BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Fuel and Purchase Power Cost Recovery Clause and Generating Performance Incentive Factor.	)))	Docket No. 080001-EI Filed: November 24, 2008

BRIEF OF FLORIDA POWER & LIGHT COMPANY ON ISSUE 13C

Pursuant to direction given by the Commission on November 12, 2008 at the hearing in this docket, Florida Power & Light Company ("FPL") hereby submits its brief on Issue 13C.

Summary of Position

ISSUE 13C: With respect to the outage extension at Turkey Point Unit 3 which was caused by a drilled hole in the pressurized piping, should customers or FPL be responsible for the additional fuel cost incurred as a result of the extension?

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FPL: FPL is entitled to recover replacement power costs for the drilled hole incident. FPL acted prudently, complying with NRC requirements and industry standards on access authorization and control and then promptly returning Unit 3 to service. The FBI's FOIA response does not evidence imprudence. Denying FPL recovery would contradict long-standing FPSC precedent and ratemaking principles, thus increasing capital costs for all Florida IOUs and discouraging solar, wind and nuclear generation.

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Background and Overview of FPL Position

Toward the end of the Spring 2006 refueling outage at Turkey Point Unit 3, FPL personnel identified a small drilled hole in the pressurizer piping during a series of pre-startup tests and inspections. The pressurizer is a device that maintains water pressure inside the reactor coolant system at desired levels. The drilled hole never posed a threat to reactor safety, but had

to be repaired before Unit 3 could restart. Of course, FPL needed to investigate the remainder of the plant to ensure that there was no other vandalism or damage requiring repair. FPL performed this work quickly and well, so that only five days of additional outage time resulted. Because FPL was able to respond so effectively – and because Unit 3 operated very reliably before and after the outage – FPL exceeded its 2006 GPIF target for Equivalent Availability at Unit 3 *in spite of* the added outage time.

The FBI and FPL's Corporate Security Department conducted an investigation aimed at identifying the individual or individuals who drilled the hole. The investigation, which is now complete, turned up substantial evidence that the hole was drilled by one individual, working alone. That individual has been permanently denied access to all FPL nuclear plants, and FPL has taken steps to ensure that operators of all other nuclear power plants around the country will be advised if the individual seeks access at any other U.S. nuclear power plant. Unfortunately, the evidence relative to the criminal investigation was spotty and circumstantial. As a result, the U.S. Attorney's Office elected not to charge the individual, and FPL has concluded that contractual liability limitations and paucity of admissible evidence pose very substantial challenges to bringing a civil action against him or his employer.

The United States Nuclear Regulatory Commission ("NRC") also conducted an investigation of the drilled hole incident, for different purposes. The NRC formed what it refers to as an Augmented Inspection Team ("AIT") to conduct a thorough investigation of the adequacy and effectiveness of FPL's security systems as well as FPL's response once the drilled hole had been detected. The AIT found that FPL properly screened individuals for access to Turkey Point before the incident, that FPL's security personnel were appropriately positioned and effectively trained to control access, and that FPL had responded to the incident

appropriately and effectively. As a result, the NRC team found no violations by FPL of the NRC's safety or security regulations during or after the incident.

FPL's process to grant unescorted access to its nuclear plants relies on detailed background checks, an FBI criminal history verification, drug and alcohol testing (both initial testing and then random retesting), and detailed psychological screening. In addition, all individuals continue to be evaluated while they are working at the plant, to determine what access they require and whether there is any observed behavior that would indicate their access should be rescinded. As is the case at all nuclear plants, FPL's access procedures are subject to stringent and frequent NRC scrutiny.

It is clear that FPL has a vigorous, aggressive and effective program for access control. In addition, FPL's nuclear plants have defenses in depth against any sort of incident that could compromise plant safety. Those defenses in depth worked well at Turkey Point Unit 3 – the drilled hole was identified before it could cause any significant problems for the plant and it was repaired with minimal additional outage time.

In short, FPL's evidence demonstrates that FPL acted prudently with respect to the drilled hole incident. The evidence further shows that Turkey Point Unit 3 was exceptionally reliable in 2006 even with the drilled hole incident, and that customers saved over a half million dollars in fuel costs as a result of FPL's nuclear fleet exceeding its availability projections. But the Office of Public Counsel ("OPC") and some intervenors want to deny FPL recovery of the replacement power costs that it had to incur to keep power flowing to customers while the drilled hole was being investigated and repaired. OPC asserts that this would be "fair, just and reasonable" but in reality the opposite is true.

OPC's proposal contradicts a long and consistent string of Commission decisions, as well

as Florida Supreme Court precedent, that a utility should be permitted to recover actual fuel costs unless it has been imprudent. The mere fact that nuclear units have much lower energy costs than the system average makes even the manner in which prudence is determined by the Commission a significant risk factor. Utilities do not profit on fuel costs, which means that customers only have to pay the actual cost of fuel. But because there is no profit, there is no reward to utilities that would justify taking a risk of not recovering prudently incurred fuel costs.

Imposing that uncompensated risk on utilities would be penny wise but pound foolish. FPL's replacement power costs for the drilled hole incident were $6.2 million. Were the Commission to disallow the recovery of those prudently incurred fuel costs, the financial markets would take quick and very unfavorable notice. This, in turn, would lead to an increase in the financing costs for *all* Florida investor-owned utilities that would have to be borne by their customers for years to come. The net impact of that increase in capital costs likely would dwarf the $6.2 million that OPC is asking the Commission to disallow.

Finally, OPC's proposal would create a very strong disincentive for investment in generating resources with low energy costs, including nuclear and renewables, at the same time that Florida is seeking to encourage such investments. Investments in low energy cost generation are important to helping Florida achieve its energy security, fuel diversity and environmental goals.

