UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT CO.	)	Docket No. 50-250-LA
	)	50-251-LA
(Turkey Point Nuclear Generating	)	
Unit Nos. 3 and 4)	)	

NRC STAFF'S RESPONSE TO CITIZENS ALLIED FOR SAFE ENERGY PETITION FOR REVIEW

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NRC STAFF'S ANSWER TO CITIZENS ALLIED FOR SAFE ENERGY PETITION FOR REVIEW

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b), the staff of the U.S. Nuclear Regulatory Commission ("Staff") files its answer in opposition to Citizens Allied for Safe Energy's ("CASE") petition[1] for review of the Atomic Safety and Licensing Board's ("Board") "Initial Decision," LBP-16-08, 83 NRC ___ (May 31, 2016) (slip op.), regarding its resolution of Contention 1 challenging the Environmental Assessment ("EA")[2] prepared by the Staff.

In its petition, CASE asserts that the Board committed legal, factual, and procedural error in finding that the EA had been appropriately supplemented by the adjudicatory proceeding and complied with the National Environmental Policy Act ("NEPA") and that the Staff's Finding of No Significant Impact ("FONSI")[3] and license amendment issuance were

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[1] Citizens Allied for Safe Energy Petition for Review (June 27, 2016) ("Petition").

[2] An EA is a concise public document that serves: (1) briefly to provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement ("EIS") or a finding of no significant impact ("FONSI"); (2) to aid compliance with the National Environmental Policy Act ("NEPA") when an EIS is not necessary; and (3) to facilitate preparation of an EIS when necessary. 10 C.F.R. § 51.14(a). Upon completion of an EA for a proposed action, the appropriate NRC staff director will determine whether to prepare an EIS or a FONSI on the proposed action. 10 C.F.R. § 51.31(a).

[3] A FONSI is a concise public NRC document 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 EIS will not be prepared. 10 C.F.R. § 51.14(a). A FONSI will: (1) Identify the proposed action; (2) State that the Commission has determined not to prepare an EIS for the proposed action; (3) Briefly

appropriate.[4] Further, CASE argues that the Board should have done more than supplement the analysis supporting the EA and should have imposed remedial measures on Florida Power & Light ("FPL") to correct the perceived harm.[5]

As discussed below, the Staff submits that CASE has not established that its petition meets the requirements for review and, in any event, the Board resolution of the contention in favor of the Staff was correct. Thus, CASE's petition should be denied and the Staff's EA affirmed as meeting the requirements of NEPA.

BACKGROUND

This proceeding concerns the license amendments for Turkey Point Nuclear Generating, Units 3 and 4, (collectively "Turkey Point").[6] The license amendments were granted by the Staff under exigent circumstances on August 8, 2014, prior to the hearing.[7] The amendments, as granted, changed the Technical Specifications ("TS") limiting condition of operation ("LCO") by raising the allowed ultimate heat sink average inlet temperature for continued plant operation from 100°F to 104°F.[8] In addition to raising the average inlet temperature limit, the

present the reasons why the proposed action will not have a significant effect on the quality of the human environment; (4) Include the EA or a summary of the EA (if the EA is included, then the FONSI need not repeat any of the discussion in the EA but may incorporate the EA by reference); (5) Note any other related environmental documents; and (6) State that the finding and any related environmental documents are available for public inspection and where the documents may be inspected. 10 C.F.R. § 51.32.

[4] Petition at 6-9.

[5] *See, e.g., id.*at 24.

[6] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-16-08, 83 NRC ___ (May 31, 2016) (slip op. at 4-6).

[7] LBP-16-08, 83 NRC __ (slip op. at 6).

[8] *Id.* at 4.

amendments added surveillance requirements for the component cooling water ("CCW") heat exchangers and made editorial non-substantive changes.[9]

Contention 1, as filed, asserted that "The uprate of Turkey Point Reactors 3 & 4 has been concurrent with alarming increases in salinity, temperature, tritium and chloride in the CCS [(Cooling Canal System)] area."[10] On March 23, 2015, the Board reformulated and admitted Contention 1. In its reformulated form, Contention 1 states:

> The NRC's environmental assessment, in support of its finding 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) the withdrawal of fresh water from surrounding aquifers to mitigate conditions within the CCS.[11]

On December 3, 2015, in accordance with the schedule established by the Board, FPL moved for summary disposition of Contention 1, which was supported by the Staff.[12] CASE's opposition to FPL's summary disposition was not supported by an affidavit or declaration and did not dispute FPL's statement of material facts. The Board determined that two documents

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[9] NRC Staff Testimony, Exhibit ("Ex.") NRC-001 at A32.

[10] Citizen's Allied for Safe Energy, Inc., Petition to Intervene and Request for Hearing ("Request for Hearing") at 5 (Oct. 14, 2014). CASE also asserted three other contentions that were denied by the Board on March 23, 2016, and were not part of the petition for review. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 476-478 (2015); Request for Hearing at 5.

[11] LBP-15-13, 81 NRC at 476. Both FPL and the Staff, petitioned for review of the Board's decision to grant CASE standing and admit Contention 1. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389 (2015). In response, the Commission described the contention as a "close call" at contention admissibility. *Id.* at 397. The Commission did state that concerns regarding the consultation with Florida's designated officials were outside the scope of this proceeding. *Id.* at 406 n.110.

