



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET SW SUITE 23T85
ATLANTA, GEORGIA 30303-8931

June 5, 2003

EA-00-230

Florida Power & Light Company
ATTN: Mr. J. A. Stall
Senior Vice President of Nuclear Operations
PO Box 14000
Juno Beach, FL 33408-0420

SUBJECT: NOTICE OF VIOLATION (U.S. DEPARTMENT OF LABOR ALJ CASE
NO. 2000-ERA-5, ARB CASE NO. 00-070)

Dear Mr. Stall:

This is in reference to a U.S. Department of Labor (DOL) proceeding involving a claim of discrimination by Florida Power and Light Company (FPL) against an FPL employee, Mr. Donald Duprey. On July 13, 2000, the presiding DOL Administrative Law Judge (ALJ), found, under a dual motive analysis, that complainant was demoted in violation of the Energy Reorganization Act (ERA), but that FPL had successfully shown that it legitimately would have demoted complainant even if he had not engaged in protected activity. For this reason, the complainant was denied the relief he sought and his complaint was dismissed. Subsequently, complainant appealed the ALJ's Recommended Decision and Order (RDO) to the Administrative Review Board (ARB). On February 27, 2003, the ARB issued a Final Decision and Order, affirming the ALJ's decision denying complainant any relief on his claim of discrimination.

By NRC letter of May 12, 2003, and via an exit teleconference, FPL was informed that escalated enforcement action was being considered for an apparent violation of 10 CFR 50.7, based on the NRC's review of the DOL findings. Additionally, FPL was informed that the NRC had sufficient information, regarding the apparent violation and associated corrective actions, upon which to make an enforcement decision without the need for a predecisional enforcement conference. By letter of May 14, 2003, FPL advised of its decision to decline a predecisional enforcement conference and also provided its response to the apparent violation. The NRC has reviewed this information and believes it has sufficient information upon which to make an enforcement decision.

In its response of May 14, FPL advised that NRC's letter of May 12, 2003, was in error when it asserted that DOL found that FPL discriminated against the complainant in violation of Section 211 of the ERA. In this regard, FPL asserted that the ALJ determined that complainant made a preliminary or *prima facie* case of discrimination requiring a response from FPL, but that both the ALJ and ARB concluded there was no violation of the Act and ruled in FPL's favor. In support of this conclusion, FPL noted that Section 211(b)(1)(B) of the ERA requires DOL to order abatement of a violation, including reinstatement and back pay whenever it determines that a violation of subsection (a) has occurred. FPL advised that no such remedy was ordered in this case because there was no violation of the ERA.

The NRC agrees that both the ALJ and ARB determined that no remedy would be awarded the complainant because FPL successfully demonstrated that it would have taken the same action

against him even in the absence of his protected activity. The NRC does not agree, however, with FPL's conclusion that there was no violation of the ERA. The ALJ, under Section II (Dual Motive) of the RDO, expressly found that in addition to his being legitimately and appropriately disciplined for continued, regular violation of Respondent's sick leave policy, "... complainant was also demoted for the illegitimate reason of retaliation for his protected activity." In a footnote to this finding, the ALJ concluded that "Complainant has thus established that Respondent's proffered reason for the adverse action taken against him, i.e., that he was demoted solely for violation of its sick leave policy, is pretextual." Similarly, the ARB, at page 10 of its Final Decision and Order, concurred that the record supported the ALJ's conclusion that FPL violated the Act when it demoted complainant, and that FPL successfully demonstrated that it would have demoted complainant in the absence of protected activity. Thus, it is clear that both the ALJ and ARB concluded that complainant's demotion was motivated, in part, by the illegitimate reason of complainant's protected activity, and these findings form the bases for the NRC's conclusion that a violation of its Employee Protection regulation occurred.

The violation is described in the enclosed Notice of Violation (Notice) and involves a violation of 10 CFR 50.7, Employee Protection. Specifically, the NRC has concluded that FPL demoted Mr. Duprey in January 1999, at least in part, because of his engagement in protected activity. The protected activity involved Mr. Duprey's reporting of nuclear safety violations and plant procedural issues to FPL supervisors and to the NRC. Discrimination against employees who engage in protected activity is of concern to the NRC because of the potential for creation of an unfavorable working environment where employees may be unwilling to raise safety concerns. Therefore, this violation has been categorized in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" NUREG-1600, (Enforcement Policy) as a Severity Level III violation.

In accordance with the Enforcement Policy, a civil penalty with a base value of \$60,000 is considered for a Severity Level III violation. Because your facility has not been the subject of escalated enforcement action within the last two years, the NRC considered whether credit was warranted for corrective action in accordance with the civil penalty assessment process in Section VI.C.2 of the Enforcement Policy.

