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Florida Power
CORPORATION

R. ALEXANDER GLENN
CORPORATE COUNSEL

May 29, 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 (15) copies of Florida Power Corporation's 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 5.1 format. Thank you for your assistance in this matter.

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Sincerely,

R. Alexander Glenn

RAG/mgc

Enclosures

cc: Parties of record

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A Florida Progress Company

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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: May 29, 1997

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

Florida Power Corporation ("Florida Power") moves the Public Service Commission ("the Commission") to strike the prefiled testimony of William R. Jacobs, Jr. concerning the prudency of Florida Power management's decisions with respect to the shutdown of its nuclear unit on September 2, 1996.

SUPPORTING MEMORANDUM

I. INTRODUCTION

On April 28, 1997, the Florida Office of Public Counsel ("Public Counsel") submitted the prefiled testimony of William R. Jacobs, Jr., challenging Florida Power's entitlement to recover costs incurred on account of the outage of Florida Power's nuclear plant, Crystal River Unit 3 ("CR-3"). Dr. Jacobs' testimony should be stricken.

Dr. Jacobs' testimony recounts at length, and is fundamentally predicated upon, evidence that may not be relied upon legally to determine the prudence of management's actions. This evidence consists of NRC safety inspection reports and other hindsight evaluations and critical, hindsight assessments created for and provided to the NRC by Florida Power. In directly controlling precedent, the Florida Supreme Court has held

that hindsight evaluations, post-incident investigations, and reports relating to NRC compliance-related concerns may not serve as a legally permissible basis for a finding by this Commission of management imprudence. If the Commission were to rely upon Dr. Jacobs' testimony in disallowing any part of the costs that Florida Power may seek to recover, the Commission's Order would be subject to reversal. Accordingly, the testimony should be stricken.

II. DR. JACOBS' OPINIONS ARE IMPROPERLY FOUNDED ON HINDSIGHT, SELF-EVALUATIVE, NRC COMPLIANCE-RELATED EVIDENCE.

Florida law is settled that, in considering the prudence of what Florida Power's management has done or not done, the Commission must put itself in the shoes of Florida Power's management at the time those decisions were made and hence it may consider only what management knew or should have known at that time.[1] See, e.g., Gulf Power Company v. Florida Public Service Comm'n, 487 So. 2d 1036, 1037 (Fla. 1986) (managerial decisions must be evaluated "under the conditions and times they were made") (emphasis added); In Re: Recovery of Fuel Costs Associated with Florida Power Corporation's Crystal River 3 Outages in 8/89 and 10/90, Docket No. 910925-

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[1]Florida law is in accord with other states in this regard. See, e.g., Garst v. General Motors Corp., 484 P.2d 47, 61 (Kan. 1971) ("Reasonable care does not require prescience nor is it measured with the benefit of hindsight. Tort law does not expect Saturday manufacturers to have the insight available to Monday morning quarterbacks."); Wisconsin Telephone Co. v. Public Service Commission, 287 N.W. 122, 167 (Wis. 1939). cert. denied, 309 U.S. 657, 84 L. Ed. 1006, 60 S.Ct 514 (1940) ("It is much easier to point out past errors in management than it is to avoid further mistakes ... [T]he Commission may not ignore actual expenses because in the light of experience and present conditions it is possible to say that some part of the expenses might have been avoided.")

EI, Order No. PSC-92-0289-FOF-EI, p. 5 (May 5, 1992) ("FPC acted in a reasonable and prudent manner under the circumstances that existed at the time") (emphasis added).

The impropriety of determining management prudency through a hindsight analysis was expressly recognized by the Florida Supreme Court in Florida Power Corporation v. Public Service Commission, 424 So. 2d 745, 747 (Fla. 1982). In reversing the PSC's finding of management imprudence there, the Court noted that the PSC's finding was based on two reports presented after the outage in question. One of the reports was a notice of violation issued by the NRC that criticized Florida Power's plant procedures for the labeling and testing of hooks. The second was a report by Florida Power's own Nuclear General Review Committee. Because both reports were issued "after the accident had occurred," the Supreme Court held that the Commission's reliance upon them to find management imprudence "would clearly violate Florida's strong public policy in favor of post accident investigation," and it further emphasized that "[h]indsight should not serve as the basis for liability [i.e., a finding of imprudence] in this instance." Id. (emphasis added).