[12] Florida Power & Light Company's Motion To Dismiss CASE Contention 1 Or, In the Alternative, For Summary Disposition (Dec. 3, 2015); NRC Staff's Answer to Florida Power & Light Company's Motion To Dismiss CASE Contention 1 Or, In the Alternative, For Summary Disposition (Dec. 21, 2015); *see also* 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 (Dec. 13, 2015).

submitted as part of CASE's Statement of Position demonstrated a genuine dispute that should be resolved at a hearing and that "the Board's resources would be best served by reviewing the evidence more thoroughly at a hearing."[13]

On May 31, 2016, the Board resolved Contention 1 in favor of the Staff.[14] While the Board faulted the EA performed by the Staff, it concluded that the information elicited at the hearing was sufficient to support the Staff's FONSI and the issuance of the license amendments.

DISCUSSION

I. Legal Standards Governing Petitions for Review

Pursuant to 10 C.F.R. § 2.341(b)(4), the Commission may grant review of a Board decision, in its discretion, "giving due weight to the existence of a substantial question with respect to the following considerations":

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to the established law;
>
> (iii) A substantial and important question of law, policy or discretion has been raised;
>
> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
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> (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.341(b)(4).[15]

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[13] Order (Denying Application for Subpoenas, Denying Motion for Summary Disposition, and Granting in Part and Denying in Part Motions to Strike) at 5, 7-8 (Dec. 22, 2015) (unpublished) (Agency Document and Management System ("ADAMS") Accession No. ML15356A297).

[14] LBP-16-08, 83 NRC __ (slip op. at 56).

[15] *Accord, Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-01, 77 NRC 1, 17 (2013) (the petitioner had "identified a substantial question as to whether the Board decision reaches at least one 'necessary legal conclusion without governing precedent' or address at least one 'substantial and important question of law, policy or discretion.'"); *Entergy Nuclear Vermont Yankee, LLC*

In *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC __ (June 29, 2016) (slip op. at 9), the Commission summarized its standards for review as follows:

> We review questions of law *de novo*; and we defer to the Board's findings with respect to the underlying facts unless the findings are "clearly erroneous." The standard for showing "clear error" is a difficult one to meet; to do so, a petitioner must demonstrate that the Board's determination is "not even plausible" in light of the record as a whole.[16]

Similarly, the Commission has emphasized:

> As for conclusions of law, our standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law.'
>
> Decisions on evidentiary questions fall within our board's authority to regulate hearing procedure. "[A] licensing board normally has considerable discretion in making evidentiary rulings." We review decisions on evidentiary questions under an abuse of discretion standard.[17]

II. Commission Review is Not Warranted Because the Board's Supplementation of the Environmental Record is Well Supported By Long Standing Precedent

CASE argues that the Board's decision to supplement the environmental record with the information adduced at the hearing and through pre-filed testimony is not supported by precedent and does not resolve the issues raised by CASE in its contention.[18] CASE, however,

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& Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 13 (2010) ("the challenged portions of [the Board's decision] address significant issues of law and policy that lack governing precedent and raise issues that could affect other license renewal determinations"); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 690 (2006); *Northwest Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001); *Private Fuel Storage, L.L.C*. (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 234 (2001); *cf. Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, 72 NRC 56, 73 (2010).

[16] *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-16-13, 83 NRC __ (June 29, 2016) (slip op. at 9) (footnotes omitted).

[17] *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 99 (2010) (citing. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 256 (2009); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004)) (footnotes omitted).

[18] *See* Petition at 5.

points to no legal decision by federal courts, the Commission, or other adjudicatory bodies that preclude a Board from supplementing the environmental record with the information adduced at the hearing. CASE also asserts that the Board's decision did not fully satisfy its obligations under NEPA and that the Board's remedy of additional disclosure does not remedy the harm suffered by its members.[19] As explained below, CASE's arguments are unavailing because the Board's order fully complies with the requirements of NEPA,[20] cures any harm that was cognizable under CASE's NEPA contention, and complies with the long standing precedent of the Commission.[21]

A. The Board's Supplementation of the Environmental Record is Consistent with the Commission's Long Standing Precedent

CASE claims that the Board has no legal authority to supplement the environmental record.[22] The Commission has repeatedly held, however, that Boards may supplement the environmental record with the information elicited from the hearing process.[23] Contrary to CASE's assertions, the Board's Initial Decision fully explained its authority to supplement the record, the Board's findings are "deemed to amend the NRC Staff's NEPA documents and become the agency record of decision on those matters. . . . [A] licensing Board decision satisfies the disclosure purpose of NEPA through the public vetting of environmental issues at

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[19] Petition at 5, 7, 11.

[20] "NEPA's twin goals are to inform the agency and the public about the environmental effects of a project." *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-04, 61 NRC 10, 13 (2005) (citing *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 339 (1989); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 348 (2002)).

[21] *Strata,* CLI-16-13, 83 NRC __ (June 29, 2016) (slip op. at 38-39).

[22] Petition at 5.

[23] *Strata*, CLI-16-13, 83 NRC __, __ (June 29, 2016)(slip op. at 38-39); *Louisiana. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998); *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 53 (2001); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340,388 (2015).

an evidentiary hearing . . . ."[24] The Board's authority to supplement environmental documents through the hearing process is well recognized, and CASE has not identified any legal error as a result of the supplementation. Thus, CASE's Petition should be denied.

