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ACTION OFFICE: OGC / EDO

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ADDRESSEE: NRCExecSec Resources  
SUBJECT: Complainants' Rebuttal Brief in Respondent U.S. Nuclear Regulatory Commission

ACTION: Appropriate

DISTRIBUTION:

LETTER DATE: 10/18/2009

ACKNOWLEDGED No

SPECIAL HANDLING: Re-assigned to OGC/EDO, OGC is lead office.

NOTES:

FILE LOCATION: ADAMS

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DATE SIGNED:

## McKelvin, Sheila

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**From:** Thomas Saporito [saporito3@gmail.com]  
**Sent:** Sunday, October 18, 2009 7:16 PM  
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**Cc:** NRCExecSec Resource; Gody, Tony; Paige, Jason; Hamman, Jeffrey; Wert, Leonard; Sykes, Marvin; Checkle, Melanie; RegionIII, Allegations; DeMiranda, Oscar; R2ORA\_EICSMailCenter Resource; Ninh, Son; Orf, Tracy; Kugler, Andrew; Starefos, Joelle; Whited, Ryan; Coffin, Stephanie  
**Subject:** <<< Complainants' Rebuttal Brief in Response to Respondent U.S. Nuclear Regulatory Commission  
**Attachments:** 2009-10-20 Complainant's Rebuttal Brief in Response to Res....pdf

Please see the attached PDF document related to the subject matter.

Kind regards,

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UNITED STATES DEPARTMENT OF LABOR  
BEFORE THE ADMINISTRATIVE REVIEW BOARD

*In the Matter of:*

ARB NO. 09-129

THOMAS SAPORITO and  
SAPORITO ENERGY CONSULTANTS,

ALJ NO. 2009-ERA-00006

DATE: 20 OCT 2009

Complainants,

v.

FLORIDA POWER AND LIGHT COMPANY,  
NEXTERA ENERGY RESOURCES, LLC,  
LEWIS HAY III, MITCHELL S. ROSS,  
ANTONIO FERNANDEZ, STEVEN HAMRICK, and  
U.S. NUCLEAR REGULATORY COMMISSION,

Respondents.

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COMPLAINANTS' REBUTTAL BRIEF IN RESPONSE TO  
RESPONDENT U.S. NUCLEAR REGULATORY COMMISSION

NOW COMES, Thomas Saporito and Saporito Energy Consultants (Complainants or Saporito or SEC) and hereby file *Complainants' Rebuttal Brief in Response to Respondent U.S. Nuclear Regulatory Commission* (NRC) and states as follows:

In a pleading dated October 8, 2009, Respondent NRC submitted *Respondent U.S. Nuclear Regulatory Commission Reply to Complainants' Initial Brief* (Brief). For the reasons stated below, the Administrative Review Board (ARB) should reject and deny NRC's Brief:

## BACKGROUND

On August 13, 2009, the ARB issued *Notice of Appeal and Order Establishing Briefing Schedule* (Order) in the instant action. In its Notice, the ARB clearly and specifically delineated in BOLD print its requirement that:

**"All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1 ¼ inch top and bottom margins, printed on 8 ½ by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted. If a party fails to file a brief that complies with the requirements of this briefing order, the Board may refuse to accept the brief, and if the brief is an initial brief, the Board may dismiss the appeal. See e.g., *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-6 (ARB Dec. 30, 2004).**

*Id.* at 2.

## LEGAL ARGUMENT

### I. NRC Failed to File an Initial Brief in Compliance With the ARB's Notice of Appeal and Order Establishing Briefing Schedule

The ARB's requirements for the filing of briefs by the parties in the instant action could not have been stated any clearer in their Order. However, despite the ARB's Order, NRC filed its Brief in blatant disregard of the dictates of the ARB.

First, NRC's Brief was apparently printed in an Ariel font and less than 12 point, 10 character-per-inch type as required

by the ARB's Order. The NRC's disregard for the ARB's filing requirements provided the NRC with an unwarranted advantage over pro se Complainants by allowing NRC to print more verbiage within the page limitation set-out in the ARB's Order.

Second, NRC's Brief contains footnotes which are apparently printed in an Ariel font and less than 12 point, 10 character-per-inch type as required by the ARB's Notice. Here again, NRC's blatant disregard for the dictates of the ARB's Order is egregious and provides NRC with an unwarranted advantage over pro se Complainants by allowing NRC to print more verbiage within the page limitation set-out in the ARB's Order.

