UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

LICENSEE'S RESPONSE TO PETITIONERS' BRIEF

I. INTRODUCTION

During the prehearing conference held in Homestead, Florida on February 28, 1984, petitioners were provided an opportunity to file a brief concerning consolidating the consideration of two sets of license amendments issued late last year to Florida Power & Light Company ("FPL" or "licensee"). Tr. pp. 50-51. The other parties were also provided an opportunity to file a response. Tr. pp. 52-53. This pleading constitutes licensee's response to petitioners' brief.*/

II. ANALYSIS

A. Background

The pertinent facts and chronology are simple. On June 3, 1983, licensee requested a set of amendments in support

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*/ Licensee was originally given until March 9, 1984, to respond. Tr. p. 53. The deadline was later extended to March 14, however, in response to a Motion for Extension of Time filed on March 5, 1984.

of the planned use of new fuel assemblies at Turkey Point. Specifically, licensee applied for amendments providing for the replacement of Westinghouse 15x15 low parasitic (LOPAR) fuel and borosilicate glass burnable absorber rods with Westinghouse 15x15 Optimized Fuel Assemblies (OFA) containing Wet Annular Burnable Absorber (WABA) rods. The purpose of the change is to improve fuel economy through the use of fuel assembly and burnable absorber rod structural material (Zircaloy in place of Inconel and stainless steel) which causes less parasitic capture of neutrons. A notice of the licensee's request was published in the Federal Register on July 20, 1983 at 48 Fed. Reg. 33,076, 33,080. The notice specifically stated that the "core safety limits and associated set points in the current Technical Specifications are applicable" (emphasis added). No petitions to intervene were received*/ and the amendments were issued on December 9, 1983. See 48 Fed. Reg. 56,518-19.

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*/ Petitioners maintain that they "manifested an intention to obtain a hearing on" the July 20 Amendments in their petition to intervene filed on November 4, 1983. (Petitioners' Brief, p. 7). However, the November 4, 1983 Request for a Hearing and Petition to Intervene is explicit and unequivocal. On page 1, it specifically requests intervention only with respect to the October 7 Amendments. The mere fact that some of Petitioners' proposed contentions in that petition pertain to the July 20 Amendments does not thereby bring those amendments within the scope of this proceeding or correspond to a request for intervention on the July 20 Amendments. In short, if petitioners had desired to intervene with respect to the July 20 Amendments, they should have submitted a timely petition to intervene in that proceeding rather than relying upon post hoc arguments to reform proposed contentions to which the other parties have objected.

On August 19, 1983, licensee requested other changes to the Technical Specifications contained in its licenses for Turkey Point. Among other things, the changes provided for increasing the hot channel factor $F_{\Delta H}$ limit and total peaking factor F_Q limit applicable to operation of the reactor core. The purpose of these changes is to support licensee's modified low-leakage core arrangement as part of its program for reducing neutron flux at the reactor vessel wall, thereby lessening embrittlement. A notice of this request was published on October 7, 1983 at 48 Fed. Reg. 45,862. In response to this notice, petitioners submitted a timely petition to intervene on these amendments. On December 23, 1983, the NRC issued the amendments, finding that they involved no significant hazards consideration. See 49 Fed. Reg. 3364.

Having failed to seek timely intervention in a proceeding pertaining to the amendments first noticed on July 20, 1983, involving the use of OFA/WABA fuel (hereinafter referred to as the "July 20 Amendments"), petitioners have sought to raise matters which would have been potentially pertinent to such a proceeding in the instant case, involving wholly separate amendments first noticed on October 7, 1983 (hereinafter referred to as the "October 7 Amendments").*/ See,

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*/ At the prehearing conference held on February 28, 1984, participants offered their views as to which of petitioners' proffered contentions were associated with each set of amendments. See Tr. pp. 39-47. In this regard, transcript page 40 should be corrected to add proffered contention "p" to the list of those Licensee believes are pertinent to the July 20 Amendments. See Licensee's Answer to Amended Petition to Intervene, p. 19 (Feb. 10, 1984) [hereinafter referred to as "Licensee's Answer to Amended Petition"].

e.g., Amended Petition to Intervene, pp. 2-4 (Jan. 25, 1984) [hereinafter referred to as "Amended Petition"]; Petitioners' Brief on the Conflict Posed by the Legal Requirement of Timeliness and Equitable Considerations (Mar. 3, 1984) [hereinafter referred to as "Petitioners' Brief"]. As discussed below, however, this attempt is unjustified, improper and should not succeed.