What makes the potential replacement power costs so high during periods when nuclear plants are offline is the differential between high fossil fuel prices and substantially lower nuclear fuel prices. Of course, the differential also would be large during periods when renewable energy facilities are offline, because there is essentially a zero fuel price for solar and wind power technology. Utilities – and the investment community – will have to seriously

consider the added risk associated with building and operating nuclear or renewable energy facilities if the utilities are going to be exposed to non-recovery of a large fuel price differential every time that a nuclear or renewable energy facility is unexpectedly out of service.

FPL's Actions Were Prudent

By any reasonable measure, FPL acted prudently in its operation of Turkey Point Unit 3 during 2006 in general and in its conduct of the Spring 2006 refueling outage in particular.

1. Turkey Point Unit 3 performed excellently throughout 2006.

As a result of FPL's effective management, Turkey Point Unit 3 achieved an excellent equivalent availability during 2006 of 91.3%, which exceeded the GPIF target for the year and resulted in the unit receiving the highest achievable GPIF reward for 2006 *in spite of* the five days of additional outage time due to the drilled hole incident. Tr. 855-56 (Dubin). Because Unit 3 and the rest of FPL's nuclear fleet achieved this high availability, they produced about 8,500 MWh more low-cost nuclear energy for the year than projected and thus saved customers an additional $560,000 in fuel costs beyond what was projected based on targeted performance of the nuclear fleet. *Id.* Thus, FPL's customers had no reason to be disappointed in the overall performance of Turkey Point Unit 3 in 2006; to the contrary, they had good reason to be pleased. While FPL recognizes that Unit 3's excellent overall performance does not, by itself, demonstrate the prudence of FPL's specific actions with respect to the drilled hole incident, it certainly provides relevant perspective from which to judge those actions particularly as it relates to the risk of operating nuclear plants that is perceived by investors.

2. FPL acted prudently with respect to the drilled hole incident, both before and after the incident.

The Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., requires that civilian uses of nuclear materials and facilities be licensed, and it empowers the NRC to establish by rule or order, and to enforce, such standards to govern these uses as "the Commission may deem necessary or desirable in order to protect health and safety and minimize danger to life or property." The NRC's authority to ensure the safe operation of nuclear facilities such as Turkey Point Unit 3 is plenary and preemptive. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190 (1983). Prominent among the NRC's areas of safety regulation is ensuring the physical security of nuclear plants, in recognition that malevolent acts at those plants could pose a substantial threat to public safety. Not surprisingly, the NRC's emphasis on physical security increased substantially in the aftermath of the 9/11 attacks.[1]

A key element in the NRC's regulation of physical security is control of access to vital areas of nuclear facilities. For example, in describing its post-9/11 security enhancements, the NRC lists "requir[ing] strict site access controls for personnel" among its major actions. NUREG/BR-0314, at iii (this document may be accessed on the NRC website at http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0314/br0314.pdf).

1 "The U.S. Nuclear Regulatory Commission (NRC) is committed to protecting the health and safety of the public and the environment. The terrorist attacks on September 11, 2001, reaffirmed the need for collective vigilance, the need for enhanced security, and improved emergency preparedness and incident response capabilities across the Nation's critical infrastructure. As a result, the NRC has since conducted a comprehensive review of the agency's security programs and made further enhancements to security at a wide range of NRC-regulated facilities." Introductory Statement to NUREG/BR-0314 on NRC website at http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0314/.

Consistent with this emphasis on access control, the NRC's rules define the general performance objective and requirements for access control as follows:

> The licensee shall establish and maintain an access authorization program granting individuals unescorted access to protected and vital areas with the objective of providing *high assurance that individuals granted unescorted access are trustworthy and reliable,* and do not constitute an unreasonable risk to the health and safety of the public ….

10 CFR 73.56(b) (emphasis added). While the NRC's rules do not prescribe the details of access control programs, the NRC regularly inspects each licensee's physical security plan to determine whether the controls are sufficiently rigorous to meet these high security expectations. Tr. 730, 1242 (Jones). Moreover, with respect to screening the arrest records of individuals who seek plant access, the NRC requires licensees to implement the Nuclear Energy Institute's NEI-0301 procedure, which sets forth detailed criteria for how to evaluate those records. Tr. 1243 (Jones).

Given the strong emphasis that the NRC places on physical security generally and access control specifically, the NRC naturally took prompt action to investigate when FPL discovered a drilled hole in the pressurizer piping at Turkey Point Unit 3 on March 31, 2006. Tr. 537, 539 (Jones). Within a couple of days the NRC dispatched an AIT to Turkey Point to review the circumstances surrounding the drilled hole incident. Specifically, the AIT evaluated several aspects of the incident, including FPL's application of its access authorization program to individuals with access to the Unit 3 containment area and the effectiveness of the immediate actions taken by FPL in response to the incident. Tr. 539 (Jones); Ex. 3, Tab 8 at FCR-08-9402, FCR-08-9405 (April 26, 2006 AIT Report – CONFIDENTIAL[2]). At the end of the investigation, the AIT concluded the following:

- FPL's identification, classification, and response to the event were appropriate.

2 The AIT report was provided to Staff, OPC and other intervenors and was made available to

- FPL's planned actions to ensure restart readiness for Unit 3 and the continued operation of Unit 4 were effective and thorough.
- FPL appropriately positioned security officers at access points leading into containment.
- Access authorization personnel were knowledgeable in the area of access authorization, and that personnel were appropriately cleared before gaining unescorted access to the site.

The NRC issued no findings or violations as a result of the AIT's investigation and, in fact, informed FPL that it had reacted well in a difficult situation. Tr. 540 (Jones); *see* Ex. 3, Tab 8 (April 26, 2006 AIT Report – CONFIDENTIAL).

