September 8, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040-COL
	)	52-041-COL
(Turkey Point Units 6 and 7)	)	
	)	ASLBP No. 10-903-02-COL
(Combined License)	)	

FLORIDA POWER & LIGHT COMPANY'S RESPONSE OPPOSING JOINT INTERVENORS' MOTION FOR LEAVE TO REPLY

INTRODUCTION

Applicant Florida Power & Light Company ("FPL") hereby responds in opposition to the Motion for Leave to Reply to Florida Power & Light Company's Response Opposing Request for Stay of Licensing Proceedings Pending Resolution of Rulemaking Petition ("Motion") filed on August 29, 2011 in the above-captioned combined license proceeding ("Turkey Point COL proceeding") by intervenors Mark Oncavage, Dan Kipnis, Southern Alliance for Clean Energy, and National Parks Conservation Association ("Joint Intervenors").

On August 11, 2011, Joint Intervenors filed with the Commission and in the adjudicatory docket of this proceeding a document entitled Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision ("Rulemaking Petition"). The Rulemaking Petition is part of an August 11, 2011 filing by Joint Intervenors and

other participants in pending licensing proceedings. That filing seeks admission of a contention (the "Contention") raising the alleged environmental implications of "Recommendations for Enhancing Reactor Safety in the 21st Century" (July 12, 2011) (the "Task Force Report"), a report by the NRC Task Force investigating the insights to be gained from the accident at the Fukushima Daiichi nuclear power station. *See* Joint Intervenors' Motion to Admit new Contention to Address the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-Ichi Accident (August 11, 2011).

The Rulemaking Petition includes a request that the Commission suspend the Turkey Point COL proceeding while it considers the Rulemaking Petition and the environmental issues raised in the Contention (the "Stay Request"). Rulemaking Petition at 1. On August 20, 2011, FPL filed a response opposing the Stay Request. Florida Power & Light Company's Response Opposing Request for Stay of Licensing Proceedings Pending Resolution of Rulemaking Petition ("Response").

The Joint Intervenors have now filed their Motion, seeking leave to reply to two points made in FPL's Response. They have attached to their Motion the reply that they ask the Commission to consider, a document entitled Joint Intervenors' Reply to FPL's Response Opposing Request for Stay of Licensing Proceedings Pending Resolution of Rulemaking Petition ("Proposed Reply").

The Commission's rules generally do not allow replies, and the Motion does not make the requisite showing of compelling circumstances necessary to overcome the

general prohibition against replies. Accordingly, the Motion should be denied and the Proposed Reply should be disregarded.

DISCUSSION

The Motion fails to meet the criteria for allowing the filing of replies to the answers to motions in Commission proceedings. 10 C.F.R. § 2.323(c) provides:

> (c) Answers to motions. Within ten (10) days after service of a written motion, or other period as determined by the Secretary, the Assistant Secretary, or the presiding officer, a party may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. *The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.*

10 C.F.R. § 2.323(c) (emphasis added).[1] Thus, the Commission Secretary or the presiding officer of the proceeding in question will deny a motion to file a reply unless the motion shows "compelling circumstances," such as a demonstration that the moving party could not "reasonably have anticipated the arguments" raised in the responses to which it wishes to reply.

The "compelling circumstances" standard is a rigorous one. As explained by the Commission in adopting the 2004 changes to the Rules of Practice,

---

[1] The Joint Intervenors disagree that the Stay Request should be treated as a motion under 10 C.F.R. § 2.323 because the Rulemaking Petition is not an adjudicatory matter. Motion at 2 n.1. However, there is nothing in Section 2.323 that prevents its applicability outside adjudicatory proceedings, and the Commission has invoked its supervisory powers over its proceedings to direct that petitions to the Commission to suspend proceedings be treated as motions under 10 C.F.R. § 2.323. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002); *see also AmerGen Energy Co., LLC, et al.* (Oyster Creek Nuclear Generating Station, *et al.*), unpublished Order (Jan. 11, 2008) at 1 (ADAMS Accession No. ML080110284).

> This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). Under the compelling circumstances standard, a reply to the answer to a motion would be permissible only if (1) "manifest injustice would occur" if a reply was not allowed, *and* (2) the matters set forth in the reply could not have been raised earlier. Neither situation exists here, nor are there any other "compelling circumstances" that warrant granting the Motion, and the Joint Petitioners have made no showing that there are any.

The first point which the Joint Intervenors seek to raise in their Proposed Reply is a clarification that in the Stay Request they do not request suspension of all aspects of the Turkey Point COL proceeding, but only seek to bar issuance of a COL for Turkey Point Units 6 and 7 until the Commission "has addressed the environmental concerns raised by" the Task Force Report. Proposed Reply at 1-2. However, the Stay Request is captioned "Request for *Suspension of Licensing Proceeding*" (Stay Request at 3, emphasis added), and it argues that "the NRC has a non-discretionary duty to *suspend the Turkey Point 6 & 7 licensing proceeding* while it considers the environmental impacts of that decision, including the environmental implications of the Task Force impacts of the Task Force Report with respect to severe reactor and spent fuel pool accidents." *Id.* at 3-4, emphasis added. Thus, the alleged "clarification" is refuted by the Stay Request itself. In addition, the distinction the Joint Intervenors seek to make in the Proposed Reply is of no consequence, because there is no practical difference between suspending "decisions" and suspending "proceedings." The Commission has treated a request to stay consideration of a

petition for review (i.e., a request to withhold a decision) as "at bottom" seeking a suspension of a proceeding. *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __, slip op. at 8-10 (July 8, 2010).[2]

The second point that Joint Petitioners seek to make is that, while they "agree with FPL that NRC regulations excusing license applicants and the NRC from addressing the environmental impacts of spent fuel storage during the reactor license term (*i.e.*, 10 C.F.R. Part 51 Appendix B and 10 C.F.R. §§ 51.45, 51.53, and 51.95) do not strictly apply to COL applications . . . it is incorrect for FPL to assert that the regulations are irrelevant. To the contrary, FPL appears to have relied on those regulations because its Environmental Report ("ER") for Turkey Point Units 6 and 7 completely fails to address the environmental impacts of spent fuel storage during the license term." Proposed Reply at 2.