Third, NRC's Brief does not have 1 ¼ inch margins at the top and bottom of each page as required by the ARB's Order. Once again, NRC's blatant violation of the ARB's Order provides NRC with an unwarranted advantage over pro se Complainants by allowing NRC to print more verbiage within the page limitation of the ARB's Order.

For these reasons alone, the ARB should (1) Refuse to accept NRC's Brief; and (2) Dismiss NRC's appeal in its entirety. See, *Mathhews v. LaBarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-56 (ARB Nov. 26, 2008). Notably, in *Mathhews*, the ALJ dismissed the complaint after the Complainant blatantly failed to comply with the ALJ's discovery orders and failed to

show cause why sanctions should not be imposed. The ARB found that the ALJ had given the Complainant adequate opportunity to comply with his orders, had given him two opportunities to show cause why he should not impose sanctions, and had warned the Complainant about the consequences of failing to comply with the discovery orders. Affirming the ALJ, the ARB wrote:

" . . . If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply. To hold otherwise would render the discovery process meaningless and vitiate an ALJ's duty to conclude cases fairly and expeditiously."

Slip op. at 3, quoting *Cynthia E. Aiken*, BSCA No. 92-06 (July 31, 1992) (footnotes omitted). Here, the NRC is a government agency staffed with experienced attorneys who are well-versed and trained in law. Thus, NRC's conduct in filing its Brief in blatant violation of the ARB's Order cannot be excused and the agency must be held accountable. See, e.g., *Power v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-6 (ARB Dec. 30, 2004); *Evans v. Miami Valley Hospital and CJ Systems Aviation Group, Inc.*, ARB Nos. 07-118, 07-121, ALJ No. 2006-AIR-22 (ARB Mar. 11, 2008). Notably, in *Evans*, the ARB agreed with the complainant that the brief demonstrated "outrageous disrespect to the Board and disregard for the integrity of the briefing

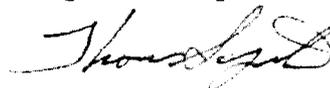
*process. It is cheating. It is quite obviously deliberate. It should not be overlooked or excused."*

In the instant action, NRC is represented by experienced, polished, professional legal counsel who fully understands the meaning of the ARB's Order regarding the scalable type, font, character size, and page margins which NRC was required to use in filing its Brief. Thus, NRC must be held accountable and must be sanctioned by the ARB in rejecting and dismissing NRC's Brief and appeal in the instant action.

#### CONCLUSION

FOR ALL THE ABOVE STATED REASONS, and as a matter of law, the ARB should reject the NRC's Brief and dismiss NRC's appeal in the above-captioned matter. To the extent that NRC's Brief fails to meet the filing requirements set-forth in the ARB's Order, NRC's Brief is deficient as a matter of law. Therefore, Complainants are not required to rebut the same.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that a copy of the foregoing document was provided on the 20<sup>th</sup> day of October, 2009, to:

Administrative Review Board  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Room S-5220  
Washington, D.C. 20210  
    {Original and Four-Copies}  
    {Sent via U.S. Mail}

Associate Solicitor  
Division of Fair Labor Standards  
U.S. Department of Labor  
Room N-2716, FPB  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
    {Sent via U.S. Mail}

Laura C. Zaccari  
Agency Representative  
Office of General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop OWFN-15-D-21  
11555 Rockville Pike  
Rockville, MD 20852  
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By: 

Received: from mail1.nrc.gov (148.184.176.41) by TWMS01.nrc.gov  
(148.184.200.145) with Microsoft SMTP Server id 8.1.393.1; Sun, 18 Oct 2009  
19:16:10 -0400

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X-SBRS: 4.5

X-MID: 7270713

X-IronPort-Anti-Spam-Filtered: true

X-IronPort-Anti-Spam-Result:

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Received: by qyk36 with SMTP id 36so2760624qyk.17 for <multiple  
recipients>; Sun, 18 Oct 2009 16:16:05 -0700 (PDT)

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MIME-Version: 1.0

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18 Oct 2009 16:16:04 -0700 (PDT)

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Subject: <<< Complainants' Rebuttal Brief in Response to Respondent U.S.

Nuclear Regulatory Commission

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Return-Path: saporito3@gmail.com