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 Station, Unit Nos. 3 and 4)	)	March 31, 2022

FRIENDS OF THE EARTH, NATURAL RESOURCES DEFENSE COUNCIL, AND MIAMI WATERKEEPER RESPONSE TO NUCLEAR REGULATORY COMMISSION STAFF'S & FLORIDA POWER & LIGHT CO.'S VIEWS AS REQUESTED IN COMMISSION ORDER CLI-22-02

I. Introduction

As directed by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") in *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-02, __ NRC __, slip op. at 15 (Feb. 24, 2022) ("CLI-22-02"), Friends of the Earth, Natural Resources Defense Council, and Miami Waterkeeper (together "Environmental Organizations") submit their response to Florida Power & Light Company's ("FPL's") Views on License Status as Requested in Commission Order CLI-22-02 (Mar. 21, 2022) ("FPL View") and 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) ("NRC Staff Views").

II. Previous Licenses Can Be Reinstated with Amended, Updated Safety Provisions

As Environmental Organizations suggested in our March 21, 2022 response (at 5-6) (hereinafter, "Environmental Organizations Views"), it is neither necessary nor appropriate for the Commission to reinstate now-outdated safety programs that applied to the initial license

renewal term. FPL has completed a safety review and an offering of a public hearing on FPL's revised Aging Management Plan. We therefore have no objection to the Commission declaring that FPL's initial renewed licenses have effectively been amended to incorporate the revised Aging Management Plan and all of its associated schedules and requirements. And on further reflection, we think it incumbent upon the Commission to do so. This step is consistent with *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-8-13, 67 NRC 396, 400 (2008) (cited in *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-22-04, __ NRC __, slip op. at 3 (Feb. 24, 2022)). It would also be an appropriate exercise of the Commission's "ultimate responsibility to ensure the safe operation of the facilities that it licenses." *Yankee Atomic Electric Co.* (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 12 (1991). There is nothing in either NRC Staff's or FPL's responses that demonstrates otherwise.

FPL incorrectly suggests that a

> … practical effect of vacating the SROLs [subsequent renewed operating licenses] is that FPL would no longer be required to implement or complete any of these 57 programs or activities, and the NRC Staff would no longer be able to inspect or enforce them because they are unique to the SROLs and are not included in or required by the ROLs [former initial renewed operating license]. If deferred until new SROLs are eventually issued, it is unclear whether or how FPL could schedule and complete such activities prior to the SPEO [subsequent periods of extended operation].

FPL Views at 6. NRC Staff, for its part, expresses concern that license amendments granted after the issuance of the subsequent renewed licenses and the "new and enhanced" programs would not be required. NRC Staff Views at 9-13.

NRC can require, and FPL is capable of cataloguing (and seems to have already done so), those 57 updated, improved, and currently applicable programs that can and should be incorporated as amendments or additional requirements to the previous licenses. It is well within

the Commission's authority to ensure updated programs, conditions, and schedules can be accommodated, as it is unquestioned that NRC bears the "ultimate responsibility to ensure the safe operation of the facilities that it licenses." *Yankee Atomic Electric Co.* (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 12 (1991).

To the extent that there are more complicated scheduling challenges associated with programs that must be reconciled, we find FPL's presentation of the complexities unpersuasive. FPL writes,

> Turkey Point has an integrated surveillance capsule program that applies to both Units 3 and 4. Currently, there is one remaining surveillance capsule that can provide meaningful data for the SPEO [subsequent periods of extended operation]. Following issuance of the SROLs [subsequent renewed operating licenses], an updated Turkey Point withdrawal schedule was approved by the NRC to account for the SPEOs. If the SROLs are vacated, FPL may be required to revert to the former withdrawal schedule and immediately withdraw the one remaining capsule. But then, if the SROLs are subsequently reinstated, there would be no remaining surveillance capsules capable of providing meaningful data for the SPEOs.

FPL Views at 10.

