March 7, 2016

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 MOTION IN RESPONSE TO THE BOARD'S ORDER
(TAKING OFFICIAL NOTICE AND ORDERING BRIEFING)

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("Board") Order,[1] the staff of the Nuclear Regulatory Commission ("Staff") hereby files its motion in response to the Board's Order.[2] As more fully set forth below, the Staff does not object to the Board taking official notice that the non-final and non-binding Recommended Order was issued or exists, but does object to the Board taking official notice of the Recommended Order's facts and conclusions in the matter challenging the Administrative Order issued by the Florida Department of Environmental Protection ("DEP") to Florida Power and Light Company ("FPL").[3] Accordingly, the Staff moves that the Board (1) clarify that the recited facts and conclusions of law in the Recommended Order are not part of the record and (2) clarify that the parties may not address any particular facts or conclusions of law recited by the Recommended Order in their proposed findings of fact

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[1] Order (Taking Official Notice and Ordering Briefing) ("Order") (Feb. 26, 2016).

[2] The Order provides an opportunity for the parties to file a motion "seeking to controvert the new state order …." *Id.* at 1.

[3] *See id*. at 1-2 (stating that the Recommended Order "appears to call into question several critical assumptions in both the Environmental Assessment and the parties' testimony regarding the timing, effectiveness, and validity of state-mandated mitigation measures.").

and conclusions of law. The recited facts and conclusions of law are not properly subject to official notice.

BACKGROUND

A. Procedural History

This proceeding arose from the issuance of license amendments that raised an ultimate heat sink ("UHS") temperature limit in the Turkey Point Units 3 and 4 Technical Specifications. The temperature limit is measured at the inlet to component cooling water heat exchangers from the 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]

On January 11-12, 2016, the Board held an evidentiary hearing on the single admitted contention. After granting-in-part and denying-in-part the parties proposed transcript corrections, the Board closed the evidentiary record on February 17, 2016.[7] On the same day and after the Board had closed the record, FPL notified the Board that an Administrative Law Judge had issued the Recommended Order. Without reopening the record, "[t]he Board [took] official notice of this [Recommended Order] as an official record in a state administrative proceedings" on February 26, 2016.[8] The Board also directed the parties (1) seeking "to controvert the new state order [to] do so by written motion within 10 days" and (2) "to address the significance of this state order in their proposed findings of facts and conclusions of law."[9]

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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] Order (Adopting Transcript Corrections and Closing Evidentiary Record) at 2 (Feb. 17, 2016).

[8] *Id.* at 1.

[9] *Id.*

DISCUSSION

I. Legal Standards

A. Legal Standards Governing Official Notice

The Commission's regulations state that:

> [T]he presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

10 C.F.R. § 2.337(f)(1). Rule 201 of the Federal Rules of Evidence limit the ability of a court to take judicial notice. Rule 201 states:

> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
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> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

FRE 201(b) (emphasis added). The courts have built important limitations into the use of judicial notice.[10] The Court of Appeals, in various circuits, have consistently indicated that it is

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[10] *See U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (explaining that "a court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation"); *Western Radio Servs. Co. v. Qwest Corp*, 530 F.3d 1186, 1192 n. 4 (9th Cir. 2008) (taking judicial notice only of the existence of an order); *King v. Kramer*, 763 F.3d 635, 649-50 (7th Cir. 2014) (affirming a district court's refusal to take judicial notice because the issue was disputed); *General Electric Capital Corp v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) (emphasizing indisputability as prerequisite for judicial notice); *Vestavia Plaza LLC v. City of Vestavia Hills*, No. 2:11-cv-4125-TMP, 2013 WL 4804196, at *2 (N.D. Ala. 2013) (emphasizing that the court could not take notice of public documents for the purpose of establishing the truthfulness of recited facts); *MVM Inc. v. Rodriguez*, 568 F. Supp.2d 158, 163-65 (D. Puerto Rico 2008) (noting that courts cannot take judicial notice of findings of fact contained in another court's order); *Scott Timber Co. v. United States*, No. 05-708C, 2008 WL 4725447, at *1 (Fed. Cl. 2008) (unpublished) (noting that taking judicial notice of the facts would amount to issue preclusion and that facts are not capable of accurate and ready determination). *But compare Transmission Agency of Northern California v. Sierra Pacific Power Co.,* 295 F.3d 918, 924 n.3 (9th Cir. 2002) (taking judicial notice of facts in an order because the

inappropriate for a court to take judicial notice of facts contained in an order or administrative proceeding.[11] The courts have repeatedly warned that judicial notice should be reserved for issues that are not subject to reasonable dispute.[12] While it can be appropriate to take judicial notice of another proceeding or the fact that an order was issued in another proceeding, it would be contrary to the 2.337(f)(1), Rule 201 of the Federal Rules of Evidence, and well established precedent to use the order for official notice of the truth of the facts recited therein.[13]