B. The Board Lacks Jurisdiction to Grant Petitioners' Request

As licensee has already discussed in detail, the Board is simply without authority to consider matters pertaining to the July 20 Amendments. See, e.g., Licensee's Answer to Amended Petition, pp. 4-6, 12-14. Most fundamentally, the jurisdiction of the Board is limited by the notice giving rise to the proceeding. See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-616, 12 NRC 419, 426 (1980); Public Service Company of Indiana (Marble Hill Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976). The notice resulting in the instant proceeding was published in the Federal Register on October 7, 1983, and pertains only to certain specified limits and setpoints. See 48 Fed. Reg. 45,862. Similarly, the notice establishing this Licensing Board only provides authority to rule on petitions to intervene associated with, and preside over any necessary hearing concerning, the October 7 Amendments, and no others. See 48 Fed. Reg. 52,369. Lacking jurisdiction over the July 20 Amendments and issues relevant thereto, the Board should confine this proceeding to

matters pertinent to the October 7 Amendments, and allow petitioners to seek whatever relief they deem appropriate.*/

C. There Is No Connection Between the July 20 and October 7 Amendments

Apparently sensing the difficulty in attempting to raise issues pertinent to the use of OFA/WABA fuel in this forum,**/ petitioners attempt to construct a relationship between the July 20 and October 7 Amendments. According to them, both the July 20 and October 7 Amendments are related and dependent because they are part "of the same program to achieve flux reduction." Petitioners' Brief, p. 2. Petitioners maintain that because "there had not been full and fair disclosure by the Commission in the July 20th notice of the full scope and impact of the flux reduction program," there is an "equitable argument"***/ that the July 20 and October 7 Amendments should now be considered together. Id.

The fact is, however, that petitioners are simply mistaken in their conclusion that both sets of Amendments pertain to licensee's flux reduction program and that they

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*/ Petitioners could, for example, seek remedial action from the Director of Nuclear Reactor Regulation under 10 C.F.R. § 2.206; or, indeed, pursue any other course they consider appropriate.

**/ Indeed, page 6 of Petitioner's Brief notes that they "have conceded their original Request for A Hearing and Petition for Leave to Intervene may be considered untimely as it relates to issues arising from the July 20, 1983 Federal Register notice (48 FR 33080)."

***/ Licensee assumes that petitioners' use of the word "equitable" here is not in the technical legal sense, but more as a synonym for "fairness." Licensee knows of no basis for the application of equity jurisprudence by the NRC, and petitioners suggest none.

are related. As a matter of fact, the July 20 and October 7 Amendments are wholly separate and independent. The perceived connection between the two by petitioners reflects, at best, a basic misunderstanding of what they involve.

As explained in detail in the Affidavit of Daniel C. Poteralski, attached hereto and incorporated herein by reference, the July 20 and October 7 Amendments are not connected. Each is separate. Each has independent value unassociated with and unrelated in any way to the other.

In essence, last June licensee sought permission to change from the use of LOPAR type fuel with borosilicate glass burnable absorber rods, tc OFA type fuel with WABA rods. The OFA/WABA design provides for improved uranium utilization, and licensee sought to transer to the new design for economic reasons. The OFA/WABA design does not result in any appreciable changes in either the power within the core or, for that matter, neutron flux at the reactor vessel wall. Accordingly, the OFA/WABA design does not necessitate any changes in core safety limits, such as the limits on total peaking or hot channel factors. Use of the OFA/WABA design did require modifications to the Turkey Point Technical Specifications, however, resulting from control rod drop time changes, changes to permit the use of WABA and borosilicate glass burnable absorber rods, and changes to reflect a different departure from nucleate boiling ratio (DNBR) correlation used in OFA analysis. Affidavit of

Daniel C. Poteralski, pp. 1-2, 7 [hereinafter referred to as "Poteralski Affidavit"]. NRC approval of the necessary Technical Specification modifications was granted in the July 20 Amendments. 48 Fed. Reg. 56,518-19.

