

PDR

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March 7, 1994

Priority Mail Certified:  
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Executive Director for Operations  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Re: Petition Filed Under 10 C.F.R. 2.206 Against The  
Florida Power & Light Company

Dear Sir:

COMES NOW, Thomas J. Saporito, Jr., (hereinafter "Petitioner") pursuant to 10 C.F.R. 2.206, and hereby files his request for specific action by the U.S. Nuclear Regulatory Commission ("NRC") within a reasonable time against the Florida Power & Light Company (hereinafter "Licensee") and operator of the Turkey Point and St. Lucie nuclear stations located in the State of Florida.

Specific Request:

- A. Petitioner requests that the NRC construct and submit an amicus curiae brief to the U.S. Department of Labor ("DOL") pursuant to 10 C.F.R. 50.9; 29 C.F.R. 18.10(d); 29 C.F.R. 18.12; and 10 C.F.R. 50.7 regarding issues of fact in DOL Case Nos. 89-ERA-7/17 (consolidated) concerning the Licensee's retaliatory conduct towards Petitioner during Petitioner's period of employment at the Licensee's Turkey Point nuclear station in 1988 as a direct or indirect result of Petitioner having engaged in "protected activity" under 10 C.F.R. 50.7 and the Energy Reorganization Act of 1974 as amended ("Act"), 42 U.S.C. 5851, Section 210/211.
- B. Petitioner requests that the NRC institute a show cause proceeding pursuant to 10 C.F.R. 2.202 to modify, suspend, or revoke the Licensee's permissive operational licenses authorizing the operation of the Turkey Point nuclear station.

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- C. Petitioner requests that the NRC institute a show cause proceeding pursuant to 10 C.F.R. 2.202 and Order the Licensee to provide the Petitioner with a "make whole" remedy, including but not limited to, immediate reinstatement to his previous job as an instrument control technician at Turkey Point, back wages, front pay, interest on back wages and front pay, compensatory damages for pain and suffering, and a posting requirement to offset any "chilling effect" Petitioner's discharge may have had on other Licensee employees at the Turkey Point and St. Lucie nuclear stations.

Basis and Justification:

1. The NRC generally defers to the DOL and does not take immediate action against a licensee when an aggrieved employee files an employment discrimination complaint with the DOL alleging illegal discharge because the employee engaged in "protected activity". See, copy of NRC letter dated February 16, 1993, from James Lieberman, NRC Director, Office of Enforcement attached hereto. Mr. Lieberman states in his February 16, 1993, letter, in part, that:

"...The NRC generally defers to the Department of Labor (DOL) process before taking action and normally does not take independent action with respect to alleged discrimination for the exercise of a protected activity prior to a decision by a DOL Administrative Law Judge (ALJ) absent a compelling safety reason..." Id at pp.1-2.

In Case Nos. 89-ERA-7/17 (consolidated), the ALJ rendered a decision in June of 1989. Therefore, the NRC can take action as requested above in this petition against Florida Power & Light Company. Moreover, the NRC should take action against the Licensee as requested in this petition to offset any "chilling effect" which may have been instilled at the Licensee's facilities as a direct or indirect result of

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Petitioner's discharge from the Turkey Point nuclear station in December of 1988.

2. The NRC and DOL have a long standing Memorandum of Understanding ("MOU") which provides for the cooperation of these two government agencies to work together on DOL discrimination complainants as in Case Nos. 89-ERA-7/17 (consolidated). See, 47 FR 54585; December 3, 1982. Thus, while the NRC actions in discrimination cases are normally held in abeyance pending the DOL process, there are times, because of the significance of the issues to public health and safety, that NRC actions are warranted notwithstanding the ongoing DOL process.
3. NRC action in complying with the requests set out above in this petition against the Licensee are warranted for the following reasons:
  - (a) On June 30, 1989, the DOL ALJ issued a Recommended Decision and Order ("RDO") in Case Nos. 89-ERA-7/17 (consolidated) recommending that the case be dismissed. The ALJ's RDO was opposed by Petitioner through his counsel in a March 2, 1994, Reply Brief to the DOL Secretary of Labor ("SOL"). See, copy of Complainant's Reply Brief ("CRB") dated March 2, 1994, and attached hereto.
  - (b) The entire record in Case Nos. 89-ERA-7/17 (consolidated) contains evidence which was completely ignored by the ALJ. The NRC should weigh the entire record in this case in determining whether the Licensee violated the ERA and 10 C.F.R. 50.7 in discharging Petitioner from the Turkey Point nuclear station in December of 1988. See, CRB at p.1.
  - (c) In Case Nos. 89-ERA-7/17 (consolidated), the parties and the ALJ agreed on the six elements that complainant was required to prove in order to establish a prima facie case. The ALJ's conclusion that complainant failed "to show that

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the alleged discriminatory actions and eventual discharge were motivated in any way by complainant's protected activity," is not consistent with well established precedents on the issue of causation. See, CRB at p.2.

