BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million.	DOCKET NO. 060658-EI ORDER NO. PSC-08-0136-FOF-EI ISSUED: March 3, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

On October 25, 2007, the Office of Public Counsel (OPC) filed a Motion for Reconsideration of Final Order No. PSC-07-0816-FOF-EI (Order), issued October 10, 2007, in this docket. Simultaneously, OPC filed a Request for Oral Argument. On November 1, 2007, Progress Energy Florida (PEF) filed its Response to Citizens Motion for Reconsideration and Request for Oral Argument. The motion and responses were timely filed pursuant to Rule 25-22.060, Florida Administrative Code (F.A.C.) At our February 12, 2008, Agenda Conference we declined to grant oral argument as the motion and responses adequately addressed the issues.

At issue in the original proceeding was whether PEF had acted prudently in procuring the most economical coal to operate its Crystal River Units 4 and 5. OPC had brought a petition arguing that, since 1996, PEF should have been burning a mix of 50 percent bituminous coal and 50 percent sub-bituminous (known as Powder River Basin or PRB) coal. PEF has burned 100 percent bituminous coal at its Crystal River Units 4 and 5 since commencement of operation, with the exception of some limited test burns. PEF asserted that it acted prudently. In support of its position, PEF offered evidence of numerous factors it considered in determining the type of coal it would burn at its Crystal River Facility.

Order No. PSC-07-0816-FOF-EI, a 57 page decision, found PEF to be imprudent in certain of its management decisions. As a result of the imprudence, we required PEF to refund $12,425,492, plus interest, to its customers. Our decision to require the refund of $12,425,492 instead of the $143 million request by OPC was based on a blend of 20 percent PRB coal and 80 percent bituminous coal. OPC's Motion for Reconsideration now asks us to require a refund based on a blend of 30 percent PRB coal and 70 percent bituminous coal.

We have jurisdiction over this matter pursuant to Sections 366.01, 366.04, 366,041, 366.05, 366.06 and 366.07, Florida Statutes.

MOTION FOR RECONSIDERATION

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. This standard has often been cited by us in considering motions for reconsideration. In prior orders, we have relied on several Florida cases as precedent. OPC and PEF cite those cases in support of their motion and responses. A complete review of these cases will provide insight into the limited nature of motions for rehearing.

PEF cites State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1959), in its response. Jaytex sets forth the limited nature of motions for reconsideration. In Jaytex, the court stated:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.
>
> * * *
>
> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

Id. at 818-819. Furthermore, the court explained that it is not necessary to respond in its opinion to every argument and fact raised by each party, stating:

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not

> from this fact draw the conclusion that the matters not discussed were not considered.
>
> It is not the purpose of these remarks to discourage the filing of petitions for rehearing in those cases in which they are justified. If we have, in fact, inadvertently overlooked something that is controlling in a case we welcome an opportunity to correct the mistake. But before filing a petition for rehearing a member of the bar should, as objectively as his position as an advocate will permit, carefully analyze the law as it appears in his and his opponents brief and the opinion of the court, if one is filed. It is only in those instances in which this analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law or fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed.

Id. at 819.

PEF also cites to Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959). In Sherwood, the court, citing the Florida Supreme Court's opinion in Florida Land Rock Phosphate Co. v. Anderson, 39 So. 397 (Fla. 1905), stated:

> . . . the proper function of a petition for a rehearing is to present to the court some point which it overlooked or failed to consider by reason whereof its judgment is erroneous . . . .

Both OPC and PEF reference Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962). In Diamond Cab, the Court stated:

> The purpose of a petition for rehearing is merely to bring to the attention of the trial court, or in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order. . . .

Both parties also cite Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974), in which the Court overturned an order reconsidered by the Commission. Bevis involved a matter in which we had originally denied a statewide certificate of public necessity and convenience for transportation of household goods. We subsequently granted a motion for reconsideration reversing our decision and granting the certificate. Our basis for granting the motion for reconsideration was:

> (1) That the evidence discussed above had been reconsidered in light of the "relaxed" standard of proof for household goods carriers' applications (a facet already considered), and

> (2) that extraordinary population growth in a mobile society tends to lessen the adverse impact on existing carriers.

Bevis at 316. The Florida Supreme Court, in reviewing our decision, noted

> [t]his order did not include any new findings of fact, nor did it recede from the findings made in the previous order; it merely stated that the PSC changed its mind upon re-examining the evidence in light of the 'relaxed' standards applicable – which were the very same standards which the PSC stated it was following when it entered its original order denying the application.