On March 18, 2008, the NRC sent FPL a letter confirming that the NRC considers the AIT inspection to be complete and does not plan to conduct any further inspection. Tr. 540 (Jones); *see* Ex. 2, Tab 24 at FCR-08-8928-8929. As Mr. Jones explained at hearing, by finding that no further inspection is required, the NRC effectively concluded that the NRC identified no violations and made no adverse findings about any aspect of FPL's actions before or after the drilled hole incident, and that no follow-up actions of any nature were required. Tr. 1253-54. In common parlance, the NRC gave FPL a clean bill of health.

Thus, the evidence clearly establishes that (1) the NRC closely regulates the safe operation of nuclear power plants, including but not limited to physical security at those plants; (2) in view of its statutory responsibilities and the potential safety implications of the drilled hole incident, the NRC had a strong motivation to investigate the incident and assure itself that FPL was properly implementing all of the NRC's requirements for controlling access to Turkey Point;

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the Commissioners pursuant and subject to the Commission's confidentiality rule.

(3) the NRC conducted a prompt and thorough investigation of the drilled hole incident; and (4) the results of that investigation (*i.e.*, the AIT report) confirmed that FPL was in full compliance with those requirements. There is no contrary evidence on any of these points. In an industry that is as strictly and closely regulated as nuclear power, regulatory requirements effectively *define* industry-standard behavior. Moreover, in at least one important respect, the NRC found that FPL exceeded normal regulatory expectations: when an NRC inspector reviewed the decision matrix that FPL uses to determine whether individuals' arrest records disqualify them for plant access, the inspector was so impressed that he took a copy back to regional headquarters to use as a model for evaluating other plants' matrices. Tr. 588 (Jones). By any reasonable measure of prudence – comparing FPL to industry standards and compliance with applicable regulatory requirements without the benefit of hindsight – FPL's handling of the drilled hole incident was unequivocally prudent.

3. Nothing in the FBI's FOIA response evidences imprudence.

In the face of FPL's compelling evidence of prudence, OPC and other parties opposing FPL's cost recovery focused their attack on a document that, while salacious, sheds little light on the prudence inquiry: the FBI's response to FPL's Freedom of Information Act ("FOIA") request to the NRC for documents related to the drilled hole incident. This attack had two components, both unwarranted and unsubstantiated. The first was a thinly veiled accusation that FPL had withheld information from the Commission and parties to this proceeding because the FBI FOIA response was provided shortly before hearing. The second was an inaccurate assertion that the FBI information demonstrated that FPL had acted imprudently in authorizing unescorted access to the individual who is suspected of drilling the hole at Unit 3. Each component is addressed and refuted below.

a. Disclosure of the FBI FOIA response.

As discussed in the April 3, 2008 prefiled testimony of FPL witness Jones, once the U.S. Attorney's office and the NRC declined to pursue actions against the individual who was suspected of drilling the hole, FPL asked the FBI to release its final investigative report on the incident but the FBI refused. Tr. 538-39. FPL understood that FBI had given a copy of its report to the NRC, so FPL requested a copy of the report from the NRC via a FOIA request. *Id.* FPL hoped that the FBI's report might assist FPL in seeking recourse against the suspect and/or his employer. *Id.*

The NRC responded to FPL's FOIA request on May 13, 2008. FPL provided that response to the Commission Staff in discovery last July, but the NRC had redacted the response so heavily that it provided no meaningful insight into the drilled hole incident. *See* Ex. 2, Tab 25, FCR-08-9423 to FCR-08-9451. The NRC did not indicate that more was to come, and FPL did not expect to receive any further information from the NRC. However, it turns out that much of what was redacted in the NRC's response was FBI information as to which the NRC felt the FBI was in a better position to determine what could be released. Accordingly, the NRC referred the FOIA documents to the FBI for review and, in late September 2008, the FBI sent FPL a separate FOIA response in which substantial portions of the information that the NRC had previously redacted was now left visible. *Cf.* Ex. 2, Tab 25, FCR-08-9423 *et seq.* and Ex. 54. FPL had not previously seen the newly-revealed FBI information in this response. FPL evaluated the FBI response carefully and ultimately determined that, while there were no outstanding discovery requests or other obligation for FPL to disclose the FBI response, FPL

would do so in order to provide all available information to the Commission. It did so by letter to the Staff attorney in this docket, dated October 27, 2008, with a copy to OPC. Ex. 54 at 1.

As should be apparent from the foregoing, FPL clearly was not trying to avoid disclosure of the FBI's investigative information. To the contrary, the information came to light only through FPL's persistence in pressing for its disclosure, first with the FBI directly and then through the NRC. And once FPL had succeeded in obtaining the information, it promptly and voluntarily turned it over to the Commission Staff and OPC, the two parties that had previously sought information on the FBI investigation. FPL had no hand in the timing of the FBI's release of the information, so while it is unfortunate that the information only came to light shortly before hearing, FPL should be praised for securing its release at all rather than blamed for the timing.

b. The FBI FOIA response contains nothing that demonstrates imprudence.

OPC and others have argued that the FBI FOIA response "changes everything" because it constitutes evidence of FPL imprudence where none previously existed. In fact, the FBI FOIA response is nothing of the sort and in no way contradicts the clear evidence of FPL's prudent handling of the drilled hole incident described above.

First of all, some perspective is needed on what exactly *is* contained in the FBI's response. It is not an FBI report, but rather a collection of field notes prepared at various points in the FBI's investigation of the drilled hole incident, which it had provided to the NRC.[3] In any event, the information available to the FBI was not sufficient to convince the U.S. Attorney to prosecute the person suspected of drilling the hole (the "person of interest"). *See* Ex. 54 at 9; Tr.

3 The FBI apparently prepared a "case summary report," dated April 30, 2007, but it is not

538 (Jones). It was also insufficient for the NRC to pursue any civil remedies against the individual. Tr. 538 (Jones). Clearly, drilling the hole was a serious and dangerous bad act. If there were sufficient evidence to pursue criminal and civil remedies, the U.S. Attorney and NRC would have done so. By electing not to bring charges, those agencies showed that they had deep reservations about the quality of the information that the FBI had collected.[4] This Commission should exercise the same caution in how it uses the information.

