

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of :
FLORIDA POWER AND LIGHT : Docket No. 50-250 OLA-5
COMPANY : 50-251 OLA-5
:
(Turkey Point Plant, :
Units 3 and 4) : ASLBP No. 90-602-01-OLA-5
Facility Operating License :
DPR-31 and DPR-41 :

BRIEF FOR APPELLANTS
NUCLEAR ENERGY ACCOUNTABILITY PROJECT (NEAP)
AND THOMAS J. SAPORITO

STATEMENT OF FACTS

Of concern in this appeal are matters of standing to intervene of a particular organization, in its own right or through one or more of its members, regarding proposed amendments to the technical specifications of a nuclear power plant. Intervention as a matter of discretion for this organization or for one of its members is also involved here.

I. Petition to Intervene and Other Initial Matters

On June 5, 1989, Florida Power & Light Co. (FPL or Licensee or Applicant) requested of the Nuclear Regulatory Commission (NRC or Commission) license amendments for its Turkey Point nuclear power plant (Units 3 and 4) in Dade County, Florida, near the town of Homestead, south of Miami (the Plant). The amendments relate to numerous changes in Plant

technical specifications (TS) and related documents.

The Commission, on December 5, 1989, issued in the Federal Register a notice of the requested action and an opportunity for a hearing (54 Federal Register 50,295-50,296 (No. 33) (December 5, 1989)). On January 2, 1990 (signed December 27, 1989), the Nuclear Energy Accountability Project (NEAP) and Thomas J. Saporito, Jr., filed a timely request for leave to intervene and for a hearing concerning these amendment proceedings. The Petition was filed pro se by Mr. Saporito.

The Petition stated that NEAP is a corporation with its principal place of business in Jupiter, Florida. NEAP is "an environmental organization with specific and primary purposes to operate for the advancement of the environment and for other educational purposes, by the distribution of its funds for such purposes, and particularly for research relative to the environment and the impacts of technology on the environment."

The Petition also alleged that there are NEAP members who live, work, and vacation in, or otherwise use and enjoy, a geographic area within the immediate vicinity of the Turkey Point Plant (that is, within a 50 mile radius of the Plant). The Petition also alleged that NEAP and its members "are significantly and adversely affected and otherwise aggrieved by the license actions" described by the Federal Register notice. It alleged that the interests of its members and their families "could be significantly and adversely affected if a serious accident occurred" at the Plant due to its unsafe operation.

The Petition further alleged that some of NEAP's members who may be affected are Astrid Weinkle, Bill Wilson, Judith White Edelson, and Shirley Brezenoff. The Petition noted that further information would be supplied as to these members.

As to Mr. Saporito, the Petition stated that he is NEAP Executive Director, works in and about the city of Miami as an instructor in digital electronics and microprocessor technology, and regularly travels to Miami "to conduct research in the nuclear field." The Petition stated these activities place Mr. Saporito in the zone of interest around the Turkey Point plant "on a regular basis of 5 to 6 days a week."

The Petition further contended that the proposed license amendments would not provide reasonable assurances that: the plant would operate in conformity with its application or with the general provisions of the Atomic Energy Act, the activities authorized by the amendments could be conducted without endangering public health and safety, the probability of a Plant accident would not be increased, and the operating margin for the Plant would not be reduced. The Petition stated that even though the license change sought by the Plant is compatible with NRC and industry initiatives to standardize and improve nuclear plant technical specifications "it must be realized that the Turkey Point plants, being a very early vintage were not constructed nor designed with the standards reflected in the more modern nuclear plants."

Also, the Petition stated that the requested technical specification amendments "would increase the probability and consequences of a major nuclear accident because the Turkey Point plant units are an out-dated design and any relaxation of existing requirements must be based solely on an operating experience germane to nuclear plants of identical design and not generic industry standards." The Petition also charged various Plant inadequacies and past violations (See generally, In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Request for Hearing and Petition for Leave to Intervene, pp. 1-6).

On January 10, 1990, the Licensee filed its answer opposing intervention by NEAP or by Saporito. The Licensee stated the amendments "reflects more than three years of effort by FPL and the NRC Staff to upgrade the Turkey Point technical specifications" and "consist of hundreds of pages of requirements governing operation" of the Plant. In a general description of the amendments, the answer did acknowledge, however, that some of the proposed changes "would relax existing requirements" or would "relocate existing requirements" from the TS to other controlled documents.

The Licensee's answer further stated that "injury-in-fact" standing which requires some "real stake" in the outcome of the agency action did not exist for Mr. Saporito, since he resides 100 miles from the Plant. The Licensee also claimed that other

statements in the Petition as to the extent of Mr. Saporito's activities in the "zone of interest" lacked specificity.

As to NEAP, the Licensee contended that statements as to its corporate status or the fact that certain members may live, work, or vacation in the area within 50 miles of the Plant are insufficient to establish organizational standing for NEAP on its own. The Licensee also contended that neither can NEAP claim organizational standing based on its organizational purposes, which the Licensee contended were too general to support standing in this specific proceeding.

The Licensee also claimed that statements as to other NEAP members were not sufficient enough to permit NEAP to establish standing based on the affected interests of one or more of its members. In addition, the Licensee's answer emphasized that there must be a further description of the "membership" and degree of participation and control in the organization with respect to individual members named. To this effect, the Licensee made mention that NEAP by-laws are not on public file and thus there supposedly was no available means to determine the status and nature of general membership in NEAP.

Finally, the Licensee contended that even if the basics of standing were fulfilled, neither NEAP nor any of its stated members can demonstrate that they would be adversely affected by the amendments. In other words, the Petition "does not allege that the proposed changes in the Technical Specifications at Turkey Point will cause such accidents other

otherwise adversely affect Petitioners. Furthermore, it is not readily apparent how the proposed changes in the Turkey Point Technical Specifications could affect the interests of the Petitioners, given the fact that most of the changes are editorial in nature and do not substantively alter the requirements governing operation" of the Plant. (pp. 17-18).

The Licensee also contended that the scope of the issues raised in the Petition were outside the narrow matters to be considered in a license amendment proceeding. The Licensee claimed that "an amendment proceeding is not an appropriate forum for reexamining previous NRC determinations that are not affected by the amendment." (p. 19, and see pp. 20-25)

The Licensee's answer requested either that the petition to intervene be denied or that an evidentiary hearing be conducted to determine the standing of NEAP, Saporito, or other NEAP members. (See, In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Licensee's Answer in Opposition to Request for Hearing and Petition for Leave to Intervene, and pages as noted).

An NRC Staff response to the Petition by NEAP and Saporito was submitted on January 16, 1990. The Staff concluded that NEAP and Saporito did not meet the standing requirements for intervention.

The Staff described the changes to be made to the Plant's Technical Specifications as being in four general categories: 1) non-technical editorial and typographical changes intended

to make the TS easier to use, 2) more stringent specifications which provide "enhanced safety," 3) removal of selected requirements from the TS and relocating requirements into other controlled documents, and 4) relaxing existing requirements "which, based upon operating experience, have been shown to provide little or no safety benefit and which place a burden on the licensee."

The Staff concluded, similar to the Licensee's allegations in its own answer to the Petition, that from the language of the Petition it is not clear "whether Mr. Saporito's contact with the Miami area is sufficient to establish the requisite interest to support standing." Particularly, "Mr. Saporito : not established that his normal, everyday work activities are conducted at specific locations in the Miami area or in the vicinity of the Turkey Point plant."

Visits to the Miami area are not sufficient by themselves, and Mr. Saporito's residence in Jupiter, Florida is too far from the Plant (100 miles) to support an individual interest. Thus, the Staff concluded there was insufficient information to show his regular contacts within a 50-mile radius of the Plant.

As to NEAP, the Staff concluded that it could not obtain standing through Executive Director Saporito if Saporito's own standing was not established. NEAP itself, the Staff further concluded, had not established an interest which could be affected by the license amendment proceeding. The group's "general claim" that it has an interest in environmental issue

is insufficient to give it standing.

