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June 6, 1997

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. ~~970251~~-EI

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of Response in Opposition to Florida Power Corporation's Motion to Strike Testimony of William R. Jacobs, Jr. for filing in the above referenced docket.

Also Enclosed is a 3.5 inch diskette containing the Response in Opposition to Florida Power Corporation's Motion to Strike Testimony of William R. Jacobs, Jr. in WordPerfect for Windows 6.1 format. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

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Sincerely,


John Roger Howe
Deputy Public Counsel

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reversed the 1987 modification so that the steam-powered pump no longer started automatically with the electrically driven pump.

2. Dr. Jacobs, however, offers an additional fact (at page 51) not found in testimony from company witnesses: In 1996, when FPC reversed the 1987 modification, FPC forgot or failed to recognize that the 1990 modification relied on the steam-powered emergency feedwater pump being available under all conditions. Thus, FPC created a situation in which it had no automatic emergency feedwater to cool the reactor core under a postulated accident scenario when pressure fell below 500 psi.

3. This is an opinion based upon fact, one FPC would be expected to rebut (if it could) with evidence that it factored the 1990 modification into its decision process in early 1996. The schedule in this docket certainly offered ample opportunity: Although Dr. Jacobs had only two weeks to respond to the five witnesses who prefiled testimony in the company's direct case, FPC had a full month to formulate its rebuttal. FPC's four rebuttal witnesses, however, are concerned with other matters in their 110 pages of prefiled testimony and hundreds of pages of exhibits; no response is offered to Dr. Jacobs's assertion that FPC took CR-3 outside its technical specifications because of a failure to appreciate the interdependence of the 1987 and 1990 modifications resulting in no automatic emergency feedwater protection for the reactor core below 500 psi.

4. Unable to rebut the facts, FPC has responded with a motion to strike Dr. Jacobs's testimony. But it is nonsensical for FPC to argue that an expert with Dr. Jacobs's qualifications must resort to hindsight and reliance on the company's self-critical evaluations designed to establish new procedures for the future to demonstrate that FPC's management knew from 1990 onward that the 1990 modification required that the 1987 modification not be reversed and similar matters.

5. These circumstances are, therefore, very different from those in Maklakiewicz v. Berton, 652 So. 2d 1208, 1209 (Fla. 3d DCA 1995) (“[T]he [police] officer testified he would be unable to render an opinion without relying on the hearsay statements. Hence, his conclusion as an expert was based on the inadmissible evidence.”), or in Riggins v. Mariner Boat Works, Inc., 545 So. 2d 430, 432 (Fla. 2d DCA 1989) (“The expert could and did render his opinion exclusively on information outside the evidence.”) Assuming (without conceding) that the Evidence Code is applicable to Commission proceedings, Dr. Jacobs’s testimony is admissible under the terms of Section 90.704. Similarly, FPC has not identified any instance of Dr. Jacobs’s reliance on subsequent remedial repairs which would implicate Section 90.407.

6. The issues in this proceeding will deal with matters of process, with the question of whether FPC, through managerial ineptitude, lost control of the design basis of CR-3 to such an extent that it will require a protracted outage for the company to convince the NRC that it can operate the unit consistent with the terms of its license. The first consideration, therefore, must be the initiating cause of the outage. Dr. Jacobs addresses the pipe failure in the turbine lubricating oil system at page 23 without reliance on hindsight or NRC documentation.

7. The next question to be answered is why the unit was kept out of service after the pipe failure was repaired. Dr. Jacobs addresses the matter beginning on page 24, relying on the deposition testimony of Mr. Fran Sullivan, FPC’s Manager of Nuclear Operations Engineering. Dr. Jacobs then speaks (beginning on page 27) to the multitude of issues the NRC is requiring FPC to address, in addition to the emergency feedwater and emergency diesel generator loading issues, prior to allowing restart. For this he refers to NRC documentation. He also refers to NRC documents to explain (at

page 35) why FPC cannot restart the unit without NRC approval. NRC documents are certainly a permissible source of information to explain why the NRC won't let FPC bring CR-3 back on line.