Id. at 316-317. The Court overturned our decision, stating that "[t]he only basis for reconsideration noted in the instant cause was the reweighing of the evidence discussed above. This is not sufficient." Id. at 317.

OPC and PEF also cite Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981), in which the court reviewed a trial court's denial of a motion for rehearing. In Pingree, the court, in denying the Motion for Reconsideration, also said, "[t]he purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it failed to consider or overlooked." From the Pingree decision, we see that motions for rehearing requested after a non-jury trial are not favored. In considering motions for reconsideration, we have consistently stated that the standard of review for a motion for reconsideration is:

> whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817(Fla. 1st DCA 1958).[1]

OPC's Argument

OPC states that its motion for reconsideration addresses the significant mistakes and matters that we overlooked or misapprehended in reaching our decision to require PEF to refund $12,425,492 based on a less expensive blend of coal that could have been burned at Crystal River Units 4 and 5. We found that blend should have been 20 percent PRB coal and 80 percent bituminous coal. OPC argues that the blend should be 30 percent PRB coal and 70 percent

[1] Order No. PSC-07-0783-FOF-EI, issued September 26. 2007, in Docket No. 050958-EI, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company; Order No. PSC-07-0561-FOF-SU; issued July 5, 2007, in Docket No. 060285-SU, In re: Application for increase in wastewater rates in Charlotte County by Utilities, Inc. of Sandalhaven; Order No. PSC-06-1028-FOF-EU, issued December 11, 2006, in Docket No. 060635-EU, In re: Petition for determination of need for electrical power plant in Taylor County By Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

bituminous coal. According to OPC, we overlooked or misapprehended three key points of evidence when we established the percentage of PRB coal to include in the blend of fuel for burning at PEF's Crystal River Units 4 and 5. According to OPC, we misapprehended the Sargent & Lundy Study. OPC also claims we misapprehended the ramification of PEF witness Toms' testimony. Finally, OPC charges that we overlooked exhibit numbers 223 and 224. According to OPC, these pieces of evidence require us to reconsider our final order and find that PEF could have burned a blend of 30 percent PRB coal and 70 percent bituminous coal at Crystal River Units 4 and 5, thus requiring a larger refund amount to PEF's customers.

PEF's Response

PEF responds that we did not overlook or ignore the argument that a 30 percent blend of PRB should be the basis for the refund Order. According to PEF, we expressly considered, debated, and voted against a motion to re-open the proceeding based, in part, on whether a 30 percent PRB blend should have been used. PEF asserts that the arguments OPC used for its motion for reconsideration are the same as it used in the hearing when urging us to require a refund of a 50 percent blend of PRB coal. PEF asserts that we are not permitted to reweigh the evidence on a motion for reconsideration.

Furthermore, PEF asserts that the record evidence as a whole does not support OPC's motion for reconsideration. PEF asserts that when the evidence OPC singles out for reconsideration is viewed as a whole with all the other evidence, the motion is not supportable.

Analysis

OPC applies the incorrect standard of review for its motion for reconsideration. In essence, OPC is asking us to reweigh the evidence it already considered. A review of the transcript makes it clear that we considered the Sargent & Lundy report, the testimony of PEF witness Toms, and exhibits 223 and 224.[2] OPC uses words like "misapprehend," "mischaracterize," "import," and "assuming" to support its motion. As the discussion below demonstrates, those words are synonymous with asking the tribunal to reweigh the evidence. Thus, OPC is not asking us to look at newly discovered evidence or evidence that we missed the first time around, but is instead asking us to reweigh the evidence, which is not proper for reconsideration. See Bevis 294 So. 2d at 317.

Moreover, OPC is not entitled to reconsideration just because we did not address in our Order every piece of evidence admitted into the record. As the court stated in Jaytex:

[2] The depth of our review and the type of evidence we considered is evidenced in the transcript of the July 31, 2007, Agenda Conference. For example, on page 8 of the transcript, we discussed whether to require a refund based on a 30 percent blend of PRB coal and in so discussing, referred to some of the very testimony OPC claims we overlooked: "Simply put, there's sufficient testimony in the record to duly support the fact that the uprate can be maintained by burning a 70/30 blend when it's cost-effective to do so. And, again, that's supported on numerous instances by witness Sansom, PEF's own consulting engineer, Sargent & Lundy, and PEF's own witness." After weighing all the evidence in the record, we rejected a refund based on a 30 blend percent blend of PRB coal, and instead found that the refund should be based on a 20 percent blend of PRB coal.