B. The Board's Hearing and Initial Decision Fully Satisfy the NRC's Obligations Under NEPA

CASE argues that the issues identified with respect the Staff's EA and FONSI cannot be cured "by a rhetorical review of the matter in these proceedings."[25] CASE attacks the Board's decision as "confusing to witness (*sic*) and as disrespectful to the letter and spirit of NEPA" because it ultimately accepted the Staff's review with additional supplementation by the evidentiary record.[26] But CASE's arguments are unavailing. First, although CASE expresses general dissatisfaction with the Board's supplementation, CASE's petition does not identify any specific area of error with the Board's decision. However, since the Board does not have an independent NEPA obligation, CASE appears to assert that the Board's decision failed to provide a full disclosure of NEPA material upon which a FONSI could be based. The Commission has held that petitioners are obligated to identify the issues that they want to raise with particularity and the Commission, the Board, and other parties are not obligated to sift through the record in order to identify petitioner's claims.[27]

Additionally, the Board's evidentiary hearing process fully satisfied NEPA's requirements. NEPA requires the NRC to consider the environmental impacts of its licensing

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[24] LBP-16-08, 83 NRC __ (slip op. at 38) (citing *Indian Point,* CLI-15-6, 81 NRC at 388; *Friends of the River v. FERC*, 720 F.2d 93, 106 (D.C. Cir. 1983); *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 197 n.54 (1975)).

[25] Petition at 5.

[26] *Id*. at 11.

[27] *See Hydro Res.*, CLI-01-4, 53 NRC at, 46; *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 NRC 185, 194 (1999); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 132 n.81 (1995); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001); *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-33, 60 NRC 581, 591-92 (2004).

actions prior to issuing licenses.[28] NEPA is procedural and does not mandate a specific outcome or action.[29] NEPA only requires that the agency take a "hard look" at the environmental impacts of a proposed action.[30] NEPA's procedural requirements are intended to foster informed decision-making and provide public disclosure of the relevant impacts.[31]

The Board's evidentiary hearing provided significant opportunity for public disclosure on the potential environmental impact of NRC's licensing action.[32] Although CASE claims that the evidentiary hearing was "confusing" and did not satisfy NEPA, CASE had the opportunity to present witnesses and evidence identifying areas where the disclosures of the environmental impacts were incomplete or omitted. However, CASE did not file any sworn testimony in support of its Initial Statement of Position.[33] Despite repeated instructions from the Board, CASE never filed copies of the documents for its exhibits.

Instead, CASE decided not to submit testimony on the issues raised in Contention 1 regarding saltwater intrusion and, instead, only in reply to the Staff's testimony and FPL's

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[28] *See, e.g., Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983).

[29] *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 23 (2008).

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

[31] *See id.* at 349-51.

[32] *Strata* , CLI-16-13, 83NRC __ (slip op. at 38-39); *La. Energy Servs., L.P.*, CLI-98-3, 47 NRC at 89; *Hydro Res.*, CLI-01-4, 53 NRC at 53; *Indian Point*, CLI-15-6, 81 NRC at 388.

[33] No testimony was filed with CASE's Initial Statement of Position. *See* Citizen's Allied for Safe Energy Initial Statement of Position, Testimony, Affidavits and Exhibits (For January, (sic) 2015 Evidentiary Hearing) ("CASE Initial SOP"), Ex. INT-000, (Oct. 9, 2015). In its rebuttal SOP, CASE submitted the testimony of Dr. Stoddard. *See* Citizens Allied for Safe Energy's Joint Rebuttal to NRC Staff's and FPL's Initial Statements of Position, Exhibit List and Exhibits, Ex. INT-076. Dr. Stoddard's testimony addressed issues that the Board had excluded from the contention. As such, CASE's case did not provide any additional information beyond its initial petition. While CASE did submit a few additional exhibits, they were unsupported by any testimony, occurred after the Staff's issuance of the license amendment, and were often the result of settlement agreements between FPL and their local or state regulators. While adjudicatory proceedings before the Board are not generally bound by the strict rules of evidence, the federal courts have consistently ruled that settlement agreements are generally inadmissible because it would discourage settlement of disputes. *See Portugues-Santana v. Rekmodiv Int'l,* 657 F.3d 56, 63 (1st Cir. 2011); *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 297-98 (5th Cir. 2010).

testimony, provided some testimony on the impact of salinity and temperature on the American Crocodile, an issue excluded by the Board when it admitted and reformulated Contention 1.[34] Any concerns that CASE had regarding the conduct of the hearing and the Board's compliance with NEPA should have been pursued in the first instance at the evidentiary hearing, in pre-filed qualified expert testimony, or in proposed findings.[35]

C. The Remedy for Issues Raised Regarding NEPA is Additional Disclosure Not Substantive Relief

CASE makes several interrelated claims asserting that the Board's remedy for its NEPA claim is not adequate.[36] For example, CASE asserts that the Board's decision is "doublespeak" meant to paper over the inadequacies in the Staff's review.[37] Further, CASE seemingly argues that the EA, regardless of whether or not it is supplemented by the Board, does not remedy its member's continuing "potential for injury" because the water resources are still being impacted including the "Biscayne Aquifer and surrounding waters."[38] These claims represent CASE's misunderstanding regarding the scope of NEPA, NEPA's available remedies, and the scope of the contention, as admitted. As discussed above, NEPA is a procedural statute with only procedural relief.[39] It does not require any particular result, only sufficient disclosure to inform

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[34] LBP-15-13, 81 NRC at 478 n.135. For example, Dr. Stoddard's pre-filed rebuttal testimony only addressed the impact of salinity and temperature on local animals and plants. *See* Ex. INT-076 at 4-11. During the evidentiary hearing, Dr. Stoddard addressed saltwater intrusion using information that had not been disclosed to the other parties. *See, e.g.*, Transcript ("Tr.") at 282-86. However, Dr. Stoddard clearly indicated that he is not a hydrogeologist capable of modeling the migration of water between the CCS and the Biscayne Aquifer. *See, e.g.*, Tr. at 304 (stating he is a zoologist).

