December 21, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT COMPANY	)	Docket Nos. 50-250-LA
	)	50-251-LA
(Turkey Point Nuclear Generating,	)	
Units 3 and 4)	)	

NRC STAFF'S ANSWER TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS CASE CONTENTION 1 OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205(b), and the Atomic Safety and Licensing Board's ("Board") Orders,[1] the staff of Nuclear Regulatory Commission ("Staff") hereby files its answer in support of "Florida Power & Light Company's Motion to Dismiss Case Contention 1 or, In the Alternative, For Summary Disposition ("FPL's Motion")[2] regarding Florida Power & Light's ("FPL") license amendments for Turkey Point Nuclear Generating Units 3 and 4 ("Turkey Point").[3] As more fully set forth below, FPL has demonstrated that Contention 1 should be dismissed or in the alternative that there is no genuine issue as to any material fact and that

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[1] *See* Licensing Board Order (Initial Scheduling Order) (May 8, 2015) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15128A369) ("ISO"); ORDER (Granting in Part Extension for Summary Disposition Motions) (Nov. 19, 2015) (ADAMS Accession No. ML15323A028).

[2] *See* Florida Power & Light Company's Motion To Dismiss Case Contention 1 Or, In the Alternative, For Summary Disposition ("FPL's Motion") (Dec. 3, 2015). On December 13, 2015, Citizens Allied for Safe Energy ("CASE") filed its response to FPL's Motion. Citizens Allied For Safe Energy, Inc.'s Answer To FPL'S Motion To Dismiss CASE Contention 1 Or, In the Alternative, For Summary Disposition, and FPL'S Statement of Material Facts On Which No Genuine Dispute Exists ("CASE's Opposition") (Dec. 13, 2015). Notably absent from CASE's Opposition is any affidavit or testimony to support any of its claims regarding FPL's Motion.

[3] *See* Letter from Michael Kiley, FPL, to NRC, License Amendment Request No. 231, Application to Revise Technical Specifications to Revise Ultimate Heat Sink Temperature Limit (July 10, 2014) (ADAMS Accession No. ML14196A006).

FPL is entitled to judgment as a matter of law. Accordingly, FPL's Motion should be granted and Contention 1 should be dismissed.

BACKGROUND

A. Procedural History

This proceeding arose from the issuance of license amendments that raised the temperature limit in the Turkey Point Technical Specifications. The temperature limit is measured at the inlet to component cooling water heat exchangers from the ultimate heat sink ("UHS"). The amendments raised the temperature limit from 100 °F to 104 °F before the licensee would have to initiate shutdown actions. The amendments also increased the surveillance frequency for the component cooling water heat exchangers' performance tests, and made minor editorial changes for clarity. In response to the license amendment request, the Staff prepared an environmental assessment ("EA"), a biological assessment, a safety evaluation and a finding of no significant impact ("FONSI"). The Staff also consulted with the State of Florida ("State" or "Florida") and the U.S. Fish and Wildlife Service ("FWS") before issuing the license amendments.

Separate and independent from the NRC's approval, FPL sought and obtained permission from Florida to treat the cooling canal system ("CCS") for blue-green algae using a combination of copper sulfate, hydrogen peroxide, and a bio-stimulant. The State also approved Turkey Point's request to extract additional water from the Floridan aquifer and was reviewing a request to extract water from other sources for use in the CCS. Those requests to extract additional water are currently being litigated in administrative proceedings conducted by State agencies.[4]

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[4] Letter from Steven C. Hamrick, FPL, to Administrative Judges, Atomic Safety and Licensing Board (Oct. 9, 2015) at 1-2.