- (d) The ALJ simply chose to ignore overwhelming evidence of timing in Case Nos. 89-ERA-7/17 (consolidated) when he concluded that there was no discriminatory motive established. Indeed, the most common fact used to establish retaliatory motive is evidence of timing. See, CRB at p.2. Soon after complainant raised safety concerns in early May, 1988, he was subjected to discipline. See, CRB at p.2-8. Additionally, the Licensee's animus was publicly demonstrated in front of Petitioner's coworkers at Turkey Point instilling a "chilling effect" at the station.
- (e) FPL claimed it fired Petitioner for three reasons: (1) for refusing to divulge his safety concerns to Mr. Odom on November 23, 1988; (2) refusing to meet with Odom on November 30th (to divulge his safety concerns); and (3) refusing to submit to a physical exam by a company doctor. See, CRB at p.8-9. The ALJ erred as a matter of law by failing to find FPL's reasons pretextual or, in the alternative, to conduct a dual motive analysis. See, CRB at p.9.

(f) The adverse action by FPL against Petitioner in November and December, 1988, including his termination on December 21, 1988, occurred immediately after Petitioner engaged in additional protected activity. Petitioner was in contact with the NRC between September and December of 1988, and he filed complaints under the ERA with the DOL in October and November of 1988. The Licensee, FPL learned these facts, which were common knowledge at Turkey Point, directly from the NRC, Messrs. George Jenkins and Oscar

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DeMiranda and other NRC officials, during these months.

Odom's questioning of Petitioner on November 23, 1988; FPL's placing of Petitioner on restricted status; Jemeanig job assignments; and Odom's attempted interrogation of Petitioner on November 30, 1988; related directly to Petitioner's protected activity and shortly followed Petitioner's contacts with the NRC and his filing ERA complaints with the DOL. See, CRB at p.7-8.

- (g) The Licensee's actions taken against Petitioner in 1988 as described above constitute a "hostile work environment" under the law. All of the harassment incidents and adverse actions that occurred between May and December, 1988, more than satisfy a prima facie case of "hostile work environment." Mitchell v. APS/ANPP, Case No. 91-ERA-9, slip op. of ALJ, at 36-37 (July 2, 1992). See, CRB at p.8.
- (h) The NRC is mandated by Congress to ensure that a non-hostile work environment exists at facilities licensed to operate by the NRC. The NRC simply cannot tolerate a "hostile work environment" at the FPL Turkey Point nuclear station. Indeed, in Case No. 91-ERA-9 and in Case No. 89-ERA-19, Sarah C. Thomas v. APS/ANPP, the NRC took enforcement action because the licensee allowed a hostile work environment to exist at the Palo Verde Nuclear Generating Station. The NRC's enforcement action taken against Arizona Public Service Company stated, in part, that:

"...Both situations are significant because discrimination may create a chilling effect which could discourage individuals from raising safety issues. Such an environment cannot be tolerated if licensees are to fulfill their responsibility to protect the public health and safety. Thus, licensee management must avoid actions that

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discriminate against individuals for raising safety concerns, and must promptly and effectively remedy actions that constitute discrimination...Therefore, to emphasize the importance of maintaining an environment in which employees are free to provide information or raise safety concerns 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 & Research, to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalties in accordance with the "General statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), 10 CFR Part 2, Appendix C..."

- (i) The NRC is required to take the actions requested in this petition. The NRC has a mandated duty and responsibility to ensure that licensee employers maintain a work environment which encourages employees to raise safety issues. See, e.g., 55 Fed. Reg. 10397, 10402 (Mar. 11, 1990). See also, *Ellison v Brady*, 924 F.2d 872 (9th Cir. 1991). Licensee employees have been dissuaded from raising safety issues concerning operations at Turkey Point to the NRC because of FPL's continuing retaliation against employees who do so. Since Petitioner's termination from Turkey Point in December of 1988, numerous other employees have filed DOL complaints under the ERA against FPL complaining of retaliation for raising safety issues about Turkey Point. (i.e. Richard Robaines and Terry Dysert and others).

(j) The Licensee's interrogations of Petitioner about his protected activity in 1988 were illegal conduct under the law and NRC regulations under Title 10 of the Code of Federal Regulations. In Case No. 89-ERA-7/17 (consolidated), is

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uncontested that on two occasions petitioner refused to tell Odom, an FPL vice president, safety concerns that everyone involved knew had already been reported by Petitioner to the NRC. (i.e. DeMiranda and Jenkins and other NRC officials). As a matter of law, an employee's refusal to tell an employer about safety concerns communicated to the NRC cannot be considered insubordination. See, CRB at p.10.