As a first matter, Chapter 4 of the Turkey Point Updated Final Safety Analysis Report, submitted May 2021, shows multiple capsules in Units 3 and 4.[1] Some have been withdrawn. Others remain. Whatever the precise number of capsules, Environmental Organizations trust that all parties are interested in NRC and FPL obtaining meaningful safety data. And if, for example, there needs to be a provision in the Commission's order to ensure FPL will not be required to revert to the former withdrawal schedule and *not* be immediately required to withdraw the one remaining capsule, we doubt such a provision would elicit objection on the part of any party. If there is a subset of similar questions where it is important to provide FPL the regulatory certainty

[1] See Chapter 4 of the Turkey Point Updated Final Safety Analysis Report, Table 4.4-2 at 117 https://www.nrc.gov/docs/ML2114/ML21145A286.pdf.

it requires, we have confidence that those questions can be addressed in a methodical, transparent matter that provides assurance and clarity for FPL and a continued adherence to safety for the other parties.

III. Incidental Take

Another area where accommodations for all parties can be made is in the matter of the incidental take. *See* FPL Views at 7–8. FPL seems to suggest that if the subsequent renewed licenses were vacated, then the American Crocodile and Eastern Indigo Snake would no longer be protected because FPL would no longer be required to abide by the explicit provisions of the U.S. Fish and Wildlife Service's 2019 Incidental Take Statement, and nor would the NRC Staff be able to enforce the provisions.

This is inaccurate. First, as with safety matters, any order from the Commission could and should include explicit provisions to comply with any updated terms and conditions of Incidental Take Statements negotiated with U.S. Fish and Wildlife Service. Next, even accepting FPL's argument that vacatur of the subsequent renewed licenses might to some extent limit the NRC's ability to enforce the most recent Incidental Take Statement, we are unaware of any bar to the U.S. Fish and Wildlife Service enforcing the terms of the Endangered Species Act for unauthorized take. And finally, if the Commission fails to include a provision in its Order requiring compliance with updated Incidental Take Statements, to the extent FPL is concerned that the 2006 Biological Opinion is inadequate, that can be addressed through reinitiated consultation with U.S. Fish and Wildlife Service. In any event, with new and more thorough environmental reviews on the horizon, reinitiating consultation seems a sound course of action.

IV. The National Environmental Policy Act ("NEPA")

In addressing the crux of the Commission's ruling, FPL seems to suggest that the Commission's ruling was wrong—that the NEPA analysis was sufficient because the Turkey Point environmental impact statement did not rely solely on the generic environmental impact statement ("GEIS")—and further, that "… at the present time, the administrative record—including the recent Commission decisions—*does not reflect any finding that the Turkey Point SEIS in fact contains any material defect* (much less a 'serious' one)." FPL Views at 14 (emphasis in original); *see also* FPL Views at 3-4. FPL's assertions miss the point.

NEPA does not simply impose a ministerial task where an incomplete review can be remedied by merely checking an additional box. As the Commission itself notes, NEPA obligates an agency "to consider every significant aspect of the environmental impact of a proposed action" and to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." CLI-22-02, slip op. at 10 n. 38 (citing *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 46 U.S. 87, 97 (1983)). The Commission's ruling further "acknowledge[s] that the environmental review is incomplete" because "the 2013 [Generic Environmental Impact Statement] did not address subsequent license renewal." Environmental Organization Views at 4 (citing *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-22-03, __ NRC __, slip op. at 4 (Feb. 24, 2024) and CLI-22-02, slip op. at 2).

Full compliance with the hard look duty under NEPA is especially vital and in the public interest here due to Turkey Point's unique situation. As the Commission is well aware, the Turkey Point plant is located adjacent to Biscayne Bay National Park in Southeast Florida. It is also the only U.S. nuclear power plant that uses a 5,900-acre cooling canal system as the heat

sink for its operations, a system that is also the source of a hypersaline plume that is harming groundwater and surface water resources inland of the plant in a region where water resources are already stressed. A searching supplemental review is necessary to ensure the NRC makes an informed decision about extending FPL's licenses until the 2050s. Concretely, there are also likely mitigation alternatives that will have to be considered based on evolving science, understanding, and community needs and priorities. And now the Commission has found—unequivocally—that it has yet to make that informed decision. The current analysis is lacking, and FPL and NRC Staff appear to have had little interest in taking a hard look at the reasonably foreseeable impacts of operating Turkey Point when the affected environment will be more stressed due to increased temperatures and higher sea levels. The period for which environmental impacts have yet to be determined does not commence for another decade. There is time to do a thorough environmental review.