In addition, the Florida Supreme Court explained that some of the reports were "concerned solely with safety-related matters, consistent with the NRC's limited scope of responsibility for nuclear safety and the health of the general public from a radiological standpoint." Id. at 747. This "involved a very different risk and a much higher standard of care than were involved in this [management imprudence] case." Id. Thus, the Court recognized that the NRC does not consider whether Florida Power made reasonable management decisions based on the information available to the company at

the time. Rather, the NRC engages in an evaluation of Florida Power's compliance with NRC safety standards and procedures based on a hindsight perspective and a more stringent standard than is properly applied to a determination of management imprudence.

Furthermore, the Court noted, the purpose of certain reports was "to suggest improvements in procedures after an accident occurs." Id. at 747. Given Florida's strong public policy in favor of post-accident investigations, this too was an improper basis upon which to find fault.

The Court made the same point concerning hindsight evaluations again in Florida Power Corporation v. Public Service Commission, 456 So. 2d 451, 452 (Fla. 1984) when it reversed this Commission's renewed finding of management imprudence in connection with that nuclear unit outage. On remand the Commission had focused on language in the Court's first opinion indicating that the Commission should not place "primary" reliance on hindsight, safety-related assessments. Based on this language, the Commission proceeded to review such materials but emphasized that it was not placing "primary" reliance on them.

The Court concluded nonetheless that the Commission had failed to adhere to the Court's directive to base its decision only on information that Florida Power had available to the company's management at the time the events at issue had occurred. In particular, the Court pointed out that the Commission had impermissibly relied upon a hindsight statement made by the plant manager of CR-3, stating "[o]ur internal procedure was not adequate enough to preclude this happening because it did not require

the testing of the hooks and it should have." Id. at 452. In reversing, the Court stated that "[t]he lack of procedures which might have prevented the accident, suggested by the PSC, amounts to an application of the 20-20 vision of hindsight. The PSC has not shown that FPC management acted unreasonably at the time." Id. at 452 (emphasis added).

As these controlling precedents make clear, reports and other documents that reflect a hindsight perspective and a self-evaluative analysis of compliance-related matters in order to propose new standards, practices, or procedures may not -- as a matter of law -- be considered by the Commission in making a prudency determination. Since such evidence may not be relied upon by the Commission in determining the prudency issues presented in this proceeding, the Commission must exclude supposed "expert" testimony based upon those reports and documents.

Although experts may base their opinions on facts that are not necessarily admissible into evidence, they may not be used as a conduit through which inappropriate evidence is presented to the fact finder. Maklakiewicz v. Berton, 652 So. 2d 1208, 1209 (Fla. 3rd DCA 1995); see also Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430, 432 (Fla. 2d DCA 1989) (expert testimony cannot be used "as a conduit to place otherwise inadmissible evidence before a jury"); Ehrhardt, Florida Evidence, §704.1 (2d ed. 1984).

For example, in Berton, the trial court permitted a police officer, qualified as an accident reconstruction expert, to opine that the defendant was not at fault in the incident, even though the officer admitted that his opinion was partly founded on hearsay

accounts of the incident. The Third District reversed, holding that, "[a]lthough an expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied on by experts on the subject, the witness may not serve merely as a conduit for the presentation of inadmissable evidence." Id. at 1209.

