UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket Nos. 50-250-SLR & 50-251-SLR
FLORIDA POWER & LIGHT COMPANY	)	
(Turkey Point Nuclear Generating Units 3 and 4)	)	March 31, 2022

FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO OTHER PARTIES' VIEWS ON LICENSE STATUS AS REQUESTED IN COMMISSION ORDER CLI-22-02

On February 24, 2022, given its rulings in CLI-22-02 and CLI-22-03,[1] the Commission directed the parties to the above-captioned proceeding, by March 21, 2022, to submit their views on the practical effects of (1) the subsequent renewed operating licenses ("SROLs") for Turkey Point Nuclear Generating Units 3 and 4 ("Turkey Point")[2] continuing in place with amended expiration dates, and (2) the previous initial renewed operating licenses ("ROLs") being reinstated, *i.e.*, vacating the SROLs. Florida Power and Lighty Company ("FPL") submitted its views on these issues on March 21, 2022,[3] as did the other parties: the U.S. Nuclear Regulatory Commission ("NRC") Staff;[4] and Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (collectively, "Joint Petitioners").[5] The Commission further established a

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1 *Fla. Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 & 4), CLI-22-02, 95 NRC __ (Feb. 24, 2022) (slip op.); *Duke Energy Carolinas, LLC* (Oconee Nuclear Station, Units 1, 2, & 3) *et al*., CLI-22-03, 95 NRC __ (Feb. 24, 2022) (slip op.).

2 Turkey Point Nuclear Generating Unit No. 3, Subsequent Renewed Facility Operating License No. DPR-31 (Issued Dec. 4, 2019) (ML052790649); Turkey Point Nuclear Generating Unit No. 4, Subsequent Renewed Facility Operating License No. DPR-41 (Issued Dec. 4, 2019) (ML052790652).

3 Florida Power & Light Company's Views on License Status as Requested in Commission Order CLI-22-02 (Mar. 21, 2022) (ML22080A233) ("FPL's Views").

4 NRC Staff Views on the Practical Effects of (1) the Subsequent Renewed Licenses Continuing in Place and (2) the Previous Licenses Being Reinstated (Mar. 21, 2022) (ML22080A279) ("Staff's Views").

5 Views in Response to CLI-22-02 of Friends of the Earth, Natural Resources Council, and Miami Waterkeeper (Mar. 21, 2022) (ML22080A249) ("Joint Petitioners' Views").

deadline of March 31, 2022, for the "parties' responses."[6] FPL hereby provides its response to the other parties' views. In sum, and as further explained below, the information presented by the parties compellingly supports leaving the SROLs in place.

I. FPL'S RESPONSE TO JOINT PETITIONERS' VIEWS

Joint Petitioners seek complete SROL vacatur.[7] However, they articulate no legitimate basis for their preferred outcome. Indeed, Joint Petitioners' Views rest largely upon erroneous legal assertions and demonstrably inaccurate (and incomplete) factual claims, as detailed below. Accordingly, the Commission should afford them no weight.

A. Joint Petitioners Assert and Rely on an Incorrect Legal Standard

Joint Petitioners assert that, as a legal matter, the Commission may leave the SROLs in place "only" upon determining that there would be "severe consequences" from vacating the licenses.[8] Joint Petitioners cite a non-binding federal district court case as alleged support for the "severe consequences" standard they encourage the Commission to use here.[9] However, Joint Petitioners misrepresent the legal standard applied in that case.

In the cited case, the agency failed altogether to prepare an environmental impact statement ("EIS"),[10] presenting the type of extraordinary National Environmental Policy Act ("NEPA") deficiency for which vacatur is the "ordinary practice."[11] But the district court applied the legal standard in *Allied-Signal* to determine whether vacatur was warranted.[12] In

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6 *Turkey Point*, CLI-22-02, 95 NRC at __ (slip op. at 15).

7 Joint Petitioners' Views at 1.

8 *Id*. at 2.