[35] *See Hydro Res*., CLI-01-4, 53 NRC at 46; *Zion*, CLI-99-4, 49 NRC at 194; *Univ. of Mo.*, CLI-95-1, 41 NRC at 132 n.81; *Shearon Harris*, CLI-01-11, 53 NRC at 383; *Hydro Res.*, CLI-04-33, 60 NRC at 591-92.

[36] *See, e.g.*, Petition at 6, 8-9.

[37] *Id*. at 5.

[38] *Id*. at 7.

[39] *Winter v. Nat. Res. Def. Council*, 555 U.S. at 23; *La. Energy Servs., L.P.*, CLI-98-3, 47 NRC at 87-88. *See also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003).

the public and the decision-maker regarding the potential for environmental impact.[40] Nor does NEPA require mitigation for environmental impacts that may have been identified.[41]

Thus, CASE's request that the NRC determine the cause of saltwater migration and impose mitigation measures on FPL that will remedy any issues related to water quality and saltwater migration is beyond the scope of a NEPA review.[42] The EA appropriately supported the Staff's FONSI, and therefore, nothing more was required. Therefore, CASE has not identified any clear legal or factual error for failing to impose substantive changes or mitigation measures on FPL. Thus, CASE's Petition should be denied.

III. Commission Review is Not Warranted Because the Board's Determination That No Significant Environmental Impacts Result From the License Amendments is Well Supported by the Record

CASE argues that the Board made factual errors that are unsupported by the record.[43] For example, CASE makes several assertions of error regarding the following issues: Florida's designated contact for consultation; the impact from NRC "authorized" withdrawals; the impact of freshening the CCS; the hydrological connectivity between the Biscayne Aquifer and the Floridan Aquifer; and the impact of water withdrawals on the Floridan and Biscayne Aquifers.[44]

A. The Commission Determined that Florida's Designated Person for Consultation Purposes Is Not Litigable Before the Board

CASE argues that the Board erred because it did not examine the interactions between the Staff and Florida and that the interactions between the Staff and Florida are dysfunctional.

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[40] *Winter v. Nat. Res. Def. Council*, 555 U.S. at 23; *Massachusetts v. NRC*, 708 F.3d 63, 67 (1st Cir. 2013); *La. Energy Servs., L.P.*,), CLI-98-3, 47 NRC at 87-88. *See also* McGuire, CLI-03-17, 58 NRC at 431.

[41] *Methow Valley,* 490 U.S. at 353; *Winter v. Nat. Res. Def. Council*, 555 U.S. at 23; *La. Energy Servs., L.P*, CLI-98-3, 47 NRC at 87-88. *See also* McGuire, CLI-03-17, 58 NRC at 431.

[42] *Methow Valley,* 490 U.S. at 353.

[43] Petition at 12-13.

[44] Petition at 9-10, 15-18, 20-22.

CASE asserted that interactions are dysfunctional because "[t]he point of contact between the NRC and the State of Florida is Cindy Becker, Chief, Bureau of Radiation Control in the Florida Department of Health."[45] The petition asserts that the Board should have engaged in wide-ranging review of all the interactions between Florida's various agencies and the Staff.[46] Further, CASE invites error by recommending that Board should have imposed requirements on Florida's regulatory agencies and local regulatory agencies even though they were not parties to the proceeding and did not participate.

The Commission made clear, however, that this issue raised *sua sponte* was not part of CASE's contention as plead and that the Board overstepped its authority to import this challenge into the admitted contention. The Commission in response to FPL's and NRC's earlier petitions[47] for review stated:

> The Staff notes that the Board itself raised a challenge as to whether the Staff consulted the correct state official when preparing its Environmental Assessment. To avoid any confusion going forward, we agree that this issue was not raised by CASE and is not properly encompassed within Contention 1 as admitted. Thus, the Staff's selection of an official for consultation purposes is not within the scope of the proceeding, and the Board overstepped its authority in this instance by inserting this issue into CASE's filing.[48]

Because the Commission made clear that the issue of consultation was not within the scope of CASE's original contention and the Board had already expressly limited admitted contention to the EA's discussion of saltwater intrusion resulting from the CCS or impacted by authorized or anticipated aquifer withdrawals, CASE's assertions regarding examining and changing the

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[45] *Id*. at 10; *see also id.* at 9-10.

[46] *Id*. at 10.

[47] Both FPL and the Staff challenged the Board's contention admissibility decision. *See* Florida Power & Light Company's Notice of Appeal of LBP-15-13 (Apr. 17, 2015); NRC Staff's Notice of Appeal of LBP-15-13 (Apr. 17, 2015).

[48] *Turkey Point*, CLI-15-25, 82 NRC at 406 n.110 (citations omitted).

interactions between the Staff and Florida are not within the scope of this proceeding. This issue cannot be used to support an assertion of legal or factual error in the Board's decision. Thus, CASE's Petition should be denied.

