

July 16, 1996

EA 96-051

Florida Power and Light Company  
ATTN: Mr. T. F. Plunkett  
President - Nuclear Division  
P. O. Box 14000  
Juno Beach, FL 33408-0420

SUBJECT: NOTICE OF VIOLATION AND PROPOSED IMPOSITION OF CIVIL PENALTY -  
\$100,000 (Department of Labor Case No. 92-ERA-010)

Dear Mr. Plunkett:

This refers to the Secretary of Labor Decision and Remand Order (Decision) issued on January 19, 1996, in Department of Labor (DOL) Case No. 92-ERA-010, Regino R. Diaz-Robainas vs. Florida Power and Light Company. The Secretary of Labor reversed previous DOL decisions by the DOL Area Director and DOL Administrative Law Judge and concluded that Florida Power and Light Company (FP&L) discriminated against Mr. Diaz-Robainas, a former FP&L employee, when he was terminated on August 19, 1991, for his failure to submit to a psychological evaluation which was ordered by FP&L in retaliation for his engaging in protected activities. The Secretary of Labor found that Mr. Diaz-Robainas' protected activities included: (1) identification of various technical issues involving safety concerns, regarding projects with which he was associated; (2) various verbal complaints to management alleging he was being discriminated against for identifying safety concerns; and (3) assertions made to FP&L management that he would go to the media and the Nuclear Regulatory Commission (NRC). The Secretary of Labor denied your Motion for Reconsideration by Order dated April 15, 1996.

In a letter dated March 25, 1996, the NRC described the apparent violation and transmitted a copy of the Secretary of Labor's Decision to you and provided you an opportunity to either respond to the apparent violation in writing or request a predecisional enforcement conference. In your April 24, 1996, response, you requested a predecisional enforcement conference, denied the violation, and stated that no corrective actions were required; however, you did refer to recent FP&L initiatives designed to ensure that employees feel free to raise safety concerns. A predecisional enforcement conference regarding this matter was conducted in the Region II office on June 14, 1996. This conference was closed to public observation and was transcribed. A letter summarizing the conference was sent to you by letter dated June 21, 1996.

Based on the information developed by the Secretary of Labor, the information provided in your April 24, 1996 letter, and the information you presented at the conference, the NRC has determined that a violation of NRC requirements occurred. The violation is cited in the enclosed Notice of Violation and Proposed Imposition of Civil Penalty (Notice) and involves the failure of FP&L to adhere to the requirements of 10 CFR 50.7, Employee Protection, which

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prohibits discrimination against employees for engaging in protected activities. At the predecisional enforcement conference, FP&L denied the violation stating that Mr. Diaz-Robainas' referral to a psychologist to undergo a fitness-for-duty evaluation was based on a pattern of declining performance and behavioral observations, and he was terminated for direct insubordination for refusing to comply with the referral order. Despite your denial, the NRC adopts the Secretary of Labor's decision in this case and finds that the action taken against Mr. Diaz-Robainas was an act of discrimination for his having engaged in protected activities. The Secretary of Labor's decision is based on his analysis of the DOL adjudicatory record and his determination that FP&L's order that Mr. Diaz-Robainas "undergo a psychological evaluation was based solely on retaliatory animus for his protected activity." [92-ERA-010, Decision and Remand Order at 8.] In addition, FP&L had full and complete opportunity to present all relevant evidence before the DOL. Absent any compelling information to refute the Secretary of Labor's conclusion, the NRC finds no basis at this time to challenge the decision.

The NRC recognizes that licensees are required by 10 CFR 73.56 to observe employee behavior in order to detect behavioral changes which could lead to acts detrimental to public health and safety; however, such programs cannot be utilized in retaliation for engaging in protected activities and raising safety concerns. Although at the conference you stated that the DOL decision in this case could result in increased management reluctance to question an individual's fitness-for-duty for fear of legal retribution, the NRC maintains that full compliance with access authorization and fitness-for-duty requirements can be achieved through effectively implemented and safety-motivated programs. NRC agrees with the Secretary of Labor's findings in this particular case, as described in his Order dated April 15, 1996, denying your Motion for Reconsideration, that "this decision does not undermine the employer's duty to participate in the NRC's behavioral observation program and to refer or remove an employee whose fitness it questions."