Dr. Jacobs, himself, has acknowledged the perils of relying on hindsight NRC reports or critical self-assessments generated by nuclear plant operators. His own deposition testimony establishes that the purpose of these reports and self-assessments is not to justify or evaluate the prudence of past decisions but, with the benefit of hindsight, to enable the plant operator and the NRC to institute changes for the future. As Dr. Jacobs admitted, "the NRC has very little patience for a nuclear plant operator that attempts to justify plant actions where we now know it was a bad result." (WRJ Dep. pp. 73-74). He agreed that "if the NRC finds a violation of one of its standards or regulations, that does not in and of itself prove that a decision was made that is imprudent." (WRJ Dep. p. 51). He acknowledged that "the NRC has applied a rising standard over time, meaning a standard that is becoming increasingly rigorous and strict over the years." (WRJ Dep. p. 51). Necessarily, he admitted that "as an industry, this industry is a lot smarter and better in 1997 than it was in 1987" and that "the NRC responds to that evolving experience and knowledge on [the] part of the industry and on its own part." (WRJ Dep. p. 52).

In the same vein, Commissioner Diaz of the NRC recently confirmed in a speech on April 7, 1997, that NRC hindsight evaluations are not a proper basis for assessing

management imprudence. He acknowledged, "there is one area, where the NRC has no business but the industry has: the good management practices area." He further noted, "At times it appears that NRC has found a scapegoat, 'the management' who is blamed for mechanical, electrical, or human failures, whether or not they are warranted." He continued, "we still have too many uncertainties in our regulations and their applications, resulting from patchwork, developed over time in a less than systematic fashion. These uncertainties affect regulatory burden, encumber the regulator, and inhibit public understanding." He emphasized, "Safety and compliance are not the same thing." (Prefiled Rebuttal Testimony of Ralph G. Bird, p. 6).

In the face of these inherent problems associated with applying NRC inspection reports and hindsight self-assessments to determine the prudency of prior management actions, Dr. Jacobs relied almost exclusively on such materials in faulting actions taken by Florida Power almost a decade ago, in 1987. Although Dr. Jacobs pays lip service to the requirement that Florida Power management be evaluated solely on the conditions and information available at the time the management decisions were made, Dr. Jacobs engaged in no independent analysis of Florida Power's management decisions based on truly contemporaneous information. Instead, he relied dispositively on after-the-fact evaluations of the NRC and Florida Power.

Dr. Jacobs' prefiled testimony is 58 pages in length. The first several pages is background material. After arguing at the beginning of his testimony, contrary to the Florida Supreme Court's controlling decisions, that "it is appropriate and valuable to use documents prepared by the NRC or INPO in performing an evaluation of the actions of

nuclear plant management" (WRJ Prefiled Testimony, pp. 5-8, hereinafter cited "WRJ, p.___), Dr. Jacobs devotes the first substantive section of his testimony -- "Overview of CR-3 Management Problems" -- to extensive quotation from and discussion of either NRC or Florida Power hindsight, compliance-related documents. Indeed, Dr. Jacobs unabashedly admits that "[t]his overview is primarily based on assessments, root cause analyses and corrective action plans developed by the Company." (WRJ, p. 10). All of these documents were created after 1995, almost a decade after the decisions that Dr. Jacobs says led to the current outage. (WRJ Dep. pp. 63-65). None of this evidence may be permissibly relied upon under controlling Supreme Court precedent. Dr. Jacobs' quotation from and discussion of inherently critical, hindsight material is a blatant attempt to induce this Commission to receive and rely upon inappropriate evidence through the guise of proffering expert opinion testimony.

Dr. Jacobs commences the next portion of his testimony -- "History of the Current Outage" -- by merely summarizing the deposition testimony of Florida Power witnesses. (WRJ, pp. 23-27). Beginning again at p. 27, however, and extending through p. 36, Dr. Jacobs quotes, paraphrases, and otherwise belabors Florida Power and NRC hindsight and compliance-related documents. Again, none of this material provides a proper basis for evaluating the prudence of Florida Power's management decisions at issue in this case.

