

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of) Docket Nos. 50-250 OLA-1
) 50-251 OLA-2
FLORIDA POWER & LIGHT COMPANY)
) ASLBP No. 84-496-03 LA
Turkey Point Nuclear Units 3 & 4)
)

INTERVENORS' RESPONSE TO
LICENSEE'S STATEMENT OF
MATERIAL FACTS AS TO
WHICH THERE IS NO
GENUINE ISSUE TO BE
HEARD WITH RESPECT TO
INTERVENORS' CONTENTION (d)

This is Intervenor's response to Florida Power & Light Company's second motion for summary disposition dated September 20, 1985, in which FPL submitted a new motion on Intervenor's contention (d), which was previously resolved in favor of Intervenor in an Atomic Safety and Licensing Board Order of August 16, 1985, which required a hearing on the contention.

The new FPL motion, which deals with the same subject matter of their previous motion, is unsupported by any affidavit, and to the extent that it raises new issues it is therefore defective. Furthermore, the Commission's Rules do not allow interlocutory appeal of denials of motions for summary disposition. What FPL seeks to obtain here is interlocutory appeal of a prior denial

for summary disposition on Contention (d). This is not permitted:

A denial of a motion for summary disposition is interlocutory and therefore cannot be appealed. Louisiana Power & Light Co.
(Waterford Steam Electric Generating Station, Unit 3) ALAB 220, 8 AEC 93,94 (1974).

Upon receipt of the new motion for summary disposition, Intervenor's submitted the FPL Motion to their expert witness, Dr. Gordon Edwards, Professor of Mathematics, Vanier College, Montreal, Canada. As of October 25, 1985, Dr. Edwards reported that the bare Motion was not fully comprehensible by him because a sufficient fact basis for the new arguments stated in the Motion was not provided.

Furthermore, it should be noted that on October 15, 1985, the Staff submitted their NRC Staff Response To Licensee's Second Motion For Summary Disposition of Contention (d) which relied upon a new affidavit submitted by Yi-Hsiung Hsui, an NRC Staff nuclear engineer, and included a newly disclosed SER on the Applicability of WRB-1 to Westinghouse 14x14 and 15 x 15 OFA Fuel. (Coincidentally, this was the same date that Intervenor's attorney was in Washington for Oral Argument on Lorion and the Center for Nuclear Responsibility vs. the U.S. Nuclear Regulatory Commission and FPL, Case No. 82-1132. It was also the same date that Intervenor's original response to FPL's Motion for summary disposition was due.)

Because the Staff's submittal appeared to develop and supplement the new FPL motion for summary disposition, Intervenor's are submitting the material to their expert, Dr. Edwards. Under the Rules of Practice at 2.749 (a), Intervenor's have twenty days, plus five for mailing, to respond to a motion for summary disposition. Although Intervenor's have requested until October 25, 1985, to respond to the FPL motion, they now claim the right under 2.749 (c) to respond to the new information and arguments submitted collectively by FPL and the Staff; consisting of the FPL Motion to Dismiss, the Staff's Support of FPL's Motion to Dismiss, the Affidavit of Yi-Hsiung Hsui, and the SER. Intervenor's claim this right to respond on November 9, 1985, because the only data that might be construed as being supportive of the renewed motions for summary disposition is data accompanying the October 15, 1985, Staff Response.

In the alternative, Intervenor's maintain that the FPL Motion and the Staff's supporting view represent an illegal procedure not allowed by the Commission Rules. (ALAB 220, 8 AEC 93, 94 (1974)) Intervenor's also contend that FPL's failure to properly support their motion and failure to show that that no genuine issue of material fact exists should cause their motion to be denied, even in the event that the Board does not accept Intervenor's argument that a denial of a motion for summary disposition is interlocutory and appeal is not allowed.

It is the party seeking summary judgement which has the burden of showing the absence of a genuine issue as to any material fact, and where the moving party's evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgement must be denied even if no evidentiary matter is presented. *Adickes v. Kress and Co.*, 398 U.S. 144, 157 (1970), *Perry ALAB 443*, *supra*, 6 NRC at 753.

Finally, in the event that the Board addresses the merits of the new FPL Motion, it must be recognized that what the motion does is advance a spacious and confusing argument. It is to avoid this confusion that the Board Order granting a hearing specified that "The Licensee has the burden of showing in hearing either that the application of DNBR of 1.17 to the OFA fuel in Units 3 and 4 satisfies the 95/95 standard, or that if such application does not, the margin of safety is not significant." (Board Order August 16, 1985, page 54.)

FPL's response to the Board Order in the form of a new motion for summary disposition is not responsive to this Order, which decided forcefully that a hearing must be held on this important safety issue with all that implies. By submitting their Motion FPL has begged the question.

The Commission's Rules have been formulated to make litigation predictable. The Board has ruled and set a date for hearing on Contention (d). Thus, for all the foregoing reasons, the Motion for Summary Disposition should be denied.

In the event the Motion is not denied on the basis of

Intervenors' argument that denial of a motion for summary disposition is interlocutory and cannot be appealed, then the Board should issue an Order allowing Intervenors until November 9, 1985, to respond to the cumulative effort by the Staff and FPL in their respective motions for summary dismissal.

Respectfully submitted,

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*signed in his absence by
Joette Lorion

Dated: October 25, 1985

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In the Matter of)
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Intervenors' Response to Licensee's Statement of Material Facts As to Which There Is No Genuine Issue to Be Heard With Respect to Intervenors' Contention (d)", have been served on the following parties by deposit in the United States Mail, first class, postage prepaid, on the date shown below:

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