9 *Id*. (citing *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019) ("*NPCA*")).

10 *NPCA*, 422 F. Supp. 3d at 99.

11 *See* FPL Views at 12 (citing *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1050 (D.C. Cir. 2021)).

12 *NPCA*, 422 F. Supp. 3d at 99-103 (relying on *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993)).

considering the "disruptive consequences" prong of the *Allied-Signal* standard, the court found (as a factual matter, not a legal one) that there would be "severe consequences" from vacating the specific permit at issue in that proceeding.[13] The court did not—as Joint Petitioners claim—purport to establish an entirely new legal standard *requiring* vacatur absent a demonstration of "severe consequences." Notwithstanding the complete absence of *any* EIS, which is a serious "deficiency" under the other prong of the *Allied-Signal* standard, the court declined to vacate the permit after balancing the "overall equities and practicality of the alternatives."[14] That is precisely what the Commission should do here.

B. Joint Petitioners' Commentary on Equitable Considerations Is Factually Flawed and Does Not Support Vacatur

Joint Petitioners' Views also mischaracterize or disregard relevant factual information. And under the equitable considerations articulated in *Allied-Signal*, *Oglala*, and *Powertech*,[15] nothing in Joint Petitioners' Views justifies vacatur here.

1. Joint Petitioners Overstate the Seriousness of Any Purported Deficiencies

Joint Petitioners assert that, due to certain ambiguities regarding the intended scope of the Generic Environmental Impact Statement for License Renewal ("GEIS"),[16] the NRC Staff "failed to provide public notice" that the GEIS applied to subsequent license renewal ("SLR").[17] They then argue that SROL vacatur is justified here because "failure to provide the required

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13 *Id*. at 99.

14 *Id*. (quoting *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270 (D.D.C. 2015) (in turn, citing *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008))).

15 *See Allied-Signal*, 988 F.2d 146; *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018); *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-19-1, 89 NRC 1, 11 (2019)

16 Generic Environmental Impact Statement for License Renewal of Nuclear Plants—Final Report (NUREG-1437, Revision 1) (June 2013) (Vol. 1, Main Report, ML13106A241; Vol. 2, Public Comments, ML13106A242; Vol. 3, Appendices, ML13106A244).

17 Joint Petitioners' Views at 5.

notice and to invite public comment" is a "fundamental flaw that normally requires vacatur."[18] But that logic does not apply here. Notwithstanding any ambiguities as to the scope of the *GEIS*, generally,[19] there certainly was no similar ambiguity regarding the scope of the environmental review *in this proceeding*, specifically. FPL's Environmental Report ("ER") clearly applied the GEIS to SLR.[20] The Staff's Draft Supplemental Environmental Impact Statement ("SEIS") did as well.[21] And the public was given notice and invited to comment on those documents that *unambiguously* applied the GEIS to SLR.[22] In other words, the NRC Staff certainly did not "fail to provide public notice" that the GEIS was being applied in *this* SLR proceeding. Thus, Joint Petitioners' attenuated claims neither identify a "fundamental flaw" in the Turkey Point Final SEIS[23] nor justify the draconian remedy of vacatur.

Ultimately, this prong of the *Allied-Signal* test boils down to a question of whether there exists "any reason to expect that the agency will be unable to correct [the identified] deficiencies."[24] Joint Petitioners identify no such expectation here, and the Commission has squarely announced its contrary expectation—that the Staff "will be able" to correct the

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18 *Id*. (quoting *Standing Rock*, 985 F.3d at 1052 (in turn quoting *Heartland Regional Medical Center v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009))).

19 *See Turkey Point*, CLI-22-02, 95 NRC at __ (slip op. at 9).