Significantly, Dr. Jacobs does not even identify the acts or omissions that he believes led to the current outage until p. 37 of his prefiled testimony, in the section "The Emergency Feedwater System Modifications." (WRJ p. 39). Apart from

summaries of his opinions, this portion of his testimony comprises the balance of his opinions. The linchpin of his testimony appears at p. 49, where Dr. Jacobs asserts:

> If FPC had done a complete analysis of the potential hydraulic affects of [a modification made in 1987] or had done an adequate 50.59 evaluation for the 1987 modification and identified the potential cavitation problem the modification would not have been installed. FPC would either have selected another option for meeting their goals of increasing EDG margin and reducing operator burden, or the 1987 modification would have been changed to include the installation of flow limiting devices such as the cavitating venturis that FPC is installing during this outage to eliminate the cavitation problem. In either case, the present outage would not have been required to install the EFW and EDG modifications. [Emphasis added]

This testimony is significant because it establishes beyond any question that Dr. Jacobs' reliance throughout his testimony on NRC and Florida Power documents created during the years 1994 through 1997 are plainly hindsight documents in relation to the decisions that Dr. Jacobs contends brought about the current outage. These current-day self-assessments and NRC evaluations were formed with the full benefit of hindsight, experience in operating the power plant, experience in the industry, and regulatory advances. These materials necessarily include information, and incorporate judgments made on the basis of information, that was not available to Florida Power's management at the time decisions in 1987 were made.

Moreover, Dr. Jacobs' selective reliance on these materials constitutes a gratuitous effort to place Florida Power in a bad light based on considerations that have nothing to do with why company management was compelled to initiate and then to extend the current outage. Significantly, Dr. Jacobs explicitly conceded in his deposition that "even if the NRC had given CR-3 straight A's on its report card . . . 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 with its design basis." (WRJ Dep. p. 127) (emphasis added).

Although Dr. Jacobs examined the contemporaneous Modification Approval Record associated with the 1987 modification to ascertain what Florida Power said about the modification at that time, importantly, Dr. Jacobs' based his finding of fault not on information that existed in 1987 but on a critical self-assessment created by Florida Power in 1996 in conformity with NRC requirements, called a "root cause" analysis. Dr. Jacobs quotes from this document at p. 41 of his prefiled testimony.

In deposition, Dr. Jacobs confirmed that he arrived at his conclusion that Florida Power had erred in installing the 1987 modification based on hindsight analyses:

> Q
> Would you explain to us how you determined that the modification made in 1987 introduced a potential problem at Crystal River 3?
>
> A
> From reviewing the various analyses of the modifications that were done.
>
> Q
> Which analyses?
>
> A
> Well, probably I think that was addressed in the company's preliminary report to the commission. That was the first one that I read and I read the ASV-204 root cause analysis. I read NRC reports, inspection reports dealing with the situation.

(WRJ Dep. p. 153) (emphasis added).

The root cause report that Dr. Jacobs relied upon and quoted at p. 41 of his prefiled testimony identified a number of issues that had been identified in 1996 concerning the 1987 modification. In deposition, Dr. Jacobs acknowledged that he reviewed no contemporaneous information that had identified those problems, and that Florida

Power's root cause analysis was based on recent insights not available to Florida Power management in 1987:

> Q
> [I]n 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 those 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.

(WRJ Dep. pp. 156-57).

Dr. Jacobs has freely conceded that "root cause analyses are conducted to satisfy NRC regulatory requirements." (WRJ Dep. p. 68). As Dr. Jacobs acknowledged in his deposition, "the term root cause is a term of art of the nuclear power industry," and "the NRC provides guidelines and guidance to nuclear power plant operators on conducting root cause analyses." (WRJ Dep. p. 68). Dr. Jacobs admitted that "the whole purpose" of a root cause analysis is to determine that "something went wrong and pinpoint what is was . . . with the benefit of knowing what went wrong," i.e., with the full benefit of hindsight. (WRJ Dep. p. 71) (emphasis added). Put another way, "[i]n doing a root cause analysis you're usually working from the event." (WRJ Dep. p. 71) (emphasis added). The point of this is so that the plant and the NRC "can learn some lessons from what happened so that we prevent a serious problem from occurring in the

future." (WRJ Dep. p. 70) (emphasis added). This is a far cry from attempting to determine whether management made reasonable decisions in the past, based on the information available to the company at that time, without benefit of hindsight.