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.

This is particularly true in a lengthy record and subsequent order such as this one. The evidence presented addressed issues regarding environmental permitting, the megawatt rating of the plants, the operational considerations of the plants, the proximity of the plants to a nuclear power plant, affiliate relationships, the market response to our actions, physical and Commission-created transportation constraints, the actual availability and costs of PRB coal, PEF's coal procurement practices, and other factors. The transcript and order are clear that we considered and weighed all the evidence in the record and reached our decision based on the entire record.

The Jaytex court opined that a petition for rehearing should be before the court only in those instances when the question of law or fact, had it been considered by the court, would require a different decision. This is an instance in which we considered the facts as evidenced by the record, and the disputed evidence would not require a different decision. OPC's motion for reconsideration is denied. A discussion of each point raised by OPC is set forth below.

The Sargent & Lundy Study

On page 28 of the Order, as part of our review of evidence regarding the megawatt (MW) capacity of Crystal River Units 4 and 5, we stated:

> In 2005, PEF hired Sargent & Lundy to assess the use of PRB coal at CR4 and CR5. That study indicated that a blend under 30 percent was likely to prove cost effective. Blending off-site was recommended in that report as well. In 2006, PEF successfully completed a short-term test burn of a lower blend of PRB (20 percent) and bituminous coal.

According to OPC, we overlooked a passage of the study which supported a higher blend of PRB coal. OPC argues that we "misapprehended and mischaracterized key evidence that, when properly viewed on reconsideration, supports the ability of the units to accommodate successfully far more than the 30% PRB ratio that the Commission attributes to the study . . . ."

PEF counters by stating that OPC selectively quotes from the study to claim the study supports a 30 percent PRB blend. PEF asserts that we were aware that the Sargent & Lundy study was a "high level" and "first cut" study of PRB blends. PEF states that we did not rely entirely on the study to determine the appropriate PRB blends. PEF urges us to look at the entirety of our order to understand what we relied upon to reach our conclusion. For instance, according to PEF, we relied on actual test burns and expert witnesses who testified that test burns were necessary to determine how the units would operate. PEF concludes that we did not "misapprehend" or "mischaracterize" the Sargent & Lundy study, but rather gave it the weight we believed the study deserved.

Conclusions on the Sargent & Lundy Study

The terms "misapprehend" and "mischaracterize" by definition mean that the evidence was wrongly apprehended or wrongly characterized.[3] To "misapprehend" or "mischaracterize" evidence means we looked at the evidence. The standard for granting a motion for reconsideration is if the tribunal overlooked the evidence. If you look at evidence but "misapprehend" or "mischaracterize" it, you have not overlooked it. Even if OPC were correct that we "misapprehended" or "mischaracterized" the Sargent & Lundy report, it cannot be said, then, that the evidence was overlooked. We cannot disregard or ignore evidence if we acknowledged its existence in the order. After reviewing the transcript, it is clear that we considered the Sargent & Lundy study.[4] OPC's complaint, then, is that it disagrees with our evaluation of the evidence. It is not appropriate, however, to reargue matters that have already been considered. OPC did not meet the established test for reconsideration.

Furthermore, reading the passage from page 28 quoted above in context with the remainder of the Order, it is apparent that the Sargent & Lundy study was considered in context with other testimony and evidence presented at the hearing. For instance, in the last two paragraphs of page 28 of the Order, we evaluated evidence of two separate test burn results, the Sargent & Lundy study, and a PEF Strategic Engineering Group's report. It is not just one piece of evidence that we relied upon in determining the appropriate amount of refund, it was the record as a whole. The Sargent & Lundy study was considered and given the appropriate weight in light of all of the record evidence.

PEF Witness Toms' Testimony

As part of its second argument for reconsideration, OPC asks us to assume that when PRB coal containing 8,800 Btus per pound is blended with Central Appalachian coal of 12,500 Btu per pound, the blend would be 11,390 Btus per pound. OPC then asks us to apply that assumed fact to the testimony of PEF witness Toms. Witness Toms stated that falling below 11,000 to 11,300 Btu would cause a loss in MW capacity at the two units. OPC argues that we relied upon witness Toms' testimony in reaching the decision on the percentage of PRB coal to be burned at Crystal River Units 4 and 5. While relying on the testimony of witness Toms, OPC asserts that we overlooked the fact that the criteria of 11,000 to 11,300 Btu per pound of coal is met with a blend of 30 percent PRB coal and 70 percent bituminous coal. That blend, according to OPC, would be above the breakpoint that the witness says was necessary to maintain the output at the units.