B. NRC Did Not Authorize Any Water Withdrawals by FPL

CASE also mistakenly asserts that the NRC authorized FPL to conduct water withdrawals that will result in the loss of freshwater.[49] But CASE provides no evidence and points to no part of the record for this assertion.[50] The Staff has no authority to authorize water withdrawals and did not authorize any water withdrawals. Further, CASE does not clearly or specifically articulate any "NRC-authorized" withdrawal that it is challenging.

With respect to water withdrawals, the Staff in its EA reasonably projected the water withdrawals likely to be authorized by Florida and utilized by FPL as part of their salinity mitigation program.[51] The Staff's EA determined that the water withdrawals expected to be authorized by Florida would on whole be beneficial.[52] The Board ultimately agreed with the Staff's determination after eliciting additional information that supplemented the EA but did not alter the Staff's ultimate conclusion.[53] Thus, the Board could not have erred with respect to

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[49] Petition at 15.

[50] *See id*. at 15.

[51] At times the Board's decision indicates that the Staff reasonably anticipated that FPL would begin water withdrawals from the L-31 canal. LBP-16-08, 83 NRC __ (slip op. at 52). While the Staff, however, was aware that the L-31 canal represented a possible source of water for salinity mitigation, it determined based on the information available at the time it granted the amendment and communications with the FPL that L-31 canal withdrawals were not expected to be pursued because other sources with sufficient volumes were already being pursued. Tr. at 391 (stating that FPL still had access to other already authorized sources of water that at the time made use of the L-31 canal unlikely). Like all rapidly developing situations, however, FPL's plans did change after the issuance of the amendment to include limited withdrawals from the L-31 canal.

[52] *See, e.g.,* NRC Staff Testimony of Audrey L. Klett, Briana A. Grange, William Ford, and Nicholas P. Hobbs Concerning Contention 1, Ex. NRC-001, at A52.

[53] LBP-16-08, 83 NRC __ (slip op. at 56); *compare* Environmental Assessment and Final Finding of No Significant Impact; Issuance, Ex. NRC-009, 79 Fed. Reg. 44,464, 44,468 (July 31, 2014).

NRC authorized withdrawals because the NRC did not authorize withdrawals and the Board's decision was consistent with this fact.

C. The Record Fully Supports that Freshening the CCS Will Help to Mitigate Any Saltwater Intrusion in the Biscayne Aquifer

CASE asserts that the Board's conclusion that freshening of the CCS will be beneficial to reducing the impact of the CCS on saltwater intrusion is unsupported by the record.[54] For support, CASE relies on a draft order from an Administrative Law Judge in a separate proceeding.[55] But as indicated by the Board in response to motions by FPL and the Staff, the Board did not take official notice of the draft order for the truth of its recitation but only for its existence.[56] Thus, the draft order cannot serve as evidence contradicting the Board's findings of fact.

Moreover, CASE presented no testimony and no experts regarding the potential impact from freshening the CCS.[57] As the Board noted, the Staff and FPL presented substantial uncontroverted evidence that freshening the CCS would be beneficial and reduce the impact of saltwater migration.[58] Even assuming that CASE had presented some evidence that freshening the CCS would be detrimental, the standard for reviewing and ultimately reversing a finding of fact is that it is "not even plausible in light of the record viewed in its entirety."[59] In light of the

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[54] Petition at 16-18.

[55] *Id.*

[56] Order (Clarifying Scope of Official Notice), at 2 (Mar. 10, 2016) (unpublished) (ADAMS Accession No. ML16070A128). Subsequently, Florida Department of Environmental Protection rejected the draft order in accordance with Florida's statutes and regulations. *See* Florida Power & Light Company's Third Notice to the Board Regarding State Administrative Proceeding, Attachment 1, at 26 (ADAMS Accession No. ML16123A027) (rejecting significant portions of the draft order).

[57] LBP-16-08, 83 NRC __ (slip op. at 56).

[58] *Id*.

[59] *See Southern Nuclear*, CLI-10-5, 71 NRC at 98-99 (citing *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-06-22, 64 NRC 37, 40 (2006)).

substantial evidence presented by the Staff and FPL, it cannot be said that the Board's findings are implausible in light of the record as a whole.

D. The Discussion of the Interaction Between the Floridan Aquifer, the Biscayne Aquifer, and the CCS is Fully Supported By the Record

CASE also asserts that the Board erred when it determined that the confining layer prevented hydraulic connectivity between the Floridan and Biscayne Aquifers.[60] CASE argues that Floridan and Biscayne Aquifer are connected because FPL is withdrawing water from the Floridan Aquifer and injecting it into the CCS. This theory of hydraulic connectivity resulting from the withdrawal of Floridan Aquifer for injection into the CCS was first raised through CASE's representative unqualified argument in the petition for review.[61] CASE also points to the expert testimony of the Staff and FPL to attempt to show some contradiction between the Staff's and FPL's description of the Biscayne and Floridan Aquifer.[62] CASE argues that the Board erred when it determined that no evidence had been presented to dispute the testimony of the expert witnesses of the Staff and FPL.[63] CASE's description of the record, however, is mistaken.

CASE identifies Ex. INT-046 as disputing the evidence presented by the Staff and FPL.[64] However, Exhibit INT-046 was not admitted by the Board as a separate exhibit.[65] CASE

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[60] Petition at 20-22.

[61] *Id*.

[62] *Id*.

[63] Petition at 22.

[64] *Id*.