On April 2, 2003, FPL provided NRC its response to the DOL findings. FPL supplemented its response by letter dated April 23, 2003. Although FPL continues to assert that its actions against Mr. Duprey were unrelated to his engaging in protected activity, the April 23rd letter summarized its anti-discrimination policy and discussed the other actions FPL has taken to maintain a safety conscious work environment (SCWE) at its nuclear sites. These actions included informing all FPL Nuclear Division managers and supervisors of company expectations regarding maintaining SCWEs, making nuclear counsel available to answer questions and to provide additional training on SCWE issues, issuance of a written memorandum to all Nuclear Division personnel reiterating company expectations regarding management receptivity to safety concerns, and emphasizing FPL's position on not tolerating discrimination, Site Vice President meetings with plant workers to emphasize his focus on nuclear safety and the importance of open communications, and developing safety culture training which will be provided to Nuclear Division managers and supervisors. Based on the foregoing actions, the NRC has determined that credit was warranted for corrective actions.

Therefore, to encourage prompt and comprehensive correction of violations, and in recognition of the absence of previous escalated enforcement action, I have been authorized, after consultation with the Director, Office of Enforcement, to propose that no civil penalty be

assessed in this case. However, you are on notice that significant violations in the future could result in a civil penalty.

The NRC has concluded that information regarding the reason for the violation, the corrective actions taken to correct the violation and prevent recurrence, and the date when full compliance will be achieved is adequately addressed on the docket in your letter of April 23, 2003, and in this letter. Therefore, you are not required to respond to the violation contained in this letter unless the description herein does not accurately reflect your corrective actions or your position. In that case, or if you choose to provide additional information, you should follow the instructions specified in the enclosed Notice.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and your response (if you choose to provide one) will be made available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/ADAMS.html> (the Public Electronic Reading Room).

If you have any questions about this inspection, please contact Mr. Victor M. McCree, Director, Division of Reactor Projects, at (404) 562-4500.

Sincerely,

/RA/LAR

Luis A. Reyes
Regional Administrator

Docket Nos. 50-250, 50-251
License Nos. DPR-31, DPR-41

Enclosure: Notice of Violation

cc w/encl:

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DATE	6/4/03	6/4/03	6/4/03	6/4/03	6/4/03	
COPY?	YES NO	YES NO			YES NO	YES NO

OFFICIAL RECORD COPY DOCUMENT NAME: C:\ORPCheckout\FileNET\ML031560478.wpd

NOTICE OF VIOLATION

Florida Power and Light Company
Turkey Point Nuclear Plant
Units 1 and 2

Docket Nos. 50-250, 50-251
License Nos. DPR-31, DPR-41
EA-00-230

Based on NRC review of a U.S. Department of Labor (DOL) Administrative Law Judge (ALJ) Recommended Decision and Order (ALJ Case No. 2000-ERA) issued on July 13, 2000, and a DOL Administrative Review Board (ARB) Final Decision and Order (ARB Case No. 00-070) issued on February 27, 2003, a violation of NRC requirements was identified. In accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions," NUREG-1600, (Enforcement Policy), the violation is listed below:

10 CFR 50.7 prohibits discrimination by a Commission licensee against an employee for engaging in certain protected activities. Discrimination includes discharge or other actions relating to the compensation, terms, conditions, and privileges of employment. The activities which are protected are established in Section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act. Protected activities include, but are not limited to, reporting of safety concerns by an employee to his employer or the NRC.

Contrary to the above, Florida Power and Light Company (FPL) discriminated against Mr. Donald Duprey, an employee at the Turkey Point Nuclear Plant, for engaging in protected activity. Specifically, as determined by DOL, FPL demoted Mr. Duprey in January 1999, at least in part, because of his engagement in protected activity involving his reporting of nuclear safety violations and plant procedural issues to FPL supervisors and to the NRC.

This violation is characterized at Severity Level III (Supplement VII).

The NRC has concluded that information regarding the reason for the violation, the corrective actions taken to correct the violation and prevent recurrence, and the date when full compliance was achieved is already adequately addressed on the docket in your letter of April 23, 2003, and in cover letter transmitting this Notice of Violation (Notice). However, you are required to submit a written statement or explanation pursuant to 10 CFR 2.201 if the description therein does not accurately reflect your corrective actions or your position. In that case, or if you choose to respond, clearly mark your response as a "Reply to a Notice of Violation," and send it to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555 with a copy to the Regional Administrator, Region II within 30 days of the date of the letter transmitting this Notice.

If you contest this enforcement action, you should also provide a copy of your response, with the basis for your denial, to the Director, Office of Enforcement, United States Nuclear Regulatory Commission, Washington, DC 20555-0001.

Because any response will be made available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS), to the extent possible, it should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the public without redaction. ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading->

Enclosure

[rm/ADAMS.html](#) (the Public Electronic Reading Room). If personal privacy or proprietary information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such material, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.790(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

In accordance with 10 CFR 19.11, you may be required to post this Notice within two working days.

Dated this 5th day of June 2003