B. Legal Standards Governing Re-Opening

The Commission has stated that introduction of new evidence or new contentions after the record has been closed should "address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing."[14] Section 2.326(a) of the Commission's regulations states that a motion to reopen will not be granted unless the following criteria are satisfied:

> (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

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existence of the opinion and facts were not in dispute); *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.29 1239, 1242-43 (11th Cir. 1991) (taking judicial notice of public meeting minutes previously filed by the parties in the same proceeding). In *Cash Inn of Dade, Inc.*, the court provide several overlapping reasons for taking judicial notice. The court concluded that judicial notice was reasonable there because (1) an economic regulation could be upheld for any conceivable motivation and an "accurate record is irrelevant"; (2) any otherwise admissible evidence could be used for the purpose of the summary judgement motion before the district court; and (3) the defendant had already introduced the record as an exhibit during the hearing on plaintiff's motion for a preliminary injunction. *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.29 1239, 1242-43 (11th Cir. 1991). In other words, the meeting minutes were already part of the record before the district court. *Id.*

[11] *U.S. v. Jones*, 29 F.3d at 1553; *Western Radio Servs. Co. v. Qwest Corp*, 530 F.3d at 1192 n. 4; *King v. Kramer*, 763 F.3d at 649-50; *see also Union Elec. Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 349 (1983) (stating that interested parties must have an opportunity to respond to crucial facts).

[12] *See General Electric Capital Corp v. Lease Resolution Corp.*, 128 F.3d at 1081; *MVM Inc. v. Rodriguez*, 568 F. Supp.2d at 163-65.

[13] *See, e.g., U.S. v. Jones*, 29 F.3d at 1553.

[14] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009).

> (2) The motion must address a significant safety or environmental issue; and
>
> (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.326(a). While the reopening standards are not applied as rigorously to the Board acting *sua sponte*, and the Board has broader responsibilities than the parties, the significance of the issue being raised by the new information and the burden being imposed on the parties should guide any decision by the Board to reopen the record to take into account facts contained in the Recommended Order for the purpose of altering previously filed and admitted testimony.[15] The Staff recognizes that the Board is guided primarily by its responsibility to make sure that the record is sufficient for review.[16] Here, the record is sufficient for review without the Recommended Order because the issue of the efficacy and performance of the State's actions to monitor saltwater intrusion has been adequately raised by intervenors.

The Recommended Order is not final and not binding on the Florida DEP. Under Florida Stat. 120.57(1), the Florida DEP may reject the conclusions of law and findings of fact, if it states the reasons with particularity and explains why the Recommended Order was not based upon competent substantial evidence.[17] Unless the Florida DEP chooses to adopt the Recommended Order, it has no legal effect.[18]

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[15] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-2, 78 NRC 83, 84-85 (1978). However, there is a paucity of *sua sponte* actions by Boards to reopen the record.

[16] *Id.*

[17] Florida Stat. 120.57(1). Under Florida Stat 120.569(l), Florida DEP has 90 days to make its final order. Florida Stat. 120.569(l).

[18] Florida Stat. 120.57(1).

II. Taking Official Notice of the Facts Recited in the Recommended Order is Contrary to the Commission Regulations and Federal Law

The Board's Order does not specify as whether any particular fact recited in the Recommend Order is encompassed by the taking of official notice, but it does direct the parties to address how the Recommended Order impacts the testimony provided by the parties in this proceeding.[19] The Order states:

> [T]his recent order appears to call into question several critical assumptions in both the Environmental Assessment and the parties' testimony regarding the timing, effectiveness, and validity of state-mandated mitigation measures. The parties should address how, if at all, this order changes: (1) the parties' testimony with respect to the likelihood and potential outcomes resulting from vacating the previously state-mandated salinity mitigation measures, and (2) the Environmental Assessment's conclusion that the state mitigation measures will reduce salinity in the cooling canal system and help moderate water temperatures.