[65] Order (Admitting Exhibits) at 1-2 (Jan. 4, 2016) (unpublished) (ADAMS Accession No. ML16004A258). It appears as part of Ex. INT-001. The Board in ruling on FPL's Motion to Strike and the Staff's Motion to Strike described these exhibits as "primarily considered less reliable because they are hearsay." Order (Denying Application for Subpoenas, Denying Motion for Summary Disposition, and Granting in Part and Denying in Part Motions to Strike) at 10 (Dec. 22, 2015) (unpublished) (ADAMS Accession No. ML15356A297), *citing* 10 C.F.R. § 2.337(a). In the December 22nd Order, the Board

appears to be referencing Ex. INT-001.[66] The document described as INT-046 by CASE consists only of Mr. White's, CASE's representative, personal description of the contents of a separate document that was not put in evidence or addressed by any testimony.[67]

Contrary to CASE's assertion, the Staff's testimony and FPL's testimony regarding the interaction between the Floridan Aquifer and the Biscayne Aquifer is consistent. Both experts identified the confining layer as precluding interactions between the two bodies of water.[68] Both experts, in response to questions from the Board, explained that other evidence tended to demonstrate that the confining unit did preclude hydraulic communication between the aquifers because there was no evidence of the hyper-saline plume in the underlying Floridan Aquifer and that the Floridan aquifer existed at a higher head[69] than the Biscayne Aquifer.[70] As a result, water would tend to migrate from the Floridan Aquifer to the Biscayne Aquifer in the absence of the confining unit.[71]

Finally, CASE argues that withdrawing water for freshening the CCS would itself be harmful.[72] CASE again presented no evidence that this would be so. The Staff and FPL expert witnesses explained that withdrawing water from the Biscayne Aquifer at the Turkey Point site

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stated that it "will be better able to resolve the disputes surrounding FPL's motion upon consideration of the full evidentiary record." *Id.* at 12.

[66] Ex. INT-001 at 17.

[67] *Id*.

[68] Tr. at 430-33, 434.

[69] Head is a common measurement of pressure used in hydrogeology. Ex. NRC-001, at A15.

[70] Tr. at 434. As part of explaining the higher head, FPL witness explained that due to the higher head in the Floridan Aquifer, water, to the extent it might migrate between aquifers through the confining unit, would move from the Floridan to the Biscayne. *Id.* FPL's expert witness did not say that water was migrating; rather, only that direction of flow, should water migrate, would be from the Floridan Aquifer to the Biscayne Aquifer. *Id.*

[71] *Id*.

[72] Petition at 20-22.

would not impact saltwater migration because the aquifer is saltwater under the Turkey Point site.[73] The Floridan Aquifer is hydraulically separated from the Biscayne Aquifer; thus, withdrawals from the Floridan Aquifer cannot impact saltwater migration in the Biscayne Aquifer.[74]

IV. CASE'S Other Assertions of Board Errors Are Without Merit and/or Harmless

CASE makes a myriad of other complaints regarding the Board's decision and the other parties in the litigation. CASE asserts that the Board failed to determine the cause of the salinity, attacks the Staff's performance in this case, and argues that FPL will continue to violate regulations and the law. CASE also argues that it had no obligation to challenge the evidence presented at the hearing or in pre-filed testimony.[75] However, as explained below, the issues raised by CASE are not errors at all. CASE has not demonstrated that the Board had an obligation to make a finding regarding the cause of the salinity. Moreover, attacks on the Staff's performance have no place in this proceeding, and CASE had an obligation to challenge evidence presented at the hearing and in pre-filed testimony. In any event, it is not enough for a petitioner to merely point to a perceived error.[76] A petitioner must demonstrate that the findings of the Board were not even plausible in light of the record.[77] Thus, even if CASE had pointed to actual errors, which it did not, the Board's finding were plausible in light of the record.

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[73] Tr. at 336.

[74] *Id*. at 431. *See also* LBP-16-08, 83 NRC __ (slip op. at 47).

[75] Petition at 7-9, 11-12.

[76] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005).

[77] *Id.*

A. The Board Did Not Err With Respect To CASE's Concerns Regarding the Cause of Saltwater Migration

CASE's petition argues that the Board failed to determine the cause of the problems in the CCS.[78] The petition argues that the Board rejected CASE's proposed causes for the CCS problems.[79] CASE, however, points to no evidence in the record identifying its proposed causes of CCS problems.[80] CASE's petition also ignores the extensive discussion and explanation of high salinities that was provided during the evidentiary hearing and in the pre-filed testimony, which were used to supplement the Staff's EA in accordance with long-standing Commission precedent.[81]

For unknown reasons, CASE decided to forgo presenting any qualified expert testimony on the causes of the CCS salinity and temperature issues. CASE appears to treat its statement of position ("SOP") and Mr. White's statements at the contention admissibility stage as evidence in this proceeding.[82] However, the SOP and Mr. White's arguments at contention admissibility are not evidence on the record[83] and consequently cannot be used to support the Board's findings, or, alternatively, demonstrate that the Board erred. As such, the Board did not reject CASE's proposed causes; CASE failed to place any causes for the CCS salinity and temperature issues in the evidentiary record.

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[78] Petition at 8-9.

[79] *Id*. at 8.

[80] *Id*.

[81] LBP-16-08, 83 NRC __ (slip op. at 9-10).

[82] *See* Petition at 14 (citing Transcript of Contention Admissibility Oral Argument on January 14, 2015 at 31). In CASE's Petition, this reference is described as the "Hearing" transcript. However, Mr. White's arguments in support of contention admissibility does not constitute evidence and Mr. White has provided no evidence that he is or could be qualified as an expert on hydrology.