The Staff also found that there was insufficient information as to the other four NEAP members listed in the Petition (Weinkle, Wilson, Edelson, and Brezenoff). Further, the Staff concluded the Petition's allegations were too general and did not support the requirements of issue specificity and applicability for a claim. Discretionary intervention was not considered. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, NRC Staff Response to Request for Hearing and Petition for Leave to Intervene of Nuclear Energy Accountability Project and Thomas J. Saporito, Jr., pp. 4, 6-10).

On February 5, 1990, the Atomic Safety and Licensing Board (the Board) issued a Memorandum and Order. The Board's Order set a prehearing conference date (March 23) and filing schedules. It also suggested that an amended petition be filed by the proposed intervenors so that additional facts may be described permitting a more detailed consideration of the standing to intervene either of Saporito or NEAP.

Specifically, the Board stated that the Petitioners should study the Licensee's answer and the NRC Staff answer and "cure whatever deficiencies exist by amending their Petition." An amended petition was filed in due course.

The current appeal concerns this Amended Petition and the various issues surrounding it. Petitioners contend that the Board erred in eventually dismissing the Petition to intervene.

II. Proceedings on Amended Petition to Intervene

On the issue of intervention both of NEAP and Saporito, further information was certainly provided by the Amended Petition for Intervention and Brief in Support Thereof, a 158-page document dated March 5, 1990. This Amended Petition was also filed pro se by Mr. Saporito.

The Amended Petition reviewed the standing criteria and the status of both NEAP and Saporito. The Amended Petition contended that the health and safety issues involved and the concerns of the Petitioners are sufficient to establish standing.

The Amended Petition noted that "the world witnessed the effects of the Chernobyl nuclear plant when it exploded an[d] dispersed radioactive fission products into the environment hundreds of miles from the plant." (p. 9). The Amended Petition also contended that the revised TS for Licensee's Turkey Point Plant "will cause the plant to be operated unsafely because of relaxed safety margins resulting in a release of radiation into the environment which will enter the food chain and adversely affect Petitioner's health, safety and well-being and that of his family and pets by causing them cancer and related illnesses." (p. 9).

The Amended Petition further claimed such a release of radioactivity in an event from Licensee's Plant due to unsafe operation would surely affect Petitioner's interests of well-

being as well as his interests in real and personal property in Jupiter, Florida. The Amended Petition and a supporting Affidavit described Petitioner Saporito's activities in the Miami area (Affidavit discussed below).

The Amended Petition also claimed that discretionary intervention should be considered. Petitioner Saporito described his extensive experience with these general issues, his direct experience with Licensee and its Turkey Point plant as a former employee there, the contribution he could make to the proceedings, and noted that his interest will not be represented by any existing parties. (pp. 13-15).

The Amended Petition declared NEAP's status as an intervenor. [Note: While the Petition alleged NEAP derives its standing from Saporito, (p. 15) there was no intent here to foreclose any other available means of standing for NEAP.]

The Amended Petition stated, in fact (p. 15-16) that NEAP "distributes information about the Turkey Point nuclear plant in Homestead, Florida. This function provides for public education of nuclear energy issues and meets a requirement of NEAP's mission." The Amended Petition also stated that NEAP "utilizes the legal library and the Florida International University which are (10-20 miles respectively) of the Turkey Point nuclear plants." (see pp. 15-16).

Additionally, NEAP "has obtained authorization from the Superintendent of the Dade County School Board to conduct educational seminars at all of the public schools in the School

Board's jurisdiction." The Amended Petition then described how these organizational interests and purposes would be affected by an unsafely operated Turkey Point facility (see p. 16-17).

Further, the Amended Petition identified four persons who are members in good standing with NEAP, who share NEAP's concern regarding the license amendment, and who own real and personal property within the zone of interest around the Plant. The four were: Weinkle, Edelson, Brezenoff (noted in the original Petition), and Ms. Maria Firmino. (p. 17). The Amended Petition stated is not required that these individuals submit affidavits authorizing NEAP to serve individual interests in a representational capacity, although the Amended Petition stated that, at the direction of the Board, NEAP would provide an affidavit of at least one member residing in the geographical zone of interest around the Plant and which would satisfy the standing requirements for organizational representation.

Finally, as to intervention, the Amended Petition stated discretionary intervention also could be permitted as to NEAP. It also observed, "It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities." (p. 22).

Supporting the Amended Petition was an affidavit prepared by Mr. Saporito on January 28, 1990, that more fully described his interest in these proceedings, more particularly his involvement in the geographic zone within 50 miles of the

Plant. The Affidavit stated that he is a resident of Jupiter, Florida, 83 miles from the Plant and is Executive Director of NEAP (as well as President and Treasurer).

The Affidavit also stated that Mr. Saporito is an instructor at the ATI Career Training Center in Miami, teaching digital electronics and microprocessor technology Monday through Thursday for six hours per day. He also incurs travel time of two hours per day and prepares lesson plans four hours per day within the same zone of interest. He also stated that he holds an A.A. degree in electronics technology along with numerous diplomas from various technical training seminars, spanning a 17-year career in this field.

In addition, the Saporito Affidavit stated that as Executive Director of NEAP, he conducts frequent and extensive research at the legal library in Coral Gables in South Miami at various times during the week, from between five to 20 hours per week. It further stated that he was authorized to represent the interest of the Petitioner.

Mr. Saporito also stated that he had been employed by the Licensee at both the Turkey Point and the St. Lucie plants. His duties in the seven years of his employment including technical analysis, as well as testing and repair of sophisticated electronic instrumentation for monitoring and control of the fission process at the plants. The Affidavit further stated in significant detail the various plant systems with which Mr. Saporito is familiar (see par. 12). He stated that he satisfies

the requirements of a plant engineer in instrument and control.

In addition, the Amended Petition presented 56 Contentions related to proceedings as to the Plant's TS amendments.¹ In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Petitioners Amended Petition to Intervene and Brief in Support Thereof, pp. noted).

The Licensee's reply to the Amended Petition was submitted March 16, 1990. Licensee once again stated that the intervention should not be permitted in this matter.

The Licensee stated that the TS revisions "would represent an improvement in safety in comparison to the current" Plant TS. As to some of the "relaxations," the Licensee stated (p. 5) that these relaxations "reflect industry experience indicating that some surveillances and action statements are unnecessarily restrictive and, for example, do not afford enough time for appropriate analysis before taking corrective action, or unnecessarily require interruption of steady state operations." (See fn. 7 in the Licensee's reply, to the effect that certain of the proposed changes in the Plant's TS "would not require hardware changes" at the Plant.)

¹ These Contentions were treated in great detail in this Amended Petition and in other documents in the record. Because the primary issue at this stage is standing, the Contentions themselves will be mentioned only in background. This is particularly so since decisions as to standing are to be made by the Board with respect to the applicability of only one appropriate contention and independent of the adequacy of other contentions. However, it should be kept in mind that although many of the 56 original Contentions were later withdrawn, the Board adopted several of the remaining Contentions reviewed.

The Licensee's reply to the Amended Petition challenged the sufficiency of the statements made with regard to each of the 56 Contentions raised by Petitioners in the Amended Petition. (see Licensee's reply, pp. 10-29). The Licensee declared that each of the 56 Contentions raised was either flawed, not appropriate, not applicable, or insufficiently stated. Thus, intervention should not be permitted because the Petitioners have not advanced one admissible contention.

Prior to a prehearing conference on these issues, and before the NRC Staff response to the Amended Petition could be filed, developments on the issue of standing for either NEAP or Saporito took an unusual turn. On March 8, 1990, Saporito was approached by the Director of the ATI Career Training Center where he is employed, who inquired as to a letter sent by Licensee's counsel to the ATI Director. Apparently, counsel's letter was an attempt to verify the information in Saporito's sworn affidavit concerning his employment at ATI.