A second set of Amendments was requested on August 19, 1983. The primary purpose of the requested changes in Technical Specifications was to support licensee's program for reducing neutron flux at the reactor vessel wall, thereby mitigating reactor vessel embrittlement and the possibility of pressurized thermal shock. Changes in hot channel factor ($F_{\Delta H}$) and total peaking factor (F_Q) limits enable a power increase at the center of the core, and decrease at the periphery of the core, with total power remaining unchanged. However, by lowering the power at the periphery of the core, neutron flux is reduced at the pressure vessel wall. Poteralski Affidavit, pp. 4-5. The requested Technical Specification changes providing for flux distribution modification, and continued reactor operation at previously authorized power, were granted with the issuance of the October 7 Amendments. See 49 Fed. Reg. 3364.

As indicated, the purpose of the July 20 Amendments is to improve fuel economy. The purpose of the October 7 Amendments is to provide for reduction of neutron flux at the reactor vessel wall. The two sets of amendments are separate, independent, and have no connection or relationship, other than the coincidence that they were implemented at the same time. Poteralski Affidavit, pp. 5-7.

It would be possible to operate Turkey Point at full power, using the OFA/WABA design, without the October 7 Amendments. This is because, as previously noted, the mere change in the type of fuel assemblies and burnable absorbers, in and of itself, has virtually no affect on the power distribution with n the core. Poteralski Affidavit, pp. 10.

Conversely, it would be possible to operate Turkey Point with reduced neutron flux at the vessel wall, but at full power, utilizing the new total peaking factor and hot channel factor limits without the OFA/WABA design approved by the July 20 Amendments. This is because arrangement of the previously-approved LOPAR fuel and borosilicate glass burnable absorbers (instead of the OFA/WABA design) could be modified to increase the power at the center of the core while decreasing it at the periphery. Poteralski Affidavit, pp. 5-10.

Viewed from a different perspective, licensee could and would have implemented either set of amendments, separate and apart from approval of the other set. Thus, while licensee sought both the July 20 and October 7 amendments -- and is, in fact, operating pursuant to both sets -- utilization of either set is not dependent, in any way, upon utilization of the other set of amendments. Poteralski Affidavit, p. 6.

Petitioners, in general, seem to be under a basic misimpression that the July 20 Amendments are "the same as, part and parcel of, and to the same purpose as" the October 7

Amendments because both sets of amendments are portions of "an entire scheme or program to deal with . . . reactor pressure vessel embrittlement and Pressurized Thermal Shock (PTS) at Turkey Point." See Petitioners' Brief, pp. 3-4. As is clear from the foregoing, however, this is simply not true. The July 20 Amendments pertain only to the type of fuel and burnable absorber rod used at Turkey Point.*/ This has no bearing at all on the neutron flux at the reactor vessel wall, reactor vessel embrittlement, or PTS.**/ See also Poteralski Affidavit, pp. 7-8.

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*/ Petitioners have argued that the two sets of amendments are part of an FPL "program to achieve flux reduction and allow Turkey Point units to run at 100% power (Petitioners' Brief, p. 10), and that the entire program should be evaluated under NEPA (Tr. pp. 64-65). We have demonstrated above that this is factually incorrect. Even if it were wholly or partially correct, NEPA consideration may properly be limited to those elements of a program which have independent utility, so long as the agency is not thereby foreclosed from withholding approval of subsequent aspects of the alleged program. See, Duke Power Company (Amendments to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 313 (1981) and cases there cited. Petitioners have not even attempted to make a showing of lack of independent utility of each set of amendments or foreclosure of future proposals.