While any discrimination against a person for engaging in protected activities is cause for concern to the NRC, this violation is of very significant regulatory concern because it involved discrimination by a member of management above first-line supervision. The NRC places a high value on the freedom provided to nuclear industry employees to raise potential safety concerns to their management and to the NRC. Therefore, this violation has been categorized in accordance with the "General Statement of Policy and Procedures for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600, at Severity Level II.

In accordance with the Enforcement Policy, a base civil penalty in the amount of \$80,000 is considered for a Severity Level II violation. In this case, the NRC considered whether credit was warranted for *Identification* and *Corrective Action* in accordance with the civil penalty assessment process in Section VI.B.2 of the Enforcement Policy. The NRC determined that credit for *Identification* was not appropriate because the violation was identified by the DOL and not by the licensee. In your letter of April 24, 1996, and at the conference, you stated that corrective actions were not required because no violation occurred and that existing programs have been effective in assuring



that employees feel free to raise safety concerns. However, you indicated that the following actions had been initiated recently regarding the FP&L Employee Concerns Program: (1) you reaffirmed management expectations in this area by issuance of a memorandum dated December 11, 1995 (DOL Case No. 94-ERA-53, Gary Phipps vs. Florida Power and Light Company); (2) in early 1996, selected FP&L managers were trained on handling employee concerns; and (3) an independent assessment of the Employee Concerns Program was conducted. Notwithstanding these actions, the NRC has determined that credit is not warranted for the factor of *Corrective Action*. Specifically, you have not reinstated Mr. Diaz-Robainas as directed in the Decision and Remand Order of the Secretary of Labor. We recognize that there is some question whether the Secretary's Order with regard to reinstatement and assessment of damages is final or immediately enforceable; however, we are concerned that lack of compliance with the Secretary of Labor's Order may itself have a chilling effect on other employees.

Based on the severity level of the violation and NRC's determinations regarding *Identification* and *Corrective Action*, a civil penalty in the amount twice the base would normally be assessed. However, consistent with Section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2282, the maximum civil penalty for a single violation may not exceed \$100,000 per day. Therefore, to emphasize the importance of ensuring that employees who raise real or perceived safety concerns are not subject to discrimination for raising those concerns and that every effort is made to provide an environment in which all employees may freely identify safety issues without fear of retaliation or discrimination, I have been authorized, after consultation with the Director, Office of Enforcement, and the Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations and Research, to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalty in the maximum amount of \$100,000 for the Severity Level II violation.

At the conference you stated that FP&L has appealed the Secretary of Labor's Decision in this case to the United States Court of Appeals for the Eleventh Circuit. In view of the judicial appeal in this case, NRC has determined that it is appropriate to defer your submittal of a written response to the Notice and payment of the associated civil penalty pending the outcome of the appeal in this case. Accordingly, FP&L may defer written response and payment of the proposed civil penalty until 30 days after judicial review of this case is completed and a decision based on the review is issued. In the interim, FP&L should keep the NRC informed of the status of the appeal and provide copies of the briefs and any other filings in the case to the Director, Office of Enforcement. In addition, if the case is successfully appealed and the Secretary of Labor's Decision is reversed, the NRC will reconsider this enforcement action at that time.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and any response you may provide will be placed in the NRC Public Document Room (PDR). Any response that is provided, to the extent possible, should not include any personal privacy, proprietary, or safeguards information so that it can be placed in the PDR without redaction. However, if you find it necessary to include such information, you should

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clearly indicate the specific information that you desire not to be placed in the PDR, and provide the legal basis to support your request for withholding the information from the public.

Sincerely,

/s/ by S. D. Ebneter

Stewart D. Ebneter  
Regional Administrator

Docket Nos. 50-250, 50-251  
License Nos. DPR-31, DPR-41

Enclosure: Notice of Violation and Proposed  
Imposition of Civil Penalty

cc w/encl:  
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cc w/encl: (Cont'd on Page 5)



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cc w/encl: (Cont'd on Page 6)

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