

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Florida Power & Light Company)	Docket No. 50-250-LA
)	50-251-LA
(Turkey Point Units 3 and 4))	
)	ASLBP No. 15-935-02-LA-BD01

**FLORIDA POWER & LIGHT COMPANY’S MOTION TO CONTROVERT
OFFICALLY NOTICED RECOMMENDED ORDER**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323(a) and (e), 2.337(f), and the Licensing Board’s (“Board”) Order dated February 26, 2016, Florida Power & Light Company (“FPL”) files this motion in response to the Board’s Order taking official notice of a Recommended Order issued by the Florida Division of Administrative Hearings.¹ The Board’s order directed parties wishing to controvert the Recommended Order to do by motion so within ten days. As discussed below, FPL controverts the Recommended Order, to the extent it is used as evidence in this proceeding.

II. BACKGROUND

This case involves the Nuclear Regulatory Commission (“NRC”)’s Environmental Assessment for an amendment to FPL’s operating license for Turkey Point Units 3 and 4 to change the maximum allowed ultimate heat sink temperature from 100°F to 104°F. The ultimate heat sink at Turkey Point is the Cooling Canal System (“CCS”). The NRC’s Environmental Assessment concluded that this change would not have a significant environmental impact and specifically would not have a significant impact on groundwater quality.

¹ Order (Taking Official Notice and Ordering Briefing) (“Order”) (Feb 26, 2016).

The Recommended Order of which the Board took official notice is part of a separate regulatory proceeding in the state of Florida. In 2013, the South Florida Water Management District (“SFWMD”) concluded that water from the CCS at Turkey Point had migrated outside the geographic boundaries of the CCS and so it initiated consultation with FPL and FDEP in accordance with the terms of the Fifth Supplemental Agreement between the SFWMD and FPL.² This consultation also included the Florida Department of Environmental Protection (“FDEP”), enforcing certain Conditions of Certification for the Turkey Point site. Following the consultation, the FDEP issued an Administrative Order in December 2014, which concluded that “saline water from the CCS has moved westward of the L-31E Canal in excess of those amounts that would have occurred without the existence of the CCS.”³ FDEP, “recognizing that all contributing factors affecting groundwater movement in the South Miami-Dade County region (including the saltwater migration to the west of the CCS) have not been fully established,” determined that the CCS is “one of the contributing factors in the western migration of CCS saline water.”⁴ Accordingly, the FDEP issued the Administrative Order to help prevent further harm to the waters of the State.⁵ The Administrative Order requires FPL to “reduce and maintain the average annual salinity of the CCS at a practical salinity of 34” within four years.⁶

FPL did not challenge FDEP’s Administrative Order, but it was challenged by several third parties, who raised procedural challenges and argued that the Administrative Order was insufficient to address the migration of hypersaline waters outside the CCS.⁷ An administrative hearing was held in November 2015.⁸ The Administrative Law Judge (“ALJ”) assigned to that

² FPL Panel Testimony (Exhibit FPL-001) at A59; Exhibit FPL-026 (SFWMD Consultation Letter).

³ *Id.* at A59-60; FDEP Administrative Order (Exhibit INT-004) at ¶24.

⁴ INT-004 at ¶25.

⁵ *Id.* at ¶25.

⁶ *Id.* at ¶37.a.; ¶37.b.; FPL-001 at 37, A60.

⁷ FPL-001 at 37, A61

⁸ *Id.*

case issued a Recommended Order on February 15, 2016. The ALJ's Recommended Order found several infirmities with the Administrative Order and recommended that the FDEP either rescind or amend it.

The Recommended Order, on its face, is not a final decision. It is a recommendation to the FDEP. As it states:

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.⁹

Under Florida law, the Secretary of FDEP will consider both the Recommended Order and any exceptions filed by the parties before entering a final order.¹⁰ Florida law provides that an agency may reject or modify findings of fact in a Recommended Order if it first determines that: (1) "the findings of fact were not based upon competent substantial evidence" or (2) "the proceedings on which the findings were based did not comply with essential requirements of law."¹¹ As to conclusions of law, "the agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction."¹²

The Board closed the evidentiary record in this proceeding on February 17, 2016. That same day, FPL provided notice to the Board of the ALJ's Recommended Order. FPL did not provide the Board with a copy of the Recommended Order because the Board had closed the record.¹³ Without a motion from any party, the Board sought out a copy of the Recommended

⁹ INT-004 at 34.

¹⁰ §§ 120.57(1)(b), (k) Fla. Stat.; Rule 28-106.217, Fla. Admin. Code.

¹¹ § 120.57(1)(l), Fla. Stat.

¹² *Id.*

¹³ To ensure CASE had an opportunity to request reopening the record, FPL provided copies of the Recommended Order to both CASE's representative and the NRC Staff concurrent with its Board notification. CASE did not request to reopen the record.

Order and officially noticed it, *sua sponte*. FPL hereby controverts the Recommended Order, to the extent it is used as evidence in this proceeding.

III. MOTION TO CONTROVERT THE OFFICIALLY NOTICED RECOMMENDED ORDER AS EVIDENCE IN THIS PROCEEDING

The Commission's rules for official notice state that:

The Commission or the presiding officer may take official notice (1) of any fact of which a court of the United States may take judicial notice or (2) of any technical or scientific fact within the knowledge of the Commission as an expert body.¹⁴

The Board's Order referenced the first basis for official notice, based on the practice in federal courts. Rule 201 of the Federal Rules of Evidence establishes the kinds of facts of which a court of the United States, and therefore the Board, may take judicial notice. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.¹⁵ The Board's invocation of official notice in this instance appears to rest upon the second of these bases, using the Recommended Order as a "source whose accuracy cannot reasonably be questioned."

