

RELATED CORRESPONDENCE

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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'84 AGO 13 A11:49

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD  
OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250 OLA-1
	)	50-251 OLA-1
	)	
(Turkey Point Plant,	)	ASLBP No. 84-496-03 LA
Units 3 and 4)	)	
	)	

LICENSEE'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTIONS FOR SUMMARY  
DISPOSITION OF INTERVENORS' CONTENTIONS (b) and (d)

I. Background

Following a prehearing conference on February 28, 1984, the Licensing Board in this proceeding issued a Prehearing Conference Order (May 16, 1984). The Order, inter alia, admitted petitioners Center for Nuclear Responsibility, Inc., and Joette Lorion as Intervenor in this proceeding and accepted the petitioners' contentions (b) and (d).

Licensee Florida Power & Light Company (Licensee or FPL) is today filing two motions, pursuant to 10 C.F.R.

§ 2.749, requesting summary disposition of those contentions (b) and (d).<sup>1</sup> Each motion is accompanied by Licensee's "Statement of Material Facts as to Which There Is No Genuine Issue To Be Heard" with respect to the pertinent contention. This Memorandum of Law addresses the applicable standards under NRC authorities for determining whether to grant motions for summary disposition.

## II. Summary Disposition Under NRC Regulations

Admission of an intervenor's contention in an NRC proceeding carries no connotation regarding its merit--or lack thereof. If a contention meets the requirements of 10 C.F.R. § 2.714 as interpreted in NRC case law, it is admitted. A ruling that a contention is admissible determines only that a contention is relevant to the proceeding, is stated with specificity, and has an identified basis. The intervenor is given the opportunity to prove the truth of the assertions supporting his or her admitted contention although not necessarily in an evidentiary hearing. Houston Lighting and Power Co.

<sup>1</sup>

Section 2.749 of the NRC's regulations states that motions for summary disposition are to be filed "within such time as may be fixed by the presiding officer." However, as is clear from the Statement of Considerations accompanying promulgation of the regulation, the Commission intends to permit such motions to be filed "at any time," subject to the Board's authority to set time limits "tailored to fit the circumstances" of the particular case and to "dismiss summarily" motions filed shortly before or during the hearing if responding would require diversion of substantial resources by the Board or other parties. 46 Fed. Reg. 30,328, 30,330 (1981).

(Allens Creek Nuclear Generating Station), ALAB-590, 11 NRC 542, 549-50 (1980).

After contentions have been admitted, any party may request that the licensing board decide "all or any part of the matters involved in the proceeding" in the party's favor. 10 C.F.R. § 2.749(a) (1984). Such a motion must be accompanied by "a separate, short and concise statement of the material facts as to which . . . there is no genuine issue to be heard." Id. Any other party may support or oppose the motion. If it opposes the motion, a party must file its own statement of the material facts as to which it contends there is a genuine issue to be heard. Material facts are deemed to be admitted unless controverted by the opposing party. Id.

Not only do NRC regulations permit motions for summary disposition, the Commission has in fact exhorted licensing boards to

encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

Statement of Policy on Conduct of Licensing Proceedings, 13 NRC 452, 457 (1981). The Appeal Board has also endorsed the use of summary disposition as "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on

demonstrably unsubstantial issues." Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-590, 11 NRC 542, 550 (1980); Gulf States Utilities Co. (River Bend Station), ALAB-183, 7 AEC 222, 228 (1974).

### III. Applicable Legal Standard

The regulation states:

The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d) (1984). Section 2.749 and the standard-- "no genuine issue as to any material fact"--are similar to the standard under Rule 56 of the Federal Rules of Civil Procedure. Tennessee Valley Authority (Hartsville Nuclear Plant), ALAB-554, 10 NRC 15, 20 n.17 (1979) (relying upon Wright and Miller, Federal Practice and Procedure (1973), Vol. 10, p. 377 and cases cited therein); Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant), ALAB-443, 6 NRC 741, 753-54 (1977).

