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Florida Power
CORPORATION

R. Alexander Glenn
CORPORATE COUNSEL

June 13, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 970261-EI

Dear Ms. Bayó:

Enclosed for filing in the subject docket are an original and fifteen copies of Reply of Florida Power Corporation to Public Counsel's Opposition to Motion to Strike Testimony of William R. Jacobs, Jr.

Please acknowledge your receipt of the above filing on the enclosed copy of this letter and return to the undersigned. Also enclosed is a 3.5 inch diskette containing the above-referenced document in WordPerfect format. Thank you for your assistance in this matter.

Sincerely,

R. Alexander Glenn

RAG/kp

Enclosures

cc: Parties of Record

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CERTIFICATE OF SERVICE
Docket No. 970261-EI

I HEREBY CERTIFY that a true and correct copy of Reply of Florida Power Corporation to Public Counsel's Opposition to Motion to Strike Testimony of William R. Jacobs, Jr. has been sent by Federal Express to the following individuals on June 13, 1997:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of nuclear outage at Florida Power Corporation's Crystal River Unit No. 3.	Docket No. 970261-EI Submitted for filing: June 16, 1997

REPLY OF FLORIDA POWER CORPORATION TO PUBLIC COUNSEL'S OPPOSITION TO MOTION TO STRIKE TESTIMONY OF WILLIAM R. JACOBS, JR.

Florida Power Corporation ("Florida Power") submits this reply to the Opposition filed by the Office of Public Counsel ("Public Counsel") to Florida Power's motion to strike the prefiled testimony of the Citizens' witness, William R. Jacobs, Jr.

In its motion, Florida Power demonstrated that Dr. Jacobs relies fundamentally on inadmissible evidence for the opinions that he proffers in this case.[1] To summarize, his testimony consists of two parts: (1) An extensive discussion and quotation of the hindsight conclusions and judgments of Florida Power in critical self-assessments developed in accordance with NRC

[1] Public Counsel argues that because Florida Power cited and relied upon an NRC report in a 1991 rate case, the Commission would be justified in relying upon NRC reports in this proceeding. One proceeding has nothing to do with the other. Among other things, Florida Power was seeking an incentive award over and above cost recovery in that 1991 proceeding based on a demonstration that Florida Power had met standards of excellence that far exceeded prudence. The NRC report was used to demonstrate that FPC had excelled in all aspects of its operations even under the high standards established by the NRC. The proceeding did not involve the prudence of any management decision.

requirements and provided to the NRC and of the hindsight conclusions and judgments of the NRC itself concerning matters taking place in the 1994-1996 timeframe unrelated to the current outage; and (2) criticism of Florida Power's analysis of hypothetical safety issues associated with a plant modification (the ASV-204 modification) made in 1987, based on 1996 NRC hindsight inspection reports and 1996 hindsight, self-critical evaluations by Florida Power itself concerning that modification. In opposition to our motion, Public Counsel does not dispute that Dr. Jacobs relied upon these hindsight materials in reaching and expressing his opinions in this case. Rather, Public Counsel insists that Dr. Jacobs' testimony should be admitted into evidence and may be relied upon by the Commission because Dr. Jacobs relied upon these hindsight documents solely to ascertain facts, not opinions or judgments.

It is understandable that Public Counsel would strive arduously to protect the sole evidence he has proffered in opposition to Florida Power's showing of prudence in this case, but Public Counsel's unsupported assertion that Dr. Jacobs relied upon and discussed forbidden hindsight documents only to ascertain "facts" is flatly belied by the plain text of Dr. Jacobs' prefiled testimony and by Dr. Jacobs' own admissions in deposition. Dr. Jacobs' prefiled testimony is rife with quotation and discussion of hindsight conclusions and judgments. Even a cursory reading of Dr. Jacobs' prefiled testimony, let alone his deposition, conclusively demonstrates that Dr. Jacobs' opinions are inextricably intertwined with, and

hopelessly tainted by, his extensive reliance upon and detailed discussion of impermissible hindsight judgments, opinions, conclusions, and critical after-the-fact evaluations. Contrary to Public Counsel's effort to claim that Dr. Jacobs relied merely upon "facts" set forth in Company or NRC hindsight documents, Dr. Jacobs himself freely conceded in his deposition that these hindsight statements about "root causes" that he relied upon and quoted extensively in his prefiled testimony were "not statements of objective facts." Instead, as he admitted, "they reflect value judgments." (Dep. p. 78) (emphasis added).

