



**FPL**

L-2001-196

**AUG 16 2001**

Mr. Frank J. Congel  
Director, Office of Enforcement  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Re: Florida Power & Light Company Comments  
Draft Discrimination Task Group Report (April 2001)

Dear Mr. Congel:

Florida Power & Light Company (FPL), the owner and operator of the St. Lucie Nuclear Plant, Units 1 and 2, and the Turkey Point Nuclear Plant, Units 3 and 4, hereby submits the following comments on the draft report of the NRC's Discrimination Task Group.

In summary, the draft report reflects a strong bias toward maintaining the existing flawed process for handling allegations of discrimination. For the reasons explained in this letter, FPL urges that the report be withdrawn in its entirety. FPL further suggests that the following comments, as well as the comments received from all stakeholders, including those filed by the Nuclear Energy Institute (NEI), be carefully considered before a final report is issued and before any changes to NRC's process for handling discrimination complaints as recommended in the report are implemented.

#### NRC's Role in Addressing Allegations of Discrimination

In its comments filed on January 22, 2001, NEI recommended that the Commission leave the investigation of individual discrimination cases to the U.S. Department of Labor (DOL). Despite the Task Group's conclusion that "discrimination does not appear to be a common or prevalent problem" for all NRC licensees (Draft Report at 10), the Task Group has proposed to reject this recommendation, and to stop deferring discrimination cases to DOL. FPL urges that these recommendations be reconsidered. It is duplicative and wasteful of government and licensee resources for two separate agencies to investigate the same set of facts. Dual investigations result in unnecessary expenditures of licensee resources, the potential for inconsistent results, and no additional protection of the public health and safety.

Additionally, the statistics presented on pages 6-7 of the draft report do not justify the allocation of the Commission's resources in investigating allegations of discrimination. According to the draft report, the NRC substantiates only 10 percent of the discrimination cases investigated each year. The percentage of substantiated cases is an even smaller fraction of the total number of discrimination allegations received by the NRC. FPL questions the commitment of Commission resources devoted to investigating discrimination allegations where a very small number of those cases are substantiated, and where the DOL has the clear statutory authority and investigative expertise to investigate the same allegations. Further, DOL has the authority to correct any

proven case of discrimination by ordering the reinstatement of and awarding money damages to the victim of discrimination.

#### NRC's Authority to Investigate and Enforce 10 CFR 50.7

The draft report asserts that the Commission has broad authority, derived from Section 161 of the Atomic Energy Act of 1954, as amended, to investigate allegations of discrimination for engaging in protected activities, to take civil enforcement action for such violations, and to refer alleged violations to the U.S. Department of Justice for criminal prosecution.

The Task Group has interpreted the Commission's legal authority in this area far too broadly. As explained in more detail in the comments filed by Foley and Lardner on February 16, 2001, and in NEI's comments on the subject report, the NRC's legal authority to pursue enforcement action for allegations of discrimination for having engaged in protected activities derives from Section 211 of the Energy Reorganization Act (ERA). FPL notes that text of 10 CFR 50.7 tracks closely with and specifically refers to Section 211 of the ERA. Moreover, that regulation was intended to implement then Section 210 of the ERA (47 Fed. Reg. 30452) and its 1983 amendments were "intended to conform current NRC regulations to the new nuclear whistleblower protection provisions of the Energy Policy Act of 1992...." (58 Fed. Reg. 52406).

In this respect, the NRC lacks the authority to deviate from Section 211 and pursue enforcement action in "dual motive" cases where the overall conclusion is that the employer has advanced legitimate business reasons for the employment action taken and it cannot be proven that these business reasons are a pretext. Such enforcement actions are inconsistent with Section 211. The Task Group's draft report simply glosses over this point. The NRC should carefully revisit its authority to investigate and enforce 10 CFR 50.7 in a way that is consistent with the standards set forth in Section 211.

#### Conduct of OI Investigations

FPL agrees with the recommendation in Section III.B of the draft report that the legal standards for determining when an investigation of alleged discrimination should be initiated require improvement. The NRC should, however, bring those standards in line with the legal standards set forth in Section 211 of the ERA, as opposed to the new, less stringent standards used in evaluating allegations of discrimination created by the Millstone Independent Review Team in its report to the Commission dated March 12, 1999.