If a party opposes the requested summary disposition, he must answer, setting forth "specific facts showing that there is a genuine issue of fact." 10 C.F.R. § 2.749(b) (1984). It will not be sufficient to rest upon mere allegations or denials. Id.; Houston Lighting and Power Co.

(Allens Creek Nuclear Generating Station), ALAB-629, 13 NRC 75 (1981); Duke Power Co. et al. (Catawba Nuclear Station), LBP-83-56, 18 NRC 421, 430 (1983). "The opposing party's facts must be material, substantial, not fanciful, or merely suspicious." Gulf States Utilities Co. (River Bend Station), LBP-75-10, 1 NRC 246, 248 (1975) (footnotes omitted).

We submit that Licensee's motions and supporting statements filed today discharge Licensee's burden of proof and establish that there are no genuine issues of material fact to be tried and decided in connection with Intervenor's Contentions (b) and (d). In our view, because of the nature of the contentions and matters involved, Intervenor will be unable to discharge their responsibility to "set forth specific facts showing that there is a genuine issue of fact." 10 C.F.R. § 2.749(b); Virginia Electric and Power Co. (North Anna Nuclear Power Station), ALAB-584, 11 NRC 451, 453 (1980).

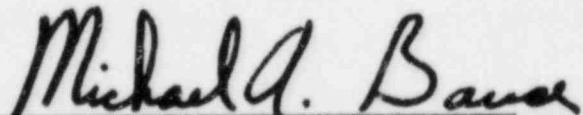
Intervenor cannot be permitted to drag the Board and parties to a pointless trial "on the vague supposition that something may turn up." Gulf States Utilities Co. (River Bend Station), LBP-75-10, 1 NRC 246, 248 (1975). When viewed in light of the record, there will be no doubt but that contentions (b) and (d) are "'demonstrably unsubstantial issues' that should be decided pursuant to summary disposition procedures in order to avoid unnecessary and possibly time-consuming hearings." Louisiana Power & Light Co. (Waterford Steam Electric Station), LBP-81-48, 14

NRC 877, 883 (1981), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-590, 11 NRC 542, 550 (1980). It will remain only for the Board to apply the relevant legal principles and grant each motion in its entirety.<sup>2</sup>

#### IV. Conclusion

Based on the foregoing, and the accompanying Motions for Summary Disposition and Statements of Material Facts as to Which There Is No Genuine Issue To Be Heard, FPL respectfully submits that the Board should summarily dispose of Intervenor's Contentions (b) and (d), and issue a decision in Licensees' favor.

Respectfully submitted,



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Date: August 10, 1984

<sup>2</sup>

We note that NRC regulations permit the Board to grant summary disposition "as to all or any part of the matters involved in the proceeding." 10 C.F.R. § 2.749(a) (1984). If the Board identifies some issues within a contention which must be tried, we request that the Board grant summary disposition as to the other issues.



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Units 3 & 4 )

Docket Nos. 50-250 OLA-1  
50-251 OLA-1

ASLBP No. 84-496-03 LA

CERTIFICATE OF SERVICE

I hereby certify that copies of (1) Licensee's Motion for Summary Disposition of Intervenor's Contention (b); (2) Licensee's Statement of Material Facts as to which There Is No Genuine Issue To Be Heard with respect to Intervenor's Contention (b); (3) Licensee's Motion for Summary Disposition of Intervenor's Contention (d); (4) Licensee's Statement of Material Facts as to which There Is No Genuine Issue To Be Heard with respect to Intervenor's Contention (d); and (5) Licensee's Memorandum of Law in Support of Motions for Summary Disposition of Intervenor's Contentions (b) and (d), all dated August 10, 1984, were served on the following by deposit in the United States mail, first class, postage prepaid and properly addressed, on the date shown below.

Dr. Robert M. Lazo, Chairman  
Atomic Safety and Licensing Board Panel  
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Attention: Chief, Docketing and Service Section  
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