This second aspect of the Proposed Reply seeks to correct deficiencies in the Stay Request by making new arguments under the guise of "correct[ing] the record." *Id.* at 1.[3] Commission case law, however, is crystal clear: a reply to an answer may *not* be used as a vehicle to raise new arguments or claims not found in the original motion, nor be used to

---

[2] Indeed, in an Emergency Petition to Suspend all Pending Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from the Fukushima Daiichi Nuclear Power Station Accident ("Emergency Petition") filed with the Commission by Joint Petitioners last April in the Turkey Point COL docket and by intervenors in over twenty other pending proceedings, the petitioners asked the Commission for the suspension of all licensing proceedings with respect to "any reactor-related or spent fuel pool-related issues that have been identified for investigation in the Task Force's Charter" and "with regard to any other issues that the Task Force subsequently may identify as significant in the course of its investigation." Emergency Petition at 2, 28. The Emergency Petition further asserts that licensing proceedings "*should be suspended* pending completion of the Task Force's investigation into those issues and the issuance of any proposed regulatory decisions and/or environmental analyses of those issues." Emergency Petition at 2, 28-29, emphasis added.

[3] In addition to making new arguments about FPL's ER, Joint Petitioners go further afield by making irrelevant references to the NRC *Staff's* practice in its Environmental Impact Statements ("EISs") in other COL proceedings, including the Vogtle Units 3 and 4 and Levy COL proceedings. Proposed Reply at 2. The EIS for the Turkey Point COL proceeding has yet to be issued.

cure the motion's deficiencies. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004), *reconsideration denied* CLI-04-35, 60 NRC 619 (2004); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 262 n.32 (2008); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 106 n.26 (2007). The second point sought to be made in the Proposed Reply violates the NRC rules and should be disregarded as well.

CONCLUSION

For the above stated reasons, the Commission should deny the Motion and disregard the Proposed Reply attached to it.

Respectfully submitted,

/Signed electronically by Matias F. Travieso-Diaz/

Mitchell S. Ross
James M. Petro, Jr.
FLORIDA POWER & LIGHT COMPANY
700 Universe Blvd.
Juno Beach, FL 33408
Telephone: 561-691-7126
Facsimile: 561-691-7135
E-mail: mitch.ross@fpl.com
James.petro@fpl.com

Steven Hamrick
FLORIDA POWER & LIGHT COMPANY
801 Pennsylvania Avenue, NW Suite 220
Washington, DC 20004
Telephone: 202-349-3496
Facsimile: 202-347-7076
E-mail: steven.hamrick@fpl.com

John H. O'Neill, Jr.
Matias F. Travieso-Diaz
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037-1128
Telephone: 202-663-8142
Facsimile: 202-663-8007
E-mail: john.o'neill@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com

September 8, 2011

Counsel for FLORIDA POWER & LIGHT COMPANY

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Florida Power & Light Company	)	Docket Nos. 52-040-COL
	)	52-041-COL
(Turkey Point Units 6 and 7)	)	
	)	ASLBP No. 10-903-02-COL
(Combined License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Florida Power & Light Company's Response Opposing Joint Intervenors' Motion for Leave to Reply" were provided to the Electronic Information Exchange for service to those individuals listed below and others on the service list in this proceeding, this 8th day of September, 2011.

Administrative Judge
E. Roy Hawkens, Esq., Chair
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Email: erh@nrc.gov

Administrative Judge
Dr. Michael Kennedy
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Email: michael.kennedy@nrc.gov

Administrative Judge
Dr. William Burnett
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Email: wxb2@nrc.gov

Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: OCAAMAIL@nrc.gov

Lawrence D. Sanders
Mindy Goldstein
Turner Environmental Law Clinic
Emory University School of Law
1301 Clifton Road
Atlanta, GA 30322
Email: Lawrence.Sanders@emory.edu
Email: magolds@emory.edu

Robert M. Weisman, Esq.
Sarah Price, Esq.
Patrick D. Moulding, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Robert.Weisman@nrc.gov
Sarah.Price@nrc.gov
Patrick.Moulding@nrc.gov

Gregory T. Stewart
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Florida 32308
E-mail: gstewart@)ngnlaw.com

Barry J. White
Authorized Representative
CASE/Citizens Allied for Safe Energy, Inc.
10001 SW 129 Terrace
Miami, Florida 33176
Email: bwtamia@bellsouth.net

Jason Totoiu
Everglades Law Center, Inc.
PO Box 2693
Winter Haven, FL 33883
Phone: (561) 568-6740
Email: Jason@evergladeslaw.org

Courtesy copies of the above referenced document were served electronically on:

Hon. Gregory B. Jaczko
Chairman
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001
chairman@nrc.gov

Hon. Kristine L. Svinicki
Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001
CMRSVINICKI@nrc.gov

Hon. George Apostolakis
Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001
CMRAPOSTOLAKIS@nrc.gov

Hon. William D. Magwood, IV
Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001
CMRMAGWOOD@nrc.gov

Hon. William C. Ostendorff
Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001
CMROSTENDORFF@nrc.gov

OGC Mail Center
E-mail: OGCMailCenter@nrc.gov

/Signed electronically by Matias F. Travieso-Diaz/

Matias F. Travieso-Diaz