However, concerned by this action by Licensee's counsel, Saporito sent a letter to the Board on March 9, 1990. The letter charged that the actions "appear to be motivated by hopes of intimidating Mr. Saporito's employer resulting in Mr. Saporito's terminating from ATI." The statement observed that it was Mr. Saporito's belief that the Licensee has employees enrolled at ATI, at a cost of \$10,000 per student, and thus that ATI could be intimidated by Licensee.

The NRC Staff response to the Amended Petition to Intervene by NEAP and Saporito was filed March 19, 1990. The NRC Staff again reviewed the various applicable standards concerning standing.

As to Saporito, the NRC staff concluded that Saporito's employment relationship within the zone of interest around the Plant was sufficient for individual standing. The Staff observed that Mr. Saporito stated in the Amended Petition that he works "regular hours at a regular place of business in the vicinity of" the Plant, and that he alleges he could be "adversely affected" by an accident at the Plant. Thus, "Because Mr. Saporito alleges an injury in fact within the zone of interest protected by the Atomic Energy act or the National Environmental Policy Act, he has established standing to intervene as an individual in this proceeding." (p. 7).

Further reviewing the intervention issue as to Saporito, the NRC Staff stated that his standing as an individual

is based on his regular employment contacts in the vicinity of the Turkey Point facility. He has failed to establish standing to intervene based on his residence in Jupiter, Florida. Residence within the geographical zone of interest which could be affected by a nuclear accident may be a basis to establish standing. [Citations omitted]. Mr. Saporito has stated that his residence in Jupiter, Florida is approximately 83 miles from the Turkey Point facility. Amended Petition at 9. However, Mr. Saporito has not alleged facts which support a conclusion that the proposed action could result in an accident that would affect his residence which is a distance of 83 miles from the Turkey Point facility.

The Staff also concluded that Mr. Saporito's involvement with NEAP does not result in regularized contact with the Miami area, and the extent of these contact alone is insufficient for standing. (see pp. 6-8).

As to NEAP, the NRC Staff also found that since Saporito is an officer of the organization, NEAP derives organizational standing from him. (p. 9). The NRC Staff found that NEAP has not established organizational standing on its own, inasmuch as it supposedly had not alleged facts supporting a conclusion that the proposed licensing amendment could result in an accident affecting interests 83 miles from the Plant (in Jupiter, Florida, NEAP's offices). Also, NEAP's "general claim of interest in environmental issues" does not serve as a basis for establishing independent organizational standing to intervene.

As to organizational standing for NEAP through individuals other than Saporito, the NRC Staff response to the Amended Petition stated that the four persons mentioned in the Amended Petition (Weinkle, Edelson, Brezenoff, and Firmino) have not provided affidavits identifying them as NEAP members or identifying the potential injury to their interests by the license amendment proceedings.

The NRC Staff stated that if NEAP still seeks to establish standing through these individuals, then affidavits should be submitted. However, "because NEAP derives standing from Mr.

Saporito, an organization officer, such action is unnecessary for NEAP to establish representational standing."

As to discretionary intervention, the NRC Staff response expressly declined to consider it. Since Saporito and NEAP meet the standards for individual and organizational standing, "the Staff will not discuss the standards for discretionary intervention or the argument for discretionary intervention raised by the Petitioners in the Amended Petition." (p. 10). However, the Staff indicated that the discretionary intervention standards may not have been met. (p. 10).

The NRC Staff response then turned to a discussion of each of the 56 Contentions raised by the Amended Petition. Again (see fn. 1, supra) this details of this discussion are not directly relevant here. However, it is to be noted that the NRC Staff concluded that not one of the 56 Contention was admissible and thus intervention should thus be denied (p. 81). In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, NRC Staff Response to Petitioners Amended Petition for Leave to Intervene, pages as noted).

Nevertheless, although the NRC Staff recommended denial of intervention because no admissible contentions were presented in Petitioners' Amended Petition, the stage was set for further developments with respect to Saporito's standing. It appeared that the NRC Staff found that Mr. Saporito had individual standing solely on the basis of his employment as an instructor

at ATI. And the NRC Staff found that NEAP had organizational standing only through a member, and this was solely through Saporito's individual standing and his role as a NEAP officer. Saporito's ATI employment was thus declared as the sole link for standing, both for himself and for NEAP.

III. Saporito's Withdrawal and Subsequent Proceedings

A prehearing conference was held, as scheduled, on March 23, 1990. Saporito did attend this prehearing conference on behalf of himself and NEAP. The Atomic Safety and Licensing Board prepared a Memorandum and Order on issues raised by the conference, especially the issue of standing of Saporito and NEAP, and whether any admissible contention had been raised.

However, before this Memorandum and Order could be issued, Mr. Saporito sent another letter to the Board, dated April 1, 1990. By this letter, Mr. Saporito (again, pro se) withdrew all personal participation from this license amendment proceeding.

The letter complained that Licensee's counsel had once again contacted ATI Career Training Center. The letter charged unethical conduct by Licensee's counsel in this regard and stated:

As a direct or indirect result of Applicant's contact with Mr. Saporito's employer concerning matters relevant to these proceedings, Mr. Saporito's employment and employment opportunities have been adversely affected. Since Mr. Saporito has the responsibility for a wife and three small children, the results of Applicant's actions germane to Mr. Saporito's employment have caused Mr. Saporito to feel intimidated by the Applicant's actions.

Therefore, as a direct result of Applicant's actions through Applicant's counsel...the Board is hereby officially informed and advised that Petitioner, Mr. Thomas J. Saporito, Jr., hereby withdraws entirely from these proceedings.

The letter charged, "I trust that the Applicant will be satisfied that Petitioner, Thomas J. Saporito, Jr., has withdrawn from these proceedings and would refrain from further actions against Mr. Saporito or his family." The letter stated that Saporito's withdrawal leaves NEAP itself as the sole remaining Petitioner and that NEAP's standing is not based on Saporito's standing. NEAP was thus invoking standing either on its own right as an organization, or through other members.

This withdrawal announcement was met by a response by the Licensee on April 13, 1990. The Licensee stated that the withdrawal "has revived the formally resolved issue of NEAP's standing to participate." And, "As demonstrated in earlier pleadings and despite ample opportunity to do so, NEAP has not established standing other than as a representative of Mr. Saporito."

The Licensee stated that NEAP's standing has been "comprehensively addressed" and that the required additional information has not been submitted. Consequently, but for Mr. Saporito's withdrawal, "the pivotal issue of standing would have been put to rest in this proceeding." The Licensee also declared that discretionary intervention was not available to NEAP (see p. 5, fn. 3). (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and

50-251, Applicant's Response to Notice of Withdrawal from Proceeding).

Thus, the Licensee stated, NEAP has no standing at all. The Licensee also noted the response by the Department of Labor to proceedings initiated by Saporito as to the contact of Saporito's employer by Licensee's counsel.² The Licensee also challenged the nature of the charges made by Saporito in his March 9 and April 1 letters to the Board.

The Licensee's response was, in turn, the subject of an answer by Petitioner NEAP, filed April 20, 1990 (again, pro se by Saporito). The Petitioner's answer again charged unethical and unprofessional conduct by Licensee's counsel as well as claiming that counsel's actions in contacting ATI were in the nature of an ex parte communication (p. 2).

More importantly, the Petitioner's answer again asserted various aspects of NEAP's activities as an organization which establish organizational standing for the license amendment proceedings. (see p. 4, and as also stated in the Amended Petition). The Petitioner's answer reviewed the standing principles and stated that NEAP has submitted sufficient

² It is to be noted that the Department of Labor proceeding initiated by Saporito is continuing. The proceeding was initiated under the "Whistleblowing Statute", Section 210 of the Energy Reorganization Act (42 U.S.C. Sec. 5851). Although there was originally a negative response by the DOL to Saporito's complaints regarding the contact of his employer by Licensee's counsel, additional matters have also been submitted to the DOL. These proceedings are, however, collateral to the present proceeding and unrelated to the issue of standing for NEAP here.

information to permit a finding of organizational standing or standing through another one of NEAP's members. (p. 4-9).