More importantly, none of the information in the FBI's FOIA response indicates any violations of FPL's or the NRC's access authorization requirements. Although there is a telephone conversation record that characterized the person of interest as having "failed" his psychological test, in fact that individual passed the test pursuant to the established procedures for psychological screening. Based on an initial 600-question written screening test, the individual was identified for evaluation by a licensed psychologist. This happens with about 18 to 22 percent of FPL's contract work force and does not mean that a person has "failed" the test. The individual underwent this individual psychological evaluation, and was approved for access by not only the examining psychologist but also a second licensed psychologist who reviews the results of all individual examinations. This second psychologist had more than a decade of experience with evaluating workers for access to nuclear plants and is highly respected by the NRC for his process and methods. Tr. 597-99 (Jones).

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included in the FBI's response. *See* Ex. 54 at 29.

4 For example, the information on the criminal background of the person of interest appears in a telephone log that reflects notes by an NRC investigator of comments made by an FBI investigator based on the latter's review of the individual's FPL access authorization application – at least three levels removed from the direct information in question. *See* Ex. 54 at 11. Similarly, the most negative information about the person of interest comes from a confidential informant, who was providing the information in response to a $100,000 reward for information leading to the arrest and conviction of someone for drilling the hole, hardly the most reliable or unbiased of sources. *See* Ex. 54 at 37; Tr. 1246 (Jones).

The telephone conversation record also summarizes arrest record information that the person of interest reported on his access application. While the reported information is not completely accurate, it is correct that the individual had reported prior arrests, with one guilty plea (to DUI). Tr. 594-95 (Jones). However, the fact an applicant reports prior arrests does not, by itself, disqualify the applicant from being granted access. Rather, pursuant to FPL's standard practice, the arrest information is evaluated by FPL's corporate access manager and his staff using a matrix that scores applicants based on various factors that constitute NRC "Safeguards Information," the details of which cannot be publicly disclosed but include the nature of the offense, the time since the offense occurred, and the disposition of the offense.[5] The resulting matrix score did not disqualify the person of interest from access. The appropriateness of this conclusion has been directly scrutinized by the NRC's AIT, with no violations or other deficiencies found. 1244-45 (Jones). While everyone, including FPL, can now look back and wish that the person of interest had been denied access to Turkey Point Unit 3, this is only with the benefit of hindsight. The reality is that adopting a zero-tolerance policy for prior arrests is infeasible, because only a small portion of the potential craft workforce available to perform work at nuclear plants could get access under such a strict policy. Tr. 653 (Jones). Having a smaller workforce would extend the length of outages at FPL's nuclear plants, quickly costing FPL and its customers far more in additional replacement power costs than is at issue here. Tr. 760 (Jones). Moreover, it is also unrealistic to expect perfection from any security program; even at their best they will only prevent a high percentage of bad acts. Tr. 546 (Jones). FPL's security system at Turkey Point Unit 3 clearly meets the test of prudence, as measured by its

5 Tr. 585-86 (Jones). FPL's corporate access manager has been with FPL for 18 years and is so well regarded for his expertise that he serves on the industry-wide task force access control and fitness for duty issues. Tr. 640-41 (Jones),

strong success record over the years in avoiding bad acts and by the positive results reflected in the NRC's AIT report and March 18, 2008 close-out letter. *See* Ex. 2, Tab 24 at FCR-08-8928-8929; Ex. 3, Tab 8 (CONFIDENTIAL).

There is one other aspect of the FBI FOIA response that requires brief discussion. The FBI heard from a confidential informant that the person of interest had told the informant he was disgruntled and had drilled a hole in order to get back at FPL. Ex. 54 at 37. This information was not relayed to the FBI until well after the drilled hole was discovered, prompting questions from the Commission as to whether the informant should have reported what he had been told to FPL earlier, so that FPL could take appropriate steps to revoke the person of interest's access and repair the hole while Unit 3 was fully shut down. Workers are expected and encouraged to report potential safety and security concerns, so if the informant in fact was told by the person of interest that he had drilled a hole and did not report it at the time, this is a significant concern. [6] However, one must weigh that concern against the chilling effect that would result from retaliating against individuals who come forward with important information later than they should.[7] Such retaliation is prohibited by Section 211 of the Energy Reorganization Act of 1974, as amended, 42 USC 5851, and counterpart NRC regulations at 10 CFR 50.7. The Commission also asked whether FPL in any way discouraged workers from coming forward with information

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6 Tr. 733 (Jones). At this point, FPL cannot be certain of the veracity of the confidential informant's information. As noted previously, it was provided in response to a rather substantial reward offer. Coupled with the informant's delay in reporting such disturbing and pertinent information at the time he or she first heard it and the fact that neither the U.S. Attorney's Office nor the NRC found it sufficiently compelling to pursue charges against the person of interest, there is room for skepticism.

7 For example, the information that the confidential informant provided to the FBI concerning the person of interest appears to be the sort that would have been exclusively within the informant's knowledge. Had the informant been concerned that reporting the information to the FBI likely would result in criminal charges or an NRC enforcement proceeding against him or her for belatedly disclosing the information, the informant could have stayed quiet and the

on potential safety concerns, such that the informant perhaps would not have felt comfortable reporting what he had heard. FPL confirmed that this is absolutely not the case. FPL constantly reinforces with its contractor work force the importance of reporting incidents that seem out of the norm or improper. To this end, Turkey Point has a program of meeting daily with the contractor work force to encourage them to bring forth safety issues or workplace frustrations that they might be experiencing. Tr. 1249 (Jones). Finally, the Commission raised questions about a February 11, 2008 letter from the NRC that expressed concerns about possible chilling effects at Turkey Point with respect to workers raising safety concerns. In response to the NRC's letter, FPL hired an independent consultant that deployed three former senior NRC managers to Turkey Point to interview personnel and investigate the workplace environment in order to evaluate whether a chilling effect existed. The consultant concluded that, while there were some improvements FPL could make to strengthen the safety conscious work environment at Turkey Point, there was not a chilled environment at the plant and workers consistently reported that they had avenues available to them to express concerns as they arise. *See* Ex. 58, *Report of the Independent Assessment of the Turkey Point Nuclear Plant Operations Department Safety Conscious Work Environment*, Talisman International, LLC, April 9, 2008 (CONFIDENTIAL[8]).