On October 14, 2014, CASE filed a timely petition to intervene in this matter, submitting four contentions for consideration by the Board. After hearing oral argument, the Board granted CASE's Petition, admitting a narrowed and reformulated version of CASE's Contention 1. As admitted by the Board, Contention 1 stated that:

> The NRC's environmental assessment, in support of its findings of no significant impact related to the 2014 Turkey Point Units 3 and 4 license amendments, does not adequately address the impact of increased temperature and salinity in the CCS on saltwater intrusion arising from (1) migration out of the CCS; and (2) withdrawal of fresh water from surrounding aquifers to mitigate conditions within the CCS.[5]

In narrowing the contention, the Board eliminated those areas where CASE alleged the omission of information that was, in fact, discussed in the EA.[6] In particular, the Board did not admit CASE's claims regarding the environmental impacts associated with the use of copper sulfate, and other chemicals, in the CCS.[7] Likewise, the Board did not admit CASE's radiological claims, finding them to be direct challenges to the 2012 extended power uprate ("EPU") license amendments. The Board also struck several arguments raised for the first time in CASE's reply.[8]

DISCUSSION

I. Legal Standards Governing Motions for Summary Disposition

Pursuant to 10 C.F.R. § 2.1205(a), motions for summary disposition must be in writing, must include a written explanation of the basis for the motion, and must include affidavits to support statements of fact. In ruling on a motion for summary disposition, the presiding officer is

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[5] *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 476 (2015).

[6] *Id.* at 478.

[7] *Id.*

[8] *Id.*

to apply the standards for summary disposition set forth in 10 C.F.R. § 2.710. *See* 10 C.F.R. § 2.1205(c). A moving party is entitled to summary disposition of a contention if the filings in the proceeding, together with the statements of the parties and the affidavits, demonstrate that there is no genuine issue as to any material fact and that it is entitled to a decision in its favor as matter of law.[9]

A party seeking summary disposition bears the burden of demonstrating that no genuine issue of material fact exists.[10] The evidence submitted must be construed in favor of the non-moving party.[11] Affidavits submitted in support of a summary disposition motion must be executed by individuals qualified by "knowledge, skill, experience, training, or education," and must be sufficiently grounded in facts.[12]

A party opposing a motion for summary disposition cannot rely on mere allegations or denials of the moving party's facts; rather, the non-moving party must set forth specific facts demonstrating a genuine issue of material fact.[13] Bare assertions and general denials, even by an expert, are insufficient to oppose a properly supported motion for summary disposition.[14] Although the burden is on the moving party to show there is no genuine issue of material fact,

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[9] *See* 10 C.F.R. §§ 2.1205 and 2. 710(d)(2); *see also Advanced Medical Sys., Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102-03 (1993); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 179-80 (2005).

[10] *See Sequoyah Fuels Corp. & General Atomics Corp.* (Gore, Okla. Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994).

[11] *Id.*

[12] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 80-81 (2005) (*citing* Fed. Rule of Evid., Rule 702); *Bragdon v. Abbott*, 524 U.S. 624, 653 (1998) (stating that an expert's opinion must have a traceable, analytical basis in objective fact before it may be considered on summary judgment).

[13] *See* 10 C.F.R. § 2.710(b); *Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102.

[14] *Duke Cogema*, LBP-05-04, 61 NRC at 81 (citing *Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981).

the non-moving party must controvert any material fact proffered by the moving party or that fact will be deemed admitted.[15]

For a Board to find the existence of a genuine issue of material fact, "the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue."[16] The adjudicating body need only consider the purported factual disputes that are "material" to the resolution of the issues raised in the summary disposition motion.[17] Material facts are those with the potential to affect the outcome of the case.[18]

In addition to demonstrating that no genuine issue of material fact exists, the movant must also demonstrate that it is entitled to the decision as a matter of law.[19]

II. Legal Standards Governing the Environmental Assessment

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq., requires the NRC to consider the environmental impacts of its licensing actions prior to issuing

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[15] *Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102-03.

[16] *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 NRC 218, 223 (1983).

[17] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Because the Commission's summary disposition rules follow Rule 56 of the Federal Rules of Civil Procedure, federal court decisions that interpret and apply Rule 56 are considered appropriate precedent for the Commission's rules. *See Safety Light Corp.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 449 n. 167 (1995). *See also Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102-03; *Duke Cogema Stone & Webster,* 61 NRC at 79.

[18] *Ganton Technologies Inc. v. National Indus. Group Pension Plan,* 865 F. Supp 201, 205 (S.D.N.Y 1994); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-18, 44 NRC 86, 99 (1996).