20 *See* Letter from M. Nazar, FPL, to NRC Document Control Desk (Jan. 30, 2018) (ML18037A812), as supplemented by letters dated February 9, 2018 (ML18044A653); February 16, 2018 (ML18053A123); March 1, 2018 (ML18072A224); and April 10, 2018 (ML18102A521 and ML18113A132) ("SLRA"). The ER is Appendix E to the SLRA. ER at 4-2 ("FPL adopts by reference the NRC findings for these Category 1 issues.").

21 Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4 – Draft Report for Comment (NUREG-1437, Supplement 5, Second Renewal) (Mar. 2019) (ML19078A330).

22 Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4; License renewal application; opportunity to request a hearing and to petition for leave to intervene, 83 Fed. Reg. 19,304 (Apr. 4, 2019). Florida Power & Light Company; Turkey Point Nuclear Generating Unit Nos. 3 and 4; Draft supplemental environmental impact statement; request for comment, 84 Fed. Reg. 13,322 (Apr. 4, 2019).

23 Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4 – Final Report (NUREG-1437, Supplement 5, Second Renewal) (Oct. 2019) (ML19290H346).

24 *Oglala*, 896 F.3d at 538.

identified deficiency.[25] Read in this proper context, Joint Petitioners' Views vastly overstate the relative seriousness of the deficiency identified in CLI-22-02, which does not support vacatur.

2. Joint Petitioners Understate the Disruptive Consequences of an Interim Change

Joint Petitioners also attempt to downplay the disruptive consequences that vacatur would bring to this proceeding. Indeed, they fail entirely to acknowledge the extensive, complex, and time-consuming task of unwinding the Turkey Point current licensing basis ("CLB").[26] Moreover, Joint Petitioners incorrectly claim the Commission held that, if the SROLs are vacated, FPL will still "have plenty of time for any construction required."[27] Joint Petitioners appear to be relying on the Commission's statement that it "fully expect[s] that the *Staff* will be able to *evaluate the environmental impacts* prior to FPL entering the subsequent license renewal period."[28] But the Commission said nothing about the time needed for *FPL* to complete *construction*—or any of the numerous other activities necessary to prepare for the SLR term, some of which already have begun.[29] As FPL noted, "[i]f deferred until new SROLs are eventually issued, it is unclear whether or how FPL could schedule and complete such activities prior to the [subsequent period of extended operation]."[30] Joint Petitioners' misreading of the Commission's order does not undermine that assertion.

Furthermore, Joint Petitioners imply that any disruptive consequences from vacatur of the SROLs would be FPL's own fault. But that notion is factually baseless and legally incorrect. Specifically, Joint Petitioners claim that FPL "should have been aware that the subsequent

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25 *Turkey Point*, CLI-22-02, 95 NRC at __ (slip op. at 14).

26 *See* 10 C.F.R. § 54.3(a) (defining the CLB).

27 Joint Petitioners' Views at 3 (citing *Turkey Point*, CLI-22-02, 95 NRC at __ (slip op. at 14)).

28 *Turkey Point*, CLI-22-02, 95 NRC at __ (slip op. at 14) (emphasis added).

29 *See* FPL's Views at 5-7.

30 *Id*. at 6.

renewed licenses issued by the NRC Staff were not final and could still be modified or vacated."[31] But there is no dispute on that point; FPL was well aware of the Commission's ongoing authority. To the extent Joint Petitioners imply that FPL had a duty to leave its CLB untouched while the Commission considered the pending adjudicatory matters, that assertion disregards and contradicts applicable legal requirements. As FPL noted, the evolution of the CLB during that time was required by the SROLs and NRC regulations or otherwise compelled by technical and safety considerations.[32] FPL certainly cannot be faulted for following the law.