4. The testimony of OPC witness Larkin provides no basis to find FPL imprudent.

The pre-filed testimony of OPC's witness Hugh Larkin did not address the prudence of FPL's handling of the drilled hole incident. *See* Tr. 979-85. Because the FBI FOIA response

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information almost certainly never would have been disclosed.

8 As with the confidential AIT report, Exhibit 58 was made available to the parties and Commissioners pursuant and subject to the Commission's confidentiality rule.

was not available until after Mr. Larkin had pre-filed his testimony, however, OPC and FPL agreed to a procedure for Mr. Larkin to address the FBI response orally in his summary, which he did. *See* Tr. 441-44; Tr. 987-989 (Larkin). Mr. Larkin's testimony on the FBI response proved to be a complete non-event. He acknowledged that he has no expertise in engineering, power plant operation or criminal investigation. Tr. 996 (Larkin). He also acknowledged that, while opining on the adequacy of FPL's access authorization program at Turkey Point, he had not even read the NRC's rules on that subject. *Id.* Finally, he acknowledged in response to a Commissioner's questions that he was in no position to know whether FPL followed its own procedures in granting access to the person of interest. Tr. 998 (Larkin).

What Mr. Larkin did assert about issues raised by the FBI's response was simply wrong. For example, Mr. Larkin testified that "I assume since every nuclear plant operator does not have the exact same protocols [for access authorization], then they're pretty much on their own to set their own protocols." Tr. 997. Mr. Jones explained that this is completely incorrect:

> Chairman and Commissioners, the notion that the plants are on their own to develop and to meet generic regulatory requirement is just not true. The overarching requirements are set forth in the Code of Federal Regulations. Beyond that there are specifics that are specified in NRC security orders. There are details that are specified in new regs [*sic*; should be "NUREGs"[9]] and also in the NRC inspection procedures that inspectors use in the course of verifying compliance with the procedures.
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> In this particular case germane to criminal adjudication, or criminal history

9 "NUREG" is an acronym for "NRC Regulatory Guide." The NRC issues regulatory guides in 10 divisions, to provide guidance to licensees, applicants, and stakeholders on (1) implementing specific parts of the NRC's regulations, (2) techniques used by the NRC staff for evaluating specific problems or postulated accidents, (3) data needed by the NRC staff for review of applications for permits or licenses, and (4) the preferred standard format and content for information submitted for NRC's approval of a specific program, license, permit, or certificate. During development, regulatory guides undergo extensive reviews by NRC staff, stakeholders, the public, and as appropriate, advisory committees to the NRC. *See* NRC website at http://www.nrc.gov/about-nrc/regulatory/guidance-dev.html.

> adjudication, the specifics and the details associated with that are contained in NEI-0301, which was -- NEI stands for Nuclear Energy Institute, and that was a document jointly developed by the industry and the NRC, reviewed and approved by the NRC, and within that NEI-0301 is the details on how criminal history adjudication is to occur going back to how to disposition a misdemeanor, what is the history that the offense occurred, how was the charge dispositioned, including the specifics of reinvestigation and arrest reporting requirements.
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> The NEI-0301, as I said, that is not a Code of Federal Regulation. That is codified in the plant's physical security plan. Once that was approved by the NRC, then all plants were required to commit to that NEI-0301 in their physical security plan. The physical security plan is then reviewed and approved by the United States Nuclear Regulatory Commission, and so that is how those programs and processes are laid out and governed by the Nuclear Regulatory Commission.

Tr. 1242-43.

Mr. Larkin also asserted that the FBI response "at least draws into question Mr. Jones's representation of the company's vetting [*i.e.*, access authorization] system is not the pristine, no-fault, nothing ever happens that he represented it to be …." Tr. 994. Again, Mr. Larkin completely missed the mark. To start with, FPL has never represented its access authorization system as 100% effective. No system could be. Mr. Jones specifically made this point in his April 3, 2008 pre-filed testimony, before Mr. Larkin filed his written testimony and before the FBI response had become available: "FPL's security programs clearly provide a high degree of protection and represent a prudent response to the risks of such criminal acts taking place. *However, it is important to recognize that no security program – at a nuclear plant or elsewhere – is infallible.*" Tr. 545-46. Moreover, Mr. Jones explained at hearing that

> The inference would be that that was new information, or new to the NRC, and if you look carefully at the time line, the NRC dispatched the augmented inspection team. Along with that augmented inspection team, the NRC Office of Investigation obviously was involved as well as the Federal Bureau of Investigation. We won't go back through that.
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> The augmented inspection team -- and you have that report, if you read the details, there were no adverse findings or violations, and also any findings or observations by the augmented inspection team is turned over to the region

> headquarters or NRC headquarters in Washington for follow-up. And as I previously testified, there was an NRC access fitness for duty inspection that was conducted shortly after the augmented inspection team. But having said that, you have before you the March 18th, 2008, letter to which the NRC closes out the inspection from the augmented inspection team, the NRC Office of Investigations, as well as having reviewed the investigation at the Federal Bureau of Investigation with no adverse findings and no violations.
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> The way the regulatory framework is that if there is a deviation from a performance standard, it could be self-identified by the licensee, or we could identify that we have had a performance deficiency and enter that in our corrective action program. It could be a self-revealing type event. It could be identified by one of the NRC inspectors. Once a performance deficiency is identified, then they have, depending on the nature of the violation, the severity of the violation they have several options to them in that they could cite it as a finding of minor safety significance, they could cite us with what is called a noncited violation of low safety significance, or it could be a cited vision for escalated enforcement to which there could be sanctions or fines. And in this case there were none of those and not even a finding, a minor finding.