FPL next argues that "[b]ecause the potential 2013 GEIS deficiency identified by the Commission poses no imminent concerns, it cannot rightly be viewed as a 'serious' deficiency warranting the extreme remedy of SROL [subsequent renewed operating license] vacatur." FPL Views at 14. But this is not the forum to reargue what the Commission has already decided: that no valid environmental impact statement exists to support extended operation of Turkey Point past the initial renewed operating license term. Pre-judging what imminent concerns might or might not arise is precisely what NEPA is designed to avoid, through the disclosure and careful consideration of key environmental information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). As the Supreme Court held in *Robertson,* NEPA disclosures serve two key statutory goals. First, they ensure the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts

and how to mitigate or avoid them. Second, they guarantee the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision. *Id.*

Last, FPL notes that "[t]his briefing comes at a crucial moment in time when governments and private actors alike must take action to address the global climate crisis and tackle pressing issues of energy availability and independence." FPL Views at 11. We agree. Those are important questions, but not ones involved in the NRC's consideration of FPL's compliance with NEPA except insofar as FPL failed to analyze the impact of climate change on the two units. NEPA's "action-forcing" requirements are designed to ensure that these issues are addressed in a way that involves full disclosure, rigorous analysis, and public participation through the commenting process—not unilateral decision-making by FPL.

V. Vacatur

As we explained in our March 21 filing, vacatur is the "ordinary practice" when an agency violates NEPA. Environmental Organizations Views at 2-4. FPL fails to demonstrate that deviation from this standard is warranted. FPL Views at 14-15.

Rather, FPL seems to suggest that the Commission should not vacate the subsequent renewed licenses here because the Commission did not vacate the license in *Oglala/Powertech*, "notwithstanding the 'significant' NEPA deficiency" in that instance. FPL Views at 12-13 (citing *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-19-1, 89 NRC 1, 11 (2019), and *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018)). The situation here is distinct, and FPL's assertion is misplaced.

In *Oglala/Powertech*, the Oglala Sioux Tribe opposed a license to construct a uranium mining project because the Tribe "feared the destruction of its cultural, historical, and religious

sites." *Oglala*, 896 F.3d at 522. After the NRC Staff published the environmental impact statement and granted the license, the Atomic Safety and Licensing Board concluded, and the Commission agreed, that the environmental impact statement specifically did not "adequately address[] the environmental effects of the [uranium] project on Native American cultural, religious, and historic resources." *Id.* at 525. Notwithstanding the NEPA deficiency, the Board and Commission left the license in place pending the NRC Staff curing the deficiency. The Tribe challenged this decision, and, ultimately, the Court left the remedy to the NRC, *id*. at 538, and the Commission decided to leave the license in place. *Powertech*, 89 NRC 1.

In leaving the license in place in *Oglala/Powertech*, the Commission explained that "our decision in this matter is tied to the particular facts before us." *Id*. at 10. The facts in *Oglala/Powertech* are distinct from the situation here and point to the need for a different outcome. As a preliminary matter, unlike in *Oglala/Powertech* in which the applicant sought a license to construct a new facility, here, a previous license exists—one that can be updated with specific, ongoing safety management programs. Further, at no point has it been suggested that ongoing operations here be curtailed.

Moreover, the Commission decision in *Oglala/Powertech* relied heavily on the fact that "leaving the license in place for now poses no harm to the Tribe because [the applicant] *is not yet in a position to use its NRC license*." *Id.* at 9 (emphasis added); see also *id*. at 7 ("the court identified [applicant's] near-term inability to move ahead with the project due to the absence of another required permit as the key factor supporting the court's decision to leave [the] license in place 'for now.'"). The Commission decision in *Oglala/Powertech* relied significantly on this point because "[u]ntil [the applicant] can lawfully use its NRC license, the risk of harm occurring … that is traceable to the identified NEPA deficiency will remain hypothetical." *Id*. Here, on the

other hand, FPL's subsequent renewed licenses have already gone into effect immediately, in direct violation of NEPA. *See supra* section IV.

Finally, in *Oglala/Powertech* the NRC could put in place precisely designed protective measures in case the applicant was able to use its license before the environmental review was complete. The specific concern in *Oglala/Powertech* of impacts to Native American cultural, religious, and historic resources allowed for this. But in the instant matter there are whole sections of the environmental review that are missing—essentially any analysis of all Category 1 issues. The same narrow protective order the Commission could create in *Oglala/Powertech* is not possible here due to the extent of deficient environmental review. And as the Court and Commission explained, "once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm." *Powertech*, 89 NRC at 7.