PEF contends that asking us to assume blends of coal would equal 11,390 Btus per pound is improper because it is not record evidence. PEF points out that nowhere does OPC's motion

---

[3] "mis-. indicates: 1. Error or wrongness; for example, misspell. 2. Badness or impropriety; for example, misbehave, misdeed. 3. Unsuitableness; for example, misalliance. 4. Opposite or lack of; for example, mistrust. 5. Failure; for example, misfire. . . ." The American Heritage Dictionary of the English Language, New College Edition, 1981 by Houghton Mifflin Company p 837.

[4] Transcript pages 8, 11, 16, 38, 42, 52, 89, 98 from the July 31, 2007 Agenda Conference, reference the Sargent & Lundy study.

refer to any evidence in the record to support this argument. PEF concludes that this assumption is not record evidence and is therefore improper on a motion for reconsideration.

PEF also argues that although OPC asserts no adjustments should be made to the blend of 30 percent PRB coal, the expert testimony in the record differs from OPC's position. According to PEF, experts testified to differences between PRB and bituminous coal such as higher PRB moisture content that required test burns to determine the appropriate impact of particular coals on the boiler. PEF concludes that the "assumption" that the 30 percent blend had no operational impacts on the two units cannot be accepted.

Finally, PEF asserts that we did not rely merely on which blend would generate sufficient megawatts. There were other factors which we relied upon to make our decision, according to PEF. PEF points to a portion of the order at page 30 in which we explained that particle size and silo capacity also limit the production of the units. PEF concludes that we considered the entire record when we reached our conclusions in the final order that a 20 percent blend is appropriate.

Conclusions on PEF Witness Tom's Testimony

OPC's motion uses information from the record to contend that a blend of 30/70 could produce a coal with a Btu content of 11,390. It is not just Btu content that affects our decision. Without repeating the entire Order, we evaluated and weighed the entire record in reaching our decision. Among other things, we considered: test burns at the two units;[5] the actual experiences of the units in burning a coal blend;[6] the PEF Strategic Engineering Group report;[7] the capital expenditures necessary to use blends of coal;[8] the proximity and affect of PRB coal to the nuclear unit;[9] and transportation constraints associated with rail and waterborne delivery of coal.[10]

Exhibits 223 and 224

OPC also argues that we "overlooked the import of Hearing Exhibits 223 and 224." According to OPC, the exhibits contain representations made by PEF to the Florida Department of Environmental Protection that indicate PEF could burn a higher blend of PRB coal than 20 percent. According to OPC, we did not take either exhibit into account in the analysis memorialized in our Order.

PEF responds that we did consider the exhibits. According to PEF, we devoted an entire section of our final Order to environmental permitting issues. PEF argues that the evidence reflects that DEP would not have allowed any different blend of PRB without a further test burn.

---

[5] Order p. 28
[6] Order p. 30
[7] Order p. 28
[8] Order p. 31, 35-36
[9] Order p.31- 32
[10] Order p. 24-26, 37-38

PEF also urges that the complete technical evaluation contained in Exhibit 224 supports our decision.

Conclusions on Exhibits 223 and 224

Jaytex is controlling in this portion of OPC's motion. In denying the motion for reconsideration, the Court stated:

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.

Id. at 819. While we did not specifically reference Exhibits 223 and 224 in our order, we extensively discussed environmental permitting in our order, which is the subject of those exhibits.

Further, OPC states that we "overlooked the *import* of Exhibits 223 and 224." (emphasis supplied) The very language that OPC uses in its motion suggests that OPC is asking us to reweigh the evidence, not to consider evidence we previously missed. That is improper for a motion for reconsideration. See Bevis, 294 So. 2d at 315.

Conclusion

Because OPC has failed to identify a point of fact or law which was overlooked or which was not considered in the rendering of the Order, the motion for reconsideration shall be denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the request by the Office of Public Counsel for oral argument on its motion for reconsideration is denied. It is further

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's motion for reconsideration is denied. It is further

ORDERED that this docket shall be closed upon the expiration of the time for appeal.

By ORDER of the Florida Public Service Commission this 3rd day of March, 2008.

ANN COLE
Commission Clerk

(S E A L)

LCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.