Tr. 1244-45.

5. The record before this Commission fully supports a finding of prudence.

The standard of proof applicable to administrative proceedings such as this is the preponderance of evidence standard. *See, e.g., Balino v. HRS*, 348 So. 2d 349 (Fla. 1st DCA 1977), cert. denied, 370 So. 2d 458 (Fla. 1979); *HRS v. Career Service Commission*, 289 So.2d 578 (Fla. 3rd DCA 1976). This burden is met if the greater weight of competent substantial evidence in the record of the proceeding, however slight the edge may be, supports the position being asserted. *Id.* FPL has fully and thoroughly documented that its handling of the drilled hole incident was prudent. The FBI FOIA response was voluntarily produced by FPL to provide the Commission with full information about the drilled hole incident. It generated considerable heat but shed no light on FPL's prudence. The fact remains that FPL handled access authorization for the person of interest exactly as it did authorization for others and in full

compliance with the NRC's strict requirements and expectations, even going beyond industry standards in the rigor of the screening matrix that it applied. With the benefit of hindsight, everyone can agree that it would have been better not to grant access to the person of interest, but without the benefit of hindsight, neither FPL nor the NRC has identified anything that FPL should have done differently. Tr. 757-58 (Jones). Mr. Larkin has offered no competent or substantial evidence to the contrary. Thus, the greater weight – indeed, *all* the weight -- of competent substantial evidence supports the prudence of FPL's handling of the drilled hole incident.[10] On this record, FPL must be found prudent.

The Prudence Standard

The Commission has consistently applied a prudence standard to the review of fuel and purchased power costs to be recovered through the fuel adjustment clause, and the Florida Supreme Court has confirmed the application of that standard. Tr. 850-57, 1213-24 (Dubin); *see* Order No. 2515-A, dated April 25, 1959; Order No. 15486, dated December 23, 1985; Order No.

10 FPL's evidence is competent as well as substantial. FPL's compliance with the NRC's access authorization and other physical security requirements is evident from the face of the NRC's AIT report and March 18, 2008 follow-up letter, both of which are exhibits that were stipulated and admitted into evidence. *See* Ex. 2, Tab 24 at FCR-08-8928-8929; Ex. 3, Tab 18. The information that Mr. Jones provided on the specifics of FPL's access control program and its application to the person of interest identified by the FBI came directly from FPL's manager of that program. It is FPL's usual business practice for its vice president of nuclear plant support (the position Mr. Jones held at the time he prepared his testimony) to rely on that manager for information about the program, and Mr. Jones testified to his personal familiarity with the manager and that individual's integrity . Tr. 535, 573-74, 764-65 (Jones). The NRC allows disclosure of such information only to individuals with a direct need to know it for security reasons. Mr. Jones properly relied upon the access control manager to summarize information on the application of the access control program to the person of interest, rather than seeking to have such information disclosed to him directly, because of these NRC restrictions. Tr. 577-78 (Jones); *see also* Tr. 580-82 (FPL counsel commenting on difficulty of reconciling compliance with NRC restriction on access to security information, with FBI's disclosure of details from person of interest's access authorization application).

19042, dated March 25, 1988; Order No. 23233, dated July 20, 1990; Order No. PSC-96-1172-FOF-EI, dated September 19, 1996; *Florida Power Corp. v. Public Service Comm'n,* 424 So.2d 745 (Fla. 1982); *Florida Power Corp. v. Public Service Comm'n,* 456 So.2d 451 (Fla. 1984). The Commission's prudence standard, as shaped by the Court, looks to whether the decisions made by a utility's management were reasonable at the time they were made, without substituting the Commission's judgment for that of management and without the benefit of hindsight. *See* Order No. 19042, quoted at Tr. 1216-17 ("While the clear vision of hindsight suggests that it is possible that FPC could have acted more expeditiously in concluding the contract and that some benefit might have derived from it, we are unable to find that the delays were so unreasonable, or the potential benefit so clear, that the utility's actions rise to the level of imprudence. In short, we will not here substitute our judgment for that of FPC's management …."); *Florida Power Corp.,* 456 So.2d at 452, quoted at Tr. 1220 ("The lack of procedures that might have prevented the accident, suggested by the PSC, amounts to the application of the 20-20 vision of hindsight. The PSC has not shown that FPC management acted unreasonably at the time.")

OPC asserted at hearing that Order No. 23232 applied a different standard for recovery of replacement power costs that have resulted from substandard performance of a utility's employees. Specifically, OPC suggested that the utility would be responsible for the actions of its employees without regard to fault. *See* Tr. 1231-32 (questioning of Ms. Dubin by OPC that focuses on the characterization in Order No. 23232 of nuclear plant operators as a direct management function and inquiring as to whether employee access screening is also a "direct management function.").

In fact, however, Order No. 23232 applied the prudence standard when it reviewed the operator-training issue that was before the Commission at the time. This is evidenced by a conclusion of law that OPC proposed in that proceeding and the Commission adopted in the order. OPC asked the Commission to conclude that "FPL failed to establish that the removal of Turkey Point Unit 3 from service on March 29, 1989 *was not the fault of FPL's management.*" Order No. 23232 at 15 (emphasis added). The Commission adopted and incorporated that conclusion. *Id.* If, as OPC now suggests, the Commission could make a utility responsible for the actions of its contractors or employees without regard to the utility's prudence in managing the contractors or employees, OPC's proposed finding would have been unnecessary and irrelevant. But, in fact, OPC understood well that FPL would be found responsible for the replacement power costs associated with shutting the plant down because of failed requalification examinations *only* if FPL were at fault in inadequately training its employees for those examinations. That is exactly the prudence standard the Commission should apply here. As discussed above, FPL clearly and unequivocally was prudent by that standard.