[19] *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

licenses.[20] NEPA does not mandate a specific outcome or the course of action.[21] Instead, NEPA imposes procedural requirements, including that an environmental impact statement ("EIS") be prepared for any action determined to be a major federal action significantly affecting the quality of the human environment.[22] For other actions, NEPA provides for less detailed analysis, including preparation of an EA or the use of a categorical exclusion. NEPA's procedural requirements are intended to foster informed decision-making and provide public disclosure of the relevant impacts.[23]

The NRC's regulations implementing NEPA are in 10 C.F.R. Part 51.[24] The NRC has previously determined that certain categories of actions do not individually or cumulatively have a significant effect on the human environment.[25] For these actions, the NRC has established categorical exclusions. If a proposed action meets the categorical exclusion requirements, no EIS or EA is prepared.[26] The NRC has also determined that certain actions require preparation of an EIS.[27] Thus, when considering a license application for these actions, the NRC will

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[20] *See, e.g., Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976))(stating that NEPA requires "only that the agency take a 'hard look' at the environmental consequences before taking a major action); *Sierra Club v. Army Corp of Engineers*, 446 F.3d 808, 815 (8th Cir. 2006)(same); *Louisiana Energy Services, L.P.* (Clairborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998)(same); *Hydro Resources, Inc*. (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-06-19, 64 NRC 53, 63-64 (2006)(same).

[21] *See, e.g., Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 23 (2008)(stating that "NEPA imposes only procedural requirements" and does not mandate any particular result).

[22] Section 102(2)(C); 10 C.F.R. § 51.20(a).

[23] See 40 C.F.R. § 1502.1. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-51 (1989).

[24] 10 C.F.R. Part 51, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.

[25] 10 C.F.R. § 51.22.

[26] 10 C.F.R. § 51.22(c). As explained in the Staff's testimony, similar actions to raise the allowable temperature of the UHS are normally processed as categorical exclusions.

[27] 10 C.F.R. § 51.20.

prepare an EIS which contains a detailed analysis of both the environmental impacts of the proposed action and alternatives to the proposed action, among other things. While the EIS must be detailed, it is not required to be perfect or complete.[28]

Finally, if an action is not listed as requiring an EIS or as covered by a categorical exclusion, the NRC prepares an EA.[29] An EA documents the NRC's determination of whether the action is a major federal action warranting preparation of an EIS. If the NRC determines the action will not have a significant impact on the environment, the Staff prepares a FONSI.[30] If the Staff determines that the proposed action will, or has the potential to, significantly affect the environment, the Staff either prepares an EIS or a mitigated FONSI. Thus, an EA is a short concise document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; aids an agency's compliance with NEPA when no EIS is necessary; and facilitates preparation of an EIS when one is necessary.[31] Importantly, an EA is not as detailed as an EIS.[32] Pursuant to 10 C.F.R. § 51.30(a), an EA must identify the proposed action and include:

> (1) A brief discussion of:
>
> (i) The need for the proposed action;
>
> (ii) Alternatives as required by section 102(2)(E) of NEPA;
>
> (iii) The environmental impacts of proposed action and alternatives as appropriate;

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[28] *See* 49 Fed. Reg. 9352, 9355 (discussing NEPA case law).

[29] 10 C.F.R. § 51.31.

[30] *See* 10 C.F.R. § 51.23. The FONSI must be prepared and published in accordance with the requirements in 10 C.F.R. §§ 51.32, 51.34, 51.35, and 51.119.

[31] *See* http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf (citing 40 C.F.R. 1508.9(a)).

[32] *See* 40 C.F.R. § 1501.3 (stating that an EA is expected to be brief and concise). *See Hammond v. Norton*, 370 F.Supp.2d 226 (2005), motion to amend denied 448 F.Supp.2d 114 (describing an EA as less-detailed than an EIS). *See also Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509, 514 (2008) (emphasizing the brief and concise nature of an EA).

and

(2) A list of agencies and persons consulted, and identification of sources used.