Also, Petitioner's answer stated that NEAP should, in any event, be granted discretionary intervention because of the valuable contribution that NEAP could make to the decision making process. Petitioner also pointed out that NEAP's interests would not be represented by existing parties. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Intervenor's Answer to Applicant's April 13, 1990 Response and Intervenor's Motion for Sanctions Against the Application and Intervenor's Motion for Leave to Amend Contentions).

The NRC Staff, in turn, also submitted a response to Saporito's April 1, 1990 notice of withdrawal. The Staff concluded that, based on Saporito's withdrawal, NEAP does not have standing independent of Saporito.

The Staff reiterated that organizational standing cannot be achieved "by the assertion of a general interest in nuclear issues or an interest in a proceeding." NEAP's status "as an environmental and educational organization is not a sufficient basis for independent organizational standing."

The NRC Staff also found that there was insufficient additional information to consider NEAP's claim that it had standing through one of its other members. Because NEAP's standing related to that of Saporito, Saporito's individual withdrawal deprived NEAP of standing. (In the Matter of Florida

Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Staff Response to Thomas J. Saporito, Jr.'s Notice of Withdrawal).

IV. Board's Memorandum and Order on Motion to Withdraw

The action by Saporito withdrawing individual participation from the license amendment proceedings, the reply of the Licensee, the response by NEAP, and the NRC Staff response, were the subject of a Memorandum and Order by the Board (Peter Bloch, Chair), issued April 24, 1990. In light of the Saporito withdrawal, the Board found it necessary to require additional information as to standing for NEAP.

The Board first determined, on the basis of the limited information available to it, that there was no valid reason for any charge of intimidation by Saporito and that the charges level against Licensee's counsel were unfounded. (p. 2-4). Nevertheless, the Memorandum stated that "it is important to the Licensing Board to get to the bottom of this matter."

The Board also stated that it was not clear, following Saporito's withdrawal, how NEAP was claiming standing, or through which particular member(s). The Board stated that NEAP does not have standing "as an organization since it is merely claiming a generalized grievance--alleged danger from a nuclear power plant--that is shared by the general public." (p. c) [Footnote and citations omitted, emphasis omitted].

As to standing for NEAP through other individual members,

the Board reviewed the standing requirements and found that additional statements and information from additional members would be necessary. The Board required NEAP to submit the required additional filings by May 11, 1990. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Atomic Safety and Licensing Board, Memorandum and Order (Peter B. Bloch, Chair)).

V. Additional Filings and Responses as to Standing

Responding to the Board's requirements in its April 24, 1990 Memorandum and Order, NEAP submitted additional information on May 5, 1990. (Filed pro se by Saporito).

The Petitioner's response to the Board stated that Saporito would be the organization's authorized representative. The response also noted that NEAP's bylaws do not confer voting rights upon its members.

NEAP's response to the Board also took the form of an affidavit of Ms. Shirley Brezenoff, prepared on February 16, 1990. Brezenoff had been noted as an additional NEAP member in both the original and amended petitions to intervene.

The Brezenoff affidavit stated that she resides and owns real and personal property in Coconut Creek, Florida, within 50 miles of the Plant, and that she is concerned that revisions in the Plant's TS "may cause the Plant to be operated unsafely resulting in a release of radiation which will adversely affect my health, safety, and well-being and harm my real and personal

property" in Miami.

The affidavit also stated that she is a member in good standing with NEAP and that she adopts NEAP's views with respect to this proceeding. The affidavit also stated that she voluntarily gives NEAP and Saporito permission to represent her interests in the proceedings. (Also attached was a certificate of membership for Brezenoff identifying her as a representative of the "Quad City Citizens for Nuclear Arms Control," with an address the same as Brezenoff's Coconut Creek address). (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, NEAP's Response to the ASLB's Memorandum and Order).

The NRC Staff replied to NEAP's response to the Board's April 24, 1990 Memorandum and Order, on May 24, 1990. The Staff pointed out that its previous finding as to NEAP's standing was based solely on Saporito's employment with ATI and that his withdrawal from the proceedings would thus affect NEAP's standing. The Staff also noted that Saporito's withdrawal from the proceedings and NEAP's standing with respect to it were not considered at the prehearing conference of March 23.

Reviewing authorities on the issue of membership status in a situation where an organization seeks standing through its members, the Staff concluded that "indicia of membership" is essential to this status. (p. 6). The Staff observed that Commission precedents appear to adopt a liberal approach to evaluating membership criteria.

Nevertheless, the Staff concluded (p. 7) that "the proper application of the law on the subject of standing of membership organizations to the facts in this case calls for the denial of NEAP's petition to intervene." The Staff found that NEAP members do not have voting rights and "the affidavit provided by one of NEAP's members does not indicate any understanding on the part of that member as to her privileges or the nature of her participation in NEAP."

Although the Staff found that the Affiant (Brezanoff) demonstrates the requisite personal standing, demonstrates that she is a member of NEAP, and demonstrates that she has authorized NEAP to represent her interests in these proceedings, the Staff also found that NEAP "does not appear to be a traditional membership organization of the type contemplated by the Courts to qualify for representational standing." Therefore, the Staff concluded that NEAP had not met its burden of establishing organizational standing through one of its other members. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, NRC Staff's Reply to NEAP's Response to Licensing Board's Memorandum and Order of April 24, 1990).

The Board prepared its second Memorandum and Order related to this matter. It discussed the standing issue for NEAP following Saporito's withdrawal.

VI. Board Memorandum and Order as to Parties and Contentions

As to the filings, contentions, and issues raised before it, the Atomic Safety and Licensing Board (Peter Bloch, Chair), issued a Memorandum and Order on June 15, 1990. The Board denied Saporito's motion to withdraw as a person upon whom NEAP relies for standing, and further admitted several of the Contentions raised in the Amended Petition to intervene.

The Board reiterated the review, in its Memorandum and Order of April 24, 1990, of the charges and complaints made by Saporito as to actions by Licensee's counsel in contacting Saporito's employer, ATI Career Training Center, during these proceedings. The Board stated that Saporito has not addressed the concerns raised by the Board concerning those actions. (p. 5-6).

Accordingly, the Board found that Saporito was not coerced by the actions of Licensee's counsel and thus denied the motion to withdraw (p. 7), finding that the motion was frivolous and to grant it would seriously affect NEAP's standing in the proceedings. However, Saporito's motion to withdraw as an individual was granted.

The Board cautioned Saporito against creating new issues or raising other issues which the Board considered moot (see p. 7, fn. 6 and p. 8). And the Board stated that NEAP's standing is based solely on Saporito (which, again, apparently was based solely on his employment with ATI) and therefore 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." (p. 8).

The Board also noted (p. 6, fn. 5) that it is not inclined to grant NEAP standing through the affidavit of Brezenoff. The Board stated that Ms. Brezenoff has no control over NEAP and apparently became a NEAP member through the "Quad City Citizens for Nuclear Arms Control" and not for herself. She thus "lacks the indicia of membership" to establish NEAP standing.

The Board then turned to an extensive consideration of the various Contentions raised in the Amended Petition. It first discussed the general format of the Contentions and concerns raised by their general substance. (p. 9-16). The Board also noted (p. 16-17) that most of the 56 Contentions already had been withdrawn, and relatively few remained for consideration (see Board's discussion of Contentions 1, 2, 4, 5, 6, 7, 8, 9, 12, 14, 16, 18, 21, 25, 30, 33, 35, 51, pp. 17-50).

The Board thus concluded (p. 50) that NEAP would be admitted as a party "solely on its representation" of Saporito. The Board also admitted Contentions 1, 2, 11, 14, and 30 (or portions of them). It considered contentions 1 and 2 to have possible merit and deferred consideration of them pending the Board's conclusions on Contentions 11 and 30. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Atomic Safety and Licensing Board, Memorandum and Order, June 15, 1990).