8. Dr. Jacobs refers (at pages 41-42) to a Root Cause Report generated by FPC as the source for the facts that FPC has made 9 changes to the emergency feedwater system since 1980 and that 7 of the 9 introduced new problems. Such facts are either accurate or they are not. If FPC wanted to disavow them, it could have done so in rebuttal. That the facts exist in a particular type of report does nothing to lessen their validity. The probative value of facts is neither diminished nor enhanced by their appearance in documents which might also include proposed corrective actions.

9. Dr. Jacobs refers to a 1996 NRC inspection report at pages 45-46, not as an independent source of information (Motion, at 12), but as confirmation for his own conclusion, gleaned from actually examining the 1987 10CFR50.59 evaluation, that FPC did not consider the potential for cavitation in its evaluation of the 1987 modification in 1987. Dr. Jacobs notes (at pages 46-47) that on the advice of FPC's witness, Dr. Beard, he also reviewed the 1987 Modification Approval Record (MAR) and found no indication FPC had considered the potential for cavitation in 1987. Dr. Jacobs's conclusion (at page 48) that FPC should have identified a potential cavitation problem in 1987, just as the company did in 1996, has nothing to do with the use of hindsight. It is simply the recognition that fundamental principals of hydraulic design of fluid systems have, since well before 1987, required consideration of net positive suction head (NPSH) under all relevant conditions, something FPC knew or should have known in 1987.

10. Dr. Jacobs refers (at page 47) to a 1997 Licensee Event Report. This is an internally generated document cited to show -- as a factual matter -- that it was not until 1996 that FPC realized CR-3 had been in an unanalyzed condition since 1987. With the information available to it, FPC

should have identified the cavitation problem in 1987, but in fact, it did not until 1996, even though nothing had changed in the meantime. Hindsight is not involved when one concludes he should have known better at the time.

11. FPC's argument that NRC documents cannot be reviewed by an expert in the process of formulating his opinion of management performance at CR-3 is disingenuous, at best. In the company's 1991 rate case, Dr. Percy M. Beard, Jr., FPC's Senior Vice President, Nuclear Operations, based his opinion of CR-3's superior performance on NRC documentation, particularly the retrospective review of performance embodied in the Systematic Assessment of Licensee Performance (SALP) reports. Dr. Beard's prefiled direct testimony contains the following questions and answers:

Q. What reports of regulatory agencies reflect the improved performance of CR-3?

A. I am speaking primarily of the SALP which is performed by the NRC approximately every year. . . . In 1990, CR-3 received its highest SALP report to date In 1991, the positive trends identified by the NRC in the 1990 report were confirmed when CR-3 received an even higher SALP report

Q. Isn't the emphasis of the NRC on safety more than on managerial efficiency?

A. To an extent, their analysis measures both. A plant which meets the requirements for a higher SALP rating in each of these [review] areas will, by definition, have fewer maintenance problems and fewer unanticipated outages. That equates to greater plant availability, a higher capacity factor, and overall lower cost. (Emphasis added.)

Transcript of hearings, Docket No. 910890-EI, Petition for a Rate Increase by Florida Power Corporation, July 15, 1992, pp. 1373-75.

12. During his deposition in this docket on April 15, 1997, Dr. Beard was asked: "Mr. Beard, when you first came to Florida Power Corporation in 1989, . . . [w]hat documents did you review to educate yourself about the nuclear operations in this company?" He answered: "I reviewed

a lot of documents, a lot of NRC inspection reports. . . ." [T.35] When Dr. Beard was asked whether NRC inspection reports are generally an accurate source of information to determine the facts associated with outages at CR-3, he answered (after an objection by FPC's attorney): "[I]f the definition of a fact is something that is accurate, if that's what a fact is, I've found that, generally speaking, the facts are accurate." [T. 36-38]

13. In a series of questions using a broken pump shaft as an example for the initiating cause of an outage, Dr. Beard testified that many of the factual matters reported in NRC documents originate with FPC:

Q. [I]f you found in an NRC inspection report or some other NRC document it said the shaft broke at a particular location, would you generally find that to be reliable information?