[83] *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-420, 6 NRC 8, 14 n. 18 (1977).

Additionally, the expert witnesses for the Staff and FPL explained the CCS and the potential mechanism that led to increasing salinity levels and the elevated temperatures experienced just prior to the issuance of the license amendments.[84] While the Board was under no obligation to include information in its decision regarding details that were not material to its decision, the testimony made clear that the increasing salinity in the CCS was the result of small net deficits in make-up water resulting from evaporation and recharge from groundwater infiltration and precipitation over long time periods.[85] The Staff and FPL witnesses presented unrebutted testimony that the increase in temperature and salinity in the summer of 2014 was likely the result of a unique combination of extremely low rainfall and algae blooms which occurred because of low flow through the CCS during the extended outages associated with the extended power uprates and cessation of operations for the fossil fueled Unit 2.[86] Importantly, the issue before the Board is whether the Staff's EA sufficiently described the existing environmental conditions and likely impacts from the proposed action. CASE has not identified any errors with the Staff's EA, as supplemented by the Board that would alter the FONSI.

B. CASE's Complaints Regarding the Staff's Performance Are Not Within the Scope of this Proceeding

The petition engages in a series of *ad hominem* attacks on the Staff's witnesses and the Board. These type of personal attacks should not be given any weight in resolving CASE's petition. For example, CASE argues that the Staff personnel involved in the license amendments should be dismissed.[87] The issue in this proceeding is whether the environmental impacts related to saltwater intrusion from (1) migration out of the CCS and (2) the withdrawal of

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[84] Tr. at 412-17.

[85] *Id.*; Ex. NRC-001 at A29-A31.

[86] Tr. at 412-14; Ex. NRC-001 at A29-A31.

[87] Petition at 7. In a similar manner, CASE implies that the Board did not read its SOP or its proposed findings. *Id*. at 18.

fresh water from surrounding aquifers to mitigate conditions within the CCS were appropriately disclosed, the FONSI was well-supported, and thus, the license amendments should have been issued. Issues regarding the individual staff performance are not subject to challenge in a Board proceeding. Any issue regarding CASE's concern related to individual Staff performance or the adequacy of the internal procedures utilized in the Staff's review is not relevant to Contention 1. The issue of the Staff's environmental review is confined to a determination of whether the EA and FONSI complied with the Staff's obligations under NEPA. Thus, CASE's assertion that the Staff should be dismissed, retrained, or reassigned is not material to whether the Commission should accept the petition for review.

C. The Board Did Not Err By Requiring CASE to Present Testimony and Evidence Disputing Evidence Presented by the Staff and FPL

CASE states:

> It is not up to CASE to challenge the applicant's evidence since the information presented is not related to whether or not the NRC Staff was deficient in its work and that NEPA was not honored ….[88]

CASE elected to forgo offering contradictory testimony (or any testimony relevant to Contention 1).[89] Since CASE did not rebut any evidence presented by the other parties and decided to forgo presenting any sworn testimony contradicting the evidence presented, it ran the risk that the weight of the evidence in the full record would not run in its favor. As a result, CASE cannot now challenge this unrebutted testimony.[90]

CASE repeatedly failed to meet its obligations as a party in this proceeding, failed to submit relevant testimony, and failed to abide by the Board's instructions. These failings by

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[88] *Id*. at 13.

[89] Petition at 13.

[90] *See Univ. of Mo.*, CLI-95-1, 41 NRC at 115-19.

CASE cannot be assigned to the Board. CASE's decision to proceed *pro se* does not shield it from the consequential results of its choices on how to present its case or advance its evidence.

V. The Board's Decision to Affirm the FONSI After Supplementing the Environmental Record Can Be Affirmed On Other Grounds

While the petition asserts a myriad of issues and errors, the ultimate decision can be affirmed on other grounds. Ultimately, the Board determined that the Staff's FONSI was correct and that the Staff issued the license amendments correctly.[91] The Commission has indicated that the sponsor of a contention bears the burden of going forward.[92] "There may, of course, be mistakes in the [environmental document], but in an NRC adjudication, it is Intervenors' burden to show their significance and materiality."[93]

While CASE had multiple opportunities to satisfy its burden of going forward, CASE has not submitted any reliable evidence in support of its contention that demonstrated that it had met its burden of going forward, and thus, shifted the ultimate burden of persuasion to the Staff. The Board established a scheduling order that provided for staggered filing of the parties with CASE providing its initial testimony, followed by the Staff and FPL, and then a reply by CASE.[94] CASE's initial filing consisted of one document that blended its SOP with an unknown number of

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[91] LBP-16-08, 83 NRC __ (slip op. at 56).

[92] *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984), *rev'd* in part on other grounds, CLI-85-2, 21 NRC 282 (1985); *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586, 589 (1983); *Philadelphia Elec. Co.* (*Limerick* Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1008 (1973), *reconsid. denied*, ALAB-166, 6 AEC 1148 (1973), remanded on other grounds, CLI-74-2, 7 AEC 2, *aff'd*, ALAB-175, 7 AEC 62 (1974); *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973).

[93] *Exelon Generation Company, LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) ("Intervenors' [']environmental impact[']' claims are for the most part not specific and not grounded in fact or expert opinion. The claims do not suggest significant environmental oversights that warrant further inquiry at an evidentiary hearing.").