VII. Termination of Saporito's Employment and Related Filings

In this detailed review of the factual background of this matter, it would appear that the issue of NEAP's standing had been resolved in NEAP's favor by the Board's refusal to permit Saporito to withdraw insofar as his involvement permits standing for NEAP. Although the Board did not discuss discretionary intervention, it at least indicated that Saporito's involvement had been valuable by admitting all or part of five of the 18 remaining Contentions (after withdrawal of many of the 56 Contentions in the Amended Petition).

However, an event of which the Board was unaware when it issued its June 15, 1990 Memorandum and Order on NEAP standing was to seriously affect its decision on standing. On May 10, 1992, Saporito's position as an instructor with ATI Career Training Center was terminated.

This development was made known to the Board in a letter (by NEAP counsel) of June 20, 1990. Counsel (new to the case at this stage) informed the Board of Saporito's termination and noted the Board viewed NEAP's standing only as to Saporito and, in turn, his standing solely as an ATI instructor. Counsel urged the Board to reconsider the matter, in the context of Saporito's termination and his claims of intimidation. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Letter from Counsel for NEAP and Saporito, June 20, 1990).

In light of this development, Licensee filed a motion for reconsideration and to dismiss the Amended Petition to intervene, on June 22, 1990. The motion pointed out that the termination of Saporito at ATI on May 10, 1990, an event which had not occurred as of the March 23 prehearing conference and of which the Board was not aware prior to its June 15, 1990 order, had changed the circumstances of NEAP's standing. The Licensee moved that NEAP's petition to intervene be dismissed.

Licensee claimed that Saporito's sole contact with the "zone of interest" around the Turkey Point plant was his employment with ATI and he "has not presented the Board with any other claim to presence or activity within the geographical zone of interest sufficient to establish standing." Licensee claimed there is insufficient detail in Saporito's claim that he engages in research activities at Coral Gables and at the Florida International University Library (Amended Petition to Intervene at 10-11) and thus this involvement could not by itself provide individual standing (see p. 3, fn. 4). Licensee also claimed that the Board's determination "was based upon a factual error, and NEAP in fact lacks standing to intervene." (pp. 2-3). (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Applicant's Motion for Reconsideration and Dismissal of Petition to Intervene).

Thus, once again, the issue of NEAP standing without Saporito was placed squarely before the Board. Faced with this situation, the Board determined that NEAP indeed did not have standing to intervene here.

By telephone conference, a hearing on was held on June 26, 1990 before the Atomic Safety and Licensing Board (Peter B. Bloch, Chair). However, at the time of the June 26 hearing, counsel for NEAP, new to the case, had not yet received or been able to review the Licensee's June 22 motion for reconsideration and to dismiss. (p. 70).

The Board noted, however, Saporito had at least 30 days between his May 10 termination and the Board Memorandum and its Memorandum and Order of June 15 to notify the Board that he had been terminated. Counsel for NEAP replied that "in the past several weeks there have been fairly dramatic changes in the posture of this case" and the events as they were unfolding were not only confusing to Saporito but affected him personally far beyond his interest in the present matter (p. 74-75). Counsel for NEAP also indicated that NEAP's information to the Board concerning its membership as it related to the present proceeding may have been minimal, but only out ~~of~~ ~~of~~ NEAP's concern for the confidentiality of its membership (p. 76-77).

Various other matters regarding Saporito's ~~termination~~ and its effect on NEAP's standing were discussed at the hearing. It was apparent that counsel for NEAP needed to respond to the

Licensee's dismissal motion. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Transcript of Hearing, June 26, 1990, Atomic Safety and Licensing Board, pages as noted).

Thus, on July 10, 1990, NEAP, through counsel, filed a response to the Licensee's motion for reconsideration and dismissal. NEAP contended that dismissal, particularly at this stage and in this context, would not serve the ends of justice, would not further public health and safety considerations, and would not advance the integrity of the licensing process.

NEAP also contended that it should be permitted to further establish, clearly without Saporito's presence in the proceedings, that NEAP is entitled to intervene either as an organization, through one or more of its other members, or as a matter of discretion. (p. 3). NEAP also mentioned that Saporito's termination from ATI was in active litigation with the Department of Labor (p. 4-6 and see fn. 2, supra).

NEAP thus urged that the Board carefully review NEAP's standing with respect to other aspects than individual standing through Saporito, permit it to introduce other evidence with regard to those issues, and offer its guidance as to other relevant supporting facts or information for the Board's review. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Response of Nuclear Energy Accountability Project and Thomas J. Saporito to Florida Power and Light's Motion for

Reconsideration and Dismissal of Petition to Intervene).

NEAP's motion for reconsideration was in turn the subject of a filing of July 12, 1990 by the NRC Staff. The Staff concluded that Saporito's termination compels granting Licensee's motion to dismiss NEAP's petition to intervene. The NRC Staff reviewed the background of the matter and noted that it had already concluded that NEAP did not have organizational standing since it was merely claiming a "generalized grievance" concerning nuclear power plants that is shared by the general public. (p. 4) The NRC Staff also noted that Saporito's discharge now "has severed his ties with the Miami area and the 'geographical zone of interest.'"

Thus, according to the NRC Staff, Saporito no longer had personal standing to intervene. NEAP thus may not derive its representational standing from him. (p. 6).

Yet the NRC staff response did not extensively consider the possibility of NEAP standing through one or more additional members, did not comment on the possibility that NEAP may be able to establish such standing were it permitted through counsel to submit additional information, and did not discuss discretionary standing. (In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, NRC Staff Response to Applicant's Motion for Reconsideration, pages as noted).

The Board thus had before it the situation of Saporito's termination, the Licensee's motion for reconsideration and to dismiss, a conference on these changed circumstances, a reply by NEAP to the motion to dismiss, and an NRC Staff response to the Licensee's motion for reconsideration. The Board then issued a Memorandum and Order (on appeal here) granting the Licensee's motion and dismissing NEAP's amended petition.

VIII. Board Memorandum and Order (Motion to Dismiss)
[basis for present appeal]

The Atomic Safety and Licensing Board issued its Memorandum and Order on the motion to dismiss, on July 17, 1990. The Board granted the motion, finding that following Saporito's dismissal from ATI, NEAP no longer had standing.

The Board declined NEAP's request to submit additional facts and argument that could establish standing on other grounds (p. 3). The Board also found that Saporito did not substantiate his earlier claims of harassment and unethical conduct in the actions of Licensee's counsel in contacting ATI. Further, the Board found that NEAP already had ample opportunity to establish standing. (p. 4-5).

The Board thus determined that NEAP had no organizational standing. Standing through its members was restricted to standing from Saporito, in turn based on his presence in the "geographical zone of interest" through employment with ATI. Upon Saporito's dismissal, standing was no longer available.

As to discretionary standing, the Board reviewed Mr. Saporito's background, his availability of time, his other resources, and the extent of his expertise. (p. 7-8). Although complimenting Saporito on his persistence and involvement, the Board nonetheless found that he "has brought little technical expertise to his presentation of his contentions." (p. 8).

The Board therefore found that NEAP was not entitled to discretionary intervention because "it 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." Discretionary intervention was denied.

The Board then turned to the question of whether it should retain consideration of the contentions submitted by NEAP previously admitted by the Board, under sua sponte authority (p. 10-12). It requested staff guidance on this issue.

However, the Board stated that NEAP's involvement in the case was dismissed without prejudice. A motion to reopen the case would be entertained if the Department of Labor proceedings result in an agency determination that Saporito indeed was wrongfully dismissed. If so, "then it would seem improper that through that wrongful action Applicant would have succeeded in having this case dismissed." Barring such a finding at DOL, NEAP was no longer in the case. In the Matter of Florida Power & Light Co. (Turkey Point Plant, Units 3 and 4), Docket Nos. 50-250 and 50-251, Memorandum and Order, July 17, 1990). This appeal followed.

QUESTIONS AT ISSUE

1. Did the Board err in denying NEAP organizational standing?
2. Did the Board err in denying NEAP standing through members other than Saporito?
3. Did the Board err in denying NEAP discretionary standing?