Turning first to the initial part of his prefiled testimony -- Dr. Jacobs' discussion of NRC and Florida Power after-the-fact criticisms of matters occurring in the 1994-1996 timeframe -- Dr. Jacobs has made no effort to show that the self-critical, hindsight conclusions and judgments and NRC evaluations concerning that timeframe bear any relationship whatsoever to the cause of the outage. In fact, he conceded in his deposition that "even if the NRC had given CR-3 straight A's on its report card or the equivalent of all SALP one's that Florida Power Corporation still would have been obliged to take CR-3 out of service once they determined that the plant design was in a configuration that was not in compliance wtih the design basis." (Dep. p. 127). Accordingly, it is obvious that Dr. Jacobs' reliance and quotation of hindsight judgments concerning the 1994-1996 timeframe are a gratuitous effort to inject patently inadmissible and

immaterial evidence into this case that the Commission would not be free to rely upon if it were proffered directly by Public Counsel.

That leaves Dr. Jacobs' opinion that the Company failed to analyze adequately the ASV-204 modification made in 1987. As to this issue, Dr. Jacobs conceded in his deposition that he did not rely merely on facts contained in the Company's hindsight documents, as Public Counsel now argues, but rather on "analyses." (Dep. p. 153). These analyses included "the company's preliminary report to the Commission"; "the ASV-204 root cause analysis"; and "NRC reports, inspection reports dealing with the situation." (Dep. p. 153). Significantly, Dr. Jacobs did not cite or quote any facts from these documents in his prefiled testimony. To the contrary, he quoted and relied upon the hindsight conclusions set forth in these documents, and he further admitted in deposition that he could find no contemporaneous documents that put the Company on notice of the matters that the NRC and the Company came to recognize only in hindsight:

Q But the conclusion you quoted in your testimony . . . was something that was created in 1996; is that right?

A Yes.

Q And in fact with reference to the statement that seven of nine configurations introduce one or more problems or missed an opportunity to identify and resolve previous problems, were there

any documents created in the 1987 and 1992 time frame that identified these problems or those missed opportunities?

A I'm not aware of any. There may be, but I haven't seen them.

Q So the company's conclusion that such problems were introduced or opportunities missed was an insight that the company obtained only recently in 1996; is that right?

A Yes.

Q The NRC inspection reports that you relied on, likewise those were reports that were generated after 1996; is that right?

A I think in '96 and '97.

(Dep. p. 157) (emphasis added).

Public Counsel argues, nonetheless, that Dr. Jacobs' testimony must be spared because he has identified a critical "fact" not rebutted by Florida Power witnesses that establishes imprudence. Specifically, Public Counsel contends that Dr. Jacobs has opined that when Florida Power reversed the ASV-204 modification in May 1996, the Company "forgot or failed to recognize" that a 1990 modification relied upon the 1987 modification. Public Counsel's argument, however, ignores Dr. Jacobs' concession in his deposition that what Florida Power did in May 1996 did not cause the outage, but may have only delayed its onset. As Dr. Jacobs stated:

A . . . the company somehow forgot that the modification made in 1990 required ASV-204 to be powered and initiated from the A train.

Q And you would agree that had they realized the full implications of that issue in May 1996 that the company would have been in a position then that they found themselves in September 1996?

A Yes.

Q Namely, that they had a limited condition of operation that they had to deal with immediately; is that right?

A I think that's probably true, boils down to an LCO problem.

(Dep. p. 88).