**/ With respect to PTS, petitioners also maintain that there is a site-specific problem at Turkey Point and, accordingly, the "Rulemaking on the generic issue of PTS does not control the proceeding here" (Petitioners' Brief, p. 3), in spite of decisions to the contrary. See, e.g., Licensees' Answer to Amended Petition, p. 22 footnote See also Potomac Electric Power Co. (Douglas Point Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974). In fact, however, it is apparent from even a facial review of the proposed rule that it applies to all operating pressurized water reactors, including Turkey Point. No adequate reason is given as to how or why the generic approach and specific content of the proposed PTS rule (49 Fed. Reg. 4498) would, in any way, be inappropriate

[footnote continued on following page]

Two specific, additional points also bear mentioning. First, petitioners refer to letters from Dr. Robert Uhrig to Mr. Varga and Mr. Eisenhut, dated March 25 and July 6, 1983,*/ respectively, as somehow indicating a substantive connection between the July 20 and October 7 Amendments. See Petitioners' Brief, pp. 9-10. A review of the letters, however, reveals that they do no such thing. Rather, they simply reflect the fact that licensee was pursuing both the July 20 and October 7 Amendments at the same time, and planned to implement them simultaneously; i.e., at the next scheduled refueling outage when fuel would be added and the core arranged in the desired configuration for the following cycle.**/

[footnote continued from preceeding page]

with respect to Turkey Point. Absent such a showing, resolution of the PTS issue is clearly not a proper subject for consideration here. Many general rules have different "site-specific" aspects; and a mere allegation of the existence of such aspects is inadequate to make the general rule inapplicable . In any event, requests for specific exceptions to treatment of issues generically under existing or proposed rules should be addressed in a petition to the Commission. See 10 CFR § 2.758.

*/ The March 25 letter to Mr. Varga was also referred to at the February 28, 1983 prehearing conference (Tr. pp. 73-77) and apparently sent to the Board under cover of a letter from petitioners' counsel, dated March 3, 1984. A copy of the July 6, 1983 letter to Mr. Eisenhut is attached hereto for convenience.

**/ In this connection, it is relevant to note that there appears to be some continuing confusion on the part of petitioners in distinguishing between changes in the type of fuel assemblies and burnable absorber rods (e.g., from LOPAR fuel with borosilicate glass burnable absorbers, to OFA/WABA), and changes in the design of the core resulting from modifications in the arrangement or loading of fuel assemblies and burnable absorber rods within it. These are entirely separate and independent matters. It is possible to change the type of fuel assemblies and burnable absorber rods without changing their loading, and vice versa. The July 20 Amendments only pertain to type and not to loading. They are not part of any flux reduction program at Turkey Point. See Poteralski Affidavit, pp. 6-10; Tr. pp. 73-77.

Second, petitioners appear to continue to assert that the use of more highly enriched fuel and an eighteen month fuel cycle is part of a "program to achieve flux reduction and allow the Turkey Point unit to run at 100% power." See Petitioners' Brief, pp. 7, 10. No approval to utilize fuel of a higher enrichment has been sought, however, and licensee has not even made a decision as to whether to seek such approval. Further, although licensee possesses authority to utilize an eighteen month fuel cycle under its current licenses for Turkey Point, such a cycle has no relation to the reduction of neutron flux and is motivated by factors solely pertinent to cost. Poteralski Affidavit, pp. 9-10.

D. The July 20 Federal Register Notice Was Not Deficient

Petitioners also assert for the first time that, because the July 20 notice did not specifically refer to the safety analysis which licensee had submitted as part of its amendment application, that notice was deficient. Petitioners' Brief, p. 8. The regulation relied upon by petitioners, however, does not require that such an analysis be specifically identified, but only "The manner in which a copy of the safety analysis . . . , if any, may be obtained or examined." 10 C.F.R. § 2.105(b)(2). The July 20 notice clearly stated:

> For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, D.C., and at the local public document room for the particular facility involved.

48 Fed. Reg. 33,077 (emphasis added). As petitioners admit, a safety analysis was part of licensee's application. Thus, the notice was clearly sufficient, and petitioners have not and could not show any prejudice.

E. Petitioners Are Improperly Attempting To Expand the Scope of This Proceeding

It is apparent from a review of Petitioners' filings and their remarks at the prehearing conference that they are improperly attempting to expand the scope of this proceeding to investigate various miscellaneous matters related to the general operation of Turkey Point. Thus, in addition to proposing contentions related to the October 7 Amendments, they have also raised questions pertaining to the July 20 Amendments, eighteen month fuel cycle, severe accident analysis, pressurized thermal shock, an amendment which allegedly permits increases in radioiodine in the reactor coolant, and a possible future amendment authorizing an increase in fuel enrichment.*/ All of these matters are outside the scope of this proceeding.