ARGUMENT

I. THE BOARD ERRED IN DENYING NEAP ORGANIZATIONAL STANDING TO INTERVENE

The standards for intervention need only be generally reviewed here. As stated in 10 C.F.R. Sec. 2.714, a petition for intervention must describe the petitioner's interest in the proceeding and how that interest will be affected by the proceeding. The petition must show the nature and extent of the property, financial, or other interest in the proceeding and the possible effect upon that interest of any agency order which may be entered. See 10 C.F.R. Sec. 2.714(d)(1).

Judicial concepts of standing are used to determine whether a petitioner has sufficient interest to intervene in a proceeding. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). Thus, following these general principles, a petitioner must show that the action sought in the proceeding will cause an injury in fact, and that the injury is within the "zone of

interests" protected by the Atomic Energy Act. This has been further described as having a "real stake" in the proceeding, aside from a generalized or otherwise unparticularized interest.

These intervention standards are in turn derived from decisions by the Supreme Court and other courts and agencies on standing. As to the present situation, it is evident that a careful application of these principles permits a finding of organizational standing for NEAP or, alternatively, requires further and more specific evidentiary review of NEAP's stake as an organization here.

For example, in Sierra Club v. Morton, 405 U.S. 727 (1971), the Court reviewed an attempt by the Sierra Club to halt commercial development of the Mineral King Valley near the Sequoia National Park. The District Court had found the organization had standing to assert its interests, but the Court of Appeals for the Ninth Circuit reversed.

Although the Supreme Court affirmed the Ninth Circuit's finding, it also established basic standards for organizational intervention. The Court noted that the general purpose of the Sierra Club did relate to the proceedings before it:

We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under [the Administrative Procedure Act]. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

The Sierra Club court, however, also found that the Sierra Club did not establish that any of its members use the affected site for any purpose, or that the members would be significantly affected by the proposed action. Further, the Sierra Club court stated (405 U.S. at 739-40) that an "interest in a problem" no matter how longstanding that interest or how qualified the organization, is not sufficient by itself to render the organization adversely affected or aggrieved under the Administrative Procedure Act (and therefore, under the Atomic Energy Act here through 10 C.F.R. Sec. 2.714).

The court declined, thus, to confer standing upon "organizations or individuals who are seeking to do no more than vindicate their own value preferences through the judicial process." (But see Douglas, J., dissenting, especially discussion at 405 U.S. 750-52).

As also stated in Warth v. Seldin, 422 U.S. 490 (1975), involving challenges to zoning ordinances in Penfield (a suburb in Rochester, N.Y.) which supposedly foreclosed low and moderate income housing in the area, the standing question is "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." (422 U.S. at 500 (footnote omitted)). The court went on to consider whether the various organizational or individual petitioners challenging the ordinance had an interest in the actual

property effected by the ordinance such that "immediate and personal interests" would be affected (422 U.S. at 507).

The court noted, as to organizational standing (422 U.S. at 511):

There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, so long as the challenged infractions adversely affect its members' associational ties.

And generally, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974), and United States v. Richardson, 418 U.S. 166 (1974).

More recently, in Lujan v. National Wildlife Federation, ___ U.S. ___, (No. 89-640), 58 U.S.L.W. 5077 (June 27, 1990), involving a challenge to the Bureau of Land Management's federal land policies under the Federal Land Policy and Management Act and the National Environmental Policy Act, the court reversed the finding of the United States Court of Appeals for the District of Columbia Circuit (reversing the District Court). The Lujan court determined that the affidavits of the organization's members were too generalized to bring a challenge related to an area of Wyoming involving more than 4,500 acres in federal land of more than two million acres.

On organizational standing, the Lujan court declined to follow the expansive view of SCRAP and related cases (see

___ U.S. ___, 58 U.S.L.W. at 5082), but did not overrule it. Rather, the court appeared to indicate wide-ranging challenges of the sort brought by the organization regarding supposedly wholesale abuses of the federal land management program were best resolved in the other Branches. (But see Blackmun, J., with Brennan, Marshall and Stevens, JJ., dissenting).

And see also, Health Research Group v. Kennedy, 82 F.R.D. 21 (D.C. 1979) (generally); BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974) (upholding requirements of particularity as to standing to intervene in Commission proceedings); Ohio v. Nuclear Regulatory Commission, 814 F.2d 258 (6th Cir. 1987) (discussing after-the-fact organizational standing), and City of West Chicago v. United States Nuclear Regulatory Commission, 701 F.2d 632 (7th Cir. 1982) (municipality's challenge to license amendment allowing licensee's acceptance of contaminated soil from off-site locations).

Standing issues have also been the subject of frequent comment in NRC proceedings. For example, to establish the "injury in fact" or "real stake" in the proceedings for an individual or organization, more than a "mere interest" in a problem must be stated. See Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976), at 421-23, involving a challenge by the American Civil Liberties Union to movement of spent fuel to the Barnwell station. However, that same decision noted that an organization

operating a vegetarian restaurant, juice bar, and natural food store and which obtained its produce from sources near routes to be taken by the spent fuel established "a sufficiently particularized interest in the proceeding at bar to confer standing to intervene." (p. 424).

Similar standing discussions are found in decisions such as Transnuclear, Inc. (Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525 (1977), involving a challenge to the export program by the Natural Resources Defense Council. It was determined that the matter of the export licenses "is so far removed from the generalized harm mentioned by the Petitioner that intervention in these proceedings as a matter of right would not directly benefit the petitioners in a tangible fashion." (p. 531).

And see Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418 (1977) (individual mother proceeding pro se had no standing to assert interests of her Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644 (1979) (discussing intervention by a group as of right); Consumers Power Co. (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108 (1979) (challenge to license amendment to remove and replace plant's steam generators, description of principles for organizational standing in its own right, noting also the deference to be given to pro-se filed petitions), and Consolidated Edison Co. (Indian Point, Unit No. 2), LBP 82-25, 15 NRC 715 (1982).

These decisions confirm, rather than foreclose, NEAP's organizational interest here. A more careful review of NEAP's purpose and goals demonstrates that the organization's concerns in this proceeding are quite more substantial than vague general misgivings about the efficacy of nuclear power.

In Indian Point, discussing the organizational standing of the Union of Concerned Scientists, it was noted that "the organizational objectives of UCS in regard to nuclear power are clearly defined and well advertised." (p. 734). When it is beyond question that an organization's interests are specific and are related directly to the issue at hand, the question of standing is more precise than when considering the harm to be suffered by general, national-level organizations with hundreds of members, seeking to challenge a discrete agency action.

Here, the previous Board orders, the Staff memoranda and the current decision on appeal treated NEAP the way the Supreme Court in Sierra Club or Warth or Lujan treated those respective organizations. Indeed, it is not surprising that courts have found large, nationally-oriented groups will have difficulty establishing a precise organizational interest to be harmed by a particular agency action in a particular geographic location.

NEAP is not a national organization, yet no further discussion was entertained by NRC Staff or the Board as to NEAP's organizational standing except to say NEAP has only a "generalized interest" in this subject matter. Yet advancing a "generalized interest" does not alone defeat such standing.

More importantly, NEAP's stated purpose, by its own description, is directed to nuclear plants in Florida. "NEAP's focus is to ensure that the nuclear power plants in Florida operate safely and in full compliance with federal regulations." NEAP "closely monitors the actions of the NRC to ensure that every effort is being made to provide for the safe operation of the nuclear plants in Florida. Further, "NEAP's immediate objective is to secure the safe shut down of the Turkey Point Nuclear plant. NEAP believes that the Turkey Point plant is being operated unsafely and in violation of federal regulations and NRC requirements."

Further, as stated in the Amended Petition, (p. 15-16) NEAP "distributes information about the Turkey Point nuclear plant in Homestead, Florida. This function provides for public education of nuclear energy issues and meets a requirement of NEAP's mission." The Amended Petition also stated that NEAP "utilizes the legal library and the Florida International University which are (10-20 miles respectively) of the Turkey Point nuclear plants." (see pp. 15-16).