A FONSI is:

> a concise public document for which the Commission is responsible that briefly states the reasons why an action, not otherwise excluded, will not have a significant effect on the human environment and for which therefore an environmental impact statement will not be prepared.[33]

The Commission has explained that the requisite "hard look" at the environmental consequences mandated by NEPA[34] is subject to a "rule of reason," meaning that the assessment need not include every environmental effect that could potentially result from the action, but rather "may be limited to effects which are shown to have some likelihood of occurring."[35] Thus, the proper inquiry under this standard is not whether an effect is "theoretically possible," but rather whether it is "reasonably probable that situation will obtain."[36]

Thus, in considering the sufficiency of an EA, the court's review is limited to determining whether NEPA's procedural requirements have been met and whether the agency took a hard look at the environmental impacts of the proposed action.[37] In doing this review, courts should apply a rule of reason and should not engage in reviewing how the Staff's analysis would have been altered by information available after the decision.[38]

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[33] 10 C.F.R. § 51.14(a).

[34] *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998).

[35] *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978).

[36] *Id*. at 49.

[37] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

[38] *See NRDC v. Callaway*, 524 F.2d 79 (2d Cir.1975); *NRDC v. Morton*, 458 F.2d 827 (D.C.Cir.1972).

III. Intervenors' Contention 1 Does Not Raise a Genuine Dispute on a Material Issue that Requires Resolution at a Hearing

The Staff has carefully reviewed FPL's Motion, its statement of material facts, and the sworn testimony. After reviewing FPL's filings and as explained below, the Staff agrees that there is no genuine dispute with respect FPL's material facts and that Contention 1 may be resolved as a matter of law.[39] CASE's Opposition provides only bare assertions and general denials, and thus, is insufficient to survive summary disposition.[40] In addition, FPL's material facts should be deemed admitted because CASE failed to submit testimony or an affidavit challenging those facts. CASE should be precluded from presenting contrary evidence to the admitted facts.[41]

A. FPL's Motion Demonstrates That No Genuine Issue of Material Fact Exists Regarding Contention 1

The Staff has carefully reviewed the motion, list of material facts, and supporting testimony, and exhibits that form the basis of FPL's Motion, and agrees with FPL that no genuine disputes of material fact exist. FPL has listed 22 facts as not in dispute. The Staff, after reviewing all 22 facts, has determined that the statements contained in FPL's Statement of Material Facts are correct.[42]

CASE, however, does not provide even a general denial of FPL's Statement of Material

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[39] *See generally* Staff Response to FPL's Statement of Material Facts at 3 (December 18, 2015).

[40] *Duke Cogema*, LBP-05-04, 61 NRC at 81 (citing *Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981).

[41] *See Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102-03.

[42] With respect FPL's Material Fact 21, the staff's testimony reflects that the water diverted from the L-31 E canal would, if not diverted, reach the Biscayne Bay before eventually reaching the ocean. Staff Response to FPL'S Statement of Material Facts at 4.

Facts 1[43], 3, 6-8, 10-14, 16-17, and 20.[44] For the remaining 9 facts, CASE's opposition can be separated into four categories: (1) facts that CASE admits are complex but with respect to which CASE provides only Mr. White's arguments; (2) facts that CASE suggests should be addressed by expert witnesses or local authorities; (3) facts that CASE disputes based on Mr. White's arguments; and (4) facts that CASE disputes but are explicitly contradicted by the record. Mr. White is not an expert and admitted in the SOP that he is not qualified to discuss these issues. *See* Rebuttal SOP at 26. FPL's Material Facts 4, 9, 15, 18-19, 21-22 fall into categories (1), (2), and (3), and thus, CASE has not raised a genuine dispute on these facts. For Material Facts 2 and 5, CASE makes unsupported assertions that are contrary to the record: disputing the date of the license amendment and disputing whether the Biological Assessment was meant to support the Staff's EA. Neither of these are genuine disputes with the material facts. Therefore, the Staff has concluded that no genuine dispute of material fact exists with respect to Contention 1 and Contention 1 may be resolved as a matter of law.