Order at 2 (internal footnotes omitted). The Board's Order appears to take official notice of unspecified facts and conclusions in the Recommended Order that, in the Board's opinion, may contradict or undermine the testimony of the parties. *Id.* Taking official notice of the facts in the Recommended Order is contrary to well-established case law as issues that the courts of the United States may take judicial notice.[20] With the exception that an Administrative Law Judge issued a non-final and non-binding Recommended Order and that a State proceeding remains on-going, the facts and conclusions recited by the Recommended Order are subject to a reasonable dispute.[21] Since the facts recited in the Recommended Order are in dispute, official notice of the Recommended Order, including official notice of its recited facts. Furthermore,

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[19] Order at 2.

[20] *See U.S. v. Jones*, 29 F.3d at 1553 (reversing district courts judicial notice of facts recited in separate proceeding); *Western Radio Servs. Co. v. Qwest Corp*, 530 F.3d at 1192 n. 4 (taking judicial notice only of the existence of an order).

[21] *See, e.g., Vestavia Plaza LLC v. City of Vestavia Hills*, No. 2:11-cv-4125-TMP, 2013 WL 4804196, at *2 (N.D. Ala. 2013) (emphasizing that the court could only take notice of public documents for the purpose of whether they exist but not for their truthfulness).

requesting the parties to address how those "facts" would change the parties testimony is not in accordance with the law.[22] Since the record remains closed, any party addressing how their testimony would change in light of the Recommended Order does not have the effect of changing testimony such that it would be available to form the basis of any decision. The decision can only be based on facts that are on the record. Therefore, the Board should clarify that official notice of the Recommended Order does not include notice of any of the recited facts or conclusions of law and the parties should only address any legal effect resulting from the Recommended Order.

III. The Board's Order Does Not Provide a Reasonable Opportunity to Controvert Crucial Facts

First, the Board's Order taking official notice of the Recommended Order does not re-open the record. As the record remains closed, the parties are precluded from submitting additional evidence with respect to the Board's Order. The Board's opportunity to controvert the Recommended Order does not provide parties an effective chance to respond to any crucial facts.[23] Thus, the Board could not rely on any evidence presented by the parties with respect to the Recommended Order in making a decision on Contention 1. The Board specified that such action be done by written motion within a brevity of ten days. While Staff maintains its objection to official notice of the recited facts in Recommended Order, if the record was reopened, the Staff would have proffered testimony from qualified experts on the Recommended Order. With a reopened record, the Staff's testimony would have explained most of the information in the Recommended Order was not available to the Staff because it appears to have been derived from Atlantic Civil, Inc., a private corporation. The Staff would have indicated that the

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[22] *See* 10 C.F.R. § 2.337(f)(1). Further, the regulation specifies that "each fact" must be specified in the record with particularity, and it is unclear which, if any, facts specified in the Recommended Order itself are subject to official notice.

[23] *Union Elec. Co.* (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 349 (1983) (citing *Carson Products Co. v. Califano*, 594 F.2d 453, 459 (5th Cir. 1979).

Recommended Order appears to be based on incorrect conclusions and is at odds with Florida DEP Administrative Order and the record before the Administrative Law Judge. While the Staff acknowledge in its prefiled testimony and at the evidentiary hearing that the cooling canal system contributes to the saline plume, many other parties and actions by the public contribute to the behavior of the saline plume including water withdrawals by the public for drinking water, agricultural use, and mining among others. NRC Staff Testimony of Audrey L. Klett, Briana A. Grange, William Ford, and Nicholas P. Hobbs Concerning Contention 1 ("Staff's Prefiled Testimony"), Exhibit ("Ex.") NRC-001, at 23-24, 48. Given the opportunity to examine the studies presented in state proceeding, the Staff would potentially address the reliability and validity of the methods used to develop the information and any limitations in the analysis. Finally, the Staff would address the distinct difference in the focus between the two proceedings. In the State proceeding, the focus was on the overall impact of continued operation of the CCS. While the proceeding before the Board centers on the incremental changes resulting from a license amendment that allows the CCS to operate at a slightly increased temperature, that would only occur for short durations at limited times during a year, if at all. Staff's Prefiled Testimony, Ex. NRC-001, at 45, 50-52. Thus, the Staff would be greatly prejudiced without an opportunity to meaningfully counter the facts in the Recommended Order.