3. Joint Petitioners Fail to Identify Any Way in Which the SROLs Could Be Used to the Detriment of Resources

Joint Petitioners claim that leaving the SROLs in place "would signal that the NRC has prejudged that the NEPA review will produce no meaningful insights or changes in the license."[33] However, they fail to meaningfully explain that assertion. To the extent they are suggesting that a license can *never* be left in place during the pendency of curative NEPA efforts (because it might represent "prejudgment" as to the outcome), that assertion is contrary to well-established controlling law permitting remand-without-vacatur based on equitable considerations.[34] Furthermore, the equitable framework in *Oglala* and *Powertech* ensures that no license can be "used to the detriment of resources" before the agency completes its further review (i.e., before the agency determines *whether* the further review has produced any meaningful insights or warrants changes in the license). That important limitation, which Joint Petitioners disregard, renders their "prejudgement" argument meritless. More importantly, Joint

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31 Joint Petitioners' Views at 2. *See also id*. at 3 (asserting FPL "could not have reasonably assumed that the subsequent renewed licenses were final."); *id*. (asserting that a dissent in a Commission order issued two years ago was "certainly sufficient" to place FPL on notice that "recission" of the SROLs was impending).

32 FPL's Views at 8-11.

33 Joint Petitioners' Views at 4.

34 *See, e.g.*, *Allied-Signal*, 988 F.2d 146.

Petitioners do not identify any way—not even a hypothetical one—in which the SROLs could be "used to the detriment of resources" before the Staff completes the actions ordered by the Commission here. Ultimately, nothing in Joint Petitioners' Views supports vacating the SROLs.

C. Joint Petitioners Identify No Legal Basis for the Commission to "Declare" the SLR Aging Management Programs ("AMPs") Incorporated Into the ROLs

Joint Petitioners acknowledge the disruptive consequences of vacatur from FPL no longer being required to implement the revised AMPs imposed by the SROLs ("SLR AMPs"). But Joint Petitioners suggest that those admittedly-disruptive consequences can be mitigated because the Commission may simply "declare" that FPL's ROLs "have effectively been amended . . . to incorporate the [SLR AMPs]."[35] However, Joint Petitioners cite no legal authority for the NRC to do so.

Notably, Joint Petitioners offer no explanation as to how the SLR AMPs—reviewed as part of the SLR proceeding and intended to cover a period of operation from 60 to 80 years—could be rationally or legally imposed in the ROLs. Additionally, Joint Petitioners do not address the agency's "Backfit Rule,"[36] much less explain how such an action would pass muster here. And Joint Petitioners plainly acknowledge that imposing the SLR AMPs in the ROLs would raise "due process" concerns.[37] FPL agrees. Ultimately, in the context of an *Allied-Signal* analysis, the need to expend private and taxpayer resources to sort through these additional complexities would be yet another "disruptive consequence" of SROL vacatur.

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35 Joint Petitioners' Views at 5-6.

36 *See* 10 C.F.R. § 50.109.

37 Joint Petitioners' Views at 6.

D. Joint Petitioners' Attack on Commission Regulations Must Be Disregarded

Finally, the last few pages of Joint Petitioners' Views are devoted to attacking the Commission's regulations that allow immediately-effective renewed licenses to be issued notwithstanding the "pendency of any hearing."[38] Such arguments are not only beyond the scope of this briefing, but are expressly prohibited in individual adjudicatory proceedings such as this one.[39] Accordingly, the Commission should disregard these out-of-scope arguments.[40]

II. FPL'S RESPONSE TO NRC STAFF'S VIEWS

In contrast to Joint Petitioners, the Staff takes no position on whether the SROLs should be vacated. However, Staff's Views highlight the multiple technical and regulatory complexities and uncertainties that would arise from vacating the SROLs. As FPL previously noted, the expenditure of Staff and FPL resources to resolve such issues is entirely unnecessary and would be unjustified here because it would not achieve any safety or environmental benefit.

