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September 24, 2002

-VIA FEDERAL EXPRESS-

Blanca S. Bayó
Director, Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 020648-EI

Dear Ms. Bayó:

I am enclosing for filing in the above docket eight (8) copies of a letter dated September 24, 2002, from me to Marlene Stern of the Office of General Counsel explaining that FPL's St. Lucie Turtle Net Project has been undertaken in direct response to environmental regulatory requirements and hence is eligible for cost recovery through the Commission's Environmental Cost Recovery Clause. Also enclosed is a diskette containing the electronic version of my letter. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the documents appear is Word 2000.

If there are any questions regarding this transmittal, please contact me at 305-577-2939.

Very truly yours,

John T. Butler, P.A.

Enclosure
cc: Counsel for Parties of Record (w/encl.)

MIA2001/159656

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September 24, 2002

-VIA FEDERAL EXPRESS-

Marlene Stern, Esq.
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 020648-EI

Dear Marlene:

I am writing on behalf of Florida Power & Light Company (FPL) concerning FPL's petition in the above docket to recover the costs of its St. Lucie Turtle Net Project (the "Project") through the Commission's Environmental Cost Recovery Clause (ECRC).

This letter is intended to lay out in more detail the basis for FPL's position that the Project is undertaken in direct response to regulatory requirements, which FPL could ignore only at its peril.

Background of the Project

The regulatory documentation for the Project that FPL has provided to the Staff requires that a 5-inch net be installed across the intake canal at the St. Lucie nuclear plant (the "Plant") in order to prevent sea turtles from being drawn into the cooling water intake wells adjacent to the generating units. The Project essentially comprises three elements: replacement of that net with another 5-inch net that is designed not to bow and stretch in ways that could capture and drown turtles; dredging silt out of the intake canal in the vicinity of the net in order to reduce the water flow velocity and hence make it easier for turtles to swim away from the net; and a sand-removal system that will limit future silting of the intake canal in the vicinity of the net. Because the regulatory documentation does not specifically refer to these three elements of the Project, Staff has expressed concern that the associated costs may not be "environmental compliance costs" eligible for cost recovery through the ECRC.

As explained below, we believe the Project is a recoverable environmental compliance cost because it is necessary to meet the statutory and regulatory requirements imposed under the Endangered Species Act (ESA), which requires FPL to limit the trapping and killing of sea turtles.

Background on the Endangered Species Act

Pursuant to the ESA, 16 U.S.C. § 1531-1544, 87 Stat. 884, as amended – Public Law 93-205 (1973), the Secretary of the Interior lists species of animals that are "threatened" or "endangered" according to certain criteria and designates their "critical habitat." ESA § 1533. Once a species is placed on either species list, Section 9 of the ESA makes it unlawful for any person to "take" the species, which means to "harass, harm, pursue, hunt, wound, kill, trap, capture, or collect" that species, or to violate any regulation pertaining to the species. ESA §§ 1532(19) 1538(a)(1). Any person who violates the ESA's prohibition against takings of listed species is subject to civil penalties of $25,000 for each violation and criminal penalties that include potential imprisonment and fines of up to $50,000. ESA § 1540.

Section 7 of the ESA requires other federal agencies to cooperate with the Secretary to further the purposes of the ESA. ESA §1536. Specifically, subsection 7(a)(2) requires each federal agency (the "action agency") to consult with the Secretary to ensure that activities the agency authorizes, funds or carries out are "not likely to jeopardize the continued existence of any endangered or threatened species" or impact their critical habitat. The end result of this consultation is the issuance by the Secretary of a "biological opinion" that reaches conclusions as to whether or not the action agency's activities are consistent with subsection 7(a)(2). If the Secretary concludes that an activity would violate subsection 7(a)(2), then the action agency may not proceed with that activity unless it goes through a complicated exemption process before a multi-agency Endangered Species Committee. *Id.*