Additionally, NEAP "has obtained authorization from the Superintendent of the Dade County School Board to conduct educational seminars at all of the public schools in the School Board's jurisdiction." The Amended Petition then described how these organizational interests and purposes would be affected by an unsafely operated Turkey Point facility (see p. 16-17).

It is difficult to imagine a more precise organizational interest supporting organizational intervention as of right. NEAP's concerns are not the general environmental matters taken up by the Sierra Club or the pursuit of management of federal lands championed by the National Wildlife Federation. NEAP's purpose is directed at safe operation of nuclear plants in Florida and ; specifically, to the safe operation (or, in the alternative, shut down) of the Turkey Point Plant.

These quite precise and relevant organizational purposes were never fully discussed by the NRC Staff or the Board. Neither was any time spent obtaining further information about NEAP activities concerning these purposes, or the individuals involved in these activities, or how these purposes related to interests which could be affected by the proceedings. Yet the organization's particularized and specific interests are beyond dispute, and the effect upon those interests by these proceedings is similarly, beyond debate.

Therefore, a more careful review of the record and of NEAP itself would show that Sierra Club and cases like it are clearly distinguishable here. NEAP is not a large national organization expressly only a generalized concern about nuclear power which may or may not be shared by the general public.

NEAP has established standing as an organization in its own right and should have been so admitted as an intervenor in these proceedings. The Board erred in declining to do so.

II. THE BOARD ERRED IN DENYING NEAP STANDING THROUGH MEMBERS OTHER THAN SAPORITO

With Saporito's attempt to withdraw from the proceedings, and following this, with Saporito's termination as instructor at the ATI Career Training Center, it arguably is the case that NEAP's standing as an organization acting through its members cannot be established only through Saporito. NEAP was thus left to describe this organizational interest through members other than Saporito.

It should be mentioned, however, that the Board never fully considered other activities of Saporito which also are within the 50-mile "zone of interest" around the Plant, such as his involvement in research activities at Coral Gables and at the Florida International University Library (Amended Petition to Intervene at 10-11). It was assumed by all concerned that Saporito's standing chiefly concerned his employment at ATI.

Obviously, everyone including Saporito expected that employment to continue and the standing issue to thus have been resolved. As a result, insufficient attention was paid to Saporito's other activities. NEAP would contend that the Board and the NRC Staff has placed too much emphasis on the entire question of Saporito's employment status and of NEAP's standing with respect to that status.

Nevertheless, organizational standing through members other than Saporito was also demonstrated. NEAP offered the names of five different members in support of its claim for

organizational standing: Weinkle, Wilson, Edelson, and Brezenoff (as to the original Petition) and Weinkle, Firmino, Edelson, and Brezenoff (as to the Amended Petition).

Along with claiming standing as of right on the basis of organizational interest, an organization can seek standing to challenge agency action on behalf of one or more of its members. See Warth, supra, at 511. The association "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction."

In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) (challenge to North Carolina law regarding the labelling of apples shipped into the state), the court found standing was proper. The court noted that organizations have standing on behalf of their members when the members would otherwise have standing, the interests the organization seeks to protect are germane to the organization's purpose, and the issue does not require the participation of the individual members in the lawsuit.

The Hunt court also noted that while the challenging

organization was a state agency, it performed the basic functions of a trade association. In other words, its "members" possess all the "indicia of membership." The court indicated this included electing governing members, financing activities, serving on agency boards, and utilizing the agency to vindicate their interests. Thus, "it would exalt form over substance to differentiate" between the advertising agency and a traditional trade association for purposes of standing.

Th's "indicia of membership" guideline has been one way of determining the substance of the link between the member whose interests are affected and the organization through which those interests are advanced. See, e.g., Sierra Club v. Aluminum Company of America, 585 F.Supp. 842 (N.D. N.Y. 1984) (disapproving a hyper-technical reading of organizational standing requirements between "members" or "contributors" or "supporters"); Montgomery Environmental Coalition v. Costle, 646 F.2d 568 (D.C. Cir. 1980), and RITE--Research Improves the Environment, Inc. v. Costle, 650 F.2d 1312 (5th Cir. 1981).

See also, Consolidated Edison Company, (Indian Point, Unit 2), CLI-82-15, 16 NRC 27 (1982) (purpose of various organizations such as Friends of Earth are germane to the issues advanced and members interests were not too diverse for adequate representation, see p. 31-32); Consumers Power Company (Pallisades Nuclear Plant), LBP-79-20, 10 NRC 108 (1979) (organization must identify at least one member whose interest may be affected and must show either directly or presumptively

that the identified member has authorized the organization to represent his or her interest, p. 113, presumption of standing where an organization raises safety issues on behalf of a member or members residing in close proximity to a facility, p. 115); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), supra, 9 NRC 644 (purposes of "Citizens Concerned About Nuclear Power" are germane to representation of individual interests), and Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979) (lack of standing of National Lawyer's Guild through organization's own interest and lack of standing through representation of members' interest when Guild declined to provide information as to even one of its members who may be affected by the proceedings).

In Consumers Power Company (Pallisades), supra, 10 NRC at 115, it was noted that the Great Lakes Energy Alliance has properly "set forth concerns with respect to health-and-safety and environmental aspects of the proposal under review." And it was also clear that the members resided well within 50 miles of the plant involved in the proceedings.

Moreover, as also noted by Houston Lighting and Power Company (Allens Creek) there is no need for a specific representational authority for organizations whose sole or primary purpose is to oppose nuclear power in general or the facility in bar in particular. As was stated in Washington Public Power System (WPPSS Nuclear Project No. 1), LBP-83-16,

17 NRC 479 (1983), "In this type of situation, it can reasonably be inferred that by joining the organization the members were implicitly authorizing [the organization] to represent their personal interests that might be affected by the proceeding." (p. 482). It was further noted that the individual on whom the organizational standing is based need not be conversant with, or be able to defend, each of the contentions raised by the organization.

And see also Consolidated Edison Company (Indian Point), supra, noting that the organizational objectives of the Union of Concerned Scientists were well known and specific and "there can be little doubt that it is a desire to support the pursuit of these goals that motivates the financial interests of UCS sponsors." In fact, "The primary purpose of UCS in this case is to oppose the continued operation of the Indian Point plants; it was their petition to the Commission to shut down the plants that initiated this proceeding."

Therefore, UCS was not required to produce an affidavit from one of its members or sponsors since it may be presumed to represent their interests. "Thus the fact that we have not been provided with an executed affidavit is of no consequence." The fact that UCS had sponsors living within 25 miles of the plant was enough to give it standing, "provided those sponsors may be regarded in this instance as equivalent to members."

Where an individual UCS sponsor has standing, "this provides a sufficient nexus between the organization and this

proceeding so as to permit representational standing by UCS. Where, as here, a non-membership organization has a well-defined purpose which is germane to the proceedings, sponsors can be considered equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by that organization." (p. 736, and see fns. 9 and 10) [Emphasis supplied].

And see also, Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-536, 9 NRC 402 (1979); Duke Power Company (Oconee Nuclear Station and McGuire Nuclear Station), LBP-79-2, 9 NRC 90 (1979) (discussing standing issues with respect to Natural Resources Defense Council), and Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), 25 NRC 116 (1987).

As these decisions and authorities demonstrate, NEAP is fully capable of representing the interests of the four named individuals in the Amended Petition to intervene. NEAP's organizational purpose and goals are well documented, specifically with respect to the Turkey Point Plant. And the affidavit of Brezenoff (even if it is required at all), sufficiently describes the concerns of a person who lives within the "zone of interest" around the Plant.

Further, NEAP was not permitted to present additional information to describe these other member interests or to determine the "indicia of membership." It is further asserted here that "indicia of membership" exists with NEAP at least to

the extent that it existed with the Union of Concerned Scientists or other similar groups for whom standing was found proper as a basis of "member" representation.

