476, 1477).

substantive state law in its entirety. Therefore, Plaintiffs contend that they may plead a Public Liability cause of action based upon state common law standards regarding FPL's duty of care, without alleging a breach of FPL's duty to comply with federal radiation dose standards.

The Court must determine whether federal safety regulations, and particularly federal radiation dose standards, establish FPL's sole duty of care for Plaintiffs' negligence, strict liability, and loss of consortium claims. In other words, the Court must determine whether liability is precluded in the absence of a violation of federal radiation dose standards.

Pursuant to 42 U.S.C. § 2014(hh) of the Price-Anderson Amendments Act, the substantive rules for decision in a public liability action "shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of" § 2210 of the Price-Anderson Amendment Acts. Essentially, Plaintiffs contend that Florida negligence, strict liability, and loss of consortium claims which are not based upon violations of federal radiation dose standards are not inconsistent with the Price-Anderson Amendments Act. Thus, Plaintiffs assert that they can maintain their claims based upon Plaintiff Bertram Roberts's exposure to levels of radiation that were below maximum permissible dose levels set by federal safety standards.

In order to properly address FPL's motion, the Court "must look at the [Price-Anderson] Amendments Act in the context of the entire federal statutory scheme of nuclear power." O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1095 (7th Cir. 1994), cert. denied, 114 S.Ct. 2711 (1994). The Atomic Energy Act, enacted in 1946, "initially gave the federal government a monopoly with respect to the development of nuclear power." Id. However, Congress later decided to include the private sector in the development of atomic energy. Id. Therefore, "Congress enacted the Atomic Energy Act of 1954 which established the Atomic Energy Commission and gave it authority to license and regulate nuclear facilities." Id.

Because the Atomic Energy Act of 1954 "did not spur the private sector into the industry . . . ," id., in 1957 Congress responded "with the Price Anderson Act for the purpose of 'protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry.'" Id. (quoting 42 U.S.C. § 2012). The Act

> had three main features: 1) It "established a limit on the aggregate liability of those who wished to undertake activities involving the handling or use of radioactive materials"; 2) It channeled public liability resulting from nuclear incidents to the federal government; and 3) It established that all public liability claims above the amount of required private insurance "protection would be indemnified by the Federal Government, up to the aggregate limit on liability."

Id. (quoting S.Rep. No. 218, 100th Cong., 1st Sess. 2 (1987), reprinted in U.S.C.C.A.N. 1424, 1476, 1477).

In 1966, Congress amended the Act in two important respects. First, "a new provision required that those indemnified waive common law defenses in the event of an action arising from an extraordinary nuclear occurrence ('ENO')." Id. Second, the amendments "provided for the transfer, to a federal district court, of all claims arising out of an extraordinary nuclear occurrence." In re TMI Litigation Cases Consolidated II, 940 F.2d 832, 852 (3d Cir. 1991), cert. denied, 112 S.Ct. 1262 (1992) (citing 42 U.S.C. § 2210(n)(2)). See also O'Conner, 13 F.3d at 1095.

In 1975 and again in 1988, Congress amended the Price-Anderson Act. O'Conner, 13 F.3d at 1095. "Among other provisions, the [1988 Price-Anderson] Amendments Act expanded the reach of 42 U.S.C. § 2210(n)(2) to provide for removal of, and original federal jurisdiction over, claims arising from any 'nuclear incident,' instead of actions arising only from [extraordinary nuclear occurrences]." Id. Therefore, 42 U.S.C. § 2210(n)(2) now provides:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction . . . . Upon motion of the defendant . . . , any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n)(2). FPL removed this action on the grounds that is a "public liability action," and this Court has jurisdiction under 42 U.S.C. § 2210(n)(2).

In 1992, another division of this Court noted that in claims arising from nuclear exposure, "[t]here [wa]s a split of authority on the role that federal regulations play in an action for damages under state tort law." Landry v. Florida Power & Light, 799 F.Supp. 94, 96 n.7 (S.D. Fla. 1992). Further, the Court in Landry suggested that the split of authority had been "complicated by the Price-Anderson Amendments Act of 1988 . . . ." Id.