Section 7 also creates a limited exception to the ESA's general prohibition on takings of protected species. If the Secretary determines that a action agency's activity will not violate subsection 7(a)(2) (*i.e.*, the activity is not likely to jeopardize the continued existence of any endangered or threatened species or impact their critical habitat), the ESA gives the Secretary authority to issue an incidental take statement (ITS) to the action agency to allow the taking of protected species when such taking is "incidental" to the activity. In issuing an ITS, the Secretary is required, *inter alia*, to specify reasonable and prudent measures that the Secretary considers necessary to minimize the impact of the activity on the protected species and to set forth the terms and conditions that must be taken to implement those reasonable and prudent measures. Where the activity in question is the issuance of a permit by the action agency, then the permit holder must also comply with the terms and conditions set forth by the Secretary in the ITS.

FPL holds operating licenses for the Plant that are issued by the United States Nuclear Regulatory Commission (NRC). The Plant is located in an area with a large sea turtle population, many of which are listed as threatened or endangered under the ESA. Therefore, the NRC has to engage in consultation to determine whether operation of the Plant pursuant to the operating licenses is consistent with subsection 7(a)(2) of the ESA. For actions involving sea turtles in the water, the National Marine Fisheries Service (NMFS) is the agency designated by the Secretary with which an "action agency" (in this case, the NRC) must consult. 50 C.F.R. § 402.01(b). The NMFS has promulgated rules regarding the ITS process. Those rules provide, *inter alia,* that an ITS must specify how many individuals of a species may be taken and that consultation with the NMFS must be reinitiated if that limit is exceeded. 50 C.F.R. §§402.14 and 402.16.

History of NMFS Consultations for the Plant

The first biological opinion for the Plant was issued in 1982. It required FPL, *inter alia,* to install a net with an 8-inch mesh to capture sea turtles before they reach the plant's intake wells. The mesh size was based on an assumption that most of the sea turtles would be adults, of a size that the 8-inch mesh would capture. Subsequent information made it clear, however, that there was a large juvenile sea turtle population around the Plant and that this mesh size was too large to capture some of the juveniles. Therefore, the NRC and the NMFS reinitiated consultation in 1995. While that consultation was in progress, FPL installed a second net with a 5-inch mesh, because the discussions with the NMFS to that point made it clear that further mitigation measures addressing the juvenile turtle population would be needed. The 5-inch net then became a specific condition to the new biological opinion that was ultimately issued, in January 1997. The 1997 biological opinion also established incidental take limits for several species of sea turtles.

The NMFS reinitiated consultation again in November 1999, because more green sea turtles had been taken at the Plant than was contemplated by the ITS contained in the 1997 biological opinion.[1] This consultation ultimately resulted in another biological opinion, which was issued in May 2001. The new biological opinion did not specify improvements to the net system, but it revised the incidental take limits that had been established in the 1997 biological opinion and directed the NRC to immediately request a further reinitiation of consultation with the NMFS if those limits were exceeded, in order to "provide an explanation of the causes for the

[1] Consultation was also reinitiated to consider information in an March 2000 report entitled "Physical and Ecological Factors Influencing Sea Turtle Entrainment Levels at the St. Lucie Nuclear Power Plant: 1976-1998," which FPL submitted to the NMFS in compliance with requirements in the 1997 biological opinion.

taking, and review with NMFS the need for possible modification of the reasonable and prudent [mitigation] measures" that FPL had been required to implement. The ITS in the 2001 biological opinion advises the NRC that the specified terms and conditions "are non discretionary and must be undertaken by the NRC so that they become binding conditions of any grant or permit issued to the applicant [*i.e.,* FPL], as appropriate, for the exemption in [section 7 of the ESA] to apply."[2]

In 2001, there were six sea turtle mortalities at the Plant. The NMFS indicated that six turtle mortalities triggers a reinitiation of consultation under the incidental-take formula established in the 2001 biological opinion. The NMFS made it clear to FPL from the outset of this latest round of consultation that exceeding the current incidental take limit is not acceptable performance and would result in whatever additional mitigation requirements are needed to keep the sea turtle mortalities within the incidental take limit.