A. Staff's Views Reinforce the Technical and Regulatory Complexity of Vacatur

The NRC Staff's Views correctly highlight the multiple technical and regulatory complexities that would arise from vacating the SROLs. For example, Staff notes that the Turkey Point Final Safety Analysis Reports ("FSAR") would become "obsolete" upon vacatur of

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38 Joint Petitioners' Views at 6 (citing *Nat. Res. Def. Council v. NRC*, 879 F.3d 1202, 1207 (D.C. Cir. 2018) (in turn citing 10 C.F.R. § 2.1202(a))). To be clear, the "immediate effectiveness" of renewed licenses is codified in 10 C.F.R. § 54.31(c), not 10 C.F.R. § 2.1202(a). And 10 C.F.R. § 2.1202(a) applies only "[d]uring the pendency of any hearing," and thus did not apply in this proceeding when the SROLs were issued because no "hearing" was pending at that time. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 & 4), LBP-19-8, 90 NRC 139 (2019) ("terminating" the hearing on October 24, 2019, approximately two months before the SROLs were issued on December 19, 2019).

39 10 C.F.R. § 2.335 ("no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding," except pursuant to a Commission-issued waiver, which Joint Petitioners neither requested nor received here).

40 Even if the Commission considered these arguments, they are not persuasive for multiple reasons. First, they fail to engage with or rebut any of the reasons the Commission promulgated this regulation in the first place. Furthermore, Joint Petitioners claim that post-issuance adjudicatory determinations regarding NEPA defects are "often" "too late." Joint Petitioners' Views at 6. But they cite no instance of environmental or procedural injury that has ever accrued from the issuance of an immediately-effective license renewal where the NRC subsequently cured the defect before the license could be "used to the detriment of resources."

the SROLs.[41] Staff suggests that FPL would need to determine how best to rectify this complex and unprecedented situation, potentially involving multiple screening determinations under 10 C.F.R. § 50.59 and/or license amendments that would need to be submitted and reviewed.[42] As FPL previously noted, these activities would consume untold FPL and agency resources without any corresponding safety or environmental benefit, contrary to the NRC's "Principles of Good Regulation."[43]

B. The Commission Should Resolve the Ambiguity as to 10 C.F.R. § 54.21(b)

The NRC Staff also highlighted a potential ambiguity regarding the applicability of 10 C.F.R. § 54.21(b). That regulation requires license renewal "applicants" to periodically update the SLRA. Given the novelty of these proceedings, Staff suggests this requirement may "likely" apply to FPL if the SROLs are vacated, and that it is "not clear" whether it would apply if the SROLs remain in place.[44]

As a practical matter, there is no meaningful reason to reinstitute the SLRA update requirement in *either* circumstance. In fact, that would appear contrary to the Commission's intent, as expressed in CLI-22-02 and CLI-22-03. The Commission said that it "d[id] not find it necessary for the[affected] applicants to submit revised environmental reports."[45] And the Commission's rulings did not, in any way, disturb the already-completed safety review. To the extent any further information may be relevant to the actions directed by the Commission, it aptly noted that "the Staff can request additional information *if needed* during the environmental

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41 Staff's Views at 11.

42 *Id*. at 12.

43 FPL's Views at 8-11.

44 Staff's Views at 9, 12.

45 *Turkey Point*, CLI-22-02, 95 NRC at __ (slip op. at 3).

review process."[46] In other words, prescriptive SLRA updates are unnecessary and would require a substantial expenditure of resources with no apparent purpose or value in the context of the ongoing proceedings. Accordingly, FPL recommends that the Commission clarify in its "subsequent order" that 10 C.F.R. § 54.21(b) does not apply to FPL during the pendency of the Staff's ongoing environmental review.

III. CONCLUSION

Considering the overall equities and practicality of the alternatives, the information presented by the parties compellingly supports leaving the SROLs in place.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)
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Dated in Washington, DC
this 31st day of March 2022

[46] *Id*.

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing "FLORIDA POWER & LIGHT COMPANY'S RESPONSE TO OTHER PARTIES' VIEWS ON LICENSE STATUS AS REQUESTED IN COMMISSION ORDER CLI-22-02" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned docket.

Signed (electronically) by Ryan K. Lighty

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