Because the effect of taking judicial notice is to preclude a party from introducing contrary evidence and in effect, directing a verdict against it as to the fact noticed, the fact must be one that no reasonable person would dispute.¹⁶ Thus, a "court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings."¹⁷ And a court may take notice of another court's order only for the limited purpose of recognizing the "judicial act" that the

¹⁴ 10 C.F.R. § 2.337(f)(1).

¹⁵ Fed. R. Evid. 201(b).

¹⁶ *U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (citing C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5104 at 485 (1977 & Supp.1994)).

¹⁷ *Id.* (citing *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir.1992)) (internal quotations omitted).

order represents or the subject matter of the litigation.¹⁸ FPL would not object to the Board taking official notice of the mere fact that the Recommended Order had been issued, while acknowledging it as a single step in a multi-stage process with no independent legal significance.¹⁹

But the Board's Order appears to reflect a decision to take official notice as though the findings and conclusions of the Recommended Order do have independent legal significance. The Board stated that the Recommended Order "called 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."²⁰ For the reasons outlined in the previous paragraph, official notice of the findings of fact in another proceeding should not be used to call into question any testimony in this proceeding. And while the Board may take official notice of the Recommended Order's existence, its conclusions are not sufficiently final for that to be meaningful. Its own title—Recommended Order—disclaims any independent legal significance and indicates that its conclusions are dependent upon later ratification by the FDEP. The FDEP will either agree with the ALJ's Recommended Order, reject it, or some combination of the two. Only at that point could the resolution of the challenge to the Recommended Order be said to call into question any testimony.

¹⁸ *Id.* (citing *United States v. Garland*, 991 F.2d 328, 332 (6th Cir.1993); *Colonial Leasing Co. v. Logistics Control Group Int'l*, 762 F.2d 454, 459 (5th Cir.1985); and *St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172–73 (10th Cir.1979)).

¹⁹ FPL has provided the Board and parties with two previous Recommended Order in CCS-related cases, the first involving the challenge to FPL's L-31 E canal withdrawals, and the second involving the Site Certification Modification to allow the installation and operation of Upper Floridan Aquifer wells. At the direction of the Board, FPL made the L-31 Order Exhibit FPL-037. No party objected to the admission of Exhibit FPL-037. The Site Certification Modification Order, which also post-dated the evidentiary hearing in this case, was neither an exhibit, nor officially noticed.

²⁰ Order at 2.

Further, both FPL and the FDEP recently filed exceptions to the ALJ's Recommended Order, identifying significant factual errors and incorrect conclusions of law.²¹ For instance, these parties have taken exception to the Recommended Order's conclusion that the Administrative Order improperly restricts FPL from bringing average CCS salinity below 34 PSU.²² But as the exceptions of FPL and the FDEP point out, the Administrative Order specifically requires the average annual salinity in the CCS to be reduced "to or below a practical salinity of 34."²³ The exceptions also challenge other findings of the Recommended Order, including the claim that "Respondents made no effort to show how any factor other than the CCS is currently contributing to the *continuing* westward movement of the saline water interface in this area of the County."²⁴ As is explained in FPL's exceptions, the testimony in that case specifically identified numerous causes for ongoing saltwater intrusion in addition to the operation of the CCS.²⁵ The unrebutted expert testimony before the Licensing Board in this proceeding regarding the relative contribution of the CCS to the westward movement of salt water has been similar.²⁶ Both FPL and the FDEP also take exception to the ALJ's characterization of the authority under which the FDEP issued the Administrative Order. Ultimately, it will be up to FDEP itself to determine whether the Administrative Order represents a proper exercise of its authority.

For the foregoing reasons, FPL controverts the ALJ's Recommended Order to the extent it is relied upon as a final order with independent legal significance and to the extent it reflects

²¹ FPL's Exceptions to the Recommended Order, OGC Case No. 14-0471 (Mar. 1, 2016); Florida Department of Environmental Protection's Exceptions to Recommended Order, OGC Case No. 14-0471 (Mar. 1, 2016).

²² See Recommended Order at ¶ 94, 95.

²³ See INT-004 at ¶ 42. See also *id.* at ¶ 43 ("Thereafter, FPL shall continue to maintain the average annual salinity of the CCS at or below a practical salinity of 34 so long as the CCS is in operation").

²⁴ See Recommended Order at ¶ 34 (emphasis in original).

²⁵ As the record is closed in this proceeding, FPL has not attached the FPL and FDEP Exceptions to the Recommended Order. Were the record to be reopened, these documents would prove useful in evaluating the factual merits of the Recommended Order.

²⁶ See FPL-001 at 34 (A55), 36 (A58).

factual and legal conclusions. FPL has no objection to the Board taking official notice of the non-final “judicial act” of the Recommended Order.

IV. CERTIFICATION

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. The NRC Staff does not oppose the motion. FPL supports the NRC Staff’s motion filed today.

Respectfully Submitted,

Signed (electronically) by Steven Hamrick

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Florida Power & Light Company’s Motion to Controvert Officially Noticed Recommended Order,” were provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding.

Signed (electronically) by,

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Dated at Washington, DC
this 7th day of March, 2016