FPL also relies on *Hydro Resources, Inc*. to claim that vacatur is "an extraordinary remedy not required by law in lesser circumstances," FPL Views at 12 (citing *Hydro Resources Inc.*, (2929 Coors Rd., Ste. 101, Albuquerque, NM 87120), CLI-00-15, 52 NRC 65, 66 (2000) ("Some licensing defects [] such as a failure to provide sufficient information, by their nature do not call for revoking a license outright, for a prompt *cure* may be possible without compromising the public health and safety and without defeating Intervenors' hearing rights." (emphasis in original))). Reliance on that aspect of *Hydro Resources, Inc.* is misplaced for a host of reasons. Primarily, as stated, vacatur is the standard remedy. Environmental Organizations Views at 2-4. And as in *Oglala*, in contrast to the instant matter, the NRC in *Hydro Resources, Inc*. was reviewing an initial license and *Hydro Resources, Inc.* was not operating (and has yet to operate

to our knowledge). There was no pre-existing license that could be updated with ongoing safety management provisions.[2]

FPL claims that vacating the subsequent renewed licenses would be "disruptive," as though it were on a schedule that guaranteed it would have the licenses by a certain date. FPL Views at 14-15. But FPL had to have known that things could change after the NRC Staff issued its subsequent renewed licenses, because the hearing process was not closed. Further, vacating the subsequent renewed licenses need not be nearly as disruptive as FPL claims, because, despite the NRC's ruling, FPL retains a current license allowing it to operate Turkey Point years into the future; there seems to be no danger to its having submitted a license application under the "timely renewal" standard; and all parties have expressed a willingness to support provisions for the updated safety provisions and schedules to allow for regulatory clarity.

There are, however, consequences for failure to comply with NEPA, our "basic national charter for protection of the environment." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020). Recognizing "the profound impact of man's activity on the interrelations of all components of the natural environment," 42 U.S.C. §4331(a), in enacting NEPA, Congress sought to "promote efforts which will prevent or eliminate damage to the environment and biosphere," 42 U.S.C. § 4321, in order to, inter alia, "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." 42 U.S.C. § 4331(b)(1).

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[2] *See also*, Environmental Organizations' Views at 2-4 (stressing that "[v]acatur is the standard remedy for good reason. NEPA is an action-forcing statute, which serves not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action. The goal of informed and excellent decision making can only take place if agencies take the required hard look before taking [the proposed] action." *Friends of the Earth v. Haaland*, No. CV 21-2317 (RC), 2022 WL 254526, at *25 (D.D.C. Jan. 27, 2022) (citing 40 C.F.R. § 1500.1(a); *Oglala Sioux Tribe*, 896 F.3d at 532) (internal citations omitted)).

Ultimately, NRC Staff and FPL spend substantial energy speculating about misfortunes that could arrive and costs that could be imposed by vacating the subsequent renewed licenses. We note as we did a mere 10 days ago that this is an issue created by the NRC's own rules and which it has the authority to remedy. Environmental Organization Views at 6-7. But since the agency's action was not final, FPL knew that any reliance on its part was preliminary, non-final, and subject to change. FPL knew or should have known that any reliance thereon was an assumption of risk on its part.

VI. Conclusion

Environmental Organizations have already agreed to continuing with aging management provisions and are confident other matters such as the specific terms of the inclusion of the incidental take provisions can be addressed. As we wrote 10 days ago, the Commission should vacate FPL's subsequent renewed license but order the Staff to impose FPL's updated Aging Management Plan as a condition of continued operation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on March 31, 2022, I posted copies of the foregoing FRIENDS OF THE EARTH, NATURAL RESOURCES DEFENSE COUNCIL, AND MIAMI WATERKEEPER RESPONSE TO NUCLEAR REGULATORY COMMISSION STAFF'S & FLORIDA POWER & LIGHT CO.'S VIEWS ON LICENSE STATUS AS REQUESTED IN COMMISSION ORDER CLI-22-02 on the NRC's Electronic Information Exchange System.

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