As a result, FPL investigated the reason for the continued takes and concluded that five of the six turtles that were killed in 2001 appear to have become ensnared in the 5-inch net and drowned. Therefore, measures that would reduce the likelihood of turtles becoming ensnared in the net should help reduce the number of incidental takes in future years. FPL's investigation of the existing 5-inch net led to the conclusion that turtles were having a hard time escaping from the net to breathe, because (1) the net had stretched and bowed to the point that it created pockets that could trap turtles, and (2) the canal in the vicinity of the net had silted up to the point that its cross sectional area was substantially reduced and hence the flow rate of water across the net had substantially increased, making it hard for the turtles to swim away from the net. In an effort to satisfy the NMFS and prevent the addition of onerous restrictions in the next biological opinion, FPL, as it did in 1997, commenced proactive measures in order to address these deficiencies while still in the consultation process with NMFS.

Regulatory Necessity for the Turtle Net Project

As indicated above, takes by FPL in excess of its ITS limits not only triggered a reinitiation of consultation under the ITS, but the NMFS expressly warned FPL of potential additional mitigation requirements. Rather than remain in violation of the ITS and risk revocation or suspension of the favorable biological opinion by the NMFS or, worse, civil or criminal penalties under Section 9 of the ESA, FPL properly and promptly commenced proactive measures consistent with the mitigation measures identified in consultations with NMFS to

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[2] Consistent with this direction, the NRC has imposed the ITS requirements on FPL in amendments 183 (St. Lucie Unit 1) and 126 (St. Lucie Unit 2) to the Plant's operating licenses. Those amendments were issued on August 28, 2002.

assure a limited number of takes and to ensure compliance with its ITS. Thus, taking these steps was necessary to comply with the ITS.

The Secretary and its implementing agencies, such as the NMFS, possess broad discretion regarding the issuance and administration of an ITS. *See Loggerhead Turtle v. Volusia County* 120 F.Supp.2d 1005, 1019 (M.D. Fla. 2000), *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 708 (1995) (citations omitted). The NMFS has made clear its strong displeasure with take levels that meet or exceed those set forth in FPL's ITS. FPL prudently wants to avoid provoking the NMFS and triggering more costly mitigation requirements or reduced take levels. FPL's actions to invest in the turtle-protection contained in the Project was prudent and a means of assuring that other, more costly requirements would not be imposed on it or its customers later.

The total annual cost to customers for the Project is presently about $84,000 and will decline over time as the project is depreciated.[3] This is money very well spent. It is no exaggeration to say that the Project is essential to the continued operation of the Plant, for which replacement power costs would be on the order of $600,000 *per day.*

FPL has acted upon its belief that the Commission would not want FPL to delay addressing the elevated levels of turtle takings at the Plant. For the reasons discussed above, doing so would risk restrictions on FPL's continued ability to operate the Plant and/or invite expensive regulatory intervention in FPL's incidental take program.[4] Neither of these outcomes would be in FPL's or its customers' best interests.

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[3] The capital cost of the Project for which FPL is seeking recovery is $694,142. For 2003, the total return on investment and depreciation on the Project's capital costs is $84,399.

[4] This is by no means the only situation in which environmental activities are motivated by requirements to achieve some particular measure of environmental performance, rather than by specific directions to undertake that activity. For example, the owner of a point source of water discharge may be required to limit the concentrations of specified chemicals in the discharged water. Generally, the owner will be free to employ whatever combination of measures is most effective and efficient to achieve the required chemical concentrations. This does not mean, however, that the owner is not taking those measures under a regulatory mandate that qualifies the cost of those measures as an "environmental compliance cost" for the purpose of the ECRC. To conclude otherwise would unfairly and arbitrarily exclude a large area of legitimate environmental activity from the ECRC. There is no suggestion in section 366.8255 that the Legislature intended such a result.

If you have further questions, please do not hesitate to call me.

Sincerely yours,

John T. Butler, P.A.

cc: James Breman, Division of Economic Regulation