- (k) The ALJ considered Petitioner's conduct to be "insolent", "contemptuous" and "insubordinate" for refusing to be interrogated about his safety concerns by an FPL vice president and for allegedly refusing to be examined by a company doctor after he returned to work from sick leave. The ALJ's conclusion violates precedent of the Secretary which states that:

"...employees engaged in statutorily-protected activity may not be disciplined for insubordination so long as the "activity (claimed to be insubordinate) is lawful and the character of the conduct is not indefensible in its context." The right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline. The issue of whether an employee's actions are indefensible under the circumstances turns on the distinctive facts of the case..." See, *Kenneway v. Matlack, Inc.*, Case No. 88-STA-20, slip op. of SOL, at 6-7 (June 15, 1989).

Case No. 89-ERA-7/17 (consolidated) is not a case where the complainant shouted obscenities at management, openly defied work orders or otherwise

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actively disrupted the work place. In deed, while FPL management was trying to "get rid" of complainant after May, 1988, by contrast, complainant's immediate supervisor had a positive impression of complainant's work performance and protected activities. Steven Greg Verhoeven testified that complainant was "safety conscious", his safety concerns were "legitimate" and that he was correct "90 per cent" of the time. Additionally, although complainant raised numerous safety concerns his immediate supervisor did not consider them to be disruptive. See, CRB at p.11.

4. The NRC has enacted regulations to ensure that licensees cannot interfere with communications between licensee employees, like Petitioner, and NRC officials. See, e.g., 10 C.F.R. 19. The NRC maintains that employees and NRC inspectors may communicate privately without interference from licensee employers as follows:

- (a) Commission inspectors may consult privately with workers concerning matters of occupational radiation protection and other matters related to applicable provisions of Commission regulations and licenses to the extent the inspectors deem necessary for the conduct of an effective and thorough inspection.

- (b) During the course of an inspection any worker may bring privately to the attention of the inspectors, either orally or in writing, any past or present condition which he has reason to believe may have contributed to or caused any violation of the act, the regulations in this chapter, or license condition... 10 C.F.R. 19.15 (emphasis added).

If the NRC fails to challenge FPL's position (i.e. by filing an amicus curia brief in this case), that employees should be "required to disclose...nuclear

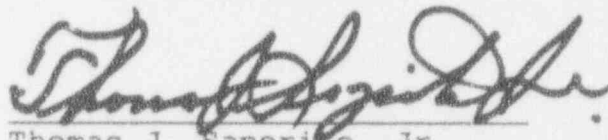
safety concerns to the licensee" (see, Respondent's Reply brief at 16), the NRC will contradict its own policies and regulations that expressly recognize the right of employees to bypass management and report their concerns to the NRC directly. NRC Form 3 informs employees that they may contact the NRC directly without first reporting safety concerns to their employers. See, CRB at p.12.

5. The NRC has expressly defined "protected activities" under the ERA and NRC regulations at 10 C.F.R. 50.7(a) to include, but are not limited, to:
  - (i) Providing the Commission information about possible violations of requirements imposed under [the ERA or the Atomic Energy Act];
  - (ii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;
  - (iii) Testifying in any Commission proceeding.
6. The interrogation of an employee about safety concerns he or she has communicated to the NRC constitutes discrimination under Section 210 and (now Section 211) of the ERA. See, CRB at p.15-22.
7. The Licensee's request that Petitioner be examined by a company doctor in Case No. 89-ERA-7/17 (consolidated) was not justified and FPL did not prove that Petitioner was insubordinate. See, CRB at p.23-27.
8. The Licensee's disparate treatment of Petitioner was illegal and must be challenged by the NRC. See, CRB at p.28-30.
9. NRC regulations at 10 C.F.R. 50.9 provide that the DOL process is, in fact, an extension of the NRC's authority. Thus, the NRC is required to act on the requests set forth in this petition.

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WHEREFORE, premises considered, the licensee cannot demonstrate to the NRC reasonable assurance that the Licensee did not illegally retaliate against Petition in terminating Petitioner's employment at Turkey Point in December of 1988, for Petitioner having engaged in "protected activity" or that a "chilling effect" does not exist at the Turkey Point and/or the St. Lucie nuclear facilities. Accordingly, it is appropriate for the NRC to consider this petition under 10 C.F.R. 2.206 wherein the Petitioner has set forth the facts that constitute the basis for the request. See, Philadelphia Electric Company (Limerick Generating Station, Units 1 & 2), DD 85-11, 22 NRC 149, 154 (1985).

Respectfully submitted,  
For the Environment,



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cc: Hon. Joseph I. Lieberman  
Chairman, subcommittee on Clean Air  
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Hon. David Williams  
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