A. Yes. Yes.

Q. And would you generally find that a description of the activities taken by the company in maintaining the pump before the accident was accurate?

A. Generally I would . . . take that to be the case. Also realizing that a lot of the facts that the NRC typically puts in reports comes from company documents, selected bits and pieces. . . . So to the extent that the company was accurate, then the report will be -- would reflect the same thing. (Emphasis added.)

Q. When you were reading an NRC report then, would you read it in the light or with the understanding that much of what you're reading probably originated with company documents?

A. Well, some -- some of it, you know, certainly does, and it depends on the issue, whether it's an issue the company started and investigated or the NRC. [T.42-43]

14. The Florida Supreme Court's opinion in Florida Power Corp. v. Public Service Comm'n, 424 So. 2d 745 (1982), is summarized in the sentence, at 747: "We disagree with the PSC's post-accident assessment of what should have been labeled safety-related." The court held that the

Commission could not use the company's and the NRC's after-the-fact determination as the basis for finding the activity should have been considered safety-related all along. Dr. Jacobs's conclusions, however, that "the present outage would not have been required to install the EFW [Emergency Feed Water] and EDG [Emergency Diesel Generator] modifications" (page 49); that "a subsequent modification in 1996 made [the 1990 modification] a problem" (page 50); and that "FPC forgot, or did not recognize, that the modification installed in 1990 relied on operation of EFP-2 under all conditions" (page 51) are all clearly based upon what Dr. Jacobs believes FPC knew or should have known at the time. There has been no attempt to use later corrective actions as proof that the initial decision was wrong in hindsight.

15. FPC has tried too hard to make the Florida Supreme Court cases into something they are not. Issues of reliance on hindsight, subsequent remedial measures, and post-accident investigations are only meaningful if there was an accident. There was no accident. There was no "dropped test weight" (or similar event) and no attempts by the FPC to keep it from happening again or notices of violation from the NRC for allowing it to occur in the first place. Moreover, nothing in those cases stands for the proposition that the Commission cannot consider the facts reported in NRC documents where the company will have every opportunity to rebut any facts offered by opposing parties. More importantly, those cases did not involve an expert witness who can refer to information in formulating his opinion which would not be admissible if relied upon by a lay person. It is Dr. Jacobs's opinion upon which the Citizens believe the Commission should rely, and it is "evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." Section 120.569(2)(e), Florida Statutes (Supp. 1996).

WHEREFORE Florida Power Corporation's motion to strike the prefiled testimony of the Citizens' witness Dr. William R. Jacobs, Jr., should be denied because: (1) FPC has not shown that NRC documents are not generally referred to by experts within Dr. Jacobs's field of expertise; (2) FPC does not cite to any case in Florida or elsewhere where a court or regulatory commission has held an expert's testimony is inadmissible where the expert has referred to NRC documents in the process of formulating his opinion; (3) FPC does not cite to any cases holding a regulatory commission cannot base its decisions on an expert's opinion where NRC documents were one of many sources the expert reviewed before formulating his opinion; and (4) FPC has not shown that Dr. Jacobs could not have reached his conclusions without placing primary reliance on NRC documents.

Respectfully submitted,

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**CERTIFICATE OF SERVICE
DOCKET NO. 970261-EI**

I HEREBY CERTIFY that a true and correct copy of Response in Opposition to Florida Power Corporation's Motion to Strike Testimony of William R. Jacobs, Jr., has been sent by *Hand-delivery or regular U.S. Mail to the following individuals on June 6, 1997:

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