However, this Court has reviewed all cases cited by the Court in Landry v. Florida Power & Light, all cases cited by the parties, and all published decisions of courts addressing this issue since Congress passed the Price-Anderson Amendments Act of 1988. All of these courts, including the three circuits of the United States Court of Appeals which have considered the issue, have concluded that federal safety regulations conclusively establish the duty element of a state tort cause of action and that there can be no liability in the absence of a violation of federal standards. See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1094 (7th Cir. 1994) (Affirming district court's conclusion "that the maximum permissible radiation dose levels set by federal safety standards provide the applicable standard of care . . . ," and holding that "even if

Illinois would not use federal safety standards as the standard of care . . ., a different state standard would be preempted by federal law.") (citing O'Conner v. Commonwealth Edison Co., 748 F.Supp. 672, 678 (C.D.Ill. 1990)), cert. denied, 114 S.Ct. 2711 (1994); In re TMI Litigation Cases Consol. II, 940 F.2d 832, 859 (3d Cir. 1991) ("[S]tates are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law.") (citation omitted), cert. denied, 112 S.Ct. 1262 (1992), aff'd in part and rev'd in part on other grounds, 67 F.3d 1103, 1107 (3d Cir. 1995) ("[F]ederal law determines the standard of care and preempts state tort law."), cert. denied, 116 S.Ct. 1034 (1996); Nieman v. NLO, Inc., 108 F.2d 1546, 1553 (6th Cir. 1997) ("[W]e agree with the analyses of preemption in O'Conner and In re TMI II . . . ."); Bohrmann v. Main Yankee Atomic Power Co., 926 F. Supp. 211, 220 (D. Me. 1996) ("This Court agrees with In re TMI Litig. Cases Consol. II and concludes that federal regulation has occupied the field of nuclear safety law and that federal law has preempted states from imposing any standard of care different from the federal safety standards. Consequently, the Court concludes that federal law sets forth the duty of reasonable care owed to Plaintiffs, and Plaintiffs must establish breach of such standard to recover for the damages claimed on those theories of negligence and

negligent infliction of emotional distress.); Corcoran v. New York Power Authority, 935 F. Supp. 376 (S.D.N.Y. 1996) ("This Court adopts the reasoning of the Third and Seventh Circuits' decisions . . ., which generally stand for the proposition that the appropriate standard of care must be dictated by federal law, including those safety regulations governing exposure to radiation. . . . [I]mposing any other standard of care would contravene the federal interest in occupying the field of nuclear safety . . . .").

Consistent with the courts' decisions in all of the cases cited supra, this Court concludes that "[e]ven if Florida would not apply the federal safety standards as the standard of care, . . . the federal regulations [establishing the maximum permissible radiation dose levels] must provide the sole measure of [FPL's] duty in a public liability cause of action." O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1105 (7th Cir. 1994), cert. denied, 114 S.Ct. 2711 (1994). Because Plaintiffs have failed to allege that FPL breached its duty of care by permitting Plaintiff Bertram Roberts to be exposed to an amount of radiation in excess of federally defined permissible dose standards, Plaintiffs have failed to state causes of action for negligence, strict liability, and loss of consortium. See also Bohrmann v. Maine Yankee Atomic Power Co., 926 F. Supp. 211, 221 (D. Me. 1996) ("Plaintiffs' claim pursuant to a strict liability theory is inconsistent with the federal regulatory scheme because

Plaintiffs could recover pursuant to such a claim without first establishing that Defendant breached a federally imposed standard of care.").

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Defendant's Motion to Dismiss Complaint, filed November 28, 1995 (D.E. #3), is **GRANTED**.

2. Plaintiffs' Complaint is **DISMISSED**.

3. This case is **CLOSED** for administrative purposes, and all pending motions not otherwise ruled upon are **DENIED** as moot.

DONE and ORDERED in Chambers, Miami, Florida, this 6 day of June, 1997.

LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: Ervin A. Gonzalez, Esq.
Alvin B. Davis, Esq.
Donald E. Jose, Esq.