Upon further questioning by Staff Counsel on this point, Dr. Jacobs confirmed that whether or not Florida Power considered the 1990 modification in May 1996 when reversing the ASV-204 modification made no practical difference. As he acknowledged, in May 1996, the Company's only viable recourse would have been to undertake the extensive modifications now being performed:

Q In your pretrial testimony you said that apparently Florida Power Corp forgot or did not recognize the 1990 modification in May of 1996?

A Yes.

Q Prior to implementing the 1996 modification in your opinion what steps should Florida Power Corp have followed?

A Well, it depends at what point in time, but by 1996 there was probably no way out. . . . [Concerning the ASV-204 modification] they had one problem if they left it in. They had another problem if they took it out, and that's how they ended up in the situation where they really had no alternative other than to go into this outage and make different modifications. There was no -- it's my belief there was no simple solution at that point in time.

(Dep. pp. 221-22) (emphasis added).

Thus, Dr. Jacobs' testimony that Florida Power ostensibly "forgot" to consider the 1990 modification when reversing the 1987 modification in May 1996 is quite beside the point, by his own admission. (In any event, even Dr. Jacobs' testimony about this event is a characterization that Dr. Jacobs arrived at based on his review of hindsight evaluations, not a statement of objective fact.) Because, by his own admission, that testimony has no bearing on why the Company had to take CR-3 out of service, the testimony may not be used to bootstrap into evidence Dr. Jacobs' overt reliance upon and discussion of hindsight judgments by the NRC or Florida Power elsewhere in his testimony.

Further, Public Counsel contends that Dr. Jacobs' testimony must be admitted because he addresses the "initiating cause of the outage," namely, he

"addresses the pipe failure in the turbine lubricating oil system at page 23 without reliance on hindsight or NRC documentation." (Dep. p. 3). The fact is, however, that without the benefit of hindsight evaluations, Dr. Jacobs was admittedly able to reach "no conclusion concerning the reasonableness" of the Company's actions on this issue, he "has not done any further work since the time [he] filed [his] pretrial testimony on this issue," and he did not "have any plans to" do any further work on this issue before the hearing. (Dep. pp. 117-18) (emphasis added). Thus, this argument of Public Counsel is another red herring.

Accordingly, it is evident that Dr. Jacobs and Public Counsel have stepped decisively over the line drawn by the Florida Supreme Court. Dr. Jacobs is unabashedly relying upon critical hindsight conclusions, not facts, for the purpose of arguing that those conclusions must be taken as prima facia, if not dispositive, evidence of imprudence.

Public Counsel seeks to distinguish controlling Supreme Court precedent by arguing that this case does not involve an "accident" or "dropped test weight." (Opposition, pp. 6-7). This argument cannot be taken seriously. As we demonstrated in our motion, the principle that this Commission cannot rely upon hindsight evidence to assess the reasonableness of past actions is a bedrock principle that the Supreme Court and this Commission have appropriately embraced for all prudence determinations. (See authorities cited in our motion). No matter what the context, it is not fair, or legally permissible, to fault

management based on facts or considerations that were not known or reasonably knowable until years after a decision was made. This Commission must put itself in the shoes of management at the time the decisions were made, without substituting its judgment for the reasonable judgments of management made at the time.

Further, it is untenable to argue that the State has less of an interest in encouraging subsequent remedial measures when the subject is improving the quality of a nuclear power plant's emergency feedwater system than in encouraging a full and candid investigation into a dropped test weight. The hindsight Company and NRC documents relied upon and quoted by Dr. Jacobs are just as "off limits" to the Commission in this case as in any other conceivable situation.

Dr. Jacobs' testimony should be stricken. If the Commission accepts and relies upon Dr. Jacobs' testimony in this matter, its decision will not withstand scrutiny by the Florida Supreme Court.

CONCLUSION

For the foregoing reasons and for the reasons provided in Florida Power's motion, Florida Power's motion to strike should be granted.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By _____

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