Although Dr. Jacobs reviewed calculations relating to this modification that were created in 1996 by Florida Power, he performed no calculations of his "own to confirm or refute that the modification made in 1987 would cause a condition of inoperability of any engineering safeguard system or equipment to occur." (WRJ Dep. pp. 158-59).

In the same vein, Dr. Jacobs conceded that the NRC inspection reports that he relied upon to pass judgment on the 1987 modifications were hindsight materials:

> 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.

(WRJ Dep. p. 157).

As can be readily seen, then, permitting Dr. Jacobs' prefiled testimony to remain in the record would amount to no less than placing before the Commission the clearly inadmissible reports and documents themselves, artfully masked as an expert opinion. Ironically, allowing Dr. Jacobs' testimony to be considered in this hearing is potentially even more damaging than admitting the reports themselves, since undue emphasis may be placed on the evidence offered through an expert based upon the witness' status. Kruse v. State, 483 So. 2d 1383, 1386 (Fla. 4th DCA 1986) ("trier of fact may place undue emphasis on evidence offered by an expert, simply because of the special gloss placed on that evidence by reason of the witness' status as an expert").

Finally, as noted above, the Florida Supreme Court has squarely held that Florida's strong public policy in favor of post-accident investigations and remedial measures precludes a finding of management imprudence on the basis of such evidence. Florida Power Corporation v. Public Service Commission, 424 So. 2d at 747 (use of hindsight "documents would be analogous to using evidence of subsequent repairs and design modifications for the purpose of showing that the original design was faulty[;] [t]his would clearly violate Florida's strong public policy in favor of post accident investigations.") That policy is codified in Florida Statutes Section 90.407, which expressly provides that such subsequent remedial measures are "not admissible to prove negligence or culpable conduct in connection with the event."

The policy considerations underlying the prohibition of admission into evidence of post-accident investigations and remedial measures are significant. Not only is there the danger of chilling the candor of persons engaged in such evaluations and the willingness of persons to perform such measures if this will then be used against them, but there is a further danger that such evidence will distract the trier of fact from the actual issue to be determined. This point was well stated in Grenada Steel Industries v. Alabama Oxygen co., 695 F.2d 883 (5th Cir. 1983), where evidence of subsequent actions by the defendant was excluded because it would focus the fact-finder's attention on the wrong issues:

> The jury's attention should be directed to whether the product was reasonably safe at the time it was manufactured. In this case, for example, there was ample expert testimony concerning that point. The introduction of evidence about subsequent changes in the product or its design threatens to confuse the jury by diverting its attention from whether the product was defective at the relevant time to what was done later.

695 F.2d at 888 (emphasis added). See also Raymond v. Raymond Corp., 938 F.2d 1518, 1524 (1st Cir. 1991) (post-accident changes to a product "may reasonably be found unfairly prejudicial to the defendant and misleading to the jury for determining the question whether the product was unreasonably dangerous at the time of manufacture and sale"); Roberts v. Harnischfeger Corp., 901 F.2d 42, 44 (5th Cir. 1989) ("design changes developed after the manufacture of the product in question ... [are] irrelevant to the reasonableness of the design at the time of manufacture").

The teachings of the Florida Supreme Court and other courts clearly establish that the basis of Dr. Jacobs' opinions on management prudency are absolutely improper. His testimony cannot stand and it cannot serve in any way as a basis for the Commission to resolve the issues in this proceeding.

III. CONCLUSION

For the foregoing reasons, Dr. Jacobs' pre-filed testimony concerning Florida Power management's prudency with respect to the shutdown of CR3 is inadmissible. Accordingly, it must be stricken from the record in this proceeding.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
FLORIDA POWER CORPORATION

By _____

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CERTIFICATE OF SERVICE
Docket No. 970261-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power Corporation's Motion To Strike Testimony of William R. Jacobs, Jr. has been sent by regular U.S. mail to the following individuals on May 29, 1997:

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