B. FPL is Entitled to a Judgment as a Matter of Law

FPL's Motion argues that Contention 1 should be resolved in favor of FPL because CASE has offered no evidence from qualified experts that the Staff's FONSI was incorrect or failed to address some aspect of saltwater intrusion in a reasonable manner.[45] CASE has not provided any additional information in its opposition to FPL's Motion. After considerable opportunity to present its case, CASE failed to obtain any probative testimony supporting its arguments or challenging FPL's Statement of Material Facts.[46] Thus, a hearing is unnecessary.

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[43] For ease of reference, the Staff will generally refer to particular facts in FPL's Statement of Material Facts as "Material Fact X," where X represents the paragraph number.

[44] These facts are thus admitted and CASE is precluded from submitting evidence contrary to its admission. *See Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102-03.

[45] FPL's Motion at 9.

[46] "[A] party sponsoring a contention bears the burden of going forward with evidence sufficient to show that there is a material issue of fact or law, such that the applicant/proponent must meet its burden

1. CASE Admitted that the License Amendment Had No Noticeable Impact on the CCS or the Surrounding Aquifers

The crux of Contention 1 as admitted by the Board is that a 4 °F increase in temperature in the CCS could impact saltwater intrusion in the surrounding aquifers.[47] Material Fact 8 stated: "The ultimate heat sink license amendment has not resulted in a noticeable effect in the surrounding aquifers." CASE provided no response and did not dispute this conclusion. This conclusion is entirely consistent with the Staff's FONSI. CASE also did not dispute Material Facts 6 and 7. Those facts concluded that the license amendment did not result in a significant change to the temperature or salinity of the CCS. The CCS prior to the license amendment and after the license amendment were essentially the same with respect to these key parameters. With no appreciable change to the CCS system, it is not reasonable to conclude that saltwater intrusion would be appreciably impacted. Thus, summary disposition should be granted in FPL's favor.

2. The Aquifers Underlying Turkey Point Have Been Established to be Brackish Water and Saltwater Sources

In determining that CASE established standing, the Board relied on the alleged injury "related to the use of freshwater aquifer resources and any resulting potential for increased saltwater intrusion."[48] It is undisputed that the aquifers located below the Turkey Point site do

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of proof. Where cross-examination is not permitted, each party must bear its burden by going forward with affirmative evidentiary presentations and testimony, its rebuttal evidence and rebuttal testimony, and well-developed questions that the party suggests the presiding officer pose to the witnesses. Thus, the responsibility for developing an adequate record for decision is on the parties, not the presiding officer. The presiding officer is responsible for overseeing the compilation of the record and for ensuring that the record is sufficiently clear and understandable to the presiding officer such that he or she can reach an initial decision. However, the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2213 (Jan. 14, 2004).

[47] LBP-15-13, 81 NRC at 476.

[48] LBP-15-13, 81 NRC at 466.

not contain freshwater.[49] In Material Fact 13, FPL and Staff agree that the Upper Floridan Aquifer is brackish. CASE provided no response to this fact. In Material Fact 17, FPL and Staff also agree that the Biscayne Aquifer in the vicinity of Turkey Point is saltwater. Again, CASE provide no response. These facts have been deemed admitted by CASE.[50] Thus, there is no basis to conclude that CASE's members would be harmed from the aquifer withdrawals of brackish water and saltwater. As discussed above, CASE similarly admitted that the license amendments had no appreciable impact on the surrounding aquifers. No harm could occur to CASE's members from these license amendments. Thus, summary disposition should be granted in FPL's favor.

CONCLUSION

For the reasons discussed above, summary disposition should be granted in FPL's favor.

Respectfully submitted,

Signed (electronically) by

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[49] Staff Response to FPL's Statement of Material Facts at 3 (December 18, 2015).

[50] *Advanced Medical Sys.*, CLI-93-22, 38 NRC at 102-03

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS CASE CONTENTION 1OR, IN THE ALTERNATIVE, FOR SUMMARY DISPOSITION" and "THE STAFF'S RESPONSE TO FPL'S STATEMENT OF MATERIAL FACTS" in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 21st day of December, 2015.

/Signed (electronically) by/
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