There is one further, related point about the prudence standard which requires brief discussion. The common law of torts provides that employers are vicariously liable for acts of their employees which are within the scope of employment, meaning that employers can be found responsible for their employees' acts within the scope of employment even if the employers themselves have not been found negligent. By analogy to that principle of vicarious liability, it has been suggested during this proceeding that FPL might be found vicariously responsible for the replacement power costs associated with the drilled hole incident. However, the tort law of vicarious liability is not an appropriate proxy for the doctrine of prudence, nor is it an apt analogy here. The individual who drilled the hole in the pressurizer piping was a

contractor not an employee, but in any case was most certainly not acting within the scope of his or her employment. There is a completely separate and distinct body of tort law that applies to deliberate bad acts that are outside the scope of employment. It is the well-established law in Florida that an employer is responsible for such acts only if the plaintiff shows that the employer has been negligent in hiring, retaining or supervising the employee. *See Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744 (Fla. 1st DCA 1991); *Total Rehabilitation & Medical Centers, Inc. v. E.B.O.*, 915 So.2d 694 (Fla. 3d DCA 2005). In fact, FPL was not negligent in any of these respects as to the individual who drilled the hole.[11] If FPL had been negligent – or even less than exceptionally diligent – in how it hired and supervised workers at Turkey Point, the NRC would have found serious violations of its physical security requirements. As discussed above, however, the NRC made no adverse findings and cited no violations with respect to any aspect of FPL's handling of the drilled hole incident. Accordingly, even if one were to analogize inappropriately the Commission's prudence test to the tort law standard for employers, there would be no basis to hold FPL responsible for the drilled hole incident.

The Adverse Consequences to Customers of
Disallowing Costs When the Prudence Standard Has Been Met

For all the reasons just discussed, FPL has shown that – by the Commission's well-established standard of prudence – FPL acted prudently with respect to the drilled hole incident. To disallow the associated replacement power costs nonetheless, either without regard to

11 The concept of "negligent retention" has no application here. It refers to continuing to employ an individual even though the employer knows that the individual has committed bad acts previously in his employment. The person of interest was not an FPL employee, making the concept inapplicable on its face. In any case, drilling the hole in the pressurizer piping was the first bad act by the person of interest of which FPL was aware, so there was no opportunity for FPL to have denied him access to FPL's nuclear plants based on prior bad acts while performing work for FPL.

prudence or by applying a new and stricter standard of prudence, would have serious adverse consequences for all investor-owned electric utilities in Florida, for their customers, and for the state as a whole.

Dr. Avera testified eloquently to those consequences in rebuttal to OPC witness Larkin:

> Mr. Larkin recommends that FPL not be authorized to recover from customers $6,163,000 of replacement power costs due to an outage at Turkey Point Unit 3. He asserts that FPL and its investors are compensated for the risk of not recovering these costs by the return on equity. Mr. Larkin also asserts that disallowing the recovery of these costs would not be a disincentive for FPL and other utilities to invest in low fuel cost generating resources.
>
> My testimony shows that Mr. Larkin is wrong on both counts. My testimony demonstrates that Mr. Larkin's recommendation would represent a dramatic change in regulatory policy in Florida, one that would be inconsistent both with established regulatory principles and investor expectations. Mr. Larkin's recommendation would result in significantly increased regulatory risk for FPL and other utilities in Florida. This increased regulatory risk would ultimately harm customers in the form of higher costs in the electric bills they pay. Mr. Larkin's recommendation would also create perverse incentives against investment and generating resources with low energy cost such as nuclear, wind and solar. This too would ultimately harm customers, the environment and the economy of the state.
>
> Mr. Larkin's proposed disallowance would send a signal to utilities and investors that this Commission has changed its long-standing policy of allowing recovery of replacement power costs unless there's been a finding of imprudent acts. The relatively small size of this disallowance would not change the perception that there has been a fundamental shift in regulatory policy in Florida. It would be economically rational and reasonable for utilities and their investors to regard this change in policy as applying or potentially applying to any and all future outages where there is no finding of imprudent behavior. As a result, a utility making a significant commitment to generating resources with low fuel costs would become exposed to disallowances that could become huge, even if the utility did nothing improper.
>
> Now the lower the fuel cost of the resource and the higher the fossil fuel that replaces it, the greater the risk to the utility and its investors. So this would clearly militate against investing in low fuel cost options because it would increase the risk of exposure. Such unlimited exposure would represent a significant risk to investors in utilities under the jurisdiction of this Commission, one for which investors would have to be compensated in the form of a higher cost of capital both for their equity and debt.

***

In his oral testimony last week Mr. Larkin explained that the company's allowed ROE includes a premium over the return for U.S. government bonds to cover the risk investors bear for unknowns like weather and he suggested that the risk of the disallowance is covered by that premium. Mr. Larkin is correct that FPL's ROE includes an allowance for risk. Investors assess the risk they're signing up for on the basis of the regulatory policy in the state. In Florida, utilities earn no profit on fuel and purchased power. The best that can happen is that they recover those costs.

And investors understand if those costs are found by the Commission to have been imprudent, then those imprudent costs will not be recovered, but investors also understand that prudence does not require perfection. As Ms. Dubin documents in her testimony, the Commission has evaluated prudence in the context of what utility management could reasonably know at the time it was making a decision. The Florida policy of full recovery of purchased power and fuel costs in the absence of prudence has resulted in Florida regulation being regarded by investors as supportive and this rating has saved customers money.