It has long been held that an amendment proceeding is not an appropriate forum for considering issues regarding operation of a plant which have no nexus to the amendment in question. See generally Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558,

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*/ "Petitioners' Response to Staff and Florida Power & Light Responses to Amended Petition to Intervene," dated March 7, 1984, exemplifies the expansive nature of the issues sought to be raised by the petitioners. Although we do not understand that the Board contemplated replies to this pleading by the other parties, licensee is prepared to submit such a reply if the Board were to consider a reply helpful.

570 (1980); Carolina Power and Light Co. (H. B. Robinson, Unit No. 2), ALAB-569, 10 NRC 557, 562 (1979). In particular, it is inappropriate in an amendment proceeding to consider the impacts of possibly related amendments which may be filed by a licensee in the future. Minnesota v. NRC, 602 F.2d 412, 416n.5 (D.C. Cir. 1979); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), LBP-81-40, 14 NRC 828, 830 (1981); Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), LBP-79-14, 9 NRC 557, 559 (1979). Thus, petitioners' attempt to transform this limited license amendment proceeding into a far-ranging examination of the operation of Turkey Point must fail.

It should be noted, however, that petitioners are not without alternative forums in which they can seek, and have sought, to raise the very issues proffered here. In this regard,

(1) Petitioners have previously submitted a request for action related to pressurized thermal shock at Turkey Point. This request was denied by the Director of Nuclear Reactor Regulation under 10 CFR § 2.206 on the grounds that, based upon the NRC Staff's evaluations, there was no near-term need for licensing action and that action was being taken to resolve the long term problem. DD-81-21, 14 NRC 1078, 1082-83 (1981). The petitioners have requested judicial review of this decision. See Lorion v. NRC, 712 F.2d 1472 (D.C. Cir. 1983), petitions for cert. filed, Nos. 83-703 and 83-1031.

(2) Petitioners also have recently filed suit for injunctive and declaratory relief in U.S. District Court for the District of Columbia*/ for reasons related to the July 20 and October 7 Amendments, pressurized thermal shock, and the consequences of severe accidents. In orders dated November 30, 1983, December 8, 1983 and January 6, 1983, the Court denied two motions for a temporary restraining order and a motion for a preliminary injunction, respectively, on the ground that petitioners failed to present any evidence in support of these motions.

(3) Petitioners were afforded an opportunity to intervene with respect to the July 20 Amendments, see 48 Fed. Reg. at 33,076, but failed to take advantage of this opportunity.

(4) If FPL were to file an application for a license amendment to increase the fuel enrichment at Turkey Point, or for any other purpose, petitioners would be afforded an appropriate opportunity to file a petition to intervene. See Section 189a of the Atomic Energy Act of 1984, 42 U.S.C. § 2239(a).

(5) Finally, petitioners may file a request for action under 10 CFR § 2.206 with respect to any of the matters mentioned above. In fact, such a request is the procedurally correct approach for raising issues outside the scope of an amendment proceeding. See Bailly, supra; Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90n.6 (1979) and ALAB-524, 9 NRC 65, 70 (1979).

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*/ Civil Action No. 83-3570.

In sum, Petitioner would have the Licensing Board conduct an unbounded hearing, including any question relating to the operation of Turkey Point they wish to raise, without regard to this Board's jurisdiction or whether petitioners have already raised the same questions elsewhere or can do so. There is simply no basis in law or sound administrative practice which permits a hearing to be so conducted.

III. CONCLUSION

As demonstrated above, this Board lacks jurisdiction to consider matters pertinent to the July 20 Amendments. Further, the July 20 notice was in no way defective. In not referring to matters associated with the October 7 Amendments, the notice simply reflected the fact that the July 20 and October 7 Amendments are unrelated and independent. Further, the July 20 notice was not insufficient for failing to specifically identify the existence of licensee's safety analysis. References to the amendment application, which included a safety analysis and where it could be examined, were clearly sufficient. Accordingly, the Board should confine this proceeding exclusively to matters pertinent to the October 7 Amendments.

Respectfully submitted,

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