[94] Initial Scheduling Order, at 8-9 (May 8, 2015) (unpublished) (ADAMS Accession No. ML15128A369).

proffered exhibits.[95] CASE did not provide any testimony or any affidavit showing that documents submitted were truthful and accurate copies or otherwise reliable.[96] FPL moved to exclude much of the information submitted by CASE in its initial filing.[97] Almost 25 days after its initial testimony was due, CASE asked the Board to issue subpoenas in order to elicit testimony to support its case because it had not obtained any experts to support is contention by the time its initial testimony was due.[98]

In support of its Rebuttal Statement of Position, CASE provided some limited out-scope-testimony.[99] Dr. Stoddard's testimony, however, did not address the issues within the scope of the admitted contention.[100] Once it was clear that CASE could not provide any testimony to support its contention, FPL moved for summary disposition in accordance with the scheduling order established by the Board.[101] Similar to its testimony, CASE's response to the summary disposition was not supported by any affidavit or declaration.[102] CASE left most of the FPL's

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[95] *See* Ex. INT-001.

[96] *Id.*

[97] Florida Power & Light Company's Motion To Strike Portions Of CASE's "Initial Statement Of Position, Testimony, Affidavits And Exhibits" Or, In The Alternative, Motion *In Limine* To Exclude It And Its Cited Documents From Evidence (Oct. 19, 2015).

[98] *See* CASE Motion Requesting Subpoenas For Expert Witnesses For January, 2016 Evidentiary Hearing (Nov. 3, 2015). CASE had identified its need to seek subpoenas months in advance of its request; however, CASE decided to wait until after its testimony was due for each of its subpoena requests. *See* NRC Staff's Answer Opposing CASE Motion Requesting Subpoenas For Expert Witness for January 2016 Hearing at 3 n.5, Attachments A-C (Dec. 15, 2015) (citing ex-parte communications with the Board regarding the subpoenas).

[99] *See* Ex. INT-076 at 4-11.

[100] Ex. INT-076 at 4-11.

[101] Florida Power & Light Company's Motion to Dismiss Case Contention 1 Or, In the Alternative, For Summary Disposition (Dec. 3, 2015); *see also* Order (Granting in Part Extension for Summary Disposition Motions), at 1-2 (Nov. 19, 2015) (unpublished) (ADAMS Accession No. ML15323A028).

[102] *See* 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 (Dec. 13, 2015).

statement of material facts unaddressed and undisputed.[103] For example, CASE did not dispute that "[t]he ultimate heat sink license amendment[s] has not resulted in a noticeable effect in the surrounding aquifers."[104] As a result, CASE could not reasonably dispute the Staff's FONSI.

Significantly, CASE also did not dispute FPL's Statement of Material Facts with respect to whether changes in the temperature or salinity of the CCS occurred because of the license amendments.[105] With these three issues no longer disputed — (1) no environmental impact from license amendment, (2) no changes to the temperature of the CCS, and (3) no changes to the salinity of the CCS — along with all the other material facts that were not disputed, nothing remained for the hearing; the Board's decision to uphold the Staff's FONSI and to leave the license amendment in place could have been resolved based on CASE's lack of evidence and inability to meet its burden of going forward as early as the summary disposition stage.[106] Due to CASE's lack of an affidavit or declaration from a qualified expert, the summary disposition could have been resolved in favor of FPL and the Staff without consuming substantial and limited resources for a hearing with a intervenor lacking evidence to support its case. Even should the Commission determine that CASE preserved its challenges for appeal and demonstrated clear error, the decision can nonetheless be upheld based on CASE's failure to submit relevant, material sworn testimony and/or its failure to raise a reasonable dispute with FPL's statement of material facts filed in support of the summary disposition. Thus, the Staff's

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[103] *Id.*

[104] *See* NRC Staff Answer to Florida Power & Light Company's Motion to Dismiss Case Contention 1 Or, In the Alternative, For Summary Disposition at 11.

[105] *Id.*

[106] *See* Florida Power & Light Company's Motion To Strike Portions Of CASE's "Initial Statement Of Position, Testimony, Affidavits And Exhibits" Or, In The Alternative, Motion *In Limine* To Exclude It And Its Cited Documents From Evidence (Oct. 19, 2015); NRC Staff's Motion *In Limine* to Exclude Portions of the Prefiled Rebuttal Testimony or In The Alternative Strike Portions of the Prefiled Rebuttal Testimony and Rebuttal Statement of Position (Dec. 14, 2015).

EA and resulting FONSI should be upheld as complying with NEPA, and the license amendments should be left in place.

CONCLUSION

CASE failed to show that the Board made a clear error with respect to the legal precedent or findings of fact when it supplemented the Staff's environmental analysis, affirmed the FONSI, and left the license amendments in place. Additionally, the Board's decision could be affirmed on other grounds including CASE's failure to present any evidence in support of its contention or raise a genuine dispute with FPL's Statement of Material Facts. Thus, the Commission should deny CASE's Petition.

Respectfully submitted,

/Signed (electronically) by/

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Date of Signature: July 22, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
FLORIDA POWER & LIGHT CO.	)	Docket No. 50-250-LA
	)	50-251-LA
(Turkey Point Nuclear Generating	)	
Units 3 and 4)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO CITIZENS ALLIED FOR SAFE ENERGY PETITION FOR REVIEW," dated July 22, 2016, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 22nd day of July, 2016.

/Signed (electronically) by/
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