If the Commission changes this policy, then investors will realize that they're exposed to risks that they did not sign up for and the reaction will be significant and harmful to utility customers in Florida. Mr. Larkin was right that FPL, not customers, controls access to nuclear plants, but this is true of all fuel and purchased power costs. The utility is responsible for the decisions. The utility, not customers, decides what fuels to buy, how to dispatch the plants and where and when to purchase power. Under established regulatory policy the utility is responsible and accountable for those costs and will be able to recover those costs unless the decisions are found imprudent. Investors know that they're exposed to the risk that management can be found imprudent, but only then will fuel and purchased power costs not be recovered.

I listened very carefully to Mr. Larkin's testimony last week and have read the transcript several times. He does not say that based on the new FBI information that the Commission should find FPL was imprudent. Indeed, he reaffirmed on Page 988 at Line 15 the Commission doesn't need to find imprudence. *In my opinion as a financial analyst who has followed utility investors for over 36 years, if this Commission were to disallow the replacement power expenses in the face of findings by the NRC and ignoring the Florida policy on prudence, the response in the investment community would be swift and significant. Investors' required risk premium for FPL and other Florida utilities would increase. The end result would be to impose a new cost on FPL's customers that would far exceed the $6.2 million reduction due to this disallowance.*

Tr. 1141-45 (emphasis added). Dr. Avera also responded effectively and instructively to questions from both the parties and the Commissioners regarding the adverse impacts of a decision disallowing the replacement power costs associated with the drilled hole incident. *See* Tr. 1145-1206; *see also* Ex. 57 (S&P Ratings Direct report). FPL commends that full examination to anyone seeking further details.

In short, while there might be a brief and ephemeral benefit to giving FPL customers back the $6.2 million in replacement power costs associated with the drilled hole incident, there are disproportionate adverse consequences of doing so. In view of the overwhelming evidence presented to the Commission that FPL handled the drilled hole incident prudently, the Commission will act in the best interests of customers and the state by *not* imposing a refund of those replacement power costs.

Potential For Recovery From Third Parties

FPL was asked at hearing about the potential for recovering the replacement power costs associated with the drilled hole incident from third parties. FPL has evaluated the possibility for such claims previously and is not optimistic that there are viable claims against entities with an ability to pay a significant portion of the replacement power costs. *See* Tr. 674-78, 745-46 (Jones); Ex. 2, Tab 27, Late-Filed Ex. 2. However, FPL committed to explore this issue further and, as a result prefers not to discuss its evaluation at this time in a public document such as this brief due to the potential adverse impact of statements made in the evaluation on future claims that might be brought. *See* Tr. 963 (Dubin); Tr. 830-31 (counsel for FPL explaining concern over briefing legal merits of potential claims). As has been the case previously, any amounts that FPL is able to recover will be flowed back to customers through the fuel adjustment clause. Tr.

963, 1222-23 (Dubin). In any event, whether or not FPL recovers its replacement power costs initially does not affect either the care with which FPL operates and maintains its nuclear power plants (Tr. 720 (Jones)) or FPL's commitment to seek recovery from third parties (Tr. 944-48 (Dubin)).

CONCLUSION

For the reasons discussed above, the Commission should not require FPL to refund the $6.2 million of replacement power costs that FPL incurred as a result of the drilled hole incident. FPL's evidence has shown -- by well beyond the required preponderance of evidence -- that it acted prudently with respect to the incident. FPL has met the Commission's test for prudence and thus, by well-established Commission and Florida Supreme Court precedent, is entitled to recover the replacement power costs that it actually and necessarily incurred.

Requiring FPL to refund its replacement power costs in the face of evidence clearly establishing that FPL fully complied with the NRC's comprehensive regulatory requirements applicable to the exact issue at hand (*i.e.*, access control) would have extremely negative consequences that extend well beyond FPL. It would increase capital costs for all Florida IOUs, ultimately costing Florida customers much more than the $6.2 million at issue here. And it would discourage (and/or make more costly) future investments in solar, wind and nuclear generation, to the detriment of Florida's energy security, fuel diversity and environmental goals.

Finally, requiring FPL to refund replacement power costs here would raise troubling questions about just what *is* the standard of care expected of Florida IOUs in operating their electric systems. Is it strict liability – a standard that by its nature would make it impossible for IOUs ever to exercise enough care to protect themselves from exposure to disallowance? There

is much in the position of OPC and others in this proceeding that suggests as much. Or is it a measure of prudence that permits reliance on hindsight – again, a standard that would make it impossible for IOUs to determine in advance what sort of actions they will be deemed responsible for taking. There is much in the criticism of FPL's actions here that suggests hindsight is now fair game, because no one has pointed to a specifically different approach to access control that FPL should have taken other than that FPL should have done *something* to deny access to the individual who is now believed to have drilled the hole. Or is it a measure of prudence that demands more than compliance with precisely on-point NRC regulatory requirements? If so, how is an IOU to know what sort of actions might meet this "above and beyond" standard, and how would the Commission reconcile such an approach with the NRC's plenary and preemptive jurisdiction over nuclear safety, including specifically the issue of physical security and access control at nuclear plants?

FPL respectfully suggests that none of these alternative standards of care would be good public policy for the state, even if they were legally viable (which they are not). FPL understands and shares the frustration that its customers and the Commission feel over the recklessness and audacity of someone intentionally drilling a hole in any component of a nuclear plant for malicious reasons. FPL respectfully submits, however, that the Commission cannot undo that outrageous act or prevent its recurrence by rejecting or distorting the standard of care that measures prudence. All that would occur if the Commission took that path would be a compounding of the harm already occasioned by the drilled hole – customers would bear the adverse consequences of a new regulatory paradigm that would ultimately increase their cost of electricity and quite possibly hinder the development of needed generation resources within the state. No one would be well served by such an outcome.

Respectfully submitted,

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CERTIFICATE OF SERVICE
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