IV. The Recommended Order Does Not Provide a Basis for reopening the Record

Even if rebuttal testimony would be entertained, thereby allowing for a meaningful opportunity to controvert the facts in the order, the Recommended Order does not satisfy any of the requirements for re-opening a closed record or supplement an otherwise inadequate record. The Recommended Order does not raise a significant safety issue or even an issue that had not already been raised by the intervenor.[24] The specific issue that Board directed the parties to

[24] 10 C.F.R. § 2.326(a); *see also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 291-93 (2009).

address (i.e. State of Florida agencies are not performing their responsibility to monitor and protect the environment and aquifers) have been adequately raised by intervenor during this proceeding.[25] As such, the Recommended Order is not necessary to developing a sufficient record for review.

The recited facts in the Recommended Order are related to the disputed issue that has been a central subject of intervenor's Contention 1. Intervenor has had ample opportunity to present evidence on this issue in its pre-filed testimony and Intervenor did not proffer the testimony of a qualified expert on the subject of the contention.[26] Intervenor chose to forgo that opportunity by failing to retain a qualified expert on the subject of the contention.

By failing to dispute many of the statements of material facts in its response to FPL's Motion for Summary Disposition, those facts have been deemed admitted by the intervenor.[27] Thus, it would be improper for intervenor to present any evidence contrary to those admissions even if the record was re-opened.[28] Intervenor admitted that the ultimate heat sink license amendment has not resulted (1) in a noticeable effect in the surrounding aquifers; (2) in a significant change in temperature to the CCS; or (3) in a significant change in salinity to the CCS.[29] In light of these admissions, the existence of the Recommended Order is insignificant and would not add information necessary for a complete record on review.

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[25] *See, e.g.,* Citizens Allied For Safe Energy Initial Statement Of Position, Testimony, Affidavits And Exhibits (For January, 2015 Evidentiary Hearing), Ex. INT-000-00-BD01, at 27-30.

[26] *Pub. Serv. Co. of N.H*. (Seabrook Station, Units 1 & 2), LBP-89-32, 30 NRC 375, 525, 549 (1989) (declining to take official notice of state law).

[27] *Advanced Medical Sys., Inc.* (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102-03 (1993).

[28] *Id*.

[29] See NRC Staff's Answer To Florida Power & Light Company's Motion To Dismiss CASE Contention 1 Or, In The Alternative, For Summary Disposition, at 11 (Dec. 21, 2015) (discussing CASE's response to Material Facts 6, 7, and 8).

CONCLUSION

While the Staff does not object to the Board taking official notice of the existence of the non-final and non-binding Recommended Order, the Staff does object to taking official notice of the recited facts and conclusions of law in the Recommended Order and the request to address these recited facts as they relate to the parties testimony in the proposed findings of fact and conclusions of law. The Recommended Order's recited facts and conclusions of law are not the type of information that the courts of the United States take judicial notice. Because the non-final and non-binding Recommended Order does not raise a significant environmental issue and is not necessary for developing a sufficient record for review, there is no reason to request the parties to address the Recommended Order in their proposed findings of fact and conclusions of law.

The Board should therefore grant the Staff's Motion and (1) clarify that it is only taking official notice of the existence of the Recommended Order and (2) clarify that the parties should limit any discussion of the Recommended Order to the legal effect of the Recommended Order.

Respectfully submitted,

Signed (electronically) by

_____

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CERTIFICATION OF COUNSEL

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful. Counsel for FPL indicated that FPL supports the motion. Mr. White, representative for CASE, indicated that CASE would oppose the motion and "would oppose the action if it will delay the final due date for Proposed Findings of Facts and Conclusions of Law beyond March 28, 2016."

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 7th day of March 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S MOTION IN RESPONSE TO THE BOARD'S ORDER (TAKING OFFICIAL NOTICE AND ORDERING BRIEFING)" in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 7th day of March, 2016.

/Signed (electronically) by/
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