With respect to OI's investigative techniques, FPL is aware of a recent shift in policy used by OI investigators to schedule interviews. Until recently, investigators would schedule witness interviews through company counsel. More recently, however, in response to criticism from some allegers, OI investigators are now contacting witnesses directly at their offices and homes. This practice can result in witnesses, caught off guard, giving statements to investigators before they have had an opportunity to carefully review the facts in order to give a more accurate statement. Such a practice can only serve to scare and intimidate witnesses, who may believe that they are required to give a statement when confronted. FPL recommends that OI reconsider this policy.

### Release of OI Report

FPL is encouraged that the Task Group proposes to release redacted versions of the OI report prior to the pre-decisional enforcement conference for a trial period. FPL respectfully suggests, however, that this recommendation is far too narrow. FPL recommends that NRC release the entire record of investigation<sup>1</sup> to the licensee prior to any enforcement conference to address apparent violations of 10 CFR 50.7.

According to the NRC's Enforcement Policy, the purpose of a pre-decisional enforcement conference is for the NRC "to obtain information that will assist the NRC in determining the appropriate enforcement action, such as: (1) a common understanding of facts, root causes, and missed opportunities associated with the apparent violations; (2) a common understanding of corrective actions taken or planned; and (3) a common understanding of the significance of issues and the need for lasting comprehensive corrective action." Failure to provide the full record of investigation to the licensee prior to the enforcement conference is unfair in that the licensee and/or individual is not placed on notice of the facts underlying the apparent violation. This practice also fails to further the purpose of the enforcement conference, which is to address all of the facts.

### Pre-Decisional Enforcement Conference Sequencing

FPL strongly disagrees with the Task Group's recommendation to re-sequence the enforcement conference and offer such enforcement conferences only after issuance of the notice of violation and proposed civil penalty. In discrimination cases, the enforcement conference presents the first opportunity for the licensee to address its position on allegations of discrimination to the NRC Staff. If implemented as recommended, the NRC will issue a proposed enforcement action, along with a press release, before it has even considered the licensee's position on the matter. This practice would be grossly unfair to licensees.

Additionally, it is unlikely that the Staff will retract proposed enforcement actions and issue press releases admitting erroneous conclusions after learning of facts during the enforcement conference that cast doubt on enforcement findings or that prove that no discrimination occurred. The significance is that most, if not all discrimination enforcement actions, will effectively become final regardless of information presented at an after-the-fact enforcement conference.

The reason given for this recommendation is that it would eliminate a step in the process that will improve the timeliness of the action. FPL submits that agency decisions involving potential civil penalties and criminal sanctions should be based on all of the facts and that the quality of such decisions should not be compromised by speeding up the process.

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<sup>1</sup> The information should include, as a minimum, the OI report, including the agent analysis, and all exhibits, including transcripts of witness interviews.

### Enforcement Discretion - Credit for Settlement Agreements

The Task Group has recommended that the NRC should no longer exercise enforcement discretion in cases where the licensee settles a complaint of discrimination filed with DOL. The draft report provides no rationale for this recommendation. This criterion for exercising enforcement discretion should be retained in the Enforcement Policy. If the licensee and the complainant have resolved an allegation of discrimination to the mutual satisfaction of the parties, public policy considerations supporting settlement of claims should give rise to enforcement discretion in order to encourage such settlements.

### Individual's Right to a Hearing

FPL also disagrees with the Task Group's decision not to recommend providing hearing rights to individuals accused of deliberate discrimination. The assertion in the draft report that "the NRC's action of issuing a violation does not in itself have any implications to the individual's career" is flat wrong. Any order restricting an individual from working in NRC-licensed activities would give rise to due process rights and would certainly have a direct and substantial effect on a career in the nuclear industry. Further, any licensee would have to carefully consider the NRC's perception of a person who had been the subject of enforcement action working in NRC-licensed activities. For these reasons, the NRC should amend its regulations to provide any individual who has been subject to enforcement action for alleged deliberate discrimination a right to a hearing to contest such a finding.

We appreciate the opportunity to comment on the Discrimination Task Group's draft report.

Sincerely yours,



J.A. Stall  
Senior Vice President, Nuclear  
and Chief Nuclear Officer