Here, the Brezenoff affidavit was dealt with by the Board only in a footnote. Further, when it was earlier determined that NEAP had representational status through Saporito, the NRC Staff found that it would not be necessary to require additional affidavits from other members. When additional material was requested by NEAP as to other members, it was provided. Thus, it is curious to note that both the NRC Staff and the Board appeared concerned that NEAP did not avail itself of "ample opportunities" to establish standing by other means, or that it found the Brezenoff affidavit lacking, particularly in view of the context here and in view of the authorities and agency decisions in similar situations.

In addition, it should be noted that much has been made by both the Licensee and the NRC Staff about the 50-mile "zone of interest" with respect to standing either of Saporito or of any other NEAP members. This "zone of interest" appears to have become a mechanically-applied litmus test which either confers or denies standing simply on the basis of geographical proximity. No authority applies this 50-mile zone so rigidly.

No specific distance from a nuclear power plant has evolved from Commission decisions to define the outer boundary of the "geographic zone of interest." See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units

1 and 2), 9 NRC 728 (1979). Distances of up to approximately 50 miles indeed have been found not to be so great as to preclude a finding of standing based on residence. See Tennessee Valley Authority (Watts Bar), supra, p. 1421, n. 4, and Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (1973).

This "geographic zone of interest" has varied through the years and has been considered on a case-by-case basis rather than strictly and conclusively applied. See Tennessee Valley, supra; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), supra, 9 NRC 728 (1979); Houston Lighting and Power Co. (South Texas Project), supra, 9 NRC at 443-44, and Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73 (1979).

In Detroit Edison (Enrico Fermi Plant), it was affirmed that standing may be asserted by claiming that an individual or organization's interests are within the "geographical zone of interests" that might be affected by an accidental release of fission products. (p. 78). In Houston Lighting and Power (South Texas Project), it was noted, 10 years ago, that the "longest distance heretofore determined to be within the "geographical zone of interest" was 50 miles. Distances of 125 or "several hundred" miles were considered too remote for this geographical interest zone. See Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), LBP-87-2, 7 NRC 32 (1987) (residence of more than 100 miles, too remote

It is apparent that the 50-mile zone is a guideline for the determination of a "zone of interest" for an intervenor, and not a bright-line boundary such as for rights to real property. This 50-mile zone, therefore, is not to be mechanically applied. No agency decision has ruled that the 50-mile zone is an absolute, overriding, or primary standard.

Beyond this, given recent historical experience, there should be some doubt whether a zone of 50 or even 100 miles around a nuclear plant is sufficient to describe the geographic zone to be affected by an accidental release of fission products. Certainly all residents within the entire area of Dade County and beyond would be immediately concerned in the wake of a serious accidental event at Turkey Point.

Thus, even if it is determined that Saporito's activities aside from his ATI employment were insufficient to confer representational standing for NEAP through him (and there was insufficient consideration of this question), it is evident that NEAP's representational standing was established through the Brezenoff affidavit. The affidavit put forth sufficient information to demonstrate that this NEAP member lived within the zone of interest, had property in that area, was concerned about the operation of the Plant, and authorized NEAP to advance those concerns on her behalf.

If this affidavit was insufficient, the Board did not give NEAP a true opportunity to supply additional information once it had obtained counsel. The Board erred in denying standing.

III. THE BOARD ERRORED IN DECLINING DISCRETIONARY INTERVENTION " NEAP OR TO SAPORITO

Finally, NEAP and Saporito contend that even if NEAP does not have organizational standing in its own right either through its own interest or through its members, NEAP or Saporito should have been granted discretionary intervention by the Board. The Board has this authority under the guidelines of 10 C.F.R. 2.174.

It is to be noted that public participation through intervention is a positive factor in the licensing process and that intervenors perform a valuable function and are to be complimented and encouraged. Virginia Electric and Power Company (North Anna Nuclear Power Station), ALAB-256, 1 NRC 10 (1975), and Consolidated Edison Company (Indian Point Nuclear Generating Station, No. 2), ALAB-243, 8 AEC 850 (1974).

As to discretionary intervention, factors in favor of such intervention include:

- 1) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record,
- 2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding, and
- 3) the possible effect on the petitioner's interest of any order which may be entered.

Factors against intervention include:

- 1) availability of other means whereby the petitioner's interests will be protected,
- 2) the extent to which the petitioner's interests will be represented by existing parties, and
- 3) the extent to which the petitioner's participation will inappropriately broaden or delay the proceeding.

See Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), supra, 5 NRC 1418; Duke Power Company, (Oconee Nuclear Station), supra, 9 NRC 90; Nuclear Engineering Company (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978), at 743-44; and Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381 (1978), pp. 387-89.

As was noted in Portland General Electric Company (Pebble Springs), at p. 614-616, the Commission is entitled broad discretion in determining the extent of public participation allowable beyond that of parties who have an absolute right to intervene. The court "have encouraged administrative agencies to adopt creative approaches to maximizing productive participation in their proceedings." Citing Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C.Cir. 1966).

The Commission should permit community representatives to participate in order to give the Commission the assistance that

it needs in vindicating the public interest. In Northern States Power Company, (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-72-1, 1 NRC 1 (1975), (noted by Portland General), it was stated:

...we wish to underscore the fundamental importance of meaningful public participation in our adjudicatory process. Such participation, performed in the public interest, is a vital ingredient to the open and full consideration of licensing issues and in establishing public confidence in the sound discharge of the important duties which have been entrusted to us.

Thus, there should be liberal interpretation not only as to intervention as of right, but also as to discretionary intervention. Even the identified factors as to discretionary intervention are not the only factors.

Portland General notes that as a general matter

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, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them.

Under these forceful guidelines for discretionary intervention, and considering the factors, is it evident that the Board erred here in declining such intervention either to Saporito or to NEAP. By the Board's own ruling, NEAP had no other available avenue of standing but discretionary. Further, neither the NRC Staff nor the Licensee challenged NEAP's repeated assertions in many documents that there were no other

intervenors, and thus no other parties to advance the interests and contentions being presented by NEAP and Saporito.

Further, the Board determined to accept five of the remaining Contentions that had been raised in NEAP's Amended Petition. Although the Board in its most recent Memorandum and Order sought to consider exercising sua sponte authority over these admitted Contentions, it is plain that the Board could just as well have extended discretionary standing to NEAP.

In the present posture of this matter, NEAP's Contentions now before the Board will have no advocate. It is difficult to determine how these Contentions, which relate to the safe and proper operation of Licensee's Plant under the proposed TS revisions, will be fully and fairly adjudicated before the Board.

It is thus difficult to determine how the interests of justice and of public health will be addressed in the present proceeding with the current arrangement of parties. The interests of justice, fairness, and public health are better served by participation of NEAP or Saporito as an intervenor.

Further, it was acknowledged that Saporito is in a unique position to argue these Contentions, with his technical background and his seven years of experience as a former employee of Licensee, working at this very Plant. Although the Board found Saporito did not have certain expertise and technical skill, it is clear the Board has an interest in fairly considering the Contentions it has admitted.

NEAP's participation would make a valuable contribution to the license amendment process here, which is a primary factor for discretionary intervention. NEAP's status and purpose place it in a unique position to assist the Board and the Commission in vindicating the public interest. The Board thus erred in denying discretionary intervention.

CONCLUSION

THEREFORE, Appellants Nuclear Energy Accountability Project (NEAP) and Thomas J. Saporito, Jr. respectfully request of this Board that it REVERSE the decision of the Atomic Safety and Licensing Board.

RESPECTFULLY SUBMITTED,

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Billie Pirner Garde

September 5, 1990

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of :
FLORIDA POWER AND LIGHT : Docket No. 50-250 OLA-5
COMPANY : 50-251 OLA-5
:
(Turkey Point Plant, : ASLBP No. 90-602-01-OLA-5
Units 3 and 4) :
:

CERTIFICATE OF SERVICE

I hereby certify that copies of the following document in
the above-captioned proceeding, dated September ____, 1990:

BRIEF FOR APPELLANTS NUCLEAR ENERGY
ACCOUNTABILITY PROJECT (NEAP) AND
THOMAS J. SAPORITO, JR.

were served on the persons designated below by regular mail,
postage prepaid, on this date:

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